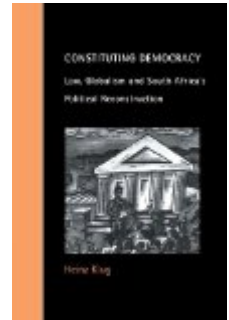


Heinz Klug. *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction.* New York and Cambridge: Cambridge University Press, 2000. xi + 270 pp. \$64.95, cloth, ISBN 978-0-521-78643-0.



Reviewed by David Penna

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Explaining Constitutionalism in the New South Africa

To what extent can the stunning democratic transition in South Africa and the related constitutional transformation be attributed to the post 1989 wave of democratization? To what extent did the domestic players in the transition manipulate international factors and to what extent were they influenced by them? These are some of the questions addressed in this excellent study by Heinz Klug of the University of Wisconsin. Klug is particularly concerned with explaining the establishment of constitutional supremacy, with an entrenched Bill of Rights, and an independent judiciary. Such an outcome was neither in the interests nor the plans of either the African National Congress or the apartheid government prior to the transition process. Klug argues that during the transition negotiations each side was frequently subject to normative pressure from the international community to accept such a scheme; however, additionally the existence of intractable political demands from each side came to make constitutionalism a viable strategy for postponing po-

litical conflict to be resolved by an impartial judiciary. Therefore, Klug argues that it was really an interaction of domestic interests and international pressures that led to the establishment of constitutionalism in South Africa.

After surveying theoretical literature on constitutionalism and democratization, the author briefly summarizes the history of constitutionalism (or lack thereof) in colonial and apartheid in South Africa. Professor Klug then sketches the changing perception of constitutionalism within the international community at the end of the twentieth century, noting trends in both international law and international political discourse. The impact of these transnational social and political forces on South Africa is examined by tracing the evolution of the negotiating strategies related to replacing parliamentary supremacy with acceptance of an independent judiciary authoritatively interpreting a supreme constitution with entrenched rights. For the ANC, the documents begin, of course, with various ANC interpretations of the Freedom Charter but focus on the late 1980s where there was a rapid shift in perceptions as to

the implementation of these principles; the author cites the 1987 Statement on Negotiations, the 1988 Constitutional Guidelines for a Democratic South Africa, the 1989 Harare Declaration, and the 1990 publication of papers by the ANC Constitutional Committee as among the documents that enable tracking of these sometimes subtle shifts in position. The government's shift is less precisely traced, but still enough is presented so that the reader is persuaded that a parallel process is at work. This is crucial because the author must then link these descriptive statements of what has happened to an explanation of why the positions have shifted.

Through an analysis of these same statements, a compelling argument is presented that international pressure and domestic stalemate of negotiations led to a reconsideration of options. This reconsideration led to new understandings as to how constitutionalism could be used to serve each group's objectives. Finally, the author offers a positive assessment of the role that constitutionalism and the judiciary have played in managing political conflict in both the democratic transition and the early years of post-apartheid South Africa.

The analysis draws upon several fields of literature: one old and the other a 1990s response to events in Africa. The older literature on "reception" of colonial law often resulted in debates over issues, such as cultural imperialism, but the author follows those who carve out a role for local actors in deploying and re-shaping received law in contests over local power and resources.

Such an analysis shifts the terms of debate from whether the law was transplanted "correctly" to the purposive actions of Africans in crafting a new legal system.

The second area of literature considered by the author is the literature of democratic transition. This literature has several strands, including the notion of an emergence of a global democratic political culture precipitating waves of democracy

to narrower versions which focus upon the disintegration of the authoritarian state through the emergence of forces and interests that authoritarian structures can no longer suppress. In such a view, the transition to democracy becomes a function of local powers and interests, dovetailing nicely with the refinement in the reception literature that the author pursues.

The focus on local agency is theoretically interesting but evidently more than an academic interest for the author. Professor Klug can speak as one of those actors, having been a participant on the ANC Land Commission, which was responsible for both communicating with constituents and drafting proposals related to perhaps the most contentious issue in the whole transition process.

The author appropriately gives important insights on the development of ANC policy on this issue without making the discussion into a first-person account of the deliberations or negotiations.

In fact, the book is remarkable in the attention paid to a wide range of scholarly literature and theory. Klug adeptly discusses policy, political theory, international relations and jurisprudence.

Klug is both interested in the role that the negotiators have reserved for the judiciary and the role that the Courts have played in establishing this new constitutionalism. The independent judiciary is a result of the transition process, but it also influences the ongoing democratization. One method of influence is through constitutional interpretation. The author's review of several prominent cases concludes that while the judiciary has maintained its autonomy, by not blindly deferring to the executive branch in various disputes, it has reflected a healthy respect for the political processes of governance. It has practiced judicial restraint in only interpreting constitutional issues when they were impossible to avoid.

Such incrementalism leaves room for negotiated compromise among the political actors involved and does not abruptly slam doors to alter-

native futures that political groups may wish to continue to imagine.

This latter point is significantly linked to the author's over-arching theme: the interplay of domestic and international forces. Through allowing additional time for groups to feel linked to the system, not only does the judiciary gain institutional legitimacy, but the effects of international norms can permeate

South African society. These norms, over time, can set the boundaries for acceptable resolutions to political conflict. As groups' perceptions change, these alternative demands are likely to converge, at least to an extent, thereby making local compromise possible for what at one time was a seemingly intractable conflict.

The study under review makes an excellent contribution not only to the literature on modern South Africa's transition but also to an understanding of the interplay of international and domestic social forces that influence the success or failure of democratic transitions globally. Applying such a model to understand other less intensely studied transitions may be problematic since domestic forces elsewhere are less likely to be studied, never mind understood, by academics. The interpretation of local elites of the demands and opportunities presented by international political forces is likely to be less documented. Still, *Constituting Democracy* at least gives researchers an indication of what should be sought out.

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