CONSTITUTION-MAKING AND IMMUTABLE PRINCIPLES

Master of Arts in Law and Diplomacy Thesis

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Acronyms.

ANC	African National Congress (South Africa).
BLDP	Buddhist Liberal Democratic Party (Cambodia).
CPP	Cambodian People's Party (Cambodia).
EPLF	Eritrean People's Liberation Front.
FCC	Federal Constitutional Court (Germany).
FRODEBU	Front pour la Démocratie au Burundi (Burundi).
FUNCINPEC	National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia.
GNU	Government of National Unity (South Africa).
IFP	Inkatha Freedom Party (South Africa).
KPLNF	Khmer People's National Liberation Front (Cambodia).
NP	Nationalist Party (South Africa).
PDK	Party of Democratic Kampuchea (Cambodia).
PFDJ	People's Front for Democracy and Justice (Eritrea).
PRPK	People's Revolutionary Party of Kampuchea (Cambodia).
SWAPO	South West Africa People's Organization (Namibia).
UN	United Nations.
UNTAC	United Nations Transitional Authority in Cambodia.
UPRONA	Unité pour le Progrès National (Burundi).

CHAPTER 1. INTRODUCTION.

The South African constitution-making experience is viewed as a remarkable and exemplary process of constitution-making, signaling not only the formal transition from apartheid to constitutional democracy, but also the peaceful end to what was a very violent struggle for a new form of governance. Through a constitutional assembly, the major opposing sides came together to draft their new constitution, hammering out differences that all hoped would usher in a brighter future. Wide public consultation had occurred, enhancing the document's legitimacy. Thus, it came as somewhat of a surprise when on September 6, 1996, South Africa's Constitutional Court rejected this proposed draft of the constitution.

The court had been charged with certifying that the draft constitution was in conformity with thirty-four "constitutional principles" that had been laid out in South Africa's 1994 Interim Constitution.[1] This certification provided a check on the political process of drafting the constitution, to assure that it met with the original basic principles that the opposing sides had agreed to before beginning constitutional negotiations. After the Constitutional Court identified the draft's deficiencies, the constitutional assembly reconvened and amended their original draft. This amended version was later certified by the Court, and came into force on February 7, 1997.

South Africa's use of constitutional principles is the most robust example of how "immutable principles" can be used as a check on democracy in general, and the politics of drafting a constitution in particular. South Africa was not the first to use such immutable principles, and it has not been the last. Still, the use of immutable principles has been rare, and it is still an open question as to how, and when, such principles should be used. The purpose of this paper is to begin to define some guiding principles on this issue, by looking to both political

[1] S. AFR. CONST. (1994) art. 71 para. 2.

theories on the viability of immutable principles, as well as the historical examples where immutable principles have been used. From this, a possible framework will be constructed for consideration of their use in the future.

The paper will proceed in the following manner. First, some introductory comments about immutable principles, including a working definition, will be provided. Two distinct flavors of immutable principles will be defined. The first is that of constitutional principles, as used in South Africa. The second is that of "unconstitutional constitutional amendments," which has a broader reach than merely the formation of a constitution. These categories will then be discussed separately.

Part I will focus on constitutional principles. Theoretical considerations of such principles will first be considered. Several case studies will then be examined. Finally, conclusions from these theoretical considerations and the case studies will be provided. Part II will take the same approach to UCA's. Theoretical considerations will first be discussed, followed by case studies, and a summary and comparative conclusion.

It should be noted that this topic of study is fairly under-developed academically. As such, the "conclusions" drawn will be intended to serve more as "guiding principles" for their future usage than as concrete, scientific analysis. The case studies will reveal that the invocation of immutable principles generally has much to do with the unique historical and cultural circumstances that have given rise to the opportunity—and need—for such principles. While such cases are unique, there exists commonalities useful for future consideration.

Chapter 2. THEORETICAL CONSIDERATIONS.

The concept of an "immutable principle" is herein defined as a principle or concept that provides a substantive limit on a political process related to the formulation or amendment of a constitution. This definition is limited to substantive elements, and does not incorporate procedural processes; procedural processes are of major significance, for often procedural limitations are employed to make change more difficult. Super-majorities are the most common example of this, but other measures, such as a ratification requirement, or time-delays, are also possible. Such procedural elements are thus of great importance, and are commonplace in democratic societies. Whereas, substantive limitations are very distinct from, and possibly antithetical to, democracy in its purest form. Thus, immutable principles are far more controversial than are procedural limitations,. However, even though they are not included in the definition of immutable principles, such procedural considerations will also be highlighted in the various case-studies to the extent that they further our understanding of immutable principles.

Presumably, any such substantive limitations will also require an enforcement mechanism. This requirement is not included in the working definition of immutable principles, for that would unnecessarily narrows the definition. However, the existence—or lack thereof—of enforcement mechanisms will receive special attention as different examples of immutable principles are examined.

Immutable principles can be broadly categorized into one of two types. The first category commonly referred to as "constitutional principles," that is, principles put forth before a constitution-making (or amending) process takes place, with which the final document (or revision) must comply. South Africa's constitutional principles are a prime example. A second form of immutable principles is commonly referred to as "unconstitutional constitutional

amendments" that is, limitations on how a constitution can be amended. The quintessential example of this check is found in the German and Indian constitutions.

Though similar, these two categories are quite distinct. Constitutional principles serve as a check on the political process that is imposed by the same political parties that will then be bound by them. This usually occurs in the form of a peace agreement, an interim constitution, or a similar accord which gives rise to a constitution-making (or amending) process. Whereas, the concept of UCA's does not emanate from this sort of a political agreement; the theory of UCA's is being imposed from outside of the political arena, usually through the courts. Though this theory may have a textual basis in the constitution, and thus were the result of political negotiations, this political negotiation occurred at a different time, and possibly between different political parties, than those in the legislature who are now trying to enact amendments. In addition, we shall see that some approaches to UCA's do not have any explicit textual basis in the constitution at all, severing any connection to the political parties being limited. Thus, these two forms of immutable principles will be treated separately, for though they have commonalities, they have different origins, and thus have different implications on the democratic process.

There is no inherent nexus between constitutional principles and UCA's. Though it would be possible to have constitutional principles give rise to an unconstitutional constitutional amendment theory, this need not be so. This remains an open debate, with some arguing that in certain instances, constitutional principles do have a life beyond the formulation of a new constitution, that is, that constitutional principles can give rise to UCA's. Others disagree, suggesting that constitutional principles cease to have any legal significance once the procedural requirements of drafting the constitution are completed. Clearly, though, constitutional

principles are not a prerequisite for UCA's. Examples of constitutional principles that have not yet given rise to UCA's, and of UCA's which emerged without constitutional principles, will both be seen.

The substance of immutable principles is also of great importance. Some principles extend only to the form of government. Others address human rights needs. Some focus especially on minority or group rights (especially in the context of constitutional principles being used in a post-conflict situation). Others go beyond all of this, into great detail about how certain government agencies should function. These differences, and their origins, will be considered, so as to better understand what immutable principles can and should look like in future usage.

Finally, it should be noted that there is a clear tension between immutable principles and democracy / majoritarianism, in that immutable principles clearly provide a check on the political process, and thus are inherently anti-majoritarian, and possibly anti-democratic. This topic will be discussed throughout the paper, but since constitutional principles and UCA's pose different challenges to democracy and majoritarianism, they will each be discussed independently.

PART I: CONSTITUTIONAL PRINCIPLES.

Chapter 3. CONSTITUTIONAL PRINCIPLES: DEFINITION AND THEORY.

Before turning to case studies on the use of constitutional principles, it is first important to understand how constitutional principles have fit into the larger process of constitution-making, as well as to understand what issues and challenges it raises. This chapter will address these points by first describing "new constitutionalism," a theory of constitution-making that is gaining increasing acceptance. Then, the intersection between new constitutionalism and constitutional principles will be considered, and points of commonality—as well as conflict—will be examined. Finally, the role of enforcement mechanisms for constitutional principles will be discussed.

a. A theory of constitution-making: New Constitutionalism.

When the United States drafted its constitution in 1789 largely in response to the failures of the Articles of Confederation. The constitution that emerged, as well as the ensuing amendments, have created a very stable democracy and constitutional system, and as such, this undertaking was unquestionably a success. However, the process that created the United States Constitution was clearly a very elite-driven enterprise, focusing far more on stability than on such things as human rights, or even participatory democracy. This can be rationalized by looking to the era of history in which it was created, but in more modern times, it is debatable whether the United States process would be considered a good approach, regardless of the outcome.

The South African experience, and others, have taken a very different approach, one which takes a far more expansive perspective to democracy. Referred to as "democratic constitution-making," or "new constitutionalism," this approach has gained increasing acceptance as an adept technique to use in post-conflict situations (which is often the situation involving new constitutions in our modern era). Though they are not directly connected, the concepts of new constitutionalism and constitutional principles have developed somewhat in tandem, and so, to understand the connections—and tensions—between these two theories, a brief account of new constitutionalism will be given here.[2]

New constitutionalism is based on the premise that for a constitution to be legitimate, it must have the support of the people. Without this legitimacy, there is less assurance that either the constitution, or rule of law generally, will be willingly accepted and internalized.

In order to achieve such legitimacy, new constitutionalism borrows from the ideas of democracy, to ensure that the populace is involved with the process of drafting the constitution. Such involvement usually commences with public education, which is often a necessity in countries were democracy is a novel concept. This education campaign will generally have two elements. First, the population must be educated about the role that they will play in the formulation of the new constitution. Then, the populace must also be informed about how democracy and constitutional supremecy works in general, and more specifically, about the possible considerations available to them in forming the constitution. This task is not necessarily easy, but as the Eritrean experience revealed, it is possible even in societies where the literacy rate is quite low.[3]

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[2] For a further description of new constitutionalism, *see* VIVIEN HART, DEMOCRATIC CONSTITUTION MAKING (U.S. Inst. for Peace, Special Report No. 107, 2003).

[3] *See infra* Chapter 4. e.iii.

This public education process permits the public to be consulted on what shape the constitution should take. Their views on such things as the form of government (i.e., a monarchy, parliament, or presidency), the vertical sharing of power (i.e., a centrist unitary state or a federal state), minority issues (i.e., indigenous languages or minority inclusion in politics), and other general concerns should be taken into account. These public consultations often target certain demographics of the population, to assure that the final result is as inclusive as possible.

This education and consultation role is often done by some form of a constitutional commission, which can also call for proposed constitutional drafts to be submitted to them. All the material collected will then be combined, perhaps in the form of a "working document," and presented to another body charged with creating the constitution, such as a constitutional assembly.

While the commission may be appointed, it is very important that the assembly should be elected by the general population, ensuring that those elected represent the people. This constituent body will then be charged with drafting the final constitution, but only after full consideration of the issues raised through this public consultation. Finally, when a document is drafted, it is then to be ratified by the people, giving the people the final say.

Variations on this approach exist, and very few constitution-making processes have effectively completed all of these steps. However, any form of new constitutionalism will require three basic factors to exist before the process can succeed.[4] First, as described above, there must be social inclusion in the process. Second, freedom of speech and expression must be assured, for otherwise, these efforts for public consultation will be in vain. Third, there must be

[4] HART, *supra* note 2, at 11.

general security, for without this, the other efforts for inclusion and for freedom of expression could face insurmountable obstacles.

Perhaps what is most intriguing about this process of constitution-making is that it not only adds legitimacy to the final constitution, but it can also provide the ground-work for a stronger democracy to take shape when the new constitution comes into force. If done properly, the process can instill within the population a desire for—and respect of—rule of law, enhancing security. Thus, the purpose of constitution-making can be seen as being less about creating actual justice (in the form of substantive rights), and more about creating the desire within the population to *seek* access to justice.[5]

The promise of new constitutionalism can be clearly seen in post-conflict situations. By allowing opposing sides to come together and work together in creating their shared new constitution, and by assuring that all sides have ownership in the process, it enhances the new constitution's, and the new government's legitimacy. Of course, there is no guarantee that new constitutionalism will thus assure peace. But, it is one more tool that can help to contribute to a peaceful reconciliation in post-conflict situations, which is why this approach has become so popular.

b. The process of creating Constitutional Principles.

Given this framework to constitution-making, the origins of constitutional principles will next be considered. Constitutional principles provide a check on the constitution-making process. This definition implies that constitutional principles pre-date the constitution-making process. Indeed, constitutional principles usually appear through the form of an interim

[5] Alexander Thier, Address at The Fletcher School, Tufts University (March 2, 2004).

document that lays out the groundwork toward the creation of a new constitution. (Often the process for creating the new constitution, as described in the previous section, will also be articulated in this document.) This interim document will generally either be in the form of a peace agreement, or an interim constitution.

Why are constitutional principles formed? The specifics of each instance will be different, but at least two purposes should be apparent. First, constitutional principles permit the political parties to publicly declare and commit themselves to a particular vision of the future. Second, and often more importantly, constitutional principles provide some insurance to those undertaking the constitution-making experience. Constitutional principles provide assurances that the end-result—while unknown—can at least be guided in a particular direction. This assurance can be of particular importance in countries where democracy and elections are new, and where the political parties have never faced open elections, and thus do not have a strong sense of how they will fair in elections for a constitutional assembly.

Thus, constitutional principles are a tool that protects the interests of political parties. This can often take the form of protection for minority groups concerned about the will of the majority; if a minority group fears being out-voted in a constituent assembly, then it can try to assure that certain core issues are decided beforehand, so that it is not disadvantaged. Constitutional principles can similarly serve to protect former rulers who know that they will be losing power through this democratization process.

From these considerations, it would appear that constitutional principles are best suited when there are multiple competing factions who do not entirely trust each other, but that are committed to bringing about a new constitution, and thus, a new government. This coalition process can be desirable for several reasons. It encourages a "legal" process to creating change,

as opposed to a militarily-imposed change in government. Thus, even if one side could militarily dominate the other, this less violent approach could—and should—be appealing. (It can also be the case that a military / insurgency approach is unappealing, precisely because neither side is certain it can ever achieve a "victory".)

This process of coalitions also discourages political parties from attempting to play a spoiler role. A party that wishes to remain outside of the constitution-making process will need to be involved at the beginning to have an impact in shaping the constitutional principles. Of course, spoilers may still occur, but constitutional principles provide one more disincentive to remain outside of the political process.

Constitutional principles can also provide a mechanism through which not only security, but also reconciliation, can become possible. Implicitly, constitutional principles encourage an inclusive approach, and while there is no direct connection between constitutional principles and either security or reconciliation, constitutional principles can create an environment where such goals can be more easily achieved, as constitutional principles can encourage opposing factions to work with each other. Of course, the role of constitutional principles should not be overstated; constitutional principles are not a silver bullet, and ultimately, constitutional principles will likely only be possible when the main opposing factions are willing to trust each other, at least a little bit. But, again, constitutional principles should be viewed as a tool that will encourage such an arrangement.

c. New Constitutionalism and Constitutional Principles.

There is a potential tension between new constitutionalism and constitutional principles. Constitutional principles are defined before the constitution-making process gets under way. As

such, they are inherently going to be elitist-driven, which has been true historically. Constitutional principles are formed by the leaders of the primary political groups, and/or international actors who have become involved in resolving an on-going dispute.

This elitist aspect of constitutional principles should give us pause, for three reasons. First, constitutional principles are counter-majoritarian, raising questions about their compatibility with new constitutionalism, which is premised upon democratic inclusion. Second, constitutional principles are created by political elites and/or internationals who do not necessarily have any legitimacy with the people. Third, there is no natural limit to what can be substantively included within constitutional principles; though we will see that there are some general tendencies as to what is included, this need not be so. Thus, there is no guarantee that constitutional principles will ultimately comport with the will of the people.

There is no perfect response to these serious issues; this tension is real, and cannot—and should not—be dismissed. However, constitutional principles hold the potential to provide the best "second-best" option for situations where there are legitimate fears and/or concerns that the democratic process alone is not protected from the intense pressures that it will face. Regarding the first two issues, it is likely a necessity to get the support of such political leaders at the beginning of the process, especially in post-conflict situations. Without such support, then there is a significant risk that the process can be coopted through violence, and thus, will not move forward. This weakness of constitutional principles is not ideal, but then, neither are most post-conflict situations.

The third issue—the content of constitutional principles failing to comport with the will of the people—is even more problematic. If this were to happen, then presumably the entire constitution-making process would fail, since the process would not gain the legitimacy of the

people. Assuming a final ratification process of the final constitution by the citizens can help to minimize this threat. However, this is a weakness of constitutional principles, that has no easy solution, for fundamentally, it is a problem of how to protect democracy from the problems of majoritarianism, while simultaneously trying to ensure that the fundamentals of democracy are not violated.

d. Enforcement Mechanisms.

Since constitutional principles serve as a check on the political process, and as an assurance to those participating in the process that the power of the majority is limited, it seems a likely corollary that for constitutional principles to be effective, an enforcement mechanism will also be needed to assure all parties that these original agreements will be honored. Of course, it is hypothetically possible that such a mechanism will not be necessary; perhaps the political parties—who have agreed to the constitutional principles in the first place—can monitor themselves, and assure that they are carried out. Such self-policing may occur in specific instances, but seems doubtful in the general context of constitution-making.

Since constitutional principles are formulated before the creation of the body that will draft the constitution, the actual power dynamics of the drafting body will not be known in advance. This can lead to at least three scenarios. The opposing parties could be roughly equal in strength, so that no one side could dominate the process. If this were to happen, then self-policing seems more likely. But, if there is a divergence of powers, with one (or multiple) groups placed in a dominant position over the others, then any political agreements reached beforehand could easily be sacrificed in an effort by those in the dominant position to exploit this strength. Alternatively, there could be a situation where a formerly dominant group knows that

it is going to relegated to minority status after free and fair elections; constitutional principles can offer it minimal guarantees as to the outcome, that is, that the in-coming majority cannot use the democratic process to draft a constitution that systemically harms the now out of power minority.[6]

More fundamentally, the purpose of an effective enforcement mechanism is to add credibility to the constitutional principles. This is especially true in post-conflict situations where one side might be tempted to use the threat of violence in order to effect the outcomes of the negotiations. By having constitutional principles, and ensuring they will be enforced, this threat is not eliminated, but it is negated.

An enforcement mechanism could take a number of different forms. One possibility is the creation of a constitutional court, which would not only have the mandate of certifying the final draft of the constitution, but also, could continue to serve in the new government as a protector of the constitution specifically, and constitutionalism generally. Alternatively, one could rely on an international coalition of countries to certify that the final document is compatible with the constitutional principles, especially if international actors are already involved in the process. Such an approach would raise issues of sovereignty of the people who are to be ruled by the constitution, but this approach seems especially viable when the constitution-making process has been the result of a peace process involving significant international actors. This could be especially appealing if there were a lack of capacity to form a constitutional court to rule on such hefty determinations. Different approaches have been taking in the following case studies, and the merits of each will be considered below.

[6] This example can be seen in South Africa. The ruling Nationalist Party (NP) knew full well that the African National Congress (ANC), led by Nelson Mandela, had far broader support (in terms of the population). Thus, it was important for the NP to have some basic guarantees before ending the apartheid regime.

Chapter 4. CONSTITUTIONAL PRINCIPLES: CASE STUDIES.

Constitutional principles are a relatively new phenomenon; the first example of principles is the 1982 Constitutional Principles of Namibia. However, the most well-known and robust example is that of South Africa's constitutional principles contained in its 1994 Interim Constitution. South Africa's example will be considered first, followed by Namibia. Then, Burundi will be considered, whose process and principles, as articulated in the 2000 Arusha Agreement, is so recent that the ultimate outcome of the process is still unknown. Finally, two other examples will be considered where constitutional principles were used, but where the end result of the process has proven undesirable. These examples are Cambodia and Eritrea.

In exploring these case studies, the following methodology will be used. First, a brief overview will be given of the lead-up to the country's new constitution, in order to provide a background for each country's invariably unique experience with constitution-making. Then, the usage of constitutional principles in this process of constitution-making will be analyzed. Next, the process used to draft the constitution will be explained, with a particular emphasis on enforcement mechanisms of the constitutional principles. Finally, the "success" of the entire process will be assessed. This assessment will be based on whether the spirit and intent of the constitutional principles was achieved, as opposed to the actual textual requirements. That is to say, if a principle states that there must be an independent judiciary, and if the resulting constitution mandates that the judiciary will be independent, but if in practice the judiciary is still very much under the thumb of the executive, then this would be an example where the principles did not achieve their purpose. Such an assessment admittedly requires significant subjectiveness and ambiguity, both in assessing the "spirit" of the principles, and also in assessing the end-result. Thus, such conclusions should be drawn cautiously, but this risk is

necessary in order to provide useful comparative commentary on the effectiveness of various attempts to use constitutional principles.

a. South Africa and the Interim Constitution.

i. *Background Notes*.

On December 4, 1996, the Constitutional Court of South Africa certified a new constitution, marking the last step for liberal democracy to be ushered into the formerly apartheid South Africa. This brought to an end two years of work by the Constitutional Assembly, an elected body charged with drafting the constitution. Yet the Assembly's deliberations, though complex and contested, were in many respects secondary in importance to the initial negotiations that occurred between the Afrikaner-dominated sitting government, the Nationalist Party (NP), and the reform-demanding African National Congress (ANC), headed by Nelson Mandela. Had these preliminary negotiations not occurred, the constitution-making process would have taken a very different form, if it had occurred at all.

The South African experience was neither peaceful nor calm. Political violence waxed and waned for decades in South Africa, and in the final years leading of NP power, especially from 1990 to 1994, more than 14,000 people were killed through political violence.[7] This period coincided with the most intense negotiations between the ANC and the NP, and resulted in an Interim Constitution for South Africa that became effective on April 27, 1994.[8] This interim document was intended to last for only two years, during which time a new constitution would be drawn up by a representative constitutional assembly. During this time the Interim

[7] *See* PIERRE DU TOIT, SOUTH AFRICA'S BRITTLE PEACE: THE PROBLEM OF POST-SETTLEMENT VIOLENCE 34 tbl. 2.1 (2001).

[8] S. AFR. CONST. (1994).

Constitution served as the governing constitution, mandating that South Africa be ruled by a consociational, power-sharing Government of National Unity (GNU). After the ANC handily won elections in May, 1994 (as expected), Mandela led the GNU, but all parties that had received more than five percent of the vote were represented in the coalition.

ii. *Constitutional Principles.*

The newly-formed Constitutional Assembly was not given free reign to create a new constitution. Schedule 4 of the Interim Constitution specified thirty-four constitutional principles with which the final constitution had to conform. These constitutional principles fit into several broad categories related to (1) the form of the national government, (2) the power relations between the national and sub-national governments, (3) minority group concerns, (4) human rights concerns, (5) formation of public-sector organizations, and (6) amendment procedures. These will be considered in turn.

First, several principles addressed the form of the national government. These principles required that South Africa would be a constitutionally-supreme democracy committed to the equality of men and women of all races.[9] The government was to have a separation of powers between three branches of government, with an independent judiciary to "safeguard the Constitution and all fundamental rights."[10] Finally, government openness and accountability to the citizenry would be encouraged via provisions to ensure the freedom of information.[11]

Second, principles addressed the relationship between the national and sub-national governments, assuring limited local autonomy. All levels of government, at the national, provincial, and local levels, were to be democratic.[12] The allocation of powers between these

[9] *Id*. at sched. 4, arts. I, IV.

[10] *Id*. at sched. 4, arts. VI–VII.

[11] *Id*. at sched. 4, art. IX.

[12] *Id*. at sched. 4, arts. XVI–XVII.

levels was to recognize the need for national unity, but to also recognize the legitimacy of provincial autonomy and the importance of cultural diversity.[13] Basic considerations for allocating this power are laid out in Principle 21.[14] While the national government was not to encroach upon the integrity of the provinces, any ambiguity regarding the allocation of powers was to be resolved in favor of the national government.[15] But, provinces and local governments were to be given a constitutional right to an "equitable share of revenue collected nationally" in order to provide basic services, as recommended by a Financial and Fiscal Commission.[16]

These principles were trying to draw a delicate balance between the desires for a strong central government (promoted especially by the ANC, who had majority status in the country), and wishes for sub-national autonomy, permitting minority groups greater control over local affairs. The end result did shore up certain powers for provincial governments, but there was also significant ambiguity in the meaning of some of these principles.

Perhaps the most interesting example of this revolves around Principle 34, which provides that the other principles do not preclude a "constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage."[17] This principle, rather than offering a substantive right, attempted to clarify other principles (most notably Principle 12, which provides for self-determination in the formation of "organs of civil society," that is, associations).[18] Indeed, Principle 34 was actually inserted after

[13] *Id*. at sched. 4, art. XX.

[14] *Id*. at sched. 4, art. XXI (The National Government should address issues related to: national standards; international aspects requiring the country to speak with one voice; all needs for "uniformity across the nation"; and national economic policies. Provincial Governments would address issues specific to the provinces. When mutual cooperation is needed, concurrent allocation will occur.).

[15] *Id*. at sched. 4, arts. XXII–XXIII.

[16] *Id*. at sched. 4, arts. XXVI–XXVII.

[17] *Id*. at sched. 4 art. XXXIV, cl. 1.

[18] *Id.* at sched. 4 art. XII. ("Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of

the Interim Constitution had already come into effect, in an effort to encourage a particular minority group, the Inkatha Freedom Party (IFP), to not boycott the elections and the Constituent Assembly.[19] The IFP was particularly strong in the province of KwaZulu-Natal, and while it had a weak third-place showing of about 10% in the national elections (behind the ANC and NP), there was still a significant fear that the IFP would willingly resort to violence to try to gain through blackmail what they could not achieve politically.[20] Thus, in the end, these "principles" did not prove to be unassailable, as Principle 34 attempted to amend them after the fact. However, Principle 34 is very vague, and when the Constitutional Court rejected claims that the right to self-determination was too weak in the final constitution, they observed that Principle 34 was a "permissive rather than an obligatory provision."[21]

Third, constitutional principles addressed some specific concerns of minority groups. South Africa was to become a pluralistic democracy, with regular elections and universal suffrage, and with "[p]rovisions . . . for participation of minor political parties."[22] Diversity of language and culture was to be "acknowledged and protected," and indigenous law and traditional leadership was to be explicitly recognized and protected by the Constitution.[23]

Fourth, constitutional principles addressed human rights concerns. Some of these human rights were explicit, but it is interesting to note that many were not. Racial, gender, and "all other forms of discrimination" were to be prohibited, and everyone was to be equal before the

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non-discrimination and free association, be recognised and protected.")

[19] The IFP initially rebuffed this move, demanding more entrenched rights for provincial governments. In the end, they did participate in the 1994 elections, but would later walk out of the Constituent Assembly, continuing to try to impact affairs from afar.

[20] *See* SIRI GLOPPEN, SOUTH AFRICA, THE BATTLE OVER THE CONSTITUTION 207 (1997).

[21] *In re* Certification of the Constitution Of the Republic of South Africa, 1996, 1996 (4) SALR 744, ¶ 218 (CC).

[22] S. AFR. CONST. sched. 4, arts. VIIII, XIV (1994).

[23] *Id.* at sched. 4, arts. XI, XIII.

law (though affirmative action seemed permissible).[24] The right to association, to form trade unions and collectively bargain, as well as the right to fair labor practices, were protected.[25]

Principle 2 is the most far-reaching human rights provision, but it also lacks any specificity. It states that:

> [e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.[26]

This Principle is striking for what it did—and especially what it did *not*—say. It called for human rights to be "entrenched and justiciable," but it did not list any rights. Rather, it stated that "all universally accepted" rights shall be enjoyed. One could assume that such documents as the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and/or the African Charter would be logical reference points, but again, none of these were directly incorporated.

Principle 2 did mandate the *consideration* of Chapter 3 of the Interim Constitution, which has a long list of civil/political rights (but interestingly, neither social, economic, nor group rights, which are seen in the African Charter). Chapter 3 also includes the right to protection of one's human dignity (following the German tradition), and a right to an "environment which is not detrimental to his or her health or well-being."[27] But again, the text of Principle 2 said only

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[24] *Id*. at sched. 4, arts. III, V (Article V seems to permit affirmative practices, for while it states that "[t]he legal system shall ensure the equality of all before the law and an equitable legal process," it also notes that "[e]quality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.").

[25] *Id*. at sched. 4, arts. XII, XXVIII.

[26] *Id*. at ached. 4 art. II.

[27] *Id*. at art. 29; *id*. at ch. 3.

that these rights must be contemplated, and stopped short of requiring the Assembly to include all (or any) of these rights.

Fifth, there were constitutional principles calling for independent and impartial institutions to be created, including a Financial and Fiscal Commission, a Public Service Commission, a Reserve Bank, an Auditor-General, and a Public Protector, as well as a "non-partisan, career-oriented public service" which is to "serve all members of the public in an unbiased an impartial manner."[28] Also, the security forces were to perform their duties in relation to the "national interest," and shall not further interests of political parties.[29]

To American scholars, these provisions might seem out of place in a constitutional document, for they are narrower and suggest a constitutional specificity that simply does not exist in the United States Constitution. However, these principles especially must be understood in the context of apartheid South Africa. These institutions had been abused in South Africa's past, and thus these principles can best be understood as an effort to explicitly prevent such abuses in the future.

Sixth, amendment to the constitution would require a super-majority, and amendments affecting the provinces were to require ascension by a special majority of the provinces.[30]

iii. *Drafting the Constitution, Enforcing the Constitutional Principles.*

From a new constitutionalism perspective, the South African experience was exceptional. Elections for the Constituent Assembly were only the beginning of the public's participation in the process. The Assembly undertook a major outreach and educational effort to solicit opinions about the constitution. The public responded with two million submissions.[31]

[28] *Id*. at sched. 4, arts. XXIX–XXX.

[29] *Id*. at sched. 4, art. XXXI.

[30] *Id*. at sched. 4, arts. XV; XVIII, cl. 4.

[31] *See* HART, *supra* note 2, at 7.

Over two years, from 1994 to 1996, the Assembly deliberated and drafted a final version. The Interim Constitution mandated that this draft's compliance with the constitutional principles would have to be certified by the Constitutional Court of South Africa.[32] This model of using judicial review seems an ideal method to assure compliance, but it also imposed significant challenges on what is likely a new constitutional court, as was the case here. The Court had only been created in 1994, via the Interim Constitution, and certifying the constitution was a significant challenge.

The role of the Court became more difficult as it started to review the draft. In an effort to solicit opinions, the Court asked all political parties, as well as private individuals, to submit their comments on how the draft document violated the principles. This effort to create a sense of objectivity by asking for everyone to present their views, and then to deal with these views accordingly, was not without difficulties. Though five political parties and 84 private parties invoked this process to comment on the legality of the draft, the ANC did not participate.[33] The ANC pointedly allied itself with the document put forth by the Assembly. By so doing, the ANC injecting a partisan flavor into the eventual Court decision.

The Court ultimately concluded that certain provisions of the draft did not comply with the constitutional principles. These inconsistencies involved the following principles:

— CP 18:2, CP 24, CP 25, and CP 10: Powers given to the local and provincial governments were not deemed to be adequate;
— CP 4 and CP 7: Certain statues were shielded from judicial review;
— CP 2 and 15: Fundamental rights, freedoms, and liberties were not "entrenched," and that amendment to the constitution did not involve "special procedures involving special majorities";

[32] S. AFR. CONST. art. 71, para. 2 (1994).

[33] *In re* Certification of the Constitution Of the Republic of South Africa, 1996, 1996 (4) SALR 744, ¶ 24 (CC).

— CP 29 and CP 20: Independence and impartiality of certain government institutions were not being safeguarded, and/or that their purpose was not adequately defined; and
— CP 28: The right of individual employers to engage in collective bargaining was not assured.[34]

While each of these objections were important, the first three are of particular interest here. The first identifies problems related to a lack of power being given to the provincial and local governments. This no doubt resulted from the fact that the ANC, which knew it would have a clear majority for the foreseeable future at the national level, did not have much interest in ceding power away from the central government as it was willing to do during earlier negotiations. However, for better or worse, this was part of the "deal" giving rise to the Assembly and the constitution-making process. Here, then, the principles clearly did serve as a check on political majoritarian rule.

The second and third points relate to the powers of the judiciary as a check on the future government. The Court had to demand that it be given the final say as to the constitutionality of all statutes (judicial review). Likewise, the Court required that the fundamental rights needed to be more "entrenched" in the constitution, again, so that the judiciary could defend these rights from legislative or executive attack. In this sense, the Court was making sure it would have a future role to play in the balance of powers. This decision was functionally similar to *Marbury v. Madison*, but there was a key difference; the Constitutional Court was already authorized to have this power via the Interim Constitution and various constitutional principles. The United States Supreme Court gave itself the power of judicial review without any such clear textual basis.

[34] *Id*. at ¶ 482.

After referring the text back to the constitutional assembly, the Court certified the amended version on December 4, 1996.[35]

iv. *Outcome of the Process*.

The ambitions of the ANC were not entirely satisified through this process. The NP was not able to secure for itself a role in future governance, which the ANC, with its majority status, should be able to maintain for the foreseeable future. Likewise, the central government is fairly strong, a position advocated by the ANC, and opposed by other groups, especially the IFP. Thus, though the ANC did have to make some concessions through the constitutional principles, the ANC agenda was largely unaffected. This might suggest that the principles were actually not terribly effective in shaping the process, for the ANC—the majority—largely obtained what it sought.

However, several factors suggest that this process in general, and the constitutional principles in particular, were quite successful. First, the final transition to democracy saw a peaceful exchange of power, which involved all of the major political parties. Second, though the ANC might have been pleased with the end-result, the constitutional principles did effect the process, as is reflected by the fact that the Constitutional Court actually rejected the first draft—the enforcement mechanism proved effective, reflecting the validity of the process. Thus, this example of constitutional principles should definitely be heralded as a success, even though caveats have been noted.

[35] *In re* Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1997 (2) SALR 97 (CC).

b. Namibia and the 1982 Constitutional Principles.

i. *Background Notes*.

On March 21, 1990, Namibia formally declared its independence. This marked the end of a long path to self-rule, and was the result of not only a domestic struggle, but also significant international actors' involvement in the process of independence. Namibia[36] was colonized by Germany in the late nineteenth century.[37] After World War I, South Africa received a League of Nations mandate to administer Namibia.[38] As the League dissolved, the UN inherited this mandate. Over the next several decades, as colonization diminished in Africa, pressures on South Africa to liberate Namibia increased. By 1966, the UN General Assembly revoked South Africa's mandate to administer Namibia, though South Africa never acknowledged this, nor acquiesced its control.[39] A civil war / armed revolt opposing South Africa's presence soon followed, led primarily by the South West Africa People's Organization (SWAPO). There was also significant international diplomacy, including efforts from the Front-Line States and the Western Contact Group, to end South Africa's rule.[40]

In 1978, the U.N. Security Council adopted Resolution 435, which called for the independence of Namibia through "free elections under the supervision and control of the United Nations."[41] South Africa originally agreed to abide by this resolution, but it took more than a decade for these elections to take place, largely due to South African resistence.[42]

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[36] Present-day Namibia was referred to as "South West Africa" throughout most of the twentieth century.

[37] U.S. DEP'T OF STATE, BACKGROUND NOTE: NAMIBIA (Mar. 2005) *at* http://www.state.gov/r/pa/ei/bgn/5472.htm.

[38] *Id*.

[39] *Id*.

[40] The Front-Line States were those neighboring Namibia, including Angola, Botswana, Mozambique, Tanzania, Zambia, and Zimbabwe. The Western Contact Group included the United States, Canada, France, Germany, and the United Kingdom.

[41] S.C. Res. 435, U.N. SCOR, 33rd Sess., at 13 para. 3, U.N. Doc. S/INF/34 (1978).

[42] This "resistance" was of two forms. First, South Africa seemed generally unwilling to allow Namibia to

In 1982, the Western Contact Group (led by the United States), the Front-Line States, and SWAPO drew up Constitutional Principles to guide both the process for creating, and the final content of, a new constitution. These principles were indirectly adopted by the Security Council,[43] though their legal status in Namibia was somewhat unclear.[44] However, when the Constituent Assembly met for the first time on November 21, 1989, the members unanimously resolved to use the 1982 Constitutional Principles as a framework for Namibia's new constitution.[45] This was the first time where constitutional principles were used to shape the drafting of a future constitution.

ii. *Constitutional Principles*.[46]

The 1982 Constitutional Principles are formally named "Principles concerning the Constituent Assembly and the Constitution for an Independent Namibia." As this name suggests, the document actually contains two parts, the first addressing procedural aspects

become independent. Second, South Africa seemed especially concerned over the demise of apartheid, and the future status of the Afrikaners living (and ruling) in Namibia.

[43] The Secretary-General's report S/15287 (1982) contained the 1982 Constitutional Principles. This report was referenced in *Further Report of the Secretary-General Concerning the Implementation of Security Council Resolutions 435 (1978) and 439 (1978) Concerning the Question of Namibia*, U.N. SCOR, 44th Sess., at 10, U.N. Doc. S/20412 (1989) ("The text of the Principles concerning the Constituent Assembly and the Constitution of an independent Namibia which was transmitted to the Secretary-General on 12 July 1982 (S/15287)."). The Security Council then approved this report, implicitly adopting the principles, in S.C. Res. 632, U.N. SCOR, 44th Sess., at 3, U.N. Doc. S/INF/45 (1989) ("[The Security Council a]pproves the report [S/20412] of the Secretary-General and his explanatory statement concerning the implementation of the United Nations plan for Namibia.").

[44] Marinus Wiechers argues that, because S.C. Res. 435 authorized the Secretary-General to ensure the independence of Namibia through free elections, and because S.C. Res. 632 incorporated the 1982 Principles, that the Secretary-General was then bound to assure that these Principles were followed in making Namibia independent. *See* Marinus Wiechers, *Namibia: The 1982 Constitutional Principles and Their Legal Significance*, *in* NAMIBIA: CONSTITUTIONAL AND INTERNATIONAL LAW ISSUES 3–8 (David Van Wuk, et al., eds., 1991). However, when the Administrator-General issued Proclamation 62 on Nov. 6, 1989, convening and laying out the procedure for the Constituent Assembly, no mention was made of the 1982 Principles. *Id*. at 13.

[45] *See* BACKGROUND NOTE: NAMIBIA; *supra* note 37. *See also,* Wiechers at 35.

[46] Given the difficulty in otherwise attaining the text of the 1982 Constitutional Principles, they have been reproduced in the Appendix. They were reproduced from Wiechers at 7–8.

related to the adoption of the constitution, and the second addressing the substantive aspects of the constitution.

The Principles state that Namibia will be a "unitary, sovereign, and democratic state" marked by constitutional supremacy.[47] They call for a three-branch republican government, with the executive and legislative being elected through free, fair, and periodic elections.[48] They state the judiciary will be independent, and "will be responsible for the interpretation of the Constitution and for ensuring its supremacy and the authority of the law."[49]

Principle 5 requires the constitution to have a declaration of fundamental rights, including the rights to life, personal liberty, freedom of speech and press, freedom of assembly and association, due process and equality before the law, protection of property, and freedom from racial, ethnic, religious or sexual discrimination. This declaration is to be consistent with the Universal Declaration of Human Rights.[50] Though Principle 5 stops short of requiring these rights to be entrenched in the Constitution, it does require that aggrieved individuals will have recourse to the courts to adjudicate these rights.[51] Principle 6 prohibits retrospective criminal offenses.

Principle 7 calls for provisions to be made for the "balanced structuring of the public service, the police service and defense services," as well as equal access in recruitment processes.[52] This Principle is clearly a reflection of Namibia's apartheid history, and similar provisions are seen in the constitutional principles of South Africa.[53]

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[47] *Principles concerning the Constituent Assembly and the Constitution for an Independent Namibia* sec. B paras. 1–2 (1982) [hereinafter Namibian Constitutional Principles] *reprinted in* Wiechers, *supra* note 44, at 7–8.

[48] *Id*. at sec. B para. 3–4.

[49] *Id*. at sec. B. para. 3.

[50] *Id.* at sec. B para. 5.

[51] *Id*.

[52] *Id*. at sec. B para. 7.

[53] *See supra* notes 28, ?, and accompanying text.

Finally, Principle 8 provides for elected councils on the local and/or regional level.[54] This principle is very vague, but seems to be in response to a desire for local autonomy, to prevent a central government that is too strong, following a consociational model of respecting the autonomy of individual groups. The need for this was perhaps enhanced following their apartheid history which was hallmarked by a strong central government.

These Principles were relatively brief, but were also fairly robust, especially given that they were the first real example of constitutional principles being used. Though South Africa is considered the prime example of the use of constitutional principles, it should be clear that many of the same issues and concepts appeared first in the Namibian constitutional principles, which were written more then a decade earlier than South Africa's

iii. *Drafting the Constitution, Enforcing the Constitutional Principles*.

The Namibian Constituent Assembly was convened on November 21, 1989. By February 9, 1990—less than three months later—the final constitution had been adopted by consensus.

Elections for the Assembly were held from November 7-11, 1989, with SWAPO winning 60% of the seats, a significant majority, but still less than the two-thirds required to adopt a constitution. Before the Assembly convened, most parties had already created drafts. Given SWAPO's majority status, its draft was expected to be of significant importance. But then external events played a surprising role in this process; SWAPO, itself having a socialist bent, had drafted a text inspired heavily by Eastern European models, emphasizing the power of political parties. With the fall of the Berlin Wall in 1989, the merits of an Eastern European model were called into question. SWAPO discarded its original draft and quickly created a new draft, comprised almost entirely of components from other parties' drafts. This SWAPO draft

[54] Namibian Constitutional Principles, *supra* note 47, at sec. B para. 8.

was accepted at the beginning of the Assembly as the initial working document, but in reality, this draft was little more than a conglomeration of the other parties' drafts, and SWAPO, after claiming 60% of the vote, had no genuine proposal of its own on the table.[55]

After adopting the 1982 Principles and the SWAPO submission, the Assembly turned this "working document" over to three constitutional law experts from South Africa, who worked for three weeks to turn this working document into a draft. The document was then referred to a 12-member Constitutional Committee, who reviewed the experts' draft, and worked with the experts for one week to create a final draft. This was then referred for consideration to the entire Assembly. After brief debate, this was unanimously adopted on Feb. 9, 1990.[56]

In terms of the ideals of new constitutionalism, this process fell short in terms of public participation. The only public participation was through the election of members to the Assembly (although significant political advertising did occur in the run-up to these elections, which almost entirely focused on constitutional issues, and thus did play a rule in informing the public). Once the elections occurred, this was an elite-driven process.

The question of "enforcement" is hard to assess. On the one hand, there was no formal Constitutional Court of Namibia to certify that the 1982 Principles had been followed. However, in reporting to the Security Council, the Secretary-General asserted that the new constitution did, indeed, comport with the 1982 Principles.[57] Some have argued that if the Secretary-General had not found this to be true, then it would have been incumbent upon the UN General Assembly and

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[55] *See* Marinus Wiechers, Constitution-Making, Peace-Building, and National Reconciliation: Namibia 8–9 (Jan. 2003) (unpublished manuscript, on file with author).

[56] For a detailed description of this process, *see* Weichers, *The 1982 Constitutional Principles*, *supra* note 44, at 9–12.

[57] *Further Report of the Secretary-General Concerning the Implementation of Security Council Resolution 435 (1978) Concerning the Question of Namibia*, U.N. SCOR, 45th Sess., at 1, U.N. Doc. S/20967/Add 2 (1990) ("As the fundamental law of the sovereign and independent Republic of Namibia, the Constitution reflects the 'Principles for a Constituent Assembly and for a Constitution for an independent Namibia' adopted by all the parties concerned in 1982 and set out in the annex to document S/15287 of 12 July 1982.").

Security Council to reject Namibian membership, as Namibia would have been in violation of Res. 435.[58] This view, though arguably legally correct, is likely ignoring the political dimensions at play in U.N. decision-making, and it is far from clear that, if the Assembly had chosen to not honor the 1982 Principles, the U.N. would have had the political will to challenge the process. However, one should be cautious to not underestimate the role the U.N. did play in impacting what occurred. Thus, though there was no explicit enforcement mechanism such as that found in South Africa, the U.N. did serve this role to some extent, and the end result was that the constitutional principles were ultimately followed.

iv. *Outcome of the Process*.

The outcome in Namibia has been mixed. The 1982 Constitutional Principles were met on paper, but their application has proven far more difficult. Human rights abuses and disparities persist, but the U.S. State Department views the situation in Namibia as improving.[59] One of the main problems cited has been a lack of resources for the courts, limiting their effectiveness.[60] Thus, though the case study of Namibia is problematic, its experience with constitutional principles was largely successful, though the ideals have still not been fully met..

c. Burundi and the Arusha Agreement: an Unfinished Story.

i. *Background Notes.*

Burundi is in the midst of creating a new constitution, in accordance with the Arusha Agreement that was adopted in 2000. This process is not complete, and its outcome is uncertain,

[58] *See* Wiechers, *The 1982 Constitutional Principles*, *supra* note 44, at 17.

[59] *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003: NAMIBIA (2004), *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27741.htm.

[60] *Id*.

but it will still be considered here, since the Arusha Agreement does contain constitutional principles.

Though Burundi has been able to avoid the label of genocide that has tarnished its neighbor, Rwanda, Burundi's recent history is also plagued with shocking violence and unrest. The U.S. State Department has cautiously reported that "[w]hile no definitive countrywide casualty figures were available, reports from media and NGOs estimate that more than 250,000 persons, mostly civilians, may have been killed in conflict-related violence since 1993."[61] This approximation says nothing of the corresponding number of displaced persons (both internal and external), and it also does not include the significant violence that has shaken Burundi before 1993.[62]

Burundi was first colonized by Germany, and then ceded to Belgium after World War II, but became independent in 1962, creating a constitutional monarchy. Military coups soon followed, and a Tutsi minority party (Unité pour le Progrès National, UPRONA) dominated politics from 1965 until 1993, when elections were finally held. At that time the majority Hutu party (Front pour la Démocratie au Burundi, FRODEBU) came to power. This democratic rule was short-lived; a military coup occurred within a year, and as genocide occurred in neighboring Rwanda, civil war followed suit in Burundi.

By 1998, negotiations toward a peace agreement were occurring, which culminated in the Arusha Agreement, signed in 2000.[63] The lasting impact of Arusha is unclear. Former peace

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[61] U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003: BURUNDI (2004), *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27715.htm [hereinafter Burundi Country Report].

[62] *See* FILIP REYNTJENS, BURUNDI : PROSPECTS FOR PEACE 7 (2000) (noting that in 1972, during the worst violence before 1993, more than 100,000 Hutu's were killed by Tutsi forces; such violence—though not this extreme—was common since 1962).

[63] ARUSHA PEACE AND RECONCILIATION AGREEMENT FOR BURUNDI, Aug. 28, 2000, *at* http://www.usip.org/library/pa/burundi/pa_burundi_08282000_toc.html.

agreements in Burundi have failed, and a cease-fire was only finalized in 2002.[64] Furthermore, additional agreements have been necessary to clarify the political arrangements of the Arusha Agreement.[65] These three factors do not bestow much confidence to the Arusha Agreement's future, but for all this criticism, the process is still moving forward.[66]

The Arusha Agreement's second protocol the guidelines for the formulation of Burundi's new constitution. Chapter I lays out the substantive constitutional principles with which the new constitution will have to comply, and Chapter II addresses the procedural aspects to be followed. These will be addressed in turn.

ii. *Constitutional Principles*.

The preamble of Chapter I states that the parties are committed to "a democratic system of government" based on "unity without exclusion."[67] The Protocol then lays out very detailed provisions for the future constitution, consisting of more than 120 paragraphs, subdivided into eleven articles. The Protocol is itself almost a complete constitution. Only a brief commentary will be provided here, but if Burundi continues to follow—and implement—these principles, it will be a very interesting future case study.

Article 1 establishes certain "Fundamental Values" of the constitution. These values are not human rights (which are included as "Fundamental Rights" in Article 3), but rather, are underlying ideals of the new constitution. These include that all Burundians are "equal in value and dignity," that the government shall be "based on the will of the Burundian people," and the purpose of the political system shall be to both unite and serve Burundians.[68]

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[64] E.g., in 1994 the Kigobe Agreement was signed, but proved ineffective. *See* REYNTJENS at 15.

[65] *See* THE PRETORIA PROTOCOL ON POLITICAL, DEFENCE AND, SECURITY POWER SHARING IN BURUNDI, Oct. 8, 2003, *at* http://www.usip.org/library/pa/burundi/burundi_10082003.html.

[66] *See* Burundi Country Report, *supra* note 61.

[67] ARUSHA AGREEMENT, Protocol II, pmbl.

[68] *Id*. at Protocol II, art. 1, paras. 1–6.

Article 2 addresses General Principles, including that the state will be divided into provinces.[69] (The autonomy of these provinces will be limited, though, as they will have their local government appointed by the president, minimizing the possibility for regional bifurcation.[70]) The exact form of republican government is not specified, but the National Assembly may restore the monarchy if it so desires.[71]

Article 3 lays down the Charter of Fundamental Rights. This thirty-paragraph charter mandates constitutional supremacy, and general rule of law.[72] It also recognizes that all citizens have both rights *and* obligations, in following the tradition of rights articulated in the African Charter.[73] "Human dignity" is to be respected and protected, reflecting the continued German ties from its earlier colonial era.[74] The rights to life, personal freedom, freedom from slavery and servitude, and freedom from discrimination are all to be protected.[75] Freedom of expression and of the media, freedom of assembly and association, and the right to join trade unions, are also to be guaranteed.[76] Special rights of children are included, as well as rights to basic education.[77] Finally, good management of natural resources, and the promotion of development, will be obligations of the state.[78]

Article 4 addresses Political Parties, stating that Burundi will be a multi-party system, with certain prohibitions on the goals and techniques employed by political parties (such as

[69] *Id.* at Protocol II, art. 2, para. 3.
[70] *Id*. at Protocol II, art. 8.
[71] *Id.* at Protocol II, art. 2, para. 4.
[72] *Id*. at Protocol II, art. 3, paras. 21–22, 29–30.
[73] *Id*. at Protocol II, art. 3, para. 2.
[74] *Id*. at Protocol II, art. 3, para. 3.
[75] *Id*. at Protocol II, art. 3, paras. 4, 6–8.
[76] *Id*. at Protocol II, art. 3, paras. 13–14, 20.
[77] *Id*. at Protocol II, art. 3, paras. 17, 26–28.
[78] *Id*. at Protocol II, art. 3, paras. 18, 23.

violence or anti-democratic intentions).[79] Article 5 regards Elections, requiring that they be "free, fair, and regular."[80]

Article 6 addresses the Legislature. While it defers on the Burundian choice among republican forms of government, it does place limits on the amendment process. A super-majority of four-fifths in the Assembly, and two-thirds in the Senate, will be required, and the amendment of organic laws will also require a super-majority.[81]

Article 7 deals with the Executive, mandating that the President be elected by "direct universal suffrage."[82] Article 9 relates to the judiciary. A Constitutional Court shall address all constitutional matters, and will have abstract and concrete review.[83] Finally, Articles 10 and 11 lay out a framework for the Administration (civil services), as well as Defense and Security Forces.[84]

The Arusha Agreement represents the most comprehensive set of constitutional principles that have ever been articulated. This raises some interesting issues in relation to new constitutionalism, for much of the work is already complete, and thus the role of the assembly and the public is correspondingly diminished. However, the benefits and drawbacks of this approach are ambiguous at this time.

iii. *Drafting the Constitution, Enforcing the Constitutional Principles*.

The process for the creation of Burundi's new constitution is as follows. First, the National Assembly and Senate must draft an identical document, and adopt it by a two-thirds

[79] *Id*. at Protocol II, art. 4.
[80] *Id*. at Protocol II, art. 5, para. 2.
[81] *Id*. at Protocol II, art. 6, paras. 5–6.
[82] *Id*. at Protocol II, art. 7, para. 1, cl. a.
[83] *Id*. at Protocol II, art. 9, para 19.
[84] *Id*. at Protocol II, arts. 10–11.

majority.[85] This draft will then go to the Constitutional Court, to assure its compliance with the principles found in Protocol II.[86] Upon certification, the document would be put to a popular referendum before finally becoming the new constitution of Burundi.[87] In the event that the above procedure does not produce a new constitution within 23 months, then experts—national or international—would instead prepare a draft, which would comply with the constitutional principles. This draft would be subject to a direct referendum. If it passed, it would become the new constitution. If it failed, it would serve as a provisional constitution until elections were held, at which time the new legislature would be charged with amending the new constitution.[88]

iv. *Outcome of the Process*.

As noted above, the end result of the Arusha Agreement is unknown. The Arusha Agreement is a robust example of constitutional principles, but it is not yet clear that this process will ultimately find acceptance in Burundi.

In terms of new constitutionalism, this process is problematic. First, the great detail found within the principles highlights the tension between new constitutionalism—founded upon an ideal of democratic participation in the drafting of the constitution—and constitutional principles. Second, if the proposed process does not work, then international experts will single-handedly create the new constitution (subject to a referendum and subsequent amendments by the legislature). These provisions are antithetical to the ideals of new constitutionalism. The end results, though, are as yet unknown.

[85] *Id*. at Protocol II, art. 15, para. 4.
[86] *Id.* at Protocol II, art. 15 para. 5.
[87] *Id.* at Protocol II, art. 15 para. 6.
[88] *Id.* at Protocol II, art. 15 para. 7.

d. Cambodia and the Failings of the Paris Agreement.

i. *Background Notes*.

The case of Cambodia is most significant as an example of the inherent limits to constitutional principles in being able to shape a peaceful future for a country. The Cambodia experience reveals that constitutional principles are merely principles put down on paper; it is their implementation, and the spirit in which they are enforced, that will ultimately determine if they will have any impact at all in the domestic setting.

Cambodia had been the scene of more than two decades of sustained and brutal violence. Through civil war, mass murder, starvation, and other forms of repression, it is calculated that in a county of only eight million people, more than one million have perished.[89] A civil war continued from 1970 until 1990, though the worst period was from 1975-78, when the Party of Democratic Kampuchea (more commonly known as the "Khmer Rouge") was in power. In 1978, Vietnam invaded and set up the People's Republic of Kampuchea. For more than a decade, resistance against this imperialist rule continued.

The Paris Agreements were signed in 1991, ending this civil war.[90] The four opposing factions in Cambodia were brought together, as well as a significant coalition of international actors.[91] The Paris Agreements called for a transitional period, during which time the

[89] Stephen P. Marks, *The New Cambodian Constitution: from Civil War to a Fragile Democracy,* 26 COLUM. HUM. RTS. L. REV. 45, 46 (1994) [hereinafter Marks, *Cambodian Constitution*].

[90] *Letter Dated 91/10/30 from the Permanent Representatives of France and Indonesia to the United Nations Addressed to the Secretary-General*, U.N. GAOR, 46th Sess., at 8, UN Doc. A/46/608-S/23177 (1991), *reprinted in* 31 ILM 174 (1992), *available at* http://www.usip.org/library/pa/cambodia/pa_cambodia.html. This document actually contains four agreements. These were (1) Final Act of the Paris Conference on Cambodia, *id.* at 2; (2) Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, *id*. at 8; (3) Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia, *id*. at 48; and (4) Declaration on the Rehabilitation and Reconstruction of Cambodia, *id*. at 55. These are collectively referred to as the "Paris Agreements," whereas, the singular "Paris Agreement" refers to the second agreement..

[91] The four Cambodian political groups were (1) the Cambodian People's Party (CPP), previously known as the People's Revolutionary Party of Kampuchea (PRPK); (2) the National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia (FUNCINPEC); (3) the Khmer People's National Liberation Front

government of Cambodia would be administered by the United Nations Transitional Authority in Cambodia (UNTAC). UNTAC would administer Cambodia from the signing of the Paris Agreement until a new constitution had been written.[92] The Paris Agreement also set out principles with which the final constitution would comply.

ii. *Constitutional Principles*.

Annex 5 of the Paris Agreement, titled "Principles for a New Constitution for Cambodia," was a brief, six-paragraph document. It specified that the new government must be a constitutionally-supreme, liberal, pluralistic democracy, with "periodic and genuine" elections.[93] It called for a declaration of fundamental rights, which was to be "consistent with the provisions of the Universal Declaration of Human Rights and other relevant international instruments."[94] A prohibition on the retroactive application of law was mandated, and any aggrieved individual would be "entitled to have the courts adjudicate and enforce these rights."[95] Finally, the judiciary was to be independent, and empowered to enforce the rights provided under the constitution.[96]

In the Cambodian context, these principles might seem quite far-reaching, given that any semblance of rule of law had been dormant for decades. However, these principles were

(KPLNF), also known as the Buddhist Liberal Democratic Party (BLDP); and (4) the Party of Democratic Kampuchea (PDK) also known as the Khmer Rouge. The following states also participated in the Paris Agreements: Australia, Brunei Darussalam, Cambodia, Canada, the People's Republic of China, the French Republic, the Republic of India, the Republic of Indonesia, Japan, the Lao People's Democratic Republic, Malaysia, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States, the Socialist Republic of Viet Nam and the Socialist Federal Republic of Yugoslavia.

[92] Paris Agreement, *supra* note ?, at arts. 1, 6.

[93] *Id.* at annex 5, paras. 1, 3–4.

[94] *Id*. at annex 5, para. 2. (The fundamental rights were to include "the rights to life, personal liberty, security, freedom of movement, freedom of religion, assembly and association including political parties and trade unions, due process and equality before the law, protection from arbitrary deprivation of property or deprivation of private property without just compensation, and freedom from racial, ethnic, religious or sexual discrimination.").

[95] *Id*.

[96] *Id*. at annex 5, para. 5.

generally vague (e.g., calling for conformity with the Universal Declaration of Human Rights, without specifying particular rights to be included). Given the lack of specificity found in the document, these principles were largely subject to the desires and integrity of the actors involved in the drafting of he constitution. This process left much to be desired, suggesting that compliance with these principles was never very likely.

iii. *Drafting the Constitution, Enforcing the Constitutional Principles.*

Elections for the Constituent Assembly—a proportionally elected body that, according to the Paris Agreement, would draft the constitution, and then transform itself into the first legislative body—were held in May, 1993, under the watchful eye of the UN.[97] This body promulgated the new constitution, which entered into force on September 24, 1993.

The ideals of new constitutionalism—especially the participation of the public in the drafting process—simply did not happen. Though the Assembly was elected from the people, this was the only opportunity for input that the Cambodian citizenry had. The process of drafting was done behind closed doors, as the Assembly appointed a smaller drafting committee to create a draft in secret. However, this document proved immaterial; at approximately the same time that the drafting committee presented its document to the Assembly, former-King Norodom Sihanouk[98] presented an opposing draft, which was ultimately adopted by the Assembly on September 23, 1993.[99] This brought to a close the transitional period for Cambodia, and ultimately rendered moot the work done by the Assembly.

[97] *Id.* at arts. 1, 12.

[98] King Sihanouk led the Cambodian monarchy from the 1940s until the civil unrest of the 1970s. For a brief historical analysis, see Marks, *supra* note 89, at 51–56.

[99] Stephen P. Marks, The Process of Creating a New Constitution in Cambodia 13 (May 17, 2004) (unpublished manuscript, on file with author).

The Cambodian process included no enforcement mechanism. Though international actors were involved, they did not have as prominent a role as in the Namibian experience, and as such, there can be no claim that the international community "validated" the outcome of the Cambodian process. While this lacking did not single-handedly lead to an unfavorable outcome, it certainly contributed to a process that was neither transparent nor particularly democratic and representative.

iv. *Outcome of the Process.*

The ultimate effect of the principles on Cambodia's future are dubious. Though the 1993 Constitution does nominally assure basic human rights, it is on paper only.[100] In reality, the executive has remained incredibly strong in Cambodia, and any sort of balance or separation of powers—especially regarding the role of the judiciary in assuring that fundamental human rights are upheld—has not been realized. The 1993 Constitution identifies that the judiciary is to be an "independent power" that "guarantees and upholds impartiality and protects the rights and freedoms of the citizens."[101] However, the judiciary has never attained this independence, nor has it been able to play such a protective role. The judiciary is controlled very tightly by the Minister of Justice, removing any realistic opportunity for a check on executive (or legislative) power by the judiciary.[102]

The Cambodian experience exemplifies the limits of constitutional principles. These principles were admittedly minimal, but that alone does not explain their failure to have any resonance in the drafting process. The work of the Assembly was done in secret, without even the involvement of most of the Assembly members, much less the general public. Ultimately,

[100] *See* CAMBODIA CONST. ch. III.

[101] *Id.* at art. 109.

[102] *See* Julio A. Jeldres, *Cambodia's Fading Hopes*, J. DEM. No. 7–1 at 151–52 (1996).

the Assembly did little more than affix its rubber stamp on the former king's draft. Thus, though an election was held, the Assembly in no way represented democratic ideals. The constitution-making process in Cambodia in no way prepared the country for a democratic government. As such, it should come as little surprise that the government has not given much credence to the text of the constitution, for there is no one to force it to do so.

In part, the failings of the Cambodian government have been a direct result of political party manipulation. The FUNCINPEC came to power with broad support, but did not transition well from a resistance movement into a political party, and has been plagued by internal division and lack of unity . Thus, through threats of violence and other power struggles, the CPP, the remainder of the Vietnamese party, has retained far more power through coalition governance with the FUNCINPEC than its numbers in elections would suggest. This has resulted in the new constitution being largely ineffective, though Cambodia is certainly more peaceful than before. As such, the constitutional principles have not proven effective because democracy in general has not taken hold. Until political parties are willing to be controlled by their own constitution, there is going to be little that constitutional principles can do to bring about lasting change.

e. Eritrea's Faltering Independence.

i. *Background Notes*.

Eritrea ratified a new constitution in 1997, marking the formal end of a period of transition from Ethiopian rule that had begun in 1991, with the removal of Ethiopian troops. Eritrea used constitutional principles, but they served a vastly different purpose than did the principles in other examples. Eritrea's transition did not involve a coalition of competing political parties who needed to reconcile their differences; Ethiopia was not involved in this

constitution-making exercise, and there was really only one domestic party. As such, the constitutional principles in Eritrea can be seen as less of an agreement between political parties, and more of a political promise to the people of Eritrea.

Eritrea was first colonized by Italy in 1890, but after World War II, oversight of Eritrea was transferred to Ethiopia. Ethiopia quickly attempted to annex Eritrea, turning Eritrea into an Ethiopian province. This gave rise to a thirty-year armed struggle for Eritrean independence, starting in 1963, and ending in 1991 with the withdrawal of Ethiopian troops. In a symbolic referendum held in 1993 and certified by the UN, more than 99% of Eritreans voted for independence.[103] On May 23, 1997, a new constitution was ratified for this purpose.

The armed resistence movement was headed by primarily one group, the Eritrean People's Liberation Front (EPLF). Upon the withdrawal of Ethiopia, the EPLF set up a provisional government, and later changed its name to the People's Front for Democracy and Justice (PFDJ). Though Eritrea is not homogenous (Eritrea is split into two roughly equal ethnic groups defined by their religion: Muslims and Coptic Christians[104]), the EPLF/PFDJ had a clear unity of purpose in gaining independence from Ethiopia

ii. *Constitutional Principles*.

The Eritrean experience with constitutional principles was quite distinct from the previous examples. In 1993, the provisional government charged itself with "preparing and laying the foundation for a democratic system of government."[105] In 1994, a Constitutional Commission was created. In Proclamation 55, the commission was ordered "[t]o draft a

[103] Bereket Habte Selassie, *The Dialectical Process of Constitution-making in Eritrea*, *in* CONSTITUTION-MAKING AND DEMOCRATISATION IN AFRICA 191 (Goran Hyden & Denis Venter, eds., 2001).

[104] Richard A. Rosen, *Constitutional Process, Constitutionalism, and the Eritrean Experience*, 24 N.C.J. INT'L L. & COM. REG. 263, 267 n.20 (1999).

[105] Selassie at 359 n.1 (citing Eri. Proc. No. 37 (1993)).

constitution on the basis of which a democratic order would be established, and which, as the basic law, shall be the ultimate point of reference of all the laws of the country, and the final arbiter of all basic issues in dispute."[106] The EPLF/PFDJ also adopted a National Charter, which set forth goals for Eritrea's future, including the objectives of democracy, human rights, social justice, national unity, stability, and economic development.[107] The Commission used this charter as a guiding principle.[108] This Charter was never formally adopted, however, and thus did not have any binding weight on the Commission. Whereas, Proclamation 55 did have legal effect. Thus, from a legal perspective, only Proclamation 55 is a genuine, enforceable constitutional principle, but the National Charter at least had a quasi-legal status, since it was an expression of intent by the dominant political party.

iii. *Drafting the Constitution, Enforcing the Constitutional Principles*.

The Commission was not elected, but rather, appointed. However, the two main ethnic groups were each well-represented. The Commission had a very difficult task on its hands, for Eritrea has high rates of illiteracy, and there were questions as to whether the norms of new constitutionalism could be applied to this landscape, where public consultation would face significant challenges. In this respect, Eritrea is a phenomenal example of how new constitutionalism can still be employed in countries where literacy is low. Creative means were employed, including devising musical plays, radio broadcasts, secondary school writing projects, and even comic books, to inform the public about the constitution-making process, to educate people on the choices to be made about the constitution, and to inform them more generally on how a constitutional democracy works.[109]

[106] Rosen at 285 n.104 (quoting Eri. Proc. No. 55 art. 4 (1994)).

[107] Selassie at 359.

[108] *Id*.

[109] *See* Rosen at 294.

After broad consultations, domestically and also with international experts, the Commission prepared a draft, based on earlier proposals and public comments. This was submitted to a ratifying body, comprised of the National Assembly, representatives from regional assemblies, and representatives from Eritreans who were abroad. This body ratified the proposed constitution, with only small changes.[110]

There was no "enforcement mechanism" employed in the Eritrean example. This is not terribly surprising, since the constitutional principles were asserted by the only political party involved in the process. As such, there was likely little recognized need for an enforcement mechanism, since the principles were serving as more of a statement of principle than as an actual political agreement. However, this also reveals the weakness of the constitutional principles in this example; it is incumbent upon the PFDJ to assure their compliance, but there is still no other political party in Eritrea, and thus, no political counter-part to assure that the PFDJ fulfills its promises.

iv. *Outcome of the Process*.

The text of the Eritrean constitution does satisfy the requirements of their constitutional principles, but the application of these principles has been incomplete. Elections have been continuously postponed, and the independent judiciary has remained weak, and, according to the U.S. State Department, "subject to executive interference."[111] The Eritrean government's human rights record remains poor, as the constitutional protections have gone largely unimplemented. Thus, these principles have created a constitution that could give life to the original purpose of these principles, but this has not yet happened.

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[110] *Id*. at 293–94.

[111] U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003: ERITREA (2004), *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27726.htm.

Chapter 5. CONSTITUTIONAL PRINCIPLES: COMPARISONS AND CONCLUSIONS.

In comparing these examples of constitutional principles, the following two-prong approach will be taken. First, substantive elements will be considered; what did the constitutional principles include, and more importantly, why? Second, procedural aspects will be compared. In particular, the issue of who drew up the constitutional principles will be evaluated, as well as whether or not there was an effective enforcement mechanism.

a. Substantive elements.

Looking first to the substantive issues, it is important to note that there was a significant variance of specificity in these examples. Burundi's principles comprised almost an entire constitution. South Africa had thirty-four principles, Namibia included eight, Cambodia had just six, and Eritrea arguably had just one principle.[112] Of course, the number of principles is not an accurate assessment of their specificity, but it does provide a rough approximation of the variety of approaches to constitutional principles that have been taken.

Each of these examples incorporated democratic representation as one of their fundamental constitutional principles. This is perhaps unsurprising, for two reasons. First, with the exception of Namibia, each example occurred after the fall of the communist block, in a time when it has become widely accepted that some form of democratic representation is key for effective governance.[113] Though Namibia's principles were written during the cold-war era, they

[112] However, Eritrea's National Charter was more expansive, and the Commission did treat its ideas as guiding principles. *See supra* notes 107, 108, and accompanying text.

[113] Of course, many other forms of governance still exist. However, with the demise of Communism, arguments for non-democracy were certainly negatively influenced, as can be seen by the actions taken by SWAPO in Namibia; they dropped their Eastern-European-leaning draft constitution after the fall of the Berlin Wall. *See supra* note 55 and accompanying text.

were prepared with significant western international support, led by the United States. A democracy requirement for Namibia was thus a foregone conclusion.

Second, with the exception of Eritrea, each of these cases involved a post-conflict situation in which there were opposing sides domestically that now had to somehow share power.[114] Democracy seems the best way forward in such a post-conflict situation, for it provides an opportunity for plurality, something which non-democratic forms of government lack.

Third, human rights have also been an element in each of these examples, though the method has varied. The South African example included very few explicit human rights requirements, requiring instead that the Constituent Assembly consider those rights articulated in their Interim Constitution. Cambodia and Namibia took a slightly different approach; they both articulated several explicit human rights, but concluded by stating that these rights would be "consistent with the provisions of the Universal Declaration of Human Rights." Such a requirement is very weak, for ultimately, the Universal Declaration is an aspirational, non-justiciable declaration. Burundi, on the other hand, has a very robust and specific list of human rights provisions, moreso than any other example.

This emphasis on human rights again should come as little surprise. First, human rights are becoming increasingly recognized as a necessary component of a democratic system, and there is a growing acceptance of human rights worldwide. Second, in post-conflict situations, where two or more ethnic groups have feared and/or attacked each other in the past, a recognition of fundamental rights that must be respected can be seen as contributing to, and being a part of, a healing and reconciling process.

[114] In Eritrea, the "opposing force" was Ethiopia; once Ethiopia left, there was really only one political force, the EPLF. *See supra* Chapter 4. e.i.

The type of human rights included has also varied significantly. Namibia, Cambodia, and South Africa each articulated rights that are of a civil and political nature; economic and social rights were not included.[115] Burundi took a broader approach, including, among other things, a right to education.

This focus on civil and political rights seems a reflection of two things. First, the western nations that have been most involved in these constitution-making processes have traditionally focused more on these rights; since western powers were involved significantly in Namibia and Cambodia, it is not surprising that their influence was seen. Second, these rights are far more easily justiciable; it is generally seen as being more difficult—sometimes impossible—to have justiciable social and economic rights. The approach to this is changing in some countries, but this process is happening slowly. Thus, it should be expected that while human rights will always need to play a prominent role in constitutional principles, these will no doubt be primarily civil / political in nature, at least until the time that economic and social rights become more broadly accepted.

Fourth, an independent judiciary has been included in most of these examples. Constitutional rights mean little unless there is a mechanism to enforce these rights. Thus, with the exception of Eritrea, each example called for an independent judiciary that would be capable of assuring these rights.[116] Of course, this has not always proven effective in practice, especially as Cambodia has illustrated, but the necessity of an independent judiciary—and the need more generally for a separation of powers in the government—has been recognized in the drafting of constitutional principles.

[115] Though South Africa did suggest that its Assembly should consider the rights listed in its Interim Constitution, which included a right to both human dignity and to a safe environment. Thus, indirectly, social and economic rights were referenced. *See supra* note 27 and accompanying text.

[116] Eritrea's constitution calls for an independent judiciary, as well, but this was not mandated as a constitutional principle.

Fifth, it is interesting to consider the resulting specificity of the final constitution when constitutional principles are used. It should not be assumed, *a fiori*, that constitutional principles will result in either a less or more detailed constitution. However, in some circumstances—such as that of Namibia and South Africa, where apartheid had permeated the entire structure of the government, there is a fairly significant amount of specificity in their constitutions, far more so than in most North American or European constitutions. This is not inherently problematic, though it does raise the question of how effectively these constitutions—which go into significant detail in outlining how a Public Service Commission, or Reserve Bank, will be structured—will be able to stand the test of time. This is an open question, but is one to consider when drafting a constitution. Presumably, though, these states were not content to simply enumerate a right to "equal protection"; the problems of apartheid were perhaps too recent to trust that such a general right—which, if implemented correctly, could achieve the same goals—would be able to correct the harm.

Finally, it should be noted that there are numerous other substantive elements that are specific to each example. These will not be discussed in any detail here, except to observe that the historical circumstances that gave rise to the conflict in the first place should always be taken into consideration when drafting constitutional principles. In Namibia and South Africa, there were certain elements to their constitutional principles—such as a public service core which will be balanced and accessible to all persons on an equal basis, or the requirement that the military and police not be responsible to political parties—that are clearly a response to their apartheid history. Thus, when new constitutional principles are being formed, special attention should obviously be paid to the history of interactions between the competing parties. For example, have techniques such as "emergency rule" been abused in the past? In many countries this

seems to be the case, and thus, an interesting area to explore would be to limit the scope and/or availability of emergency rule through a constitutional principle. This has never been done before, but something of this nature might be appropriate in a future setting.

b. Procedural elements.

There are two main procedural questions to consider with constitutional principles. First, how are they drafted? Second, how are they enforced? These questions are perhaps more important than the substantive content issues, for the answers to these two procedural questions will better reveal the likely success and legitimacy of the constitutional principles, regardless of what they contain. Unfortunately, the answers to these questions are also far more ambiguous.

The drafting of constitutional principles varied tremendously from one situation to the next. In South Africa, it was a process negotiated entirely by the two main domestic competing factions—the ANC and the NP. Other smaller domestic actors, like the JFP, were excluded during the early negotiations. There was also very little direct international involvement (though the role of international pressure on the NP to end apartheid should not be understated). Whereas, in Cambodia, the primary domestic factions—the FUNCINPEC, CPP, KPLNF/BLDP, and PDK—were all involved in the Paris Agreements, but so were numerous international actors.[117] The Arusha Agreements for Burundi also involved domestic and international interaction. The drafting of the Namibian principles, on the other hand, also involved numerous international and domestic actors, but it did not involve South Africa's apartheid regime, which posed the strongest opposition—within and outside of Namibia—to the process.

[117] *See supra* note 91 and accompanying text.

The merits of these different approaches are not patently obvious. South Africa's approach should seem ideal—to have the domestic actors engage each other in a *sui generis* nature bodes well for their ability to continue interacting with each other in the future. However, waiting for domestic actors to engage each other at the peace table without international influence—or at least pressure—might take too long, and thus prove to be impractical. However, it should be obvious that domestic factions must be fundamentally involved in the process, for this will be the only way that the constitutional principles—and the process—will be given any legitimacy.

Eritrea and Namibia are unique cases; they involved a struggle against an external power, not an internal struggle. As such, there likely is less (and perhaps no) need to involve the foreign power, for international diplomacy alone might be enough to keep the foreign power from meddling in the future. Once this interference ends, then the foreign power has no direct role to play in the domestic politics.

The Cambodian experience should be considered carefully, precisely because it did not work. One suggested reason is that the domestic parties were not fully committed to the process. All parties agreed that the civil war was not going to result in a clear winner, but the parties were not clearly willing to find another solution. This problem was no doubt exacerbated here by the fact that one of the parties—the CPP—was really just a proxy for the Vietnamese government. As such, its loyalties lied less in shaping a beneficial solution for Cambodia than in maintaining Vietnam's presence in Cambodia, and continuing to effect the wishes of the Vietnamese government on their neighbor. Thus, when there were opportunities to coopt the process for their benefit, these parties have quickly done so.

A related point is that of enforcement mechanisms. South Africa clearly set the gold standard on this issue, by creating a Constitutional Court in its Interim Constitution which would have to certify that the constitutional principles were met by the final draft. This Court has continued to exist, and addresses South African constitutional and judicial review issues today. Burundi has followed this example, calling for a similar court and process in the Arusha Agreements.

None of the other examples involved an explicit enforcement mechanism. Arguably, the U.N. served as a weak enforcement mechanism for Namibia, which seemed to work sufficiently well there, but is likely an unsatisfactory model to follow in the future. First, there is a legitimate fear that the U.N. might not be able to adequately enforce constitutional principles, for external political reasons. But second, it is far better to set up a court structure that will continue to have a lasting role in the new government that is being formed.

Cambodia and Eritrea had no enforcement mechanisms. This failing alone does not explain all of the problems occurring in these countries, but it does begin to shed some light on why the constitutional principles were not honored, especially in Cambodia. In the Cambodian example, the process devised to create their constitution was frequently manipulated by the political parties. The international community did nothing to intervene in this process, and thus, though the principles were actually satisfied on paper, it should come as no surprise that the spirit of these principles has remained unfulfilled. This point is more clearly explained by observing that there is also no equal balance of power between the domestic factions in Cambodia. Though the FUNCINPEC party has faired better in recent elections, it has always needed to form coalition governments with the CPP (either to assure majority voting, or out of fear that the CPP would resort to violence if they were not included). The CPP, having its

origins in the Vietnam-orchestrated puppet regime, remains far more organized and focused as a political party than has the FUNCINPEC, which has permitted the CPP to manipulate the other political parties. This imbalance in domestic power, combined with a lack of an enforcement mechanism for the original principles, as well as a weak and non-independent judiciary today, means that these constitutional principles never had a good chance of being successful.

The Cambodian experience reveals a necessary contradiction in post-conflict work; in situations where there is the most need for checks against a dominant party abusing the system, it is the hardest to implement those checks, precisely because one party dominates, and does not want to relinquish any power. Though it is not a complete answer, an effective enforcement mechanism is a partial response to this problem. An enforcement mechanism will stand a greater chance to force the political parties to follow the constitutional principles. Perhaps this will be in the form of a constitutional court; perhaps it is actually better in some cases to use international actors, especially if there is a concern that the resources or skills for such a court are not readily available domestically. Regardless of the mechanism, this is necessary to assure that parties are really serious about the constitutional principles that they are agreeing to follow.

PART II: UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS.

Chapter 6. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: DEFINITION AND THEORY.

The concept of an "unconstitutional constitutional amendment" (UCA) appears to some as an oxymoron; if the constitution is the supreme law of the land, and if its procedural rules for amendment are properly followed, then how can an amendment to the constitution nevertheless be deemed unconstitutional?

Putting aside the cumbersome nomenclature, this theory of understanding and interpreting a constitutional document need not be viewed as being internally inconsistent, as will be explained in the following sections. Furthermore, though the theory of UCA's does not exist in most legal systems, it has been expressly adopted in two countries, with others having potential to employ the theory in the future.

In this chapter, the theoretical considerations of UCA's will be examined. A definition for UCA's will first be provided. Then, concerns about the feasibility of a UCA theory—especially those related to liberal democracy—will be contemplated. This will be followed in the next chapter with several case studies where UCA's have been used in the past, and could be used in the future. Finally, a chapter of comparative analysis will be given.

a. Unconstitutional constitutional amendments: A definition.

Unconstitutional constitutional amendments are best understood by distinguishing between the *procedural* and *substantive* elements of amending a constitution. All constitutions have an amendment process specified in the constitution, which almost certainly involves a more restrictive process for passage than does ordinary legislation. This procedural limitation can

come in multiple forms, including, but not necessarily limited to, super-majority voting requirements, the convening of a special constituent assembly with the specific mandate of amendment, the need for ratification by states/provinces (in a federal system), or by the general populace (in the form of a referendum), and/or temporal delays in the passage of an amendment.[118] In most systems, once these procedural hurtles are met, the constitution has been amended. There is no examination of the content of such amendments. This approach is fundamentally based on the idea that legitimacy for alteration of the constitution is found in the *source* of the amendment, and not in its actual substance.[119] Thus, in the United States, a federal amendment's legitimacy comes solely from the fact that it has been adopted by the democratic institutions of the federal and state legislatures, or from a national assembly convened for the purpose of amending the constitution.[120]

The theory of UCA's goes beyond the *source*, focusing as well on the *substance* of the amendment. Procedural requirements remain, but even if these procedures were properly followed, the amendment will still be subject to a pseudo-judicial review. Thus, what could be a "constitutional amendment" in the sense of satisfying the procedural requirements could still be deemed "unconstitutional" by the judiciary, based on its substance, resulting in an unconstitutional constitutional amendment.

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[118] All of these procedural requirements can be seen within the United States; the normal process of amending the United States Constitution is by a super-majority vote (of two-thirds of both houses of Congress) and ratification by three-fourths of state legislatures. U.S. CONST. art. V. Alternatively, two-thirds of the states can call for a National Convention to propose amendments (which then must be ratified by the states). *Id*. Whereas, in the Massachusetts state constitution, an amendment must be passed by two successive legislatures, via a special joint session; it will then be submitted to the voters in the form of a referendum. MASS. CONST. art. XLVIII, pt. IV.

[119] *See* Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 278 (Sanford Levinson, ed., 1995).

[120] *See* U.S. CONST. art. V.

Judicial review requires something upon which to base this review. For ordinary legislation, the text of the constitution is the metric used to conduct judicial review. With UCA's, this approach to judicial review is complicated, for by definition an amendment is either going to alter or remove an existing part of the constitution, or create an entirely new section. Thus, an amendment cannot be compared to the entire constitutional text (as occurs with typical legislation), for the amendment would necessarily be found invalid, rendering the constitution static, without the possibility of change.

The theory of UCA's is not intended to make constitutional amendments impossible, but rather, it wishes to simultaneously permit some flexibility in adjusting the constitution, while still shielding certain core aspects of the constitution from amendment. To achieve this end, two distinct approaches have been used. One is to explicitly preclude the amending of portions of the constitution from within the constitution itself. The second approach has been to look outside of the explicit text of the constitution to other, fundamental, concepts which cannot be violated, thus limiting the amendment process.

The first form of an embedded textual limitation can be exemplified by a clause in the constitution stating that a certain article or section cannot be amended.[121] Alternatively, a clause could make specific reference to an unamendable concept.[122] In both these approaches, the UCA theory ultimately represents a super-entrenched concept which is unassailable through the amendment process, and thus will survive as long as the constitution itself.

Alternatively, UCA's can be based on something other than the text of the constitution. Namely, the judiciary could elicit certain "overarching principles," "fundamental principles," or

[121] *See*, *e.g.*, GRUNDGESETZ [Constitution] art. 79 cl. 3 (F.R.G.) ("Amendments of this Constitution affecting. . .the basic principles laid down in Articles 1 and 20 are inadmissible.").

[122] *See*, *e.g.*, *id*. ("Amendments of this Constitution affecting the division of the Federation into States [Länder], [or] the participation on principle of the States [Länder] in legislation . . . are inadmissible.").

a "basic structure" of the constitution. These would not be explicit from the text, but could be drawn from them, when reading the constitution as a whole. To a strict textual formalist, this approach might seem baseless, and even be seen as destroying the very idea of constitutional supremacy, for from the textualist perspective, this approach to UCA's is making the judiciary's interpretation supreme to the constitution itself. To a certain extent, this criticism might be warranted. However, common-law lawyers raising this criticism should realize that this idea of an internal harmony is not new to the Romano-Germanic (civil) law tradition. Indeed, the main method of interpreting the Civil Codes has been to use the exegetical method.[123] This approach is borne out of a necessity; for both the French and German Codes proceed from general formulations to more specific instances, requiring a consideration of the entire code to correctly apply any one provision.[124] Of course, using the exegetical method to apply law is very different from using it to derive limitations to the constitutional amendment process, but it still suggests an alternative approach to statutory, and constitutional, interpretation.

b. Unconstitutional constitutional amendments and liberal democracy.

Liberal democracy is based, fundamentally, in the concept that the sovereign power of the state is vested in the people. As a corollary, legitimacy must also find its basis in the people. The theory of unconstitutional constitutional amendments poses a dilemma for liberal democracy for two reasons. First, the theory of UCA's poses a check on the political process, and as such, it poses a check on the free will of the people. Of course, procedural requirements play a similar

[123] This theory of interpretation suggests that each code must be interpreted in the context of the other codes, for the codes together form a "whole cloth" that contains the entirety of the law.

[124] *See* JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA, CASES AND MATERIALS 1158–61 (1994) (citing Alain Levasseur, *On the Structure of a Civil Code*, 44 TUL. L. REV. 693, 699–703 (1978).).

role, but there remains a big difference between super-majority requirements and UCA's. A UCA is absolute, and cannot be overcome by even 100% of the populace (unless a new constitution were devised). Whereas, procedural limitations can be overcome if he issue is important enough to a sufficiently broad coalition of citizens.

Second, a theory of UCA's places the final determination of substantive issues in the hands of the judiciary, a body that is not directly responsible to the public. Generally, it is considered advisable to have an independent and insulated judiciary, for these protections help the courts to maintain their "objectivity." That the courts are objective and above the political fray is a very important legal fiction in most societies, as it provides the courts—and their determinations—with legitimacy. This legitimacy is encouraged by the idea that the courts are merely applying the law, as written by the legislature. Of course, in reality, the work of judges is never so mechanical. Court decisions require the interpretation of statutes and constitutional clauses which are rarely perfectly clear in meaning. But UCA's significantly undermine this fiction, for the application of UCA's will almost certainly involve political or policy decisions that sometimes are not grounded in any text at all. The usage of UCA's seems to leave no doubt that the judiciary is explicitly involved in the political process.

As with constitutional principles, there is no easy answer to these perplexing questions. However, depending on the right, one can see why such limitations might be desirable. First, it can be argued that, even in a democracy, the people are not free to do anything of their choosing. One view that has been suggested is that a democracy cannot "legitimately use democratic processes to destroy the essence of democracy," which can be described as the "meaningful participation in self-government."[125] In particular, a majority, or even a super-majority, should

[125] Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 163, 179 (Sanford

not be permitted to deny the right of participation in self-government to current minorities; for that matter, even if 100% of the population agreed that democracy should end, this, too, might be prohibited in order to protect the rights of members of future generations.[126]

This view is not without controversy, but it suggests to a larger, and perhaps less controversial, view: democracies are not necessarily a process of majoritarian rule. Thus, though the concept of UCA's may seem foreign to U.S. lawyers and political scientists, in reality, all amendment processes can be seen on a continuum, from fairly easy amendment processes, to more difficult processes, to those which are simply impossible. Though many will still find this unsettling for the issues of democracy identified above, at least theoretically, this is not such a difficult concept. However, this characterization also suggests that, if all options are along a continuum, then UCA's can be viewed as a particularly draconian option. Alternatively, a constitution could hypothetically include higher standards for certain fundamental rights in the constitution, such that it would be very, very hard to change, but not impossible. This approach would concern most U.S. lawyers far less, and yet, in reality, could be structured in such a way that it could be almost equivalent to an UCA theory. Thus, as case studies are now considered, it is perhaps a useful question to ask whether there was another method that could have been used to entrench these rights, or if, in fact, the UCA's were responding to something more than just a need for entrenchment.

Levinson, ed., 1995).

[126] *Id*.

Chapter 7. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: CASE STUDIES.

The following case studies of UCA's will be considered. First, Germany's use of UCA's will be explored, both by examining the origins of the theory, and also the relevant case-law of Germany's Federal Constitutional Court. Next, the example of India will be examined, again by following the case law, and also considering the historical factors that gave rise to India's usage of UCA's. Then, eight other examples will be briefly considered; these examples involve countries whose constitutions lend some support to the theory of UCA's, but whose courts have not clearly endorsed the concept. Finally, the connection between constitutional principles and UCA's will be analyzed, looking particularly at the Namibian and South African experience.

a. Germany's Unconstitutional Constitutional Amendments.

Germany's Federal Constitutional Court (FCC) has endorsed the concept of UCA's. Indeed, UCA's were referenced (albeit as dictum) in the very first case the FCC decided.[127] However, the concept has remained somewhat ambiguous, as the Court has never been forced to spell out the meaning of UCA's in any great detail.

The starting point for UCA's is Article 79 of the German Constitution, which places substantive limitations on the amendment process, namely: "[a]mendments of this Constitution affecting the division of the Federation into States [Länder], the participation on principle of the States [Länder] in legislation, or the basic principles laid down in Articles 1 and 20 are inadmissible."[128] This clause does three things. First, it states that the federation cannot be dissolved (or sub-divided) by an amendment. Second, the federal character of the political system cannot be amended. Finally, the concepts enshrined in Articles 1 and 20 cannot be

[127] *See* Southwest State Case 1 BverfGE 14 (1951).

[128] GRUNDGESETZ [Constitution] art. 79 cl. 3 (F.R.G.).

amended. All three of these components present a form of substantive limitations, but none are as far-reaching as is the entrenchment of Articles 1 and 20.

Article 1 is the first of nineteen articles in Chapter I of the German Constitution, which is collectively labeled "Basic Rights." It states the following:

> Article 1
>
> (1) Human dignity is inviolable. To respect and protect it is the duty of all state authority.
> (2) The German People therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace, and of justice in the world.
> (3) The following basic rights are binding on legislature, executive, and judiciary as directly valid law.[129]

Article 20 is the first article of Chapter II, labeled "Federation and States." It states the following:

> Article 20
>
> (1) The Federal Republic of Germany is a democratic and social federal state.
> (2) All state authority emanates from the people. It is being exercised by the people through elections and voting and by specific organs of the legislature, the executive power, and the judiciary.
> (3) Legislation is subject to the constitutional order; the executive and the judiciary are bound by law and justice.
> (4) All Germans have the right to resist any person seeking to abolish this constitutional order, should no other remedy be possible.[130]

It is through these two articles that the broad scope of Article 79 is really revealed. The concepts of "law and justice" and "constitutional order" referred to in Article 20, and the concept of "human dignity" proffered in Article 1, are each very ambiguous terms, but could not be more broad in their scope. Since it is upon the FCC to define what these terms mean, the FCC's role in supervising constitutional amendments could be quite far-reaching.

[129] *Id*. at art. 1. Note that clause three is especially interesting, for its reference is ambiguous. "The following basic rights" seemingly refers to the rest of Chapter 1, collectively labeled "Basic Rights." Thus, it could seemingly be argued that the remainder of Chapter 1 (Articles 2-19) is also unamendable, just like Article 1. However, the FCC has not considered this possibility when contemplating amendments to the Basic Rights. *See* Klass Case, *infra* note ?, and accompanying text.

[130] *Id*. at art. 20.

Yet when the FCC first discussed the usage of UCA's, in the *Southwest Case*, it did not limit itself to the mandates of Article 79; it suggested an even broader meaning.

> An individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an inner unity, and the meaning of any one part is linked to that of the other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.[131]

The FCC went on to note that "any constitutional provision must be interpreted in such a way that it is compatible with those elementary principles and with the basic decisions of the framers of the constitution."[132] These comments suggest a very broad discretion for the courts, which is not limited by the text of the constitution itself. However, it must be stressed that this was only dicta.

Two years later, in the *Article 117 Case*,[133] the FCC moved the concept of UCA's from mere dictum into an actual theory, noting that there were higher-law principles involved with the German constitution, and that, "[i]n the improbable event that a provision of the Basic Law exceeded the outer limits of the higher-law principle of justice, it would be the Court's duty to strike it down."[134] The origins and meaning of these "higher-law principles" are not clear; a logical starting point might be the concepts enshrined in Article 79, and thus, implicitly, in Articles 1 and 20. (Indeed, the central concept referenced in the *Article 117 Case*—the concept

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[131] *Southwest Case* at 32 (as translated in W. F. MURPHY & J. TANENHAUS, COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES 209 (1977)). The Court also quoted a Bavarian Court decision which pre-dated the formation of the FCC, stating: "That a constitutional provision itself may be null and void, is not conceptually impossible just because it is a part of the constitution. There are constitutional principles that are so fundamental and to such an extant an expression of a law that precedes even the constitution that they also bind the framers of the constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles."

[132] *Id.*

[133] 3 BverfGE 225 (1953).

[134] *Id*. at 234 (as cited in VENICE COMMISSION, OPINION ON THE CONSTITUTIONAL AMENDMENTS CONCERNING LEGISLATIVE ELECTIONS IN THE REPUBLIC OF SLOVENIA (44th Plenary Meeting, 13-14 October 2000), *available at* http://www.venice.coe.int/docs/2000/CDL-INF(2000)013-e.asp).

of "justice"—comes directly from clause 3 of Article 20.) But, the dictum of the *Southwest Case* suggests that these "higher-law principles" might be originating from "overarching principles" that are not explicitly within the constitution, leaving this concept unresolved.

The only other case that has directly involved UCA's was the *Klass Case*.[135] This case involved the monitoring of postal communications and telecommunications without the knowledge of the person being monitored. To authorize this, an amendment to Article 10 was proposed, which had previously stated that "[t]he privacy of letters as well as the secrecy of post and telecommunication are inviolable. Restrictions may only be ordered pursuant to a statute."[136] The amendment was to add a second clause, which would not only permit secret monitoring, but would also replace a citizen's recourse to the courts with a review process by a body created by Parliament.[137]

This amendment was ultimately upheld by the FCC. But, dissenting justices expressed a willingness to reject this amendment, on the basis of a violation of Article 79 clause 3. They saw the amendment as a violation of the general concept of human dignity (as protected in Article 1), as well as a violation of the concept of "individual legal protection," which is a derivative of the concepts of separation of powers and of general lawfulness (which are protected under Article 20, clauses 2 and 3, respectively).[138] The dissent argued that since Article 79 refers to measures "affecting" these principles, the proposed amendment violated Article 79, and thus, this was an unconstitutional constitutional amendment.

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[135] 30 BverfGE 1 (1970).

[136] GRUNDGESETZ art. 10 cl. 1. (This second sentence was later removed from clause 1, and inserted into clause two, pursuant to the 17th Amendment.).

[137] *Id.* at art. 10 cl. 2 ("Restrictions may only be ordered pursuant to a statute. Where a restriction serves the protection of the free democratic basic order or the existence or security of the Federation or a State [Land], the statute may stipulate that the person affected shall not be informed and that recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament.").

[138] *Klass*, 30 BverfGE, (Geller, Schlabrendorff, and Rupp, dissenting) (as translated in W. F. MURPHY & J. TANENHAUS, COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES 659 (1977)).

These three cases are the entirety of the UCA jurisprudence. It should be recognized, then, that UCA's in Germany are relatively undeveloped. The scope of the UCA concept is uncertain, but the dissenters in the *Klass Case* reveal just how far-reaching these concepts could reach: such concepts as human dignity, the separation of powers, and the rule of law, could all serve as grounds for declaring an amendment unconstitutional. Other concepts, such as militant democracy, the party state, justice, and the idea of a moral code, are viewed by commentators as being underlying principles of the German Constitution, and thus, they, too, could hypothetically be invoked to void an amendment.[139] However, the meaning of any one of these concepts is far from clear.

This arrangement has led Donald Kommers to suggest that there are, in fact, three constitutions at play in Germany. The first is the unamendable constitution, as protected by Article 79, clause 3. The second is the amendable constitution, being all parts of the written text, except for those areas protected under Article 79. The third is the unwritten constitution, comprised of the core principles of the constitution, such as justice, dignity, and a moral code.[140] This tripartite arrangement—and especially the last, unwritten, portion—is debatable, for in both the *Article 117 case* and the *Klass case*, the actual concepts employed (i.e., justice, separation of powers, and human dignity) are theories that have textual bases in the "unamendable constitution." However, the central thesis of Kommers is beyond argument: the text of the "unamendable constitution" is vague, explicitly referring to more general, undefined concepts. As such, the courts have retained significant discretionary powers—if and when they will choose to use them—to rule on the constitutionality of constitutional amendments.

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[139] DAVID KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 38, 48 (2d ed. 1997).

[140] *See id* at 38.

b. India's Basic Structure.

The Supreme Court of India has also adopted the concept of UCA's by articulating that there is a "basic structure" to the Indian Constitution. Thus, though Article 368 of the Indian Constitution (authorizing amendments) allows the Parliament to amend any part of the constitution, it "does not enable Parliament to alter its basic structure or the framework of the Constitution."[141] If an otherwise permitted amendment were to violate this basic structure, the Court can invalidate it.

The source of the "basic structure" theory is especially interesting. Unlike in Germany's constitution, there is no explicit textual basis for this concept in the Indian Constitution.[142] The stated basis for this rationale was that the word "amend" is inherently a limited word, and that if an amendment were to violate the basic structure of the constitution, then it would cease being an amendment, and become something more. The constitution only permits amendments by Parliament, not something that is fundamentally different.

This legal argument of narrowly reading the word "amend" does not tell the whole story of this concept. Rather, the "basic structure" concept emerged from a separation of powers struggle between the Court and the Parliament. The Court, after repeatedly rejecting laws related to certain fundamental rights (especially property rights), found an aggressive Parliament that was increasingly willing to use the amendment procedure to enact their policies. This Parliamentary activity culminated in what has historically been seen as an abuse of power, in the

[141] Kesavananda Bharati v. State of Kerala, AIR 1973 S.C. 1461, 1510.

[142] Although, for a brief time, the Supreme Court of India said there was such a textual limit. In *I.C. Golaknath v. State of Punjab*, A.I.R. 1967 S.C. 1643, the Court attempted to limit the ability of Parliament to amend the constitution by arguing that amendments were, in fact, no different from normal legislation. As such, Article 13, which prohibits any laws that take away or abrogate the "fundamental rights" of the constitution (found in Part III of the Constitution), would also prohibit amendments that had the same effect. This argument was reversed in *Kesavananda*, where it was recognized that amendments were different from normal legislation, and thus, not limited by Article 13.

form of an emergency rule being declared in 1975. For the next twenty-two months, Parliament suspended several fundamental rights, including Article 21, the protection of life and personal liberty. This abuse of Parliamentary power, more than anything else, gave credence to the concept of a judicial check on the amendment process.

The "basic structure" is a quite undefined concept, however. It has been used in other cases, but only once has a majority of the justices agreed on a concept fitting into the "basic structure." In the *Minerva Mills* case,[143] the Court struck down an amendment that would have prevented the Court from ruling on future Parliamentary amendments, and a majority agreed that a limited Parliamentary amendment power was a part of the "basic structure" of the Constitution.

Several other issues have been raised by justices as being within the rubric of the "basic structure," including the sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, and the fundamental rights of citizens.[144] However, none of these elements have ever been held by a majority, and as such, these determinations have limited jurisprudential value.

Since shortly after the 1975 emergency rule ended, the issue of the "basic structure" has not been litigated further. In large part, this has seemingly resulted from Parliament realizing its own potential for abuse, and from Parliament's willingness to curtail its own power. It is also fair to say that since the emergency rule, the Supreme Court has also been more active in entrenching fundamental rights, especially Article 21's right to life and personal liberty. Thus, just as the Court has become a more significant protector of the citizen's rights, it seems that

[143] Minerva Mills Ltd. v Union of India, A.I.R. 1980 S.C. 1789.

[144] *See* Venkatesh Nayak, *The Basic Structure of the Indian Constitution*, 10, *at* http://www.humanrightsinitiative.org/publications/const/the_basic_structure_of_the_indian_constitution.pdf.

Parliament is more cautious in abridging these rights. However, there is no reason to assume that the "basic structure" debate is over.

From the perspective of UCA's as a concept, unquestionably the most interesting element here is that the Courts created this concept of a "basic structure" in response to what was perceived as an abuse of the political process by Parliament. India's amendment process is procedurally quite lax.[145] It thus proved prone to abuse, and it was only at this time that the Supreme Court took a more activist stance to correct this political imbalance. While this move by the Court may have been questioned at first, after 1975, there was little debate on the merits of a strong Court to protect fundamental rights.

c. Unconstitutional Constitutional Amendments in Other Countries.

Germany and India represent the most developed examples of UCA's, but eight other countries also have elements of UCA's in their constitution, albeit to varying degrees. The following examples will be briefly recounted here: Bosnia-Herzegovina, Nepal, Norway, Romania, Namibia, Djibouti, Italy, and France.

i. *Bosnia-Herzegovina.*

Bosnia-Herzegovina was created via the 1995 Dayton Agreement.[146] This peace agreement ended armed fighting between ethnic Serbs, Bosniaks and Croats, which resulted largely from a declaration of independence from Yugoslavia in 1992; the Serbs were attempting to partition the state along ethnic lines, so that they could remain politically aligned with other Serbs in neighboring states. The Dayton Agreement contained an entire constitution for Bosnia-

[145] India's constitution has been amended eighty-two times. In comparison, the United States Constitution has been amended only twenty-seven times, even though it has been in existence four times longer than the Indian Constitution.

[146] The 1995 General Framework Agreement for Peace in Bosnia and Herzegovina [hereinafter Dayton Agreement].

Herzegovina in Annex 4 of the Agreement; this constitution created a democracy for the region, but much of the powers are actually vested in two sub-national entities: the Bosniak/Croat Federation and the Bosnian Serb-led Republika Srpska.

The transition to democratic rule is far from complete, the details of which will not be explored here. However, the constitution Bosnia-Herzegovina was given via the Dayton Agreement did include UCA's; the constitution does not permit amendments that "eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution."[147] Article II provides an extensive list of freedoms, including the adoption and direct applicability of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.[148]

Whether the courts in Bosnia-Herzegovina will actually enforce these rights is an open question. Right now, skepticism is well-founded; though the judiciary is supposed to be "independent," in practical terms, the judiciary is located inside of the two sub-national entities, and it has been influenced by "nationalist elements, political parties, and the executive branch."[149] In addition, rulings made by the courts have sometimes not been enforced by local authorities.[150] Thus, at this time, the UCA's articulated in their constitution are of little practical use due to the present ineffectiveness of the courts.

ii. *Nepal.*

Nepal's constitution states that "[a] bill to amend or repeal any Article of this Constitution, *without prejudicing the spirit of the Preamble of this Constitution*, may be

[147] BOSN. & HERZ. CONST. art. X cl. 2.

[148] *Id*. at art. II cl. 2.

[149] U.S. DEP'T OF STATE, *Country Reports on Human Rights Practices for 2003: Bosnia and Herzegovina* (2004), *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27829.htm.

[150] *Id*.

introduced . . . ."[151] This reference to the "spirit" of the Preamble certainly suggests a limit, but the meaning of this limit is far from clear.

Several caveats about Nepal must be noted. First, this constitution only came into being in 1990. As such, this concept of the "spirit of the Preamble" is new, and untested. Second, though the Supreme Court of Nepal has the right to conduct judicial review,[152] the text of Article 116 is ambiguous as to which government organ will assure that the spirit of the Preamble is not violated. While it seems probable that this would be the Supreme Court (based largely on a separation of powers analysis), some have argued that it could just as easily be the legislature who assures that the spirit is not violated, in a self-policing manner.[153] This point is unsettled.[154] Third, assuming there is, in fact, a court-enforced UCA, it is very vague. The Preamble of the Nepal Constitution is (not surprisingly) very general, aspirational, and at times contradictory [155] Thus, this concept could seemingly be interpreted as broadly or narrowly as its court decides to make it.

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[151] NEPAL CONST. art. 116, cl. 1 (emphasis added).

[152] *Id*. at art. 88.

[153] *See* Richard Stith, *Unconstitutional Constitutional Amendments: The extraordinary power of Nepal's Supreme Court*, 11 AM. U.J. INT'L L. & POL'Y 47, 73-77 (1996).

[154] As Richard Stith argues, this language is similar to that found in the Norwegian Constitution; Norway's courts have determined that this is to be enforced by the legislature, not the courts. *See infra* Chapter 7. c.iii. But it should also be noted that Nepal is located next to India, and has been influenced significantly by Indian scholars and jurisprudence. As such, equating the "spirit of the Preamble" to India's "basic structure" seems possible.

[155] NEPAL. CONST. pmbl. ("Whereas, We are convinced that the source of sovereign authority of the independent and sovereign Nepal is inherent in the people, and, therefore, We have, from time to time, made known our desire to conduct the government of the country in consonance with the popular will; and Whereas, in keeping with the desire of the Nepalese people expressed through the recent people's movement to bring about constitutional changes, we are further inspired by the objective of securing to the Nepalese people social, political and economic justice long into the future; and Whereas, it is expedient to promulgate and enforce this Constitution, made with the widest possible participation of the Nepalese people, to guarantee basic human rights to every citizen of Nepal; and also to consolidate Adult Franchise, the Parliamentary System of Government, Constitutional Monarchy and the System of Multi Party Democracy by promoting amongst the people of Nepal the spirit of fraternity and the bond of unity on the basis of liberty and equality; and also to establish an independent and competent system of justice with a view to transforming the concept of the Rule of Law into a living reality: Now, Therefore, keeping in view the desire of the people that the State authority and sovereign powers shall, after the commencement of this Constitution, be exercised in accordance with the provisions of this Constitution, I, King Birendra Bir Bikram Shah Deva, by virtue of the State authority as exercised by Us, do hereby promulgate and enforce this Constitution of the Kingdom of Nepal on the recommendation and advice, and with the consent of the Council of Ministers.").

The fourth, and most important, caveat relates to current events in Nepal. A Maoist insurgency starting in the late 1990s, combined with the tragic 2001 killing of King Birendra and nine members of the royal family at the hands of Crown Prince Dipendra, (who also took his own life), has led to a very turbulent time in Nepal. Since 2002, Nepal has been under emergency rule, with the parliament dissolved, but elections indefinitely postponed. Several constitutional freedoms, including the freedom of expression, assembly, privacy, and property, have been suspended.[156] As such, the future of Nepal is not at all clear.

iii. *Norway.*

Norway's constitution, as adopted in 1816, states that amendments "must never . . . contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution . . . ."[157] This prohibition against violating the "principles" and "spirit" of the Constitution is very vague, but seems immediately comparable to the "basic structure" of India, and the "immutable principles" of Germany, although Norway created this clause more than a century ahead of Germany and India.

In Norway, though, the concept of UCA's is not recognized. Given the imprecision of this amendment clause, and also the fact that the clause does not state that this power is conferred to the courts, it is commonly interpreted that this clause is nothing more than a guiding directive for the legislature, and thus is not justiciable.[158] This is important to emphasize, for it reveals the limited applicability of UCA's worldwide; Norway has a clear textual basis for UCA's, but the courts have not accepted this power. Note, though, that the Norwegian courts

[156] *See* 2003 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: NEPAL (Bureau of Democracy, Human Rights, and Labor, 2004).

[157] NOR. CONST. art. 112 cl. 1 (1814).

[158] *See* D. Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15-16 INDIAN Y.B. INT'L AFF. 375, 380 n.10e (1970) ("[t]he prevailing interpretation seems to be that a court of law is not entitled to disregard an amendment as violating the spirit of the Constitution and that the provision is but a directive for the legislature." (internal cite omitted)).

have been active in upholding the constitution in other ways; they have long exercised the power of judicial review, seemingly before any other continental country did so.[159]

iv. *Romania*.

Romania's constitution (adopted in 1991, since revised in 2003) comes close to the approach taken in Germany. Several elements are specifically insulated from revision, including the form of government, the independence of the judiciary, political pluralism, the official language, and "the citizens' fundamental rights and freedoms, or safeguards thereof."[160] Romania has a Constitutional Court which conducts abstract review, including the review of all "initiatives to revise the Constitution."[161] Thus, it is clear that the Constitutional Court, like the Federal Constitutional Court in Germany, has the authority to strike down amendments on these substantive concepts. How it will interpret these powers is as yet unclear.[162]

v. *Namibia.*

Namibia's constitution states that no amendment can "diminish[] or detract[] from the fundamental rights and freedoms" established in the Constitution.[163] This could hypothetically be enforced by the Namibian Supreme Court, although the Court does not have an explicit

[159] *See* Carsten Smith, *Judicial Review of Parliamentary Legislation: Norway as a European Pioneer* (2000), *available at* http://www.hoyesterett.no/artikler/2694.asp (stating that judicial review had been created by the courts, in a similar manner to *Marbury v. Madison*, in 1866).

[160] ROMANIAN CONST., art. 152 (2003) ("(1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, territorial integrity, independence of the judiciary, political pluralism and official language shall not be subject to revision. (2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or the safeguards thereof.").

[161] *Id*. at art. 146 para. (a).

[162] As of publication of this paper, the author is unaware of any cases involving these principles.

[163] NAMIB. CONST. art. 131 (1998).

textual constitutional basis to review amendments,[164] and thus, concerns about justiciability apply here.

vi. *Djibouti.*

Djibouti, formerly a French colony until independence in 1977, has a prohibition against any amendment that would affect the republican form of government, the pluralist character of democracy, or the existence of the state.[165] Djibouti has a Constitutional Council which, in following the tradition of France, conducts abstract review, thus suggesting that these prohibitions could be enforced, if need be.[166] However, at this time, the judiciary is not truly independent of the executive, and the dominant party (the People's Rally for Progress, RPP) controls not only the presidency, but also won every seat in the unicameral legislature in the 2002 elections, over accusations by opponents of elections fraud.[167] Thus, it is not at all clear that these paper protections would become concrete if they were actually tested.

vii. *Italy and France.*

Italy's constitution states that "[t]he republican form of the state may not be changed by way of constitutional amendment."[168] The French Constitution has almost identical language.[169]

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[164] *Id*. at art. 79 (The Supreme Court can hear "appeals which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder," as well as "matters referred to it for decision by the Attorney-General." *Id*. at art 79, cl. 2. It is incumbent upon Parliament to determine the jurisdiction of the Supreme Court. *Id*. at art 79, cl. 4.).

[165] DJIB. CONST. art. 88 (1992) ("No amendment procedure may be undertaken if it calls in question the existence of the State or jeopardizes the integrity of the territory, the republican form of government or the pluralist character of Djiboutian democracy."), *as translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz, Ed., 2005).

[166] *Id*. at Tit. VIII.

[167] U.S. DEP'T OF STATE, *Country Reports on Human Rights Practices for 2003: Djibouti* (2004), *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27724.htm [hereinafter Djibouti Country Report].

[168] LA COSTITUZIONE DELLA REPUBBLICA ITALIANA [CONST.] art. 139 (Italy).

[169] *See* LA CONSTITUTION [CONST..] art. 89 para. 5 (France) ("The republican form of government shall not be the object of an amendment.").

These examples of UCA's are clearly very limited in scope, and are of debatable value. The preservation of a republican government would not be an issue raised frequently, and if the republican form of government were to be challenged, it is equally doubtful that this would happen through the legal framework provided.

It is also unclear whether these clauses are justiciable, as has been true in the previous examples in this section. However, the presence of these clauses in other constitutions does lend some credence to the idea articulated by the Indian Supreme Court in *Kesavananda Bharati*, when it held that amendments cannot entirely re-make the constitution.[170] To limit this possibility is hardly an infringement on democracy.[171]

d. Transition from Constitutional Principles to Unconstitutional Constitutional Amendments?

There is not necessarily any connection between constitutional principles and unconstitutional constitutional amendments. After all, constitutional principles are usually located in an interim document that terminates upon the entry into force of the new constitution. Thus, it could follow that the constitutional principles are also extinguished once the new constitution is formed. This narrower perspective limits the reach of the constitutional principles to influencing the drafting of the new constitution, and not to any future attempts at change.

However, this narrow view has been challenged in academic circles. Some suggest that these constitutional principles continue having a life after the creation of the new constitution, and that any future attempts to amend the constitution would also have to comport with the original constitutional principles that shaped the constitution. These principles formed the basis

[170] Kesavananda Bharati v. State of Kerala, AIR 1973 S.C. 1461. For a discussion of this case, see *supra* note 141 and accompanying text.

[171] *See* Murphy, *supra* note 125, and accompanying text.

of the constitution, the argument goes, and as such, they continue onward, and are really a part and parcel of the new constitution. Marinus Wiechers has advocated this view in relation to Namibia's constitutional principles.[172]

The merits of this debate are difficult to assess. From a formal textual perspective, it would be difficult to read in constitutional principles that are not referenced by the new constitution. Whereas, from an "originalist intent" perspective, the argument for maintaining the constitutional principles would be far stronger. (Of course, all of this presupposes that there is a judicial body (whether it be a Supreme or Constitutional Court) to hear such a case.)

And yet, the idea of continuing constitutional principles remains a compelling consideration, especially if one considers the situation of India, where the Supreme Court created the "basic structure" concept, ultimately, out of their own desire to check the abuses of the other branch(es) of government. The Indian Supreme Court had to create a new concept to achieve this check; it would not be so difficult for a court to revive constitutional principles if the constitution was originally formulated on them, and the court felt that circumstances warranted it. Admittedly, it would require some judicial activism, but the case of India certainly suggests that this remains at least a theoretical possibility.

No court has clearly confronted, nor answered, this issue. However, the South African Constitutional Court did, in one of its first decisions, examine the "basic structure" jurisprudence of India, and went on to observe that under the right conditions, this sort of theory could possibly apply to South Africa, as well.[173] However, not too much should be read into this. First, the

[172] *See* Wiechers, *The 1982 Constitutional Principles*, *supra* note 44, at 20 ("[I]t can be said that the Namibian legislature, through the Constituent Assembly's adoption of these Principles, did introduce. . .a curb into its Constitution. The effect of this curb is that the Namibian legislature cannot by means of the constitutional amendment, abolish any of the 1982 Principles. In constitutional terms, it means that the 1982 Principles go beyond and deeper than the Constitution itself; they contain fundamental conditions upon which the existence and legal force of the Constitution itself is founded.").

[173] Premier of Kwazulu-Natal v. President of the Republic of South Africa, 1996 (1) SALR 769, ¶¶ 47–49

Court noted that such facts were not raised in the case at hand, and thus, reserved any judgement on this issue.[174] The Court also explicitly noted that these comments were only dicta.[175] Finally, it should be noted that this case came in front of the Court within its first two years of operation, and even before it had certified South Africa's constitution.[176] Thus, the future jurisprudential effect, while academically stimulating, is legally ambiguous.

(CC).

[174] *Id.*

[175] *Id.* at 784 para. 49.

[176] Note that the Constitutional Court was actually created by the Interim Constitution. *See* S. AFR. CONST. art. 98 (1994).

Chapter 8. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: COMPARISONS AND CONCLUSIONS.

These ten countries with actual or potential UCA practices are each distinct, but there exist important similarities that should be considered in assessing the feasibility and desirability of a UCA theory. In comparing and contrasting these examples, first the substance of the UCA's will be considered. Then, the source, and historical impetus, of UCA's will be reviewed. This will highlight both the potential uses, and limitations, of UCA's for the future.

a. Substance of the UCA's.[177]

The substance of the UCA schemes has some striking similarities. First, most of the examples include provisions protecting the country's (democratic/republican) form of governance. Five of the examples do so explicitly, while three do so indirectly.[178] The inclusion of India and Namibia is more open to argument, but these countries' UCA's seem to suggest continued adherence to democracy.[179]

The second common substantive element of UCA's is that of human rights. Of the ten examples, four explicitly include reference to human rights.[180] Another three are uncertain; these

[177] Note that for the purposes of discussion of "substance," the issue of justiciablity—or lack thereof—will not be addressed.

[178] Germany, Italy, France, Djibouti, and Romania explicitly refer to a democratic form of governance. Bosnia-Herzegovina's UCA refers to rights included from the Protocols to the European Convention for the Protection of Human Rights and Fundamental Freedoms. *See supra* note 148 and accompanying text. Protocol 1, article 3, of the European Convention includes the right to free elections for the choice of legislature, which is fundamental to democracy. *See* Optional Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 262. Norway and Nepal both include references to the "spirit" of the constitution (or preamble); these documents clearly embrace democracy.

[179] India refers only to the "basic structure" of the government, and while the meaning of this term is unclear, democratic ideals have been raised as a potential candidate for inclusion. *See supra* note 144 and accompanying text. Namibia's UCA example is only in reference to human rights, but arguably, the constitutional principles of Namibia have continuing effect, and if so, then these principles explicitly referred to democratic norms. *See supra* Chapter 4. b.ii and Chapter 7. d.

[180] Romania, Namibia, and Bosnia-Herzegovina all refer to the "rights and freedoms" as being unamendable; Germany only seems to include human dignity, though there is textual support for a broader inclusion of other rights. *See supra* note 129 and accompanying text.

are India, with its "basic structure," and Nepal and Norway, referring to the "spirit" of their constitutions and/or preambles. All three of these could include human rights elements, for the "spirit" of a constitution is, among other things, to protect the rights of citizens, and this is arguably a part of the "basic structure." However, such a conclusion is not necessary, and thus, remains only a hypothetical possibility.

Aside from these two broad areas of democracy and human rights, little else is mentioned. Romania includes an independent judiciary, political pluralism, and the official language in its UCA's.[181] And, the meaning of India's, Nepal's, and Norway's UCA's remain far from clear, and hypothetically could be very broad.

b. Source and Historical Origins of the UCA's.

Nine of these ten examples have a clear textual basis in the constitution. India is the only exception to this rule.[182] The concept of India's "basic structure" was derived from a narrow interpretation of the word "amend." What is most striking about this Indian example, though, is that it suggests that virtually any apex or constitutional court could reach the same conclusion, if it so desired. This seems highly unlikely, but remains possible.

However, one must not overlook the historical context in which these theories of UCA's have originated. As has been noted previously, the concept of UCA's raises some troubling issues for democracies in general, since courts usually are not democratically accountable.[183] Perhaps these theoretical concerns can be minimized by pragmatic realities; if this were possible,

[181] *See supra* note 160 and accompanying text.

[182] Note that Kommers suggest that Germany, too, seems to have both a textual and supra-textual basis for its theory of UCA's, though as the author has noted, it seems that in practice there has always been a textual basis for the Federal Constitutional Court's reference to UCA's when they are discussed as anything more than dicta. *See supra* note 140 and accompanying text.

[183] *See supra* Chapter 6. b.

then the examples of Germany and India, which remain the pinnacle examples of UCA's, would seemingly exemplify this norm.

In Germany, UCA's was placed directly into the text of the new constitution; this should be seen as a recognition of the horrors which were arguably legally committed under the of the Nazi regime, and the need to assure that such atrocities could never again recur. Other protective elements were also included, such as assuring the courts of the right of judicial review to protect citizens' rights from ordinary legislation, and limiting the role and scope of emergency powers. However, the UCA's can be seen as the crowning response; by insulating the concept of "human dignity" from constitutional amendment, as well as such doctrines as the separation of powers, and the right of all Germans to "resist any person seeking to abolish this constitutional order, should no other remedy be possible,"[184] the framers of the German Constitution were taking added precautions, empowering the populous in general, as well as their Federal Constitutional Court, to safeguard against any future attempts at political abuse. While this has theoretically permitted the German courts the opportunity to be more involved in political decisions, it was clearly seen as a necessary consequence in order to provide a stronger check on the purely political branches of government.[185]

In many respects, India's development has been similar to that of Germany. The Supreme Court of India has used the "basic structure" sparingly, but the idea became firmly accepted after the abuses that were seen during the emergency rule that occurred from 1975–77, where even the most sacrosanct right to life and personal liberty was suspended. This abuse, combined with a political system that lends itself to easy—and frequent—constitutional

[184] GRUNDGESETZ , *supra note* 128. at art. 20 cl. 4.

[185] It should also be noted that the Federal Constitutional Court also has power to conduct both abstract and concrete judicial review. Thus, in a sense, the FCC has already been inserted into the political arena, minimizing this criticism of its usage of UCA's.

amendments, has resulted in the India Supreme Court's taking a far more active role in political life than is normally expected of an apex court. This can be criticized as an act of "judicial activism," whereby the Court has attempted to place its judgements over the political branches. Alternatively, it can be seen as an attempt by the Court to assure that, when the political branches go too far, there is someone to place a check on them. Given the infrequency with which the Indian Supreme Court has used this self-appointed power, the latter view seems the more accurate. The ultimate question to be answered, though, is how the Supreme Court and Parliament of India will balance and share their respective powers and roles.

As the German and Indian examples suggest, the concept of UCA's has really only come into existence in response to historical anomalies. This will likely continue, for the judiciary is generally the weakest branch of government. The judiciary may be given the final word on certain issues, but even when this is so, it is still usually incumbent upon other branch(es) to enforce their decisions. As such, the judiciary in particular, as well as the other branches of government, must work together to be effective. UCA's are an extreme example of one branch attempting to assert its own power over other branches. If this were done without good reason, it is doubtful that it would be accepted.

Finally, it should be noted that the other eight examples of UCA's discussed in this and the previous Chapter are of questionable validity, either because the judiciary is weak or ineffective, or because it is not at all clear that the UCA's articulated are actually justiciable. This observation ties in nicely with the historical origins noted in Germany and India; if there is no need for UCA's—if the legislature and/or executive is not abusing its role—then there is no impetus for the judiciary to interfere in the political arena. As such, these other eight examples will likely either never exercise their potential UCA powers, permitting them to remain, instead,

as a guiding directive for the legislature. However, if dire circumstances arise, and if the judiciary is in a strong and independent enough position to challenge other branches' abuses of power, then these UCA's could take on greater meaning. Ultimately, though, UCA's are an emergency protection, which should be, and have been, used cautiously. That will surely continue in the future.

Appendix: Namibia's Constitutional Principles.*

Principles concerning the Constituent Assembly and the Constitution for an Independent Namibia

A. Constituent Assembly

1. In accordance with the United Nations Security Council resolution 435(1978), elections will be held to select a Constituent Assembly which will adopt a Constitution for an independent Namibia. The Constitution will determine the organization and powers of all levels of government.
   - — Every adult Namibian will be eligible, without discrimination or fear of intimidation from any source, to vote, campaign and stand for election to the Constituent Assembly.
   - — Voting will be by secret ballot, with provisions made for those who cannot read or write.
   - — The date for the beginning of the electoral campaign, the date of elections, the electoral system, the preparation of voter rolls and other aspects of electoral procedure will be promptly decided upon so as to give all political parties and interested persons, without regard to their political views, a full and fair opportunity to organize and participate in the electoral process.
   - — Full freedom of speech, assembly, movement and press shall be guaranteed.
   - — The electoral system will seek to ensure fair representation in the Constituent Assembly to different political parties which gain substantial support in the election.
2. The Constituent Assembly will formulate the Constitution for an Independent Namibia in accordance with the principles in Part B below and will adopt the Constitution as a whole by a two-thirds majority of its total membership.

B. Principles for a Constitution for an Independent Namibia

1. Namibia will be a unitary, sovereign, and democratic state.
2. The Constitution will be the supreme law of the State. It may be amended only by a designated process involving the legislature and/or votes cast in a popular referendum.
3. The Constitution will determine the organization and powers of all levels of government. It will provide for a system of governance with three branches; an elected executive branch which will be responsible to the legislative branch; a legislative branch to be elected by universal and equal suffrage which will be responsible for the passage of all laws; and an independent judicial branch which will be responsible for the interpretation of the Constitution and for ensuring its supremacy and the authority of the law. The executive and legislative branches will be constituted by periodic and genuine elections which will be held by secret vote.
4. The electoral system will be consistent with the principles in A.1 above.
5. there will be a declaration of fundamental rights, which will include the rights to life, personal liberty and freedom of movement; to freedom of conscience; to freedom of expression, including freedom of speech and a free press; to freedom of assembly and association, including political parties and trade unions; to due process and equality before the law; to protection from arbitrary depravation of private property or deprivation of private property without just compensation; and to freedom from racial, ethnic, religious or sexual discrimination. The declaration of rights will be consistent with the provisions of the Universal Declaration of Human Rights. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights.
6. It will be forbidden to create criminal offenses with retrospective effect or to provide for increased penalties with retrospective effect.
7. Provisions will be made for the balanced structure of the public service, the police service and defense services and for equal access by all to recruitment of these services. The fair administration of personnel policy in relation to these services will be assured by appropriate independent bodies.
8. Provisions will be made for the establishment of elected council for local and/or regional administration.

* These Principles first appeared in the U.N. Secretary-General's report S/15287 (1982). *See supra* note 43. However, this document is difficult to obtain, and is not available on the U.N's website. The contents of this document are reproduced here, as reproduced in Wiechers, *1982 Constitutional Principles*, *supra* note 44, at 7–8.