

Constitutionalism in Transition: Africa and Eastern Europe

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Abstract

There are a number of common themes for African and Central and Eastern European constitutional discourses, but prior to the meeting in Warsaw there had been little, if any, dialogue between these regions. The motivation for this first meeting on constitutionalism in Africa and Eastern Europe was to establish new lines of political and intellectual dialogue; identify issues that could become part of an on-going debate with the aim of isolating common grounds and differences; build a body of knowledge that would inform politics and policy-making, based on concrete analyses; and learn if there are any critical lessons that could be shared by both parties. For this first meeting, four topics were chosen for in-depth discussion: reconstructing the state through constitution-making; enforcement and oversight institutions in the constitutions; constitutional approaches to identity, nationality and citizenship; and the role of civil society in promoting constitutionalism. For each major topic and selected sub-topics, constitutional experts from the two regions presented two overview papers, one for each region, followed by a discussion. From the papers presented and the overall discussions, four issues clearly emerged. They revolved around ideology, the role of the state, post-colonialism, and the constitution-making process.

In most parts of the world, constitutional debates have become a central part of political negotiations and contestations. In the United States, debates are raging over devolution of power from the federal to the state governments, as well as over the reform of state constitutions. In Brazil, the popular constitution that was designed to empower the local constituencies has generated deep debates as to its capacity to achieve that goal. In India, a state-sponsored constitutional review process is attempting to tackle the task of deepening democratic practices and responding to growing crises over issues of local autonomy, identity, religion, secularism, and the minority question. All over Africa and other

parts of South Asia, there remains the challenge of how to use the constitution-making or constitutional review process to address the national question and close deep political and social fault lines. In Eastern Europe, the challenge of using the constitution to consolidate democratic governance and build new structures of transparency, accountability and human rights continues to inform contestations over constitutional issues and the constitutions themselves. To be bold, it could be said that constitutionalism is the main political game in town all over the contemporary world. Why is this the case?

The renewed interest in constitutions and constitutionalism is not unrelated to the political openings occurring around the world. As hitherto suppressed voices and suffocated political spaces open up, and as various communities begin to reassert themselves, there is often a demand for new rights and other guarantees that need to be constitutionalized, and not simply assumed. The quest for new platforms of politics and power, new rules to guide political engagements, new controls on the state and its custodians, and new political ideologies guiding the social contract between the people and their leaders has shaped the demand for new constitutions. Of course, a constitution does not solve all problems. Indeed, it could precipitate new problems. It is however generally agreed that a flawed constitution is probably better than no constitution at all. Experiences in Eastern Europe and Africa with corrupt, decadent, violent and brutal dictatorships, the manipulation of political institutions, the privatization of the state by political cliques, and socio-economic exploitation have dictated a new interest in using the constitution to check these failings and excesses. Is there common ground between Eastern Europe and Africa?

Both regions find themselves in a period of transitional constitutionalism, characterized by constitutional processes that follow periods of significant political change (Teitel 2000). Both Africa and Central and Eastern Europe have had to attempt to reconstruct post-colonial states or to restructure post-communist states, respectively. The challenge of simultaneously building and constraining state power faced by both regions is directly related to the constitution-making process, the constructive potential of new constitutions and their role in the development of societies. So far in both Africa and Eastern Europe, a successful transition to democracy and good governance has been threatened by unresolved questions of ethnicity and minorities, corruption and democratic culture, and the institutionalization and enforcement of individual rights.

Each region faces specific challenges as well. The failure of the communist state and its ideology in Eastern Europe led constitution-makers to accept unquestioningly principles like the separation of powers, judicial review, constitutionalism and human rights. This premise, as well as the type of regime change—violent overthrow versus velvet revolution—had a direct impact on the participatory nature of the constitution-making process. Some of the countries of the region adopted new constitutions following Roundtable negotiations, while others worked within the more traditional settings of Constitutional Commissions or Assemblies. Although the new constitutions were validated by referenda, the issue of their legitimacy has not been completely set aside, in part because of the elitist constitution-making process. While they are emblematic of these countries' continuous search for a constitutional identity, the new constitutions clearly signify the desire to break with the communist past. As such, they express the current prevalent outlook of the region, that the only alternative left after the fall of communism is the transition to democracy, market economy, and rule of law. The implementation of constitutional provisions represents the next step, and bodies such as Constitutional Courts have played an important role in bringing these constitutions to life.

A synopsis of some of the most significant themes currently debated by Central and Eastern European constitutionalists includes the existence and role of constitutional courts; issues of legal continuity and transitional justice; access to justice; legal culture; social and economic rights; ethnicity and minority rights; citizenship and political exclusion; the role of civil society; media rights and democratic culture; civic education, government responsibility and corruption.

Leaving behind dictatorships, corrupt regimes, institutional decay, social dislocation and violence, the post-colonial African states face an even more daunting challenge. During the past decade, the continent has been renewing its commitment to democratic values, and in the process, many African states have been reassessing the central character of constitutions in the democratic process. Thus, participatory and people-driven constitution-making has become vital to the African transitions to democracy. The constitution is no longer used just for the distribution of power, but is also seen as an instrument for addressing pressing social, economic, and cultural questions. However, the adoption of a constitution does not automatically resolve all problems and conflicts. In order to achieve

this goal, the constitution must be implemented and internalized, it must be seen as the embodiment of the people's democratic aspirations and the basis of governance.

Currently, an all-encompassing theme in the African constitutional discourse is the constitution-making process. This discourse focuses on issues of inclusiveness and participation; reconstructing the state through constitution-making; the role of the military; ethnicity and its ramifications; the role and status of women and youth; social and economic rights and their impact on equality; democratic and political culture; civic education; corruption; the role of political parties; the state and civil society; donor influence and globalization.

Research and discourses must not and should not be informed by common grounds alone. In fact, differences could form the basis for robust intellectual and policy debates. Although a number of common themes for both African and Central and Eastern European constitutional discourses could be easily identified, prior to the meeting in Warsaw there had been little, if any, dialogue between these regions. Issues of potential common interest included participation in the constitution-making process; constitution-making mechanisms and principles; mechanisms of constitutional implementation and control; gender, youth and constitutionalism; and ethnicity and pluralism in the new constitutions. It was also hoped that a dialogue between experts from these two regions would allow them to explore the question of "cultural" resistance to constitutionalism and rule of law, reflect on alternative forms or structures of government as determined by distinct constitutional dimensions, and identify commonalities and differences in constitutional thought and practice. For both regions, the discovery of a common ground for the accommodation of colliding values remains fundamental to the stability of their political order.

Thus, the motivation for this first meeting on constitutionalism in Africa and Eastern Europe was precisely to establish new lines of political and intellectual dialogue; identify issues that could become part of an on-going debate with the aim of isolating common grounds and differences; build a body of knowledge that would inform politics and policy-making, based on concrete analyses; and learn if there are any critical lessons that could be shared by both parties. These debates and discussions were to take place with due cognizance of the regions' historical experiences, the implications and legacies of these respective experiences, and the location and role of the respective regions in the global

divisions of labor and power. These are critical factors insofar as they inform the context and content of politics, the nature of institutions, the ideological predisposition of the power elite, the nature of accumulation and social reproduction, as well as relationships with external forces, ranging from multilateral institutions and donor agencies, to western governments, transnational corporations and international NGOs.

For this first meeting, four topics were chosen for in-depth discussion: reconstructing the state through constitution-making; enforcement and oversight institutions in the constitutions; constitutional approaches to identity, nationality and citizenship; and the role of civil society in promoting constitutionalism. For each major topic and selected sub-topics, constitutional experts from the two regions presented two overview papers, one for each region. Within the broad guidelines established by the organizers of the meeting, the authors of the papers included in this volume had considerable leeway in approaching and discussing their respective subjects. This explains the diversity of papers covering similar topics, illuminates some of the methodological approaches prevalent in each of the two regions, and highlights some of the most important or controversial subjects for each region.

The meeting was opened by Mahmood Mamdani's keynote speech on overcoming the political legacy of colonialism. Obviously of immense interest to the African participants, the speech plunged the East Europeans into one of the thorniest dilemmas of post-colonial Africa, and proved to be of enormous relevance for Eastern Europe as well. Mamdani challenges the idea of defining political identity and political rights in relation to indigeneity, and argues for the need to rethink and operate with political identities that are distinct from economic or cultural identities. This re-conceptualization would re-assess the political, institutional and legal legacy of colonialism, cast a different light on the alleged contemporary crisis of African political institutions, and consequently offer different solutions for the reconstruction of the state in Africa. The relevancy of this paper for Eastern Europe lies in the challenge of rethinking political identity as different from national/ethnic identity, a subject that would re-emerge during debates.

The choice of subjects for the first topic is indicative of the respective priorities in Eastern Europe and Africa. Within the broad topic of reconstructing the state through constitution-making, András Sajó tackles the issue of welfare rights in the post-communist

constitutional experience, while Issa Shivji assesses three generations of constitutions and constitution-making in Africa in a social and economic context.

András Sajó's paper belongs to an already classic debate in the literature of post-communist transition, regarding the inclusion of social and economic rights in post-communist constitutions. After demonstrating the inevitability of including welfare rights in post-communist constitutions, mainly because of popular expectations left over from communism, Sajó argues that the prevailing trend in the use of welfare rights in post-communist countries is status quo protective. In their reluctance to enforce welfare rights against legislative choices, Central and Eastern European constitutional courts in fact favor the emerging middle classes, do not protect the needy and do not extend welfare entitlements to new groups. Ultimately, concludes Sajó, when faced with social problems that were unknown or ignored during communism, this deferentialism might hamper the resourcefulness of the courts.

Issa Shivji's paper presents a starkly different picture. Africa's needs are very different, and so far, its post-colonial constitutional experience has been sorely disappointing. As Shivji points out, each generation of African constitutions has been marked by its processes of constitution-making, rationalizing discourses (modernization, developmentalism and globalization), as well as legitimizing ideologies (nationalism, socialism and democracy). Built on the remnants of a despotic colonial legal order, the liberal constitutions adopted on independence lacked popular legitimacy. Very soon, they were replaced by authoritarian constitutions whose main function was to legitimize military, authoritarian regimes. The constitutional reforms undertaken in the 1990s, leading to liberal constitutions and multipartyism, have not fared much better, despite being characterized by popular participation, freedom of the media and an active civil society. Shivji concludes by advocating the search for an alternative form of democracy for Africa, capable of reversing the effects of the failure of multipartyism, political instability and wars, unfettered globalization and donor-driven economic policies, loss of state sovereignty, and poverty.

Also within the first session, a separate discussion focused on issues of distribution of powers and state rebuilding through constitution-making. Once again, one major discrepancy in priorities between Eastern Europe and Africa is apparent from the choice of subjects. Cindy Skach re-examines the three major constitutional types present in the world

today and their respective suitability for transitional democracies, while Aaron Gana undertakes a holistic analysis of the state in Africa and of its prospects for reconstruction through constitutional engineering.

Skach presents presidentialism, parliamentarism, and semi-presidentialism, their electorally-generated constitutional subtypes, and their relation to institutional conflict. From this analysis, three conditions impact the ability to achieve a stable, effective, and democratic government: an institutionalized party system; the electoral system; and the executive leadership's relationship to parties and the party system. While not advocating any specific subtype, Skach does lean in favor of parliamentarism, and specifically its minority government subtype, as the least prone to democratic breakdown and institutional conflict.

The corresponding paper on Africa could not be more different. While Skach works with a tacit acceptance of the basic tenets of liberal constitutionalism, Aaron Gana builds his analysis on a Marxist legacy. Starting from the hypothesis that the state is a specific modality of class domination, and thus essentially a capitalist phenomenon, Gana surveys the main features of the pre-colonial, colonial and post-colonial state in Africa. For as long as Africa continues to reproduce the political economy of neo-colonialism, Gana argues, there will be no real development for the continent. Ultimately, Gana sees the way forward through the adoption of a people's constitution, which has the potential to solve the ethnic question, reorganize and legitimize state power, and re-conceptualize an internally-driven democracy.

Mechanisms of constitutional enforcement and oversight have been of great interest to constitutionalists from both regions. Human rights mean nothing if there are no mechanisms for their protection and implementation. Herman Schwartz chooses to focus on the performance of constitutional courts in their efforts to protect individual rights in Central and Eastern Europe, while Kayode Fayemi examines the independent institutions of the state in general, and assesses their relevance in terms of accountability, transparency and legitimacy.

After having closely examined the East European constitutional courts for the past ten years, Schwartz asserts that these courts have been surprisingly successful. Despite the lack of a human rights legacy, no tradition of constitutional judicial review, a history of authoritarianism, the lack of faith in the rule of law, and the legacy of a subservient judiciary, the new constitutional courts have indeed protected human rights and judicial independence.

Schwartz analyzes some of the factors that contributed to this success, including the choice of judges, the length of terms of service, and issues of standing and jurisdiction. Concretely, the courts have been actively involved in protecting welfare rights, insisted on procedural fairness, and sometimes took a very open role in controversial decisions, such as whether to abolish the death penalty. Ultimately, Schwartz concludes, constitutional courts can make only a significant, but not determinant contribution, towards transforming a country into a liberal constitutional democracy governed by the rule of law.

There is agreement in both regions that independent oversight institutions established by the constitution do have the potential to strengthen good governance, ensure accountability, and restore trust in the state. Kayode Fayemi examines Nigeria's experience in this area, and tries to assemble a catalogue of the best practices and missteps. Although there is a plethora of mechanisms of oversight in most African states, Fayemi points out that they face the challenges of real independence, relevance and legitimacy. Fayemi concludes by proposing institutional measures and principles of good governance that would help these institutions make the leap beyond the constitutional text.

In both Africa and Eastern Europe, the recent wave of liberal constitutionalism has been spectacularly unsuccessful in dealing with the ethnic question. No other issue has challenged to such an extent the ability of modern constitutions to enable stability in young or transitional democracies. At the same time, modern constitutionalism has been only partially successful in dealing with two other questions of collective identity: gender and youth. Nenad Dimitrijevic proposes a theory of liberal constitutionalism in plural societies, and subsequently analyzes the multi-national states of post-communist South Eastern Europe. Maria Nassali examines the constitution-making process leading to Uganda's 1995 Constitution from the perspective of women's participation.

Dimitrijevic starts from the assumption that in most countries of South Eastern Europe, democratic stability has not yet been achieved, to a large extent because of the relationship between national majorities and minorities. Nonetheless, argues Dimitrijevic, protection of minority rights within a liberal constitutional framework can correct this situation. In this view, minority rights do not primarily protect a group as such, but the identity and interests of the individuals who belong to the group. However, in the nation states of South Eastern Europe, this solution is not within reach, because the constitutions

themselves are inherently flawed, as the post-communist constitution-makers have enshrined the domination of the majority nation in the constitution, consequently dividing people along ethnic lines. Ultimately, concludes Dimitrijevic, the only lasting resolution is a constitutional revision changing the nature of the state toward a universalist, civic-based political unit.

Maria Nassali chooses to focus on what is considered to be one of the success stories of African constitution-making. In opposition to Eastern Europe, where women's participation and input into the constitution-making process and its outcome were negligible, Ugandan women were actively involved in the constitution-making process, and as a result the 1995 Constitution safeguards a number of victories for women's rights, including affirmative action. The challenges faced by women in Africa are greater than anywhere else, and are significantly different from those faced by women in Eastern Europe, especially in terms of education, health, economic opportunities, and recent history. Their achievements are thus doubly remarkable and a formidable lesson of political commitment and strategy.

The final topic of this first meeting between African and East European constitutional experts focused on the role of civil society in promoting constitutionalism. The aim of this discussion was not to debate the definition and forms of civil society in the two regions, but to compare strategies of involving communities and civil society groups in constitution-making; highlight the best practices in constitutional education; expound on the means of making constitutions the basis of good democratic governance (internalizing constitutionalism); and examine the role of constitutions in the development of societies, especially as instruments of social change.

In Eastern Europe, Venelin Ganev asserts that, despite constitutional experiments having been a success story in the post-1989 period, current polities are nevertheless characterized by unbalanced constitutionalism—the constitution has indeed become the supreme and revered law of the land, but it is not used in the work of government. Part of the answer to this riddle, in Ganev's opinion, lies in the sources of civic activism in post-communism, which in turn determine the role played by civil society and its impact. Ultimately, concludes Ganev, since civil society in Eastern Europe remains donor-driven, lacks resources and capacity, and is comprised of weak and disorganized groups, it is no

surprise that its impact on the internalization of constitutionalism in the countries of the region remains marginal.

The lackluster performance of civil society in Eastern Europe is not unique. Similar charges have been laid against Africa's NGOs and other civil society representatives. Sam Moyo and Kayode Fayemi's paper, however, proposes a more optimistic perspective. They offer an introductory overview of the 1999/2000 constitution-making process in Zimbabwe, which has been characterized by internal demands for democratization, and international pressures for good governance and economic reforms. Moyo and Fayemi place this process within the broader framework of best principles and mechanisms of constitution-making that have emerged from Africa's experiences, in comparison with the rest of the world. In contrast to the Eastern European discourse, this paper underscores once more the extent to which civil society is an integral part of the constitution-making or constitutional review process in Africa. Ultimately, it could be argued that although Zimbabwe failed to adopt a new constitution, it did succeed in strengthening the democratic process precisely because of the active role played by civil society in the constitution-making process.

While the papers presented at the meeting, as compiled in this volume, did justice to the issues outlined for discussion and the debates were vibrant and contentious, it was clear that this was merely the beginning of the conversation. Indeed, almost from the outset it was apparent that certain conversations ought to have preceded the meeting. There should have been a "catch up session" about what happened in and to both regions between 1989 and 2001! It also became clear that contextualizing transitions within post-colonialism and post-communism is not enough. Both Africa and Eastern Europe face real problems—political, social, economic, cultural—that vary not only between countries from the two regions, but also within the same region. Thus, constitutions are expected to provide different answers in each and every case, and we must be sensitive to this when approaching them in the context of constitution-making and constitutionalism. Furthermore, the leadership and the political and ideological shifts that took place in both regions have in some way separated scholars, activists, decision-makers and politicians.

From the papers presented and the overall discussions, four issues clearly emerged. They revolved around ideology, the role of the state, post-colonialism, and the constitution-making process.

First, while the East Europeans, based on experience, saw the socialist/communist past as a nightmare and welcomed the new market relations, the Africans were more doubtful. They argued that the science of socialism was valid, that capitalism had not succeeded in Africa, and that given the past relationship with the West, it was difficult to trust its investors, policies, and even foreign aid. This issue was never resolved, as the East European participants essentially felt that Africans did not grasp the new reality and continue to live in a “dream world.” The Africans, on the other hand, argued that the East Europeans were too quick to reject socialism, made a mistake by considering the ideology together with its concrete incarnations, and generally succumbed too readily to imperialism. They pointed out that Africa’s experiences with informal empire, the slave trade, colonialism, and neo-colonialism were enough for the region to be distrustful of this received ideology and its baggage.

The second issue concerned the role of the state. Again, the East Europeans, drawing from the repressive, pervasive and undemocratic character of the communist state, felt that the state had to be dismantled, democratized, and reconstructed in a more liberal fashion. Indeed, the very notion of the state seemed to bring back bitter memories. It was not clear, however, what structure would replace the dismantled state, although there was agreement that some elements—checks and balances, new leaders, liberal/market ideologies, and constitutional governance—could prevent the resurgence of authoritarianism. The Africans supported this position, but nevertheless felt that this must not be solely blamed on communism or socialism. In Africa, only a handful of countries could be described as having had “Afro-Marxist” regimes, yet the continent was littered with brutal and authoritarian regimes that caused just as much pain, misery and deaths in the name of promoting democracy and development. Therefore, the Africans argued that the problem in Africa was the absence of a state as opposed to too much state presence, and that the existing structures could hardly have been described as states, as they were mostly decrepit and unstable non-hegemonic structures designed to promote narrow interests or primitive accumulation.

A third issue of contention was the post-colonial nature of contemporary Africa and Eastern Europe. The Africans tried to read this reality into the East European situation, arguing that because of the Soviet domination, it could be said that contemporary Eastern Europe was in a post-colonial condition, and suffered from its consequent implications,

contradictions, and vulnerabilities. It was argued that both Africa and Eastern Europe shared a legacy of foreign domination, cultural imperialism, external pressures, and the inability of the post-colonial state to manage effectively and autonomously social, economic and political contradictions, due to structural distortions and the imposition of alien, i.e. Western values, tastes, worldviews and patterns of accumulation. The implicit solution, from the African perspective, was to wage a popular struggle against neo-colonialism and imperialism. The East European participants, from their side, rejected this analysis, pointing out that globalization had relegated theories of imperialism to the trash bin of history, and that the struggles for liberation from Soviet domination had been waged mostly by local people.

Finally, the fourth issue involved the constitution-making process. While the East Europeans were formalistic and legalistic in their approach to constitution-making, carving very little room for process, participation, and the role of civil society, the African participants held a fundamentally different view. They saw this shocking attitude as the consequence of excessive Western, especially American influence on the political transition and the construction of post-communist political values and institutions. In fact, some of the East European participants felt that opening up the process of constitution-making to civil society, without controls (not quite defined as to who would delineate, initiate and monitor such control) could be an invitation to anarchy. The Africans, on the other hand, saw constitution-making as a revolutionary opportunity for civil society and ordinary people to unseat the power elite, and reconstruct the state and the platforms of politics by redefining relations of power and politics. Constitutionalism was seen as the non-bloody solution to the national question. Emphasizing process, they insisted on inclusion, participation, transparency, consultation, and a bottom-up or people-driven approach to constitution-making. The East Europeans appreciated the importance of process for Africa, but believed that they had passed that stage. The primary challenge now was how to legitimize the constitution, make it workable, and strengthen it to become the basis of good governance.

Undoubtedly, the objectives of this first meeting were met. New lines of dialogue and research were opened up, common grounds and differences were identified, and a sustainable line of work for future intellectual engagements was built. It was clear that both regions shared commonalities, but also had many differences that make it imperative that lessons be drawn from their respective experiences. Both regions start from different points

in terms of developmental levels, resources, political structures, level of stability, interest of investors and donors, and other capabilities. These differences mean that we must continue to pay attention to specifics. More importantly, we must keep the debate open and lively if its goal is to connect activists, scholars, researchers, former and practicing politicians and political leaders from Africa and Eastern Europe.

The follow-up meeting, held in Kampala, Uganda, in January 2002, was hosted by the East African Centre for Constitutional Development. This second meeting between African and East European constitutionalists deepened the debate around some of the topics first introduced in Warsaw, particularly ideological issues, and opened up new topics of conversation of relevance for both regions, such as constitutionalism and the impact of globalization. We can only hope that future meetings would continue to build on the lines of communication and work already established.

References

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