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**CONSTITUTIONAL POWER AND LEGITIMACY  
IN THE POLITICAL EVOLUTION  
OF SOUTHERN AFRICA**

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**Resumo:** A elaboração de constituições na África pós-colonial mostra que as constituições resultantes de negociações ou pactos foram o modelo preferido e mais bem sucedido do processo, uma vez que o primeiro período da constituição estadual de partido único terminou, no início dos anos noventa. A competição política para a posse da legalidade constitucional é evidente no processo constitutivo da África do Sul, na Alemanha pós-II Guerra Mundial, em Portugal e Angola. Em África, os princípios de liderança tradicional africana, continuam a permear o Estado de direito, resultando num sistema de partido predominante. O exemplo mais recente da Constituição angolana mostra uma crescente afinidade com o modelo de liderança chinesa. O futuro do constitucionalismo em África é cada vez mais favorável às formas de representação democrática piramidais em vez de formas multi-polares.

**Palavras Chave:** Processo constituinte em Africa, constitucionalismo, liderança tradicional, constituições de partido predominante, cooperação Africa-China, estado constitucional em África.

**Abstract:** Constitution making in post colonial Africa shows that negotiated or pact constitutions have been the preferred and most successful process, once the first period of imposed single party state constitution ended, at the beginning of the nineties. The political competition for ownership of constitutional legality is evident in the constitution making process in South Africa, post World War II Germany, Portugal and Angola. In Africa, principles of African traditional leadership continue to permeate the constitutional state, resulting in predominant party system. The latest example of the Angolan constitution shows a growing affinity for the Chinese leadership model. The future of constitutionalism in Africa will increasingly favour pyramidal instead of multi-polar forms of democratic representation.

**Keywords:** African constitution making, constitutionalism, traditional leadership, predominant party constitutions, Chinese African cooperation, constitutional state in Africa.

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## I. Typology of the Constitution Making Process

There is agreement that the constitution making process has a fundamental impact on the future success of a constitution. However, modern reasoning is no longer overly concerned with formal democratic legitimacy. Reality and circumstantial requirements have in hundreds of cases blurred the line between constituted and constituent powers, and Montesquieu's distinction retains only theoretical value. Likewise, the faithfulness of a process to the rousseauian fiction of democratic identity between the will of the voter and the will of the ruler, is relevant in theory only.

The functions that a constitution making process is expected to fulfil, in a given historical and geographical context, stand at the centre of reflection. The function that determines the fate of a constitution most, is its ability to group and govern diverse peoples, so as to give them credible representation that can earn them credibility as members of the international system, in the context of the inescapable dictates of globalisation.<sup>1</sup> In order to be able to achieve these objectives, a constitution must find acceptance and support, through the legitimacy of its genesis.<sup>2</sup>

The task is thus primarily one of integration through the creation of the State and its organs and institutions, and resulting from this process, one hopes, nation building as part of a process of defining a positive national identity, as opposed to an identity founded on rejection and antagonism towards "other identities". The ability to sustain reconstruction, renewal, modernisation, and broad consensus about future aspirations, is what decides the welfare of modern nations. Hence, the issue is not the democratic purity of the constitution making process, but rather the suitability of the chosen process for the task of reviewing or re-making a constitution.

Ideally, the choice of the constitution making procedure will integrate the competing political elites in a country, as well as the main social, economic, cultural and religious perceptions, in whatever way they may be able to articulate their views and expectations. In the classic definition of Max Weber, there are three

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<sup>1</sup> See the exceptional appraisal by Africa's Grand Seigneur of constitutionalism, Yash Ghai, "A Journey around constitutions: reflections on contemporary constitutions", 122, *South African Law Journal*, 804-831 at 830.

<sup>2</sup> A. Thomashausen, *Verfassung und Verfassungswirklichkeit im modernen Portugal*, Berlin 1982, 24-27.

sources of legitimacy: charismatic authority or personalized leadership, rational and institutionalized authority which in our modern times is brought about and renewed by way of elections, and traditional or historically claimed legitimacy.<sup>3</sup> Historic legitimacy tends to prevail in countries that have undergone some kind of fundamental transformation, such as liberation from foreign occupation or internal oppression. The victorious liberators will tend to claim a prerogative to govern for at least one, but in Africa in most countries, more than one generation. Evidently, the three kinds of sources of legitimacy will act in an interdependent manner, and charismatic or personalized legitimacy will play a crucial role in elections, considered to be the generators of rational legitimacy.

The most manipulative process of legitimisation is the **referendum constitution**, where a proposal is elaborated in an exclusionary or elitist process, to be submitted to popular approval or rejection in a referendum, subject to subsequent enactment by an existing parliament (e.g. the French Constitution of 1958;<sup>4</sup> South Africa Constitution Act No. 110 of 1983), or such proposal is submitted to direct enactment by the vote of the electorate in a plebiscite (e.g. the French Constitution of 1958 or the Constitution of Chile of 1980<sup>5</sup>). The intended new Zimbabwean Constitution of 1999 which failed to attain a majority in a referendum illustrates the risk of the referendum approach to constitution making.<sup>6</sup> There is consensus that the troubles of Zimbabwe which by now have all but destroyed the country are the result of the failure of Zimbabwe's historically legitimized political elite to impose a new constitution by way of a referendum.

The second "most democratically pure" process of constitution making is that of the **constituent assembly constitution** where a special convened "constituent assembly" elaborates and finally enacts a constitution. However, this is also the most cumbersome and divisive process. Examples are the American constitutional convention of Philadelphia of 1787; the French Constitution of 1789; the German Constitution of 1919 or the Portuguese Constitution of 1976<sup>7</sup>.

The third approach is that of the **parliamentary constitution**, where a new constitution is elaborated and enacted simply by an existing ordinary legislature or legislatures, vested *ab initio* or as a result of a special constitutional amendment, with the formal powers (constituent powers) to prepare, debate and enact a new constitution. The best known examples are the German Constitution of Frankfurt of 1848, to a degree the West German "Grundgesetz" of 1949<sup>8</sup> or, most recently,

<sup>3</sup> Max Weber, "Die drei reinen Typen der legitimen Herrschaft", in: J. Winkelmann, ed, *Gesammelte Aufsätze zur Wissenschaftslehre*, 4th ed Tübingen, 1973, pp 475-488, 485.

<sup>4</sup> For an easy English introduction see: D Pickles, *The Fifth French Republic*, 2ed, London 1962.

<sup>5</sup> See: U. Karpen, "Die Chilenische Verfassung vom 11. September 1980 aus der Sicht der demokratischen Opposition - Kritik und Änderungsvorschläge", in 34 (1985) *Jahrbuch des Öffentlichen Rechts*, Tübingen 1985, 703-732).

<sup>6</sup> See Masula Sithole, "Fighting Authoritarianism in Zimbabwe", 12 (1) *Journal of Democracy*, 2001, pp. 160-169.

<sup>7</sup> A. Thomashausen (1982), supra (note 2) pp 176-211 and "Basic Rights, Liberty, and their Protection under the new Portuguese Constitution of 1976", 1 (1980), *Human Rights Law Journal - HRLJ*, 182-208 at 185 *et seq.*

<sup>8</sup> The present West-German constitution was approved in 1949 by 2/3 of the representative assemblies

the Angolan Constitution of 5 February 2010.

The lines between the parliamentary constitution and what is referred to as **imposed constitution** (*oktroiierte Verfassung*) can be blurred, depending on the degree of indirectness of parliamentary representation, and the actual parliamentary process followed in the making of a constitution. Purely *imposed constitutions* are constitutional texts that come into force simply by order (or enactment) of a government (or foreign sovereign) who has the effective power of so doing, without formal involvement of the electorate or of any elected representation empowered to engage in constitution making. Illustrations are the Portuguese Constitution of 1933; the Spanish Constitution of 1945; the South African Constitution of 1909, the Japanese Constitution of 1946, or the Constitution of Zimbabwe of 1979 which was “enacted” by an Order in Council of the British Government.

The greatest number of modern constitutions, especially in Africa, can be grouped in a fifth category, that of **pact-constitutions**, meaning constitutions that come about as the result of a negotiated understanding or “pact” between an existing authority and one or more contending political elites, who have the power to impose some or all of their demands. Examples in point are the German “pact-constitutions” during the 19th century, the Portuguese Constitution of 1996, the Spanish constitution of 1978,<sup>9</sup> and the South African Interim Constitution of 1994<sup>10</sup>.

All five variants, the referendum, constituent assembly, parliamentary, imposed and pact constitutions will most often appear in a constitution making process in some or other conjunction. Constitutions elaborated by a specially convened constituent assembly may in fact turn out to be merely an endorsement of a constitutional understanding or “pact” formulated outside the assembly, as was the case of the Portuguese Constitution of 1976.<sup>11</sup> In another variant, constitutions enacted by an existing parliament may have been preceded

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of the German “Länder”, then still occupied by the Western allied powers. The prevailing opinion argues that it was subsequently “acquiesced” by the result of the elections to the first federal parliament, the Bundestag, established pursuant to the provisions of the *Grundgesetz*.

<sup>9</sup> “Paktierte Verfassung”, e.g. the Prussian Constitution of 1850, the French Constitution of 1958 or the Portuguese Constitution of 1976. The latter is an interesting example of a negotiated or pact-constitution: although the then constituent assembly had full constituent powers and had been so elected, the essential parts of the 1976 Constitution were the result of a formal written agreement between the political parties represented in the Constituent Assembly and the then Portuguese “Revolutionary Council” which was dominated by the military Junta in power; see A. Thomashausen, *Verfassung*, op cit (at note 2), 115-120; 174-175; 183-211 as well as “Constituição e Realidade Constitucional”, in: 37 (1977) *Revista da Ordem dos Advogados* No II (Maio - Agosto), Lisbon, pp 471-491. On the Spanish Constitution see: J M Prats-Canut, “Spanien”, in: E Grabitz, ed, *Grundrechte in Europa und USA*, vol 1, Straßburg/ Arlington 1986.

<sup>10</sup> On the makings of the 1994/96 South African Constitution see: Vicki C Jackson, „What’s in a Name? Reflections on Timing, Naming and Constitution-Making”, 49 *William and Mary Law Review* (2007/8), pp 1249-1305, A. Thomashausen, 34 „Demokratie und Rechtsstaatlichkeit in Südafrika”, pp. 163-188, in: U Battis, P Kunig, I Pernice, A Randelzhofer, ed., *Das Grundgesetz im Prozess Europäischer und Globaler Verfassungsentwicklung*, Nomos Verlagsgesellschaft, Baden Baden 2000.

<sup>11</sup> A. Thomashausen, *supra* (note 2 and 7).

by extensive debate and review in first and second tier assemblies, as was the tradition in former soviet bloc or soviet aligned socialist countries.

An interesting example of an international law intervention in a constitution making process was the drafting and enactment of the Namibian constitution at the end of the eighties. First, an international understanding existed on the broad principles to be included in the Namibian constituent, in terms of an original Constitutional Proposal made in 1982 by then five Western members of the United Nations Security Council. These "Principles concerning the Constituent Assembly and the Constitution for an Independent Namibia" were subsequently endorsed by United Nations Security Council Resolution 629 of 1989, as a basis of the overall peace and independence plan for Namibia. The then elected Constituent Assembly entrusted the actual drafting of the Constitution to a panel of three legal experts only. Finally, the new constitution was enacted by vote of the Constituent Assembly.

## II. African Constitutionalism and the Virtual Constitution

The early independence period, from the 1960ies through to the early 1990ies, was characterized by imposed constitutions. Most independence constitutions were modelled on precedents found in Eastern Europe, and in very many instances in former East Germany. For example, in Angola, on 11 November 1975, a "Constitutional Act" was passed by a resolution of the Central Committee of the M.P.L.A. independence party, and this fact was simply recorded in art. 60 of this new Constitution. Article 1 of the "Constitutional Act" proclaimed the new independent state of Angola as a country where "any form of exploitation of man by man" would be abolished, and art. 2 announced that the MPLA party was thus installed as the only lawful political party in Angola, in order to exercise complete control over the state and all its organs, at all levels, through a system of appointed commissars, as further stipulated in arts. 31-52 and in a further party resolution, published as Act No. 1 of 1976.

Post-colonial states in Africa simply continued the authoritarian legal traditions imposed by colonial powers, on the basis of newly founded legitimacies, even where they did not opt to copy the soviet model. The most important tool of colonial administrations had been the curtailment of basic economic freedoms, subjecting all and any activity, including the most menial informal sector services or trade, to rigid licensing and permits requirements. Coupled with the denial of the freedoms of movement for persons, services and capital, the colonial legal tradition was one of excessive control. On independence these traditions were simply continued, as the new governments were characterised by political insecurity and had but frail authority.<sup>12</sup>

<sup>12</sup> Yash Ghai, *supra* (at note 1), 808. Further: H K Prempeh, "Marybury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa", 80 *Tulane Law Review* (2005-6), pp. 1239-1323, 1274-78; Ruth Gordon, "Growing Constitutions", in: 1 (3) *Journal of Constitutional Law*

As Nwabueze showed in his first and original book on African constitutionalism,<sup>13</sup> the independence constitutions had been drawn up outside Africa, inspired by legal traditions and values and ideals that were never rooted in Africa. The few African drafters and scholars involved in this process had been thoroughly “assimilated” to West European or alternatively soviet-Socialist values, and in return their ideas and writings remained stale and alien in their Africa environment.

Like the new anti-colonial politicians, they had been conditioned to mimic their former colonial masters, right down to the dress codes, expressions and state protocol, often going to absurd extremes such as to erect poorly engineered copies of Parisian government buildings in the Central African Republic, under the late President Bokassa. To this day, Robert Mugabe of Zimbabwe insists on having “high tea” in the afternoons, and strains his vocal cords to produce a resemblance of “Oxbridge” English, much to the sniggering amusement of his former colonial masters.

The misconception in the first post colonial wave of constitution making, was to encourage a selective reception of constitutional law, placing the doctrine of parliamentary sovereignty at the centre of all considerations, to the detriment of the proper understanding of the rule of law, and of the modern evolution of the constitutional state, and the supremacy of the law of the constitution.<sup>14</sup>

With the demise of the Soviet power in 1989 came the end of an international superpower rivalry that had sustained African governments as client or satellite states of the one or the other. As from 1990, the stage was set for a wave of constitutional reform and transformation across the African continent. Donor aid and the all important trade agreements with the EU and the USA became conditional upon the holding of multi-party elections.

Of a total of 53 independent African states,<sup>15</sup> before and up to 1990, only 9 had a democratically elected government. From 1990 until 2000, 36 countries held multiparty elections for the first time, or after re-emerging from some kind of dictatorial or military rule.<sup>16</sup> A further 5 countries held non-party,<sup>17</sup> and another 8 held “normal” second or third term elections.<sup>18</sup> To date, all 47 sub-Saharan

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(1998/99), pp 528-582, 536-542; Julian Go, “Modelling the State: Postcolonial Constitutions in Asia and Africa”, 39 (4) *Southeast Asian Studies* (2002), pp 558-583, 560 *et seq.*; James C N Paul, “Some Observations on Constitutionalism, Judicial Review and Rule of Law in Africa”, 35 *Ohio State Law Journal*, pp 851-869, 855-858.

<sup>13</sup> Nwabueze, B. O, *Constitutionalism in the emergent states*, London: C. Hurst, 1973, p 23.

<sup>14</sup> Isaak L Dore, “Constitutionalism and the post-Colonial State in Africa: A Rawlsian Approach”, in: 41 *St Louis University Law Journal* (1996/7), pp 1301-1317, p 1305 *et seq.*

<sup>15</sup> See listing at [http://en.wikipedia.org/wiki/List\\_of\\_African\\_countries\\_and\\_territories](http://en.wikipedia.org/wiki/List_of_African_countries_and_territories).

<sup>16</sup> The Comoros, Gabon and Ivory Coast in 1990, Benin, Burkina Faso, Cap Verde, São Tomé & Príncipe, Zambia and Algeria in 1991, Angola, Djibouti, Cameroon, Ghana, Kenya, Mali, and Mauritania in 1992, Burundi, Guinea Equatorial, Guinea, Madagascar, Niger, Central African Republic, Senegal, Seychelles and Togo in 1993, Guinea Bissau, Malawi, Mozambique, South Africa in 1994, Ethiopia and Tanzania in 1995, Gambia and Sierra Leone in 1996, Chad and Liberia in 1997 and Nigeria in 1999.

<sup>17</sup> Eritrea, Libya, Sudan, Swaziland and Uganda.

<sup>18</sup> Botswana, Egypt, Gabon, Lesotho, Mauritius, Morocco, Namibia, and Zimbabwe.



countries (which is all of Africa except for Algeria, Egypt, Libya, Morocco, Tunisia, and Western Sahara) have held regular and repeated elections, over 260 elections by now, thus seeking to base their governments on a process of democratic legitimacy.<sup>19</sup> However and as most recently in 2009 confirmed in a study by Bogaards, it is true that Parliaments in Africa continue to be dominated by one hegemonic political party, mostly reliant on its historic legitimacy.<sup>20</sup>

The advent of multi-party political dispensations in the nineties necessitated constitutional reforms in all countries. As of 2004, all 54 nations of the entire African continent have either written a new constitution or modified their previous ones.<sup>21</sup> The central question is whether this second wave of constitution making in Africa, since 1990, has fared any better in overcoming dual authority, which is the term coined in Whitaker's fundamental study on *The Politics of Tradition*.<sup>22</sup>

Dual authority, or legal dualism, or "the existence of two publics in Africa"<sup>23</sup> refers to realisation that social reality and political culture in African societies differs from the Western European and North American concepts of the constitutional state. Lusophone Africa refers to unacknowledged and hidden "second public" with the illustrative term of "africa profunda".<sup>24</sup>

Critics point out that the second wave of constitutions in Africa produced mostly constitutional propaganda, and Klug in a contribution in 2001 suggested, even in respect of the South African constitution of 1996 that it was at risk of becoming an "irrelevant constitution", because it had failed to impose moderation and control over the exercise of political power, and failed to respect minimal standards of social-economic rights, in particular the right to health, amongst other ills.<sup>25</sup>

Most scholars lament that the past two decades have failed to implant in Africa the constitutional models of multi-party democracies, or "polyarchy". Richard Joseph, at the Carter Center at Emory University, classified most democratic transformations in Africa during the first transformation decade (from 1990 to 2000) as merely "virtual transformations". Elections would have degenerated into acclamation rituals to accord legalistic blessings to those same elites that have always since independence held political power and continue monopolize to the

<sup>19</sup> Staffan I. Lindberg, *Democracy and elections in Africa*. Baltimore: The Johns Hopkins University Press, 2006, pp 68 et seq;

<sup>20</sup> Mathijs Bogaards, "Counting parties and identifying dominant party systems in Africa", 43 *European Journal of Political Research* (2004), pp 173-197,

<sup>21</sup> The magnitude of constitutional change in Africa in the past 20 years is most eloquently traced and analysed in H Kwasi Prempeh, "Marybury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa", 80 *Tulane Law Review* (2006), 1239-1323 at 1274-1287.

<sup>22</sup> C. S Whitacker, *The Politics of Tradition: Continuity and Change in Northern Nigeria, 1946-1966*, Princeton 1970.

<sup>23</sup> Peter P Ekeh, "Colonialism and the Two Publics in Africa: A Theoretical Statement" in: 17 *Comparative Studies in Society and History* (1975), pp 91-112.

<sup>24</sup> Richard L Sklar, "The African Frontier for Political Science", in: Robert H. Bates, V. Y. Mudimbe, Jean F. O'Barr, *Africa and the Disciplines: The Contributions of Research in Africa to the Social Sciences and Humanities*, Chicago 1993, pp 83-110, 104.

<sup>25</sup> H Klug, "Five Years on: How relevant is the Constitution to the New South Africa", in: 26 *Vermont Law Review* (2001/2), 803-819.

detriment of development and the welfare of their countries.

### III. Power and Authority of the Constitution

If we believe that it is a fundamental condition for the good functioning of a multi-party parliamentary democracy that the opposition can realistically assume the role of “the institutionalized hope of the minority to become tomorrow’s majority”,<sup>26</sup> then this essential condition is absent in most systems of government in Africa. As a rule, opposition parties are ill tolerated and wherever their support rises above 20-25%, they are perceived and often openly chastised as constituting “a threat to national peace”.<sup>27</sup> As a result, opposition parties in Africa, regardless of the electoral systems, continue to be fragmented, limited by predominantly ethnic allegiances, underfunded, have personalized and divisive leadership, tend to be short lived, and lack capacity to formulate political alternatives.

Nevertheless, neither are the constitutions irrelevant, nor are the constitution making processes without consequence.<sup>28</sup> Constituent and constitutional power in Africa is growing and not declining, as is evidenced by the fact that each and every instance of constitution making in Africa since 1990 has been a passionate and often drawn out, national event. From the making of the Namibian Constitution in 1990 to the negotiating of the 1994 Interim South African constitution and the latest promulgation of the Angolan Constitution on 5 February 2010, the academic, political and public debates have in all instances been intense.

Every government in Africa since 1990 has acted in reference to the constitution of the country, invoking what it believed to be the best or most adequate interpretation of a particular constitutional principle or procedure. Especially Zimbabwe confirms this assertion. The intense and most damaging political conflict in that country is centred on its constitution, on the process to apply it, on the accusations that certain policies were adopted in violation of the constitution, and on the possible timing, process and direction of changing the constitution, or drafting an entirely new one.

The essence of the Power-sharing Agreement of 15 September 2008, besides the establishment of an interim government of national unity, was a process for the drafting and popular debate of a new constitution. The lack of wisdom and adequateness of the procedures inserted in the 2008 agreement is to blame for the fact that no progress has been made to date, forcing the country to go again to elections, to hopefully resolve the political stalemate.

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<sup>26</sup> Inspired by the words of the late Werner Kaltefleiter: “Die institutionalisierte Hoffnung der Unzufriedenen”, in: W. Kaltefleiter, *Vorspiel zum Wechsel – Eine Analyse der Bundestagswahl 1976*, Berlin 1977, 246 et seq.

<sup>27</sup> W Teshome, “Opposition Parties and the Politics of Opposition in Africa: A Critical Analysis”, in: 3 (1) *International Journal of Humanities and Social Sciences* (2009), pp 1-15, 2.

<sup>28</sup> See for further reading: André Mangu, “Constitutional Democracy and Constitutionalism in Africa”, in: 2006 *Conflict Trends*, pp 3-8, 7.

### The South African Experience

The importance of the constitution making process for the eventual authority and force of a constitution is illustrated by the South African experience. South Africa's four year long conflict resolution process, starting in February 1990 with the legalisation that recognized and legalised the liberation movements as political parties, and ending in April 1994 with the first free and general South African elections ever, needed to overcome a hopelessly fundamental antagonism. The liberation movements insisted that they had fought and won a just war that had been consistently sanctioned and legitimised by the United Nations and every other organ of the international community, and this was very much a foundation of their political identity. It was inconceivable to them that they should have to accept that the brutal actions taken by apartheid government and its agents to obstruct this struggle should be regarded as equivalent and equally legitimated countermeasures, adopted in self-defence, as maintained by the outgoing apartheid government.<sup>29</sup>

The true relation of forces, as sustained by a variety of international interests, and the determination of all key players to succeed, diffused this fundamental contradiction by moulding the entire transition process into the context of a constitution making procedure. This means that peace was sought and brought about within and by means of the constitution making (or constituent) process. At the end of four years of constitutional negotiations and in terms of South Africa's Interim Constitution of 28 January 1994,<sup>30</sup> and its specially enshrined, basic pact, known as the *Constitutional Principles*, peace was established. The foundation of this "entente" was the consensus that the country should be modern and liberal, albeit developmental, but always a constitutional state in the sense of the German *Rechtsstaat*, the protection of which was entrusted to a fully independent and professional constitutional court. This consensus has held firm for the past 15 years and has immensely contributed to the advance of constitutionalism in all countries in Africa.

Today, 11 countries in Africa have fully fledged, independent constitutional courts,<sup>31</sup> and a further 8 have an independent constitutional council,<sup>32</sup> whilst 22 states have entrusted some form or other of constitutional review procedures to their highest ordinary court.<sup>33</sup> South Africa hosted from 22-24 January 2009 the first

<sup>29</sup> On the makings of the 1994/96 South African Constitution see: Vicki C Jackson, „What's in a Name? Reflections on Timing, Naming and Constitution-Making“, 49 *William and Mary Law Review* (2007/8), pp 1249-1305, A. Thomashausen, „Demokratie und Rechtsstaatlichkeit in Südafrika“, pp. 163-188, in: U Batts, P Kunig, I Pernice, A Randelzhofer, ed, *Das Grundgesetz im Prozess Europäischer und Globaler Verfassungsentwicklung*, Nomos Verlagsgesellschaft, Baden Baden 2000.

<sup>30</sup> Government Gazette (GovGaz) No 15466 v. 28 January 1994. The Constitution entered into force in accordance of Art. 251 (1) on 27. April 1994. See for all constitutional texts: <http://www.constitution.org.za/zip.html>.

<sup>31</sup> Angola, Benin, Burundi, Central African Republic, Egypt, Equatorial Guinea, Gabon, Madagascar, Mali, Rwanda, Togo.

<sup>32</sup> Algeria, Comores, Djibouti, Ivory Coast, Mauritania, Morocco, Mozambique, Senegal.

<sup>33</sup> See the most informative table at <http://www.concourts.net/tab/tab1>.

World Conference on Constitutional Justice in Cape Town, with 93 Constitutional Courts or Councils represented.

At the centre of the successful South African constitution making process was the technique, applied throughout the entire process, to achieve partial and piecemeal agreements or “pacts” which became, one by one, the building blocks and pillars of further and more comprehensive agreements. As the first constitution of 1994 was still a transitional instrument that had been negotiated without a specific electoral mandate, the first Parliament was elected in 1994 with specific constituent or constitution making powers, to produce in 1996 the final South African constitution.

### The German Constitution

The South African constitution has been inspired by the 1949 German *Grundgesetz*.<sup>34</sup> The *Grundgesetz* is another example of a very successful constitution that was not drafted by an elected constituent assembly, or submitted to a referendum. Shortly after Germany's surrender in 1945, regional legislative assemblies, known as State Assemblies were elected, whilst most central government functions were still discharged by the Allied occupation forces. In 1948, the governments of a number of 11 States controlled by the three Western Allied powers appointed a “Constitutional Convention”, a gathering of experts who prepared a draft constitution within an exceptionally short period of time of only 13 days. The draft was submitted to an indirectly elected assembly of 65 delegates, elected by the 11 State legislatures. The assembly, in close liaison with and in parts on direct instructions of the three Allied Powers who were still exercising sovereignty, concluded its debates on the new constitution within 7 months. The final draft was submitted for ratification to the legislatures of the 11 States, and entered into force following final authorization by the Allied Powers.<sup>35</sup>

The German constitution making process has been interpreted as a combination of the democratic constituent assembly and the pact-constitution procedures. The democratic legitimacy of the constitution makers was derived from the indirect election of the Assembly entrusted with the final drafting of the constitution, and the subsequent submission of the draft to the State legislatures. The factual or negotiated element was manifested in the fact that the original draft had been prepared by experts appointed and instructed by the governments of the various States, and that the final draft was prepared in continuous liaison with the controlling three Allied powers. Commentators agree that the objective of democratic legitimacy may have been compromised more than would normally be advisable. However, it is undoubtedly so that the quality of the resulting constitution stood the test of time. Just over 40 years after its entry into force, when

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php?lng=en&stat=1&prt=0&srt=0, accessed 18-03-010.

<sup>34</sup> See again A. Thomashausen, in: *Das Grundgesetz im Prozess Europäischer und Globaler Verfassungsentwicklung*, *supra* (note 32).

<sup>35</sup> See generally: Maunz, in Maunz-Dürig-Herzog-Scholz, *Grundgesetz-Kommentar*, München (loose-leaf), vol 1, „Präambel“.

the two German states were reunited in 1990, the German *Grundgesetz* became the basis of the reunified Germany.

### The Portuguese Model

A less conservative experience of a combined constituent assembly and pact-constitution procedure is that of Portugal. The Portuguese model developed without the involvement of any foreign or occupying forces in 1974, when a group of insurgent soldiers and officers overthrew 4 decades of authoritarian and basically undemocratic rule in that country.<sup>36</sup>

The provisional government, consisting of a military council, had promised at the outset to restore the protection of human rights and a democratic government, by conducting general elections for a constituent assembly which would draft a new constitution. However, in the months following the overthrowing of the old regime, the general political and in particular ideological conflicts had become such that the country found itself on the brink of civil war. The military council had sided with several left wing and communist parties and become reluctant to entrust the future constitution of the country to general elections and the unpredictable proceedings of what was anticipated to become an assembly composed of highly antagonistic and polarised party politicians. Similarly, the more conservative parties were concerned that there might not be a basis for consensus, in the future assembly, on an adequate constitutional protection of basic individual freedoms and fundamental rights.

An answer to what had become a complete stalemate situation was found in March 1975, when a committee of 8 experts appointed by the military council (which by then had adopted the name of Revolutionary Council) drafted a "Constitutional Pact" which was signed by the Council and the 12 political parties intending to participate in the elections for the constituent assembly. The pact provided for the broad outlines of the future constitution, by way of an anticipated compromise, and in order to limit otherwise unpredictable risks of the outcome of elections. It became thus possible for the various parties to finally agree on elections which took place on April 25, 1975.

The result of the elections was not encouraging. The 250 elected members of the Constituent Assembly were divided into 6 parties, with no absolute majority for either one of them, and no chances for the establishment of any party coalitions. The Assembly convened 132 times, over a total of 500 hours, from 2 June 1975 until 2 June 1976. During the first six weeks of session, each of the parties represented prepared an own complete draft constitution, prepared on the basis of the pre-election constitutional pact. Agreement on the arrangement of chapters and sections was reached within a further four weeks. Until December 1976, only broad agreement could be reached on less controversial issues. In order to overcome the various deadlocks in the Assembly, negotiations on a revision of the original constitutional pact were initiated during December 1976, outside and

<sup>36</sup> A Thomashausen, *supra* (note 7).

independently of the proceedings in the Assembly. The Revolutionary Council appointed once more a technical committee to prepare a draft compromise, which became the second constitutional pact, signed by the Council and the parties represented in the Assembly on 26 February 1976. The new pact stipulated that it would remain in force for four years, and that the political parties would undertake to adopt its provisions in the Constituent Assembly. From the date of signature until the final adoption of the new constitution, on 2 June 1976, i.e. within three months, most of the pact provisions were passed without further debate in the Assembly. It can be stated safely that without the parallel negotiation mechanism of the "pact agreements", the new constitution would never have come about through the proceedings in the Assembly. Moreover, the quality, originality and balance of the provisions of the new constitution had their origin in the facilitating role of the technical negotiation committee appointed by the Revolutionary Council.

The Portuguese constitution of 1976 was the result of both the democratic representation of the electorate's constituent power, and the political compromise which was formalized outside the Constituent Assembly. It succeeded in reducing the polarisation of the post-revolutionary polarisation of the country and became the basis of a new political and democratic culture and social peace, which has already stood the test of time during the past 34 years.

### Angola

The most recent experience in a "controlled" form of constitution making has resulted in the enactment of a new Angolan Constitution, of 5 February 2010. The Constitution concludes one of the most drawn out and complex constitution making battles in our modern times. Following an aborted election in 1992 (when a required second round for the presidential ballot could not take place, because of a resumption of an already procrastinated civil war) the parliament that had nevertheless been elected in 1992 on the basis of an interim constitutional law, commenced in 1998 with the process of elaborating an envisaged final constitution. By 16 February 2000, consensus was reached on a list of 27 Constitutional Principles that were adopted to guide the drafting process. A final draft was published 4 years later, in January 2004, only to be discarded with the decision in 2008 to hold general parliamentary elections to constitute a "fresh" constitution making mandate.<sup>37</sup> The newly elected parliament passed Law No 2/09 of 6 January 2009, establishing a new 45 member Constituent Commission and providing for a parliamentary constitution making process.<sup>38</sup> The Constituent Commission was given an autonomous status and equipped with own secretarial support services and budget, having been set at just over 5 Million USD.

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<sup>37</sup> A. Thomashausen, "Constitutional Law in Extreme Emergencies", in: Bröhmer et al, ed, *Internationale Gemeinschaft und Menschenrechte - Festschrift für Georg Ress*, Heymanns - Köln, Berlin, München 2005, pp 1295-1304.

<sup>38</sup> The text can be consulted at the website of the Constitutional Commission: <http://www.comissaoconstitucional.ao/leis.php>.

The two important aspects of the procedure of the Constitutional Commission were that its deliberations were to be taken by consensus, and only in the event that such consensus could not be reached, by majority vote of all its members. The consensus principle, and the sanction of a majority decision whenever consensus could not be reached, was applied successfully in the South African constitution making process 1993/94.<sup>39</sup> It introduces a subtle variation to the hard and fast majority rule, by forcing the participants to seek an inclusive compromise, before being permitted to take a majority vote decision. Eventually and if all goes well, decisions are taken on the basis of an overall arrangement or trade off pact between the main participants in the process.

The other important rule of procedure for the Angolan Constituent Commission was the establishment of a 19member "Technical Support Committee" that gathered considerable drafting and constitutional law expertise, under the chairmanship of a political influential and also academically respected Angolan scholar, Professor Carlos Feijó.

The workings of the Committee provided for a complex narrowing down process, scheduled over a detailed 8 months agenda with deadlines and dates set in advance. By mid May, a total of 7 drafts were submitted, from the various parliamentary groups represented in the Committee. The process of reformulating the 7 drafts into 3 consolidated alternative constitutional texts was entrusted to the Technical Committee, whilst at the same time the Constitutional Commission embarked on a schedule of country wide consultations, hearings and public presentations. The 3 consolidated alternative texts were published by the Constitutional Commission on 1 November 2009 and subsequently debated and resolved into a single text in daily sessions of the Commission, with rigorous application of the consensus principle, backed up by majority vote as a fallback step. The final text was submitted by the Commission to Parliament on 17 December 2009 and Parliament approved the text one month later, on 21 January 2010, with 186 votes in favour, none against and two abstentions, but with the main opposition party UNITA having left the session before the vote.

As provided for in a 2008 constitutional Act that created the Angolan Constitutional Court, the draft constitution was submitted on 25 January 2010 to the Constitutional Court for an anticipated constitutional review, the testing yardstick being the substantive or "eternal" principles that had been set for the constitution making process in the 1992 interim constitution, still in force. In a 6 to 1 votes judgment on the 1<sup>st</sup> of February 2010,<sup>40</sup> the Constitutional Court cleared the text but demanded 2 improvements, regarding the appointment of the future Deputy President and the clear designation of the lead candidate in every list of candidates, as the candidate who would automatically assume the office of state president, should that list of candidates win a majority.

<sup>39</sup> A. Thomashausen, "Demokratie und Rechtsstaatlichkeit in Südafrika", *supra* (note 29), pp. 163-188, 164-166.

<sup>40</sup> Acórdão n.º 111/2010, [www.tribunalconstitucional.ao/.../72318018-4009-436c-9930-47aaaa92632a\\_2\\_2\\_2010.pdf](http://www.tribunalconstitucional.ao/.../72318018-4009-436c-9930-47aaaa92632a_2_2_2010.pdf).

The chosen form of a particularly indirect appointment of the president, in the context of a presidentialist system of government, remains a controversial decision. However, the broader and more general issue at the centre of the Angolan case is the success of a structured and systematic pact approach to a constitution making process, anchored in the legitimacy of an ordinary parliament. The opposition's withdrawal of its support at the last moment, when it boycotted the final vote in parliament, had to do with the opposition's public commitment to a direct election of the president, which it simply could not revisit. It does not refute the conclusion the constitution making process achieved the "buy in" and inclusion of all relevant political forces on all issue except for the mode of election of the President.

The controversial Angolan choice for the election of the president, termed by Carlos Feijo "parliamentarian presidentialism", provides for a single ballot to elect both the members of parliament and the president. Art. 109 provides that the first name appearing the winning list of candidates as members of parliament, shall be deemed to have been elected as president and head of state. No particular vote by parliament is required. Indeed, one cannot but agree with the constitution writers that, under the circumstances of a proportional representation and nation wide list system, a separate vote in Parliament to appoint the lead candidate of the list as president is merely a ritualistic formality, as is shown, amongst others, by the example of South Africa. However, the Angolan decision in favour an "obligatory combined vote" (for the members of parliament and the president) will deprive voters of the possibility of voting for the list of one party, but for the presidential candidate of another, or for an independent presidential candidate, as is the case, for instance, in Mozambique. In Mozambique, the presidential and parliamentary elections are held simultaneously, but based on separate ballot papers and ballots. However, and has been the experience the world over since the advent of democratic elections, independent presidential candidates, or a "split " decision between the list of one party and the presidential candidate of another, are realistically never relevant or successful choices. They can be discarded for the better functioning of a democratic system, just like we have come to accept deliberate distortions in the counting process, such as are the result of the application of the d'Hondt method, because they serve to bring about more stable majorities in parliaments.

The relationship between parliaments and presidents is ultimately and always determined by the powers of the one to dissolve or dismiss the other.<sup>41</sup> In terms of Art 128, the new Angolan president can only provoke the dissolution of parliament by his own "self-dismissal" (auto-demissão), which shall be deemed not to have the effects of a renunciation of his mandate, meaning he shall be able to stand again as a candidate, although this is a theoretical possibility, considering that the existence of an "irretrievable break down of relations between the President and Parliament", as required in art. 128 would normally frustrate the chances of a president to be nominated again as head of the party list of candidates,

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<sup>41</sup> Maurice Duverger, *Echec au Roi*, Paris, 1978, pp 27-30.



to thus become eligible for re-election. Parliament, on the other hand, can only indirectly trigger the eventual removal of the president, by initiating impeachment procedures. As the true selection of a president has thus been shifted away from a direct competition for the votes of the electorate, and is in fact to be taken by the highest decision making body of the majority party, the possibility for conflict between parliament and president is remote, thus eliminating the major flaw and cause of instability in the tradition presidential and semi-presidential systems.

#### IV. The Future of Constitutionalism in Africa

As has been rightly argued and shown by Jeffrey Herbst in his treatise on *States and Power in Africa*,<sup>42</sup> the African state is characterised by its lacking ability to extend, or as Herbst put it, to “project” power and authority over the greater part of its territory and the majority of its many diverse peoples. It needs to be remembered that the African landmass with its 30 million square kilometres is so large that one can fit into it: the entire USA, India, Western Europe, China and Argentina.

To illustrate the problem: before the first general elections ever held in Mozambique in 1994, under United Nations supervision, the largest circulation weekly newspaper in Mozambique printed just short of 20.000 copies for over 16 million people, distributing 98% of its print run in the capital city. Decisions made known in the official government gazette became known mostly by chance in any one of 128 district administrations, most of which had no electricity, nor telephone or radio communications.

The cost and difficulty of extending modern administrative functions and what early Prussian constitutional thinking referred to as the “*Daseinsvorsorge*”, the provision of men’s most basic needs, is compounded by the enormous ethnic, linguistic, cultural, religious and historic plurality of its peoples in all but 3 countries in Africa. The disintegration of inherently frail states and the emergence of what we now call the “failed state”, meaning a situation of lesser or greater anarchy, is not encouraging liberalism or any deliberate strengthening of opposition politics.

The Angolan constitution illustrates the response of African political elites to the threat of state disintegration, under circumstances of extreme poverty and underdevelopment. Not surprisingly, it actually achieves a partial reception of the political management system of the People’s Republic of China. The Chinese model is a mutation of the old soviet concept of the state as an instrument of the dominant vanguard party, the Communist Party. With its close on 40 million members, it functions as a rigorous selection system for political talent and leadership. A pyramidal hierarchy replaces institutionalized political competition, but decentralisation and limited autonomies are meant to reduce the divergent tensions that will tend to arise within in any hierarchical structure. As

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<sup>42</sup> *States and Power in Africa: Comparative Lessons in Authority and Control*, Princeton University Press 2000, pp. 12 *et seq.*

one colleague from the Xiangtan University in Hunan Province (also known as the Mao university, because it was established in his honour and at his birthplace) put it: *instead of organizing a multi-Billion dollar public battle and spectacle every five years to select a president through the whims and accidents of large ballots, we have a 25 member Politburo, composed of the wisest and most resilient and disciplined leaders, who select the best available candidate for the office of the next chief executive , or president of the country.*

As in all soviet inspired constitutions, a measured space is allowed for small political associations dedicated to represent particular interest, such as those of farmers or Christian or liberal professions. There are 8 political parties represented in the PR China's parliament, the National People's Congress, the official characterisation being "registered minor parties under CPC's direction".

Opposition parties in Southern Africa, and in most of Africa generally, and including in South Africa, are kept below the +/- 20% representation threshold in parliament, and "grand-coalition" and "unity governments" have become established practice. The dominant parties are increasingly encouraging the integration of opposition parties, either as "strategic alliance partners" or simple as merged entities, as has happened in South Africa in the case of the old apartheid era government party, the Nationalist Party, which was integrated into and absorbed by the African National Congress party, ANC, in 2005.

The newly found attraction of the Chinese model has much to do with China's recent engagement in Africa, and its ability to portrait impressive developmental advances, especially in providing education, health, food, security, electricity and transport infrastructures throughout a vast and impoverished realm. Trade between Africa and China in 2009 totalled just over 120 Billion USD, with a balance vastly in favour of Africa. Chinese credit lines to the 12 most favoured countries in Africa (by order of magnitude: Angola, South Africa, DRC, Nigeria, Sudan, Zambia, Mozambique, Namibia, Ethiopia, Botswana, Zimbabwe, Mauritius), totalled in 2009 just under 50 Billion USD, only 10 billion short of the total budgeted amount for the ten-year infrastructure rescue plan presented to the industrialized nations by South Africa in 2002, know as the New Partnership for Africa's Development - NEPAD, on which the industrialized nations never even tried to embrace.

Whilst various French, Portuguese, British and EU initiated initiatives at establishing a regular co-operation forum with African governments since 2001 only to rapidly again fall into oblivion, the China Africa Forum has been meeting in an uninterrupted three year cycle since October 2000, with regular meetings of its working groups and sub-groupings in between. One of the diplomatically most successful and original such sub-grouping is the China-Africa Enterprises Co-operation Forum in Macau which ties up all Portuguese speaking countries including Brazil with China, through Macau, where Portuguese continues to be an official language. Legal cooperation has been particular stimulated in this cooperation, and the 1966 Portuguese Civil Code, via its translation into Mandarin in Macau, has gained considerable influence amongst the Chinese working groups that have been tasked to draft an entirely new Chinese Civil Code. Most

significantly, the key drafters of the already mentioned new Angolan constitution have over the past years each visited China extensively, in order to be able to engage with Chinese constitutional law scholars and practitioners.<sup>43</sup>

Not only for Angola, but most recently also manifest in the constitution making processes in Ghana and Kenya, less political pluralism and a more controlled form of constitutional democracy seem to promise better responses to the developmental challenges that continue to face all countries in Africa. The fascinating new facet of this development is that it is going hand in hand with an elevation and strengthening of the constitution as the only legitimate source of government and authority. One of the less remarked, but much debated and in fact fundamental new provisions in the African Union constitutive Act is art 30, whereby governments coming to power through unconstitutional means are not allowed to participate in the activities of the Union. The regional prohibition of government changes that are in violation of a country's constitution underlines the growing and actual power of the constitution in African states.

The trend towards pyramidal instead of multi-polar forms of democratic representation and participation is balanced by what can be seen as continual strengthening of human and fundamental rights guarantees and constitutional review procedures to safeguard them. Again the Angolan Constitution of 5 February 2010 is a case in point. It guarantees the full range and scope of all individual fundamental rights and in several instances does so even to a more generous and wider extent than the South African constitution before it. The limitation clause in Art 57 is illustrative of the quality and style of drafting:

*The law may limit the rights, freedoms and guarantees only in those cases where such limitation is expressly permitted by the Constitution, provided that such limitations shall be limited to that which is necessary, proportional and reasonable in a free and democratic society, for the preservation of the other rights or constitutionally safeguarded interests.*

The direction of the constitution making process in Africa has changed. From endeavouring to simply establish and consolidate power, constitutions today attempt to find a balance between the need to ensure long term developmental planning and progress,<sup>44</sup> and the desire to grow and indigenize the rule of the constitutional state, so that our common ideal is preserved, that *the rule of law shall replace the rule of men*.

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<sup>43</sup> See: "Chinese, African jurists discuss cooperation in first FOCAC legal forum", Xinhua 21-12-2009 and "Fresh achievements in China, Portuguese-Speaking countries Cooperation in past three years", Xinhua 23-09-2006, www.chinaview.cn; Loro Horta & Ian Storey, "China grooms a strategic relationship with the Community of Portuguese Language Countries", YaleGlobal, 22 June 2006, <http://yaleglobal.yale.edu/display.article?id=7634>.

<sup>44</sup> N. Mahao, "The Constitutional state in the developing world in the age of globalisation: from limited government to minimum democracy" in: 12 *Law, Democracy & Development*, (2008) pp 1-19, 17.