BOOK REVIEWS

Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction by Heinz Klug (Cambridge: Cambridge University Press, 2000) pages i–xi, 1–270. Price $64.95 (hard-cover). ISBN 0 521 78113 2.

The role of law in political transitions is a hot topic for legal sociology and legal theory, and South Africa is the foremost case study in this area. Just as South Africa for a long time represented a paradigmatic wicked legal system, it now assumes a similar importance for studies of 'peaceful', law-bound emergence from such wickedness. Indeed, there is something distinctively legalistic about the South African transition. Whereas the emphasis in Eastern European transitions has been the fostering of markets and capitalism, South African society, already run along capitalist lines, gives its *Constitution*[1] pride of place in the post-apartheid constellation. South Africa relies heavily on law's symbolic capacity for marking new beginnings.

But there is a sense in which law will always disappoint on this score, will never live up to the powers of transformation and justice with which we invest it. This is especially true in South Africa. An ethical legal system is not possible in the context of grossly exploitative economic structures; the legal system carries more of the burden of transforming society and legitimising power than it can truly bear. One result may be an uneven political development. For instance, a key difference between South African and Eastern European transitions is that, while the latter have been overtly — though not necessarily effectively — concerned with the fostering of 'civil society', in South Africa this phrase only circulates to lament civil society's puzzling poverty in the post-apartheid era. Where, as in South Africa, the conception of transition is overwhelmingly legalistic, such substantive changes are arguably 'crowded out' of the discourse and the dynamic of transition.

The distinctively legalistic nature of South Africa's post-apartheid transition naturally makes Heinz Klug's study of constitutional change in South Africa a significant text for those interested in the law's role in political transformation. However, Klug's theme of 'global constitutionalism'[2] will ensure that he captures an even wider audience. The last 15 years of the 20th century saw a proliferation of new constitutions identifiably American in pedigree, combining civil and political rights, strong judicial review and a federal system of power-sharing. This convergence of ideas and ideology arguably reaches its peak in

[1] *Constitution of the Republic of South Africa Act 1996* (South Africa).

[2] Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000) ch 3.

South Africa, where it is expressed as an astonishing list of rights (including socioeconomic and cultural rights) and a powerful Constitutional Court.

But it would be a mistake to see the adoption of this Enlightenment model of constitutionalism as automatic or in some way 'natural'. Klug asks the following question: how does a left-wing revolutionary party, having suffered years of oppression under a European legal system in which the role of judges was instrumental, come to accept and then advocate a constitutional model distinguished by Western liberal ideas and a powerful judiciary? As recently as 1990, the leaders of the African National Congress were highly critical of a court-administered Bill of Rights. Many believed such a system would not only risk another white oligarchy, but might obstruct the party's plans for transformation.

Klug's answer to his own question is not altogether compelling. At times, the book seems to lack a strong thesis, appearing more a meditation on the theme of contemporary constitutional 'glocalisation' (the interpenetration of the global and the local) than a set of solid theoretical arguments. However, there is a visible through-line. Klug's first task is to take full stock of the globalisation process, and he examines the conceptual issues at stake with thoroughness. Since the end of the Cold War, we have seen, through the 'emergence of a thin, yet significant, international political culture',[3] a convergence or narrowing of what is deemed possible or reasonable in constitutional engineering. But at the same time there is a widespread recognition that constitutional courts — hampered by problems of access and highly dependent for their effectiveness on other (sometimes antipathetic) arms of government — are weak institutions for protecting populations from state power.[4] Is the popularity of constitutional courts explained by the exhaustion of alternatives, or perhaps intellectual fashion?

Klug finds that in South Africa the adoption of the hegemonic model is explained by that model's ability to manage or even suspend indefinitely political conflicts which threaten, at the moment of transition, to engulf a society in violence.[5] Whereas Clausewitz argued that war is politics by other means,[6] the South African example shows us that legally structured political debate and disagreement, confined to the constitutional arena and mediated by a constitutional court, can be politics, and perhaps even war, by other means. Unresolvable political differences can be contained. According to Klug, the function of a new constitution is not, as Teitel has argued,[7] to foster new conceptions of justice during periods of transition.[8] Such a 'focus on justice blinds us from seeing the external, institutional and cultural dimensions, which ... play a constitutive role in framing the constitutional choices that different political actors may deploy in

[3] Ibid 7.
[4] Ibid 1.
[5] Ibid 14.
[6] See Carl von Clausewitz, *On War* (first published 1832, Michael Howard and Peter Paret trans and eds, 1984 ed) [trans of: *Vom Kriege*] 87.
[7] Ruti Teitel,'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale Law Journal* 2009, 2014.
[8] Klug, above n 2, 7.

the process of political change.'[9] Of course, constitutions *do* have a transitional function, but it is one where 'constitutional indeterminacy plays a pivotal role in integrating competing forces in the post-cold war process of state reconstruction. It is law's very indeterminacy ... that characterizes the relationship between law and politics.'[10]

By 'indeterminacy' Klug means, firstly, the distinctive indeterminacy of a constitutional text. Constitutions leave much unsaid. That silence operates as a vacuum which pleads to be filled and thus as a mechanism for legitimating the decisions of constitutional courts. Examining *S v Makwanyane*,[11] the case which declared the death penalty unconstitutional, Klug notes that:

> The Court reached its unanimous conclusion despite evidence that capital punishment was subject to extensive debate in negotiations before and during the constitution-making process ... Thus the Court concludes that the failure of the founders to resolve this issue left to the Constitutional Court the duty to decide [on the death penalty's constitutional consistency].[12]

Here the Court stamped constitutional (and judicial) supremacy indelibly on the South African political order, establishing itself as arbiter of unresolved political issues.

But the indeterminacy of constitutionalism also lies with the capacity of courts to arbitrate conflict. Legal disputes, especially constitutional disputes, do not have cut and dried answers and often it is possible for a legal determination to operate in the fashion of a negotiated settlement. In *Executive Council, Western Cape Legislature v President of the Republic of South Africa*,[13] a matter dealing with the autonomy of provincial governments, the South African Constitutional Court negotiated its way along narrow political straits, allowing the Western Cape Province to secure its immediate interests, but managing to set clear boundaries on provincial and presidential autonomy. Meanwhile, in the *Constitutional Certification* judgments,[14] the Court fashioned for itself a position above the political process but did so using arguments and reasoning which are in fact masterfully political, negotiating 'its way through conflicts which could elicit direct attacks on the independence of the judiciary or the tenure of individual judges'.[15] During a transition, Klug argues, the constitutional arena becomes a space for the mediation of otherwise violent conflict.[16] The novelty of that space — the fact that its rules and conventions are yet to be fully settled —

[9] Ibid 6–7.
[10] Ibid 7–8.
[11] 1995 (3) SALR 391 (CC).
[12] Klug, above n 2, 146–7.
[13] 1995 (4) SALR 877 (CC).
[14] *Ex parte Chairperson of the Constitutional Assembly; Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SALR 744 (CC); *Ex parte Chairperson of the Constitutional Assembly; Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SALR 97 (CC).
[15] Klug, above n 2, 158.
[16] Ibid 14, 158–9.

allows a constitutional court to exercise political discretion without overtly compromising its legitimacy.[17]

One weakness in Klug's argument is that every supreme municipal court, whether or not it functions as a dedicated constitutional court and whether or not it is a 'transitional court', is concerned with the absorption of conflict through the determination of institutional uncertainty. At the end of a key chapter, Klug seems to admit as much, but the terms of the admission are, characteristic of his writing, unclear.[18] He observes that:

> It is only in times of heightened social conflict — whether based on a rights consciousness engendered by constitutionally endorsed yet frustrated aspirations, or on social changes beyond the Court's responsive capacities — that the power of the Court to make these determinant institutional choices [as in the cases mentioned above] is politically exposed and brought into question, and when the co-ordinate branches of government will successfully assert a greater role in either deciding on the parameters of the Constitution or abandoning it altogether.[19]

Is Klug saying that, outside moments of crisis, a supreme court's role remains unquestioned? Is South Africa not in the midst of a crisis where constitutionally endorsed rights are frustrated?

The reality, as well as the language necessary for describing that reality, are far more complex than Klug suggests. In Australia, for example, a nation with settled legal institutions and few historical moments of genuine constitutional crisis, the High Court, between 1992 and 1999, came under sustained attack for its decisions on indigenous and implied rights. Most significantly, the Australian government, controlling the lower house of Parliament and receiving support from the Senator holding the balance of power in the upper house, was able to legislate roughshod over the High Court's decision in *Wik Peoples v Queensland*,[20] the most important post-*Mabo*[21] decision on native title.[22] The High Court had failed to absorb political conflict and the co-ordinate branches of government had strongly asserted their supremacy. But this is not to say that the High Court was 'politically exposed'.[23] In some ways, the extra-political station of the common law was affirmed, not in a cynical or strategic way — *Wik* was, after all, a split decision with diversity among the majority —but as a source of justice and a mode of reasoning well apart from that which characterises the normal political process. It is not correct to assume that the judicial 'shake-up' of the political landscape — whether or not that shake-up results in a 'loss' to other branches of government — is directly linked to the question of legitimacy.

Perhaps the question of the legitimacy of judicial institutions is more directly linked to faith in the law itself. Klug's views on this question are important to the

[17] Ibid 158–9.
[18] Ibid 158–9.
[19] Ibid 159.
[20] (1996) 187 CLR 1 ('*Wik*').
[21] *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
[22] *Native Title Amendment Act 1998* (Cth).
[23] Klug, above n 2, 159.

architecture of his book. He finds that, since anti-apartheid forces in South Africa viewed the judiciary as integral to the regime of oppression, and since law had been put to use for those oppressive purposes,[24] the adoption of the rights/review model is better explained by the 'dynamics of the democratic transition'[25] process itself — that is, the need to absorb conflict — than by faith in law.

However, Klug can only make out this argument by dismissing out of hand Teitel's claim that 'transitions imply paradigm shifts in the conception of justice.'[26] As Klug's own context-heavy analysis suggests, the key to making sense of Teitel's contribution is to decide what it means in specific environments. The transitional function of the *South African Constitution* can probably be expressed and understood in a number of ways, but surely one of the most important is the project of reuniting legality and legitimacy. After all, political power under apartheid was often wielded under and according to positive law, but it was never legitimate. If, as David Dyzenhaus has argued at length,[27] the legitimation of political power is key to the South African transition, then Klug is errant in focusing all of his analysis on the putative role and function of the Constitutional Court. Such a focus will always allow the analyst to argue (whether or not the analysis is correct is another question) either that the key constitutional 'truth' is the Constitutional Court's political function, or, stating the matter differently, that the key constitutional role of the judiciary sits with the Constitutional Court's capacity for high-level political arbitration. Such arguments only become *more* manageable in periods of transition, when political conflict is strongly at the fore.

If we are thinking about transitional justice in terms of the marriage of public power's legitimacy and legality, then other legal processes become important too, such as those contained under the administrative law banner. Administrative law processes generally take place well away from the purview of the most exalted court but this does not undermine their constitutionality in a broader sense. Moreover, in South Africa administrative law has been given 'big C' constitutional status via the inclusion in the Bill of Rights of key administrative law rights.[28] The job of protecting these rights falls, as with all others in the Bill of Rights, not only to the superior courts, but also to courts generally, including the magistracy. Furthermore, administrative law's implication in complex

[24] Ibid 70.

[25] Ibid 47.

[26] Teitel, above n 7, 2014. Klug could also be accused of misrepresenting Teitel. As part of his overall thesis, Teitel argues that courts are 'guardians' of an emerging conception of justice: at 2032. But he does not shy away from the bluntly political component of that role, arguing that 'the transitional rule of law clarifies a place and a role for hyperpoliticized adjudication': at 2035. This seems to locate Teitel much closer to Klug than Klug suggests. See also Ruti Teitel, *Transitional Justice* (2000).

[27] See, eg, David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991); David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998).

[28] Section 32 of the *Constitution* sets out the right of 'Access to Information'. Section 33 sets out the right to 'Just Administrative Action'. In line with constitutional requirements, these rights have been given legislative effect in the *Promotion of Access to Information Act 2000* (South Africa) and the *Promotion of Administrative Justice Act 2000* (South Africa).

institutional change ensures its transitional character. There is little doubt that, far more than is the case for constitutional litigation proper, administrative law reform takes up the practical, real world challenge of unifying legality and legitimacy. Perhaps a broader lens, one that looked at public law as a whole, would have substantially altered Klug's conclusions concerning the nature and significance of South African constitutionalism.

Other theoretical weaknesses, less important to its central argument but deserving of comment, are revealed early in Klug's book. He labels 1980s neo-liberalism as a 're-emergence of a nineteenth century liberalism' and suggests that such re-emergence has 'had profound implications for the politics of Constitution-making in the cold-war era'.[29] But what are those implications? There is very little that is distinctively neo-liberal about the post-Cold War constitutions and the *South African Constitution* in particular. The *Constitution* protects property,[30] but there is nothing distinctively *neo*-liberal about that, especially in constitutional terms. Klug apparently associates the re-emergence with key elements of the hegemonic constitutional model such as 'individual human rights and multiparty democracy'.[31] The result is an apparent assimilation of the neo-liberal marketisation of government with the liberal notion of limited public power, as in the liberal rule of law. In truth, contemporary neo-liberal ideologies and practices, often antithetical to such liberal staples as due process, must be sharply distinguished from the classical liberalism associated with the rule of law. Moreover, 19th century liberalism accepted basic distinctions between state and society. Contemporary neo-liberalism accepts few such distinctions.

These comments aside, the central chapters of Klug's book present a thoughtful and often fascinating account of the constitution-building process. He draws on the insider's perspective, revealing the role of political contingencies and of transnational lobbying by constitutional carpetbaggers. In some ways, South Africa's constitutional transition has been a meeting place for the world. Overall, Klug's book is to be recommended for its unusual attempt to place constitutional theory in a concrete political context.

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29 Klug, above n 2, 23.
30 Section 25.
31 Klug, above n 2, 24.
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