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Constitution-building court actors in South Africa and Kenya

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Declaration

I certify that the thesis I have presented for examination for the MPhil/PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

I warrant that this authorisation does not, to the best of my belief, infringe the rights of any third party.

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Abstract

My dissertation contributes to the theory of constitution-building, treating new constitutions as points of embarkation to fulfil constitutional change and continuity promises, and to manage their tensions, from the perspectives of court actors in South Africa and Kenya. It dissects and critically analyses the delineation and distinctions of constitution-building as a category of constitutional change involving interpretive activity of court actors that is structured within broader political processes of evolving legitimate constitutions in deeply divided societies. This interpretive activity is both novel and pivotal for cultivating constitutionalism in states like South Africa and Kenya, which have lacked deep historical roots of constitutionalism. I offer a descriptive account of their constitution-building court actors who recognise themselves as committed to incrementally fulfilling preferential outcomes of the changes ordained by their respective constitutions through politically effective legal processes. My thesis starts from the premise that the Constitutions of South Africa and Kenya, despite their numerous compromises on fundamental norms and issues by constitution makers, were intended to be implemented in morally and legally fit but politically feasible ways. In so far as constitution-building court actors focus on agreement-making between branches to make constitutions effective in non-ideal contexts for liberal constitutionalism, constitution-building has the virtue of bringing the branches closer together in their respective areas with better results for constitutionalism to nevertheless gain traction. Nonetheless, this does not mean that constitution-building enables court actors to produce coherent and sustainable constitutional results. Rather, as my thesis establishes, constitution-building enables those actors to explain the incoherence and imprecision inherent in their constitutional activities.

In this way, my dissertation further contributes to the research on constitutional change in Africa by re-examining the notion of court actors building a constitution both as a key normative dimension of bridging deep division and as an instrument for achieving transformative outcomes. This is done by drilling further into the experiences of South Africa and Kenya. Accordingly, I contribute too to the questions that are occupying South African and Kenyan constitutional scholars, and indeed constitutional scholars in other deeply divided societies in Africa.

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Contents

Introduction

In a June 2022 address to the nation to commemorate its fifty-eighth independence anniversary, the Kenyan president at the time, Mr Uhuru Kenyatta, accused constitutional judges of testing the limits of the Kenyan Constitution 2010, in a manner that derailed popular aspirations for constitutional change.[1] This speech fitted a pattern of acrimonious relations between the executive and judicial branches in Kenya, going as far as presidential retaliatory obstruction of appointment of new superior court judges.[2] Consequently, prospects for constitutionalism in Kenya were increasingly cast in doubt.[3] Weeks after Kenyatta's recrimination, pundits and politicians alike accused South African Constitutional Court judges of colonial mindsets that derailed the proper implementation of the Constitution of South Africa, 1996, following their decision to commit a former president to imprisonment for contempt of court.[4] This ruling triggered mayhem in major urban centres. Fearing escalation, the government was forced to deploy the army in urban centres to restore civic order for the first time in post-apartheid South Africa.[5]

What had the Kenyan and South African judges done to warrant these kinds of laments and accusations? What had their antagonistic critics expected of them and why? In Kenya, the presidential remonstrance this time evolved from judgements that forestalled a 2021 initiative to amend the Constitution of Kenya, 2010, through a popular but unprecedented process.[6] According to President Uhuru Kenyatta, who had initiated the process in concert with the main political opposition leader, substantial amendments to the 2010 Constitution were necessary to cure defects that efforts to implement its stipulations had unveiled, like insufficient representation and inclusion of all ethnic groups in democratic politics. Under the initiative, proposed amendments would facilitate negotiated ethnic inclusion in national government and increase the number of elected and appointive posts, among other issues. Nevertheless, assorted interest groups filed litigation against it, some of whom opposed the proposed changes arguing they were superficial and inadequately transformative of the prevailing constitutional settlement, and others because they distrusted the political leaders. This

[1] Watch President Kenyatta addressing Kenyan at https://www.youtube.com/watch?v=re3y638G8Oo (downloaded 05/06/2021). See also See https://www.tuko.co.ke/politics/436777-president-uhuru-kenyatta-bbi-a-dream-deferred-one-day-happen/; https://www.the-star.co.ke/news/2021-12-12-uhuru-bbi-is-a-deferred-dream-one-day-it-will-be-realised/;

[2] The refusal generated a string of litigation. See *Benjamin vs Chief Justice of the Republic of Kenya & Anor; Judicial Service Commission (JSC) & 13 Others* Constitutional Petition E196 of 2021 (2022) KEHC 10072 (KLR) (selective appointment of some judges from a mandatory listing was discriminatory); *Adrian Kamotho Njenga vs Attorney General & 3 Others*, High Court Petition No.369 of 2019 (2020) eKLR (President's failure to appoint persons recommended for appointed as Judges violates the Constitution).

[3] According to one researcher, political leaders might hijack a democratic constitution in Kenya due to residual structural features of governance surviving from the previous constitutional order like neo-patrimonialism, whereby "state affairs are precariously linked to the president's idiosyncrasies and whims, as opposed to the rule of law and constitutionalism". See Shilaho, Westen (2016) "The Paradox of Kenya's Constitutional Reform Process: What Future for Constitutionalism?" Journal for Contemporary History, Vol.81, No.2, pp.184-207, at p.195.

[4] See *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State vs Zuma & Others (2021) ZACC 18*, decision handed down on 29 June 2021.

[5] See https://www.news24.com/news24/southafrica/news/unrestsa-9-days-of-anarchy-timeline-of-violence-in-kwazulu-natal-gauteng-20210717; https://www.bbc.com/news/world-africa-57818215

[6] More information on the Initiative can be found at its website https://www.bbi.go.ke/

litigation, which I discuss in detail in subsequent chapters, succeeded at the High Court[7] and subsequently at the Court of Appeal.[8] Judges in both courts reasoned, inter alia, that they needed to protect a 'basic structure' of the 2010 Constitution, that it was necessary to prevent constitutional reauthorizing precipitated by a president, apprehending manipulative motives, and that proposed changes could expand to negatively impact judicial authority. Considering the uncertainty, and possibly underplaying trade-offs from any substantial benefits of proposed constitutional changes, the superior court judges largely held they were bound by certain uncodified constitutional norms to forestall them. Although the apex Supreme Court overturned some declaratory orders of the superior courts in March 2022, litigation ultimately succeeded in suspending the amendment initiative.[9] The larger result, on which I build further analysis, was an introduction of new, but confusing understandings in public discourses of constitutional transformation projects, greater acrimony between government branches, and a legalistic entrenchment of the 2010 Constitution from possibility of amendment in the near future, despite any defects it may reveal.

As for South Africa, public fury followed the Constitutional Court committing former president Jacob Zuma to imprisonment in June 2021, after finding him guilty of egregious defiance of its orders to appear before a commission of inquiry on state corruption.[10] Some critics read the decision as a low watermark of a legalistic and formalistic approach to constitutional norms and issues, arguing furthermore that judges were inadequately reflexive when absorbing alien (read 'Eurocentric') notions to interpretate the Constitution of South Africa, 1996.[11] As violence escalated, it exacerbated racial and political cleavages in constitutional discourses, with loyalists of the jailed former president vocally accusing the courts of heuristic power grabs to privilege factional interests.[12] Antagonistic critics expressed opinions in diverse media arena blaming court actors for using strategies of constitutional interpretation that mischaracterised the structure of South African society and its problems of deep racial divisions.[13] Others derided a judicially crafted rule of law in South Africa as a fiction that was deforming constitutionally enshrined aspirations for radical societal

[7] *David Ndii & Others vs Attorney-General & Others*, Petition E282, E397, E400, E401, E402, E416 & E426 (Consolidated) of 2020, High Court of Kenya (13 May 2021).
[8] *Independent Electoral Boundaries Commission vs David Ndii & Others* Civil Appeal No. E291 of 2021 (20 August 2021).
[9] I deal with the Supreme Court decision when addressing the Kenyan case study in subsequent chapters.
[10] Jacob Zuma, who was still popular with segments of the public, retaliatorily accused the Constitutional Court judges of taking the country back to apartheid legal order. See https://www.nbcnews.com/news/world/south-africa-s-former-president-zuma-compares-judges-apartheid-rulers-n1273084
[11] See https://www.kaya959.co.za/watch-is-jailing-zuma-worth-killing-people-and-destroying-the-economy-ask-moeletsi-mbeki/.
[12] For instance, see the statement of African National Congress party Secretary-General and Zuma supporter at https://www.news24.com/citypress/politics/ace-magashule-defends-zuma-and-claims-there-are-others-in-charge-of-the-anc-20210824.
[13] See Fakir, Ebrahim "The South African Constitution and its malcontents" 9 June 2021, Politics 360, available at https://www.polity.org.za/article/the-south-african-constitution-and-its-malcontents---is-the-constitution-permissive-or-prohibitive-of-social-and-economic-justice-2021-06-07 For academic criticism of the "worship" of the constitution, see Modiri, Joel (2018) "Conquest and constitutionalism: first thoughts on an alternative jurisprudence" South African Journal on Human Rights, Vol.34, issue 3, pp300-325.

transformation, asking "whose law is it anyway?"[14] Some critics used the uproar to push for constitutional change, arguing it was evidence that large social segments no longer believe the constitution that iconic President Nelson Mandela had signed into law on 10 December 1995, can usher in a fairer society for all who live in South Africa, adding to growing public disenchantment and even perturbation with the constitution.[15] Yet the judges too had many vocal defenders, including senior government officials and interest groups who were concerned with the orientation of criticism to undermine court actors in their ability to enforce constitutional rules against politicians accused of corruption.[16] Others praised the courts and defended greater judicial domestication of liberal constitutionalism.[17]

In any situation of constitutional disagreements, no significant court decision can ever meet with universal or unanimous approval. Nonetheless, what was revealed in the judicial criticism above was sharp and surging disagreement amongst national actors concerning the rationales and purposes undergirding constitutional change in both South Africa and Kenya. Some common general trends were observable; criticism shifted from public debate of the rightness and wrongness of specific judgements to acrimonious contestation over whether constitutional interpretations that courts favoured were apposite to achieve certain societal changes, before ultimately unsettling public confidence in the current constitutions. Of interest for this dissertation is that the criticism revealed substantial disillusionment amongst diverse publics that constitutional change was faltering in the hands of apex court judges as well as judges of other superior courts. Apparently, these court actors were neither sufficiently nor appropriately transformative, or they were deliberately crafting constitutional interpretations to deflect popular expectations due to dubious judicial strategizing, which some critics registered as counter constitutionalism and as serious intellectual failure.[18] Critics sought to nudge court actors to heed warnings that a time was imminent when protecting vernacular ideas of the constitution would be achieved through radical constitutional change.

I contend that these vignettes illuminate several significant tensions of working with an expansive constitution as a single currency of exchange for conflicting values and interests in states where national actors hardly agree on constitutional norms and matters. While the Constitution of South Africa 1996 and the Constitution of Kenya 2010 adopted a slew of

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[14] See Sisulu, Lindiwe "Whose law is it anyway?" Mail & Guardian, 8 January 2022, available at https://mg.co.za/opinion/2022-01-08-lindiwe-sisulu-whose-law-is-it-anyway/ For counterargument, visit https://www.news24.com/news24/opinions/columnists/karynmaughan/karyn-maughan-sisulu-echoes-zuma-in-baseless-attack-on-mentally-colonised-black-judges-20220108.

[15] See Roux, Michele & Davis, Dennis (2019) Lawfare: Judging Politics in South Africa, Jonathan Ball Publishers; Corder, Hugh, (2016) Constitutional Reform in South African History in The Quest for Constitutionalism since 1994, Routledge, pp.181-194; Johnson R. W (2010) South Africa's Brave New World: The Beloved Country Since the End of Apartheid, Penguin, UK; Foster, Douglas (2012) After Mandela: The Struggle for freedom in Post-Apartheid South Africa, WW Norton & Co.

[16] For a statement by acting Chief Justice Raymond Zondo, see https://www.iol.co.za/news/politics/sisulu-crossed-the-line-by-insulting-the-judiciary-says-zondo-eb6fb501-8a1a-45ab-b5d1-274a7a8d56b7

[17] For some analysis of this argument, see https://theconversation.com/historic-moment-as-constitutional-court-finds-zuma-guilty-and-sentences-him-to-jail-163612 Also see https://www.hrw.org/news/2021/07/08/victory-rule-law-south-africa.

[18] The notion that judicial actors were inadequately transformative due to a conservative legal culture is addressed in Roux, Michele & Davis, Dennis (2019) Lawfare: Judging Politics in South Africa, Johannesburg & Cape Town, Jonathan Ball Publishers.

novel institutions and procedures under demands to completely repudiate many aspects of previous constitutional orders, their framers left many aspects of their operationalisation to future legislation and secondary rulemaking. Yet, the discourses above engage critiques of poor, erroneous or misguided, and deliberately obfuscating implementation of these constitutions. This idea of implementation moreover encompasses several notions, which in my thesis denote multifaceted aspects of constitution-building. To start with, it denotes the notion of evolving or consolidating a constitution as a hierarchical norm-in-the-making to regulate behaviour of public officials and citizens alike. What is implicated is a familiar idea of a constitution as articulating basic, broad principles, such that court actors will always be able to assess whether any given official conduct is or is not constitutional. Additionally, it extends to the principles and practices of methods of actualising constitutional change outcomes which are publicly associated with multifunctional constitutions.[19] This means constitutions are supposed to be instrumental for diverse objectives, like transformation, or strengthening national cohesion, or building democracy and the rule of law. Moreover, some of these functions might be of a political nature. Furthermore, it poses the iteration and actualisation of outcomes of constitutional change as an intellectual endeavour. Which means court actors, particularly apex court judges, are not merely asked to settle constitutional disputes in accordance with the law, but additionally, to act as specialist who develop their own principles and doctrines of law, and as legal innovators who seek novel solutions as they reimagine more just societies under a new constitutionalism. These notions singly and cumulatively underline the criticism of the roles of South Africa and Kenyan court actors illustrated above. Yet, if we take the criticism at face value, what is suggested is that court actors, despite their immersion in contexts of deep societal division on constitutional issues, can simultaneously enforce the constitution in a supposedly clear-cut legal sphere, re-imagine the nature of the constitution on behalf of the collective diverse publics, instrumentalise the constitution to serve conflicting ideologies, and still manage to be more reflexive about their roles in a larger scheme of things. The mental image produced here is of court actors with specialised and sensitive constitution-building roles.

From the vignettes, it matters greatly for the credibility of their constitutional codification efforts, how and why South African and Kenyan court actors aim to connect the dots between ostensibly conflicted, expansive, multifunctional constitutional charters, their constitutional change judicial decision-making, and the broader political and legal relations in which they are immersed actors. Notably too, how such dots are connected is transfigured, if not disfigured, by divisive and probably diametrically opposed societal understandings of the forms and functions these constitutions should take. The courts offer a milieu in which the agenda of constitutional change is determined. They are also custodians of constitutional change discourses. Within such discourses, critics and supporters alike consider courts as a laboratory for an intellectual endeavour of constitutional implementation and ask why court actors cannot be more intellectual when this is precisely what the problems of deeply divided South Africa and Kenya demand. Arguably this depiction makes

[19] Breslin points out seven functions, including transformation. See Breslin, Beau (2009) from Words to Worlds: Exploring Constitutional Functionality, Baltimore, John Hopkins University Press, pp.4-7, 11. Transformation is one of the functions constitutions perform some of the time, at pp.30-44.

courts an important arena for examining the constitutions of these deeply divided societies and the constitutionalism they engender. It also invites attention for deeper scrutiny on the roles and functions of these courts.

Purpose of research

My research serves three purposes. Firstly, to explore the roles of court actors in fashioning constitutional change and continuity in African contexts of fundamental disagreements on constitutional issues, including foundational constitutional norms. I will use South Africa and Kenya to explore whether and how these actors can re-imagine constitutional change within their immersive landscapes, thereby adding new knowledge to a contextual constitutionalism that is rooted in African projects of constitutional codification.

Secondly, I aim to suggest constitution-building as a framework for analyzing this fashioning of constitutional change by court actors, to make multifunctional, expansive yet compromise-anchored constitutions politically effective, legally tenable, and normatively fit. I define constitution-building as a court-centric iteration of constitutional change, whereby court actors devise interpretational activities to make constitutions produce their expected change outcomes.

In deeply divided South Africa and Kenya, as exemplars of deeply divided societies, such a link while necessary, does not mean that methodologically coherent and cohesive interpretive activities are practicable, or even desirable. My third purpose therefore is to explore the practicality and desirability of constitution-building "work" of court actors in the context of deeply divided societies like South Africa and Kenya. Either court actors can manipulate constitutional change to specified ends, or they cannot because their constitution-building strategies fail to overcome associated challenges. Nevertheless, their constitution-building might still produce a viable constitutionalism.

Research questions

1. How do court actors ideate, iterate, and leverage the purposes and requirements of constitutional change and continuity in South Africa and Kenya based on their expansive, multifunctional constitutions, and considering circumstances of their status as deeply divided African societies?
2. What forms of constitution-building do South African and Kenyan court actors produce, and what are their respective value-adding to constitutional codification projects in these states? Is constitution-building practicable and desirable?
3. What does the comparative experience of constitution-building by court actors in South Africa and Kenya illuminate concerning the functions of their constitutions to achieve a new constitutionalism?

Conceptual approach

Several studies approach constitutions as containing basic rules which are proclaimed to be timeless and universal based on objective criteria and applicable irrespective of one's culture opinions achievements or origins, etc. Moreover, the constitution is to be enforced against public officials and between individuals who have no affinity or contract with each other, except common citizenship. Accordingly, all courts in the judicial system will tend eventually to have a unified jurisprudence. That does not mean that verdicts in a given court do not conflict with that of another. It means when courts have differing opinions on what the law is, it will not be long before such differences disappear, and a uniform

interpretation emerges. On the other hand, some national actors view their constitutions as evolving agreements on foundational norms of their state. They are neither final nor fixed. But serve as points of embarkation to fulfil assorted objectives for which they are enacted. For instance, Kenyan judicial actors have proclaimed on their website their view of the Constitution of Kenya 2010 as a blueprint for social transformation. In their own view therefore, the role of court actors is not just to settle disputes, but to reposition the judiciary to be an engine of development and custodian of constitutional social transformation. In fact, much of their understanding has been borrowed from constitutional precepts developed in South Africa, where the court actors have repeatedly articulated the Constitution of 1996 as a transformative, non-typical constitution.

Constitution-building is not a novel concept. Various scholars have used it descriptively to frame and rationalize choices of constitutional change purposes, mechanisms, and procedures, as I will discuss further. In essence, there is a branch of constitution-building research examining the effect of institutional policies and processes on constitutional evolution, and a plethora of institutions is assessed for these purposes, including formal and informal institutions.[20] In my dissertation, I aim to build on a distinction between new institutional theory usage of constitution-building in political science, and the constitutional theory elements of the concept. This distinction will enable me to conceptualize why and how court actors autonomously develop their constitutional change epistemology. Since the focus falls on these actors, it is by extension approaching constitution-building as interpretational activity to make constitutions produce outcomeses.[21]

Various concepts are used by constitutional scholars to describe and rationalise constitutional change. Constitution-making, which I will treat as different from constitution-building since it is more concerned with enacting new constitutions, is one dimension of constitutional change, perhaps its most vivid considering its remarkable foundational scope.[22] Others are constitutional amendments and changes via constitutional (re)interpretation. In addition to functional concepts, like rupture, revision, and incrementalism, there are conceptual rationalisations for legitimacy or illegitimacy of constitutional change, and outcomes like transformation, e.g., the assertion that constitutional change "*corresponds to images of transformation through the perpetual interaction of formal and informal mechanisms*".[23] Constitutional change is evidently likely to be a protean term, whose meanings shift in legal and political theory. Hence,

[20] See Farrell, Henry & Heritiere, Adrienne "Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe" Governance: An International Journal of Policy, Administration, and Institutions, Vol.16 No.4, pp.577-600.

[21] This does not necessarily have to be by via interpretation since framers can provide for a variety of democratic decision-making procedures as part of design of constitutions. See Frey, Bruno & Stutzer, Alois "Direct Democracy: Designing a Living Constitution" in Voigt, Stefan (ed) (2013) Design of Constitutions, Cheltenham, UK & Northampton, MA, Edward Elgar Publishing, pp.485-526.

[22] Constitution-making has been defined as the process "not only for making the constitution but generating or creating the environment, promoting the knowledge, and facilitating public participation that are conducive to a good constitution and to the prospects of implementing it." See Brandt, Cottrell, Ghai & Regan (2011) Constitution-making and reform: Options for the Process, Interpeace, p.13.

[23] Contiades, Xenophon (ed) (2013) Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA, Oxon, Routledge, at p.2. (The contributors in fact primarily deal with constitutional amendments in fifteen EU member states along with Canada and the US).

my focus is also influenced by considering what methodology would be suited to analyse constitutional change in South Africa and Kenya, specifically from the understandings of court actors.

Constitution-building as I approach it substitutes ideas or perspectives of a comity of compliance for that of enforcement. Studies of enforcement are common in contemporary constitutional studies, including in Africa, based on approaching constitution as supreme laws that entrench individual rights. Constitution-building compliance, however, is concerned with practical implications of constitutions as artificial constructs of basic rules on which everybody supposedly will agree with time. But as constructs they do not hide the fact that from the perspectives of multiple groups and actors in the state, constitutional rules represent ideas of some and not others, and they conjure an idea of law that might operate on a non-consensual basis against peripheral actors. Since compliance is be based on a perspective of using law to bridge divisions, and not merely enforcement against holdouts backed by monopoly of force in the state, then it shifts the focus of law to building relationships. How building relationships helps us understand the rules of constitutional conduct an area for further study.

When considering court actors as potentially important agents of constitution-building in deeply divided South Africa and Kenya, the salient claim is that there are always trade-offs to consider when constitutional change decision-making is risky, including for court actors themselves. Their immersion in a system of separated governmental powers draws attention to possibilities of other governmental actors to weigh incentives behind constitutional change in ways that might countervail the roles of court actors, especially their constitutional interpretation precedent setting roles. And in the broader divided society, efforts of court actors to influence outcomes of constitutional change might attract a backlash. Hence, conceptualising constitution-building entails surfacing why and how South African and Kenyan court actors have framed their understandings of rationales of constitutional change and married this ideation to deliberate strategic action on their part, to leverage constitutional change outcomes with other governmental actors, specifically the legislative and executive political branches. I question what this link between interpretive activity and strategizing consists of.

This is in my view reinforces the significance of constitution-building to help explain the expectations placed on court actors by diverse publics and by themselves. Even cursory perusal of the respective South African (1996) and Kenyan (2010) constitutions will reveal their expansive nature based on provisions of rights in conjunction with significant delineation of functions of governmental actors. With such hallmarks of liberal constitutionalism in focus, constitution-building is conceivable as an elaboration of a definitive hierarchy of norms or a hierarchy of functions, and it is possible court actors will have endeavoured to do both simultaneously. On a downside, assuming ideological disagreements on rights as bases for change might compel court actors to envisage constitution-building in ways that could entrap them in exercises of essentialising their forms, producing a new post-promulgation formalism, and the legalism that accompanies it. Furthermore, an attentive perusal of the same charters will reveal their instrumentality to produce new political and legal thought, pushing court actors into exercises concerned with discourses of change, and demands for new vernacularisation of constitutional norms and issues. With hallmarks of post-liberal constitutional orders in focus,

constitution-building is conceivable with an expectation for court actors to express what is still constitutionally inarticulate. Indeed, this is a key aspect of what the South African and Kenyan court actors have defined as a transformative constitutionalism methodology needed to successfully actualise the promises of post-liberal constitutions, which I consider in more detail in the dissertation.

Amongst the preliminary claims of transformative constitutionalism are that court actors need not be either convincingly neutral concerning plural ideologies in conflict or legalistic concerning the law, and that their constitutional roles pivot on their internal capacity to produce new expansive agreement on constitutional norms and issues in South Africana and Kenya. In other words, these court actors can be explicitly political, unlike their counterparts who should shun infusing political principles in their work.[24] These claims would be transmitted through systems of separated functions, drawing on a premise that the governmental branches, different actors, and diverse publics can work cooperatively, each in their specialisation, to surface common constitutional understandings. Yet, in deeply divided societies, what is more likely to happen is production of incomplete or semantic agreements that serve to enable further actionable development of secondary rules. Nonetheless, this functional approach to constitution-building begs the question how court actors would be able to re-examine inherited axioms of liberal constitutions, or indeed any deep constitutional re-imagination, in any meaningful way. If whatever decision-making court actors take up for functional ends would not be in isolation from the context, where underlying understandings of constitutional change are not only ideological, should we prepared to accept more formalism and legalism? In which case, is the codification of multifunctional constitutions as points of embarkation for actualising transformation toward constitutional governance that is beneficial for all stakeholders and interest holders not simply an obfuscating ploy? I aim to surface this complexity of formalist, discourse, and functionalist disjuncture with constitution-building to address the notion of links between interpretive activity and strategizing as integral elements of constitution-building work of South African and Kenyan court actors.

As my dissertation shows, the dichotomies of interpretivist and non-interpretivists accounts of constitutional interpretation can be elided in constitution-building, which subsumes both to the objective-reason seeking interpretation of constitutions that deliberately frames different societal conflicts and serve multiple functions. The point I aim to make is less about conflictual textual interpretation, which dominates constitutional theory,[25] and more about the instrumentalization of interpretation by supposedly strategizing actors. The objective is to make reconciliatory constitutional practices of deeply divided African states more explicit through reviewing the practices of two such states, South Africa and Kenya, whose national actors are relatively committed to constitutional governance projects compared

[24] See Tomkins, Adam (2010) "The Role of Courts in the Political Constitution" University of Toronto Law Journal, Vol.60, No.1, pp.1-22; Hirschl, Ran (2009) "Towards juristocracy: the origins and consequences of the new constitutionalism, Harvard University Press.

[25] Valauri, John (2000) "Interpretation, Critique and Adjudication: The Search for Constitutional Hermeneutics" Chicago-Kent Law Review Vol 76 Issue 2. Valauri adapts a definition of "noninterpretivism" as the view that "the judiciary has authority to constitutionalise values, such as fundamental principles of justice, not fairly inferable from the Constitution's text and structure" found in Garano, J (1981) Judicial Review and a Written Constitution in a Democratic Society, 28 Wayne Law Review 1, p.3, at pp. 1085 and 1095.

to counterparts in other similarly situated states in Africa. Because my sample of countries is too small, I do not have any ambition to espouse a theory of constitutional change in Africa.

Finally, my approach considers it evident that notions of constitutional outcomes will be similarly contested. I will pay some attention to the salient notion that citizens or national actors want to see demonstrated impact of a constitution as a condition for its legitimisation, meaning its internalisation in their constitutional practices. In what ways is a new constitutionalism a sufficient "outcome"? As mentioned above, I will consider South African and Kenyan court actors alike as already pivoting their approaches to outcomes of their constitutional provisions and their underlying rationales of constitutional change, on a concept of transformative constitutionalism. I will address it as a common concept by which court actors elevate the significance of interpretational activity, value-based judgements, and dominant sociological or historical expectations of both political and technical public authority in both states. Transformation is one of the multiple functions attributed to contemporary constitutions, but its usage by national actors is closely linked to other functions that shade into constitutional rational choice ideas like governmental efficiency and effectiveness, measurable outcomes, and public participation and accountability processes. Transformative constitutionalism therefore connotes both internal court actor reforms to address challenges of multifunctional constitutions and their strategies to raise the performance of constitutions. It is therefore possible to, on one hand, approach constitutional change from transformative constitutionalism lenses as dealing with a tension between classical claims of constitutionalism as dealing with a limiting dimension of power,[26] and the constant pressure to maintain authority of government in changing times.[27] On the other hand, the choice of transformative constitutionalism in both South Africa and Kenya is explicitly informed by ideological concerns, making court actors both neutral interlocutors of legal limits on government and governmental actors who determine the scope of change in their own interests and act deliberately to actualise it. Constitution-building will therefore enable me to surface the seemingly opposed notions of constitutionalism entailed in the outcomes of constitution-building work of court actors, and to explicate a persuasive argument for a more reflexive, contextual constitutionalism in these states.

As I occasionally raise above, my focus on South Africa and Kenya is premised on their characterisation as deeply divided societies, a status that is instructive for theorising how their national actors make and evolve a legitimate constitution. This evolution speaks both to a key normative dimension of bridging societal factures among national actors who fundamentally disagree on foundational norms of their state, and to practical questions of achieving constitutional

[26] The classics are Locke, J (2020) First treatise of government, Strelbytskyy Multimedia Publishing. I also referred to Dunn, J (1982) The Political Thought of John Locke: An historical account of the argument of the 'Two Treatises of Government' Cambridge University Press; McIlwain, C.H. (2005) Constitutionalism: ancient and modern, The Lawbook Exchange, Ltd.; Hayek, F. A. (2013) Law, legislation and liberty: a new statement of the liberal principles of justice and political economy, Routledge. See also Howell, Lloyd (1991) "Constitutionalism" in Burns JH & Goldie, M (ed) (1991) The Cambridge history of Political Thought 1450-1700, Cambridge, Cambridge University Press, pp.254-5, 232.

[27] Vile, Maurice (1978) (1998 2nd edn) Constitutionalism and the Separation of Powers, Liberty Fund; Loughlin, Martin (2009) Sword and Scales: an examination of the relationship between law and politics, London, Bloomsbury Publishing.

governance where it has no deep roots. Of the two characterisations of deeply divided societies in the literature with relevance for my dissertation, I will draw more from the one describing how disagreement on constitutional foundational norms influences formal constitutional change and less on literature concerned with negative impacts of societal fractures on collective, particularly inclusive democratic, decision-making.

That South Africa presents a deeply divided society is familiar to constitutional scholars because the state is frequently included among relevant case studies in the relevant literature, and Kenya less so. South Africa denotes deep division in terms of social and economic criteria, as well as from a readily accessible history of its apartheid-based, non-monopolistic legal system, which was relatively recently formally unified under the 1996 Constitution. Kenya is deeply divided along tribal and to some extent, religious and communal lines based on livelihood, but the divisions I emphasise relate to disagreements on constitutional norms, such as necessitated an internationally mediated process for the enactment of the 2010 Constitution. In both South Africa and Kenya, deeply divided diverse publics were involved in making their respective constitutions. Some wanted customary law, others traditions flowing from native culture, others common law, other legislated regulations to remove need for repetitive contracting, etc. All got something in the constitution, even though no claims were met in full and unconditionally in the eventual constitutional enactments. I will approach constitution-building as facing tensions emanating from fleshing out what was granted in these constitutions, why and how to grant residual claims for those left in old and new constitutional peripheries and how to create a harmonious objective whole from the hodgepodge of partially constitutionalised claims and interests. Obviously, court actors must also aim to distinguish the autonomy of the evolving constitution objectively from the myriad claims that can be pressed in its name.

To orient my dissertation on the characterisation of deeply divided societies where agreement on constitutional norms is elusive, I will reappraise constitution-making in South Africa and Kenya to draw on leitmotifs of disagreements that influenced framers, e.g., inclusion of new entrants into the political system, choice of legal frameworks to steer constitutional change, trade-offs for courts to consider when constitutional change is unpredictable and uncertain, etc. In this specific respect, I do not claim that either South Africa or Kenya is exceptional from other deeply divided societies in Africa.[28] From this reappraisal, I will be able to prefigure why and how their respective constitutions are not only products of efforts to codify shared constitutional understandings, but points of embarkation from which to authentic, ideate, and build on constitutional change effects with links to outcomes that diverse publics continue to demand. This is what I conceptualise constitution-building as being about, based on the preliminary definition offered above.

[28] Some domestic voices do claim an exceptional status for their state, for instance, that South Africa was subjected to colonialism of an exceptional character or "special type" referring to segregationist patterns of domination whereby capitalism and centralised state power fused to exploit the majority African population, which became an object of administration without citizenship rights. Nevertheless, similar patterns of varying magnitude could be said of Kenya or other former British colonies. See Jordan, Pallo (2017) Letters to My Comrades: Interventions and Excursions, Auckland Park, Jacana Media Ltd., p.263. See too O'Malley interview "Colonialism of a Special Type" available at https://omalley.nelsonmandela.org/index.php/site/q/03lv02424/04lv02730/05lv03005/06lv03132/07lv03140/08lv03144.htm.

Consequently, it must invite a host of theoretical and practical questions about the relevance and utility of constitutions to resolve and alleviate constitutional problems of deeply divided South Africana and Kenyan societies.

Methodology

My methodology encompasses textual analysis of the *Constitution of South Africa, 1996* and the *Constitution of Kenya, 2010*, and progresses to critical legal analysis of selected constitutional case concerning constitutional change and continuity, and thereafter, theoretical analysis based on scholarly publications on constitutional change in South Africa and Kenya, as well as contextual constitutional studies of other relevant deeply divided state contexts. For my theoretical analysis, I will draw on scholarship from constitutional law and theory, legal theory, political science, and positive political theory. Finally, I will utilise comparative methods where necessary to develop a common analytical basis for differentiated court actor ways of dealing with methodical problems of constitution-building.

Case selection

I have selected several cases decided between 1996 and 2021 by the South African Constitutional Court, recognising it has the formal last word whenever other superior courts make findings of unconstitutionality. In contrast, with regards to Kenya I have selected cases from superior courts dated between 2010 and 2021, recognising the dispersed nature of the Kenyan court system, where a High Court judge can make a final constitutional interpretation provided parties do not appeal via normal procedures up to the Supreme Court of Kenya. I have selected some cases from this apex forum where its original constitutional jurisdiction was exercised. Additional criteria for my case selection address a) contestation about the extent of problematisation of the constitution as a norm-in-the-making, b) the problematisation of continuity from antecedent constitutional order, and lastly, c) the significance of a case for changes to the legal and political order in the country. For this last criterion, reflections in scholarly publications and to a limited extent the news media, are relevant to evidence how a case resonated legally and politically. Review of all the related decisions in South Africa and Kenya would be too onerous, but I recognise that judicial engagement with constitution-building in both countries might be broad and shifting over time than individual case events suggest.

Chapter outline

In chapter one, I develop a background understanding of the constitutional change dynamics that constitution-building court actors are engaged with. I start with a descriptive account of those dynamics during constitution-making periods in both South Africa and Kenya. In addition to highlighting the fundamental disagreements on constitutional issues, I underscore the combination of legal realism and political avoidance of radical consequences. While constitution-makers considered liberal constitutional paradigm dogmas, they did not allow them to hinder compromises. The constitutional products embody these compromises in various provisions. As a result, the constitutions produced are essentially derivative of processes of ambitious societal change on which there is still little national consensus. This makes the notion of these constitutions facilitating future transformation problematic from the start. If constitution-building court actors are required to ensure that the respective constitutions of South Africa and Kenya become politically and legally

viable despite disagreement on constitutional norms and issues and with respect to societal changes on which there is little consensus either, then this scene setting chapter elucidates the intrinsic challenges they will face.

In chapter two, I aim for three things. Firstly, to define and theorise constitution-building based on its distinguishing features in the literature. Hence, I canvass two definitions of the concept, in political science and constitutional theory, allowing me to focus on the latter moving forward. Secondly, to outline anticipatory key features, rationales and counter rationales concerning constitution-building in the perspectives of national actors of deeply divided societies, while weighing in with how the concept might draw from and contribute to constitutional theory. Thirdly, to situate the concept of constitution-building in relation to other contemporary constitutional concepts and debates in the constitutional change discourse arena. I draw some insights from these concepts and debates, but contend that while insightful, these debates seldom address how court actors address constitution-building on their own terms.

In this chapter, I recentre the concept of constitution-building on court-centric accounts, which essentially describe and explain methodologies of judicial engagement with constitutional change. I deal first with current definitional aspects sourced from academic postulations, while highlighting the theories of James Fowkes and Karl Klare on the constitution-building work of the Constitutional Court of South Africa. I further highlight the desired characteristics or attributes of constitution-building court actors that enable or catalyse their engagement in constitution-building interpretive activity. Lastly, I set out analytical points for assessing the constitution-building work of South African and Kenyan court actors in respective case studies.

Chapter four presents my first case study, focussed on South Africa. I investigate and critically analyse the constitution-building 'work' of the constitutional court in relation to the three analytical bases identified in the preceding chapter: Firstly, their ideation of constitutional change as a distinctive feature of constitution-building; secondly, processes and methods of constitution-building, and thirdly, what legal outcomes of constitution-building are accentuated.

Chapter five presents my second case study, focussed on Kenya. It follows a similar layout as the preceding case study chapter.

In chapter six, I offer my first analytical observations by merging insights from the two case studies. This means drawing comparative insights concerning constitution-building ideation, processes, and outcomes in South Africa and Kenya. I move on to offer my explanation of how court actors could precipitate various forms of constitution-building. I further suggest that these various forms of constitution-building are simultaneously extended and limited by their intrinsic methods of producing convergent interpretive activity. And I analyse how elusive must be any forms of constitution-building aimed at reproducing any radical change beyond the subtexts of hegemonic and peripheral discourses and critiques. Consequently, court actors do precipitate only limited agreement in forms of constitution-building that fall back on fusing law and politics, but their capacity to crucible radical products of constitutional change invite scepticism for assorted reasons.

Chapter seven is my concluding chapter of the dissertation. In this chapter, I revisit an aspect of constitution-building as availing arenas for deeper constitutional reflection as a significant contributions of court actors, by reprising the discursive threads revealed from the interrogation in previous chapters of the empirical and normative claims concerning constitution-building in South Africa and Kenya. I also revisit the role of strategizing court actors and the limitations in a broader comparative sense. I address the significant scepticism regarding whether such contributions are practicable and realistic considering organisational and discursive limits. On the other hand, I consider that even attenuated contributions may be desirable for purposes of managing tensions of constitutional change and continuity against backdrops of deep division in South Africa and Kenya. Finally, I offer summative reflections on the nature of the new constitutionalism produced by constitution-building court actors in South Africa and Kenya.

Chapter One: Constitutional change and continuity in South Africa and Kenya

Contents

1.1 Introduction

Constitutional change in South Africa and Kenya in recent decades has sought to address the egregious problems that they experience, like political violence and weak constitutionalism. These problems stem from fundamental disagreements on constitutional norms and issues, such as characterise deeply divided societies and societies.[29] Some constitutional change proponents in South Africa and Kenya today commonly agitate for court actors to strategically mould the magnitude and effects of agreement-making on constitutional norms and issues amongst deeply divided national actors. Claims abound that poignant demands for constitutional change outcomes have been stymied by political actors, and that constitutional promises will atrophy unless court actors pursue more assertive strategies to drive constitutional change to produce assorted constitutional goods. However, what connects court actor roles and the resolution of fundamental disagreement on constitutional norms and issues, remains an unclear process. Gaining better clarity is especially important when the multifunctional constitutions of these states are considered as contingently in the making, as work-in-progress, or as being built.

This chapter serves to develop a background understanding of the constitutional change dynamics that constitution-building court actors are engaged with, the structures in which they are immersed and the obligations and outcomes with which they would be engaged. I start in section 1.2 by reappraising constitution-making in South Africa and Kenya to highlight how framers bedded for future rule making dynamics and to consider earlier references for analogous roles of

[29] Lerner, Hanna (2011) Making Constitutions in Deeply Divided Societies, Cambridge, Cambridge University Press, pp.21-26; Hanna, Lerner (2009) "Constitution-writing in deeply divided societies: the Incrementalist option" Nations and Nationalism, Vol.16 Issue 1, pp.68-88.

court actors. In section 1.3, I delve into the respective Constitution of South Africa, 1996, and the Constitution of Kenya, 2010, to highlight that while they espoused liberal constitutional paradigm dogmas, their framers did not allow these dogmas to hinder compromises, which the constitutions embody in varying degrees in various provisions, in terms of the contradictions, deferral, and locked-in disagreements. Implicit in constitutional change is the contestation of claims and counterclaims and the innovation of constitutional designs in response to constitutional problems. In section 1.4, I analyse possibilities and limits for court actors to work out the fundamental disagreements on constitutional issues in future, in terms of their immersion in an institutional structure, which arose from circumstances where legal continuity from previous constitutional order was partially preserved. By describing and analysing the structure of government, institutional obligations, and stipulations for expansive rights claims, I highlight openings for diverse approaches to making the respective constitutions produce outcomes, particularly pointing out the need for court actors to manifest substantial institutional capacity and jurisprudential resourcefulness.

What were envisaged were assorted outcomes undergirded by an overarching process of ambitious societal change on which there is still little national consensus, as I point out in 1.5. What could be expected would be increased demand from diverse publics for constitutional actors to address their proliferating claims, coupled with the emphasis the two constitutions did not terminate long-standing disagreement on constitutional norms by a peremptory constitutional drafting. Constitutional change could therefore take shape in terms ongoing extrapolation of constitutional change as part of distillation of a discourse of progressive societal transformation, in which plural ideologies and diverse publics are seek out conducive court actor catalysts. Overall approaches to making these constitutions to produce outcomes preferred by diverse publics could segue to legalism and formalism, or demand that court actors engage in pragmatic statecraft, and I envisage the roles of court actors straddling both. If, as I will subsequently analyse, constitution-building court actors are required to ensure that the respective constitutions of South Africa and Kenya become politically and legally viable despite disagreement on constitutional norms and issues and with respect to societal changes on which there is little consensus either, then this scene setting chapter elucidates the intrinsic challenges they will face.

1.2 Reappraisal of constitution-making in South Africa and Kenya

In this section, I reappraise constitution-making in South Africa and Kenya to highlight how framers bedded for future rule making dynamics and consider what precedents were set for any future analogous roles of constitution-building court actors.

Contextual studies of constitution-making in anglophone Africa, which South Africa and Kenya exemplify, have illuminated how elusive successful formalisation of constitutional change can be, including through substantive amendments, due to disagreements on change processes and their substantive outcomes.[30] Additional insights

[30] See Fombad, Charles (2014) "Constitution-building in Africa: the never ending story of the making, unmaking and remaking of constitutions" African and Asian Studies Vol.13 No.4 pp.429-451; Fombad, Charles (2011) "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects" Buffalo Law Review Vol.59 pp.1007-1108; Widner, Jennifer (2008) "Constitution Writing in Post-Conflict Settings: An Overview" William & Mary Law Review Vol.49 Issue 4, pp1513-1541; Hatchard, Ndulo &

concerning this difficulty have emerged in empirical analyses that focus on deeply divided societies, meaning states whose national actors fundamentally disagree on constitutional norms and issues.[31] Such states generally formalise constitutionalise change, if at all, through compromises, some of which lock-in disagreements in contradictory provisions, generating constitutional charters whose pedigree in terms of finality therefore remains uncertain. This theory-building further infers that constitution-making compromises tend to occur in an absence of liberal normative conditions and experiences, so that constitutional change becomes unlikely to generate constitutions or constitutional practices that comport to an ideal-type, "liberal constitutional paradigm".[32] In these circumstances, it is better to fend off worst scenario outcomes than to pursue liberal constitutions that are unlikely to emerge or endure.[33] Other studies rooted in American constitutionalism suggested that superficial agreement on normative principles is what facilitates agreements between divided national actors, court actors included, on specific, constitutional rules.[34] Legitimate constitutions can therefore be pursued in constitution-making mode via precommitments that downplay agreement on norms as a pressing priority. Yet other analysts claim that agreements on legal continuity and mechanisms to secure it during constitutional change significantly strengthened an evolving legitimacy of constitutions, despite other unideal transitional exigencies being prevalent.[35] The contradictions revealed in this literature were manifested in constitution-making in both South Africa and Kenya, albeit in varying degrees. Beyond that, the two states successfully formalised constitutions leaning toward liberal constitutional paradigms, contrary to the expectations above, but with degrees of ambivalence.

Constitution-making in South Africa and Kenya as I describe, was driven by political realism, counterpoised with securing the commitments of national actors to a higher law norm. Political actors succeeded in formalising constitutional change in part by de-constitutionalising, downscaling, and deferring fundamental disagreements on constitutional norms. This could happen despite court actor roles being structured into political agreement-making on constitutional purposes and rationales, albeit differently in the two states. From a still proximate history of constitution-making, this reappraisal suggests that constitution-building court actors in either South Africa or Kenya would need to shift from their limited roles in a constitution "in the making" mode, to more authoritative roles in which they muster progressive constitutional change and continuity projects. The descriptive account however cautions that such a shift is less than straightforward since court actors are caught in contexts where a dominant constitutional approach has been and could remain one that

Slinn (2004) Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern Africa Perspective, Cambridge, Cambridge University Press.

[31] Lerner, Hanna (2011) supra note 29, at pp.5-12, addressing a foundational rather than legalistic question of what kind of formal constitution is crafted in these states.

[32] Lerner, Hanna (2011) supra note 29, at pp.26-27.

[33] Landau David (2013) "Constitution-making Gone Wrong" Alabama Law Review, Vol.64 No.5 pp.923-980 (advising avoidance of worst-case scenarios than focus on reaching idealised deliberative democracy).

[34] Sunstein, Cass (2007) "Incompletely Theorized Agreements in Constitutional Law" Social research: An International Quarterly, Vol.74, No.1, pp.1-24.

[35] In fact, this insight is made with South Africa in focus. See Teitel, Ruti (2000) Transitional Justice, New York, Oxford, Oxford University Press, pp.191-211.

places a premium on bargaining, deferral to secondary rule compromises, and relinquishment of normative behaviour among national actors rather than securing new commitments to liberal constitutionalism.

1.2.1 Constitutional change in South Africa: Impact of court actors on constitution-making

Starting from 1991, and after a series of transitional political accords, the African National Congress (ANC) and the former ruling party, National Party (NP) framed general principles to guide constitution-making and the design of a new constitution.[36] These were codified in an *Interim Constitution (1993),* an enactment of the preceding parliament, which steered transition from a constitutional order based on white supremacy to one based on the will of a democratic majority. The *Interim Constitution* preserved legal continuity and pre-existing rights, suggesting a typology of constitutional change that, in theory, lay somewhere between a revolution and a revision.[37] Furthermore, and unusually, the *Interim Constitution* established a new Constitutional Court, which was tasked to certify that the text of a final constitution to be enacted by an elected constitutional assembly after nearly two years of debates, complied with the pre-agreed principles. The certification process has been comprehensively analysed elsewhere.[38] Of pertinent interest here is that the Court at first declined to certify the draft proposed constitution in its hearing in May 1995, citing its non-compliance with some pre-agreed principles. Certification was achieved at a second hearing after the constitutional assembly had resolved the non-compliance findings, including by downgrading contentious issues to technicalities.

Since it is established that the South African national actors negotiated their way to a constitution against heavy odds, the question flowing from certifications roles is whether court actor roles were particularly instrumental in improving normative conditions of a turbulent political process of constitutional change, concerning which national actors fundamentally disagreed in many respects? In obiter dicta offered at the first hearing, the Constitutional Court explained its role as political navigation between different legitimate standpoints on constitutional norms, for which purpose it approached legal certification as downscaling of legalism and formalism.[39] Formally, the Court was responsible for checking normative commitments to constitutional change only in terms of the *Interim Constitution, 1993*. Substantively, the Court functioned in a context where legal framing was an important part of constitutional change discourse. South Africa historical protest featured the use of "charters" and an "inherited culture of popular mobilisations"[40] and where

[36] Corder, Hugh (1994) "Towards a South African Constitution" Modern Law Review Vol.57, No.4, pp.491-533. Corder introduces the incremental constitutional change as a "two-step" transition.
[37] There are several references to constitution-making in South Africa as a revolution. Klug, Heinz (2019) "Constitution making and social transformation" in Landau, David & Lerner, Hanna (eds) (2019) Comparative Constitution Making, Cheltenham, Elgar Publishing, pp.47-68; Ackerman, Lourens (2004) "The Legal Nature of the South African Constitutional Revolution" New Zealand Law Review, pp633-656. Corder, however, emphasises the realisation of continuity, in Corder, Hugh (1994) supra, note ***29***, p.522.
[38] See Gloppen, Siri (1997) South Africa: The Battle over the Constitution, Ashgate Publishing.
[39] *Certification of the Constitution of the Republic of South Africa, 1996* (1996) ZACC 26, paras 109-112.
[40] Suttner, Raymond (2014) "Popular Power, Constitutional Democracy and Crisis: South Africa 1994-2014" Strategic Review for South Africa, Vol.36, No.2 pp.8-9. Buried in these participative mobilisations at ground levels of society was the idea, and implicit criticism of statism, that "the people" were implementing the first clause of the Freedom Charter of 1958 which provided "The people shall govern" (p.9).

Roman Dutch law practice featured certification of legislation. Moreover, under the *Interim Constitution*, precommitments to listed norms and principles served as a clear, entry-level key to constitution-making in South Africa.

In practice, how those precommitments were obtained, and how they influenced constitutional negotiations when they repeatedly broke down between multiple stakeholders, ultimately came down to the "abysmally opaque" last ditch compromise agreements between ANC and NP party leaders to settle new rules.[41] For their series of compromises to eventually ensure successful codification of the 1996 Constitution, the leaders of these two parties exploited and manipulated alternative understandings of the generic, substantive constitution-making principles, while utilising an informal rule of sufficient consensus between them. Ultimately, court actors aided them via the certification process by disallowing several parties who had been excluded from closed ANC and NP negotiations, to alter the proposed constitutional draft for non-compliance with the *Interim Constitution*, on the ground as acknowledged by the Constitutional Court, that these principles could be interpreted in numerous ways. Although the Court afforded an important arena for authorising the idea of alternative understandings of the applicable principles for constitutional change, its main input to agreements on the constitution in-the-making mode, was to legitimise and reinforce the constitutional compact haggled politically by the ANC and the NP. The Court did elevate the idea of shared constitutional norms, yet it did so at a highly generalised level that paved the way for political actors to settle principle-rule compatibility problems technically. Simultaneously, the Court established the potential for broad constitutional speculation via its expression of less formal and legalistic concerns, compared to its narrow focus on the certification principles. Noteworthy, it presented itself publicly as an important authorising forum for constitutional deliberation, underscoring its accessibility for other national actors whose civic engagement at this point was not yet key to the development of the constitutional project.

1.2.2 Constitutional change in Kenya: Impact of court actors on constitution-making

In Kenya, the legal framework for constitution-making leading to the 2010 Constitution was unprecedented and ad hoc. The 2010 Constitution emerged from a rather short transitional process, which formally commenced in February 2008 when, following serious post-election violence, the incumbent president, Mwai Kibaki and opposition leader, Raila Odinga executed an *"Agreement on Principles of Partnership of the Grand Coalition"*[42] mediated by former UN Secretary General, Kofi Annan.[43] This accord gained legal effect by virtue of its incorporation by amendment into the *Constitution of Kenya, 1964* (as amended).[44] Its implementation thereafter was effected via legislation, which sequenced a discursive and

[41] Corder, Hugh (1994) supra, note 36, at p.492.
[42] The Agreement can be downloaded from https://peacemaker.un.org/kenya-coalitiongovernmentpartnership2008 (accessed 11/10/2021). It was legislated as the *National Accord and Reconciliation Act, Act No.4 of 2008*. For analysis of the mediation process, see Wamai, Njoki (2014) "Mediating Kenya's post-election violence: from a peace-making to a constitutional moment" in Murunga, Okello & Sjogren (eds) (2014) Kenya: The Struggle for a New Constitutional Order, London, Zed Books, pp66-78, at p.71-74.
[43] For analysis of the mediation process, see Wamai, Njoki (2014) id, at pp.71-74.
[44] See *Constitution of Kenya (Amendment) Act* No.10 of 2008 and the *Constitution of Kenya Review Act*, No.9 of 2008 available at www.kenyalaw.org

negotiated constitutional review process involving an expert committee, public consultations, parliamentary debates, judicial tests, and popular validation, culminating in the 2010 Constitution.

In practice, the accord functioned analogously to an 'interim constitution' because it enabled formation of a transitional grand coalition government with a five-year term, and agreement on transitional rules to steer four national reforms, one of which was constitutional revision to be completed within two years.[45] The constitutional transition was therefore foreseen under the supervision of a transitional government, in conjunction with guarantees of constitutional and legal continuity. In terms of the special vehicle legislation, constitutional negotiations were premised on a harmonised draft of the constitution produced by an expert committee, after analysing contentious and non-contentious issues in "*all existing draft constitutions",*[46] a draft which the National Assembly would adopt, consequently triggering a popular enactment referendum, and culminating with presidential promulgation of the new constitution, which occurred on 27 August 2010.[47] This harmonised draft therefore accommodated multiple issues, some of which had been configured in earlier discursive threads weaving together peace agendas (primarily ethnic clashes over land) and policy-oriented interests. In hindsight however, the National Assembly simply passed a text finalised after trade-offs in a Parliamentary Select Committee on Constitutional Reform (PSC) dominated by Kibaki and Odinga partisans, as that text could be amended solely via an unprecedented vote of sixty-five per cent or more of all National Assembly members and only during a parliamentary debate restricted to thirty days. As a result, none of the proposed amendments at this stage, about a hundred and fifty assorted amendments, attained the qualified threshold, and the bill incorporating the new constitution was passed on 1 April 2010 without substantive alteration.[48] Moreover, the PSC trade-offs were decisive for the resultant constitution. For instance, it rejected a proposal for a constitutional court in favour of an ad hoc bench of the superior courts, citing efficiency and changed a mixed-parliamentary system to a US-style presidential system, citing popular support for a directly elected executive President. And it deferred several matters to future legislation to present a compromise but politically palatable text, noting that the drafting methodology to harmonise previous constitutional drafts drew in unmanageable issues with a long history of being in contention.[49]

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[45] The Agreement can be downloaded from https://peacemaker.un.org/kenya-coalitiongovernmentpartnership2008 (accessed 11/10/2021). It was legislated as the *National Accord and Reconciliation Act, Act No.4 of 2008*.

[46] This was a requirement of the *Constitution of Kenya Review Act*, No.9 of 2008, s.27.

[47] See ss.8, 30 and 32 of the *Constitution of Kenya Review Act*, No.9 of 2008. The refence to existing drafts was to the 2002 Draft Constitution prepared by the Constitution of Kenya Review Commission that Yash Ghai chaired, the Draft (Bomas) Constitution produced by a National Constitutional Conference in 2004, and the proposed Constitution 2005 prepared by the Attorney-General that had been unsuccessfully tested in a 2005 referendum.

[48] See Final Report of the Committee of Experts on Constitutional Review, 11 October 2010, pp.137-142.

[49] See the Report of the Parliamentary Select Committee on the Review of the Constitution on the Reviewed Harmonized Draft Constitution dated 29 January 2010 (available at https://kenyastockholm.files.wordpress.com/2010/02/report_of_psc-_naivasha_retreat-final1.pdf) . On all the PSC executed changed to the draft constitution produced by the committee of experts, see Final Report of the Committee of Experts on Constitutional Review, 11 October 2010, pp.103-136.

If pre-agreed principles guided constitution-making in Kenya, it was erratically and without clear-cut determination. As much as agreement on new fundamental constitutional norms was at issue, political actors were prepared to experiment with constitutional codification while insisting they could jettison what proved unworkable later. Although constitution-making legislation nominally broadened the normative parameters for a negotiated constitutional change process, for instance by providing for public participation, in practice it restricted constitutional deliberation to signatories of political accords and limited the time for countervailing factional and public perceptions against final constitutional proposals to gain ground.

The Kenyan context of constitution-making lacked a constitutional court. However, an interim tribunal, the Interim Independent Constitutional Dispute Resolution Court composed of five judges, was structured into its agreement-making process to determine legal disputes that emanated from that process during its pendency.[50] This tribunal complemented other inbuilt but transient mechanisms in the constitution-making process, but it had no substantive mandate to prefer any of set of constitutional proposals or drafts, as was explicit in the South African Constitutional Court's certification process. Unlike in South Africa, the Kenyan tribunal lacked a role of strictly relating constitutional change agreements back to first principles to overrule politically expedient decisions. Analysing this tribunal and the roles of courts in constitutional review, Juma and Okpaluba, concluded that "*largely depending on given circumstances, the role of the judiciary can be limiting or could be regarded as merely salutary*..." but because political actors downgrading constitutionalism "*created an entry point for the courts*", the outcomes tended to underscore the "*the unity of the political agenda against the legalistic demands of constitutionalism*."[51]

This context counterposing constitutionalism and downgrading constitutional problems, when constitutions are understood in a constitution-making mode is germane for constitutional change and continuity in Kenya as I discuss further on.

1.2.3 Possibility for different court actor roles in constitution in "building" mode?

South African and Kenyan constitution-making histories and the roles court actors played in them, are still proximate, and not in the distant past. Even though domestic peculiarities of constitution-making caution against generalization, comparable experiences are detectable above of court actors downplaying legalism to play an impactful process role. What is prefigured above in descriptions of constitution-making in South Africa and Kenya is the tendency of constitution in-the-making mode to cast the political constitution into sharper relief, requiring court actors to relegate a purely juridical legalism and formalism to be able to partake in related change discourses. With this shift away from legalism, court actors could gain some room to influence constitutional change by tilting the balance in favour of legal constitutional principles, more so in South Africa than in Kenya. Indeed, the fact that a limited interim tribunal was

[50] The *Constitution of Kenya Review Act, 2008*, ss.44-51. The rules of procedure for the interim tribunal were included as subsidiary legislation in the Act.

[51] See Juma, Laurence & Okpaluba, Chuks (2012) "Judicial Intervention in Kenya's Constitutional Review Process" Washington University Global Studies Law Review Vol.11, Issue 2, p.363.

created to bypass mainstream Kenyan court actors indicates a degree of distrust concerning the methodology of balancing law and politics in constitutional change.

As a matter of preliminary contextual background for my dissertation, it mattered that court actor roles were structured into agreement-making functions of etching compromises needed to successfully formalise constitutionalise change, and to reinforce the shared norm aspects of the constitution being made. These were supposedly shared norms of non-homogenous societies. Moreover, court actor roles were structured by political actors to include or accommodate other minor political actors and diverse publics whose engagement in the principal constitutional negotiations was kept minimal. Furthermore, political actor expectation of reciprocity between the roles of the courts and other organs of constitution making was a driving incentive. Based on this expectation, a simplistic assumption is that court actors would not materially and substantively alter constitutional agreements reached by haggling political actors on account of higher law ideas. Instead, they would find ways to formally accommodate primary and secondary agreements under the higher law umbrella. The empirical dimension of constitutional change favoured leaving room for pragmatism to resolve disagreements on shared constitutional issues and a degree of formalism in resolving gaps between higher law norm and plural agreements of incommensurate significance for successful constitutional codification.

In addition to the revelation of innovations around court actor roles in constitution-making, and their concern for downscaling legalism, glimpses of strategizing behaviour were visible where these actors supported lowering the constitutional stakes, in their contributions to surrounding discourses. For instance, the *Certification Judgement* in South Africa, offered a discourse of coming together to distil fundamental constitutional principles, while using its precedent setting power to leave the door open to peripheral actors to come onboard the constitutional project with their discordant claims in future. A similar role was played by Kenyan political protagonist who joined hands in pro constitutional change coalitions. If South African court actors helped craft a sense of coming together around normative constitutional commitments, in Kenya the question was how to come together around constitutional change mechanisms that work, i.e., produce formalised constitutional change outcomes. This recent engagement of court actors in constitution change in a constitution-making mode might have prefigured subsequent constitution-building approaches around issues of legalism, formalism, incrementalism, and constitutional change as discourse of legal rebalancing between centred and peripheral interests. Yet, if South African and Kenyan court actors would approach constitution-building analogously as they did constitution-making, the there is reason for remaining academically sceptical about the capacity of these actors in either state to mould the magnitude of agreements on constitutional change in a constitution-building mode.

1.3 Channelling constitutional change: Analysis of the South African Constitution, 1996 and the Kenyan Constitution, 2010

In this section, I analyse the texts of the constitutions of South Africa and Kenya as instruments of broader constitutional change and continuity in the long durée. South Africa and Kenya evidently enacted expansive and lengthy constitutions in 1996 and 2010 respectively. To identify how the South African and Kenyan constitutions orient further change and the implications for roles of court actors, I focus on three themes where marked shifts from preceding constitutional

orders is conspicuous, notably, the shift to constitutional supremacy, the expansive guarantee of rights, and the institutional structures and procedures for constitutional decision-making.

1.3.1 Commitment to constitutional supremacy

A significant feature of constitution-making changes in both South Africa and Kenya was entrenchment of constitutional supremacy.[52] Constitutional supremacy overturned the doctrine of parliamentary sovereignty in the previous constitutional order in South Africa, whose national actors deemed it necessary to alleviate minority group concerns by ensuring that a future majority-based government in South Africa would be bound by legally enforced constitutional rules.[53] In Kenya, it signalled rupture from a practice of gratuitous constitutional amendments, although the previous constitution had been nominally supreme law. Beyond textual declarations of their supremacy, national actors sought legally durable anchors for pre-agreed foundational norms of the state. In theory, constitutional supremacy would allow court actors to realign and enforce compliance of laws and governmental practices under a higher law norm.

In South Africa, affirmation of constitutional supremacy had another teleological purpose, notably to reinforce the foundation for "one" sovereign state founded in service to a unitary and unifying supreme law universally applicable to previously, nominally independent ethnic homelands. This higher law norm was dressed in thirteen values, among them "human dignity", "non-racialism and non-sexism",[54] and "a multi-party system of democratic government".[55] Furthermore, supremacy would amplify the social contract amidst diversity, which was expressed through recognition of eleven official languages and other indigenous languages, with languages providing drafting proxies for primordial diverse communities with their own relations and religious practices and whose interests became constitutionally tied to the legitimacy of local public authority.[56]

Taken at face value, the values scaffolding constitutional supremacy comported to a "liberal constitutional paradigm", which according to Lerner was an unlikely foundational fit for South Africa as a deeply divided state harbouring fundamental disagreement on liberal norms and where liberal governmental institutions had been historically absent.[57] This foundational categorisation matters because of its intrinsic restriction of future constitutional choices. Indeed, the constitution ruled out the establishment of government under certain ideologies, pointing to a contradictory intention to separate law and ideology, since constitutional values segued to liberal ideologies. Yet if other constitutional paradigms were, and are, present in the South African constitutional shadows, then this entrenchment of liberal norms might invite a constitutional teleology of deliberate superimposition of a particular normative framework over other competing or

[52] Sec.2 of the Constitution of South Africa, 1996 and art.3 of the Constitution of Kenya, 2010.
[53] Meyer, Roelf "From Parliamentary Sovereignty to Constitutionality: The Democratisation of South Africa, 1990 to 1994" in Andrews & Ellman (eds) (2001) Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law. Witwatersrand University Press, Johannesburg at pp.59-62 (Meyer was a Minister of Constitutional Development and NP chief negotiator in constitution-making).
[54] Sec.1. Other values are achievement of equality and advancement of human rights, supremacy of the constitution and universal adult suffrage.
[55] Sec.1(d).
[56] Sec.6(1), (2) and (5).
[57] Lerner (2019) supra note 29, at p.29.

conflicting frameworks. It could also lead to formalism, where court actors focus on producing ever rigid formal definitions of plural systems. Value stipulations could also be used rhetorically, or more likely symbolically and to orient constitutional aspiration. In fact, aspirational couching is evident, for example, in provisions for language diversity that say the state "must take practical and positive measures to elevate the status and advance the use of these (indigenous) languages".[58] Other provisions would require legislation and other measures to be established to ensure official languages enjoyed "parity of esteem". Values like the "rule of law", "democracy" and "human rights" are also described as aspirational depictions of the 'big picture'.[59] Aspirational norms can invite conflicted judicial understandings and contingent interpretation conflicts in South Africa might become about teleological readings of the constitution.[60] In other words, constitutional supremacy is underscored by liberal values in a way that denotes national agreement on foundational norms, but it is also hinged on a language of aspiration and incremental exposition of the same values. It matters therefore that the 1996 Constitution did not explicitly stipulate how s.1 values should be advanced, leaving it to future constitutional decision-making to iron it out.

Similarly, the Kenyan Constitution 2010 declared its supremacy as binding on all persons and all state organs.[61] It propounded sixteen foundational values like patriotism, national unity, sharing and devolution of power, the rule of law, democracy, human dignity, equity, inclusiveness and protection of the marginalised.[62] Although the preamble acknowledged the supremacy of God, and declared pride in ethnic, cultural, and religious diversity and a determination to live in peace and unity, the modern, cosmopolitan values above were not infused with other values stemming from religious, traditional, or cultural rhetoric. Which strengthens evidence of national actors using constitutional change to deliberately pursue a liberal constitutional order, paralleling observations made about South Africa above. On the other hand, disagreement was detectable with culture as a flashpoint, considering that the next provision (art.11) espoused hyperbolically that "This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation." Disagreement was masked too in the substantive guarantee of equality. Although declared a foundational value and a fundamental freedom, the constitution allowed its curtailment on religious grounds, with potentially adverse effects for certain social groups.[63]

Provisions propounding constitutional supremacy were affected by partially locked-in disagreement on what supremacy is about, and on how supreme norms would be implemented. In this regard, constitutional change orientation around

[58] Sec.6(2).
[59] See Madsen & Verschraegen, "Making Human Rights Intelligible: An Introduction to a Sociology of Human Rights" in Madsen & Verschraegen (eds) (2013) Making Human Rights intelligible, Oxford, Hart Publishing, p.4.
[60] For instance, in *First National Bank Ltd. t/a Westbank vs Commissioner of South Africa Revenue Service & Anor (2002) ZACC 5, CCT 19/01*, the Constitutional Court stated that one of the purposes of adopting the Constitution was to establish a society based, not only on "democratic values" and "fundamental human rights" but also on "social justice". This decision adds social justice to the expressed values and moreover reaffirms the approach of the instrumental constitution offered by van der Walt, J in (2002) ZACC 5.
[61] Art.2
[62] Art.10.
[63] Art.24(4).

supremacy would depend on the nuanced roles of court actors and their interpretive skills. In fact, the constitutions reflect awareness of the importance of sharpening interpretation as consequence of the implication of enshrining foundational norms and values in abstract, aspirational, and possibly contradictory language in both South Africa and Kenya. Consequently, provisions dealing with interpretation explicitly and directly authorised court actors, to inscribe constitutional norms in and via other laws, notably, customary law and the common law.[64] In Kenya, court actors, and indeed other public officials, were obligated to interpret all laws to conform to the spirit, objects of the constitution, a phrase borrowed from the South African Constitution.[65] Furthermore, Kenyan interpreters were required to interpret the constitution as law that is "always speaking", amplifying constitutional continuity.

Flowing from constitutional supremacy therefore, is the importance of functional interpretation not only to excavate textual meanings, but to augment the new constitutionalism by fleshing out the constitutional promises entailed in abstract foundational values.[66] It would be problematic for court actors either to abide constitutional decision-making that ignores this normative dimension, which presumably suggests that foundational values would have fixed validity, or alternatively, to cede the decision-making on the relevance of constitutional norms to understandings of political actors exclusively. Simultaneously, both South African and Kenyan court actors would be misguided if they were to depend on societal understandings of these foundational norms in deeply divided societies. Yet, since there is little explicit guidance in the South Africana and Kenyan constitutions as to how court actors should weigh agreement on constitutional norms, we might see an empirical dimension whereby court actors offer sites of polemical struggles over the orientation of value-based constitutional change and continuity. I reiterate the point too that the enshrined values reflected a liberal ideology, though provisions on cultural values suggested competing ideologies existed. As Shklar observed, decision making that attempts to be impervious to ideology leads to legalism, and the aim of separating law and ideology leads to the prescription of law "forms".[67] Constitutional supremacy therefore bedded a tension for South African and Kenyan court actors to manage, between value-determinate functionalism and a formalism where consideration of incommensurable values transitions into indeterminacy.

1.3.2 Rights as channels of constitutional change and continuity

The expansive South African Bill of Rights was plainly a rupture from the apartheid-era constitutions, compared to the revision in Kenya where the previous *Constitution, 1964,* had enshrined civil and political rights exclusively. Analysis of the South African Bill of rights abounds and most of it is laudatory, particularly because of some of its "first of a kind"

[64] Sec.39(2)
[65] In this regard, art.24 of the Kenyan Constitution resembles s.39 of the South African Constitution.
[66] See Sarkin, Jeremy (1997) "The Political Role of the South African Constitutional Court" South African Law Journal Vol.114, arguing that the shift from parliamentary sovereignty to constitutional supremacy is "probably the most critical shift to occur during the transition to democracy in South Africa" and that it mandated selection of judges who would be suited to decide constitutional issues, p.134.
[67] Shklar, Judith (1989) ONE. The Liberalism of Fear. In Liberalism and the moral life. Harvard University Press, pp.21-38.

provisions.[68] Moreover, South Africa authorised augmenting the Bill of Rights though provincial constitutions which could enshrine additional rights,[69] while the National Assembly was empowered to legislate other charters of rights.[70] The Kenyan Bill of Rights borrowed some of its provisions from the South African one,[71] but added rights such as communal rights to own their ancestral lands which were omitted in the latter. Both states provided for stronger enforcement and implementation measures for their Bills of Rights, including novel roles of national human rights commissions.[72]

How did these Bills of Rights orient constitutional change and continuity in the long durée? Two observations are worth emphasising here. Firstly, since their provisions were entrenched against amendment, they were converted into a future basis of legal continuity. This means that rights would have a potential exponential continuous effect on the orientation of legal order change, including by their use to control the constitutionality of legislation. Furthermore, the Bills of Rights underwrote a teleology linking constitutional change and continuity to the character of the state as inclusive, democratic, and committed to social justice. Their provisions were written as though what national actors, including court actors, needed to do to resolve tensions of constitutional change and continuity, was to follow the Bill of Rights as a cornerstone[73] or blueprint.[74] Such language also conveyed a notion of rights based on equal, liberal citizenship and statist projects of realising constitutional change to societies where rights were respected.

Nonetheless, the idea of orienting change by following a blueprint is less straightforward than it sounds. On one hand, the abstract nature of rights provisions in conjunction with the deliberate efforts to enshrine rights expansively in the two constitutions is also indicative of their nuanced accommodation of deep divisions in society. After all, expansive rights language in constitutions reflects and conveys multiple and potentially contradictory constitutional change agendas. On the other hand, the contextual reality of fundamental disagreement in both states was one of "historic diminishment"[75] of the rights of some groups, and their marginalisation, within recent modern histories of South Africans and Kenyans alike. Thus viewed, what is relevant is not merely to interpret the constitution to reduce practical gaps between individual rights provisions and certain practices by a managerial rationalisation of what citizens should expect. What is conveyed is a vision of rights as instruments of individual and group activism. Perhaps what will be more important for some individual and groups more than others, will be for court actors to imagine and construct societies of inclusive, and equal

[68] For instance, the explicit guarantee of equality on a basis of sexual orientation is an international "first of its kind" *per* Cock, Jacklyn (2003) "Engendering Gay and Lesbian Rights: The Equality Clause in the South African Constitution" Women's Studies International Forum Vol.26 No.1 at p.35. Praise for the Constitution as "the charter that American liberals thought the U.S. Supreme Court was going to create out of cases like *Brown v Board of Education*…" is found in Kende, M (2009) Constitutional Rights in Two Worlds: South Africa and the United States. New York, Cambridge University Press, p.7.

[69] Under sec.243, provincial constitutions can offer protections omitted in the national constitution.

[70] Section 234 provides: "In order to deepen the culture of democracy established by the Constitution, parliament may adopt charters of rights consistent with the provisions of the Constitution."

[71] For instance, the Kenyan Bill of Rights borrowed a right to fair administrative justice wholly from the South African constitution.

[72] Sec. and art.

[73] Sec.7(1) of the South African constitution declared the Bill of Rights a "cornerstone".

[74] Art.23 of the Kenyan constitution declared the Bill of Rights a "blueprint" for social and economic policies.

[75] The term is used in sec.3 of the 1996 South African Constitution.

rights enjoyment. For other audiences of court actor opinions, however, historic diminishment did not just happen by chance. The benefits of diminishment of rights accrued by virtue of state policies to some groups, and this is noticeable today in both South Africa and Kenya, being states with very high economic inequality in addition to deeply divided, especially in skewed ownership of real property and capital. What it would mean for court actors to articulate a substantial compensation for diminishment and to reconstruct what the state can do to orient constitutional change in this context, while treating rights as bases for limiting governmental power, is less than straightforward.

1.3.3 Constitutional decision-making

Since constitutional decision making hinges on the institutional configuration of systems of separation of powers, and how they position different actors to channel constitutional change, in this sub-section, I discuss some of the significant changes in separation of powers relative to antecedent constitutional orders, and then consider the positioning of judicial actors relative to perpetual governmental structures and anticipate how their agency in resolving tensions of constitutional change and continuity could be a dynamic element of interbranch conflicts.

1.3.3.1 Institutional configurations for joint and divided constitutional decision-making.

In South Africa, separation of powers although one of the principles guiding constitution-makers under the *Interim Constitution, 1993*, was nowhere explicitly mentioned in the 1996 Constitution. A new parliamentary system retained some features of the Interim Constitution, and allowed the National Assembly to elect and remove an executive president who would lead a majority instead of consociation government enjoying the confidence of the National Assembly, with cabinet ministers drawn from parliamentarians. In contrast, the Kenyan Constitution, 2010, enshrined separation of powers by providing that sovereign power is "delegated" directly by the people to each of the three branches.[76] The Constitution, 2010, retained a directly elected executive president from the previous order, but delinked the executive entirely a new bicameral legislature, comprised of a Senate and National Assembly. By virtue of its powers, to make and supervise the national budget,[77] to summon witnesses,[78] to scrutinise the reports of watchdog bodies,[79] and to vet executive appointments and override presidential vetoes,[80] it became very difficult for the executive to bypass parliament in policy making, provided the two branches were effectively controlled by different political parties.

In both cases, the system of separated powers in both cases was premised on majoritarian democratic decision-making, albeit with novel proportional representation to parliament in South Africa, and a retained first-past-the-post electoral system in Kenya. Which means that national actors in both states ignored or rejected proliferating recommendations for deeply divided societies to minimise majoritarianism in favour of consociation and formal coalitions.[81] As democracies,

[76] Art 1 (3)
[77] Art.224
[78] Art.125 confers this power to both the National Assembly and the Senate.
[79] See s.42 and art.95 & 125.
[80] Art.115
[81] Some of the literature had recommendations for South Africa, e.g., O'Flynn, Russel & Horowitz (eds) (2005) Power Sharing: New Challenges for Divided Societies, London, Pluto Press: Lijphart, Arendt (2004) "Constitutional Design in Divided Societies" Journal of Democracy Vol.15, No.2. In fact, a power sharing arrangement had been recommended specifically for South Africa prior to constitution making process. See

both states enshrined measures to militate against concentrated executive power, including by imposing two-term limits on presidents and requiring their decisions to be in writing and co-signed to have legal effect. I note in passing that both the South African Constitution, 1996, and the Kenyan Constitution, 2010, provided for novel roles for independent watchdogs of constitutional democracy, which could receive and act on individual complaints against irregular and unfair administrative and governmental decision-making. Furthermore, both states adopted similar constitutional rules for cooperative government, with litigation by and between state actors coming only as an avenue of last resort.

Institutional configurations premised on typologies of presidentialism and parliamentarism are already laden with expectations of the advantages and disadvantages with which each system is theoretically associated, although in practice, contextual variations in their operations will determine how these advantages are realised.[82] In each system, how powers are separated will also depend on the extent to which institutional specialisation can advance. It is evident that the Kenyan Constitution, 2010, enshrined a complex system of divided constitution decision-making, involving a presidential system, a first past the post electoral system, a bicameral parliament, and a devolution of some constitutional competences to forty-seven second tier governments. Several independent organs were also created to participate in constitutional decision-making in various areas of specialisation. Besides challenges of complexity, of bureaucratic operationalisation, of competing political factions and coalitions in governmental institutions, and the financial costs associated with establishing and maintaining the various constitutional institutions, the Kenyan institutional configuration harboured and continues to harbour significant risks of deadlock and disputes over the composition, financing and decision-making powers of several constitutional actors, in addition to disputes of overlapping constitutional decision-making competences. In Kenya therefore, one would expect the orientation of constitutional change and continuity under the 2010 Constitution to be influenced by disagreements over the political and technical management of constitutional change outcomes, with broad consensus on constitutional issues dependent as observed during constitution-making, on the relationships with stakeholders in executive and parliamentary institutions. In this context, it is likely that the scope for departure from the 2010 Constitution in terms of new understandings of its stipulations will be limited if the issue on the table is potentially extremely contentious in context or is unfamiliar. Furthermore, it is likely that piecemeal change might be preferred as less costly, in terms of expending political and institutional capital.

South African and Kenyan institutional configurations permit constitutional actors to deal with consequences of constitutional change and continuity through various legislative, administrative, and judicial procedures and instruments. Simultaneously, they ordain collective decision-making and consultations in relation to some constitutional decision-

Horowitz, Donald (1991) A Democratic South Africa? Constitutional Engineering in a Divided Society. Berkely, University of California Press.

[82] See for instance, Skach, Cindy (2005) Borrowing Constitutional Design, Princeton, Princeton university Press (questioning choices of semi-presidentialism based on their effects in two case studies). See also Stepan, Alfred & Skach, Cindy (1993) Constitutional Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism" World Politics, Vol.46, No.1, pp1-22 (defining the concepts and finding few formal variations in world constitutions).

making, which would seem like routine constitutional governmental practice. However, there is a significant departure from previous decision-making practice in the constitutional duty to facilitate public participation in various kinds of processes. For instance, parliaments in both South Africa and Kenya were obligated to facilitate public participation in their procedures.[83] To some extent, duties to consult and involve the public must complicate institutional decision-making. It is therefore significant to point out firstly, that the institutional configurations for specialisation and collective, cooperative, and consultative decision-making in South Africa and Kenya can transmute separation of powers into dynamic, complex, unpredictable, and sometimes confusing practices. Secondly, those same institutional configurations can spur shared or common understandings of the requirements and consequences of constitutional change and continuity in both states and highlight conflicting interpretations such that understandings of constitutional change become embattled.

1.3.3.2 The positioning of court actors

South Africa modified its parliamentary system by retaining a Constitutional Court, initially established in the *Interim Constitution, 1993*, which could overturn unconstitutional legislation, and independently direct the alignment of a unitary legal-constitutional order. Its judges were to be appointed by the President after consultation with leaders of opposition parties in the National Assembly. Notably too, appointment and removal of superior court judges were to be controlled by a Judicial Service Commission, which included representatives of both chambers of parliament, and the civil service. The Constitutional Court, composed of the Chief Justice, deputy Chief Justice and nine other judges,[84] was vested exclusive original jurisdiction to determine disputes between organs of state concerning their constitutional powers and functions, petitions concerning the constitutionality of a parliamentary or provincial bill, or a constitutional amendment.[85] Moreover, while the High Court could issue an order to invalidate an act of parliament for unconstitutionality, the Constitutional Court must confirm the order, or overturn it, and national legislation was to provide for referral of the High Court order to the Constitutional Court.[86] Only the President might approach the Constitutional Court for an advisory opinion on constitutionality of a national bill,[87] but this has so far happened only once between 1997 and 2020.[88] The Constitutional Court became the final appellate court by virtue of the Seventeenth Constitutional Amendment of 2012. The combination of its exclusive jurisdiction, the finality of its constitutional decisions, and its authority to issue any order

[83] Art.118(1) and art.124

[84] See s.167(1) of the Constitution. Under s.174(1) judges of the Constitutional Court must be South African citizens.

[85] Section 167(4). In addition, only the Constitutional Court can determine that the President or Parliament has failed to fulfil a constitutional obligation, make a final determination on the constitutionality of legislation, or conduct of the President, and certify a provincial constitution. The Court exercises discretion on whether to grant direct access to determine such claims.

[86] Sec.172(2)(c). The High Court has jurisdiction to declare subsidiary legislation or regulations as constitutionally invalid. Decisions on constitutionality of regulations do not require confirmation by the Constitutional court for confirmation orders. See *Mulowayi and Others v Minister of Home Affairs and Another* (CCT249/18) [2019] ZACC 1.

[87] Or provincial premier in case of a provincial assembly bill.

[88] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (1999) ZACC 15. The Court agreed with the President that a Bill for national government to oversee sale of liquor infringed a competence granted exclusively to provincial legislature in Schedule 5A of the Constitution, 1996.

it deems fit,[89] casts the Court as a creative law-making institution. However, it is worth noting that much about the operation of the Court, and the judicial system, was left to legislation.

Kenya considered but ultimately rejected a constitutional court,[90] suggesting an institutional difference in the management of constitutional change that remains to be seen in subsequent analysis. Instead, Kenya established a novel apex Supreme Court, composed by the Chief justice, Deputy Chief Justice and five other judges, Unlike in South Africa, these judges were appointed via a process involving an open, competitive recruitment process conducted by the Judicial Service Commission and confirmation by the National Assembly confirmation.[91] In contrast to South Africa, the Kenyan Judicial Service Commission was to be composed of judicial, bar fraternity, and civil society representatives, while excluding political representatives and appointees. The Supreme Court was vested with exclusive jurisdiction solely to determine presidential election petitions. It had final appellate jurisdiction, as of right for matters concerning an interpretation or application of the Constitution, or by discretionary certification that a matter of public importance is involved.[92] As in South Africa, Kenyan constitutional provisions on judicial independence were entrenched in art.255, so that amending them required a referendum. Again, as in South Africa, the operationalisation of the Supreme Court and the judicial system in general was deferred to constitutionally mandated legislation.[93]

When considering court actor roles in South Africa and Kenya, the institutional design of separation of powers may be a factor of their capacity to strategize on constitutional change questions, together with the choice of a Constitutional Court in South Africa and a Supreme Court in Kenya. I emphasise here that the apex court in South Africa was designed with a more overt political accountability dimension in its composition, than was the case for Kenya. These are background features to be born in mind.

1.4 What do the constitutions of South Africa and Kenya require for their actualisation?

The stated rationale of constitution-making in South Africa and Kenya centred upon the idea that under constitutional supremacy, government would become more plural in character, sharing powers between distinct levels of government, and assigning responsibilities to more localised, specialised, and democratised centres of democratic decision making. Both constitutions recognised need for citizen engagement in constitutional issue from rights-based and activism-based perspectives, with some rebalancing of powers between court actors and political branches. Even assuming the provisions highlighted above concerning constitutional supremacy, expansive rights, and democratic, institutional

[89] Court may devise any remedy it deems fit, s.167.
[90] See Ghai & Cottrell (2018) "The Contribution of the South African Constitution to Kenya's Constitution" in Dixon & Roux (eds.) (2018) Constitutional Triumphs and Constitutional Developments: A Critical Assessment of the 1996 South African Constitution's Local and International influence. Cambridge, Cambridge University Press pp.252-293. Ghai reveals the significance of personal contact between individuals, himself included, who had key roles in constitution-making in either state.
[91] Art.166(1)(a).
[92] Art.163(4). Its original and exclusive jurisdiction is limited to presidential election petitions and constitutionality of emergency declarations and measures.
[93] Hence, it is *the Supreme Court of Kenya Act, 2011*, which among other things legislates interpretation principles used by this court. The *Elections Act, 2011* deals in part with how the Court should exercise its exclusive original jurisdiction in election petitions.

decision-making, were by-products of the haggled compromises of constitution-makers, enshrining them at the very least created an expectation among citizens of what it would mean if those values and rights were institutionalized in the legal and political order. From this consideration, in one sense, the respective constitutions convey a significant possibility of transformative societal change, rendering them an apt means to conceive change in the material world. Yet they also inversely portend intractability by thick coverage of the very issues that draw fundamental disagreement. This paradox might still signify a well-conceived approach and process to organise tensions of constitutional change and continuity once the constitutions came into force, through an engagement with future rulemaking and interpretation.

Concerning what the respective constitutions of South Africa and Kenya envisaged for their actualisation, I note three points. Firstly, both constitutions recognised various sources of competing influences over orientation and direction of constitutional change and therefore included obligations with identified duty holders. For instance, in both states, elected presidents were declared guarantors and custodians of the constitution. In both states, parliaments were vested with new powers and procedures for oversight of constitutional bodies and authorised to enact a slew of legislation to actualise constitutional promises. Getting legislation might be a huge wrangle, involving protracted agreement-making on constitutional issues, but this might help too to maintain a de-escalation of constitutional disputes to legislative disputes. And courts were vested significant powers to determine constitutional disputes. For the South African Constitutional Court and the Kenyan High Court, these powers included discretionary powers to take up constitutional matters *suo moto*, of their own volition. Additionally, other independent constitutional oversight commissioners were established by both constitutions. Hence, in addition to obligations and duty holders, hierarchies of specialised functions were included to the extent that each branch could administer the constitutions duties assigned it. One expects to see multiplicity of actors, agents, and arenas such that not all constitutional disputes need the attention of court actors. Moreover, the orientation of expansive rights might allow the branches to coordinate their interests constitutionally, thereby delimiting fundamental disagreements on constitutional issues and norms. Plurality of functions might however inversely reinforce principal-agent relations between citizens and public officials if the branches fail to discover how to draw and deal with boundaries to constitutional change and continuity with the 'big picture' in focus. Perhaps due to imposition of obligations and distribution of related functions to plural actors, agents, and arenas, where orientation of constitutional change is influenced, moving on from the antecedent constitutional orders and practices is no longer taken for granted in either South Africa or Kenya? I investigate further in the case studies.

Secondly, the respective constitutions of South Africa and Kenya demonstrated concern for the methods used to institutionalise, elucidate, and consolidate constitutional change. In both, textual analysis uncovers a preference for legislation. For instance, in South Africa, issues pegged to future legislation extended from official language use, citizenship, rights and freedoms, restitutive claims, conduct of elections, institutional functions, e.g., legislative procedures to hold the executive accountable, or to create jurisdiction of courts,[94] governmental structures e.g., the transfer of revenue and competences to and from provincial and local government systems, the establishment of new

[94] Section 169 and s.171.

bodies, e.g., a council of traditional leaders,[95] cooperative intergovernmental relations,[96] and a communal right to self-determination.[97] The Kenyan Constitution, 2010 invoked legislation more pervasively than in South Africa and it included a schedule listing some fifty pieces of legislation for enactment within prescribed timelines. It created a Constitution Implementation Commission (CIC), together with a parliamentary oversight body, to ensure this legislation was enacted. This Commission was also charged with the responsibility of involving the public in the implementation process. This approach was useful to some extent as several pieces of legislation were formally enacted. Addressing issues like democratic accountability or redressing historical grievance, was conditioned on future, enabling legislation.

For stability of constitutional decision-making of legislation where diverse constitutional claims are evaluated, the fallback would be on interbranch collaboration. This was because the constitutions permitted executive presidents to veto legislation subject to legislatures overriding vetoes, and for both political branches to seek advisory opinions from court actors. Hence, in theory, the use of collective decision-making could permit resolution of legislative disputes, presenting a possibility for constitution-building to operate in a sphere of concerted action. On the other hand, the preference for legislation suggests an inbuilt preference for political methods to service agreement making on fundamentally disputed norms. Political methods entail discursive procedures which are not limited to aggrieved parties, since all who have general knowledge of issues can partake, and solutions or outcomes are prospective and not retrospective. From such a perspective of political methods, the legislature is elevated as the primary site of constitution-building coordination. Court actors on the other hand, would develop the law through adversarial procedures involving aggrieved parties who have standing alone, and through reasoned decisions that are based on evidentiary burdens, and which involve retrospective limited, directed remedies. Nevertheless, as observed above, the proposition that dynamic separation of powers could produce unexpected fusions of law and politics suggests that constitution-building could be an avenue to question assumptions about the binary logics informing secondary rulemaking in South Africa and Kenya. This view will also be subsequent chapters.

Which leads to the third point about the constitutions harbouring a salient idea of implementation of constitutional change. Their expansive requirement for legislation to vindicate enshrined values, norms and assorted issues and interests, coupled with explicit authorisation of court actors to develop the law, was clearly intended to hue closely to principles and the spirit, intent, and objects of the respective constitutions. Although the constitutions spelt out values and principles to guide legislators, we cannot assume that South African or Kenyan legislators thereby were able to take such values and principles for granted. Enacting legislation could always spur tensions between the goal for such norms and values to be germane to a future legal and political order in either South Africa or Kenya, and the interests and preferences of bargaining legislators. Moreover, it could be questioned whether legislation enacted in conditions marked either by dominance of one party in the South Africa legislature and political system, or the effects of concealed

[95] Sections 211-212.
[96] Section 41.
[97] Section 235.

bargaining behaviour in Kenyan parliament, provide appropriate bases for progressive constitutional change. A larger point however is whether the methods of constitutional decision making, which the respective constitutions stipulated must involve collective decision making, collegiality, cooperation, and public participation, would generate new forms of constitutionalism or reversion to old habits and techniques of the constitutionalism of the repudiated antecedent constitutional order, assuming that order was to be completely replaced. And how to make this replacement more legally explicit in the legal order if continued influence of former order was real. This could be restated as a tension between the old and the new constitutionalism.

Introducing new legal order changes, among other multiple functions, is clearly intended by the respective South African and Kenyan constitutions. Under their provisions concerning interpretation and future rulemaking, the legal enterprises of change under these constitutions might appear to be statist and managerial remediation. Consequently, for groups that strive for structural transformation in either state, the method of realising constitutional promises gains importance. This is because it might spur efforts by some groups to revolutionise the constitutional texts, and on the other, concerns about democratic reversals backsliding on the rule of law. Additionally, saying that constitutional change is long term, organic work is not enough when the need is to assess what the constitutions themselves require in terms of a coherent, systematic method of consolidating gains and protecting against reversals.

1.5 Conclusion

In the foregoing, I have described how constitution-making processes culminating in the 1996 and 2010 Constitutions of South Africa and Kenya respectively, successfully encoding many legal and political changes and ordaining new ones. Nonetheless, their production did not always fetishise higher law norm, and the constitution "in the making" mode evidenced prudent framers sidestepping some issues for future resolution. Additionally, I have described how the constitutions evince formally expansive provisions. Yet, in practice, their change orientation may be exponential or limited. In all this, South African and Kenyan court actors were explicitly mandated by the respective constitutions to support longer term, organic processes of structured change. Notwithstanding the praise they draw internationally, concerns about the instrumentality these constitutions engineer amongst divided national actors have been on the rise. Consequently, they remain embattled.[98]

Salient to the respective constitutions of South Africa and Kenya is an idea of some general principles and practices of constitutional decision-making. Obviously, some decision making is subject to the institutional divisions and diffuse reciprocity obtaining in presidential and parliamentary systems. Beyond that the constitutions provide for collective decision-making through provisions on consultation for instance to appoint judges, on joint signatures for executive decisions that have legal effects, and on the duty to cooperate. The requirements of public participation make constitutional decision-making by state officials subject to additional normative rules. It is therefore admissible to

[98] Outside the framework of constitutional law but related to it, political economy analyses suggest these commitments remain embattled and elusive, pushing the country to the brink of a discomfort zone for the constitutional order. See Marais, Hein (2011) South Africa Pushed to the Limits: The Political Economy of Change. Zed Books. London, UK, p.6.

suggest that fleshing out these constitutions can and should be understood as subject to some general and holistic principle, even if the constitutions do not explicitly identify one. Finding such an organising principle can allow constitutional scholars to systematically analyse what constitutional actors, especially court actors, needed to do and should do, within the constitutional framework, that will reinforce constitutional change outcomes that are better shared and therefore acceptable to varied deeply divided national actors. I address this in the next chapter under the rubric of constitution-building.

Chapter Two: The Concept of Constitution-building

Contents

2.1 Introduction

South Africa and Kenya achieved new formalisation of constitutions after turbulent years of constitution-making, as discussed in the previous chapter. Thereafter, their national actors embarked on actualising them to produce the social, political, and legal transformations those constitutions envisaged. In this chapter, I surface the theoretical concerns associated with what this actualisation might mean in a broader context, although I maintain the focus on the two constitutions of South Africa and Kenya. An early concern was flagged by the inconclusive or indeterminate nature of constitutional change processes to produce liberal constitutionalism in contexts such as those of the two states in discussion. Flowing from that concern, another would be associated with the nature of the new constitutionalism to be produced through future rulemaking to give effect to contradictory constitutional provisions. Additional, problems of ensuring divided national actors will maintain their precommitments to multifunctional constitutions will be expected. This will probably be the case given competing rationales for national actors to maximise their own institutional interests, and if, as one expects, the poignant demands of diverse publics and constitutional audiences for assorted constitutional outcomes, will proliferate. In operational terms, furthermore, actualising these constitutions will demand substantial

legal skills, and possibly, strategizing behaviour of South African and Kenyan court actors. The thesis to test is that court actors can succeed in making the respective constitutions politically and legally fit to produce assorted preferred outcomes based on their roles as constitution-building actors.

My main aim in this chapter is to introduce the concept of constitution-building and to relate it to South African and Kenya, starting from their characterisation as deeply divided states. This status has empirical implications for their conduct of constitutional change, as I discuss in 2.2. In the following section, 2.3, I address my approach to the concept of constitutional change highlighting conceptual and functional approaches in the literature. Subsequently, under 2.4, I canvass two definitions of constitution-building and flag my intention to develop the second definition more fully in subsequent chapters. Thereafter, I outline key features, rationales and counter rationales concerning constitution-building, in 2.5, weighing in with how the concept might draw from and contribute to constitutional theory. I follow on this discussion with an evaluation in 2.6 of current debates on constitutional change, aiming to relate constitution-building to the analytical insights from related concepts. I contend that these concepts while insightful, compel us to address how court actors address constitution-building on their own terms.

2.2 Constitutional change and the concept of deeply divided societies

Constitutional change raises a host of questions and controversies, and in deeply divided societies, there is little to no guarantee that agreement on these questions is achievable by polarised national actors. Copious analyses of deeply divided societies can be found in political science literature, whose division centres on several of their structural diversity.[99] While some of the analyses elucidate these diversities and their magnitude more vividly, their pertinent insight is that bifurcated diversity "fault lines" singly and cumulatively hinder collective decision making, especially democratic decision making.[100] This insight is not specific to Africa,[101] but is germane in African contexts of diverse democracies. South Africa and Kenya are democracies with deep social and cultural fragmentation, and both have constitutions that recognise them as multi-ethnic, multicultural, and multireligious polities, as I discuss in the preceding chapter. From previous constitutional order of systemic exploitation of politicised social cleavages, their constitutions pronounce new inclusive orientations of the state.

Various national actors have pursued constitutional change to legally entrench emergent and societally ascendant norms, rules and formal procedures of democratic decision-making.[102] In deeply divided societies facing risks of state

[99] Deep division in states may be a result of leaders instrumentalising divide and rule tactics, for instance according to Ihonvbere, Julius (1997) "Democratization in Africa" Peace Review Vol.9, Issue 3, pp.371-378. It may also be primordial in social relations. See for instance, Hyden, Goran & Bratton, Michael (eds) (1992) Governance, State and Politics: Governance and Politics in Africa, Boulder, Lynne Rienner Publishers, for a series of essays in part addressing implications of social diversity on 'governance'.
[100] Guelke, Adrian (2012) Politics in Deeply Divided Societies, Cambridge, Polity Press p.2, 14-22.
[101] For instance, analyses linking political transitions and constitutional change focussed on Eastern Europe and South America offer lessons that can be relevant in African contexts, e.g., concerning the disruptive nature of constitutional replacements in Negretto, Gabriel (2011) "Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America" Law & Society Review Vol.46, Issue 4, pp.749-779.
[102] Elster, Offe, & Preuss (eds) (1998) Institutional designs in Post-Communist Societies: Building the ship at sea, Cambridge, Cambridge University Press, pp.1, 3, 18, 29 and 33.

dissolution, constitutions typically were made or modified in transitional settings to reconfigure the state and to consolidate a new institutional order in which the agency of transitional actors is institutionalised and a degree of sustainability of this new order is achieved.[103] In practice, constitutional changes have sometimes disrupted democratisation where its normative visions have been antithetical to longstanding political cultures and practices.[104] Or they have generated hybrid, trade-off constitutions that are at best ambivalent about the status of democratic norms as fundamental constitutional norms of the state. Put differently, it is feasible for constitutional changes to prioritise other problems, like conflict abatement of political violence,[105] especially where the normative universe of deeply divided societies can justify multiple, alternative normative visions of foundational norms of the state. Since I am not primarily concerned with explaining democratisation theories in South Africa and Kenya, what I draw from this characterisation of deeply divided societies is that national actors desire constitutional change teleologically, for outcomes like the increased impact of norms and ideologies in governmental practices in future. However, other endogenous variables will affect those outcomes, including levels of violence, socio-cultural factors, historical experience, institutional consolidation, and so on.

In a second characterisation of deeply divided societies, the literature underlines how and why fundamental disagreements amongst national actors on constitutional norms and issues, renders constitutional change unpredictable and uncertain. I will use the term "*deeply divided societies*" based on Lerner, for whom it meant societies that seem incapable of agreeing on a collective identity of *'we the people'* as it is found in the nation-state, liberal constitutional paradigms.[106] For my purposes, a distinction is warranted between a formal, preambular, nominally united in sovereignty "we the people" in the Constitution of South Africa, 1996 and the Constitution of Kenya, 2010, and the aspiration underlying these charters to progressively produce a "nation-state" in reality. South Africa and Kenya are characterised by societies where social groupings are in conflict, and in competition for resources and public power. Deeply divided societies enact their weak horizontal social cohesion in weak vertical state cohesion, even as they seek their resolution

[103] Guelke, (2012) supra note 100, pp.34-5.
[104] This is an early inference to the problematic nature of constitutional change, which I discuss further below under constitutional changes subsection. On abusive constitutional change, see Landau, David and Dixon, Rosalind (2015) "Constraining Constitutional Change" Wake Forest Law Review, Vol.50, No.4, pp.859-890, (also identifying roles of courts in enforcing procedural and substantive restraints on constitutional changes). On the other hand, anti-democracy regression can occur despite prevailing constitutional guarantees and without any formal constitutional change. See Huq, Aziz & Ginsburg, Tom (2018) "How to Lose a Constitutional Democracy" University of California law Review Vol. pp.65-169. Of additional interest, Huq and Ginsburg offer a baseline of "constitutional liberal democracy" which in my view corresponds to a "liberal constitutional paradigm". Its baseline is three traits – a democratic electoral system, liberal rights especially speech and association, and the rule of law. (p.86).
[105] This is not restricted to Africa. For analysis using Venezuela and Bolivia, see Landau, David (2013) "Constitution-making Gone Wrong" Alabama Law Review, Vol.64, pp.923-980. For analysis where framers also prioritise conflict resolution, with examples of Australia, Ireland, Guatemala as of South Africa, see Maddison, Sarah (2016) Conflict Transformation and Reconciliation: Multilevel Challenges in Deeply Divided Societies, London, Routledge pp.4-6. See also See Carothers, Tom (2002) "The End of the Transition Paradigm" Journal of Democracy Vol. 13, No.1, pp.5-21, and Carothers, Tom (2003) "Debating the Transition Paradigm: A Reply to My Critics" Journal of Democracy Vol.13, No.3, pp.33-38.
[106] Lerner, Hanna (2011) supra note 28, p.26.

through the agency of state institutions.[107] In addition to "deep ideological rifts" that "prevent the emergence of a pre-constitutional consensus", other key features of deeply divided societies are those where, (i) constitutional change occurs while normative conditions for the formulation of liberal constitutions are weak or absent, necessitating risk-averse compromises,[108] (ii) constitutional change processes in these states, including constitution-making, generate hybrid constitutions, if at all, and (iii) constitutions generated are "characterised by intense internal disagreements over the vision of the state, and require a third paradigm of a constitution", since they do not fit into the "liberal constitutional paradigm or nation-state constitutional paradigm".[109]

Several issues attract disagreement in all societies. Ubiquitous issues like religion, ascriptive identity, economic redistribution and so on, can attract disagreement that is sharper, more intractable, and often violent in some states more than others. In so far as disagreements on these issues touches their constitutional aspects, they transmute to fundamental disagreement on constitutional norms. Constitutional solutions to these fundamental disagreements are elusive and where constitutional changes do occur, societies might generate sui generis constitutions. Still, some of their features are generalisable. For instance, Lerner and Ash augment the significance of one general feature when they observe that framers who disagree on very little concerning constitutional fundamentals, resort to "incrementalist" approaches, "expressed through different types of mechanisms, including ambiguity of the constitutional text, deferral of choices to a post-drafting stage, conflicting principles/provisions within a written constitution and the inclusion of non-justiciable principles."[110] Elsewhere, Lerner treats "incrementalist approach" as a potential theoretical paradigm for deeply divided societies.[111]

Noteworthy too is that per Lerner, this second characterisation of deeply divided societies requires a classificatory schema of constitutional paradigms to speak to divergent but legitimately held agendas of constitutional change in deeply divided societies. Paradigms infer a standpoint and have rhetorical appeal, but it is possible to discuss constitutional designs for divided polities using other schema, like accommodation and assimilation, as Choudhry and others have done, circumventing paradigm discourse altogether.[112] What I deduce to be more productive is to address constitutions of deeply divided societies in terms of the contradictory positions that permeating them. Whether South African and Kenyan framers and court actors have understood legitimisation of their constitution as fostering a liberal foundation for the state, or alternatively, they explicitly orient the constitution to comport to some other constitutional paradigm, depends

[107] See Kamatsiko, Valery (2021) "Vertical Social Cohesion: Linking Concept to Practice" Peace and Conflict Studies, Bol.28 No.1, Article 5.
[108] Landau, David (2012) "Constitution making Gone Wrong" Alabama Law Review, Vol.65 No.5, pp.923-980.
[109] Lerner (2011) supra note 29, p.29.
[110] Lerner, Hanna & Bali, Ash (2016) "Constitutional design without Constitutional Moments: Lessons from Religiously Divided Societies" Cornell International Law Journal, Vol.49, Issue 2, Article 1, pp.227-308, at pp234-.5.
[111] See Lerner, Hanna (2010) "Constitution-writing in deeply divided societies: the incrementalist approach" Nations and Nationalism Vol.16, No.1 pp.68-88, where the incrementalist approach is a "tool box" whereby framers draw from deferral of controversial choices regarding the foundational aspects of the polity (p.70).
[112] Choudhry, Sujit (ed) (2010) Constitutional Design for Divided Societies: Integration or Accommodation, Oxford, Oxford University Press.

on their interpretational accounts of constitutionally salient contradictory positions. The respective constitutional texts point to liberal constitutional designs mixed with circumstantial adjustments, including the need for some legal continuity from previous constitutional orders that were by no means liberal.

2.3 Constitutional change and constitution-building

Theories that engage with rationales, methodologies, and functions of constitutional change currently occupy a broad spectrum that includes constitutional theory,[113] positive political theory,[114] economic theory,[115] critical legal theory,[116] and transitions theories.[117] The missing ingredient to build on might be theoretical application for deeper comprehension of what South African and Kenyan court actors are doing to dealing with the tensions of constitutional change and continuity. On the other hand, the concept of constitutional change is too ambiguous or malleable. I address this problem in this sub-section while generating a workable analytical concept for my dissertation.

Constitutional scholars use various terms to describe and rationalise constitutional change in varying periods. Since the 1990s, constitution-making has emerged as one significant dimension of constitutional change, perhaps its most vivid considering its remarkable foundational scope considering the number of new constitutions promulgated in different countries in this period.[118] Others are constitutional amendments and changes via constitutional (re)interpretation. Some theories of constitutional change are theories of constitution-making or theories of constitutional amendments.[119] Alternatively, the term "constitutional transitions" has been use, for instance by Bell, to categorise constitutional change according to functions of rupture or revision, referring respectively to a decisive break from an antecedent constitutional

[113] Colon-Rios, Joel (2020) Constituent Power and the Law, Oxford. Oxford University Press. See also Giovanni, Sartori (1994) Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes, London, Palgrave MacMillan, pp.197-204.

[114] Positive evaluation of the relationship between constitutions and the process of constitution-making is provided by Blount, Elkins and Ginsburg "Does the Process of Constitution Making Matter? In Ginsburg (ed) (2012) Comparative Constitutional Design. New York, Cambridge University Press, pp.31-67. See also Elster, Jon, Ways of Constitution Making in Hadenius, Axel (ed) (1997) Democracy's Victory and Crisis, Cambridge, Cambridge University Press, pp.123-142; Elster, Jon (1995) "Forces and Mechanisms in the Constitution-making Process" Duke Law Journal Vol.45, pp.364-396. See also Elster, Offe & Preuss (1998) Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea. Cambridge, Cambridge University Press.

[115] The focus here has shifted from evaluation of distributive outcomes of constitutional to evaluation of processes by which societies choose constitutional rules. See for instance, Voigt, Stefan (1999) Explaining Constitutional Change: A Positive Economics Approach, Cheltenham, Edward Elgar Publishing Ltd. See also Brennan, Geoffrey & Buchanan, James (1985) (2000edn) The Reason of Rules: Constitutional Political Economy, Cambridge University Press (Liberty Fund edn.) pp.3-19, 149-167.

[116] Tushnet, Mark "Critical Legal Theory" in Golding, Martin & Edmundson, William (eds) (2005) The Blackwell Guide to the Philosophy of Law and Legal Theory, Blackwell Publishing, pp.80-89; Tushnet, Mark (1996) "Defending the Indeterminacy Thesis" Quarterly law Review, Vol.16, pp.339-363.

[117] For instance, the premises behind arguments such as Teitel makes concerning transitional rule of law. See Teitel, Ruti (2000) Transitional Justice. New York, Oxford University Press, pp.191-213.

[118] Constitution-making has been defined as the process "not only for making the constitution but generating or creating the environment, promoting the knowledge, and facilitating public participation that are conducive to a good constitution and to the prospects of implementing it." See Brandt, Cottrell, Ghai & Regan (2011) Constitution-making and reform: Options for the Process, Interpeace, p.13.

[119] For instance, Roznai, Yaniv (2017) Unconstitutional Constitutional Amendments: The Limits of Amendment Power, Oxford, Oxford University Press.

order, or to a graduated modification of the existing one.[120] Ackerman offers another theory analogously as rupture, notably, "revolutionary" constitutional change, which describes extra-constitutional, constitution-making.[121] Ackerman however predominantly focussing on the constitutional politics required for revolutionary constitutional change to succeed, meaning both successful formalisation and production of a legitimate constitution. Evidently, constitutional change connotes both conceptual and functional dimensions of processes whereby framers have more leeway to conceive and achieve change from a previous constitutional order. Relative to framers who exercise a constituent power, institutional actors like courts and legislatures, must deal with the limits of constitutional change, including formal amendments.[122] On the other hand, these institutional actors might have asymmetrical constitutional change impact relative to each other. For instance, European experiences of parliamentary constitutional change suggest that western constitutions have achieved their legitimacy and durability through an evolutionary process in which interpretation, revision, and change in the political culture interact in the long term.[123]

As I will discuss below, some theories about constitutional change and continuity distinguish the political from the legal constitutions. My focus is on the legal constitution, although acknowledging that change of the political constitution can be disruptive of the legal constitution and vice versa, if change in one outstrips or undermines the other. Some scholars have dealt with this imbalance, as I also discuss below, by elevating the salience of agreement making in a political field of action and by elevating the political nature of change via judicial legal reinterpretation. The theoretical debates I will address below in this regard are "constitutional unsettlement", "incrementalism" and "constitutional moments. The normative and empirical claims suggested in these debates might be transportable to South Africa or Kenya, where the possibility of dealing with a situation of plural sources of constitutional authority, despite the declared supremacy of the legal constitution, is not immaterial.

In so far as I can borrow the insights of political constitutions theories of unsettlement and incrementalism, my focus remains on the relationships between constitutional change, continuity, and judicial interpretative activity, which includes a possibility that this activity creates new kinds of constitutional politics. Consequently, my methodology moving forward will place greater reliance on an analytical conception of constitutional change that recentre court actor roles, namely, constitution-building.

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[120] Bell, Christine (2014) "Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison" Public Law, p.446.

[121] Ackerman, Bruce (2019) Revolutionary Constitutions: Charismatic Leadership and the Rule of Law, Belknap Press, Harvard University Press, pp.362-4

[122] In theory, this asymmetry manifests a contested theoretical difference between constituent power and constitutional power. See Colon-Rios, (Joel 2020) Constituent Power and the Law, Oxford, Oxford University Press, arguing the ability to exercise constituent power after promulgating a constitution is only possible if the material constitution is changed, meaning a revolution. See also Loughlin, Martin (2014) "The Concept of Constituent Power" European Journal of Political Theory Vol.13, Issue 2, pp.218-237, arguing in part that constituent power is contingent on epistemological and ideological debates about who the people are that exercise constituent power.

[123] See Alto, Andrew (1995) "Forms of Constitution making and Theories of Democracy" Cardozo Law Review Vol.17, at p.215.

2.4 Two definitions of constitution-building

Constitution-building is not a novel concept. Various scholars have used it normatively, conceptually, and descriptively to frame and rationalize choices of constitutional change purposes, mechanisms, and procedures, as I discuss in this subsection. Two understandings or meanings constitution-building are traceable in this usage, which at a simplified level, demarcate political science and constitutional theory elements of the concept. This distinction is significant because it will enable me to examine and analyze the concept from the constitution-building "work" of court actors, including their autonomous development of a constitutional change epistemology.

2.4.1 Constitutional politics-centric definitions

Constitution-building appears in political science discourses as a phenomenon of popularly sanctioned constitutional change with democratic consolidation and conflict resolution or peacebuilding attributes in the long-term.[124] Yet in this discourse, the concept is conflated with constitution-making or viewed as a graduated process of constitutional change with constitution-making as its centerpiece. Fombad highlights this dual reference which treats constitution-building both as "*a long-term process whereby a political entity commits itself to the establishment or adoption of the basic rules, principles and values that will regulate economic, social, political, and other aspects of life within that entity"* and *"the drafting of a new constitution without regard to the previous one, a wholesale redrafting of a constitution, a substantial revision of a constitution or slight revisions*."[125] The first entails a process of systematic and systemic strengthening of constitution-based institutions and processes, while the second underscores an immediate or finite constitutional authoring. This treatment of constitution-building through a constitutional drafting lens appears commonplace in political economy analyses too. Hence, in a book examining nine case studies of constitution-building in Africa, de Visser and co. address the concept peripherally through constitution-making narratives that are mostly about constitutional drafting.[126] In the same vein, am analysis of five variations of the constitution-building experience of South Africa by Klug builds entirely on a historical account of constitution-making.[127] Constitution-building is furthermore related to the sequential stage of implementation, on the premise that constitution-making culminates in promulgation or enactment of a new or revised constitution. In yet another variation, constitution-building is used to denote calculated agreement-making activity around constitutional norms and issues during and after constitution-making. Samuels, for instance, views

[124] This includes the critique that constitutional contestation typically pushes constitution building into elite pacts, negating precepts of broad consensus that underline popular constituent power theses. See International Institute for Democracy and Electoral Assistance (2021) Constitution-Building and Disruption: Addressing Changing Conflict Patterns, Stockholm, International IDEA, pp.12-14. See also International IDEA (2011) A Practical Guide to Constitution Building, Stockholm. Available at www.idea.int.

[125] Fombad, Charles (2014) Constitution building in Africa: The never-ending story of the making, unmaking and remaking of African constitutions" African and Asian Studies, at p.3.

[126] De Visser, Jaap, Steytler, Nico, Powell, Derek & Durojaye, Ebenezer (eds) (2014) Constitution Building in Africa, Nomos, University of Western Cape, pp 10-13.

[127] Klug, Heinz in Morris, Caroline, Boston, Jonathan, & Butler, Petra (eds) (2011) Reconstituting the Constitution, Springer, pp51-82. Of interest, Klug identifies these five elements as timing and timeframes of the process, process design, public or popular participation, function of constitutional principles, and substantive institutional design choices (or content).

constitution-building as both a process of making constitutions to shape institutional and governance frameworks of states and a "forum" for inclusive negotiation and dialogues on divisive constitutional issues.[128]

From these definitions or understandings in common use, three integrals of a constitution-building concept are resonant. These are, notably, legal formalization of constitutional change, bargaining behavior manifested in agreement-making purposely to augment catalytic political support for constitutional change, and institutionalization of constitutional change outcomes, via making and executing second order rules. Cutting across these integrals is the notion of strengthening the relationship between constitutions and constitutionalism, which some scholars invoke as an ultimate measure of the "success" of constitution-building.[129] In practice, any, or all these three elements might be trenchantly contested amongst divided national actors. Alternatively, any of them might gain an asymmetrical importance in any given state's constitutional change project. Consequently, political scientists must struggle to define constitution-building as a coherent concept when custodianship of its integral elements is institutionally diffuse and often periodized. Moreover, while this first set of definitions denote constitution-building as a qualified process or chain of interlinked events, it remains one whose sustenance is attributed to actors, factors, arrangements, and commitments for which the legal sphere is peripheral. In this regard, one detects some rooting of this first set of meanings in use in a political science vocabulary of engineering politics. Consequently, constitution-building is reminiscent of terms like nation-building, state-building,[130] peacebuilding, and democracy-building.[131]

2.4.2 Court actor-centric definitions

My second category of definitions treats constitution-building as a particular kind of constitutional interpretive activity. This definition has more relevance for my dissertation. Very pertinent here is the definition offered by Fowkes, with South Africa in focus, whereby constitution building *"aims to be an interpretive account – that is, a legal, constitutional account of the (Constitutional) Court's work that can be used to explain and defend its activity in legal, constitutional terms..."*[132] This definition matters more for my dissertation because it attempts to internalize the legal activity of constitution-building within court actors, yet still relates it to the social and political activity of a wider constitutional body politic. With this definition, Fowkes describes how the transformational potential of the South African Constitution, 1996, is maximized via a "joint" interpretive activity of court and non-court actors that entails plural functions like constitutional

[128] Samuels, Kirsti in Paris, Roland & Sisk, Timothy (eds) (2008) The Dilemmas of Statebuilding, London, Routledge, Chapter 8, pp.173-196.
[129] See for instance, Chilemba, Enoch "They Keep Saying, 'My President, My Emperor, and My All': Seeking an Antidote to the Perpetual Threat to Constitutionalism in Malawi" in De Visser, Jaap, Steytler, Nico, Powell, Derek & Durojaye, Ebenezer (eds) (2014) Constitution Building in Africa, Nomos, University of Western Cape, pp.200-238, arguing that the making of the Malawian Constitution of 1995 was premised on complying with principles of constitutionalism on which standard the constitution making process "failed" despite achieving formal codification of a new text (p.210).
[130] Samuels, Kirsti (2008) supra note 128, p.173
[131] See "Constitution Medicine: Building Democracy After Conflict" Journal of Democracy Vol.16, No.1, pp54-68, at p.61.
[132] Fowkes, James (2016) Building the Constitution: The Practice of Constitutional Interpretation in Post Apartheid South Africa, Cambridge, Cambridge University Press, p.4.

socialization,[133] institutional empowerment, and conflict abatement through "dialogue". Fowkes emphasizes that constitution-building is compelled by the nature of the constitution *"because compliance with such an incomplete text is often a matter of degree to be maximised rather than a binary matter of obeying or breaking."*[134] Noteworthy too is the invocation of interpretative activity as opposed to doctrinal interpretation. Constitution-building is thereby centred on demonstrative compliance rather than legal control of constitutionality, concomitantly with claiming that a discernible judicial strategizing is at work. I revisit this definition in the next chapter, which fully recentres the concept of constitution building on the roles of court actors. Furthermore, I will drill into the concept of constitution-building as a mix of judicial legal account of constitutional change and strategizing and test its implications in subsequent chapters.

At this point, I acknowledge that a judicial account of the concept is not denuded of its generic integrals, notably, a distinct process to legitimize and institutionalize constitutions amidst fundamental disagreements on constitutional norms and issues. Naturally, what contours such a process might exhibit in granular detail might be localized. However, its prevention or mitigation of counter-constitutional and extra-constitutional change would be a common concern across different contexts. Additionally, a regular process invoking some form of agreement-making on constitutional issues is significant on its own merits, even if its additional remediation in contexts where fundamental disagreements on constitutional issues turn violent, is supremely crucial. Potentially, constitution-building in any context might be laden with contentious historical claims and laced with circumstantial tensions about generating constitutional change winners and losers unfairly. Nonetheless, since constitution-building has goals of legitimizing and institutionalizing constitutional change and continuity, these would still need to become more explicit via the legal accounts court actors vest them. With these early parameters, I turn below to consider what key rationales and counter arguments pertain to the concept generally.

2.5 Constitution-building rationales

Understanding the rationales driving need for constitution-building work will pave the way to understanding what distinct processes of constitutional change and continuity are conceptualised here and what contingent conditions make constitution-building 'successful'? In this section, I outline three significant rationales, building on constitution-making and textual analysis in the previous chapter. These are, notably, a) expansive scope of constitutional change, b) methods of producing effects of constitutional change, and c) normative questions that arise. Although these three rationales seem obvious at first sight, they are nevertheless not straightforward, and the net effect of their hurdles might lead to need to revise expectations about constitutional projects in deeply divided societies like South Africa and Kenya.

2.5.1 Scope of constitutional change

A broad scope of constitutional change will underscore the significance of constitution-building processes to deal with tensions of gaps between constitutional promises and the products of constitutional change. While divided on constitutional formalisation, deeply divided national actors gain a legitimate expectation that legal formalisation of

[133] Id, at p.1.
[134] Id, at p.354.

constitutional change will generate new rules, institutions, and procedures imminently or at the proper time. Firstly, the scope of constitutional issues driving these new rules, institutions and procedures has been expansive in both South Africa and Kenya. I expect it to produce greater complexity of novel institutions and procedures in conjunction with a greater ramification of this complexity when evaluating the products of constitutional change. Furthermore, the issue of time lag between promulgation and implementation is significant, as Kenya demonstrated with fixed time frames,[135] and equally too the question of fidelity to constitutional precommitments. This complexity dimension of the scope of constitutional change and its expected products is a driving rationale for demand for systemic constitution-building processes.

Secondly, is the notion that the scope of constitutional change entails a marked differentiation in the nature of the state, ascertained by new features of its constitutional order. This dimension of scope of constitutional change will entail the production of new legal forms of governmental practices, which in turn are tied to new institutional competences, capacities, and norms. The salience of progression in achieving these new legal forms and norms is probably axiomatic to the pervasive requirements to enact enabling legislation and to pursue interpretive activity that advances constitutional spirit and objects. On the other hand, this scope of new production of legal forms and norms is not straightforward when the impetus is to also preserve the recent agreements and precommitment on which constitutional formalisation was settled. Consequently, another rationale for constitution-building is to devise a balance between marked change in the constitutional order and emphasis on cautionary engagements with products of constitutional change.

Thirdly, the scope of change exceeds legal forms, institutional innovation, and complexity, because constitutional change has not been framed in legal notions exclusively. In other words, in striving for a greater scope of constitutional change, national actors might not settle solely for new legal forms and specific institutional competences. Considering the preambles to the constitutions of South Africa and Kenya, national actors are also striving to use constitutional change to produce greater sense of communal or national belonging. The goal is not simply to guarantee new avenues of active or participatory citizenship but to implode old ideologies and identities in a substantially different kind of polity, and to do this moreover, through novel collective methods. Constitution-building is therefore demanded to supply those avenues that will herald possibly irreversible change in legal, political, and societal culture.

2.5.2 Methodology of institutionalising constitutional change

National actors can avail of varied methods to institutionalise constitutional change and continuity in deeply divided societies, including through the devices of presidential and parliamentary systems and assorted majoritarian decision-making rules I discuss in the preceding chapter. In fact, the available menu of options concerning methods can be pursued with little advance guarantee that they will work, and on a minimal normative basis. Some methods will demarcate separation of powers disputes between various institutions, which mean that the production of constitutional

[135] The reference is to the Fifth Schedule of the 2010 Constitution discussed in Chapter One.

outcomes can remain openly contested. In contrast, the primary challenge for a methodology of striving at outcomes of constitutional change is to systematically preserve the link between the autonomy of the constitution and the prudential agreements fuelling its instrumentality in accordance with the interests of divided national actors. Hence, for instance, even if constitutional change can gain anchorage in discrete pieces of legislation, the need for a continuous process of defining the empirical and normative parameters of constitutional change and continuity remains exceptionally valid through time. Yet in deeply divided societies, it is unclear whether one should create an expectation upfront of finding a definite methodology, or several multiculturally, normatively grounded methodologies?

2.5.3 Normative rationales for constitution-building

One expects deeply divided societies with experience of previous constitutions to have contingent appreciation of normative questions that arise with production of constitutional change. For instance, in the previous chapter, I highlighted whether a dominant party in South Africa or transactionally bargaining in the Kenyan legislature are proper bases for producing constitutional change outcomes. Moreover, expansive declaration of values, principles, and rights in constitutions of South Africa or Kenya point to a rationale for a systematic process for dealing with urgency with the normative questions that arise in the pursuit of constitutional change outcomes. In one sense, therefore, constitution-building is demanded to resolve, correct, maximise, and symbolise normative elements in a new constitutional order, or new constitutionalism. In another sense, constitution-building is expected to raise a host of normative questions concerning the new legal forms, specialised institutions and procedures that are being produced, i.e., the new constitutionalism, including checking the resilience of the old undesirable constitutionalism.

2.6 Constitutional change – alternative concepts and state of debates

In this section, I evaluate some of the current theoretical debates about constitutional change and aim to contrast and relate constitution-building to alternative analytical concepts. These debates highlight that constitutional change has become a highly contentious source of political and legal critique, particularly due to the ubiquitous idea that it primarily is driven by prudent statecraft and political dynamism. While neither evaluation court actor roles, nor considering African contexts, some of the empirical and normative propositions that these debates articulate might have significance for evaluations of court actor roles in dealing with tensions of constitutional change in deeply divided South Africa and Kenya. Moreover, these debates do suggest agenda for further inquiry lines, for instance concerning how and why national actors mobilise political and legal reform agendas in response to constitutional issues, or by what methods, arguments, and strategies of legalisation of politicised constitutional change agendas gains societal significance despite deep divisions on those agendas.

As highlighted above, in this section I address three debates concerning “constitutional moments”, “rupture and revision” and “unconstitutional constitutional change” due to their current significance in shaping political and legal critiques around constitutional change.

2.6.1 Constitutional moments

Debates about "constitutional moments" primarily deal with legalisation strategies for politically motivated constitutional change agendas. Nevertheless, the legalisation involved here when led by court actors, invites theoretical critique concerning the ethos of constitutional change outcomes, over and above political and legal critiques concerned with legitimate division of labour in constitutional democracies. In the early 1990s, Ackerman claimed that in the US context of constitutional rigidity, certain moments arose when remarkable social mobilisation and deep public reflection on constitutional norms articulated new sociological understandings of constitutional rules that US Supreme Court judges subsequently legalised, thereby generating new and sometimes radically different rules under the US Constitution 1789.[136] In other words, what amounted to judicial exercises of informal constitutional amendment or higher lawmaking were sanctioned by the wider body politic during specific periods of popular mobilisation on constitutional matters reminiscent of constitution-making moments. Constitutional moments theory clearly invites an empirical turn to understanding legalisation of informal constitutional change in the US. As empirics, however, there is an odd chance that court actors who might appear to simply legalise a phenomenon of popular sovereignty, have in fact misread or are biased in terms of the sociological legitimacy of constitutional reform agendas, especially if these actors are making constitutional decisions based on the empirical record litigated before them. Additionally, constitutional moments frame an empirical relationship between the respective positions, arguments and strategies that exist between different political motivations and objectives of popular mobilisations, from one moment or period to the next, on the one hand, and the constitutional positions which court actors adopt on the other. Of interest is that many cases of constitutional moments involved revision of a constitutional rule that was initially declared in precedents of the US Supreme Court. In some instances, constitutional amendments have been pushed in the US in direct response to such precedents, especially when they overturned legislation, most vividly in the "new deal" era. More recently in 2022, constitutional amendments have been proposed to respond to the US Supreme Court overturning its own precedent in *Roe v Wade*. On the other hand, the same history shows divided national actors moving court actors to set a precedent establishing a novel constitutional rule in the face of legislative intransigence to enact appropriate legislation. This constitutional history whereby constitutional rules, legislation and judicial precedents go hand in hand in shaping how constitutional change and its tensions are continuously debated.

There is however a broader theoretical debate here, which I relate to the full significance of informal constitutional change in the hands of court actors. From an alternative perspective, popular mobilisation signifies a constitution placed in a constitution-making mode, whose success should be assessed in theoretical rather than exclusively empirical terms, including from popular sovereignty lenses. [137] Popular sovereignty however infers a homogeneity of the people that is missing or misleading in juxtaposition to the concept of deeply divided societies, but the more pertinent point here is, as

[136] Ackerman, Bruce (1991) We The People: Vol.1 Foundations, Cambridge, Harvard University Press, pp.33-40. On constitutional moments as different from ordinary politics, see Ackerman, Bruce (1989) "Constitutional Politics/Constitutional Law" Yale Law Journal Vol.99, No.3, at p.461.

[137] See Choudhry, Sujit (2008) "Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures" I:CON Vol.6 Issue 2 pp.193-203.

Loughlin observes, that any exercise of popular sovereignty, or more accurately constituent power, is always a type of pragmatic statecraft.[138] Assuming court actors do transmit popular sovereignty to formalise a new constitutional rule in case law, and assuming pragmatic statecraft is at the heart of it, the theoretical relationship between the constitutional positions court actors take and the mobilisations around change or preservation of formal canonical constitutional rules, is bound to be viewed differently in other contexts. More significantly, US court actors are not alone in transmitting informal change, and other constitutional actors might not claim to do so within a constitution-making mode. A body of legislation bearing this legal effect is in fact described as the "small-c constitution", although some scholars denounce the conflation between constitutional and legislative law in this manner. The question therefore is whether informal constitutional change is embedded only in constitutional as opposed to quotidian politics. In the US, it is pointed out that legislative politics also account for considerable constitutional revision outside constitutional moments theories.[139] If informal constitutional change is driven by political and pragmatic consequences of mobilising national actors behind controversial agendas for reforms around constitutional issues, the issue might be how different national actors draw their red lines, if any, between constitutional politics and legislative politics. Unlike in the US, in contexts such as South Africa or Kenya where constitutions explicitly vest authority on executive, legislative and court actors to resolve tensions of constitutional change and continuity, diverse types of political motivations and objectives for constitutional change in the understandings of the three branches are more readily accepted.

What emerges from the above, is that in many respects, "constitutional moments" debates address the significance of the distinction between formal and informal constitutional changes, even if both kinds of change are driven by politics. To a significant extent, the idea of informal constitutional changes in the US arises due to formal constitutional rigidity. Juxtaposition of formal textual change with informal constitutional change makes it apparent that constitutional change can occur without canonical constitutions being changed. Indeed, constitutional change can occur despite the canonical constitution, although the wording in the latter matters. In contrast to formal changes, informal changes refer to constitutional provisions taking on new, often completely different meanings and applications, through presidential or executive branch decisions, legislative enactments, and judicial precedents. Yet when considering the constitutional positions which court actors are free to adopt based on the arguments, strategies, and respective positions of those mobilising the public behind constitutional change agendas, the materiality of the distinction between formal and informal constitutional change recedes in importance, in an empirical turn to understanding motivations and objectives of constitutional change. Moreover, if court actors are engaged in exercises of a pragmatic statecraft, the question of legitimacy of decisive constitutional change by court actors is not properly resolvable, at least not with a clear doctrinal, categorical justification rooted in the people.

[138] Loughlin, Martin (2010) Foundations of Public Law. New York, Oxford University Press, p.52.
[139] For a critique of constitutional moments, see Klarman, M (1991) Constitutional fact/constitutional fiction: a critique of Bruce Ackerman's theory of constitutional moments" Stanford Law Review, Vol.44. p.759.

2.6.2 Constitutional "rupture" and "revision"

In contrast to the rationalising debates of constitutional revision occurring during specific moments, other debates have been animated by the widely used concepts of rupture and revision. Rupture is understood as a decisive break from one constitutional order or settled constitutional understanding to a different one, and for some scholars, this is a defining characteristic of constitution-making viewed as a legal practice of complete replacement of one constitutional order with another.[140] In contrast, a change that serves to update an existing constitution in response to new political and societal realities without necessarily changing the text itself, would be a revision. However, this might be a mundane legal act that is anchored differently institutionally and repeated periodically. It is possible too that a revision might transmit larger overtones akin to a rupture. Constitutional revision for purposes of my dissertation signifies changes of varying magnitude in the meanings and legal effects of constitutional rules via modes of legislative and judicial law-making to maintain the legitimacy and normativity of the constitution in the long durée. Viewed thus, constitutional revision would be something court actors might view themselves as engaged continuously with, particulalry in the case of specialised constitutional courts.

Assessing the current debates, the proposition offered by Bell who proposes a unique typology of constitutional change labelled "simultaneous rupture and revision"[141] is interesting because it suggests court actor engagement with constitutional change, both conceptually and functionally, can gain a more nuanced register. According to Bell, this change occurs in two circumstances. Firstly, where court actors abandon previous constitutional interpretations or understandings completely in response to "constitutional moments" and secondly, where they disallow "unconstitutional constitutional change". Considering this typology is premised on 'constitutional moments', there is a common denominator in these debates, whereby the normative claiming concerning legitimacy of judicial action to either foster or discourage informal constitutional amendment. However, Bell unlike Ackerman is less concerned with rationalising an empirical practice of US courts, rather the focus is on the unconstitutionality of constitutional change.

Moreover, Bell makes a second claim concerning "simultaneous rupture and revision", which is that court actors will privilege constitutional continuity and abjure constitutional rupture via formal constitutional revision procedures. In practice, according to Roznai, court actors have married ideas of popular sovereignty to higher thresholds for judicially acceptable constitutional amendments, for purposes ranging from responding to what they saw as abusive constitutional change through the prescribed amendment procedures, to laying out a dimension of higher value substantive norms that are juridically privileged against alteration via constituted amendment powers.[142] Bell's second empirical claim might read like a conceptual replication of this judicial practice, but it does infer too that legal constitutions by their very existence nudge judicial actors to reject constitutional change that they perceive as requiring a dismemberment of the

[140] Landau, D and Lerner, H (eds) (2019) Comparative Constitution Making, Elgar Publishing, p.3.
[141] Bell, Christine (2014) Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison" Public Law, p.446.
[142] Roznai Yaniv (2013) "Unconstitutional constitutional amendments – the migration and success of a constitutional idea" American Journal of Comparative Law, Vol.61. No.3. pp.657-720.

texts. Viewed somewhat simplistically, this viewpoint attributes how court actors understand the requirements of rupture and revision to what analytical factors they adjudge weightier to drive their understandings of whether a legal change needs to be constitutionalised to update the governing frameworks, or if the constitution or settled constitutional understanding needs to be amended as the proper response to a new political and social reality. However, as far as constitutionality of constitutional change is concerned, theoretical debate on "simultaneous rupture and revision" reconstructs legal discourses by absorbing the forces behind radical constitutional change, for instance during constitutional moments, and marshalling them against constitutional amendments. Yet it allows court actors to overlook radical popular mobilisation to preserve a legal constitution because it is perfectible by other means. This in my view is a rather complicated debate which requires court actors to adopt strategies that manipulate devices of popular legitimisation, hoping they do so prudently.

Lastly, there is a factor around unpredictability of constitutional change, which Bell alludes to elsewhere.[143] Whether unpredictability is negative or positive in dimension is beside the point. What matters more is the potential presence of this factor when court actors shape their understandings of the requirements of constitutional change and whether they consider themselves competent to ameliorate ramifications of flowing from its unpredictability. Usually, this has meant unpredictability juxtaposing a potential perfectibility of an existing constitution against the risk of its dismemberment. Obviously, an existing constitution is unpredictable in future effects yet potentially perfectible via amendments, which we now see must pass some threshold of judicial acceptance under a concept of "simultaneous rupture and revision". Similarly, constructive judicial interpretations by way of constitutional review can contribute to this perfectibility. From these debates we can inquire further into how constitution-building court actors can formulate interpretative accounts to make the constitution more perfect in judicial estimation. Obviously, this perfectibility point both to a practical and symbolic characterisation of an aspirational understanding of constitutional continuity.

Several normative and empirical propositions are discernible in these rupture and revision debates. One is to maintain a distinction between formal and informal changes, and by accepting that both can be flawed in important ways in relation to settled constitutional principle, responding appropriately to address their dangers. Another is to use the distinction to improve on understandings of constitutional entrenchment in relation to basic, foundational or core constitutional arrangements and structures, which should be safeguarded, with all that is entailed in terms of undermining either the fundamental principles on which a state is based, or the untrammelled discretion of current generations to freely fix their own constitutional rules. A third proposition is to understand the drivers and techniques of constitutional rupture, especially considering evidence that this revolutionary change can be achieved simultaneously via formal and informal practices of change. A fourth is that in certain circumstances, informal constitutional change which occurs more frequently through judicial constitutional interpretation decisions could be functionally better valued over formal

[143] Bell, Christine & Forster, Robert (2020) "Constituting Transitions: Predicting Unpredictability" in Groof, Emmanuel & Wiebusch, Micha (eds) (2020) International law and Transitional Governance, London, Routledge, Chapter 4.

amendments that can challenge prevailing views of constitutionalism. Finally, these debates highlight the challenges involved in how to make rupture and revision more legally explicit. The terms stand out too for the faith some of their users have in the capacity of court actors to meet the aims that societies at turning points might associate with constitutional change. In deeply divided societies, it is possible that these terms might be more of rhetorical devices that court actors will deploy to store up constitutional symbolism in their teleological strategies.

Debates on constitutional "rupture and revision" therefore offer propositions concerning the instrumentality of constitutional change, and they suggest some theoretical "cause and effect" relationship in the mode of constitutional change. However, the debates might not deal with the full significance of court actors approaching constitutional change as either rupture or revision, or a combination of both, suggesting room for further inquiry. Furthermore, the "unconstitutional constitutional change" debate underlines that the benefit of the legal constitution is linked to its stability, which would be undermined by easy, facetious amendments. Additionally, such requirements have a normative value in ensuring that changes to codified constitutional rules are conditioned on as near universal consent as is practicable.[144] Yet these debates also invoke constitutional symbolism in a way that could be defeatist when a long-standing legal constitution is venerated despite is increasingly evident deficits. These debates offer a pertinent insight into the increasing complexity of theorising about corrective constitutional change and invite further inquiry into the effects of formal constitutional change on constitutionalism in each context.

2.6.3 Constitutional incrementalism

Incrementalism has two connotations in debates in the constitutional reform arena. It is used to describe both a configuration of procedures, particularly for purposes of constitutional drafting, and to establish a configuration of issues on which constitutional decision-making is deferred for assorted reasons. In the first usage, constitutional drafting is incremental where a sequence of procedures involves an interim or transitional constitution leading to a final constitutional text. I set aside the authorial debates to focus here on the second kinds of debates because they illuminate that constitutional change is complex and contingent upon a set of fluid and reactive conditions. Claims that constitutional drafters and the decision-makers who follow them cannot settle with any finality the questions, arguments or problems that surround constitutional issues imply the need for constitutional reiterations over time. As I observed in the preceding chapter, constitutional drafters did not resolve all constitutional issues by a peremptory drafting. In fact, several issues were settled by deferral, meaning they were transposed to new or future rulemaking contexts. Incrementalism debates on this deferral either focus on richer description of deferral or aim to draw out the full implications of the dynamics that continue to structure the processes of constitutional change and continuity.

From descriptive debates, the use of deferral techniques is particularly common when decisions on codifying some issues are lubricated by decisions to postpone agreement on others. Because of this prevalence, deferral is usually assumed,

[144] See Brennan, Geoffrey & Buchanan, James (1985) (2000edn) The Reason of Rules: Constitutional Political Economy, Cambridge University Press p.36.

and some of the relevant debates have tried to push back by asking what constitutes deferral in constitutional law, and to what precisely is it supposed to be a response. For instance, according to Dixon and Ginsburg, deferral is manifested in constitutional texts in the use of provisos, or "by law" clauses, and in "strategic ambiguity" of certain provisions, the purpose in both instances being to achieve formalisation of a constitution despite disagreement.[145] More broadly, this deferral is symptomatic of bargaining behaviour amongst framers.[146] According to Lerner, deferral crystallises when framers lock-in disagreement on constitutional issues in contradictory constitutional provisions. Rather than trying to find consensus, or failing which, to conceal deep divisions under a façade of constitutional unity, the framers choose to include in the constitution "…all the competing and mutually contradictory positions of the various factions. Instead of providing clear-cut decisions, the constitution embraces the conflicting visions of the state by including vague and even contradictory provisions.[147]

The precautionary element of deferral that the authors above allude to is refashioned by Lerner as avoiding majoritarian and revolutionary approaches to constitutional change. Which is based on the assertion that deferral transfers problems of ideological and other disagreements on the foundational character of the state from the constitutional to the political sphere.[148] Indeed, citing examples of India, Israel and Ireland, Lerner claims that an incremental approach to constitutional development, or incrementalism, describes how deeply divided societies account for constitutional development in future despite persistent disagreement on constitutional foundations for the state. This theory of incrementalism can be stretched to prescriptions. One way that scholars have done this is by arguing that framers should only codify basic rules and defer "state ideologies",[149] or what Tushnet calls "thick" ideologically disputed constitutional values,[150] to the legislative sphere. Another is voiced in claims that incrementalism can allow framers and constitutional decision-makers to "optimise" constitutional formalisation by minimising "errors" and their future "costs" which arise from lacking knowledge of future effects of rigid formalisation.[151] Post constitution-making therefore, incrementalism viz deferred issues could be valued for its distribution of the benefits and costs of constitutional decision-making and its capacity to improve the efficiency of constitution-building mechanisms.[152] If these constitution-building mechanisms

[145] See Dixon, Rosalind & Ginsburg, Tom (2011) "Deciding not to Decide: Deferral in Constitutional Design" I:CON Vol.9, No.304, pp.636-672; Dixon, Rosalind (2019) "Constitutional Design Deferred" in Landau & Lerner (eds) (2019) Comparative Constitution Making, Elgar Publishing, pp.165-181.
[146] Dixon & Ginsburg (2011) supra note 145, p.646.
[147] Lerner (2011) supra note 30 p.44.
[148] Id, at pp.40-46.
[149] Alternatively stated, constitutions organise the state as a core function. Everything else is codification of ideologies about the state, of which there are three archetypes. See Law, David (2016) "Constitutional Archetypes" Texas Law Review, Vol.95, p.153.
[150] See Tushnet, Mark (1999) Taking the Constitution away from the Courts, Princeton, Princeton University Press. One rebuttal is that the thin constitution is not thin at all, it "only looks that way", pointing to disagreement on the normative minimums to be democratically enforced. See Sager, Lawrence (2001) "Thin Constitutions and the Good Society" Fordham law Review Vol.69 Issue 5, at p.1991.
[151] Dixon & Ginsburg (2011) supra note 145, pp.637, 60.
[152] See Weingast, Barry & Hadfield, Gillian (2013) "Constitutions as Coordinating Devices" (arguing constitutions allow constitutional actors to coordinate beliefs to improve the efficiency of decentralised rule enforcement mechanisms, p.4) (paper downloaded 1/12/2021 from

include court actors, we can see that incrementalism would be very significant for how their roles are designed to enforce deferred rules, as I discuss in the preceding chapter. Additionally, we can also see that incrementalism would be a lens with which to view and rationalise how court actors will enforce constitutional bargains as neutral players.[153] For Dixon and Ginsburg, however, the mitigation of errors ex post constitution making is not addressed to court actors, but to the use of calibrated amendment-entrenchment provisions and periodic constitutional revision.[154]

Quite another normative claim is asserted by theorists of incrementalism with a direct focus on deeply divided societies. The claim is that incrementalism permits disagreeing and deeply divided national actors to maintain their fidelity to the state's legal framework for constitutional dispute resolution. Welikala extends this fidelity to the legal framework to encompass a state's formal institutional framework for the management of political change for the imaginable future. What is therefore distinctive about incrementalism ex post constitution making is that it permits political players who lack consensus on the plural social foundations of the state and who might agree on very little in constitutional terms, to remain committed to the idea of the constitution as a procedural legal framework for managing disagreement, e.g., for governing the conduct of democratic politics in situations of deep societal divisions. As Welikala puts it, incrementalism therefore builds on a theoretical disjuncture between the legal and political constitutions, making this classification significant for deeply divided societies.[155] Even if the legal constitution does not reflect a consensus on foundational aspects of the state, it nonetheless encapsulates a relative consensus on procedural aspects of building agreement, which is enough to maintain fidelity in the constitution among the different players in a deeply divided state. On the other hand, societal contestation around constitutional norms and issues which might occasion political instability, becomes embedded in the political constitution, which might reflect a shaky political settlement, perhaps because it is established on exclusionary principles, for instance a politicised ethno-nationalist view of the state.[156] Even if exclusionary principles were sociologically entrenched during constitution making and the increasing weight of their rejection might destabilise the political system, it is the contrasted sociological stability of the formal or legal constitution that suits it to the incrementalist approach to constitutional change. On this understanding however, the legal constitution should not deal

https://web.stanford.edu/group/mcnollgast/cgi-bin/wordpress/wp-content/uploads/2013/11/hadfield-weingast.north_.paper_.FINAL_13.0920.pdf)
See also Cooter, Robert (2000) The Strategic Constitution. Princeton, New Jersey. Princeton University Press

[153] See Rubenfeld, Jed in Alexander, Larry (2001) Constitutionalism: Philosophical Foundations, Cambridge, Cambridge University Press, p.225. See also Ferejohn, John & Sager, Lawrence (2003) Commitment and Constitutionalism 81 Texas Law Review 1929, p.1946. See also Elster, Jon (2003) "Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment" 81 Texas Law Review 1731, p.1754.

[154] Dixon & Ginsburg, (2011) supra note 144, p.650-651.

[155] Centre for Policy Alternatives, Welikala Asanga (2017) "The Idea of Constitutional Incrementalism" Working Paper No.14, p.44.

[156] The claim is made in the context of contemporary Sri Lankan constitutional politics. See Welikala, Assanga (2015) "Constitutional Form and Reform in Sri Lanka: Towards a Plurinational Understanding" in Tushnet, M & Khosla, M (eds) (2015) Unstable Constitutionalism: Law and Politics in South Asia, Cambridge, Cambridge University Press, Chapter 11.

substantively ethno-cultural differences as the nature of disagreements around them make those kinds of issues immune to final constitutional engineering.[157]

As a preliminary observation, the authors making claims concerning incrementalism like Lerner and Welikala hardly address with any specificity how court actors might use incrementalism to reconfigure their understanding of constitutional change. This is unsurprising since their concerns lie in the principal shift from constitutional politics to legislative politics.[158] With claims concerning optimization and minimization of errors, an analogy could be drawn whereby court actors approach incrementalism and deferral as judicial economy against deciding thick value disputes comprehensively. However, this judicial economy might be easily confused or conflated with court actors acting to conceal their internal divisions through the notion of incompletely theorised agreement-making to avoid what Sunstein dubs "high principle" contestations.[159] Considering the myriad ways time might play into deferral, can we say with certainty what final principles of composing future rulemaking can be judicially deduced? Constitutional law is here being developed in a double context, that of constitutional framing at a fixed period that is hostage to exigencies of the time, and that of future rulemaking, whose connections with deferred gaps might be less obvious with the effluxion of political time.

Furthermore, even if court actors opt to tackle incremental constitutional change head on, we cannot presume court actors will be better able to find consensus on deferred issued when framers could not. I note that unlike with the first usage, which is imply about stages of a singular constitution-making activity, incrementalism and deferral as used in this second meaning might also help to escape framing history, and to fix an internal stability of the constitution in time disconnected from substantive disagreements. However, even if incrementalism is an apt way to think about constitutional change, including for court actors, it remains the case that its primary organisational form in these debates is legislative. It could be argued that court actors have roles to engage with legislated incrementalism as a part of a broader process of constitutional change, for instance via traditional review or more advanced legislative critiques that take account of constitutional change purposes and outcomes. Tentatively, we can see that such processes would offer divided national actors a greater mutual understanding of the nature of the constitution. This will involve inquiring into the connection between the constitution, incremental legislated rules, and the changing nature and structure of the state. It will moreover involve asking how an increased number of national actors can be brought on board to participate in the incremental process for which legislators are custodians despite fundamental disagreements on constitutional norms and issues. We must also recognise the need to connect the constitution, or constitutional law, to integrate and harmonise trenchant political, economic, and social claims in the context of a deeply divided and socially segmented society. Which sets up a line of inquiry to investigate whether more advanced critiques are evident in cases like South

[157] Welikala (2017), supra note 155, p.49.
[158] Lerner(2011) supra note 30, p.45.
[159] Sunstein, Cass (2018) Legal Reasoning and Political Conflict, New York, Oxford University Press, p.35. See also Sunstein, Cass (1998) One Case at a Time: Judicial Minimalism on the Supreme Court Harvard University Press, p.165.

Africa or Kenya, and beyond that, whether they are desirable given the empirical record. With incrementalism, framers are said to recognize practical limits of constitutional legal solutions by restructuring disagreements on foundational norms from constitutional law-making to legislative law-making. There is a significant claim in incrementalism concerning the importance of "more process" as a solution of substantive constitutional disagreement, which resonates in my preliminary view, with constitutional designs in both South Africa and Kenya.

2.6.4 Constitutional "finality" or "unsettlement"

Constitutional unsettlement is a concept Walker advanced amidst evolving national debate concerning United Kingdom (UK) membership in the European Union (EU), to capture and articulated what was arguably a pervasive, sociological understanding of the contemporary status of the unwritten UK constitution.[160] Its empirical claims refer to a unique consequence flowing from UK membership of the EU continuing to shape the legal and juridical order of the UK by a pull of EU law, while the socio-economic and political order, in contrast, continues to be dominated by an understanding of a political settlement rooted in the historical pull of a doctrine of parliamentary sovereignty. Accordingly, by their texture, these empirical claims portray the UK as a deeply divided state in my understanding of a state where agreement on foundational constitutional norms is evasive.

Constitutional unsettlement is a phenomenon that Walker perceives as historically evolving in the nexus between on one hand, constitutional continuity of parliamentary sovereignty, which was stressed by struggles to devolve powers supranationally and sub-nationally, and on the other, the tensions of constitutional change to privilege EU legal regulation of the political order in the UK. In other words, a historical shift from a settled understanding of a constitutional order, which in the case of the UK is one that encouraged a notion of ordered, unitary, conventional constitutional norms, to another different understanding replicating pluralistic understandings of sources of legal and political authority, is material here. What occasions unsettlement in the UK debate, is an increasing sociological perception that an incremental change to a full-fledged constitutional supremacy status aligned with EU membership might be outstripping the power of the historical constitutional settlement to limit it, but this change is yet to completely supplant the legitimacy of the latter now or soon. Hence, the empirical claims Walker advances are that constitutional unsettlement is a "state of affairs" in which the UK simply finds itself, and that unsettlement, even if unexpected, is not necessarily constitutional pathology.[161]

The debate on constitutional unsettlement has some empirical insight concerning how national actors must reconcile themselves to the missing stability of a final constitutional settlement in deeply divided societies. More than this, Walker the debate hints at a normative value in constitutional unsettlement in that it is not necessarily undesirable to be in a status of constitutional unsettlement. Concretely, in a situation premised on historical unravelling of political conventions, constitutional settlement might generate better novel rules that become capable of encapsulation in a

[160] Walker, Neil (2014) "Our Constitutional Unsettlement" Public Law, Edinburgh School of Law Research paper 2014/11, pp.529- it should be noted that two years after its publication, the UK held a "stay or leave" referendum in 2016 in which a majority voted in favour of Brexit.
[161] Id, at pp.542-6

codified constitution. There is a third related claim here according to Walker, notably that in circumstances of unsettlement, the formalisation, implementation, and legitimisation of constitutional change become inevitably infused. This infusion in conjunction with its profound, holistic, and distortional implications, renders constitutional unsettlement particularly suited to political agreement making.[162] In other words, constitutional changes here are unlikely to be effectively pursued via arguments like objectivity, rationality, certainty, uniformity, universality and so on, rendering them unsuitable for judicial analyses.

Why is this debate important? The idea of constitutional unsettlement is interesting for my dissertation because its empirical claims suggest we can recast tensions between constitutional change and continuity into another distinct set of analytical choices that national actors grapple with, including court actors in deeply divided societies. For starters, Walker's analysis of constitutional unsettlement as a complex, new, modus operandi involves an interplay of the 'legal constitution' and the 'political constitution', and underlying comity as well as division of institutional competences. The legal constitution remains synonymous with the settled rules that bind everyone. Similarly, the political constitution also remains pinned to long-standing customary laws, political conventions, and assumptions, which despite an appearance of stability, can be quickly reversed and ruptured by ruling political actors. What changes is the relationship between the legal and political constitution from that portrayed in an incremental approach discussed above. With incrementalism, the stability of the relationship is based on disagreeing political players accepting the fixity of the legal constitution as the authoritative framework for resolving their disagreements. In a situation of unsettlement, the political constitution has superseded the legal constitution and therefore unsettled it in situations of incompatibility. One can straightaway see why this is problematic if it is possible that the political constitution is rooted in nationalisms and other historical or sociologically grounded characteristics for it to supersede the legal constitution and to therefore shape situations of unsettlement. What new political ordering can result from constitutional change here might be infused with legal discourses, but the ability of law to break away with the past might be purely symbolic in practice. Rather than incremental constitutional change, we might find constitutional change couched as restoration or reclamation of an idealised or romanticised past constitutional order. As far as the legal-political constitution distinction goes, unsettlement offers a framework of analysis with limited possibilities for constitution building court actors.

Nevertheless, unsettlement infers additional analytical choices that are relevant for my dissertation. Firstly, is a choice for court actors to engage with the disjuncture between, on the one hand, a unified territorial state power with a unifying notion of constitutional supremacy, and on the other, commitment to constitutional re-scaling of the state by devolving specific aspects of governance capacities to supra national and sub-state levels. Noteworthy here, both South Africa and Kenya are engaged in processes of deepening membership in supranational regional economic blocs, referring

[162] Id, at p.547. In the UK, the choice of political decision-making around Brexit was openly critiqued in terms of political versus judicial checks and enshrouded in intellectual debates about political constitutionalism in relation to populism, sometimes going as far as questioning the legitimacy of popular constitutional referendums. See Bellamy, Richard (2023) "Political Constitutionalism and Referendums: The Case of Brexit" Social & Legal Studies, Vol.1, No.23, pp.1-23.

respectively to the potentially confederal arrangements of South African Development Community and the East Africa Community. And as I point out in chapter one, moreover, their rescaling is also paralleled by devolution of powers to provincial and county level law making assemblies. Not to mention that both states are engaged with an array of international states networks, and non-state polities. These international terrains are both subsumed by, and sometimes superimposed upon, the national constitutional order. If Walter is prescient, those processes will increasingly unsettle their constitutions, despite their being written. What is offered here is an opening for constitution building court actors in South Africa and Kenya, assuming they anticipate constitutional unsettlement, to go either of two ways. Either incrementally advance interpretive accounts that capture and articulate a holistically, unified approach to constitution building, one built on self-enclosed constitutions. Or, conversely, to advance approaches that engage with possibilities of a modern contradictory ordering rather than one built on self-enclosed constitutions. The latter would more closely draw on cross references between process-based approaches to constitution building and constitutional unsettlement as "a state of affairs that is in the process of becoming more and more embedded in contemporary public life and less and less capable of wholesale or even measured undoing or transformation".[163]

A secondly analytical choice for court actors offered by claims of constitutional unsettlement as not undesirable per se, is a disjuncture between, on one hand, significant sociological legitimisation of constitutions and constitutional change that are in essence grounded on a notion of a single constitutional identity, and on the other, questions of the autochthony of the constitution, or its degree of culturally specifiable domesticity. To draw an analogy with the UK, where one spoke of the British*ness* of the constitution (if not its English*ness*, Scottish*ness* and so on), we might allude to the South African*ness* and Kenyan*ness* of constitutional identity. I draw this analytical disjuncture from normative aspects of constitutional unsettlement that have more to do with desirability of supporting a move from a conflict-ridden exclusive political order or constitutional identity, to a more inclusive and peaceful one. As I discussed in chapter one, constitution makers in deeply divided societies are pressured to profile constitutional change as inclusive. On a closer examination, the claims of unsettlement lead to a new, though not unforeseen, dimension of the salient suspicion in some deeply divided societies, that constitution building must either spur or diminish the influence of alien values emerging from commitments to supranational institutions in which their states have become members or parties. If indeed the suspicions we are up against are antagonistic to alien values, what can I expect to find among constitutional building court actors who are engaged with this dimension of putative constitutional unsettlement? One answer returns us to process-based approaches to manage constitutional identity disputes to forestall or delay their unsettling of the legal constitution. Yet the limits of channeling process alone become evident, since we would expect court actors to find formulations for constitutional values that are not simply an uncritical adoption or endorsement from sources alien to a domestic context. We therefore may have to modify a process-based approach to allow a dialectical process. What is now on offer is a process-based approach to constitution building by which court actors reflexively embed or harmonize

[163] Walker, Neil (2014) supra note 160, at p.259.

so-called alien values with others that enshrine domestic sensibility and the local culture. Yet how straightforward is this in deeply divided societies and their plural diversities?

2.7 Conclusion

In the foregoing chapter, I introduced constitution-building as a concept that reaffirms pathways to establishing legitimate constitutions, akin to constitution-making, yet with deeper concern for the tensions that constitutions pick up post promulgation, as national actors use the constitution to think about broader changes concerning the nature of their state. In its two definitions as pragmatic statecraft and as judicial interpretation activity, a turn to empiricism in constitutional theory was reaffirmed for fruitful gains in better understandings of the tensions between constitutional continuity and constitutional change, especially in contemporary deeply divided societies.

I also reviewed pertinent constitutional debates and identified their analytical hinges, which offer insights for what constitution-building court actors might be engaged with, viewed from alternative conceptual lenses. Some of the debates reaffirm rhetorical dichotomies of political and legal constitutions, or rupture and revision, in which court actors routinely are positioned as custodians of a legal constitution, whose finality and fixity they are upholding. Nevertheless, these debates were also about disagreement on this elusive constitutional finality and fixity. Incrementalism would favour legislative politics to advance constitutional agreements, some of which are deferred textual aspirations and exhortations. Analogously, it would underscore a process-based approach to constitution building. This is not explicitly debated above, but it rises from the expectation that court actors will act in predictable ways, especially to minimise the errors and costs of political constitutional agreement-making, pinpointing the significance of process as a proxy for substantive agreement. This tallies with the broad view of court actors in positive constitutional theory.[164] With "constitutional unsettlement", disagreements are more amplified, and the political constitution trumps the fixity and finality of the legal constitution in cases of incompatibility, leaving court actors to either avoid disputes as political questions, or to struggle to reinforce conservatory impulses of constitutional continuity from the past order. Under this concept analytical choices are elaborated that are anathema to ideas of a distinct autonomy of constitution as settled law denoting broad, universal unchanging principles. Its implicit takeaway is that constitution-building court actors would have very little to do with unsettling constitutional disagreements, which are firmly the terrain of political actors. Or, conversely, that court actors must search for mixed avenues to align value-based plurality in the legal and political spheres when constitutional changes unsettle the present order. For their part, incrementalists are saying something similar, except in their view, political actors will readily acquiesce to the interpretative accounts of constitutional change that court actors can offer them. For incrementalists, process-based constitution-building processes might be more about strengthening core authorising functions in positive constitutional law.

Because my dissertation addresses constitution-building in South Africa and Kenya, it is clearer now that a fuller picture of why and how their court actors engage with tensions of constitutional change is gainable only by surfacing that

[164] See Holmes, Stephen (1995) Passions and Constraints: On the Theory of Liberal Democracy, Chicago, University of Chicago Press, pp.134-140

engagement on their own terms. To aid that surfacing, however, I draw a few theoretical pointers from the two preceding chapters. My preliminary discussion in chapter one problematised the constitutions that emerged from compromises of constitution making. These Recognising their paradoxes, I spelt out three rationales whereby constitution-building emerges as a process court actors could use to decipher their inherent paradoxes, as well as absorbed post-promulgation tensions, and simultaneously, to stand above them. The debates above further offered several clues to frame a more comprehensive picture of constitution-building rationales than is obtained by solely scanning constitution making empirics. In the next chapter, I address how court actors might use constitution-building on their own terms, to identify which tensions of constitutional change and continuity require their judicial intervention. The aim thereafter is to engage with deeper description of those interventions.

Chapter Three: Constitution-building and judicial interpretive activity

Contents

3.1 Introduction

Constitution-building connotes systemic processes of connecting constitutional promises to outcomes of constitutional change, while resolving some of the dilemmas that emanate from attributes of the constitutional charters. Such processes can be rationalised based on the scope of constitutional change, demand by divided national actors for collective methods of producing outcomes of constitutional change, and by their striving for shared or converging constitutional values, not just interests. In both South Africa and Kenya, constitution-building has an additional appeal to make a constitution acceptable for actors who seek more revolutionary constitutional changes, because it will generate the processes that will aid those actors to conceptualise what that change means and entails. In the previous chapter, I illuminated a political science approach to constitution-building, which conflates it with constitution-making in tandem with democracy building and peacebuilding, to bring divided groups together. In this chapter, I recentre the concept of constitution-building on court-centric accounts, which essentially describe and explain methodologies of judicial engagement with constitutional change. I deal firstly in 3.2 with definitional aspects sourced from academic postulations, while highlighting the theories of Fowkes and Klare on the constitution-building work of the Constitutional Court of South Africa.

Quite explicit in these definitional accounts is the claim that court actors are engaged in solving the problem of evolution of liberal constitutional promises and guarantees, via techno-political approaches to constitutional interpretation that may be very broad or quite narrow. In other words, the significant constitution-building work of court actors is to produce and to continue a progressive legal process in service to liberal constitutionalism. This effort contrasts inversely with an empirical claim in the constitution-making literature, that liberal constitutional paradigms are formidably difficult to

engineer in states where agreement on liberal values eludes national actors. What is claimed, somewhat implicitly, is that constitution-building actors aim to overcome the limits of liberal constitutionalism in either South Africa or Kenya. Even so, I will contend that this is only one perspective of the constitution-building work of the court actors in discussion.

In the next section, 3.3, I highlight the desired characteristics or attributes of constitution-building court actors that emerge in the preceding section, and which might catalyse their engagement in strategizing constitution-building interpretive activity. This will be useful to bear in mind when subsequently analysing the implications of institutional or organisational limits on constitution-building, which I reserve for the concluding chapter of the dissertation. By drawing on various threads in the definitional accounts, I propose exploratory analytical points based on which more granular consideration of the constitution-building work of court actors in South Africa and Kenya is undertaken in subsequent case studies. I set these out in 3.4, as three points, notably: the ideation dimension of constitution-building, what legal processes and methods are accentuated, and how court actors understand outcomes of constitutional change, considering its scope, complexity, and attributes of constitutions, among other challenges highlighted in previous chapters. Consequently, this chapter also paves the way for deeper scrutiny of constitution-building court actors in South Africa and Kenya in subsequent chapters.

3.2 Court-centric constitution-building revisited

In the preceding chapter, I observed that constitution-building is not a novel concept, and that two conceptual meanings could be discerned in political science usage of the term in contrast to how constitutional theorists understand it. I referred to the first usage as a "constitution politics-centric" understanding that elevates institutional design aspects of constitution-making, agreement-making and bargaining aspects of constitutional rule-making processes, and material outcomes of constitutional changes. In comparison, I referred to the second understanding as "court-centric" and set up this specific understanding as significant for my dissertation. Consequently, my point of commencement in this chapter is the notion of court-centric constitution-building, which I deal with in this sub-section. I highlight that what court-centric conceptions offer at first sight is a call for court actors to transcend legalistic and formalistic conceptions of constitution, to conceive of constitutional change historically and holistically, and to strategize to secure liberal democratic commitments. Equipped with the knowledge, skills, and methods these conceptions offer, the empirical premise is that court actors will be able to muster projects of constitutional change despite fundamental disagreement on fundamental norms and issues. Salient in all this is the elevation of the liberal constitutional paradigm, which is the main problem to solve as it eludes deeply divided national actors. I surface the court-centric accounts with focus on two sources of constitution-building concepts, notably, Fowkes and Klare.

3.2.1 Fowkes' constitution-building courts

James Fowkes, with South Africa in focus, defined constitution-building as aiming to be *"an interpretive account – that is, a legal, constitutional account of the (Constitutional) Court's work that can be used to explain and defend its activity*

in legal, constitutional terms..."[165] This definition is significant because it uses the term constitution-building more specifically, technically, conceptually and functionally to describe and rationalize roles of court actors when engaged in elucidating constitutional change with atypical constitutions in mind. The invocation of interpretative activity as opposed to doctrinal interpretation, was deliberate. It was intended to identify an essential legal feature of constitution-building that is also atypical of constitutional interpretation. As Fowkes conceived it, constitution-building was emphatically an internalized, legal activity of court actors, designed or strategized to link constitutions to the social and political activity of a wider constitutional body politic. This definition therefore spoke directly to the rationales of constitution-building that are defined by the scope of constitutional change, attributes of the constitution, the necessity for some kind of legal method of elucidating its ethos and telos, and adequate attention to real world outcomes, meaning both legal and extra-legal effects.

These rationales were visible in the way Fowkes elaborated on constitution-building as joint interpretative activity. Firstly, the constitution-building work of the South African Constitutional Court was compelled by the attribute of the South African Constitution, 1996, *"because compliance with such an incomplete text is often a matter of degree to be maximised rather than a binary matter of obeying or breaking*."[166] I take this as meaning that the legal constitution was both formally and substantively incomplete, in that both its scope of future rulemaking and actualisation or institutionalisation of the constitutionally authorised substantive changes, remained work in progress – things to be built. Secondly, constitution-building called for adaptive and exploratory legal methods. The essential method Fowkes fronted was one whereby the transformational potential of the South African Constitution, 1996, was maximized via a "joint" interpretive activity of court and non-court actors.[167] Joint interpretive activity entailed discursive approaches to constitutional socialization, so that constitution-building efforts of the Constitutional Court harnessed and gave jural language to convergent understandings of constitutional values and the objects of constitutional change. For this to succeed in granular details, Fowkes firstly pointed out the significance of a discernible dialogue with pollical branches that offered judicial interpretive authority as a trade-off with other constitutional actors. This trade-off consisted of the Constitutional Court absorbing and extrapolating constitutional interpretations that other constitutional actors generate within their institutional purviews, while the Court in turn aided their constitutional compliance by bringing their understandings within constitutional ambit. This element of dialogue had explicitly judicially endorsed, for instance, by Justice Sachs of the South African Constitutional Court stating in obiter that a "civilized conversation" existed and was pursued between court actors and other branches.[168] The second element Fowkes highlighted was "strategizing", both to build institutional legitimacy with political actors by securing inter-institutional influence on significant, shared constitutional understanding, and to marry constitutional interpretation to innovate judicial remedies, on the premise that courts are interested in practical constitutional outcomes. In this second sense, strategizing extended to courts

[165] Fowkes, James (2016) Building the constitution: The practice of constitutional interpretation in post-apartheid South Africa (Vol.16) Cambridge, Cambridge University Press, p.4.
[166] Id, at p.354.
[167] Id, at p.1.
[168] Sachs, J in *Minister of Justice and Constitutional development and Others v Prince* (2018) ZACC 30, para 51.

coopting the infrastructure of the executive branch to achieve its innovative remedial orders, hence dialogue encompassed both interpretation and remedies. Consequently, strategizing is borne out by an argument of reciprocity anchored on dialogic comity and on manipulating institutional structures. Thirdly, constitution-building worked by a broader discursive element, in this case engaging judicial communications to a public discourse of the recursive links between the incomplete constitution and broader societal transformation. It was clear that this discourse mobilised public constitutional socialisation around new norms of human rights and democracy.

What I surmise from Fowkes is that constitution-building was what court actors do to subtly influence resolution of constitutional continuity and change by using their own actions to leverage those of political branches or to elicit their compliance in pursuit of the outcomes court actors understand the constitution as prescribing. Additionally, constitution-building court actors are preoccupied with how to best translate the wishes of the people into constitutional language and discourse. Salient in all this is the idea that constitution-building court actors seek to go beyond the traditional ethos of disinterested adjudication to enhance certain constitutional precommitments to the constitution as a framework for problem-solving, albeit within confines of liberal democracy. The motivation is that those precommitments cannot be complacently presumed or taken for granted in South Africa. Fowkes does not claim that this push to secure a liberal constitutional paradigm outcome is successful. On the contrary, this constitution-building work is erratic, inconsistent, and even incoherent because the nature of strategizing works on a case-by-case basis.[169]

Furthermore, constitution-building court actors engage in strategizing behaviour. By strategizing, they claim a distinct causal impact on incremental change under a constitution that remained indeterminate and whose functions were contingent on building conformity incrementally, rather than focusing on legal compliance exclusively. Conformity on the other hand remained dependent on the social interaction of conflicting power and interests, where judicial power had limited effect. Strategizing therefore aids a maximization of judicial power in areas where it was substantially limited. I note too that Fowkes built the notion of strategizing in part on Roux, who argued that the first bench of the South Africa Constitutional Court considered itself compelled to strategize as a novel court engaging in constitutional interpretation, for reasons of political caution and to bolster the sociological legitimacy of a new constitution.[170] Since Roux justified this strategizing as an exercise of "moral leadership" on the part of the court,[171] the additional contribution of strategizing court actors was to rescue actualisation of outcomes of constitutional change from reduction to a phenomenon that could be explained away by social or political realism. Indeed, Roux argued elsewhere that South African court actors

[169] Fowkes (2016) supra note 165, at p.33.
[170] Roux, Theunis (2013) The Politics of Principle: The first South African Constitutional Court, 1995-2005, Vol.6, Cambridge, Cambridge University Press, pp.3-9. See also Epstein, Lee and Knight, Jack (2000) "Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead" Political Research Quarterly Vol.53, No.3 pp625-661.
[171] Roux, Theunis (2013) supra note 170, at p.16.

should prefer "pragmatism" in their decision making, since the second-best interpretation it produced was still normatively valuable based on its observed results in social and political compliance.[172]

3.2.2 Klare's transformative courts

My second source of definitional understandings of court actor engagement with constitutional change and outcomes is the theory of "transformative constitutionalism" espoused by Karl Klare.[173] Klare in turn drew inspiration from both American legal realism school and the moralist adjudication arguments espoused by Mureinik to encourage a judicial construction of a post-apartheid culture of moral justification for political acts.[174] According to Klare, South Africa had enacted a post-liberal constitution with an expansive scope of constitutionalised issues anchored in its explicit transformation function. This view of the constitution as atypical was echoed by Fowkes above. Court actors were agents of transformation by virtue both of explicit of authorisation to develop the law and pursuant to their constitutional review jurisdiction. The question then was how the possibility of the transformational constitution could be actualised in social and political structures through the actions of court actors. Klare proposed firstly that court actors must discard legal formalism in constitutional interpretation, which is how they had thought of the constitution in the antecedent constitutional order. Instead, they must explicitly adopt creative modes of constitutional argument grounded in diverse sources of constitutional norms. In other words, they should change their understandings of constitutional change by changing their assumptions about constitutional interpretation. Only thereafter could they accommodate interpretive methodology that backed their decisions to actualise those understandings by drawing from more general theories of law, moral-political philosophy, and empiricism.

Secondly, according to Klare, to realise the constitutional transformation function, court actors must reconstruct the legal culture of the country. This they were uniquely placed to do institutionally, subject naturally to their capacity and who composed the benches. With their constructivist approach, it would become possible for courts to reproduce their new constitutionalism goals routinely and continuously over time. Although Klare dwelt more on the first proposition, this constructivist approach gained traction with proponents of ideological adjudication who argued that court actors must adopt baseline or core ideas from which to reproduce constitutional change impetus, especially human rights and democracy, but also the reimagining of their polities.[175] This reproduction could be pursued in diverse ways, including experimental decisions and discursive practices in curial and extra curial speech. Unlike with Fowkes above, where cooperation and dialogic comity was crucial, constructivist court actors would accommodate a shift from cooperation to

[172] See Roux, Theunis (2009) "Principle and Pragmatism in the Constitutional Court of South Africa" International Journal of Constitutional Law, Vol.7, No.1, pp.106-138.
[173] Klare, Karl (1998) "Legal Culture and Transformative Constitutionalism" South African Journal on Human Rights, Vol.14, No.1, pp.146-188.
[174] Mureinik, Etienne (1994) "A Bridge to Where? Introducing the Interim Bill of Rights" South African journal on Human Rights, Vol.10, Issue 1, pp.31-48.
[175] See Tshishonga, Ndwakhulu (2019) "The Legacy of apartheid on democracy and citizenship in post-apartheid South Africa: an inclusionary and exclusionary binary" AFFRIKA Journal of Politics, Economics and Society Vol.9 No.1, available at https://journals.co.za/doi/abs/10.31920/2075-6534/2019/9n1a8.

conflict with other constitutional actors depending on the significance of ideas, on which presumably court actors could be able to provide the most rigorous justifications.

The empirical claim that judicial actors are compelled by the nature of constitutions they are dealing with to adopt a change-oriented interpretation of their provisions, greased the borrowing of transformative constitutionalism in Kenya.[176] As I observed in the first chapter, the Kenyan Constitution, 2010 mirrored ideas and provisions of the South African Constitution, 1996, and a shared common law culture between these states facilitated migration of jurisprudence. Additionally, Kenyan court actors similarly understood transformative constitutionalism in its two limbs, as abandoning both legalism and formalism in constitutional interpretation, and secondly in pushing constructivist, idea-based and idea-seeking constitutional decision-making within the judiciary and though court leveraged decision-making by other constitutional actors.

One might view transformative constitutionalism as asking judicial actors to do more to give effect to constitutional change than merely technically elucidating a principle of legality in relation to a specific constitutional rule or falling back on precedents or on analogous thinking. Accordingly, its postulations could be yet another thread in long-standing debates about desirable methodologies and styles of judicial interpretation, irrespective of constitution-building conceptual similarities.[177] This is a possibility since analysis of problems of judicial engagement with constitutional change precede the terminology of constitution-building court actors. For instance, Griffin espoused a theory of "*constitutional historicism*" as a functionally better methodology by which court actors and constitutional scholars could engage with constitutional change in the US context.[178] Griffin argued that court actors already conceptualised change within interpretivist accounts, meaning either against a baseline of the intents of framers as expressed in the constitution and contextual documents, or against a baseline of judicial constitutional precedents. However, the way they did this elevated a textual, interpretivist and legalistic concept of change, which built up conceptions of constitutional change that culminated in ahistorical and therefore misleading understandings of its proper functions. Consequently, court actors, constitutional lawyers and scholars would be better off switching to and using a constitutional historicist understanding. This is an understanding whereby constitutional change is understood against a baseline of "*the institutional structures and state capacities created by the Constitution. We can study constitutional change by observing the continuities and discontinuities as these structures develop over time.*"[179] In essence, this was a call to switch to a form of empirical understanding of constitutional change that is simultaneously more critical and reflexive, and not that dissimilar from what Klare espoused. However, the shift Klare espoused was clearly difficult to achieve when as Griffin

[176] Mutunga, Willy (2021) "Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?" Transnational Human Rights Review, Vol. 8, Art.2, pp.1-31.
[177] See Fallon, Robert (2015) "The Meaning of Legal "Meaning" and its Implications for Theories of Legal Interpretation" The University of Chicago Law Review Vol.215, pp1235-1308; Posner, Richard (2005) Law, pragmatism and Democracy, Cambridge, Harvard University Press; Shapiro, Martin & Sweet, Alec (2002) On Law, Politics and Judicialization, Oxford university Press; Bobbit, Philip (1982) Constitutional Fate: Theory of the Constitution, Oxford University Press
[178] Griffin, Stephen (1999) "Constitutional Theory Transformed" The Yale Law Journal, Vol.108, pp.2115-2163.
[179] Id at p.2116, fn.6. Griffin also describes this theory as "historical institutionalism".

argued, court actors ultimately placed a higher premium on trade-off lawyering with immediate case events in mind. With this narrow lawyering, interpretation of constitutional change and continuity in terms of a historically factual, societal, constitutional development, was unrealistic if not farfetched. Instead, what was and is likely to remain on offer was lawyerly obsession on narrowing down and cherry-picking historical facts to build case law in adversarial proceedings. Nonetheless, while alerted to the challenges of the shifts espoused for transformative courts and historicist courts respectively, the references to processes of determining trajectory of constitutional change via interpretive activity with certain outcomes in mind, still speak to the conceptual features of constitution-building as defined by Fowkes.

What I surmise from Klare is an overarching theory of change; by changing or reforming their internal understandings of law and interpretation, court actors will adopt creative interpretations suited to atypical constitutions, producing changes in legal culture that cascades to broader societal transformation. As earlier stated, the reason for beginning with these definitional accounts is to identify distinct features of constitution-building as a distinct interpretational activity of court actors. The following claims emerge: Firstly, this activity is contingent on the attribute of atypicality of the constitution one is dealing with. Secondly, this activity specifies and makes constitutional change, including its tensions with continuity, more legally explicit. Thirdly, this activity adopts methods that acknowledge realism in interactions with other actors and amongst themselves as far as constitutional decision-making goes, but simultaneously seeks to transcend it to explain outcomes of constitutional change in jural discourses. Fourthly, this activity involves strategizing behaviour. It is furthermore constructivist, and it aims to reproduce outcomes of constitutional change in terms of constitutional ideas.

Summarised thus, this constitution-building activity has advantages and disadvantages, and several challenges are foreseeable. Before dealing with those, however, I first explore what attributes of court actors are expressed or inferred from the definitional accounts.

3.3 Attributes of constitution-building courts

Firstly, constitution-building court actors need legitimacy. Legitimacy is obviously a cross-cutting attribute of constitutions, where, in its most basic empirical understanding, it is expressed through voluntary obedience to the legal and possibly moral authority of the constitution.[180] Hence, any court actors acting based on expressly vested powers or in terms of constitutionally structure, will have stronger legitimacy claims. This can mean formalistic and legalistic constitutional interpretations are prima facie legitimate.[181] However, considering the empirical claims Fowkes, Rioux and Klare put forward above, institutional legitimacy of constitution-building court actors who strategize to actualise constitutional promises in deeply divided societies, is generally a more complicated affair. Independent judicial constitutional interpretation may not be its single prerequisite even though it remains certainly important.

Secondly, constitution-building court actors have increased confidence in their own institutional agency. If a constitution is explicitly transformational, court actors who advance its transformative considerations are simply following the law

[180] Fallon, Richard (2005) "Legitimacy and the Constitution" Harvard Law Review Vol.118, No.6, pp.1787-1853.
[181] Id, at pp.1834-9.

without need for controversial interpretive explanations. If a constitution is sociologically deemed to be transformative, then judicial actors can more readily admit that they start from constructing social reality to build up the purposes of constitutional change.[182] Constructing this reality means asking what the people committed to in adopting the constitution. Constitution-building court actors can deploy a notion of "we the people" or of lay constitutional discourse, as bases for enculturating and framing understandings of constitutional change.

Thirdly, constitution-building court actors can and will use interactions with other branches, as well as social interactions, to form conceptions of constitutional functions and their outcomes. This does not mean they jettison legal sources. However, these actors have must have notions of collective constitutional meanings and converging discourses. This distinction between reliance of exclusively legal sources and ability to use exogenous sources is central to functionalist and realist dimensions of their interpretive activity. It is furthermore a key to their ability to marshal strategizing behaviour to structure engagements with other constitutional actors, particularly the political branches.

Fourthly, constitution-building actors have complex understandings of the constitutions, in terms of its authority, utility, functions, structure, guarantees, promises, finality and historical contingency. Salient here might be tendency to view the constitution as a framework for many actions,[183] and a capacity to distinguish when compliance is necessary or when conformity is prudent. This means have diverse understandings of how to make a constitution relevant in governmental, political, and public decision-making. Nonetheless, these actors must pay great attention to the ideas a constitution expresses, although in practice, those ideas are mostly a function of the ideation processes of these same court actors.

Fifthly, for their constitution-building work to materialise, these actors must be able to hold or discern a baseline starting point for their view of the requirements and purposes of constitutional change outcomes they are to help produce. Relatedly, it appears there is expectation among national actors in deeply divided societies that constitution-building court actors have some residual capacity to amplify some missing ingredients in the historical creation and development of the constitution that arose from haggled constitution-making compromises. Consequently, constitution-building court actors can time the constitution in a "building" mode analogous to "in the making" mode, as a historical process of evolving a legitimate, feasible and morally fit constitution.

Sixthly, constitution-building court actors are creative rule-makers. They resemble cognitive thinkers who use the hermeneutics of constitutional understandings to authorise desirable constitutional functions.[184] They are observed to deploy a theory of constitutional change prior to the task of constitutional interpretation and the theory then informs the ontology emerging from the latter. Hence, they should not be stuck to formalistic, legalistic, and superficially idealistic

[182] Academics too are increasingly invested in this account. Hirschl, Ran (2009) "The realist turn in comparative constitutional politics" Political Research Quarterly Vol.62 No.4 pp825-833.
[183] For instance, Klug argues the South African constitution is "a national plan or aspirational guide that attempts to address the past". See Klug, Heinz (2010) The Constitution of South Africa: A Contextual Analysis, Oxford, Hart Publishing Ltd., p.1.
[184] See Balkin, Jack (1993) "Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence" Faculty Scholarship Series Paper 273, Yale law School, p.107

constructions of constitutional change for lawyering purposes, which only worsens blind spots for the holistic constitution and its potential bigger picture of the 'real' problems of constitutional change that these actors should be addressing. Moreover, if constitutional change is problematic, it is not simply for legalistic reasons. In addition to the holistic view of the constitution, there is a salient invitation here to view the constitution as a coordination device[185] and mechanisms for "holistic complementarity".[186]

Seventhly and lastly, constitution-building court actors are strategists. Given that strategizing behaviour is a function of interactions, the key to constitution-building court actors work is not so much elucidation of legality and legal enforcement of constitutional compliance, although this too is significant, but how they produce the potential for joint action and co-evolution of understandings on constitutional outcomes. Accordingly, this production is both about cooperation, dialogue, reciprocity and so on with other actors, but additionally, the production of ideas to rise through strategizing behaviour. Moreover, these ideas are diverse. They relate to commitments to liberal democracy as well as organic ideation.

Presumably, not all court actors within domestic judicial systems have these kinds of attributes and capacities to engage in constitution-building work. In fact, the ambition projected above on constitution-building court actors hints at their establishment by design, which is perhaps unsurprising since Fowkes and Klare for instance were analysing a carefully designed Constitutional Court of South Africa. Kenya lacks such a court, for reasons I discuss in a preceding chapter. Nonetheless, since constitutional amendments, the South African Constitutional Court is in practice an apex court with final appellate jurisdiction over all matters just like the Supreme Court of Kenya. Obviously, besides expectations that constitution-building court actors will possess requisite managerial and other institutional capacities, some of their attributes will hinge on roles of non-court actors, for instance, on political actors acting in predictable ways continually.[187] Or that despite the interdependence of constitutional actors being a function of realist interactions, these actors will pursue roles that will be swayed by ideas of constitutionalism. For now, I note these as background matters to be revisited after mapping the empirics of constitution-building work of South African and Kenyan court actors in the next chapters.

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[185] Hardin, Russell (2013) "Why a Constitution?" in Gilligan & Versteeg (eds) (2013) Social and Political Foundations of Constitutions, Oxford University Press, pp.60-62; Weingast, Barry & Hadfield, Gillian (2013) "Constitutions as Coordinating Devices" (arguing constitutions allow constitutional actors to coordinate beliefs to improve the efficiency of decentralised rule enforcement mechanisms, p.4) (paper downloaded 1/12/2021 from https://web.stanford.edu/group/mcnollgast/cgi-bin/wordpress/wp-content/uploads/2013/11/hadfield-weingast.north_.paper_.FINAL_13.0920.pdf).

[186] The reference to constitutions as mechanisms for "holistic complementarity" is in Reynolds, Andrew (2005) "Constitution Medicine: Building Democracy After Conflict" Journal of Democracy Vol.16, No.1, pp54-68, at p.61.

[187] See Rubenfeld, Jed in Alexander, Larry Constitutionalism: Philosophical Foundations, p.225. See also Ferejohn, John & Sager, Lawrence (2003) Commitment and Constitutionalism, Texas Law Review, Vol.89, p1929, at p.1946. See also Elster, Jon (2003) "Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment" 81 Texas Law Review 1731, p.1754.

3.4 Constitution-building "work" of court actors

From the foregoing, the immediate expectation is that court actors who possess some or all the attributes above, will be crucial constitution-building actors or agents by virtue of their strategizing behaviour and as cognoscenti of constitutional change rationales and purposes. These competences will enable them to leverage other actors to align with their understandings of distinct or overarching connections between constitutional change promises and constitutional change outcomes. Nonetheless, their constitution-building work ultimately lies in building shared or convergent understandings of norms and values of the desired constitutional order, through a regular participation in processes of ideation of constitutional change and its outcomes. This claim of norm entrepreneurship and ideation in some kind of regular process, and the constitution-building work it fosters to make constitutions produce desired outcomes, remains significant in view of an inverse empirical claim that deeply divided societies have difficulty formalising constitutional change, not to mention a multitude of determinist arguments.

Nonetheless, divided national actors have strived after constitutions that require South African and Kenya court actors to deal with an expansive and complex scope of constitutional change, where outcomes might have assorted meanings, such as advancing liberal constitutionalism, or ensuring incremental change of progressive transformation, or reforming legacies of past diminishment of rights, or ideating more revolutionary change in the new constitutional order viewed holistically. How are these actors to make their respective constitutions functionally and normatively acceptable to an assorted range of groups and actors, as an integral element of constitutional change outcomes? It is both worthwhile and productive to evaluate empirical and normative claims concerning the constitution-building work of court actors. I will base this evaluation on the three analytical bases of constitution-building: Firstly, how do court actors think about links between constitutional change and outcomes in South Africa compared to Kenya? Secondly, which processes, or methodology, do they accentuate as integral co-producers of rationales for constitutional change to make constitutional processes link to outcomes. This must be more than agreement making. Thirdly, what outcomes of constitution-building do these actors accentuate, i.e., what are their distinctive legal features?

3.4.1 Ideation of constitutional change as a distinctive feature of constitution-building

As I noted above, South Africa and Kenyan constitutions are already oriented toward the liberal constitutional paradigm, which happens to be globally dominant, despite empirical claims as to its aptness for deeply divided societies. Constitutional-building court actors would hardly avoid ideating constitutional change and continuity to make liberal constitutionalism normatively and empirically attractive. We might therefore expect to find them ideating distinctive institutional and procedural features of the new liberal constitutionalism and their diffusion in the political branches in a substantively unique way from their approaches under the old constitutional order. We might also expect to find them ideating gaps and deficits in the respective constitutions to enable deeper consensus on their liberal anchors as counterweight to their haggled compromise attributes. Simultaneously, the definitional accounts above underlined the atypical nature of the constitution, including for instance the characterisation of the south African constitution 1996 as post liberal. One would therefore expect constitution-building ideation to elucidate this atypical pedigree of the constitution. So far as constitution-building will be influenced by transformative constitutionalism, what is on offer is

firstly ideation of superior interpretation capacities of the courts away from legalistic and formalistic understandings of constitutional law. however, such shifts would suggest court actors are not sole custodians of interpretation, once it is no longer or is less legalistic. In which case, we would also expect to see ideation of a less legalistic and formalistic approach that authorises constitutional meanings to be surfaced by other actors in the political branches, noting there are quite radical examples in Africa for court actors to assess in this regard.[188]

Moving more centrally into court centric constitution-building that draws from insights of debates in constitutional change, two claims are pertinent. One deals with the methods of constitutional change and institutionalisation of its outcomes, involving questions of how court actors understand phenomena like rupture, revision, and incrementalism, to make it more legally explicit in their ideation. The second reverts to the problems that constitutions of deeply divided societies were supposed to address. In addition to problems of democratic, collective decision-making and rule of law accountability, the constitutions produced in South Africa and Kenya were multifunctional.[189] Which means they involved a broad scope of change covering multiple profound issues, for instance culture, fiscal discipline, economic redistribution, military security, and the environment. We therefore expect to see ideation of this scope of change and ways to manage its complexity. Lastly, concomitant to the scope of change were issues of its radicality, which partly reconnect to the ideation of rupture, but go beyond it to deal with the rebalancing demanded by diverse publics to recentre their poignant demands differently from their location in the peripheries of the old constitutionalism. one therefore expects to find ideation of a more exploratory nature, one where court actors aid deeply divided societies to reimagine constitutional order, including interrogating assumptions about constitutional functions and purpose more critically and reflectively.

3.4.2 Processes and legal methods of constitution-building

Beyond ideation, there is need according to Fowkes, Klare et al, constitution-building must utilise legal methods that have can potentially shape a broader converging discourse. Three considerations arise for purposes of my proposed empirical inquiry in the case studies: Firstly, the problem that processes and legal methods for constitution-building court actors are prioritising presumably turns on the nature and extent of the burdens they carry to galvanize broader support both from the executive and legislative branches and from the public, for their understandings of constitutional ordering rules. For instance, court actors could engage legislators to see legislation as part of a more comprehensive programmatic, process of constitutional change formalisation. Yet, these court actors will be acutely aware of the

[188] For instance, court actors might frame standards for a non-judicial scheme for constitutional interpretation favouring legislators instead of court actors, as in Ethiopia. See Vibhute, T (2014) "Non judicial review in Ethiopia: Constitutional Paradigm, Premise and Precinct" African Journal of International and Comparative Law Vol.22, No.1, pp.120-139, p.122.

[189] According to Breslin, constitutional functions include transformation (destroying the old polity and creating a new one); aspiration (conceiving a more perfect community); designing institutional arrangements, conflict management, recognition (of minority groups), empowerment (of government institutions to act) and limits (on use of sovereign power). See Breslin, Beau (2009) From Words to Worlds: Exploring Constitutional Functionality, Baltimore, The John Hopkins University Press, pp7-8. An eighth function could be integration, of individuals into a polity that safeguards rights. See Grimm, Dieter (2005) "Integration by Constitution" I.CON Vol.3 No.2 pp.193-208.

margins of ambiguity between constitutional language and extant governmental and societal practices. Hence, what kind of process(es) of constitution-building are emerging here?

Secondly, to the extent that constitution-building court actors will aim to introduce new understandings of constitutional change and continuity dilemmas, the premise is that their methods will utilise strategizing behaviour to proactively leverage shared understandings of ideas that might be alien to other actors and the public, as well as to facilitate their legal enforceability. What kind of strategizing behaviour is emergent here? Do court decisions on constitutional change disputes align with any discernible judicial strategy? Indeed, whether processes of constitution-building are nothing more routine than agreement-making with third-party judicial ratification remains to be seen. How is this strategizing behaviour shaped by attributes of constitutions, or the scope and complexity of institutionalising constitutional changes in either South Africa or Kenya, if at all? What about the institutional design features and dynamics of separated powers and functions described above?

Thirdly, Incrementalism emerged as an important concept of constitutional change for court actors in both South Africa and Kenya, considering the extent of deferral that their respective constitutions reflected in for instance via "by law clauses", and "strategic ambiguity".[190] Presumably, the actors to whom deferral obligations understand them as binding. Yet, if such an assumption is empirically inaccurate, how have court actors dealt with a weak legal status of prescriptive rules of incrementalism, if at all? Moreover, with supposedly incremental constitutional change, how do court actors determine boundaries of constitutional change and continuity? What are we expecting of court actors if coordinating incremental constitutional change is the real issue? After all, incremental change underscores a calculated affair, with cost minimising coordination and bargaining behaviour as dominant theoretical lenses.[191] How can efforts to place constitutional reinterpretation at centre of incremental constitutional change be successful here and what would that mean? Since the effort is to delineate constitution-building as legal activity distinctly from agreement-making processes around power and interests, as happens with constitution-making, it will be interesting to investigate how constitution-building court actors can accentuate outcomes where the autonomy of the constitution is safeguarded from blurred lines between politics and law, when their processes feature fusion of the two. What if processes and methods of incremental constitutional change institutionalisation are inhibiting more radical or reflective change?

3.4.3 The legal features of constitution-building outcomes

What constitutional change outcomes do and should court actors have in mind? From the interpretational accounts, three ideas around outcomes are discernible. The first set of outcomes are court-centric, involve capacities to ideate change, and are premised on the theory that changes in interpretational methods and legal culture will cascade in societal changes, where culture refers to the rules, attitudes, behaviour, and beliefs to be reflected by different judicial actors to

[190] See Dixon, Rosalind & Ginsburg, Tom (2011) "Deciding Not to Decide: Deferral in Constitutional Design" International Journal of Constitutional Law Vol.9 Nos.3/4, pp.636-672, at p.640-1.
[191] Id, at p.638.

produce cohesive constitutional understandings.[192] Hence, outcomes here are institutional and jurisprudential, which are presumably matters over which court actors have a high degree of control. On the other hand, practical outcomes of sophisticated interpretation can be elusive despite design,[193] and measuring them quantitatively is exceedingly difficult.[194] Even more so if one has in mind phenomena around deep divisions, like reconciliation, reduced levels of inter-group violence, and increasing trust in public authority amongst national actors.

Secondary rulemaking presents a second set of outcomes, but it hides various complexities. Obviously, an essential feature of constitution-building legal activity is the accentuation of fundamental norms and principles, so that deeply divided societies will undergo constitutional change to produce by a supreme law that is predictable and binding on all members of the society including the most powerful. However, predicting the course of such outcomes in the long durée is akin to divination with an illusion of control. Concomitantly, constitution-building court actors must accentuate multiple constitutional functions to make them more legally explicit in the framework of interpretive activity concerning the generation of a new constitutionalism. A new corpus of law comprising legislation and secondary rules can reasonably quickly be put in place in formal terms, for instance within the five-year deadline stipulated by the Kenyan Constitution, 2010.[195] In fact, legislated outcomes with judicial inputs might be pervasive. If the constitution and ensuing legislation provide a hard law framework for incremental change that constitution-building court actors will influence to generate a clearer basis for consolidating constitutional change onward, I expect court actors to create a soft law framework that can be observed and analysed, to identify and explain what it is, what purposes it serves, whether it is desirable and how it is accountable.

That said, one expects secondary rulemaking to render the constitutional order gradually more congruent with the rationales of constitutional foundations, and legislated outcomes might misrepresent the structure of the real problems of deeply divided societies constitutional change should address. The more constitution-building court actors in South Africa and Kenya think of their constitutions from perspectives of incrementalism, so that latent constitutional disagreements are shifted from a constitutional to an ordinary politics plane, then outcomes could simply mean an appreciated restructuring to abet relations to political actors, with the risk that any substantive outcomes become more random and nonlinear. A further consideration is that incrementalism is problematic in judicial hands, if having to address legacies of systems such as apartheid and hyper presidential personal rule, incrementalism harbours a status quo apologist position to which court actors should not submit. Might we find rejection of incrementalism in favor of an alternative deeper teleology of constitutional change?

[192] See Mazzone, Jason (2005) "The Creation of a Constitutional Culture" Tulsa Law Review, Vol.40, Issue 4, pp671-696, at p.672 (underlining the importance of civic associations).
[193] These successes are emblematic of what Hirschl calls "design sciences". See Hirschl, Ran (2009) "The Design Sciences and Constitutional Success" Texas Law Review, Vol. 87, at p.1341.
[194] On problems of quantitative empirical legal research, see Epstein, Lee & King, Gary (2002) ("The Rules of Inference" University of Chicago Law Review, pp.1-133.
[195] Schedule Six of the Constitution.

In a third register, constitution-building could be about how outcomes are valued, by who and why. This perspective segues inexorably into discourses of legitimacy in the new constitutionalism. As we saw in chapter one, South African and Kenyan constitutions embody aspirations for reimagining the state, and the constitutions may be valued by all comers for symbolic outcomes, even as court actors in these countries wrestle with narrowing gaps between aspirations and reality. If constitutional change in deeply divided societies is uncertain and unpredictable, as theorised in chapter two, then understandings of outcomes might be based on societal perspectives, or that of the observer scholar alone. In which case, holistic understandings of constitution-building work of court actors might be pegged to narratives and discourses which are far from universal in deeply divided societies, but which nevertheless influence what kind of case law is pursued to augment or question constitutional change, and who accepts, and when, that the constitutional knowledge from this case law is as valuable. In the vignettes in the introduction chapter, critics characterised success or failure of court actor endeavours to determine the purposes of constitutional change and continuity in terms of 'proper' implementation of a new constitution. In South Africa and Kenya, this critique of outcomes encompassed the idea of the constitution as a norm-in-the-making to shape behaviour of public officials and citizens concomitantly with an idea of iterating the requirements and outcomes of constitutional change as an intellectual endeavour that is suited to the 'real' constitutional change problems of deeply divided societies.

From the foregoing, it is therefore possible to conceive of constitution-building premised on three analytical points of ideation, unique methods, and outcomes. The latter might lead us to things like pooling constitutional knowledge, sacralising universal and indigenous constitutional emblems and symbols, and constitutional guidance offered for other constitutional actors. Whether constitution-building court actors generate ideational outcomes that force a re-think is the question. Yet, if the main thrust concerning outcomes is to force this rethink amongst constitutional actors and the public, to align constitutional change even if evolutionary or incremental with fundamental reimagination of a constitutional order rather than thinking about formal change of judicial culture and constitutional case law, will the present court actors be able to achieve this? The word present in the last sentence is deliberate since an inference from a descriptive account of the first bench of the South African Constitutional Court by Roux is that different courts can be engaged in different constitution-building activities in different periods.[196]

The three analytical points will allow me to address broader questions like, if constitution-building works, what are the limits and when does it cease to work? What drivers lead to constitution-building to not work, as a methodological issue? For instance, perhaps court actors cannot deal with constitutional change intellectually, self critically, or reflexively, because they are always predisposed to "best fit" pragmatism and resolution of specific cases according to the exigencies of lawyering? Or there can be but little hope for more radical constitution-building efforts as demanded by some South Africa and Kenyan critics because court actors are more invested in simply coping with different, mutually alienating constitutional paradigms? Yet, if constitution-building court actors can muster projects of progressive

[196] See Roux, Theunis (2013) supra note170, pp.189-199.

constitutional change on a case-by-case basis, must they also engage with deeper, cognitive, and structural answers to constitutional change? Is this even desirable in conditions of deeply divided South Africa and Kenya?

3.5 Conclusion

In this chapter, I have delineated a court-centric understanding of constitution-building, that narrows down the research to engagement with interpretive activity. Its dominant explication by constitution-building court actors in South Africa and Kenya might be premised on legal realism praxes, as Fowkes and Klare offer. Yet, alternative formulations of this interpretive activity are available, such as those drawing from historicism. What connects the varied explications is a salient notion of constitution-building court actors deploying strategies whose crucial anchor is some form of problem-solving constitutional decision-making. In other words, the salience of constitutions as frameworks for incremental constitutional change, is surfaced. How court actors might draw from theories of incrementalism was discussed in the previous chapter. In this regard, it seems highly important for court actors to strategize to secure the comity and legal reciprocity with other constitutional actors that they require to assure alignment and compliance with their understandings of constitutional change. At the same time, recalling the constitutional change challenges discussed in previous chapter, constitution-building court actors would also need to manage challenges of its scope, materiality, determinism, and complexity. Whether these actors can muster the configurations needed to manoeuvre constitutional change with various outcomes in mind is an empirical question. Another question is whether it is reasonable to expect judicial strategizing to generate coherent, convergent constitution-building in the long durée? Both empirical and functional information can be gathered in relevant case law.

Processes and methods of interpretive activity, especially if approached as technical problem-solving, obviously cannot be exhaustive of all possible methodological categories of constitution-building. It is also unclear why this technical approach should engage the interest and support of political and other kinds of actors outside the narrow legal sphere, despite their engagement with facets of constitutional change and continuity. Hence, we may have to expect the necessity of constitution-building court actors to provide more sophisticated constitution-building explanations. This information will be discoverable too in selected case law. Moreover, this case law will simultaneously allow detection of the strategizing behaviour of court actors, which apparently allows their constitution-building work to have consequences for the theoretical outcomes of constitutional codification projects in deeply divided societies in Africa. Furthermore. it enables comparison between South Africa and Kenya and assimilation of scholarly scepticism about whether court actors can accomplish construction of constitution-building schemes through strategizing behaviour. Consequently, in the next two chapters, I delve deeper into case studies of South Africa and Kenya to excavate and critically analyse their constitution-building work as evidenced by their case law.

Chapter Four: Constitution-building court actors – South Africa case study

Contents

4.1 Introduction

In this case study, I investigate and critically analyse the constitution-building work of South African court actors in relation to the three analytical bases identified in the preceding chapter: Firstly, their ideation of constitutional change as a distinctive feature of constitution-building; secondly, processes and methods of constitution-building, and thirdly, what legal outcomes of constitution-building are accentuated.

Current conceptions of constitution-building court actors encapsulate empirical claims that they strategize to push constitutional outcomes. Some scholars have contended that such outcomes must be about transforming constitutional change toward liberal constitutional paradigms. In contrast, other analyses suggested there was no guarantee the framing of new constitutions will achieve desired outcomes in deeply divided African states, underscoring how constitutional change has been driven by multiple and conflictual rationales. Instead of driving transformational outcomes, constitution-building court actors might simply have been dealing with the social realities of constitutional disagreements. Moreover, the prospects of these actors adopting radical processes to bring about transformation in South Africa hinge on mistaken or wishful observations about their constitution-building work. If so, then the related academic analyses tended to overstate their capacity to strategize for specific constitutional change outcomes. With this scepticism in mind, my scrutiny of the ideation, in conjunction with the legal and processes court actors adapted for constitution-building work, aims to detect strategizing behaviour and to analyse it critically. Furthermore, I seek to

understand the various drivers and rationales that influence court actors to enable me to subsequently reframe what their constitution-building work is about, based on better empirical insights.

My focus in this chapter is on relevant case law of the Constitutional Court of South Africa. As I described in chapter one, this Court is a key institutional link between the 1996 Constitution and the constitutional change outcomes it was intended to catalyse and produce. The 1996 Constitution tasked the Court to angle for value-based interpretation of its provisions, of legislation, and of Common Law as well as Customary Law. The Court was empowered to promote "the values that underlie an open and democratic society based on human dignity, equality and freedom";[197] to invalidate any law or conduct for constitutional inconsistency with finality;[198] to enforce constitutional and legal rights and duties,[199] and to advice on prospective legislation if requested.[200] Consequently, the Constitutional Court was expected to explicate requirements of a new normative order, regulate norm compliance, settle constitutional disputes, and lay down binding constitutional laws to augment any gaps in the constitutional canon.

Since the Constitution took effect in 1997, to date, the Constitutional Court has handled over two thousand applications, averaging some thirty-five decisions per annum, about half of which have dealt with constitutional disputes involving the constitutionality of the acts and decisions of governmental actors.[201] Constitutional Court judges therefore have had several opportunities to elucidate their understandings of the constitution, its rationales, functions, purposes and connection to the myriad issues that bedevil South Africa as a deeply divided state. It has had some time to explicate the constitution, and to expound it in a new constitutional law corpus, with its own distinct legal and non-legal effects within the legal sphere and across society. Statistically, the volume of legislation and statutory instruments enacted in this period with an intention of transforming the constitutional order in South Africa outstrips what caselaw the Court has generated, but we need not be belabour statistics. Even if constitutional interpretive activity involved the executive and legislative branch actors, the perspective of the Constitutional Court reserved a potential last word.

Several scholars inside and outside South Africa have encouraged the Constitutional Court to play a vanguard constitution-building role on its own terms.[202] Some, like Fowkes and Klare whom I discussed in chapter three, argued that due to its expansive scope of change and guarantees of values and rights, the 1996 Constitution justified strategizing approaches that could stem from theories of transformative constitutionalism, which they said court actors needed to internalise to achieve liberal constitutional paradigm outcomes. Other scholars identified controversial aspects of the work of the Court to defend as exercises of principled politics and dialogue.[203] In practice, such analyses and

[197] Sec.39 and s.233.
[198] Sec.172.
[199] Ss.9-21.
[200] Sec.65.
[201] See www.saflii.org.za for all Constitutional Court decisions organised by year.
[202] For instance, Ellman, Stephen (2015) "The Struggle for the Rule of Law in South Africa", New York Law School Law Review,Vol.60, p.57 suggests the work of the Court can be periodised based on major rights themes, pp.58-90.
[203] Roux, Theunis (2013) supra note 170, p.31, 65.

encouragement aimed to instrumentalise two dimensions of the jurisdiction of the Constitutional Court. One was its supervisory review and appellate jurisdiction, through which it determined most constitutional issues disputes before it, after lower courts had filtered their principal arguments. The second was a discretionary power claimed by the Constitutional Court and the Supreme Court of Appeal, to autonomously frame and dispose of novel issues of law that litigants had not themselves raised, provided those issues arose from the evidence submitted, the framing was not unfair to the litigants and the court deemed it necessary to resolve them.[204]

Purpose of chapter…this case law will simultaneously allow detection of the strategizing behaviour of court actors, which apparently allows their constitution-building work to have consequences for the theoretical outcomes of constitutional codification projects in deeply divided societies in Africa, plus to frame academic scepticism as to whether South African court actors can manage the complexities of constitution-building.

4.2 Ideation of constitutional change as a distinctive feature of constitution-building

Much of the ideation work of the Constitutional Court stemmed from the understanding that Constitution 1996, had codified a rupture from the apartheid constitutional order and moreover provided a foundational blueprint for future societal transformation. In its preamble, the Constitution acknowledged a historically awareness of major sacrifices to achieve an inclusive, democratic state. Some of its provisions embodied a careful plan for corrective dismantling of residual rules of the previous discredited constitutional order while remediating their existing harmful effect. And its future signposting via deferred rulemaking equally emphasised need for adaptive responses to constitutional incompatibilities and incommensurability, based on coordination and cooperation between state organs. The constitutional text itself could therefore be a driver for ideation to differentiate the old and new constitutionalism.

Before assessing the empirics of constitution-building ideation by the Court, I tentatively set out as a mental exercise, a map of issues that might drive its ideation toward conceiving of a more radical potential of constitutional change in South Africa as a deeply divided state. At the outset, the Court, which had participated in the certification of the 1996 Constitution in a uniquely crafted process, would have been aware of the deficiency in universal agreement in support for the 1996 Constitution. On the contrary, building broader agreement on constitutional issues going forward was envisaged in deferral provisions dealing with avenues for various struggles of deeply divided national actors to be transmuted into constitutional struggles, for instance via legislation and the codification of additional charters of rights. Fundamental disagreement on constitutional issues could therefore be a potential driver of reflective and experimental ideation by constitutional-building court actors. Moreover, a visibly, textually liberal constitution potentially sharpening a disjuncture occasioned by historically absent liberal governmental practices, pointed to another deficiency for ideating court actors to address. Revolutionary drivers of ideation festered too in social shadows, if considering what sociological constitutional legitimacy might mean for most South African citizens who were impoverished. Even though it recognised a historical continuity of constitutional grievances, for instance in provisions addressing highly skewed land ownership,

[204] See *Fischer v Ramahlele* (2014) (4) SA 614 (SCA) para 13; *CUSA v Tao Ying Metal industries* (2009) SA 204 (CC) para 68 and *Barkhuizen v Napier* (2007) (5) SA 323 (CC) para 39.

the codification of the 1996 Constitution did not directly resolve related problems peremptorily. Unsurprisingly, its enactment and its post promulgation evolution always portended risk of sharpened social consciousness of unchanged social conditions despite constitutional guarantees.[205] Subsequently, the transformation seeking 1996 Constitution could paradoxically disillusion discontented groups and imbue others with a counter-constitutional, assertive nationalism. At least one consequence of this potential driver pointed in my view to ever salient demand for the development of new intellectual and radical forces in public institutions, including the courts, to push structural change against prevailing hegemonies. With these potential drivers in mind, ideation as a feature of constitution-building could be considered more contextually.

How did the constitution-building constitutional Court utilise its ideation distinguish the new constitutionalism from the old, and to make the change more legally explicit? Did it succeed in dislocating the constitution from its embedded location in compromises of constitution-making, and in relocating its telos for future moral, legal, and political changes in its interpretive activity of constitution-building? What kind of constitution as a norm-in-the-making was accentuated here? With such questions in mind and based on the relevant caselaw of the Constitutional Court, I traced three aspects of ideation that emerged as insightful for how the constitution-building court conceived of constitutional change, and its tensions with continuity of the old constitutionalism. Firstly, ideation engaged with constitutional rupture from an old to a new constitutionalism by amplifying an ethos of legality. Nonetheless, practical need for constitution-building as joint interpretive activity, as Fowkes termed it, limited the radical potentiation of this ideation. Secondly, the Court ideated constitutional change to transcend its incrementalism with urgency, but this ideation caved to process-based solutions, which however had a limiting effect on the emergence of one dominant ideology. Thirdly, the Court tried to ideate organic norms and transcendental native constitutional ideas, as elements of the evolution of a legitimate constitution. Yet, this ideation also produced centres and peripheries of constitution-building outcomes.

4.2.1 Rupture from the old constitutionalism

The Constitutional Court initially attempted to accentuate constitutional change as a rupture from the preceding constitutional order, by making a constitutional ethos of rights and, democratic accountability more legally explicit. This was perhaps unsurprising as the Court was inundated with scholarly encouragement to entrench the 1996 Constitution firmly in a liberal constitutional paradigm. For instance, the Court was pushed to prioritise mandatory reliefs to promote democracy,[206] or to robustly prioritise caseloads "*with an overriding motive to protect rights and democracy*",[207] as the way to make constitutional rupture more legally explicit. The Court was reminded via comparative assessments that

[205] See Corder, Hugh (2016) "A Sense of Grievance and the Quest for Freedom: South Africa's Constitution – the Struggle Continues" in Dowdle & Wilkinson (eds) (2016) Constitutionalism Beyond Liberalism, Cambridge, Cambridge University Press, pp282-314.

[206] Roach, K & Budlender, G (2005) "South African Law on Mandatory Relief and Supervisory Jurisdiction" South Africa Law Journal, Vol.122, p.325

[207] See Botha, H (2003) "Rights, Limitations and the (Im)possibility of Self-government" in Botha, Van der Walt, A & Van der Walt, J (eds) (2003) Rights and Democracy in a Transformative Constitution, Sun Press Stellenbosch, pp24-25

constitutional rupture was intrinsically normative, and that adjudication was a normative exercise,[208] and hence the Court "*with its widely admired judges, seemed ideally placed to breathe life into the constitutional text and in so doing contribute to international understanding of the transformative possibilities of judicially enforced constitutional rights*."[209]

A high point of the ideation dimension of constitution-building emerged with the application of the principle of constitutional supremacy to clarify constitutional change as a shift from the apartheid-era legal system whose bifurcation aided repression, to a singular normative order imbued by legality throughout. The initial attempt to ideate this singular normative order emerged in *Carmichele v Minister of Safety and Security,* where the Court for the first time approached its duty under s.39 as postulating "*an objective, normative value system*."[210] An objective construction, according to the Court, married a "*society's notions of what justice demands*"[211] with a more objective construct of justice rooted in taking rights seriously, to redefine unlawful governmental action.[212] The Court thereafter aimed to articulate an objective normative system to guide other constitutional actors. In practice, one result is that governmental actions and omissions not previously construed as unlawful according to a common societal view of unlawfulness, became unlawful from a principled view anchored in human rights principles that society could or should consider as objective. In this line of analysis, the Court set about casting a wider "*net of unlawfulness*".[213] Under this wider net, ministers were held liable for criminal acts by individual police officers,[214] and for infections individuals caught during incarceration.[215] In this way, the ideation of the Court had the potential to gain a radical impact on an ideological understanding of legality in any exercise of governmental authority.

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[208] See Ellman, Stephen (2016) The Struggle for the Rule of Law in South Africa" New York School of Law Review 57; An earlier view in the same vein was offered by Mureinik in the context of the Interim Constitution Bill of Rights. See Mureinik, Etienne (1994) "A Bridge to Where? Introducing the Interim Bill of Rights" South African journal of Human Rights Vol.10 Issue 1, pp.31-48

[209] Dixon, Rosalind and Roux, Theunis (eds) (2018) Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence, Cambridge, Cambridge University Press, p.2.

[210] *Carmichele v Minister of Safety and Security* (2001) ZACC 22 (establishing state liability when a female victim was physically harmed by a known sex offender who should have been in police custody for another unrelated violent offence). The Court synthesised negative rights such as life and personal security, with positive obligations to fulfil the same, pointedly rejecting a constitution of framed with exclusively negative liberties in mind, para 36-57. What was balanced was not only interests of parties inter se, but conflicting interests of the community, e.g., in immunity of public officials from delictual liability, vis-à-vis the "spirit, purport and objects of the Bill of Rights". The instrumentality of the Constitution is here juxtaposed against its embodiment of "an objective, normative, value system" (para 55).

[211] Per Ackerman, J and Goldstone, J in *Carmichele*, para 56.

[212] The Dworkinian inference to "Taking Rights Seriously" relates more to his proposition that the political morality informing a constitution should be understood as a claim about the objective correctness of a particular interpretation, which Roux argues better reflects the practice of the Court than does Klare in Roux (2009) "*Transformative Constitutionalism and the Best Interpretation of the South African Constitution*: Distinction without a Difference? Stellenbosch Law Review Vol.2 at p.259

[213] *Carmichele*, para 56

[214] In *F v Minister of Safety and Security & Anor* (2011) ZACC 37, the minister became liable for rape committed by police officers on duty.

[215] *Lee v Minister of Correctional Services* (Minister had legal duty to provide healthcare and was therefore liable for prisoner infected with Tuberculosis). The Court held that the factual causation test of negligence at common law should not be inflexibly applied.

However, as the caseloads of the Court grew, the Court also pursued reciprocal comity in its interpretive activity where it realised the impact of organisational limits. Even if the emergence of an objective normative system was integral to a revolutionary new constitutionalism, constitutional aspirations were still contingent upon organisational capacities that were themselves still in formation and in need of strengthening. This is one of the critical insights put forward by Fowkes in a descriptive account of the Constitutional Court as a constitution-building court. It became crucial for the Court to embed its interpretive activity in a responsive re-organisation of public institutions which were plagued by incapacity to organise an objective, normative system, instead of fetishizing legal compliance with a constitution that was "work in progress". One of the consequences of enhancing a constitution-building approach resting on joint interpretive activity, was that ideation fell back from revolutionary aspects of the new constitutionalism to familiar aspects of the old constitutionalism, such as legality and reasonableness. As former constitutional court judge O'Regan, put it, theorising about the 1996 South African Constitution required reconciling a tension between a commitment to textual constitutional constraints on one hand, and a commitment to social transformation on the other, recognising that the Constitution "*endorses a range of values and constructs a set of institutions that together enable the achievement of the substantive goal of the Constitution. However, the achievement of the goal remains in the first instance the task of politics rather than law*."[216] In a curial setting, O'Regan described how court actors aided this achievement by producing an "an astute jurisprudence of difference" within the bounds of reasonableness.[217]

From the foregoing, constitution-building ideation can paradoxically repress the radical potential of experimental ideation. It is not axiomatic that constitution-building court across seeking to establish a new constitutionalism will prioritise ideating revolutionary means for institutionalising fundamental constitutional change. Nevertheless, from the empirics in this sub-section, it must be recognised that constitution-building ideation was animated by contradictions of constitutional rupture, and its limits emerged from the nature of organisational deficiencies rather than straightforwardly reflecting negatively on revolutionary constitutional ideas.

4.2.2 Incremental change

The second aspect of ideation dealt with the idea of constitutional change as incremental. As I discussed in previous chapters, incrementalism theories brought two issues into focus: firstly, deferral techniques that allowed framers to codify constitutional change despite disagreement on constitutional issues. Secondly, the systematic way future legislation could be used to resolve tensions of constitutional change and continuity. What relevant case law revealed

[216] O'Regan, Catherine (2018) "Mission in Progress: Toward an Assessment of South Africa's Constitution at Twenty" in Dixon & Roux (eds) (2018) pp25-44, at p.44.

[217] In *Bato Star Fishing vs. The Minister of Environmental Affairs and Tourism & Ors* (2004) ZACC 15 (applicant sought substantial volume increase in the fishing rights allocated under a transformational equity scheme). The Court accepted that transformation is a drawn-out, conflictual process and upheld the executive's transformation measures, which placed a higher value on internal transformation and restructuring of current actors in a capital- and labour- intense sector. Justice O'Regan stated "what is also clear … is that the broad goals of transformation can be achieved in a myriad of ways. There is not one simple formula for transformation. …The manner in which transformation is to be achieved is, to a significant extent, left to the discretion of the decision-maker." At para 35.

here was a dual approach to ideating incremental change. On one hand, the Court ideated incrementalism as a formative and underdeveloped conception of constitutional issues during constitutional framing. This underdevelopment therefore had necessitated deferral to future legislation. Once constitutional conceptions matured post promulgation, for instance because better information became available and errors of law could be better mitigated, the premises of incrementalism no longer held. Ideating incrementalism in this manner was evident in efforts to push political branches to enact comprehensive legislation, especially in the field of equality in social relations.[218] Ultimately, however, the Court encountered new considerations in political branches whose preferences favoured iterative, pieces of legislation. This does not discount that pushing for comprehensive legislated reform worked in other areas, e.g., criminal law reform, but even in these areas, the Court eventually absorbed limits on its room for experimentation that necessity of cooperation with political branches imposed.[219]

Secondly, the Court tried to ideate incremental change to harness urgency of constitutional change, especially where it considered normative questions, like vulnerability, participation, or accountability, to be highly material. Hence, its ideation sought to transcend incrementalism by reasoning that it truncated anthropomorphic dimensions of the 1996 Constitution. From this perspective, the Court expressed preference for more urgency and expedition in the flow of change for ideological reasons. This is evidenced in caselaw on democratic accountability and vulnerability. For instance, in 2015, the High Court had ruled that the Constitution 1996 might require parliamentary rules to make legal provision for secret balloting on a 'no confidence' motion, but was silent on the point.[220] In 2017, the Constitutional Court had addressed this constitutional silence on a voting procedure as deliberately done by framers guided by incrementalism, to empower the National Assembly to determine its own procedures under s.57.[221] The Court therefore declined to

[218] See (i) *National Coalition for Gay and Lesbian Equality v Minister of Justice & Ors. (1998) ZACC 15* (criminalisation of consensual sodomy in s.20 *of Sexual offences Act, 1957* and other statutes); (ii) *National Coalition for Gay and Lesbian Equality & Ors. v Minister of Home Affairs & Ors (1999) ZACC 17* (differential application of provision of *Aliens Control Act, 1991* to immigration of same-sex partners of permanent residents); (iii) *Satchwell v President of RSA & Ors (2002) ZACC 18 (No.1)* (unmarried permanent same-sex partners of judges must be treated as conjugal spouses in ss 8 and 9 of *Judges' Remuneration Act*); (iv) *Du Toit & Anor v Minister of Welfare and Population Development (2002) ZACC 20* (same-sex couple can adopt a child); (v) *Satchwell v President of RSA & Ors (2003) ZACC 2 (No.2)* (new legislation had retained impugned omission of same-sex partner of judge in pension scheme); (vi*) J & Anor v Director General Department of Home Affairs & Ors (2003) ZACC* (whether s.5 of Status Act discriminates against same-sex partner becoming a legitimate parent of partner's children); (vii) *Volks NO v Robson & Ors (2005) ZACC 2* (majority decision that s.2 of *Maintenance of Surviving Spouses Act, 1990* includes unmarried cohabiting partner for purposes of maintenance by estate of deceased spouse); and (viii) *Minister of Home Affairs v Fourie (2005) ZACC 19*, decided together with (ix) *Lesbian and Gay Equality Project and Eighteen Ors v Minister of Home Affairs & Ors* (2005) ZACC 20 (whether lesbians can formalise marriage under existing legislative provisions that are silent on same-sex marriages). See the last decision for a summation of incremental changes through this case-law.

[219] See *S v Thunzi & Ors* where the Court was asked to invalidate different legislation resulting in a contradictory criminal framework for offences involving weapons; the Court referred to ongoing processes to standardise these residual laws from defunct apartheid-era homelands in comprehensive legislation based on the evidence of the Justice Department and declined to issue any final orders to allow the legislative process to redress the situation.

[220] High Court decision in *Tlouamma v Speaker of the National Assembl*y (2015) ZAWCHC 140, holding that the South African constitution did not expressly or impliedly secret balloting for motions of no confidence.

[221] See *United Democratic Movement v Speaker of the National Assembly & Ors* (2017) ZACC 21, para 86.

compel the Speaker to allow a secret ballot vote under existing rules, and declined to prescribe a secret vote as interference with a power the Constitution entrusted exclusively to the Speaker, but it offered guidance on how the Speaker might determine the question.[222] Later in the same year, in December 2017, a majority decision of the Constitutional Court issued an order directing the National Assembly to adopt rules for the removal of a President by impeachment pursuant to s.89(1), holding that failure to make such rules without further delay violated a cardinal constitutional stipulation to establish accountability mechanisms.[223] Similarly, in *Mwelase*, which dealt with incremental resettlement of landless groups in new areas, the Court went as far as directly appointing an official into the executive branch to oversee a resettlement programme. Obviously, ideation in these instances generated a string of curial statements on the flexibility of the doctrine of separation of powers in the new constitutionalism.

From the empirics, it must be recognised that once its ideation committed the Court on a path to push for comprehensive legislation, or urgent change despite relatively established incrementalism lenses, the Court invited logics of radicalism into prevailing logics of deferral, igniting new tensions between constitutional change and continuity. These logics obviously generated popular pressures on the constitution-building Court, making it prisoner to its own idealism. From this perspective, the contradictions of ideation on incrementalism became more vivid. Accepting incremental change meant implicit proof of the failure of the constitution-building Court to act on some of the drivers and rationales behind constitution-building. Obviously, the Court could in certain circumstances emphasise that constitutional obligations of incremental change were imposed on legislators primarily. In a normal course of events, the Court and these legislators were acting in the same direction, possibly on shared or similar ideation, Nonetheless, divided national actors might make their own considerations if the Court successfully pushed selectively for comprehensive or urgent constitutional change implementation in some areas, while appearing to accept the limitations of gradualism in others. This is a question both capacity of the constitution-building Court to maintain idealism in protracted incremental change battles, and of the neutrality dimension of incremental change ideation. Lastly, it needs to be recognised that ideation could spur a new forcefulness in the Court to transcend incrementalism and gradualism. Yet the force of incremental and gradual change in a context of fundamental disagreement on constitutional norms and issues, tended to integrate the Court into its schemes, thereby exposing the practical limits of this aspect of ideation.

4.2.3 Ideating constitutional norms and the creation of constitution-building centres and peripheries

This third aspect of ideation was significant because it showed what this dimension of the constitution-building work of the Constitutional Court accentuated, in addition to its pendulating on the radical potential of constitutional change discussed above. When ideating constitutional change, the Court deliberately as well as inadvertently created centres and peripheries of constitution-building work, which would eventually determine in which areas its epistemology of constitutional change in South Africa would build up. Therefore, ideating the constitutional norms whose entrepreneurs or custodians were not present in the national centre and in centred institutions like the national executive and

[222] The Court highlighted the need for rational basis of decision, avoidance of corruption and illegitimate hardships influencing the vote, and having regard to the prevailing atmosphere in parliament (para 87).
[223] *Economic Freedom Fighters & Ors v Speaker of the National Assembly & Anor* (2017) ZACC 47 para 6.

legislature, would arguably have permitted the Court to adopt a more theoretical approach to its work. Indeed, the Court was even encouraged to adopt an experimental approach to its constitution-building work. However, the drivers involved in this work limited the capacity of the Court to relocate fundamental constitutional change form perspectives of peripheralized constitutional norms.

As previously noted, the Constitution empowered the Court use its s.39 authority to develop Common Law and Customary Law. Opportunities arose for the Court to develop the two legal systems in several applications. Regarding the Common Law, this opportunity arose in at least eight cases between 1997 and 2021. Their results included invalidation of the Common Law writ of arrest for debt,[224] validation of Common Law defamation as a limit on freedom of expression[225] and permission for lower courts to enforce a Common Law remedy for recovery of confiscated property from the police.[226] On the other hand, the Court invalidated a legislative amendment that permitted admission of extra-curial statements of co-accused and restored the Common Law rule ante.[227] Arguably, these cases did not exemplify 'hard cases' conflicts between the Constitution and Common Law, though they evidenced that the Court had flexibility either to change, maintain or re-introduce a Common law norm, rule or remedy. A reason for this absence of conflict might lie with continuity of the old constitutionalism on that the Common Law already was highly developed in South Africa, with internal means of correction. This may be the reason too why framers saw no need to define Common Law in the 1996 Constitution. Another reason could be that the Court eschewed its role in Common Law development because legislation provided more pathways to that goal, and the Court was better placed to ideate new Common Law norms under legislation, as I will evidence further below,

A possibility to adopt a more theoretical and philosophical approach to recentre native, traditional, or at least Africanist norms via constitution-building had already been noted when the Court in its formative period had espoused the notion of *ubuntu* when quashing the death penalty. While difficult to define, *ubuntu* presented an African version of humanistic philosophy.[228] The prospective recentring would have been warranted given the double recognition of individual rights and traditional culture in the Constitution.[229] Nevertheless, the prospects for the Court to ideate a new constitutionalism in relation to customary laws were not taken up. For instance, in its 2018 decision in *Sigcau (No.2)*[230] dealing with the

[224] *Malachi v Cape Dance Academy & Others* (2010) ZACC 13.
[225] *Khumalo & Others v Holomisa* (2002) ZACC 12.
[226] *Van der Merwe v Inspector Taylor Others* (2007) ZACC 16.
[227] In *Mhulungu v State; Nkosi v State* (2015) ZACC 19. Maintain the statutory change would leave convictions vulnerable to attack for admission of extra-curial statements.
[228] See Mokgoro, Yvonne (1998) "Ubuntu and the Law in South Africa" 1 PER/PELF 15
[229] In *Makwanyane v Republic* (1994) abolishing the death penalty, on among other grounds, its non-conformity with ubuntu. The case concerned the right to life provision in the *Interim Constitution 1993*, and provisions on right to cultural life, since carried over to the 1996 Constitution. The 1996 Constitution protects the right to participate in cultural life (s.31), subject to reasonable and justifiable limitations (s.36), and it empowers the Constitutional court to develop customary law; in ss212-212 it recognises the institution, status, and role of traditional leadership.
[230] *Sigcau & Anor v Minister of Cooperative Governance and Traditional Affairs & Ors* (2018) ZACC 28 (No.2). Prior to amendment, the statutory power to appoint kings and queens was vested in the President and the unamended Act took that decision away and conferred it on the royal family when there is no dispute, but on

question of who should notify who was entitled in terms of Customary Law, to be confirmed as a traditional king – the President acting under statutory authority or the concerned traditional royal family under customary authority – the Court sided with the interpretation by the President. A majority agreed with the President by reasoning that the expertise of a statutory commission behind the interpretation by the President was such that the presidential decision should be immediately implemented. The Court expressed concern for a royal family identifying a person to be enthroned other than the person recommended by the statutory commission. In fact, while the majority was congenial to the formal, expert-driven process, and the enabling presidential role in it, it did not set out what the proper statutory process is in such cases.[231] A dissenting minority opinion lamented a continuation of mistaken top-down imposition on customary law.[232] The dissenting opinion suggested that its formal treatment by the Court remained unchanged from pre-Constitution times. This continuity of the old constitutionalism attenuated any radical potential of the Court to ideate transformational understandings of fundamental constitutional change based on Customary Law.

To put this ideation into proper perspective, its nature was avoidance of generating endogenous constitutional policy resources based on African native culture, which was kept at the constitutional periphery. In reality, according to Comaroff & Comaroff, the officially avowed symbolism of supremacy of the 1996 Constitution was contradicted by that of resilient traditional authority, resulting intermittently in dramatic confrontations.[233] Despite strenuous efforts to resolve it, this antinomy persisted and resisted even the most capacious politics of tolerance.[234] Retaining centre-periphery relations of national law and traditional law in the name of embodying liberal constitutional paradigms, not only replicated the old constitutionalism, it was additionally liable to limit the ability of the Court to ideate a unified nation under the 1996 Constitution, because this ideation was limited by its hegemonic discourse. The result of this centre-periphery disjuncture created a specific ideation problem of the marginalisation of the periphery in the new constitutionalism. On the other hand, the periphery was not still. On the contrary, according to Comaroff & Comaroff, it was nursing an overt hybridisation in some areas of the constitution, as well as the rise of "new popular politics" that could later be antithetical to the ideation explicated by the Court.

In fact, Comaroff & Comaroff had gone further to provide an insider view of the centre-periphery discourse within the Court that drove it to decisions like *Sigcau* to exclude customary laws from a fortress of constitutional law. The reality

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the Commission when there is a dispute. Sec.26 of the statute required the President to immediately gazette the decision of the Commission once it was received under s.9, but s.9(1)(b) obliged the President to recognise the person identified by the royal family.

[231] *Sigcau (No.2)* Perhaps it missed the point entirely as the dissenting opinion stated, which was to consistently with the Constitution, "not repeat the historical mistake of imposing (customary law) in distorted form from above" (para 80).

[232] See also *Mayelane v Ngwenyama & Anor* (2013) ZACC 14, where the Court ordered that customary law of the Tsonga be read as developed in terms of s.39 to require informed first wife consent for the validity of subsequent rites of polygamous marriages. However, as the minority observed, the evidence adduced on customary law suggested that this is already the case in Tsonga customary practice, hence removing the need for a formality of development by the Court.

[233] Comaroff, Jean & Comaroff, John (2003) "Reflections on Liberalism, Policulturalism, and ID-ology: Citizenship and Difference in South Africa" Social identities Vol.9, No.4, pp.445-473.

[234] Id, at p.465.

was that judges could not agree on how to experiment to recentre Customary Law. For Justice Yvonne Mokgoro, complexity of law and of density of social relations meant "*the Constitutional Court operated at great distance from law-as-lived… A good deal of local practice continued in defiance of the Bill of Rights…; it was merely a matter of time before cases emerged that contested its Eurocentrism in the name of cultural difference. Meanwhile, these tensions were managed, day in and day out, in various pragmatic ways, rendering real law in the new South Africa more complex and diverse than most jurists acknowledged*" while in contrast, Albie Sachs argued the Constitution provided "*the frame within which customary law, to the degree that it remains relevant to everyday life, might sustain itself in a liberal democracy. If conflict were to arise … it was to be addressed by means of statutory law.*" [235]

It must be recognised that for the Court, ideating why and how to bring constitutional norms and issues that the old constitutionalism had relegated into the periphery, and instead relocating them in the centre in the new constitutionalism, would be a matter of disagreement. This should be borne in mind when considering prospects of a strategizing constitution-building Court. Judicial disagreement was however always par for the course. Moreover, this was not about a contest of legitimacy between constitutional and Customary Law. The principal issue was the ability of the constitution-building Court to ideate transformational change from the old constitutionalism, to entrench the ideological erosion of the latter in a fundamentally changed new constitutionalism. Furthermore, if constitution-building ideation was also about symbolising a historical struggle for the majority who continue to uphold customary law and authority, then constitution-building suffered an inevitable setback if the Court could not find ways to experiment to rework Customary Law and possibly a range of African philosophies into elements of the new constitutionalism. The ideation work of the Court might have a limited impact on the development of Customary Law, but likewise, Customary law appeared to have a limited impact on the ideation dimension of constitution-building.

4.4 Process and methods of constitution-building

In the relevant case law, some evidence could be found of court actors acting to leverage convergence on diverse constitutional norms and interests with political branches, in two kinds of processes. In one, court actors strived to link constitutional changes to their preferred outcomes, directly and autonomously. In the other, court actor roles were structured into constitutional decision-making processes, analogously to their in-built functions in constitution-making processes. As I discussed in chapter one, South Africa had provided for a certification role for the Constitutional Court during constitution-making, while an interim tribunal was included as one of the in-built constitution-making mechanisms in the Kenyan process. Structured roles of court actors could differ in the two states, but neither was mechanistic when it came to reinforcing norms in constitution-making decision-making. Constitution-building processes and legal methods reflected the anthropomorphic dimensions of constitutions, but they could also emerge as phenomenological constructs only loosely informed by constitutional design.

[235] This exchange is reported in Comaroff, Jean & Comaroff, John (2003) supra note 233, at pp.452-3.

The evidence of strategizing constitution-building court actors, whether autonomously or manifested within institutional relations, was less straightforward, meaning it may be a question of subjective interpretation. On one hand, if the claim is that strategizing behaviour was needed to impose definite incentives or limits to leverage the other constitutional actors who are involved in constitutional decision-making, then it can be inferred from the empirics in the relevant case law. On the other hand, there is evidence that court actors strategized on some issues selectively. And there is evidence of denial of strategizing behaviour. For instance, Sachs who sat on the Court was sceptical about its judges achieving convergent judicial mindsets, though they might provide a rich mix of individual consciences.[236] Considering that strategizing by court actors was neither provided for in the 1996 Constitution, nor required by it for actualisation of its outcomes, we may have to approach the presence of strategizing as another phenomenological construct.

Judicial efforts to reconcile different understandings of constitutional change among the branches by pushing for convergence discourses were easy to spot because court actors readily acknowledged them in curial obiter dicta. According to Albie Sachs, the three branches were involved in a common project and the1996 Constitution envisaged a "civilised conversation" between them.[237] In *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another,* Cameron, J, described the three branches as being "*engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable*."[238] Such common enterprise perspectives more over tended to downplay the separation of powers. The doctrine could be understood in terms of actual textual obligations, but sometimes "*it will be necessary to extrapolate what amounts to a blueprint of organizational relationships from the fundamental structural postulates one sees as informing the constitution as a whole*…".[239] Convergence discourses evidently embodied functional conceptions of constitutional change as a common project aimed at practical constitutional promises, on which interbranch agreement was catalysed by court actors.

How were these convergence discourses pursued and what evidence was there of strategizing constitution-building court actors? Firstly, the empirics revealed the Court using interpretive activity to engineer related processes autonomously and independently, and secondly, the existence of structured processes providing a context for the role of Court in broader constitutional decision-making processes.

4.4.1 Autonomous agency and production of convergence discourses

It sometimes appeared as if autonomous engineering to push convergence discourses using legal methods of introducing novel issues *suo moto*, was simple to perform. An interesting case was *Sarrahwitz v Maritz NO & Anor.*[240] Sarrahwitz applied for a court order to compel the trustees of a deceased insolvent to transfer residential property in her name after she purchased it, but failed to secure the transfer while the seller was alive. However, the remedy she sought under legislation (*Alienation of Land Act*) was only available to purchasers of residential homes who paid sellers in two or more

[236] Sachs, Albie (2009) The Strange Alchemy of Life and Law, Oxford, Oxford University Press, p.58.
[237] Id, at p.147
[238] (2019) ZACC 30, para 45.
[239] *S vs State* (2000) ZACC 60 para 17.
[240] (2015) ZACC 14.

cash instalments. Both the High Court and the Supreme Court of Appeal held quite formalistically that this statutory provision did not protect her since she had paid the seller in a single cash instalment. Additionally, the High Court held that her residual Common Law claim could not stand as that law conferred no right on an unsecured creditor to compel the trustees to recognise her ownership claim and they were thus free to terminate the initial sale contact. Eventually, the applicant moved to the Constitutional Court where she sought leave to appeal on, inter alia, a new ground that the Common Law was discriminatory because it foreclosed a remedy for a single transaction purchaser of a residential home to be protected from the discretionary refusal of trustees of an insolvent seller to complete a pre-insolvency transfer. The applicant argued that the Common Law discretion of the trustees rendered her vulnerable to homelessness in violation of her constitutional right to adequate housing.[241] After granting leave, the Constitutional Court upheld a general principle to not entertain arguments about developing the Common Law where the superior courts that dealt routinely with it had previously not canvassed the issue.[242] Thereafter, the Court had options to remit the question for re-hearing, or to dismiss the appeal, or to invoke its discretion to hear the issue as a first-instance court. In fact, as the trustees had since withdrawn from litigation, the Court could have ordered transfer of the residential home in favour of the applicant.

Instead, the Court directed the Minister responsible for administering the land alienation legislation to be joined in the proceedings for the purpose of addressing a novel argument that the statute was unconstitutional for discriminating purchasers of residential homes based on the form of payment. Eventually, the Court held the statue was unfairly discriminatory to this extent. Accordingly, it remedied the infringement by interpreting the statute to omit two words and reading-in seventy-six additional words. Having expanded the legislation to offer a new protection to the applicant, the Court directed the residential property be transferred to the applicant. Evidently, the Court opted to bend its rules of procedure to join the Minister, who then conceded that the relevant statutory provision was unconstitutional and proceeded to propose much of the wording that the Court eventually read into it. In this instance, the Court and the executive coordinated an alteration to an original statutory purpose to allow protection of certain vulnerable purchasers of residential homes, rather than all purchasers by instalment, allowing the Court to elide a pleaded Common Law conflict with the 1996 Constitution, while deliberately engineering a statutory law conflict when this recourse was unnecessary given the facts. If the original statutory purpose was to improve the efficiency of transactions in a category of home purchases paid in multiple instalments, the new purpose became the protection of vulnerable purchasers of residential homes irrespective of mode of purchase, which altered the underlying statutory logic from market efficiency to a normative criterion of minimising vulnerability. The Minister who was joined late in the litigation nevertheless helped the Court to reframe responses to conflicting claims of economic interests away from Common Law to legislation, assisting the Court to waive the option of developing the Common Law rule governing the discretion of trustees of insolvent estates.

Given what appeared to be remarkable, independent, exertion by the Court, and the acquiescence by the Minister, what inference can we draw? One, is that the Court could undoubtedly assert its autonomous preference for constitutional

[241] Sec.26 of the South African Constitution, 1996.
[242] Per Mogoeng, CJ, para 21

outcomes and leverage other governmental actors to adopt those preferences. The unilateral stress the Court placed on using the 1996 Constitution to shape commercial rules of home ownership, conveyed its view of vulnerability in this area as negating the constitution's anthropomorphic aspiration of social change.[243] Another, which Fowkes utilised to develop a definition of constitution-building, was the vivid demonstration of constitutional interpretation as a joint activity between the Court and the Minister. A third, which has significant implications, is the manifestation of strategizing behaviour on the part of the Court, to an extent that the Court manipulated its rules of procedure in its pursuit of a specific, narrowly defined outcome. By strategizing, the Court imposed incentives and limits in a way that encouraged the Minister to alter legislated government policy in favour of a judicially backed calculus of commercial interests in homeownership. Furthermore, the legal methods the Court adopted revealed a salient comity of interactions between the Court and the executive branch.

4.4.2 Structured court actor roles in constitutional change rationalisation

While autonomous and independent manoeuvres of the Court could leverage executive branch actors to pursue the constitutional outcome preferences of the former, there was reason to infer that the role of court actors reflected certain structured relations. Such structures would cover independent court action with a wholesomeness that further illuminates the fundamental postulates of holistic constitution referred to above. In the constitution-making process in South Africa, the certification role of the Constitutional Court contributed to a more optimum drafting process in a normative sense, even if it did not fundamentally alter the agreement reached on the constitutional settlement between two significantly powerful political actors. Using this analogy, it was possible to discover analogously structured roles that permitted political actors to constrain their constitutional decision-making in an optimal manner, while observing that the Constitutional Court had no mandatory role in the amendment of the South African Constitution.[244] Accordingly, if court actors were strategizing within the frame of constitution-building processes, such processes were nevertheless structured and tied up with a settled shared understanding of the holistic constitution.

How do we know these structured processes anchored constitution-building processes? A simplistic answer is that the Constitution 1996 did provide for court actors to engage in exercises of statecraft ceremonially, for instance, the Chief Justice officiating at swearing-in ceremonies, or during the election of the Speaker of the National Assembly. Moreover, court actors periodically reinforced the credence of various commissions of inquiry, such as the one discussed further below on state corruption. More specifically, we can analyse the presence of such structures indirectly by considering the purposes behind the 17th amendment to the 1996 Constitution. This amendment secured interbranch cooperation and collaboration with intricacies of constitutional review in the background. Formally, the 17th amendment, which parliament enacted in 2012, dealt mostly with municipal authorities, with judicial restructuring tacked in. it created the Office of Chief Justice as a public service office in administrative charge of the judiciary. Behind the change, the executive branch intended for the bureaucratisation of this office to streamline allocation of institutional resources based on an

[243] The Court had pronounced on vulnerability in relation to housing in fifteen years earlier in *Government of the Republic of South Africa and Others vs. Grootboom and Others* (2000) ZACC 19 per Yacoob, J, para 69, 93.
[244] Section 74-75.

organisational structure and composition that was mirrored on the executive-led civil service departments. This evidently rationalising set up incorporate a mutual understanding of the judicial independence the 1996 Constitution mandated under s.165.[245] From the outset, the direct administrative control the Chief Justice gained over the institutional judiciary was facilitated by and secured with the assistance of an executive Ministry. In this connection, it is telling that the "infrastructure" Fowkes credited for successful implementation of the creative remedies of the Constitutional Court was provided by the executive branch.[246] Even if the actual level of assistance between the executive branch and the Constitutional Court remained indirect and apolitical, the institutional design cannot be separated from the processes and mechanisms set up to convey information between the judiciary and the executive. It is therefore reasonable to infer that the 17th amendment immersed interbranch relations in ostensibly technical-bureaucratic processes, whereby a rationalised system of constitutional judicial review could be maintained for mutual benefit. i.e., one administratively serviceable from perspectives of executive and judicial officials, while simultaneously decoupling that system from overt political control.

Klaaren made this evidence of structured court actor roles even more explicit in an analysis of a governmental study on the role of the post-apartheid transformation of the judiciary, which was launched in the same year the 17th amendment was enacted. This governmental study was intended to scrutinise judicial commitments to constitutional norms that are open-textured. In it, the government cast the judiciary as a complex and diffuse agent of constitutional change. In analysing the legitimizing aspects of the regulatory reasons behind the 17th Amendment and the proposed ministerial assessment, Klaaren observed on aggregate, a "*fairly high degree of common understanding among the significant players*" regarding the shape and place of the judiciary in South African governance.[247] Klaaren attributed this common understanding to overlapping logics of justification for regulating the judiciary, such as, legislative mandate, accountability, due process, expertise and efficiency. These logics of justification were distinct from the justificatory logics of "*constitutionality, legality and morality*"[248] that abounded in the transformative constitutionalism scholarship. Hence, a notion of constitution-building processes being anchored on shared understanding of constitutional change as rationalising had grounding in practice. Hence, unsurprisingly, the government postulated the 17th amendment as bureaucratic rationalisation, of municipal government and of the judiciary. Yet this amendment also prefigured an alternative understanding of dialogic comity to that espoused in transformative constitutionalism that I discuss in the preceding chapter. Klaaren made an interesting observation when highlighting a managerial approach to the 17th

[245] According to Justice Kriegler, the requirements of s.165 meant that "the Constitution recognises and expressly commands not only exemplary conduct by the executive and legislative branches of the state, but the active support of all organs of state in subsections 165(3(, (4) and (5). See *S v. Mamodolo* (2001), at para 63.
[246] Fowkes, James (2016) supra note 132, at p.213.
[247] Klaaren, Jonathan (2015) "Transformation of the Judicial System in South Africa, 2012-2013" The George Washington International Law Review Vol.47 pp481-407, at p.483.
[248] Id, at p.507.

Amendment where tensions arose not between the executive and the judiciary, but between these pivotal constitutional actors and third-party interest groups that positioned themselves as promoters of constitutionalism in South Africa.

With this evidence of the structuredness of constitution-building court actors, there is a possibility that the strategizing dimension of constitution-building legal methods are not that different from strategizing behaviour of key public bureaucracies, because what unites them is an understanding of public choice rationalisation. There is evidence for this perspective too. For instance, in *Minister of Defence & Ors. v Potsane*[249] the Constitutional Court was asked to confirm a High Court ruling that invalidated the establishment of a military prosecution structure to prosecute independently of the national prosecuting authority and to interpret s.179(1) of the Constitution to require a single, national prosecutor. The defence minister submitted that the purpose of including a single national agency in s.179 must be understood as a *rationalisation* (my emphasis) against a historical backdrop of multiple prosecuting agencies reflecting the apartheid system of racially balkanised jurisdictions.[250] Additionally, the minister argued that resolution of inevitable conflicts between military and civilian prosecuting agencies would be grounded on a settling praxis of cooperation between administrative agencies.[251] The Court upheld the establishment of the military justice system echoing these functional arguments to support separate systems under principles of cooperation and rationalisation. Similarly, the Court accepted rationalisation arguments to uphold an overall scheme placing an anticorruption agency under the police service, despite impugning some of elements of its design.[252]

Rather than being evidence of constitution-building court actors strategizing to leverage other actors to converge on their understandings of constitutional changes and court actor preferences regarding outcomes, these cases epitomized processes of bureaucratic rationalisation. In other words, court actors could be viewed as integral in structured processes that systematically entrenched narrow dimensions of rationalisation norms. Here, it was the bureaucratic rationalisation ethos and its managerial legal method of constitution-building that were accentuated.

4.5 Legal features of constitution-building outcomes

4.5.1 Rupture and revision

As previously discussed in chapter one, the origins of the 1996 Constitution were regularly attributed to constitution=making changes that embodied a rupture from an antecedent constitutional order characterised by white supremacy imbued legal racial discrimination. Scholars regularly associated this Constitution with national assertion of a fundamental distinction between that discredited order and one rooting for a democratic society where human rights had a high degree of legal, political, and sociological legitimacy. For instance, in a contextual analysis of the Constitution, 1996, Klug posited that South African leaders had intended it to "consolidate a democratic transition" and to herald "a

[249] Joined with *Minister of Defence v Legal Soldier* (whether the *Military Discipline Supplementary Measures Act 16 of 1999* establishing military prosecution system was inconsistent with s.179 of the Constitution which establishes a single national prosecuting agency).
[250] *Potsane,* para 17
[251] *Potsane,* para 19-25.
[252] In *Helen Suzeman Foundation v President of RSA & Ors* and *Glenister v President of RSA & Ors* (2014) ZACC 32.

national plan or aspirational guide that attempts to address the past".[253] Constitution-building court actors were encouraged to push for a "human rights state" as a legal feature of their constitution-building outcomes. As I showed above, the Constitutional Court of South Africa tried to ideate rupture in terms and premises of an objective normative order and sough to cement is principal rules via Bill of Rights case law.

In fact, rupture even at the time of constitutional origins always entailed an element of legal continuity. In the same contextual study referenced above, Klug highlighted that democratic consolidation included a str a strategy of "legal continuity", meaning continued recognition of existing legal rights and duties derived from the old constitutionalism and directed at maintaining political and economic stability during and after the transition.[254] In other words, the binary of constitutional change and continuity that court actors dealt with right from the beginning entailed some judicial maintenance of pre-existing legal rights balanced against precommitments to dismantle other legal vestiges of apartheid in concordance with an ongoing reconstruction of a new political system by political branches. Continuity from the old constitutionalism was further evidenced by instances of the Court tinkering with structures of government, legislation, and common law, in incremental changes to constructing a new constitutionalism. While the Court demonstrated a commitment to rupture from the old constitutionalism, it followed that it was reluctant to depart too much from the constitutional text, which has preserved some of the legal rights of the old order via its constitution-making compromises. Even allowing for possibilities of amendments to replace legacies of constitutional compromises during constitution-making, any groups emerging to contend that the Court must act as the vanguard of radical treatment of rupture, might underestimate the forcefulness of legal continuity in this context. At no point did the cases I examine above suggest that the Court treated the 1996 Constitution as in need of radical reform. The Court therefore hardly pursued the radical constitutional rupture that some contended that South African social realties needed.

4.5.2 Transformation of the legal culture

As I discussed above, how constitutional provisions functioned to influence legal changes, and consequentially to produce social change, came under considerable focus in South Africa. This focus generated a constitutional discourse under a rubric of transformation and transformative constitutionalism, whose essence was the contingency of constitutional interpretation on the prevailing legal or judicial culture. By culture was meant primarily the written and unwritten norms on constitutional interpretation, which regulated how and why court actors decided what constitutional change was legitimate along the change-continuity binary.[255] Based on these norms, court actors could interpret and

[253] Klug, Heinz (2010) The Constitution of South Africa: A Contextual Analysis, Oxford, Hart Publishing Ltd., p.1,
[254] Id, at p.8. On the same page, Klug notes that the "idea of legal continuity played an understated yet significant role in this debate. While liberation movement politicians and the general public saw no difficulty in making a clean break from the past, the lawyers (even within the liberation movement) soon grasped the significance of the regime's demand that there be legal continuity within the existing legal framework." See also Klug, Heinz, (1996) "Participating in the Design: Constitution-Making in South Africa" Review of Constitutional Studies Vol. 3 No.18 pp.3, arguing it was important for divided groups to find "shared characteristics", one of which might be legal continuity.
[255] See Froneman, J (2005) "Legal Reasoning and Legal Culture: Our "Vision of Law" 16 Stellenbosch Law Review 1.

apply constitutional provisions in ways quite different from those indicated prima facie by the text, in some cases in direct contradiction to the text. Related to this, additionally, was the secondary rulemaking that court actors produced to actualise constitutional change promises, or to institutionalise constitutional change. As Schauer had observed, this secondary rulemaking evidenced the determinacy of the constitution more narrowly. Furthermore, culture could implicate the symbolic weight court actors attached to the constitutional text and its promises.

In the transformation discourse, the key observation was that the culture of legal or judicial interpretation in the old constitutionalism was formalistic, legalistic, and therefore conservative. Hence, a key dimension of legal outcomes of constitution-building was argued as a paradigm shift to a dynamic, purposive, and transformative culture of constitutional interpretation. As the empirics demonstrated, the Court repeatedly addressed this shift from legal formalism, or legalism, to a praxis whereby interpretation combined with instrumental strategies to approach constitutional provisions holistically as authorising wide-ranging, sociologically legitimate, assorted, reforms. For instance, the Constitutional Court held that transformation involved *"not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to 1994 where largely under the control of whites and, in particular, white men*".[256] And that the Constitution "*roots for greater substantive equality in society*".[257] In its Bill of Rights case law, there was evidence of the Court utilising empiricism and extra doctrinal interpretation to arrive at decisions and sometimes innovative remedies, for instance in *Mwalase* discussed above, or in *Grootboom* where the Court preferred a historicist interpretation of housing rights. The Court therefore evidenced openness to reflexive avoidance of technical lawyering, or rigid textual interpretation and adherence to legal precedents. It tried to engage with substantive historical claims behind pressures to change a constitutional law, to "*move away from a static, typically private-law conceptualist view of the constitution as a guarantee of the status quo to a dynamically, typically public-law view of the constitution as an instrument for social change and transformation…*".[258] Furthermore, the Court utilised its ideation of transformation to envisage a legal ontology of societal transformation as an outcome of its interpretive activity, which it insisted must lead to practical effect.[259] The transformative constitutionalism jurisprudence of the Court, particularly its Bill of Rights case law, was praised by scholars as highly successful outcomes of its constitution-building work.

On the other hand, the empirical record was not that straightforward. Firstly, other empirical claims were made that court actors had not distinguished themselves as transformation agents. According to Cockrell, it was uncertain that judges achieved a change of mindsets to abandon formalism during the crossover to a post-apartheid legal system, and after evaluating judgments of a still-new Constitutional Court, Cockrell regretted that "the *Constitutional Court has shown an*

[256] See *Van Rooyen & Ors v S & Ors* (2002) 8 BCLR 810 at para 50.
[257] *Per* Sachs, J in Minister of Finance and Another v Van Heerden (2004) 11 BCLR 1125, at para 142.
[258] Van der Walt, J in (2002) ZACC 5 at para 50, 52.
[259] In *JT Publishing (Pty) Ltd & Anor vs Minister of Safety and Security & Ors* (1996) ZACC 23 Didcott, J stated in obiter that the Court was not obliged to decide inconsistency when, "owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration. It is already settled jurisprudence in this Court that a court should not ordinarily decide a constitutional issue unless it is necessary to do so," para 30.

unwillingness fully to embrace the substantive vision of law" required by a purposive approach.[260] Some court actors claimed too that judges did not and cannot share a collective understanding of transformative constitutionalism,[261] that judges lacked proper juridical standards to deal with substantive issues more so when it may be "unfair" to decide issues unless litigants pleaded them,[262] and that at any rate, transformation of society was "*a task for all three arms of government to perform in partnership*."[263]

Secondly, court actors were neither alone in pursuing transformation of the legal culture, nor was transformation exclusively judicially defined. On the contrary, some scholars described transformation as a code for the power agenda of the ruling party, the African National Congress (ANC). According to Malan "*transformation is the master concept of the ANC's ideological project and of the present South African politico-constitutional order. In terms of this project, … all structures of power, including the army, the police, the public service, intelligence structures, parastatal institutions, agencies such as regulatory bodies, the public broadcaster, and the central bank, must be placed under control of the ruling party. The transformation drive also extends to the judiciary*."[264] Malan argued that political transformation entailed, inter alia, the judiciary being made more representative in its composition, and that individual judges mirror ANC ideology,[265] although Choudhry countered on this point arguing that ANC strategies of deploying its cadre to the public service to achieve the transformation of South Africa, was not a material issue for the Constitutional Court.[266] Yet the constitutional actors engaged here did not

Evidently, transformation arguments clearly had long pedigree in constitutional discourses within and outside the arenas of court actors, and not all actors engaged in the discourse were expected to accept transformation as simply inevitable and neutral. What emerges empirically is an open question whether court actors had succeeded to reframe a generalisable scope of constitutional transformation of South Africa.[267] Evidently, too, transformation lacked a settled meaning and constitutional object among plural constitutional actors. This should qualify its use to conceptualise legal outcomes of constitution-building specifically in terms of an ontology of constitutional change outcomes. At his point, I draw attention to the possibility that transformation discourse by court actors shaped hermeneutics of delineating legal

[260] Cockrell, A (1996) "Rainbow Jurisprudence" South African Journal of Human Rights, pp.1-10. Much earlier, in 1993, Du Plisses and de Ville labelled the approach of the Court under the Interim Constitution 1993, as "literalist-cum-internationalist". See Du Plessis L.M & De Ville, J (1993) "Bill of Rights in South African context (3): Comparative perspectives and future prospects" Stellenbosch Law Review Vol. 364.
[261] Langa, Pius (2006) "Transformative Constitutionalism" Stellenbosch Law Review, Vol.17, No.3, pp.351-360, p.355.
[262] See *Fischer v Ramahlele* (2014) (4) SA 614 (SCA) para 13; *CUSA v Tao Ying Metal industries* (2009) SA 204 (CC) para 68 and *Barkhuizen v Napier* (2007) (5) SA 323 (CC) para 39
[263] See Langa (2006) supra note 261, at p.360
[264] Malan, Koos (2019) There is No Supreme Constitution: A Critique of Statist-Individualist Constitutionalism, African Sun Press, p.19
[265] Id p.21
[266] In Choudhry, Sujit (2009) ""He had a mandate"; the South African Constitutional Court and the African National Congress in a dominant party democracy" Constitutional Court Review Vol.2 No.1, pp.1-86, at p.14
[267] Choudhry, Sujit (2009) supra note 266, at pp.14 and 19

parameters of constitutional change versus continuity in legal outcomes of the constitution-building work of the Court, by enhancing the symbolic importance of the 1996 Constitution in public purview.

Accordingly, a utility of repetitive transformation discourses engaging South African court and non-court actors would be its estimated effects on socialising ordinary South Africans into familiarity with the promises of constitutional change and the mechanisms of its delivery. The Court in several instances crafted its decisions, including transformation discourses, with the public in mind. If indeed it was strategizing, the Court could utilise the public symbolism of transformation outcomes to immerse discontented and disagreeing groups into the binary logic of constitutional change and continuity which they drew it.

On the other hand, noting the active presence of a dominant political party, court actors could publicly appear to be hijacked into ideological conflicts concerning constitutional change outcomes. I address this point further in the discussion below on legitimacy of the constitutional order.

4.5.3 Legal entrenchment of constitutional rules

As I discussed in chapter one, the 1996 Constitution could be viewed as multifunctional. It was intended to help solve a range of problems: tyranny, political repression, racism, sexism, corruption, anarchy, collective action problems, absence of public participation, economic myopia, ethnic nationalism, lack of accountability, social marginalisation, etc. A legal feature of constitution-building outcomes would entail making such a constitution a binding legal mechanism, and legally entrenching its principles and rules in exercises of governmental powers. The 1996 Constitution authorised the Court to promote values of equality, liberty, human rights when interpreting the Bill of Rights. Earlier in its formative years, the Court had announced that it will enforce the 1996 Constitution as supreme law irrespective of political consequences.[268] On the other hand, it also announced that it prefers its decisions to have a practical effect,[269] therefore necessitating greater coordination with the other branches. As discussed above, in some of its constitution-building interpretive activity, the Court treated promotion of rights as a common constitutionally defined project shared with the other branches, to improve the lives of ordinary people and protect human dignity, equality and freedom.[270] This highlighted the importance of procedures or processes of constitution-building work.

That the Court entrenched the Bill of Rights in governmental decision-making is empirically vouched, both here and in other analyses, and therefore does not need repetition. This legal entrenchment was a very positive trend, which was due partly to a political consensus between the three branches to promote and improve liberal constitutional democracy.

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[268] See *Executive Council of Western Cape & Others vs President of the Republic of South Africa & Others* (1995) CCT 27/95 per Chaskalson, J.

[269] In *JT Publishing (Pty) Ltd & Anor vs Minister of Safety and Security & Ors* (1996) ZACC 23 Didcott, J opined the Court is not obliged to decide inconsistency when, "owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration. It is already settled jurisprudence in this Court that a court should not ordinarily decide a constitutional issue unless it is necessary to do so," para 30.

[270] Sachs, Albie, J in *Minister of Justice and Constitutional development and Others v Prince* (2018) ZACC 30.

Consequently, a negative constitutionalism aspect of the new constitutionalism was strongly in focus, perhaps rendering the positive constitutionalism aspect less categorical in contrast. This focus could be related to treatment of other aspects of the constitution and the change it was intended to produce, as incremental, meaning a matter of timing. The empirics revealed that the Court tended to assist and encourage legislation to deal with array of constitutional stipulations, and to leave it to legislature to device its own procedures as largely noted above. The Court did contemplate the issue of urgency, observing calls for the Court to push for immediate change. For instance, according to Corder, this change was urgent because South Africa may not have the luxury of a slow revolution for the 1996 Constitution to be interpreted to lead to "human flourishing".[271]

4.5.4 Increased sociological legitimacy of the new constitutional order

South Africans strived for an autochthonous constitution that would evolve into broader sociological legitimacy that transcended its origins in deal making between two political groups, as I discussed in chapter one. Obviously, this legitimacy of a new constitutional order was aided by the evolution of constitutional conventions in the legislative and executive branches, as part of the convergence discourses pursued by the Court. Legitimacy moreover depended on the stability of the constitution over time as evidenced by its ability to withstand and resist "constitutional unsettlement" as I discussed in the second chapter. It was therefore expected that the Court would resist corrosive discourses against the Constitution, by seeking to strengthen its evolving emblematic value. Indeed, the reality of fundamental societal disagreements on constitutional norms and issues would make this resistance to corrosive discourses of greater importance for constitution-building court actors.

How successful was the Court in this regard? If we consider convergence of institutional and interbranch discourses, the Court was successful. If we consider adjustment of the Constitution to transformations in society – political, economic, and cultural – as indicative of increased sociological legitimacy, it is difficult to make a categorical judgement. The decision handed down by the Constitution Court in *Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including organs of state vs Zuma & Ors*[272] is indicative of this fluidity. This decision culminated a series of litigation that started after the Court obligated former president Jacob Zuma to implement remedial actions ordered by the Public Protector to counter official corruption, including an order that he must appoint a commission of inquiry.[273] Once appointed in 2018, [274] this commission of inquiry, which Deputy Chief

[271] See Corder, Hugh (2004) "Judicial Authority in a Changing South Africa" Legal Studies Vol.24, stating "Few countries have enjoyed the luxury of a gradual evolution of their governmental systems, informed by rational public debate, such as had been the experience of the established democracies… Occasionally, …the need to design institutions of governance to facilitate democratic transition in a revolutionary climate provides a clear and necessary resolution… South Africa is a case in point" (p.253) .

[272] See (CCT 52/21) (2021) ZACC 18

[273] See *President of the Republic of South Africa v. Office of the Public Protector (2017) 2 SA 100 Gauteng High Court*. For discussion on the implications from a separation of powers perspective, see Slade, Bradley (2020) "The Implications of the Public Protector's remedial action directing the exercise of discretionary constitutional powers: separation of powers implications" Law, Democracy and Development Vol.24 pp 364-383.

[274] See Proclamation No.3 of 2018 Government Gazette 25 January 2018. See https://www.statecapture.org.za/site/about/mandate (Justice Raymond Zondo was appointed on the

Justice Raymond Zondo chaired, sought severally to summon Zuma to appear for questioning on allegations of official corruption. During the conduct of the inquiry, Zuma lost the leadership position in the ANC after factional in-fighting, leading to his resignation and replacement by his ANC opponent Cyril Ramaphosa as President of the Republic. Eventually, the commission applied to the Constitutional Court seeking orders to enforce its summonses to Zuma, which the Court duly granted.[275] Zuma thereafter declared he would neither abide by the order of the Court, nor be compelled to appear before the Zondo commission, at which point he was confronted with proceedings for contempt of the Constitutional Court. The Court proceeded with contempt charges and its ruling was handed down in June 2021 unanimously holding Zuma in contempt of its order. Thereafter a majority of 6-2 decided to commit Zuma to a custodial sentence in prison for a period of fifteenth months.

In its decision, the Constitutional Court started by framing its view of the desired outcome of the 1996 Constitution as achievement of a social reality underpinned by the rule of law as a foundational norm. It then framed its view of its own role as a guarantor of the rule of law, which the Constitution 1996 enshrined in s.1, by deconstructing it to a legal criterion of respect for court orders issued by independent courts. The Court then set down its view of the problem of Zuma refusing to comply with court orders as a corrosive and therefore unacceptable challenge to the rule of law, measured by a criterion of respect for court orders. This approach allowed the Court to contest public defence by Zuma of his stance to the courts as a principled resistance against what he perceived as a biased legal procedure to compel his cooperation in producing the evidence with which to subsequently criminally convict him. Noting that Zuma had opted to not participate in the contempt proceedings before it, the Court repeatedly asserted its independence and the *fixity of its procedures to manifest constitutional values on which everybody agreed* (italics mine). In short, Zuma was disrespectful too of the status of the Court. Considering this, the Court posited an expectation that all other actors will adhere to its orders as evidence of a manifestation of a new normative legal order grounded in sociological legitimacy of the 1996 Constitution. The Court stated it was constitutionally duty-bound to vigilantly inscribe a norm of this new normative legal order that even a President is not beyond the law. Another norm spelt out here was an obligation of all other constitutional actors to assist the Court to realise its constitutional purpose, which was described as merely formally enforcing the rule of law. However, on this point, the dissenting opinion warned the Court could be straitjacketed by previous judicial decisions around Zuma to be pushed into making bad law.[276] The Court then evaluated arguments by the Zondo commission on contempt of court, which was not a constitutional but a common law offence. Its dicta could be considered a mix of formalism and a reflexive narrowing down of its remit in response to the peculiar circumstances of

recommendation of the Chief Justice as the Public Protector had ordered the chairperson must be a judicial nominee of the Chief Justice).

[275] See *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma* (2021) ZACC 2, 21 January 2021. In addition to an order directing Zuma to obey all summonses, to appear and give evidence, the Court ordered that Zuma "does not have a right to remain silent in proceedings before the Commission" para 115.

[276] The dissenting opinion argued the Court had been straitjacketed by preceding judicial decisions into pushing the boundaries of the law to meet exceptional circumstances and thereby leading to the creation of bad law (para 191).

the present case. Which left it open whether its reasoning was a binding addition to a corpus of rules on contempt of court or a distinguishable, sui generis case law.

Having unanimously found Zuma guilty of contempt of court, a minority bench would have handed down a suspended committal sentence to afford a chance for compliance, or directed the director of prosecutions to decide on whether to criminally charge Zuma, arguing it would be unfair to convict him in an apex court without a criminal trial and without a possibility of appeal.[277] The contempt of court hearing, it was conceded, was not a criminal trial.[278] Instead, a majority went on to argue that the contempt of court orders by Zuma was "egregious"[279] given his social and political status. Accordingly, an exemplary sentence was merited to reinforce public belief in the rule of law. Arguing thus, the Court ordered Zuma to surrender to the police within five days to commence a custodial sentence of fifteen months.

Once the decision was handed down, Zuma supporters unleashed days of massive violence, looting and mayhem in major urban centres, eventually compelling the government to deploy the military into the streets for the first time in post-apartheid South Africa.[280] Of greater significance here, several intellectually conflicting camps emerged either to support or to criticise the postulations by the Court concerning the nature of the 1996 Constitution and its desired outcomes. Some camps went further to discredit the Court as a threat to the 1996 Constitution.[281] Supportive voices praised both the reasoning in the decision and the sentence triumphs for the rule of law. Critical voices dismissed the sentencing as a political manoeuvre, observing that the Zondo commission should have started contempt proceedings in a lower court as was customary, rather than directly at the apex court where Zondo sat as deputy Chief Justice.[282] Concerning the reasoning of the Court, a renowned South African analyst castigated the Court for "quoting Western textbooks" to show that it was very important to sentence Zuma in particular, deriding the rule of law in South Africa as a fiction.[283] Another commentator questioned the meaning of the rule of law in a South African context, and went on to contend that the Constitution 1996 faced a dire challenge of democratic legitimisation on the ground for most of the citizenry who were immersed in a "sea of African poverty" despite 30 years of constitutional guarantees of transformation.[284] This

[277] Paras 153, 176, 246-251 and 268.
[278] Para 75 "a contemnor in civil proceedings does not fit the description of an accused person…". See also para 144.
[279] Para 90.
[280] See https://www.news24.com/news24/southafrica/news/unrestsa-9-days-of-anarchy-timeline-of-violence-in-kwazulu-natal-gauteng-20210717
[281] The point about direct apex court proceedings worried the minority, per the dissent by Justice Theron. See para 78 and 262, referring to hijacked proceedings. For additional analysis, see https://theconversation.com/south-africas-constitutional-court-the-case-for-judicial-dissent-and-the-caveats-164454
[282] For some analysis of this argument, see https://theconversation.com/historic-moment-as-constitutional-court-finds-zuma-guilty-and-sentences-him-to-jail-163612 Also see https://www.hrw.org/news/2021/07/08/victory-rule-law-south-africa
[283] See https://www.kaya959.co.za/watch-is-jailing-zuma-worth-killing-people-and-destroying-the-economy-ask-moeletsi-mbeki/
[284] Sisulu, Lindiwe (2022) "Hi Mzansi, have we seen justice?" found at https://www.iol.co.za/dailynews/opinion/lindiwe-sisulu-hi-mzansi-have-we-seen-justice-d9b151e5-e5db-4293-aa21-dcccd52a36d3?utm_term=Autofeed&utm_medium=Social&utm_source=Facebook&fbclid=IwAR1fEJfpRgg7rsN

commentator went further to accused South African judges of being "mentally colonised" and stuck on legal notions that ironically had sustained the legality of apartheid for decades.

In contrast to some of the corrosive discourses above, the *Zuma* decision also illuminated collaborative support for the Court from the political branches. It also underscored the ubiquity of transformation discourses vis-à-vis sociological legitimacy of the constitution and the change its implementation supposedly produced in the long durée. Nonetheless, it also revealed a relatively widespread decline in the sociological legitimacy of the 1996 Constitution, a phenomenon that Klug had labelled as a discourse of its "negation".[285] More specifically, in addition to raising questioning concerning whether the constitution-building work of court actors was indeed contributing to achievement of thicker and broader agreement among deeply divided national actors of a constitution as a norm-in-the making, or if this work was capable of that achievement, another underlying concern received a new impetus. This concern was that the beneficial impact of constitution-building processes on constitutional change outcomes was conflictual. Quite aside from the related public interrogation of the legitimacy of constitution-building court actors or whether they were usurping power and so on, the immediate issue is a social perception that their constitution-building work and its outcomes, was generating winners and losers. This might mean it was therefore having unintended consequences of aggravating new and existing divisions in an already deeply divided state. In the *Zuma* decision, the Court appeared to be aware of these overt and covert corrosive undercurrents. Its obiter dicta revealed an effort to reconstruct the legitimacy of constitutional change in South Africa and to digest a desired societal nirvana in terms of the instrumentality of the 1996 Constitution. Hence the decision was packed too with emblems and symbolism and a language addressed not at litigants, but to ordinary South Africans.

4.6 Conclusion

The cases I addressed in this chapter dealt with how and why South African court actors might make the 1996 Constitution produce certain outcomes of constitutional change. This commenced with their ideation of the constitution and constitutional change and extended to their construction of legitimate constitution-building work and its outcomes. Its ideation of rupture was far from consistent, but it did have a limiting effect on the emergence of one dominant political ideology. In this way, it opened avenues for subordinate categories of ideas concerning constitutional change to germinate. However, the ability of court actors to ideate radical change as demanded by some groups among divided national actors, for instance to correspond to exigencies of multivariate constitutional change in a deeply divided state, emerged as unrealistic. South African constitution-building court actors aimed to connect the constitution to constitutional 'outcomes' by pushing convergent discourses of constitutional change and its demands, via various kinds of procedures or processes. In such processes, where court and non-court actors jointly configured processes that point to new constitutionalism results, interpretations of strategizing behaviour could be subjective. Because the issue of their strategizing, and whether this strategizing was successful, could not be definitively fixed, scepticism of the ability of

F_0L7TSZMIi27-uqg7uQYqeCSNZAihpG1r_E3tMyev_s#Echobox=1641528944 and here https://mg.co.za/opinion/2022-01-08-lindiwe-sisulu-whose-law-is-it-anyway/

[285] Klug, Heinz (2016) "Challenging Constitutionalism in Post-apartheid South Africa" Constitutional Studies, Vol.2 pp41-58.

these actors to strategize successfully to make the constitution produce politically feasible results continued to invite further analysis.

The emergence of features of a new constitutionalism was evident, especially in dimensions of interpretation as a matter of legal culture. Yet, this aspect did not prevent the narrow legalism of the old constitutionalism reasserting itself. The new constitutionalism therefore also invited additional analysis to figure out its fuller characteristics. Relatedly, and finally, symbolic constitution-building emerged as an important dimension of constitution-building work of court actors, where the new constitutionalism was publicly explained in terms of iconoclastic departures from the old constitutionalism. With hindsight, this seemed unavoidable considering the complexity of the 1996 Constitution, its cope of change and its multifunctionality. What is illuminated above therefore concerning roles of constitution-building court actors, might be described as constitution-building in a multi-layered sense.

Chapter Five: Constitution-building Court actors – Kenya case study

Contents

5.1 Introduction

When Kenyans adopted their 2010 Constitution by popular referendum after a tumultuous three-decade long struggle, they aimed to end zero-sum politics, to reverse legacies of one-party authoritarian rule, and to reconfigure the state as an inclusive, responsive enabler for all ethnic communities to advance their political, economic, and cultural interests. Indeed, the 2010 Constitution enshrined a constellation of liberal values and governance principles, and it established dedicated institutions to make sense of its expansive stipulations, including concerning constitutional implementation to nurture a new constitutionalism.

Although tasking "all state organs" to interpret it constructively,[286] the 2010 Constitution created a new apex Supreme Court comprising the Chief justice, Deputy Chief Justice and five other judges, but not a 'constitutional court', since this option was explicitly rejected in constitution-making compromises.[287] The Supreme Court could determine final appeals as of right for matters concerning an interpretation or application of the Constitution, or by discretionary certification

[286] Art.159 on constitutional interpretation addressed "all state organs" rather than court actors exclusively.
[287] Constitution-making compromises were narrated in the Final Report of the Committee of Experts, Constitutional Review, 11 October 2010, Government of Kenya, p.154

that a significant matter of law was involved.[288] Its exclusive original jurisdiction was limited to presidential electoral disputes alone.[289] Simultaneously, the 2010 Constitution allowed any person claiming a constitutional right was infringed, or appealing the decision of any tribunal, or requesting an interpretation of a constitutional provision with respect to validity of any law or public power, to seek a determination from the High Court.[290] Constitutional cases filed at the High Court could be determined by an uneven number of judges if certified as raising a substantial question of law.[291] In theory and practice, a single High Court judge could invalidate and suspend legislation or governmental actions on constitutional grounds, and claimants could invoke the Constitution in appellate hearings until the Supreme Court delivered a final ruling. Court actors were tasked to develop the new constitutionalism, most importantly regarding provisions implicating constitutional values,[292] the Bill of Rights, the scope and limits of constitutional change, and the institutional rules on the machinery of government, e.g., electoral procedures, the competences and procedures of the main state organs, separation and balance of devolved powers, procedures for legislation, fiscal and revenue sharing procedures, and governance ethics, etc. Because the 2010 Constitution was expansive yet very rigid to amend, possibilities of fulfilling its promises in a new constitutionalism would in theory be dependent on legislation, including on many deferred matters, and on constitutional interpretation.

What have been the empirics of constitution-building court actors here? As I describe and critically analyse below, how national actors can make a constitution to produce assorted outcomes in a deeply divided state, where they hardly agreed on fundamental constitutional norms and matters, raised different questions concerning the constitution-building work of Kenyan court actors in the superior courts. Using the three analytical points framed in chapter three, I interrogated this work in terms of how court actors ideated constitutional change in multilayered ways, and the varied approaches they adopted to link the 2010 Constitution to their constitutional change outcome preferences concerning their new constitutionalism. Kenyan court actors sometimes made efforts to elucidate their roles and approaches under a unifying logic of transformative constitutionalism. Nonetheless, what processes court actors adopted in practice to deal with the complexity of the 2010 Constitution and the density of new constitutionalism problems, i.e., the processes that I conceptualise as constitution-building, were diffuse and multilayered. What could be evidenced were constitution-building court actor roles and approaches with many variations. There was not much evidence in these variations of a consistent model of pushing convergence discourses on constitutional change outcomes as joint interpretive activity with other actors. Rather, there was an unfolding context of acrimonious disagreement on constitutional norms and their application. Similarly, evidence of any consistent strategizing by court actors to perfect a clear-cut interpretation

[288] Art.163(4). Its original and exclusive jurisdiction is limited to presidential election petitions and constitutionality of emergency declarations and measures.
[289] Art.140 of the 2010 Constitution vests original jurisdiction on the Supreme Court to determine a petition that a president-elect was not validly elected, which it must determine within a total period of fourteen days.
[290] Art.165(3)
[291] Art.156(4). The minimum number of judges is three.
[292] Art.10.

modality under a universalising perspective of the 2010 Constitution and the tensions of constitutional change and continuity it generated, was not compelling.

Consequently, this case study suggests constitution-building court actors generated a depiction of a new constitutionalism that is realist, pluralistic, and societal, i.e., one treating tensions of constitution and change as always open to reinterpretation depending on the situation. As I discuss below, reasons behind this malleable constitution-building producing a theoretically open-ended new constitutionalism were varied, but contextual. They included judicial ideation of the constitution as a non-typical legal mechanism of dealing with legal and political change, resilience of fundamental disagreements on constitutional norms among political actors who continued to deal with constitutional problems by downgrading constitutionalism, and ambivalent sociological legitimacy of the constitution and its promises. This case study raised questions concerning whether a single model of constitution-building court actor role can exist, how constitution-building is fundamentally engaged as a situational coping process that sometimes fails to resolve constitutional disagreement, and why constitutions are instrumental to improve the prevalence of liberal norms in constitutional decision-making in Kenya as a deeply divided state.

5.2 Ideation of constitutional change

5.2.1 Old vs new constitutionalism

Considering its provisions on values and an expansive Bill of Rights, as well as constitution-making historical accounts, which I discussed in chapter one, the 2010 Constitution clearly envisaged the recreation of a normative legal order as integral to a new constitutionalism. However, it was debatable whether this Constitution embodied a rupture from the antecedent order considering its retention of legal foundations and basic institutions of the preceding *Independence Constitution, 1964*. While it too attempted to introduce a philosophy of higher law, despite the absence of rooted liberal norms,[293] the 1964 constitution was ultimately associated with absence of constitutionalism.[294] The 2010 Constitution, whose making revealed a similar ambivalence to constitutionalism,[295] was a compromise charter, where "*none of the*

[293] Ghai and McAuslan (1970) Public Law and Political Change in Kenya, Nairobi, Oxford University Press, p.510. For a similar take on the two pre-independence constitutions of Kenya and their legacy, see Atieno-Odhiambo, E.S (1995) The Formative Years" in Ogot, B.A & Ochieng W.R (eds) (1995) Decolonization & Independence in Kenya: 1940-1993. London, James Currey Ltd at pp.27-33 and pp.37-41. See also Ojwang J.B (2000) "Constitutional trends in Africa" Transnational Law & Contemporary Problems Vol.10, p.517, pp 520-523 on the innovations around pre-independence constitutions.

[294] Ghai, Yash "Chimera of Constitutionalism: State, Economy, and Society in Africa" cited in Thiruvengadam, A & Hessebon, G (2012) "Constitutionalism and Impoverishment: A Complex Dynamic in Rosenfeld, Michel & Sajo, Andras (eds) (2012) The Oxford Handbook for Comparative Constitutional Law, Oxford University Press, at p.165 (relating access to wealth/capital to control of the state); Berman, Bruce (2009) "Ethnic Politics and the Making and Unmaking of Constitutions in Africa" Canadian Journal of African Studies, Vol.43, No.3, pp.441-461, p.442 (describing how an informal system of patronage politics existed behind the façade of formal political structures); Shivji, Issa (ed) (1991) State and Constitutionalism: An African Debate on Democracy. SAPES Trust; Okoth-Ogendo H.W.O (1988) "Constitutions Without Constitutionalism: Reflections on an African Paradox" American Council of Learned Societies.

[295] See Murunga, G (2014) "Elite Compromises and the content of the 2010 Constitution" in Murunga, Okello & Sjogren (2014) Kenya: The Struggle for a New Constitutional Order. Zed Books pp.144-162. For a description of factionalism in the process, see Kramon, Eric & Posner, Daniel (2011) "Kenya's New Constitution" Journal of Democracy Vol.22, No.2, pp89-103, at pp.93-97.

interest groups, including the CoE itself, politicians, the religious sector, and Kenyans at large, got all that they wanted."[296] Against this origin, Kenyan constitution-building court actors were afforded a significant opportunity to ideate the tensions of constitutional change and continuity that the 2010 Constitution generated, within a broader framework of its instrumentality to spur a converging world view concerning its outcomes. In this section, I analysed this ideation based on how court actors in the High Court, Court of Appeal, and the Supreme Court, engaged with the most significant effort to amend the 2010 Constitution since its promulgation, under the rubric of the "*Building Bridges Initiative (BBI) cases*". As I noted in the introduction vignette, court actors earned subsequent praised and opprobrium for halting the constitutional change initiative entailed in these cases.

The BBI cases rose from the High Court in 2020 to the apex Supreme Court in 2022. Formally, they addressed the legality of a "*Constitution of Kenya (Amendment) Bill, 2020*" and its concomitant fourteen draft legislative bills, pursuant to amendment provisions in art.257 of the Constitution.[297] Substantially however, they engaged several ideas and discourses concerning legitimacy, rationales and instrumentality of constitutional change, and the tensions of constitutional change and continuity spurred by the 2010 Constitution, and not least, the salient divergence in how constitution-building court actors, political actors and civil society actors, viewed constitutional norms and issues.

By way of background, a presidentially appointed ad hoc committee motivated the BBI amendment proposals as needed to remediate and bolster the sociological legitimacy of the 2010 Constitution, by curing its normative and operational deformities that had emerged in a decade of its implementation.[298] For instance, one of the proposals was intended to finally implement a requirement by the constitution for not more than two-thirds of members of elective public bodies to be of the same gender,[299] by increasing the number of electoral districts for parliament. A proposal to enable higher percentages of public revenue to be allocated to county governments reintroduced ideas from earlier constitutional drafts that were sacrificed in the 2008 constitution-making agreement. Another proposal would expand existing constitutional provisions against corruption, by enabling legal enforcement of public ethics and integrity principles. A new constitutional office of judicial ombudsman was proposed to deal independently with public complaints against judicial officials. Moreover, observing that existing design of the executive branch and its powers spurred zero-sum electoral politics that turned violent periodically, BBI included proposals to establish a mixed parliamentary system of government, by incorporating similar proposals from the Bomas constitutional draft of 2004. Consequently, new constitutional rules would create positions of a Prime Minister, two Deputy Prime Ministers, and a Head of the Official

[296] Final Report of the Committee of Experts on Constitutional Review, 11 October 2010, p.154.
[297] Under art.257, the Constitution could be amended if a proposed bill or amendment petition signed by at least one million registered voters was passed by at least one-half of 47 county legislative assemblies and passed by a majority of the bicameral parliament. If matters in the amendment bill were entrenched under art.255, a subsequent referendum was required to enact the amendment with respect to those entrenched issues.
[298] See Ongunyi, Philip (2021) "Politics Behind Kenya's Building Bridges Initiative (BBI): *Vindu Vichenjanga* or Sound and Fury, Signifying Nothing?" Canadian Journal of African Studies Vol.54, issue 3, pp.557-576. Indeed, the author argued the BBI political settlement would similarly unfold due to principal-agent problems.
[299] Art.81 of the Constitution. The requirement had never been implemented.

Opposition to be occupied by the person who comes second in a presidential election. In other clauses, the Amendment Bill proposed to remove the requirement for vetting by the National Assembly of Cabinet Ministers, Secretary to the Cabinet and Principal Secretaries, and to reintroduce the position of Deputy Ministers.[300]

These proposals and the amendment initiative ignited protests from political opponents and civil society interest groups who eventually organised their discontent via litigation. Some BBI related cases were filed even before parliament formally passed the *Constitution Amendment Bill, 2020*.[301] One such case challenging whether the President had constitutional authority to instigate the BBI process, resulted in a High Court ruling upholding the President.[302] The President was therefore free to obtain proposals for constitutional change from any quarters including the BBI Steering Committee, a finding that resulted in the High Court subsequently overruled itself. The High Court consolidated several petitions, which were filed at various times and stages of the BBI process, to one consolidated petition, namely *David Ndii & Others vs Attorney General & Others*.[303] The main respondents in the consolidated challenge included the Attorney-General, the Independent Electoral and Boundaries Commission (IEBC), County Assemblies, and the BBI Steering Committee.

The High Court dealt with the BBI joint petition by a five-judge bench whose proceedings were televised nationally. It was asked to hand down several declaratory and mandatory orders, against counter-arguments by the respondents whose gist was that the declarations sought were abstract, hypothetical and unacceptable notions inconsistent with textual amendment provisions, under art.256 and art.257 and relevant statutes; that the legal disputes were premature and in essence determining political questions; that the Constitution, 2010 augmented by legislation had inbuilt safeguards to prevent the President instrumentalising popular support behind amendments, and that court actors were being misused to interfere with the competence of other constitutional actors for partisan purposes.

In a unanimous decision handed down on 13 May 2021, the High Court upheld the petitioners. It declared, inter alia, that: (a) the basic structure doctrine is applicable in Kenya and accordingly, the provisions of the 2010 Constitution that comprise its basic structure can only be amended through the "sovereign primary constituent power"[304] which must include four sequential processes namely: civic education, public participation and collation of views, constituent assembly debate, and a referendum; (b) that civil court proceedings can be instituted against the President while in office for alleged constitutional contraventions; (c) the President has no constitutional authority to initiate changes to the Constitution; (d) the BBI Steering Committee is an unconstitutional and unlawful entity; (e) the BBI Taskforce Report cannot be used to initiate any action towards promoting constitutional changes under art.257 of the Constitution; (f) the

[300] See https://www.capitalfm.co.ke/news/2020/10/bbi-recommends-prime-ministers-post-and-official-opposition-leader-in-expanded-executive/

[301] Republic of Kenya, The National Assembly and The Senate (2021) Joint Report of the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights on The Constitution of Kenya Amendment Bill (2020) pp.92-100

[302] *Thirdway Alliance Kenya & Anor v Head of Public Service & Others* (2020) eKLR, Petition 451 of 2018.

[303] Petition No. E282 of 2020 High Court Constitutional and Human Rights Division.

[304] See *David Ndii & Others v Attorney-General & Others* para 746 at p.176.

BBI process usurped an exercise of sovereign power; (g) the President contravened ch.6 of the Constitution, and specifically Article 73(1)(a)(i) by initiating and promoting a constitutional change process; (h) the entire constitutional change process promoted under BBI was unconstitutional, null and void; (i) the Constitution of Kenya Amendment Bill, 2020 cannot be subjected to a referendum before the IEBC carries out nationwide voter registration exercise; (k) the IEBC does not have quorum stipulated by s.8 of the *IEBC Act* for purposes of carrying out the proposed referendum; (l) at the time of the launch of the Amendment Bill and the collection of endorsement signatures, no legislation governed the collection, presentation and verification of signatures, or the conduct of referenda; (m) this absence of a legislation or legal framework in the circumstances of this case rendered the attempt to amend the 2010 Constitution flawed; (n) County Assemblies and Parliament cannot, as part of their constitutional mandate to consider a *Constitution of Kenya (Amendment) Bill 2020* initiated through a popular initiative under art.257 of the Constitution, change the contents of such a Bill; (o) the second schedule to the *Constitution of Kenya (Amendment) Bill, 2020* where it purports to predetermine the allocation of seventy constituencies is unconstitutional; (p) the second schedule to the same Bill purporting to direct the IEBC on its function of constituency delimitation is unconstitutional; (q) the second schedule to the same Bill purporting to delimit the number of constituencies is unconstitutional for want of public participation; (r) IEBC administrative procedures for the verification of signatures in support of constitutional amendment referendum are illegal, null and void, and; (s) art.257(10) of the Constitution requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the people.

As one might expect, such a comprehensive invalidation of the BBI process was appealed by the Attorney-General,[305] the IEBC,[306] the legal teams representing President Kenyatta and Raila Odinga,[307] and the legal representation of the BBI

[305] The A-G raised 31 appeal grounds inter alia faulting the High Court for finding that the basic structure doctrine is part of Kenyan constitutional law, that art.255-7 are limited by such a hypothetical doctrine, for reliance on partisan amici curiae briefs, for misconstruing the requirements of amendment by popular initiative, for holding only private citizens may initiate an art.257 initiative, and for failing to appreciate that the BBI process was subjected to all procedural requirements under art.255-7. Furthermore, the court was mistaken in finding various constitutional procedures related to popular initiatives could not be undertaken at all by parliament or IEBC without enabling legislation. With reference to substantive proposals, the court was wrong to pre-adjudicate these issues by simply placing them outside the remit of parliamentary consideration. The interpretation approach and methodology used by the court was also faulted as leading to onerous conclusions, e.g., that amendments needed a four-sequence process involving a constituent assembly and referendum.

[306] In its memorandum of appeal raising 12 grounds, IEBC was primarily keen to overturn a declaration that it was not quorate to transact official business, being composed of only 3 commissioners after the resignation of 3 commissioners in 20178 and 2019. In other appeal grounds, the IEBC argued the High Court misconstrued art.257(4) requiring a popular initiative to be supported by one million signatures by insisting instead on one million *verified* signatures, by invalidating an administrative verification of signatures procedure and insisting on a more onerous legal procedure not explicitly mention in the constitution, by requiring the IEBC to carry out an additional national voter registration exercise ahead of a constitutional referendum while the IEBC statutorily carried out continuous voter registration, and by declaring IEBC had a constitutional obligation to ensure the promoters of the BBI initiative complied with requirements of public participation before submitting an Amendment Bill to County Assemblies for their endorsement as stipulated under art.157. IEBC further faulted the High Court for interfering with its exclusive competences.

[307] The team mounted 19 appeal grounds centred on amendment procedures, the legality of the BBI process and the role of the president. It was pointed out that another High Court judge had upheld the same issues in

structures.[308] Across the board, nearly all the declaratory and mandatory orders of the High Court were attacked as errors in law, setting the stage to recalibrate arguments concerning constitutional change and continuity tensions at the Court of Appeal, where a seven-judge bench was empanelled to determine a consolidated appeal in yet again nationally televised proceedings.[309]

The Court of Appeal handed down its decision on 20 August 2021, which it structured on twenty-questions for determination.[310] This court unanimously held that a sitting President cannot utilise a popular initiative for a constitutional amendment under art.257 and therefore the Amendment Bill was invalid to this extent. On all other issues, the court decided on a plurality. Save for Sichale, J.A, six judges found that the basic structure doctrine is applicable in Kenya. Sichale, J.A was joined by Okwengu, J.A in dissenting that the basic structure doctrine imposes an extratextual limit on amendment procedures under art.255-7, meaning five judges upheld such a limit. A 4-3 majority held that amendments to basic structure provisions required an exercise of primary constituent power via a four-sequence process that involves civic education, collection of public views, a constituent assembly, and ratification by referendum. Regarding other consolidated grounds, the court held by 6-1 majorities that civil proceedings can be instituted against a sitting President for constitutions violations, that an art.257 referendum must be preceded by continuous voter registration, that IEBC with three commissioners was not quorate to organise a constitutional referendum (but could organise elections and byelections), that legislation was required to enable art.257 procedures and to enable constitutional referenda, that the proposed creation of additional parliamentary constituencies was unconstitutional, and that IEBC administrative procedures to ascertain one million signatures were invalid as the body was not quorate for this purpose.

As it considered its delineated twenty-one issues, the appellate court sidestepped questions of emergent deformities of the 2010 Constitution, and whether it needed radical reform. Instead, its main frame of analysis deployed legal labels like imperial presidency and hyper-amendment to engage in arguments and counterarguments about the difference between a people collectively pushing for constitutional change, and executive branch doing so with the participation of the public in demarcated stages. According to the majority, enshrining public participation as a constitutional value meant it must be exemplary, transparent, rooted in accessible language, initiated by citizens and "sacrosanct" or "free of manipulative compromises".[311] Secondly, the operational quality of public participation in terms of language, duration,

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previous litigation in the matter of *Thirdway Alliance Kenya & Anor v Head of Public Service & Others* (2020) eKLR, Petition 451 of 2018

[308] The team mounted 17 grounds concerning inter alia the legality of the BBI process, the impositions of onerous legalistic obligations on a popular exercise, on justiciability of proposals concerning constitutional amendments, and adoption of hyperbolic theories instead of holistic and contextual constitutional interpretation.

[309] Consolidated Civil Appeal No. E291 of 2021 (*IEBC v David Ndii & Others*) E292 of 2021 (*Building Bridges to a United Kenya National Secretariat and Hon Raila Amolo Odinga v David Ndii & Others*), E293 of 2021 (Attorney-General v David Ndii & 73 Others) and E294 of 2021 (*H.E. Uhuru Muigai Kenyatta v David Ndii & 82 Others*), Coram: Musinga (P), Nambuye, Okwengu, Kiage, Gatembu, Sichale & Tuiyott, JJ.A.

[310] The composite judgement of 1089 pages is available at www.kenyalaw.org

[311] Musinga, JA, para 343.

comprehensibility, etc., failed judicial standards for proper participation. In orbiter dicta, the court ideated a link between constitutional change and outcomes, as anchors for the collective people to use constitutional law to shape their political organisation and the legitimate ends it should serve. However, apprehending that a president could subvert this political organisation, court actors saw their roles as entailing framing ideas like hyper-amendment and imperial presidency to sort out underlying logics of constitutional changes, situating constitutional changes into historical context, surfacing implicit ideologies in political instrumentalization of constitutions, and helping the people to make mindful choices concerning constitutional change. Hence, a majority determined to interrogate BBI proposals as authoritarian conspiracies. As Musinga (President of the Court) opined, "*Whereas the process of amending the Constitution was still ongoing, there was every indication that a majority of County Assemblies as well Parliament were poised to approve the impugned Bill, (which they eventually did), and thus pave way for a constitutionally flawed referendum. Our transformative Constitution cannot countenance that*."[312] Kiage, JA echoed this caution, stating that the transformative 2010 Constitution commands "conscious activism" on the part of judges so that they defended the constitution by demarcating executive power.[313].[314] Nevertheless, the court actors acknowledged an art.257 popular initiative available solely for ordinary citizens assured a very low propensity for such citizens to muster public participation in citizen-driven initiatives, which would be too expensive and onerous. Recognising this unintended consequence, Kiage, JA proposed as a general thought that public participation should evaluated as a rule of thumb whose elements *"must per force be understood to form a spectrum or a continuum which is incremental in character."*[315]

Appellate court actors spent considerable time and effort surfacing implicit ideologies of the 2010 Constitution, and relating them to what constitutional change was authorised, as well as what it was authorising. Reflecting on how far theoretical argumentation went, one counsel characterised the appeal as "*a strange case in which there seemed to be no agreement on anything*" because it was a case "*about theory and not a live one about (living) people*".[316] Although several appellants argued that concepts like 'eternity clauses' must be anchored in specific constitutional language, a majority of the judges argued transformative constitutionalism enabled them to import implicit ideologies into the 2010 Constitution. Consequently, its reasoning on the relevance of constitutional ideologies was premised on interpretation bricolage, with judges emphasising historical, contextual, purposive, holistic, and even "imaginative" interpretation.[317] There was little evidence of a concerted effort at an interpretational methodology informed by a particular ideation of the 2010 Constitution.

In fact, a dissenting opinion by Sichale, JA was more reflexive on this point, after recognising that what was sought of court actors, was to ideate "contradictions" "draftsmanship gaps", and "vagueness" in the 2010 Constitution. Applying

[312] Musinga JA, para 414
[313] Kiage, J, p.24. The judge went on in pp54-56 to outline executive branch abuses of post-independence constitutions, reading such abuses as intrinsic to an "Africanness of the African presidency".
[314] Kiage, JA, p.33
[315] Kiage, JA, p.37
[316] The citation is attributed to Prof Githu Muigai, by Kiage JA, p.30.
[317] Per Kiage, JA, pp.37, 40.

implicit ideology theories to find and safeguard a "basic structure doctrine" in the 2010 Constitution did not work if no judge could pinpoint an unamendable provision.[318] Moreover, recognition of a "notion of implicit unamendability",[319] begged the question why Kenyan constitution-building court actors needed to import provisions on esoteric grounds that the Constitution had "unspoken language".[320] Furthermore, Sichale JA discounted the need for implicit ideology because after probing the social realities,[321] it emerged that since its promulgation, twenty-one (21) amendments to the 2010 Constitution had been attempted – nineteen by parliament and three involving a popular initiative, and all these attempts had "fallen by the wayside."[322] What actual empirics revealed was an evolving equilibrium between formal constitutional change and rigidity,[323] such that court actors needed neither to appropriate an unfettered power to "validate or invalidate amendments on the basis that there are eternal clauses from their preferred reading of the Constitution"[324] nor to take sides in a clash of historical narratives when guiding the implementation of a constitution in new applications.[325]

The judgement of the appellate court was appealed to the Supreme Court, affording a final opportunity to retune some ideation. The Supreme Court sat as a full bench to consider this appeal, after drawing seven questions for determination: (i) the applicability of the doctrine of basic structure in Kenya, (ii) whether the President could initiate a popular amendment initiative, (iii) the constitutionality of the proposed substantive amendments, (iv) whether civil proceedings can be initiated against the President while incumbent, (v) whether the electoral commission was legally obligated to ensure public participation in a popular amendment initiative, (vi) whether the electoral commission was quorate for purposes of organising a constitutional referendum, and (vii) whether constitutional amendments could be voted for as a package at a constitutional referendum.

On the first point, the Court held by a 6-1 (Ibrahim, J dissenting) majority that "basic structure" doctrine is not applicable in Kenya, reversing both the appellate court and the High Court. On the second, the Court held with a 5-2 majority that the President cannot initiate a popular amendment initiative under art.257, and therefore the amendment Bill was unconstitutional. However, one of the dissenting opinions (Ndungu, J) averred that the President or any state organ could initiate such an initiative based on popular delegated authority, invoking a principal-agent doctrine. On the third point, the Court unanimously invalidated proposed substantive amendments for want of public participation. Additionally, the Court unanimously held on the fourth point, that a president is constitutionally immune from civil proceedings while in office. On the fifth point, the Court unanimously held that the electoral commission was not legally bound to ensure

[318] Sichale, J, p.8.
[319] Sichale, J p.34.
[320] Sichale, J, p.43.
[321] I use the term immediate because Sichale was clear that references to context in concurring opinions alluded to the historical context of amendments such as set out by Okoth-Ogendo, HWO "The Politics of Constitutional Change in Kenyan since Independence, 1963-1969" (Sichale, p.48).
[322] Sichale, p.43. All the previous amendment attempts were tabulated in the submission of the Solicitor-General (appearing for the Attorney-General).
[323] The expression of balance between rigidity and change was analysed by Okwengu, JA, para 11.
[324] Sichale, JA, p.51
[325] Okwengu, JA, para 16.

promoters of a popular amendment initiative allowed public participation. However, the court found on a plurality that there was public participation in the process, and that participation was meaningful. On the sixth point, a 6-1 majority held the electoral commission was quorate to organise a referendum if it had at least three members, which was the lowest constitutional threshold. Although an electoral statute required a higher quorum of five, reaching nine at the ceiling, the Court read the statute in conformity with the Constitution and elided the inconsistency in favour of the constitutional quorum. Finally, on the seventh point, the Court unanimously held it was not ripe for determination, thereby concurring on this point with the sole dissenter in the Court of Appeal.

Mirroring the superior courts before it, the Supreme Court spent considerable time reviewing the historical background to the 2010 Constitution, which it extended beyond the immediate constitution-making history. Based on this review, the Court emphasised certain attributes of the 2010 Constitution as a rupture from its predecessor, by ideating it as a carefully crafted response to the abusive constitutionalism of the past, despite the reality of constitution-making compromises. In their ideation, Supreme Court judges deployed various legal labels to reify key features of the new constitutionalism, e.g., constituent power, core constitutional architecture, prohibition of constitutional hyper-amendment and imperial presidency, and sacrosanct public participation. Moreover, the 2010 Constitution became primarily a legal constraint on executive power. According to Chief Justice Koome, "*In its architecture and design, the Constitution strives to provide explicit powers to the institution of the presidency and at the same time to limit the exercise of that power. This approach of explicit and limited powers can be understood in light of the legacy of domination of the constitutional system by imperial Presidents in the pre-2010 dispensation. … I find that implying and extending the reach of the powers of the President where they are not explicitly granted would be contrary to the overall tenor and ideology of the Constitution and its purposes*."[326]

To this extent, the Supreme Court joined the superior courts in deconstructing BBI as an illegitimate power grab, except that it dispensed with need to ideate this risk via a heuristic device like "basic structure" to judge the competing claims of constitutional actors concerning constitutional change. While reversing the superior courts and rejecting this device, the Supreme Court concurred that court actors must uphold the new constitutionalism by preventing constitutional hyper-amendment.[327] Nonetheless, downvoting the basic structure doctrine did remove a newly imposed hurdle to formal change to the 2010 Constitution, thereby allowing the President to promote amendments if following a parliamentary route.[328] The Supreme Court was more circumspect than the superior courts concerning the propriety of proposed substantive amendments and issuing declaratory orders accordingly. Instead, it opted to unanimously overrule substantive proposals on technicalities about public participation in their formulation. Generally, the Supreme Court underscored that legislation should be the repository of constitutional gap filling rules. In short, what was needed was a system of legislation to emerge to deal with popular conflicts over formal constitutional changes, which court actors

[326] Koome, CJ para 243.
[327] Koomer, CJ paras 192-7, Lanaola J, para 1418
[328] Koome, CJ para 200.

could enforce against an overreaching presidency. It seemed therefore that court actors returned the underlying conflicts back to politics.

Considering the ideation of tensions of constitutional change and continuity in the landmark BBI cases, whose decisions were unsurprisingly controversial,[329] one question is whether the roles of court actors in these cases foreshadowed or uncovered a paradigm shift away from the roles of court actors in the old constitutionalism. Another question is whether these cases revealed a strategizing behaviour on the part of court actors to drive their own perspective on the need, rationales, and purposes of constitutional change. Regarding the first question, the role of the Supreme Court was significant, this being a novel institution under the 2010 Constitution. In the High Court and Court of Appeal, court actors were explicitly dismissive of several proposals to change the constitution by outlining multiple protected characteristics of the new constitutionalism.

In contrast, the Supreme Court simply avoided detailed analysis of such proposals, allowing them to ripen elsewhere. For instance, Lenaola, J, wondered why deal with constitutional dismemberment and subversion, when the issue before the courts was amendment procedure?[330] Nonetheless, salient recognition that the BBI conflict entailed conflictual power relations, was expressed in the keenness of court actors across the board to demarcate the specialist functions they drew in the new constitutionalism, from legislating, to organising referenda, and adjudicating overreach. This demarcation pushed a procedural and incremental view of constitution-building, as I discuss below. Moreover, court actors in the superior courts more vigorously debated paradigm shifts in interpretation methodologies to deal with challenges of the 2010 Constitution more flexibly in accordance with their demands on the judiciary. In contrast, the Supreme Court, a court that in theory might be composed predominantly of intellectuals rather than career judges and lawyers, appeared to push back against abstract argumentation in favour of a mix of constitutional historicism and legal formalism. Quite explicitly on this point, Wanjala J, objected to the abstract enquiry on constitutional change, but acknowledged that courts actors were entitled to adapt interpretation methodologies suited to a new constitutionalism by resorting to heuristic devices to preserve constitutional equilibrium as they saw fit.[331] This was permissive, but it could also serve as a definitive accelerant to new ideation of interpretative methodology, noting allusions by the Court of Appeal to transformative constitutionalism.

Concerning strategizing behaviour, assuming the Supreme Court was expected to endeavour to hand down unanimous decision with clear-cut rules to bind future similar cases, this did not happen. The Court was divided on the seven issues it profiled, which were significantly scaled down from the 21 issues delineated by the Court of Appeal. If unanimous decisions would lend credibility to claims of strategizing behaviour, especially in a dispute reflecting fundamental

[329] See https://www.the-star.co.ke/news/2022-03-31-top-lawyers-reactions-to-bbi-judgement/
[330] Lenaola, J para 1472.
[331] Wanjala, J at para 1000 "Speaking for myself from where I sit as a judge, and deprived of the romanticism of academic theorizing, it is my view that what has been articulated as "the basic structure doctrine", is no doctrine, but a notion, a reasoning, a school of thought, or at best, a heuristic device, to which a court of law may turn, within the framework of art.259(1) of the Constitution…". See also para 1026.

disagreements amongst the fractured political groupings of the day, and where a collective judgement could guide bargaining behaviour amongst those groupings, then evidence of credibility reinforcing strategizing behaviour by court actors was missing. In fact, reviewing the split majorities and plurality in the decision on issues of amendment, the Supreme Court obscured any guidance to lower courts in future, beyond that, is the push to think incrementally about constitutional change. Despite the significant disjuncture BBI cases revealed between the legal and political constitutions, the ideation of the apex court actors generally eschewed concrete ideation of the new constitutionalism preferring a common law intermingled with legislative constitutionalism approach. Salient here was an impression of constitution-building as an aspirational coping process to deal with situational challenges, typically though revising processes of ideation, interpretation, and decision-making.

5.2.2 Ideating incremental change

As noted in chapter one, the Constitution, 2010 deferred several matters to legislation, for instance by requiring at least fifty pieces of legislation to substantiate its provisions and their guarantees?[332] In chapter two, I noted this need for legislation to concretise the legitimacy of a new constitutional order as premised on deferral and incremental approaches to constitutional change.[333] Getting legislation might be a huge wrangle, but once gained, it gave room for divided national actors to do something with political processes of constitutional change, generating some progressive, incremental change. However, caveats were required since incremental change highlighted challenges around legislating constitutional outcomes, not only because legislators were constitutionally constrained procedurally and in terms of democratic pressure, but because of additional constraints in contextual dynamics of legislating divisive constitutional issues.

As seen above, a major reason why courts were reluctant to uphold BBI changes was their preference for legislated rules. Some of the issues the Supreme Court decided should be sorted by legislation included public participation in amendments, the procedures for popular initiatives and questions of the quorum of independent bodies, such as the electoral commission. In this connection, the Court of Appeal also considered that existing legislation could deal with some issues, but that new legislation was needed to enhance the role of parliament in art.257 initiatives. Court actors generally viewed public participation as a conceptual marker of rupture from the old constitutionalism, hence deferring it to legislation indirectly acknowledged the difficulties of court actors earmarking some characteristics of the new constitutionalism. Although acknowledged that failures to enact constitutional deferral in legislation created gaps in the constitutional provision, the Supreme Court, like the superior courts below it, wrestled with legislation as a form of actualising constitutional decision-making.

[332] See Fifth Schedule titled "Legislation to be Enacted by Parliament".

[333] Ginsburg, Tom & Dixon, Rosalind (2011) "Deciding not to decide: deferral in constitutional design" International Journal of Constitutional Law, Vol.9, No.3-4, pp.636-672, at p.637-8 and 646-7. The argument is these deferrals are strategies to help the constitution survive longer, and deferrals can be through "by law" clauses, implied ambiguity, or omission.

It was possible to view this push for legislation as evidencing the ways in which Kenyan court actors framed constitution-building incrementally. This could entail a process of understanding the forces that shaped how disagreeing national actors framed, responded to, and resolved the problems emerging from implementation of the 2010 Constitution via legislating. Court actors could thereby remove the need for their direct response to those problems, and instead explore opportunities for actualising constitutional promises from two paths. Firstly, by sponsoring pragmatic legislative action within existing frameworks as a minority in the Court of Appeal and majority in the Supreme Court emphasised in the BBI cases. Secondly, by waiting to see how solutions were framed by dominant interests in efforts to restructure existing frameworks, and thereafter to seek to influence new possibilities for action. However, this second path depended on how the roles of court actors were structured into constitutional decision-making processes, as I highlighted with the role of an interim tribunal during constitution-making period in Kenya. Nevertheless, as Juma observed concerning the constitution in a 'making (or building) mode',[334] the roles of court actors in discrete, incremental changes via legislation could afford them opportunities to shape politics and to render political actors accountable in degrees to options tabulated by court actors as and when parliamentary decisions were challenged before them.

5.2.3 Ideating local legitimisation

As I discussed in chapter three, constitution-building could highlight what ideation frames court actors used to span levels of analysis and lenses of local legitimisation of constitutions. In some of its official strategies, the Kenyan judiciary approached the 2010 Constitution as a blueprint for transformation, notably in the "*Judiciary Transformation Framework, 2012-2016*" and "*Sustaining Judiciary Transformation, 2017-2021*".[335] In these texts, transformation meant both operational modernisation and an ideological dispensation. To concretise the latter, former Chief Justice Mutunga, who initiated the first framework, characterised the goal as transformation from a situation where "*Equitable distribution of resources in the Judiciary has been critical as the conservative judicial elite before the 2010 Constitution controlled over 60% of the resources (pertaining to loans for housing, cars; insurance; per diems; travel; inequitable salary disparities; and training) and foresaw judicial politics that was anti-people and for the ruling Kenyan elite. This made the judiciary an appendage of the Kenyan elite and their politics and ideology*."[336] During the tenure of Mutunga, therefore, transformation appeared to mean appointing and fostering judges who democratised or socially integrated classes and developed a 'pro-people' case law while invoking non-legal phenomena in constitutional interpretation.

This dogma was supposed to advance an interpretation that the 2010 Constitution commissioned "activist judges" and "decrees the judiciary as an institutional political actor"[337] whose function was "anchored on the centrality and

[334] Juma, Dan (2011) "Precommitments in contemporary constitution-making? African and Kenyan experiences reviewed" Law and Politics in Africa, Asia and Latin America, pp.482-515.
[335] These are available on the judiciary website, https://judiciary.go.ke/facts/ (online texts last viewed 3/10/2023.
[336] Mutunga, Willy (2021) "Transformative Constitutions and Constitutionalism" Transnational Human Rights Review, Vol.8, Art.2, pp30-60, p.22, fn73
[337] Id, p.41, attributing the terms *activist judge* and *institutional political actor*, to Upenda Baxi. He quotes Baxi to define an activist judge: "an activist judge regards herself as holding judicial power in fiduciary capacity for civil and democratic rights of all peoples… She does not regard adjudicatory power as repository of the reason

supremacy of the Kenyan people in the transformation of their country".[338] In pursuance thereof, courts were to emerge as instruments of fleshing out the constitution when they reviewed acts of state officials who were similarly engaged in filling in constitutional gaps, primarily through legislation.

Based on the BBI cases, there was evidence of court actors ideating the requirements of a new constitutionalism through a conception of "transformative constitutionalism", which Kenyan constitutional discourse borrowed from South Africa.[339] Specifically, a link between transformative constitutionalism and judicial interpretation as enunciated for South Africa by Klare received Kenyan judicial endorsement in *Communications Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others*[340] where the Supreme Court of Kenya interpreted foundational constitutional values for the first time. The Court stated: *"Transformative constitutions are new social contracts that are committed to fundamental transformations in societies. They provide a legal framework for the fundamental transformation required that expects a solid commitment from the society's ruling classes. The Judiciary becomes pivotal in midwifing transformative constitutionalism and the new rule of law. As Karl Klare states, "Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.""*[341] Similarly, in *Speaker of the Senate & Another v Attorney-General & Another & 3 Others*[342] the Supreme Court observed that the "*Constitution of 2010 is a transformative charter. Unlike the conventional 'liberal' Constitutions of the earlier decades which essentially sought the control and legitimisation of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy ..."*[343]

Considering the obiter dicta in BBI cases, the strategy texts above, and the transformative constitutionalism jurisprudence, a composite impression is court actors ideating the constitution as a non-typical legal mechanism that was geared to address specific, long-standing problems of a deeply divided state. This impression was periodically visible in how court actors understood or viewed a judicial midwifing role, yet as the immediate citation above shows, it was not

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of the state; she constantly reworks the distinction between the legal and political sovereign, in ways that legitimate judicial action as an articulator of the popular sovereign." (Citing Upendra Baxi, "The Avatars of Indian Judicial Activism: Exploration in the Geographies of (In)Justice" in SK Verma and K Kumar (eds) Fifty Years of the Supreme Court of India: Its Grasp and reach, New Delhi, PUP, 2000, p.156). At p.53, Mutunga states: In the case of Kenya, my view is that the Constitution is *activist* and I believe our judges and other judicial officers are all expected to *be activist in their quest to implement an activist Constitution*." (italics supplied)

[338] Mutunga, Willy (2021) supra note 336, at p.51

[339] For analysis of this migration of transformative constitutionalism with legal transplants of proportionality testing and interpretation theories around constitutional rights litigation, see Kibet, Eric & Fombad, Charles (2017) "Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa" African Human Rights Law Journal Vol.Vol.17, No.2, pp340-377. The authors see the migration as offering "hope for better protection" of rights in Kenya and South Africa, p.342, and an "antidote for past failures of constitutionalism", p.348.

[340] Supreme Court Petition No.14 of 2014

[341] Para 377.

[342] (2013) electronic Kenya Law Reports (eKLR) Supreme Court of Kenya.

[343] Para 51.

a homogenous or universal impression across diffuse courts. Court actors recognised that transformative constitutionalism had normative aspects, but it was also a strategy, a policy as well as interpretive practice. Normative aspects empowered court actors to develop the law, e.g., to "advance" human rights and contribute to good governance,[344] read together with art.10 values and art.19(1) providing that "*the Bill of Rights is an integral part of Kenya's democratic state and the framework for social, economic and cultural policies*." Normative considerations were not the only motivations here, however. For instance, Mutunga argued art.10 values like patriotism obliged Kenyan courts to promote "*indigenous jurisprudence*".[345] Proponents of constitutional outcomes like devolution for their part encouraged courts to scale up these values to irrevocable "*eternity clauses*" that undergird the basic structure of the 2010 Constitution.[346] And human rights activists encouraged courts to scale up human rights by envisioning the constitutional goal as generating a human rights state "*that possesses the ingredients of a radical social democracy*".[347] Ideating local legitimisation of constitutional change and its outcomes was therefore encumbered in varying degrees with ideological instrumentalization that differed and was multilayered, from superior court to superior court, and from one judicial administration to the next. This mattered considering empirical claims of strategizing actors who could push radical conceptions of constitutional change.

5.3 Processes and methods of constitution-building

5.3.1 Autonomous agency and production of convergence discourses?

Assuming court actors and legislative actors ideated constitutional change and its outcomes differently, the result might a supremacy of judicial framing, or of legislative framing, or some form of alliance between judges and legislators, entailing emergence of new pathways for convergent discourses. At any rate, some dedicated constitution-building processes were needed so that divided constitutional actors with differing and conflictual understandings of the constitution and its requirements could make it possible to pursue constitution-building as joint interpretive activity. The question here was whether there was evidence of constitution-building court actors autonomously sorting out and organising processes whereby they could independently influence the interactions needed to manage a complex cope of constitutional change, where constitutional law reached many new applications, and where change outcomes could invite contradictory understandings.

There was evidence in case law that relations between court actors and the political branches were periodically too acrimonious to be conducive to constitution-building as joint interpretive activity. In the BBI cases, the tone used in the

[344] Art.259(1).

[345] See Mutunga, Willy (2015) Human Rights States and Societies: A reflection from Kenya" Transnational Human Rights Review Vol.2, pp.63-102, p.82, See also Mutunga, Willy "The 2010 Constitution of Kenya and its Interpretation: reflections from the Supreme Court Decisions" Inaugural distinguished Lecture Series at University of Fort Hare October 16, 2014, (unpublished) where indigenous jurisprudence is poetically linked to emergence of an "African gospel" of law. See also Mutunga, Willy "Transforming Judiciaries in Africa: Lessons from the Kenyan Experience" Keynote Address delivered at the Annual General Conference of the Nigerian bar Association, August 23, 2015 (unpublished)

[346] See Kangu, Mutakha (2015) Constitutional law of Kenya on devolution, Nairobi, Strathmore University Press, p.108.

[347] Mutunga, Willy (2015) supra note 345, at p.74.

superior courts referred to executive actions as conspiratorial. On the other hand, prior to the appeal judgement in the BBI case, President Kenyatta had cautioned courts to weigh the material consequences of their intervention, and to ask reflexively whether they preferred defending the status quo by elevating theories and legal technicalities, or whether they considered themselves as bearing the burden of choices with ordinary Kenyans whenever exploiters of ethnic majoritarianism spurred periodic political conflagration.[348] If we are looking for evidence of dialogic comity here, it was sometimes missing.

This view is further evidenced by considering case law beyond BBI, specifically the acrimony involved in interpreting straightforward provisions on appointment of judges. Citing a constitutionally enshrined principle of their independence, court actors claimed greater latitude to singlehandedly make judicial appointments and effect removals, powers that were vested in the president in the old constitutionalism. Consequently, prominent institutional conflicts flared up between court actors and other branches. On an occasion when the President refused to ceremonially gazette an election by judges of their representative to the Judicial Service Commission (JSC), the High Court issued an order that the appointee "*is hereby deemed to have been appointed and is at liberty to take his position as a Commissioner of the Judicial Service Commission, representing Judges of the Court of Appeal*."[349] In another case, the President declined or delayed to gazette and swear-in thirty-four judges recruited by the JSC for the Court of Appeal, citing intelligence briefings under official secrecy that implicated several them in corruption. The JSC counter-argued that presidential appointment power was merely ceremonial. After a succession of unheeded court orders for their appointment handed down since 2016,[350] the President swore in twenty-eight of the 34 JSC recruited judges in August 2021, but rejected six of the original nominees. In further proceedings to compel their appointment, the High Court directed the Chief Justice to instead swear them in within fourteen days. This order was stayed by the Court of Appeal in November 2021, on an application by the President which argued inter alia that the orders were likely to trigger a constitutional crisis, while the Chief Justice Martha Koome filed an appeal against the High Court orders arguing overreach.[351] Considering these cases were contemporaneous with BBI proceedings, the tone assumed by court actors might invite deeper undertones.

More pertinent however, was the absence of evidence of court actors providing systemic impetus to other constitutional actors to jointly pursue constitution-building as joint interpretive activity during this period in consideration.

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[348] President Kenyatta posed these questions rhetorically during an official address on 1 June 2021 while commemorating Madaraka (Self-Rule) Day. Can be watched on https://www.youtube.com/watch?v=re3y638G8Oo (downloaded 05/06/2021).

[349] See *Law Society of Kenya & Ors v Attorney-General & 2 Ors* (2019) eKLR and Petition No. E327 of 2020 to enforce the original orders. The timeline for gazettement was fixed by s.15(2)(b) of the Judicial Service Act, 2011.

[350] *Law Society of Kenya v Attorney-General & Ors* (2016) eKLR. See also Petition No.36 of 2019, *Adrian Kamotho Njenga v Attorney-General and 3 interested parties* (Judicial Service Commission, the Chief Justice, and the Law Society of Kenya) where a 3-judge bench directed the President to swear in the appellate court judges within a specific timeline.

[351] See https://allafrica.com/stories/202107260429.html, https://www.standardmedia.co.ke/national/article/2001428938/cj-appeals-decision-allowing-her-to-appoint-six-judges.

Parliamentary reactions to court actors, for instance, sometimes considered judicial decisions on its work as simply spreading confusion and deepening overall incoherence of the constitutional system.[352] In some respects, parliamentary-judiciary conflicts visibly escalated.[353] Alternative empirical analysis on this point could be drawn from political science analysis observing that deeply divided national actors tended to craft joint activities to "*pursue, install and defend constitutional norms*" but in informal pacts, precisely like BBI.[354] Considering both BBI and judicial appointments case law in this light, there was little evidence court actors could do more than push tentative convergence on legislation that triggered new political reactions from political branches, whose result might be either protracted, semi-durable agreement or persistent disagreement on constitutional questions.

5.3.2 Structured processes

"Implementation" was the term used by the Kenyan Constitution, 2010 to address a structured process of substantiating its provisions. This term first appeared in the Bill of Rights invoking "*legislative, policy and other measures*",[355] and later in a provision establishing a *Commission for the Implementation of the Constitution*,[356] mandated to "*monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution*" and to "*work with each constitutional commission to ensure that the letter and spirit of this Constitution is respected*".[357] According to this Commission, implementation involved "*reform of policies, legislation, subsidiary law and general administrative practice in a manner that upholds the letter and spirit of the Constitution*." The Fifth Schedule of the Constitution 2010 fixed the time and procedures for enactment of various laws that the Implementation Commission could oversee. Moreover, it provided for sanctions for default, including a last recourse remedy of court-ordered dissolution of parliament followed by a new election, where parliament failed to enact scheduled legislation. Consequently, implementation as a structured process of augmenting the constitution via a complementary body of law, ultimately hanged on final back-up roles of court actors.

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[352] See The National Assembly Republic of Kenya (2019) "Report on the Consideration of the 2017/2018 Report of the Judiciary on the State" Report of Legal Affairs Committee, Departmental Committee on Justice and Legal Affairs, para 34 (vii) states "The ruling of the Supreme Court in SC Ref No.2 of 2013, *Senate and Another vs National Assembly and Others* on the jurisdiction of the Senate and the National Assembly lacked clarity and was a source of conflict between the two houses." (This report is available at http://www.parliament.go.ke/sites/default/files/2019-07/JLAC%20State%20of%20Judiciary%20rpt%202017-2018.pdf)

[353] See Gathii, James (2016) "Assessing the Performance of the 2010 Constitution Five Years Later" in Ginsburg, Tom & Huq, Aziz (2016) Assessing Constitutional Performance, New York, Cambridge University Press, at pp346-8.

[354] See Muhula, Raymond & Ndegwa, Stephen (2014) "Instrumentalism and constitution-making in Kenya: triumphs, challenges and opportunities beyond the 2013 elections" http://creativecommons,org/licences/ny-nc-nd/4.0 at p.93. On same page, the authors noted Kenyan leaders preferred safe havens in which they can craft agreements that "circumvent the press of outsiders (civil society, churches, the poor, etc.), who, by their numbers or their rhetoric, can force issues on to the agenda but cannot necessarily conclude agreements that in other circumstances would be executive by the state…".

[355] Art.21(2).

[356] Art 5(1) of the Fifth Schedule.

[357] Art 6(a) and (d) of the Fifth Schedule.

The implementation record above was evaluated by Sihanya, who noted that parliament enacted most of the constitutionally mandated legislation within fixed timeframes, but that these enactments drew public controversies and public contestation over dilution of constitutional standards.[358] Some examples included legislation to establish the Supreme Court of Kenya and its procedures, to enable vetting of sitting judges, and to restructure the courts, all of which was enacted most immediately after the Constitution took effect.[359] Yet, according to Sihanya, implementation contests arose from conflicts over constitutional understandings, suggesting "*full and effective implementation of the 2010 Constitution largely depends on its proper and accurate interpretation. The judiciary is the final authority is the final authority in interpretation of the 2010 Constitution as the process of implementation unfolds*."[360] Obviously, structured processes of implementation understood as an issue of fidelity to constitutional text, became primarily a legal procedure subject to judicial constitutional review and judicial law-making.

An underlying premise was that structured processes would enable regular invocation of constitutional problems before the courts and that the more often constitutional implementation was invoked before the courts, the more room there was for normatively better reform through judicial interpretation as well as the greater likelihood of converting the 2010 constitution into hard law through augmenting, binding case law. I deal with this point as an outcome of constitution-building below.

5.4 Strategizing court actors?

Considering the foregoing, what was the evidence that Kenyan constitution-building court actors engaged in strategizing behaviour firstly, to secure their constitutional change understandings and preferences by leveraging other actors, and secondly to immunize themselves from potential institutional backlash for their positions on constitutional change? In chapter three, this strategizing emerged as a principal empirical claim integral to the concept of constitution-building. Moreover, it is this claim that would permit us to question that role of actors in redefining the impetus of constitutional change in more radical ways, for instance such as elevate subjugated voices or that reposition peripheral claims into the centre of the evolution of legitimate constitutions in deeply divided societies like Kenya and South Africa.

There was evidence that promoters of BBI were strategizing, not only in terms of the substantive content of their amendment proposals, which they carefully aligned with proposals in previous constitution-making efforts, but primarily though their choice of a popular initiative of constitutional amendment. These promoters showed acute consciousness of the possibility of sui generis processes to fix constitutional deformities as they understood them, in the interstices between constitution-making, legislating, and adjudicating. In contrast, what ripostes to BBI claims court actors made, illuminated their engagement as arenas of legalistic discourses, which pendulated between the esoteric and the

[358] Sihanya, Ben (2012) "Constitutional implementation in Kenya, 2010-2015: Challenges and Prospects" FES Kenya, Occasional Paper No.5, p.2.
[359] This legislation included the Judicial Services Act, No.1 of 2011, the Vetting of Judges and Magistrates Act, No.2 of 2011, the Supreme Court Act, No.7 of 2011, the Environment and Land Court Act, No.19 of 2011, and the Industrial court Act, No.20 of 2011. The legislation is available at www.kenyalaw.org.
[360] Sihanya, Ben (2012) supra note 358, at p.23.

formulaic. Court actors pushed discourses with which they were uniquely familiar relative to non-court actors. Furthermore, court actors attacked BBI proposals on grounds of normative constitutionalism. In this case however, constitutionalism was pinned on an unattainable and ahistorical popular hyper-participation. However, it is questionable whether this was strategizing since the exact same hyper-participation ruling, specifically the four-tier process of mobilising constituent power, had already been rejected by the political class in the past.[361] Yet, after this rejection, political actors successfully midwifed the 2010 Constitution. Lastly as noted above, the plurality of opinions in the Supreme Court obscured any clear-cut guidance to lower courts concerning how to deal with BBI-like cases in future, Hence, the question whether Kenyan court actors were strategizing still stands.

In fact, more circumspect analyses of the capacity of court actors to influence political branches by strategizing was available in case law on elections where the Supreme Court enjoyed exclusive, original jurisdiction.[362] Although a famous 2017 decision of the Supreme Court of Kenya in 2017 to annul presidential elections exemplified this transformation, the Supreme Court eventually proved unable to ensure its decisions "*were accepted by the losing side, or to ensure that the electoral process itself enjoyed broad credibility*."[363] Either court actors lacked control over the purse and sword, meaning even landmark judicial decisions depended on how other constitutional actors respond to them, or contextually, "*the courts operate within a wider political system in which their operations are not grounded in a set of supportive informal norms*."[364]

If strategizing lacks legal dimensions on which to evaluate it, we can note that in the political science view of broader processes of constitutional rulemaking in Kenya, Juma and Okpaluba, argued based on the history of Kenyan constitutional review processes, that "*largely depending on given circumstances, the role of the judiciary can be limiting or could be regarded as merely salutary*…". This was because constitutionalism was not the reason for agreement-making behind new constitutional proposals by political actors, and what mattered for successful processes of constitutional rulemaking was to show "*the unity of the political agenda against the legalistic demands of constitutionalism*."[365] By engaging closely with political actors in pragmatic ripostes highlighting need to strengthen constitutionalism, court actors could be strategic about shaping the unity of the political agenda. However, this pragmatism was not categorically in view in the BBI decisions. On strategizing Kenyan court actors therefore, we could heed Zeleza who cautioned that even if Kenyan courts were assigned greater powers of constitutional judicial review and norm entrepreneurship, without

[361] See *Aaron Ringera & Others vs Attorney General & Others* Misc. Civil Application 82 of 2004.
[362] Art.150 of the Constitution, 2010.
[363] Cheeseman, Kanyinga, Lynch, Ruteere, & Willis (2019) "Kenya's 2017 elections: Winner-takes-all politics as usual? Vol.13, No.2, 215-234, at p.228.
[364] Id, at p.228
[365] See Juma, Laurence & Okpaluba, Chuks (2012) "Judicial Intervention in Kenya's Constitutional Review Process" Washington University Global Studies Law Review Vol.11, Issue 2, p.363.

the involvement of administrative agencies and consultative forums, Kenyan constitutional processes were not, or not yet, designed to make them work as some scholars view them.[366]

5.5 Legal features of constitution-building outcomes

5.5.1 Transformation of legal culture

Did constitution-building court actors manage to transform the legal culture of the new constitutionalism, for instance to scale up judicial norm entrepreneurship via transformative constitutionalism? The finding is a mixed outcome. Transformative constitutionalism was regularly cited, for instance by all the levels of courts in the BBI cases. Yet, consider the obiter dicta in *Trusted Society of Human Rights Alliance v Attorney-General & Others,*[367] where the Court of Appeal faulted the High Court for widening judicial review to encompass testing the reasonableness of parliamentary vetting decisions concerning appointments to a state body. Where the High Court had reversed parliament citing leadership and integrity values, the Court of Appeal overturned the High Court and reinstated the initial decision, stating: "*We wish to reiterate … that leadership and integrity are broad and majestic normative ideas. They are the genius of our constitutional fabric. However, their open-textured nature reveals that they were purposefully left to accrue meaning from concrete experience. Restated, whereas these concepts germinate from the ground of normativity, they grow in the milieu of the facticity of real experience. Their life blood will therefore be our experience, not merely the abstract philosophy or ideology that may underlie them*."[368] Such disagreements revealed more than doctrinal differences. They illustrated that court actors disagreed about the instruments at the disposal of courts to engage with transformation and about the sources of substantiation of transformative ideas.

5.5.2 Enacted legislation and incrementalism

Sometimes envisaged legislation was expedited, for instance land ownership legislation,[369] but sometimes it was dilatory, e.g., legislation related to environmental and natural resources governance.[370] This mix left constitutional settlement of claims around these resources pending, often for several years.[371] We can see that erratic implementation via legislating

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[366] Zeleza, Paul (2014) "The Protracted Transition to the Second Republic" in Mutula, Okello & Sjogren (2014) Kenya: The struggle for a new constitutional order, Zed Books, at pp.17, 37 and 43.
[367] Civil Appeal No.290 of 2012.
[368] Para 59.
[369] The pieces of legislation were enacted within five years of promulgation. These include the *Land Registration Act*, No.3 of 2012 (giving effect to principles of devolved land governance); the *National land Commission Act*, No.5 of 2013 (reconstructing the statutory land management body); the *Land Act*, No.6 of 2012 (giving effect to art.68 of the Constitution to repeal and rationalise inherited laws for land registration and management of land resources), and; *Matrimonial Property Act*, No.49 of 2013 (providing for enforcement of rights of spouses pursuant to constitutional principles).
[370] See art.71-72
[371] Indeed, legislative proposals remain pending in debates to date, some since 2014. Relevant bills include the Sovereign Wealth Fund Bill, 2014 (establish a fund as a base for financing developmental schemes pursuant to art.201 of Constitution)); Energy Bill, 2014 (regulate supply and consumption of energy and establish an energy authority); Water Bill, 2014 (reform management of water as a utility); Mining Bill, 2014 (regularise exploration and prospecting of mining and mining revenue allocation); Petroleum (Exploration and Production) Bill, 2015 (give effect to constitutional provisions); Natural Resources (Benefits Sharing) Bill, 2014 (regularise system for benefit sharing among levels of government and establish a statutory management authority); Prevention and Control of Marine Pollution Bill, 2014 (give effect to art.2 and art.69 of Constitution); and the Climate Change

was evident, which would affect how court actors approached incrementalism, since absent or deficient mandated legislation, left residual rules of the pre-2010 order in force, spurring a possibly contradictory mix of old and new rules. In theory, this outcome might have built on pre-existing features of legal pluralism, yet it could aggravate the complexity of an eventual recreated corpus of law of the new constitutionalism by fragmenting it.

In practice, the official record of implementation revealed mixed outcomes for recreating a new body of law, coupled with a contested notion of what implementation entails, and normative deficits in implementation legislation.[372] Legislation was prone to other kinds of constitutional disagreements, but while these did not deter legislating per se, the question left open was whether a new normative legal order was thereby created. After all, by mandating legislation, framers of the 2010 Constitution aimed to encourage normatively better procedures to shape how constitutional rules will be applied in new areas in the future. Accordingly, later extensions of constitutional rules via legislation would benefit as much as possible from distancing constitutional outcomes from constitution-making compromises, including enhanced public participation and deliberation.[373] What was required against this form of participation was for constitutional actors to pursue a more constitution-centric public view of legislative contests by building on salient demands for people-driven constitutional implementation.[374]

Yet, as the BBI cases above patently evidenced, court actors directed attention to the deficient quality of public participation when executive branch actors pushed vigorously for amendments as well as legislated options to accommodate as many negotiating manoeuvres as possible. Although court actors rejected the constitutional change, they pushed for legislative options for conflictual reasons.[375] Ultimately, the BBI amendment option was rendered currently implausible due to fundamental disagreements, while the second option for a lesser scope of change via legislated reforms received support across the board, but with little independent guarantee of normatively better legislating procedures. It seemed likely that Kenya will in practice retain approaches to constitutional change that allow for copious but discrete amounts of legislation and secondary laws in pursuit of constitutional objectives. Despite their efforts to push for a legal ideological warrant in support or rejection of certain outcomes of legislative law-making, it remained an open question whether court actors could do more than shape processes of constitution-building by matters

Bill, 2014 (legal and institutional framework for mitigating effects of, and achieving resilience measures for, climate change).

[372] See Kenya Human Rights Commission (2015) A Report on the Status of Constitutional implementation to the Kenya Law reform Commission, available at https://www.klrc.go.ke/images/images/downloads/implementing-the-total-constitution-towards-a-normative-approach.pdf.

[373] See art.118(1) and art.124 with respect to parliamentary committees.

[374] For instance, Mutunga, Willy (2005) Constitution-making from the middle: Civil society and transition politics in Kenya, 1992-1997, Nairobi, CLARION Press.

[375] Legislation recommended covered comprehensive procedures for conducting referenda, processing a constitutional amendment bill by a county legislative assembly, the initiation and formulation of a popular initiative for constitutional amendment, for public campaigns on constitutional amendments and for timelines with reference to art.257 procedures. In the Court of Appeal BBI decision, judicial notice was taken of two pending bills – the Referendum Bill No.11 of 2020 and the Referendum Bill (No.2) of 2020.

of degree rather than principle, based on properties of specific legislation, rather than a worldview of convergent discourses.

5.5.3 Legal entrenchment of constitutional rules

For constitution-building court actors, the legal entrenchment of constitutional rules in a new constitutionalism would be the most manageable scope of their constitution-building work. This is because these actors could use specific provisions purposefully through specific cases, rather than engage with complexities of the holistic constitution and its expansive outcomes. Furthermore, legal entrenchment could take forms of negative constitutionalism, where court actors insisted only on controlling the acts of other constitutional actors in accordance with the law. Moreover, this was an outcome court actors could effectively manage institutionally, considering judicial independence was touted as one significant outcome of legislated changes under the 2010 Constitution.[376]

Yet, legal entrenchment as a constitution-building outcome generated mixed outcomes too in case law analysis. In *Centre for Rights Education and Awareness & Others v Speaker the National Assembly & Others*[377] the Hight Court triggered a conflict after it issued an order of mandamus to compel parliament and the Attorney-General to enact constitutionally mandated legislation mandated[378] to ensure no more than two-thirds of representatives in elected bodies were of the same gender. In 2012, the Supreme Court of Kenya reaffirmed the order and directed that parliament was obligated to enact the mandated legislation by 27 August 2015. Parliament failed to meet this deadline and missed a further extended deadline of one year. Thereafter, the Supreme Court issued a fresh order directing parliament and the Attorney-General to enact the legislation within sixty days, failing which any person could petition the Chief Justice to submit an opinion to the President for the dissolution of parliament as contemplated in the Fifth Schedule of the Constitution concerning implementation of legislation within fixed time frames. The Chief Justice was dully petitioned by multiple petitioners. On 22 September 2020, the Chief Justice submitted an advisory opinion to the President calling for the dissolution of parliament due to its failure to enact a constitutionally mandated gender representation rule. The President received the advisory opinion and took no further action, and the matter appeared to have rested there.

What was happening here might be characteristic of teething problems of a new constitution that aims to break away from a previous constitutional order. Nonetheless, at least one analyst viewed the problem as an institutional difficulty of court actors wrestling to impose the discipline of legal entrenchment on a recalcitrant political class.[379] Legal entrenchment of constitutional rules could alternatively be analysed from perspectives of predictability, stability, and settlement of constitutional rules over time. As such, this constitution-building outcome could be viewed through the

[376] Gathii, James (2016) "Assessing the Constitution of Kenya five years later" in Ginsburg & Huq (eds) (2016) Assessing Constitutional Performance, Cambridge University Press, pp337-364, p.338, 343-4 and 356.
[377] (2017) eKLR.
[378] Art.81.
[379] Ghai, Yash "Constitutions and Constitutionalism: the fate of the 2020 Constitution" in Murunga, Godwin, Okello, Duncan & Sjogren, Anders (eds) (2014) Kenya: The Struggle for a New Constitutional Order, London, Zed books. pp.119-143, stating "The question is whether those who are committed to the reform of the state will be able to impose the discipline of the constitution on the ruling class." (p.127).

secondary rulemaking in presidential election petitions, where the Supreme Court sought a manageable scope of a novel procedure that petitioners invoked after contested presidential elections.[380] In 2013, the Court had ruled that the constitutional rule was for petitioner to evidence a scale of error or impropriety in the conduct of presidential elections that materially affected the result so that the declaration of a president-elect must be invalidated. In 2017, the Court abandoned the material effect rule, and it quashed the presidential election, a first in Africa, on grounds that if pre-election procedures were prima facie flawed, it followed logically that their outcome could not stand. However, this decision simply revealed a deeper political crisis where ensuing fresh elections were derailed in opposition strongholds or unfolded in an atmosphere of violent intimidation in other electoral districts. The electoral outcome in presidential elections was immediately challenged for a second time within a brief period. However, apprehensive of consequences of returning the country back to violently divisive electioneering, the Supreme Court upheld the outcome of a second election that was patently more flawed than in the previous round. Because these election cases sought to entrench a novel rule that was simultaneously a signature marker of the unique jurisdiction of a novel apex court, they directed attention to how court actors could drive their ideation to discern diverse ways, to entrench novel constitutional rules of the new constitutionalism. In the 2017 decision to quash the election in a first instance, the Supreme Court exhorted divided national actors to utilise unifying legal principle and process to understand why democratic electoral competition is meaningful. Ultimately, however, the predictability of the legal rules succumbed to the diametrically opposed pragmatism of the political constitution, Court actors did not always succeed to compel political actors to abandon a frame of analysing constitutional rules for their utility in gaining and holding on to state power, and less so when legal entrenchment required applying new legal rules in new areas of an expansive scope of change outcomes, some of which evoked considerable technical complexity.

5.5.4 Social legitimacy of new constitutional order

During its promulgation, the Committee of Experts (CoE) behind its drafting had recommended that the Constitution 2010, although a compromise text, must be associated with "building a culture of constitutionalism".[381] After evaluating its structured implementation after five years however, Sihanya unearthed different forms of ambivalence towards the Constitution, including that of the body politic.[382] This ambivalence in implementation reflected conflicts over the meanings of constitutional norms and rules, that unfolded in contests over how to harness constitutional teleology. Some aspects of these teleology undoubtedly impinged on conservative and retrogressive political and social forces, and other aspects of its application especially in new areas of law, such as electoral law above, left constructive critics uncertain

[380] Art.140 of the Constitution, 2010.

[381] Final Report of the Committee of Experts on Constitutional Review, 11 October 2010, p.154.

[382] Sihanya, (2012) supra note 358, at p.32. According to Sihanya, implementation of the 2010 Constitution has revealed four types of ambivalence. "Firstly, there is textual ambivalence. Certain clauses may yield different interpretations, constructions, or results. Second, there is institutional – and especially executive – ambivalence. The key decisions makers in the Executive, Parliament, Judiciary, and the Commission and Independent Offices, have conflicting perspectives on text and process. … Third, there is ambivalence among the administrative bureaucracy: the state bureaucrats, politicos, and formal as well as informal advisors. … The fourth type is ambivalence in the body politic."

of what positions to take on assorted constitutional issues. Ultimately, the Constitution stirred a cognitive dissonance amongst national actors that increasingly fed popular perceptions that it needed radical reforms, leading eventually to the imbroglio evidenced by the BBI cases above.

In theory, court actors that were engaged in constitution-building work could forestall this ambivalence and dissonance via driving or fuelling convergence discourses in constitutional understandings, while strategizing to deter corrosive discourses against the constitution. Empirical claims that court actors could perform this work by ideating elements of the new constitutionalism which they understood the constitution to strive at, and by careful attention to see how other constitutional actors articulated these elements, suggested engagement beyond exhortation to principles and fetishisation of legal enforcement of the constitution. What was suggested in addition was careful attention to underlying logics of sociological legitimacy of a new constitutionalism, which could be indicated by depictions of metaphors and emblems of convergence discourse narratives.

According to Sihanya, the evaluation of structured implementation did evidence a broader civic discourse that could saturated the public with intricacies of fidelity to the law or the spirit of the law and other rigamaroles concerning enactment of constitutionally mandated legislation.[383] The divided Kenyan public could thereby observe how and which operational features of the 2010 Constitution were coming into being, for instance from following televised proceedings of parliamentary vetting of executive branch nominees or interviews of candidates for judicial office. Similarly, the BBI ad hoc committees that engineered preliminary stages of a formal constitutional change initiative, did so by framing a matrix of constitutional pathologies, like widespread corruption, divisive politics, expensive electoral fallout, and defective constitutional institutions which amplified all the other pathologies. In fact, the eventual BBI approach deliberately centred on a popular initiative for constitutional amendment, i.e., the most people-centred and public participation-intensive procedure possible under the 2010 Constitution.[384] According to Maina, this was the correct instinct because a major problem to solve that persisted under the constitution was a "captured state repurposed to private goals and objectives of ruling elite", and one that that birthed problems of "mandate ambiguity", meaning it was

[383] For instance, Sihanya acknowledges a broader civic discourse on the constitution within what is called civil society. See Sihanya, Ben (2012) supra note 358, p.3.

[384] This obviously assumed that Kenya had a unified people who could muster a progressive project of constitutional change. The inverse was also empirically showed, for instance with fragmented, ethnically biased voting patterns in the 2005 constitutional referendum. See Kimenyi, Mwangi (2006) The Demand for Power Diffusion: A Case Study of the 2005 Constitutional Referendum Voting in Kenya" Economic Working Papers, University of Connecticut, pp2-21.

never clear what exactly the public required Kenyan leaders to be accountable for.[385] Similarly, Ghai posited that a new constitutionalism was elevating the participation of "the people" in state affairs.[386]

However, Ghai also recognised that the *"political order intended to be set up by the constitution competes with other models and realities*".[387] Which implies constitutional disagreements between court and non-court actors would unfold in c a context where a new constitutionalism could not take root based on a single, coherent, political, social, and philosophical outlook. Which is why the former Chief Justice, Willy Mutunga, had called unsuccessfully for collaboration between court actors, academia and the Kenyan middle-class to lead defence of the constitution against ruling classes.[388] However, the constitutional history of Kenya leads us to doubt that non-political elites alone have yet to reach a point of critical mass to restrain political elites under constitutional rules.

5.6 Conclusion

The Constitution of Kenya, 2010 enshrined aspirations for broader societal change, while itself a locus of conflict. A decade after its promulgation, fundamental differences could still erupt on such basic questions, such as whether the constitution was amendable. Constitutional framers never touted constitutional finality, but they made court actors highly publicly accessible hoping they would catalyse incremental, progressive change under shared worldview of constitutional outcomes, whose actualisation was not an inexorable movement. In this chapter, I described some of the constitution-building work of these court actors, by tracking three analytical focal points of this work – its ideation, its processes, and its accentuated outcomes. Based on these focal points, constitution-building work of court actors revealed a mixed epistemology of the tensions of constitutional change and continuity in Kenya. What was highlighted was a need to deepen understanding of constitution-building as a theoretical framework within the context of fundamental disagreement on constitutional norms that gives rise to it.

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[385] Maina, Wachira (2020) The Decline and Fall of Electoral Integrity. Nairobi. Electoral Law and Governance Institute of Africa (available at https://elgia.org/images/ELGIA_REPORTS/ELGIA-FCDO_Research_Project_on_Decline_of_Electoral_Integrity_in_Kenya.pdf (18/10/2021)), p.54. For a contrary view, see Githuku, Nicholas & Maxon, Robert (2021) "The Building Bridges Initiative Déjà Vu: A Whitewash Process Taking Us Forward by Taking Us Backwards" in Githuku, Nicholas (ed) (2021) A Tapestry of African Histories, Lanham, Lexington Books, pp293-317.

[386] See Ghai, Yash (2011) Chimera of Constitutionalism: State, Economy, and Society in Africa (unpublished paper).

[387] Ghai, Yash (2009) "Decreeing and establishing a constitutional order: challenges facing Kenya" Oxford Transitional Justice Research Working Paper Series, p.3 (available at https://www.law.ox.ac.uk/sites/files/oxlaw/ghai_de1.pdf downloaded 29/09/2021).

[388] Mutunga, Willy (2021) "Memo to Upper Deck People: Fight for the 2010 Constitution of Perish" Op ed by Willy Mutunga, available at https://www.theelephant.info/op-eds/2021/02/05/memo-to-upper-deck-people-support-the-constitution-or-perish/ (downloaded 24/09/2021).

Chapter Six: Comparative analysis of constitution-building court actors in South Africa and Kenya

Contents

6.1 Introduction

In South Africa and Kenya, court actors labelled their respective 1996 and 2010 constitutions as transformative instruments. Once promulgated, neither constitution terminated constitutional disagreements with peremptory drafting. Rather each became a point of embarkation for court actors to try to make sense of its teleology for broader societal outcomes.

This teleology encouraged several propositions. One, was the production of legally constrained governmental power in some areas and its enhancement in others, so that the aggregate effect corresponded to typical understandings of a liberal constitutional paradigm. However, empirical analyses discounted this outcome as far as contemporary deeply divided societies that lacked experience of liberal governance were concerned.[389] Nonetheless, despite entrenched divisions and disagreements, South Africa and Kenya, enacted constitutions that obligated court actors to promote

[389] Lerner, Hanna and Landau, David (eds) (2019) Comparative Constitution Making, Cheltenham, Edward Elgar Publishing, pp.15-17,21.

choices of constitutional decision-making to promote liberal constitutionalism, via liberal human rights and democracy.[390] A second proposition was the production of a new legal order, in conjunction with complete or partial rupture with the rules of a previous constitutional order, pursuant to specific constitutional stipulations. A third proposition was radical, far-reaching societal change. In fact, the constitutions in discussion could be distinguished by the efforts of their framers to cater for plural constitutional functions.

Simultaneously, the vagaries of constitution-making compromises produced a framing of multiple constitutional functions in abstract and vague terms. These constitutions could therefore convey symbolic or aspirational qualities. At any rate, they stoked new conflicts and became and remained sites of disagreements. What followed were demands of diverse publics either to recentre norms or issues, or to alter the pace of change, or to push for more radical changes. From a definition offered by Fowkes, three basic premises regarding constitution-building emerged: that constitution-building will offer court actors a way to ideate convergent constitutional interpretations, a means to generate processes whereby they lead the way in mediating this convergence, and a framework for invoking broadly agreeable, legitimate outcomes of constitutional change.[391] With the benefit of more information from the case studies in preceding chapters, I revisit the concept of constitution-building to refine its empirical in this chapter, while pushing analysis of normative claims to the following, concluding chapter of this dissertation.

In 6.1, I observe and analyse how court actors addressed constitution-building ideation, processes, and outcomes in the case studies and suggest multiple facets or forms of constitution-building are embodied in their work. In 6.3 I relate how court actors precipitate the various forms driven by the prevailing rationales behind constitutional change in the two states. In 6.4, I analyse how the various forms of constitution-building are limited by their methods of producing convergent interpretive activity. And in 6.5, I analyse why and how the gorms of constitution-building fail to produce any radical change, a failure undergirded by the subtexts of hegemonic and peripheral discourses and critiques. Court actors can therefore in theory precipitate any form of constitution-building, but their ability to generate radical results of constitutional change invite scepticism for assorted reasons. Analysis of why and the extent to which this scepticism matters is pushed to the next chapter.

6.2 Forms of constitution-building

The concept of constitution-building contemplated the agency of court actors to devise processes whereby national actors harness constitutional cooperation, communications, and infrastructure, to bear on the secondary rulemaking that their respective constitutions stipulate to actualise a new constitutionalism. In other words, constitution-building fronted empirical claims concerning reflexive court actors strategizing to utilise interpretive activity to harmonise rationales, purposes, and goals of constitutional change amongst divided national actors. It sought to explain how court actors could muster broader projects of transcending the tensions of continuity of an old constitutionalism and the

[390] Sec.39 and art.24 of the 1996 Constitution of South Africa and 2010 Constitution of Kenya, respectively.
[391] Fowkes, James (2016) Building the Constitution: The Practice of Constitutional Interpretation in Post Apartheid South Africa, Cambridge, Cambridge University Press, p.30.

problems associated with the production of a new constitutionalism. And it entailed normative claims concerning the benefits and desirability of such roles for court actors.

In the case studies narrated in preceding chapters, it was evident that South African and Kenyan court actors widely engaged with the multifaceted teleology of their respective constitutions, thereby creating a volume of constitution-building work, evidenced by case law. This teleology compelled these court actors to deal with varied aspects of constitutional disagreements, encompassing matters like constitutional supremacy, rights, institutional machinery, amendments, and decision-making procedures, etc., amidst unfolding constructive as well as corrosive public discourses concerning evolving constitutional legitimacy. Consequently, different forms of constitution-building were visible regarding the organisation of levels of analysis. In addition, my evaluation surfaced judicial concerns regarding how the constitutional fabric might be unravelled by poorly conceived amendments and disregard by high officials and a recurring theme of incrementalism, as well as notions of constitutional change as work-in-progress. Subsequently, I observed constitution-building work of South African and Kenya court actors materialising some common forms of constitution-building, which for purposes of analysis, I label "architectural", "process-based", and "aspirational" constitution-building. Additionally, a fourth form was visible whereby court actors were pushed to ideate more radical conceptions of constitutional change products and to device processes for their delivery via more theoretical approaches. I address this empirically patchy form of constitution-building as "experimental" constitution-building.[392]

The organisation of analysis according to these forms of constitution-building helped to situate constitution-building in context, rather than approach court actor roles as stand-alone efforts. Secondly, it further illuminated emergent practices and methods, particulalry "dialogues" as part of the dynamics that shape court actor responses and constitutional discourses within each form. Thirdly, it helped to recognise that forms of constitution-building in which court actors engage may not necessarily resonate with understandings or preferences of non-court actors, or to demands of the latter for more radical constitution-building work. Fourthly, the organisation helped to create richer depictions of the comparative challenges in the contexts of South Africa and Kenya, that while similar in some ways, were significantly different in others.

6.2.1 Architectural constitution building

The respective constitutions of South Africa and Kenya stipulated an expansive scope of constitutional change while seeking to entrench foundational values, principles, procedures, and institutionary machinery under a principle of constitutional supremacy as a major declaration. Subsequently, the link between the constitutions and constitutional changes raised crucial questions concerning understandings of a higher law, legal entrenchment, and the constructed perception of constitutional equilibrium in the democratic system. These questions were moreover fueled by debates

[392] As a passing observation, my organisation of analysis mirrors the thematic approach used by Fowkes to analyse constitution-building interpretation of the South African Constitutional Court on themes like human rights and democracy. See Fowkes (2006) supra note 391. Alternatives could have been to periodize, following Roux in Politics of Principle, or in terms of paradigms, following Lerner. However, thematic organisation involved fewer problems of boundary drawing.

concerning constitutional amendments, as seen with the 17th amendment to the 1996 Constitution in South Africa and the proposed amendments to the 2010 Constitution of Kenya pursuant to the Building Bridges Initiative. It is moreover possible that the architectural slant to these questions was sharpened by the provisions for substantial devolution of governmental powers to provincial government in South Africa and county governments in Kenya, in addition to explicit references to Bills of Rights as cornerstones and blueprints. At any rate, court actors did construe constitutional reform in institutional and procedural demarcation disputes, as though the constitutions embodied carefully calibrated, organized, and unified structure, i.e., architectural design. Which generated *architectural constitution-building* whereby South African and Kenyan court actors aimed to ideate the central features of a new constitutionalism by reference to the fixity and finality of controlling architectural constitutional principles.

As South Africa showed, court actors tried to fix these principles by ideating an objective normative order. Kenyan court actors approached architectural constitution-building in a series of corrective and restorative remedies to disputed constitutional implementing legislation, especially in the formative years of the Constitution, 2010. In both states, court actors converted constitutional amendment disputes to tectonic or building plates questions. In other instances, court actors ideated constitutional reform as management of uniform standards and rationalization to reinforce one, single, hierarchical, constitutional order. Moreover, in both states, court actors sought to derive their logic of treating constitutional norms as basic, or fundamental, by reference to supposedly prescriptive and universal axioms of liberal constitutional paradigms.

6.2.1.1 Advantages

Firstly, architectural constitution-building materialised new legal rules, procedures and institutional forms that could be pursued in the early days post-promulgation, more likely because popular and political support for a new constitution was still high. Since the hierarchical ordering rules and principles was broadly accepted as legally, politically, and sociologically legitimate, there was less tension between the constitution as capturing cosmopolitan ambition of "we the people", and the constitution as an expression of superimposed national-cultural identity.[393] Nonetheless, the complexity of the constitution presenting multiple architectural propositions became a significant factor regarding what archetypes court actors could realistically promote.

Secondly, aspects of architectural constitution-building dealing with new institutional and legal forms, despite their complexity, were amenable to technical legal solutions that court actors could quickly craft or foster, e.g., new procedure for electing the president, or basic formulae for sharing revenue between levels of government. Deepening a construction of an architectonic core of the constitution fed perceptions of constitutional finality and settlement. It thereby disengaged the constitution from haggles of constitution-making compromises.

Thirdly, architectural constitution-building allowed court actors to deal with demarcation disputes between state actors or public authorities, bolstering the bureaucratic organisational claims of court actors that they produce coherent

[393] Klug, Heinz (2000) Constituting Democracy: Law, Globalism, and South Africa's Political Reconstruction, Cambridge, Cambridge University Press, pp.1, 23, 49.

answers to problems of the institutional infrastructural system of the constitution.[394] Court actors endeavoured to catalyse new institutional forms of constitutional architecture in their push for convergent constitutional interpretations with the other branches.

Comparative differences of architectural interpretations between South Africa and Kenya showed that courts could offer new thinking on related matters. Kenya set off with a more hybrid constitution that locked-in disagreement, not only in fundamental norms but also in institutional forms and system of government. Individual branches did not contribute to the same overarching or even collective interpretation of a constitutional architecture, including as a unified, normative system, that was present in South Africa. Nonetheless, Kenyan court actors seemed to borrow architectural constitution-building ideation from South African jurisprudence without much hindrance, and vice versa.

6.2.1.2 Disadvantages

Firstly, architectural constitution-building still left several crucial issues on which there was fundamental disagreement obscure. For instance, why were principles like electoral democracy and the rule of law more grounded in constitutional architecture for court actors than, say, social justice, or patriotism, or *ubuntu*? Or in what way could both sets of principles be equally architectural? In other words, this form of constitution-building may have had few answers to prior questions like on what grounds court actors regarded some principles as constitutive and exhaustive of the appropriate, contingent, standards for constitutional legitimacy. After all, foundational principles in the respective constitutions[395] never exhausted the common ground of national political culture. Furthermore, architectural constitution-building elevated abstract principles that might be best specified for purposes of avoiding disagreement,[396] rather than for concrete institutional design for a modern, deeply divided African state.

As court actors undoubtedly were aware, different traditions and worldview yielded different specifications of such ideals as democracy, accountability, and the rule of law. If their elaboration of architectural constitution-building should be based on the best arguments for these principles, then court actors must aim to articulate this in their ideation, which was far from straightforward, especially after internal curial disagreements were factored in.

Secondly, because court actors made arguments from precedents or sources before them, challenges arose concerning how principles like *ubuntu*, or *objective normative order* are articulated and adjusted in actual conflicts of incommensurable yet legitimate interests. Architectural constitution-building therefore did not resolve the unavoidable trade-offs of a realistic empiricism in specifications of the foundational values and principles. Instead, it created an

[394] Vermeule, Adrian (2011) The System of the Constitution, New York, Oxford University Press, pp.38-41.
[395] See sec.1 of the Constitution of South Africa, 1996; art.10 of the Constitution of Kenya, 2010.
[396] See Sunstein, Cass (2007) "Incompletely Theorized Agreements in Constitutional Law" University of Chicago Public Law, Legal Theory Working Paper No.147, arguing although abstraction can aid concrete outcomes, it did so be "enlisting silence on certain basic questions", p.2.

impression that those values and principles remained obscure and open to unguided discretion or slippery slope "divination" of court actors.[397]

Thirdly, architectural constitution-building was incapable of responding satisfactorily to other actors who sought a vernacularisation of norms in either South Africa or Kenya. This mattered particularly for cultural norms subscribed to by large segments of the population, which were said to be pushed to constitutional peripheries. Some critics lamented architectonic ideation as privileging an ever-present and increasing foreign borrowing that potentially obfuscated a the supposedly core objective meaning of a norm within a given context. Subsequently, court actors themselves spurred difficulties of fit between canonical supreme law and forging a dynamic, living constitution.[398] Moreover, heterarchical normativity produced clashes between separate objectives of constitutionally permissible plural legal systems. The result was not an architectural clarity, but rather a rise of hybridity, despite efforts of court actors to articulate one normative, objective order under constitutional supremacy.[399]

In both South Africa and Kenya, architectural constitution-building privileged norms and rules related to human rights democracy, and liberal constitutionalism. However, crucial points of difference remained concerning the exact rights involved, particularly the right to be afforded to groups, in addition to differences in relation to the composition of court actors and forms of governance. In Kenya, moreover, court actors painted a concerning picture of how easily and irreversibly badly basic or core features of the constitution could still be ripped apart via poorly conceived formal amendments, despite a decade of their ideating architectonic constitution-building. This suggested a highly superficial product of this form of constitution-building.

6.2.2 Process-based constitution-building

As discussed in Chapter 2, advocates of transformative constitutionalism encouraged South African and Kenyan court actors to first embody constitutional change in immediate changes in legal and judicial culture. This typically meant an interpretive shifts from legal formalism to procedures of resolving constitutional disputes within their complex historical contexts. This turn to empiricism and historicism was essential to how Fowkes, for instance, defined constitution-building. Moreover, the extent to which the respective constitutions deferred issues to secondary rulemaking encouraged theorising the constitutions from perspectives of incrementalism. These in turn spurred process-based solutions to constitutional disagreement on substantive issues.[400] Process could be viewed as a protean term that connoted things

[397] See *R v Zuma* (1995) ZACC 1 "It cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination." Per Kentridge, J

[398] See Strauss, David (2010) The Living Constitution, New York, Oxford University Press, defining it as one that "evolves, changes over time, and adapts new circumstances, without being formally amended," at p.1.

[399] Comaroff, Jean & Comaroff, John (2003) "Reflections on Liberalism, Policulturalism, and ID-ology: Citizenship and Difference in South Africa" Social identities Vol.9, No.4, pp.445-473, pp.447-9. See also Weeks, Sindiso (2022) "South Africa Legal culture and its Dis/Empowerment Paradox" in the Oxford Handbook of Law and Anthropology, oxford, oxford University Press.

[400] Welikala, supra note 155, at p.14

like, steps to raise consensus and unanimity, to minimise error in codification, to make corrections and improvements, to raise the level of information and diversity of stakeholders in decision-making, and generally to improve normative conditions for any constitutional decision-making. Both South African and Kenyan court actors became preoccupied with distinctive disputes of incremental change, for instance conditioning legislation and administrative decision-making with sequencing approaches. They therefore had opportunities to stir the bowl and become adept at turning the procedures of other branches to their own purposes of ideating and actualising preferences for products of constitutional change. On this reading, court actors generated "process-based constitution-building".

Process-based constitution-building created an inference that the complex weighing of alternative constitutional premises, proposals, and actions to inform decision-making, was what was most striking about effects of constitutional change. Critical aspects of process-based constitution-building in both South Africa and Kenya were observed concerning constitutional amendments, legislating, and administrative rationalisation, as well as constitutional interpretive activity involving dialogues and civilised conversations. In Bills of Rights disputes, court actors recognised that open ended provisions of economic, social, and cultural rights, as well as political rights requiring progressive realisation subject to available resources must be faced head on with principled arguments. However, their remediation efforts typically triggered more dialogues and procedural actions with parliaments. In practice, process-based constitution-building tended to draw dynamics of collectively bargained policy making and rationalisations of evidence-based outcomes into constitution-building, with a corresponding toning down of transcendental interpretations.

This form of constitution-building highlighted interbranch conflicts over the constitutionality of enabling legislation. Nonetheless, constitutional change was said to explicitly demand convergence discourses around constitutional norms to enable divided national actors to find solutions without conflict or risk of jeopardised constitutional legitimacy. As Fowkes put it, the proper instinct was to acknowledge that a situation was more complicated than a simple binary – constitutionality versus unconstitutionality of legislation – because it pointed to need to jointly manage a teleology of constitutional change via legislation, through a converging discourse. This form of constitution-building therefore made legal forms of political discourses more explicit in a contextual fusion of law and politics. However, in Kenya where court actors borrowed South African remediation to allow them to monitor corrective changes as legislators made them, thereby envisaging some functional specialisation in process-based constitution-building, the fusion of law and politics remained visibly acrimonious.

6.2.2.1 Advantages

The principal advantage of process-based constitution-building was broad allowance for court actors to downscale constitutional disagreement if they needed to elide substantive solutions. It allowed court actors to ideate constitutions as legal instruments to be pragmatically enforced, yet as non-typical legal instruments resting on models of compromise politics on account of their abounding with controversial premises, such as justiciable economic rights. However, the

emphasis here differed between states. Process-based constitution-building sometimes enabled court actors to focus on normative dimensions of decision-making, for instance its fairness, equity, accountability, effectiveness, transparency, etc., without losing sight of instrumentality, i.e., maintaining fidelity to constitutional rules despite fundamental disagreements.

Furthermore, process-based constitution-building enabled court actors to safeguard the constitution against revolutionary changes. Which assumed court actors must at least explore and elevate rationales behind threatening constitutional changes, the better to counter their corrosive discourses.

6.2.2.2 Disadvantages

Firstly, despite theoretical claims that incrementalism minimised constitutional errors,[401] which incoherence in an emergent legal and political order might reflect, it was difficult to discern from case law that actors could populate governmental decision-making with common constitutional norms in protracted processes. If crosschecking processes with the normative constitutional order became difficult due to persistent disagreements, the solution seemed to call for "more" process, hence a self-propelling tautology. Questions whether process-based constitution-building could provide long-term resolution beyond process, or whether silencing substantive disagreement was enough for deeply divided societies remained obscured.

Secondly, process-based constitution-building seemed to suit court actors who viewed themselves as bolstering the democratic procedures that pertain to change.[402] Yet, this did not mean it also fitted its corresponding understanding in the political realm thinking. Court actors might seek to fuse law and politics by taking a realist view of the politics of constitutional deferral, i.e., that constitutional change was better achieved through an incremental approach that permitted the suppleness of the ordinary political process to negotiate the necessary compromises and reforms, rather than to reify them through rigid constitutionalizing.[403] Nonetheless, process-based constitution-building still depended on the strength of political factors. These might be conducive in one context and adverse in another. Ultimately, process-based constitution-building illuminated the difficulties of sustaining constitutional commitments, including fidelity to compromise constitutional charters, including through second-best judicial decisions that sought to enhance common normative positions. Since differences between court actors and political actors could remain incongruous as a matter of principle than degree, it was possible some process aspects worked more because of "hidden hand" and behind-the-scenes factors, than due to court actor processual exertions.

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[401] Dixon, R., & Ginsburg, T (2011) "Deciding not to decide: deferral in constitutional design" International Journal of Constitutional Law, Vol.9, Nos.3-4, pp.636-672.

[402] Framers obviously will address procedures of democratic decision making on constitutional issues as part of the design of constitutions. See for instance Frey, Bruno & Stutzer, Alois "Direct Democracy: Designing a Living Constitution" in Voigt, Stefan (ed) (2013) Design of Constitutions, Cheltenham, UK & Northampton, MA, Edward Elgar Publishing, pp.485-526

[403] See Roux, Theunis (2013) Politics of Principle: The first South African Constitutional Court, 1995-2005, Vol.6 Cambridge University Press, at pp.73-88

Thirdly, the net effect of giving priority to incremental process-based constitution-building was that delay in achieving constitutional change outcomes will be inevitable. This notwithstanding competing priorities of divided national actors pressuring constitutional actors to produce radical change, including by revising preexisting constitutional arrangements of the old constitutionalism.

Lastly, process-based constitution-building could address dilemmas of constitutional change winners and losers if court actors were nevertheless still aiming, willing or able to nurture radical, indigenous, and other norms and beliefs that the old constitutionalism marginalised. Yet when faced with associated claims in adversarial settings, court actors reverted to rationalising public choice schemes, or ultimately, to legalism and formalism. Although offered as a solution, incrementalism could also be divisive. Subject to other legal and political constraints, process-based constitution-building might harbour an additional challenge – incapacity or unwillingness of court actors to create or innovate new processes and procedures, particularly those that are unfamiliar to the continuity of a usable legal past.[404]

6.2.3 Symbolic constitution-building

Symbolic constitution-building extrapolated a dimension of the respective constitution to offer diverse publics an iconic emblem or "culturally significant symbol" [405] around which disagreeing national actors adapted a convergent mindset for future constitutional decision-making. It suggested that court actors can reify a constitutional text into a revered form of authority for its audiences, by imbuing it with deeper, culturally sophisticated meanings with which many diverse publics could in time relate.[406] Court actors could be instrumental too for assorted groups and actors to convey their claims and arguments as a discourse aptly suited for a revered constitutional penumbra and not the arenas of quotidian politics. In essence, therefore, symbolic constitution-building elevated a constitution as an authorising source of privileged legal and political discourses, as well as an instrument by which various diverse publics could bolster their claims and interests by gaining the trust and attention of constitutional audiences.

It seemed intuitive that for countries lacking any historical veneration of constitutions, and where the respective constitutions emerged from haggled compromises of a closed group of political actors, South African and Kenyan court actors would imbue their constitutions with qualities that encouraged sceptical publics to regard them as both necessary and familiar governance icons.[407] In literary work, the still-new Constitution of South Africa 1996 was mythologised as a

[404] Sunsten Cass (1995) "The idea of a Usable Past" Columbia Law Review, Vol.95, pp.601- (addressing a role of constitutional lawyers to contribute to narratives of continuity through feeding the prevailing legal culture with a repertoire of arguments and political or legal narratives that place a stylized past and present into a trajectory leading to a desired future within that legal culture).
[405] Ackerman, Bruce. (1997) "The Rise of World Constitutionalism" Virginia Law Review Vol.83 No.4 pp771-797 at p.779
[406] The US Constitution 1789 is revered in this sense. It has apparently been referred to as an American Ark of Covent, alluding to biblical endorsement. See Kammen, Michael (1986) (2006edn) A Machine That Would Go of Itself: The Constitution in American Culture, Alfred Knopf, New York, pp.47, 142 and 225.
[407] See https://www.worldpulse.org/story/pomp-and-colour-promulgation-for-kenya-constitution-4871.

metaphorical, pacifying "soul of a nation."[408] Thereafter, these constitutions were commonly discussed in metaphorical terms, although some critics questioned whether the charters were panacea or nostrum.[409]

The purpose of using constitutional symbolism as seen in other contexts, was to bolster sociological legitimacy of new constitutions via their manipulated propagation in the social realm and to mitigate competing sources of authority.[410] Moreover, symbolism was one way of stabilising the unpredictability that a new constitution or constitutional change brought with it.[411] Symbolism was moreover integral to invest embattled Kenyan leaders with authority regardless of political pacts, while paradoxically, constitutional uncertainty was seen by other elites as a last ditch attempt to maintain stability via stalemates.[412] Lastly, symbolic constitution-building, as with interpretation of aspirational clauses, might also be about detecting the unwritten or invisible constitution and making it part of the canonical constitution.[413]

From the cast studies, South African and Kenyan court actors repeatedly reimagined and ideated their respective constitutions symbolically, both as emblems of a better future and as transformative instruments to get there.[414] In cases like the *Zuma*[415] contempt decision in South Africa, or the *Building Bridges Initiative* cases in Kenya, court actors utilised entire paragraphs of obiter dicta to carefully address their public audiences, who they exhorted to view constitutions as embodiments of sovereign power, or emblems of new unity under the rule of law. Since there could be discontent with these charters, court actors utilised symbolic constitution-building to fuse political communication and legal construction, to reaffirm diverse publics as principal co-authors of constitutional futures. Remarkably, court actors in both states reiterated a consensus to abandon traditional notions of constitutional interpretation to bolster the emblematic power of their constitutions. Provided court actors could successfully use figurative language to convert constitutions into powerful symbols of governance, they set trends in motion for all kinds of policy initiatives to be framed and argued in constitutional terms.

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[408] Noteworthy, the expression was used by someone who was involved in its drafting. See Hassen, Ebrahim (1998) The Soul of a Nation: Constitution-making in South Africa, Cape Town, Oxford University press, p.132.
[409] See for instance, https://law.strathmore.edu/the-constitution-of-kenya-2010-panacea-or-nostrum/.
[410] Goodrich, Peter (2014) Legal Emblems and the Art of Law: *Obiter depicta* as the vision of Governance, New York, Cambridge University Press, at p.49, Goodrich notes that it "is not only, as adumbrated, that subjects must "observe" the law, "recognise" its validity, and "appear" before it, but also that legality constitutes a vivid imaginary sphere within the social realm".
[411] Bell, Christine and Rodrigues, Charmaine and Suteu, Silvia and Daly, Tom and Sapiano, Jenna, (2016) "Constitution-Making and Political Settlements in Times of Transition" Global Constitutionalism, special section, 2017 Forthcoming, Edinburgh School of Law Research Paper No. 2016/23. Available at SSRN: https://ssrn.com/abstract=2850530.
[412] Bedasso, Biniam (2015) "Ethnicity, Intra-Elite Differentiation and Political Stability in Kenya" African Affairs, Vol.114, No.456, pp.361-381, p.364
[413] Dixon, Rosalind and Stone, Adrienne "The Invisible Constitution in Comparative Perspective" in Dixon Rosalind & Stone, Adrienne (2018) The Invisible Constitution in Comparative Perspective, Cambridge, Cambridge University Press, pp3-20
[414] Klug, Heinz "Transformative constitutionalism as a Model for Africa?" in Dann, Philipp, Riegner, Michael & Bonnemann, Maxim (eds) (2020) The Global South and Comparative Constitutional Law, Oxford, Oxford University Press, pp.141-163.
[415] *Jacob Gedleyihlekisa Zuma vs Secretary of Judicial Service Commission of Inquiry into Allegations of State Capture & Others* (2021) ZACC 52

Constitutional symbolism in both states was however subject to qualifiers. Constitutions might be swallowed by symbolism discourses and lose their emblematic power to engage with peripheral issues or novel areas of law. If anything, the conclusions of the *Zuma* contempt decision and BBI decisions above, suggested that symbolic constitution-building as currently elaborated was about to fall of its fictive cliff. Rather than managing uncertainty of constitutional change, these cases suggested court actors were struggling to amalgamate and consolidate fundamental rules and principles in ways that appealed across the board for diverse politics with equal significance.[416] The increasingly visible result, at least according to South Africa centric analyses, was a discourse of negation that was corrosive of the court actor-backed account of the new constitutionalism, or a discourse of overt hybridisation in some areas of the constitution.[417] This view of an erosion of symbolic constitution-building discourses favoured by court actors resonated with other analyses that pointed out the failure of their rights-aspirational ideation to lead to delivery of material benefits to most of South Africans based on constitutional rights guarantees.[418]

6.2.3.1 Advantages

Firstly, constitutional actors could engage in symbolic constitution-building to mitigate adverse risks of delays and unpredictability of constitutional change. And they could bolster the legitimacy of the respective constitution against any competing symbolic sources of authority available to other actors, like charisma and traditions, while bringing holdouts into a metaphorical common constitutional tent.

Secondly, symbolic constitution-building could shift of attention away from materialisation of constitutional aspirations that were implausible in the short term. Moreover, it protected constitutional norms against over-zealous norm entrepreneurs who would readily take the meaning of a norm to be fixed, and thus as uncritically authorizing them to dismiss alternative prescriptions as condemnable acts of noncompliance. In either South Africa or Kenya, it could be expected that extended public sentiment of constitutional compliance communicated via resonating emblems and in aspirational heuristics, could help these states to avoid entrenching a sense of permanent winners and losers.

Thirdly, it allowed the constitution to grow into a dynamic icon, depending on how astute constitutional actors dealt with it in future. In addition to not getting to any real point where constitutional finality becomes a viable phenomenon, it provided court actors theoretical room to draw from empirical considerations and strategic rationales regarding how symbols are appreciated in the real world in relation to commensurable constitutional values.[419]

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[416] For instance, as related to amalgamating customary and constitutional law, see Weeks, Sindiso M (2021) "Constitutionally Transforming South Africa by Amalgamating Customary and Common Law: *Ramuhovhi*, the Proprietary Consequences of Marriage and Land as Property" Constitutional Court Review Vol.11, pp.1-41.
[417] Weeks S.M (2021) "Reflections on Liberalism, Policulturalism, and ID-ology: Citizenship and Difference in South Africa" Social identities Vol.9, No.4, pp.445-473, p.465-6.
[418] See Corder, Hugh (2016) "A Sense of Grievance and the Quest for Freedom: South Africa's Constitution – the Struggle Continues" in Dowdle & Wilkinson (eds) (2016) Constitutionalism Beyond Liberalism, Cambridge, Cambridge University Press, pp282-314.
[419] See Schauer, Frederick (1994) "Commensurability and its Constitutional Consequences" Vol 45 Hastings Law Journal, pp.785-812, arguing an ordering of values can be prioritised on instrumental grounds. For a riposte, see Waldron, Jeremy (1994) Fake Incommensurability: A Response to professor Schauer" Vol 45 Hastings Law

6.2.3.2 Disadvantages

Firstly, with symbolism as a frame of understanding constitutional stipulations for broader reforms, constitutional determinism could recede further into obscurity.

Secondly, constitutional actors could construct the symbolic purposes of a constitution in ways that accommodated other contradictory symbolic associations just enough to render the respective constitution and its authority acceptable to hold outs. If so, symbolism was merely dissembling craft.

Thirdly, constitutional non-compliance could become a significant issue if constitutions were treated by national actors as merely as performative symbols. As some authors observed "contrary to common wisdom, setting an aspirational goal might move us further from, not closer to, reaching that goal, and in the process, it might also move us further from reaching other independent goals."[420] What was done or not yet done in terms of requirements of constitution may taint the entire constitutional order.[421]

6.2.4 Experimental constitution-building?

In theory, expansive constitutions of South Africa and Kenya allowed national actors to view constitutional change as the most important testing ground for new legal and political ideas, proposals, and interests. For instance, as discussed in chapter one, the respective constitutions stipulated for widespread direct participation and inclusion in diverse publics in an array of governmental decision-making in ways that could be viewed as experimental, since consequences could not be fully grasped ab initio. In South Africa, demand for what was described as "experimental constitutionalism" straddled the gamut of novel features of the 1996 Constitution, but experimental emphasis could be placed on enabling citizens to see what works or does not with respect to these innovations and their connections to lived realities.[422] Noteworthy too is that such views elevated notions of breathing life into a liberal constitution.

Given the expansive scope of constitutional change with which they were dealing, South African and Kenyan court actors were sometimes pushed to serve as laboratories for experimenting with constitutional concepts that may or may not be subsequently adopted via legislation,[423] or formal constitutional amendments. This was quite explicit in the Kenyan BBI cases concerning basic constitutional structures. Nevertheless, whether court actors could experiment depended on practical matters like shifting priorities of litigants, and what sources or authorities were available or deemed suitable. However, their legal culture was also an issue. As Weeks noted, court actors were not solely or predominantly responsible for a "disempowerment paradox" under the 1996 Constitution, but the explanation for the paradox could be found in the

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Journal. Pp.813-824, arguing incommensurability is weakened in real life by fluidity of "what exactly it is that we hold most dear", p.823.

[420] Leibovitch, Adi, Stremitzer, Alexander & Versteeg, Mila (2022) "Aspirational Rules" the Journal of Legal Studies Vol.51, No.2, pp.427-453, at p.430.

[421] See Zuckert, Michael (2006) "Legality and Legitimacy in *Dredd Scott*: The Crisis of the Incomplete Constitution" Chicago-Kent Law Review Vol.82, p.299.

[422] Woolman, Stu (2013) The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law, Cape Town, Juta & Co. Publishers (Ch.5 and ch.8).

[423] For instance, in South Africa, see *Bhe vs Khayelitsha Magistrate* (2004) ZACC

judicial participation in the formation of the legal culture in the country in terms of its freezing continuities of the present and past. [424] Opportunities to experiment on the myriad social issues that were litigated, could be realised if they also led to innovations in policy formulations by other governmental actors. More pertinently, court actors were also nudged to experiment in areas where there was neither adequate judicial guarantees nor explicit jurisprudence. For instance, in the Kenyan case study, former Chief Justice Mutunga rooted for an African constitutional jurisprudence to address normative problems from indigenous philosophical lenses.[425] Nonetheless, it was often the case that these problems had yet to be addressed satisfactorily by indigenous normative political theory in general, so court actors lacked tools and resources from domestic legal research communities to guide them. Furthermore, as noted with BBI cases, court actors were also reluctant to engage with abstract sources.[426] On one hand, therefore, experimental constitution-building could permit more theoretical approaches to be reimagining constitutional change. on the other, empirical evidence of emergence of indigenous or African jurisprudence was scanty.

6.3 Constitution-building rationales in South Africa and Kenya

What tensions were driving these forms of constitution-building? In chapter three, I prefigured three theoretical rationales, notably, a) expansive scope of constitutional change, b) methods of producing effects of constitutional change, and c) normative questions that arise. Leaving the normative questions to the next chapter, I revisit analysis of constitutional-building rationales by reprising the empirics observed in the case studies in terms of scope of change, and methodology, which I break into two aspects – complexity and timing.

6.3.1 Effects of broad scope of change on constitutional decision-making

As a result of the expansive scope of constitutionalising noted in chapter one, South African and Kenyan court actors dealt with a proliferation of widely ranging applications touching on familiar and novel legal fields. These actors sought and were encouraged to optimise constitutional transformation of societies, including by reimagining of their polities.[427] In dealing with such demands, it was not plausible for court actors to produce a realistically coherent or cohesive body of secondary rules to flesh out constitutional promises. More pertinent here was the effect of a broad scope of change on court actors themselves, in terms of their understanding of the dynamics of constitutional change and their receptivity

[424] Weeks, Sindiso (2022) "South African Legal Culture and its Dis/Empowerment Paradox" The Oxford Handbook of Law and Anthropology, Oxford University Press pp.56-72 (Chapter 3), p.57. See also Weeks, Sindiso M (2021) supra note 416, observing "the (*Ramuhovhi* decision) takes a single author's say-so in an academic text as authority on the content of vernacular law when it should rather have invested more into explicitly weighing this scholar's account of the living law's content against the testimony received in the case on whether their particular living law's content is the same as that of the communities studied by (the single author)." P.11.

[425] Mutunga, Willy (2021) "Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South" The Transnational Human Rights Review, Vol.8, No.8, seeking demystifying amalgamation of inherited law and traditional jurisprudence, p.19-20.

[426] See *David Ndii & Others v Attorney-General & Others*, per Wanjala J.

[427] See Tshishonga, Ndwakhulu (2019) "The Legacy of apartheid on democracy and citizenship in post-apartheid South Africa: an inclusionary and exclusionary binary" AFFRIKA Journal of Politics, Economics and Society Vol.9 No.1, available at https://journals.co.za/doi/abs/10.31920/2075-6534/2019/9n1a8.

to innovative ideas. In South Africa, court actors had expected to internalise change to best "*develop efficient and equitable principles of rights protection and good administration*"[428] and to support a "*move from 'a culture of authority' to a culture of justification'".*[429] In contrast to South Africa, the immediate effect of a new Kenyan constitution compelled court actors to focus on current problems rather than historical legacies. Perhaps these actors could be said to seek a culture of connection with what works.[430]

Due to the broad range of litigated issues, the precise bases of judicial decision-making evident in the relevant case law cannot be pinned down to single rationales and must remain open to debate. However, it was evident that in both states, an expansive scope of constitutional change encouraged court actors to internalise the driving force of values in their interpretive activity. This meant using architectural values as central vehicles to decide cases and deciding cases for their motivated consequences on values. However, the push for values in interpretive activity did not overcome fundamental disagreements, since it was evident that its impact was extensive in some areas and relatively limited in others. In South Africa, for instance, the impact in ideating and propagating the value of equality in same sex relations, differed in degree from that in criminal justice.[431] In Kenya, more than in South Africa, legal norm creation under the 2010 Constitution occurred in unstable and continuously changing normative environments, such that court actors starting at the High Court were constantly invalidating legislation for constitutional incompatibility. Yet, on the other hand, this invalidation went hand in glove with an approach where expansive constitutional change means ideas are to be tested, and quickly jettisoned where they failed to produce desired results.

Moreover, an expanded scope of constitutional change linked value-based adjudication to receptivity to political theory ideas. Yet, this receptivity could be shallow, performative, or pro forma. Consequently, constitution-building work of court actors could be heavily conditioned by contextual knowledge, not only concerning its ex-post promulgation rationalisations, but also about how judicial interpretation, litigation procedures and remedial orders were excessively determined by contextual imperatives rather than by a general process of constitutional legitimation. The main question however, which I revisit under discussion of discourses and critiques below, was the extent court actors were receptive to unfamiliar ideas.

6.3.2 Effects of complexity of constitutional change

During constitution-making, fundamentally disagreeing framers approached many of their problems as though they were difficult to resolve by traditional judicial or political methods. In addition to codifying an expansive scope of change to

[428] Chaskalson, Arthur (1989) "The Past Ten Years: A Balance Sheet and Some Indicators for the Future" South African Journal of Human Rights, Vol.5, pp.294, 298.
[429] Mureinik, Etienne (1994) "A Bridge to Where? Introducing the Interim Bill of Rights" 10 SAJHR 31, at p.32.
[430] Gathii, James (2016) "Assessing the Constitution of Kenya 2010 five years later" pp.337-359.
[431] See *S v Thunzi & Ors* where the Court was asked to invalidate different legislation resulting in a contradictory criminal framework for offences involving weapons; the Court referred to ongoing processes to standardise these residual laws from defunct apartheid-era homelands in comprehensive legislation based on the evidence of the Justice Department and declined to issue any final orders to allow the legislative process to redress the situation.

gain broad support for successful formalisation of new constitutions in South Africa and Kenya, framers tried to have more detail in constitutional charters and a greater number of institutional actors to oversee them, while easing proliferation of constitutional claims to broaden support for these charters. The result was expansive constitutions with contradictory provisions, locked-in disagreement, extensive deferral, several abstract ideas, plural institutions and loaded ambitions to evolve into distinctive charters. In other words, far from ideal legal texts. Consequently, a rationale for constitution-building was to manage this complexity in unfolding constitutional change and its contingent tensions with continuity of the old constitutionalism. This rationale entangled court actors in managing the complexity of constitutional change, eliciting responses that could be viewed from two interrelated perspectives: trying to widen the solutions space while simultaneously professing ideology, and recourse to specialisation and rationalisation rhetoric, and risk management.

Faced with complexity, a primary inclination of South Africa and Kenyan court actors was to acknowledge it before focussing on the unity of a vision of interactions and relations that both facilitated further agreement on constitutional issues, and differentiating the knowledge needs of protecting the autonomy of the constitution. This is the gist of the joint interpretive activity of the Constitutional court described by Fowkes in previous sections of this dissertation. Both South African and Kenyan court actors anchored constitution-building in conceptions of constitutions as models of decision-making by compromise, deliberation, participation, and compromise. Simultaneously, court actors professed liberal political ideology to deal with selected matters, especially regarding those where they preferred to render difficult-to-reverse decisions. In a second perspective, court actors privileged discourses of specialisation and rationalization, which were public choice entreaties concerning the production of coherent polities from plural moving parts. There were several ways for court actors to utilize their general knowledge to bolster rationalisation in adversarial litigation. More rarely, other branches valued the ability of court actors to provide general expert advice to help them think through and frame an issue and act as a guide. This was particularly pertinent for procedural decision-making, for instance, whether it was constitutional for the Kenyan National Assembly to enact legislation on division of revenue to devolved governments without consulting the Senate.[432]

The fact that court actor decisions were driven by ideological value postulates, and in other cases by efficiency of outcomes, brought significant political risk, necessitating pragmatism. When it suited court actors to profess ideology, they proceeded to decide moot applications where litigants had withdrawn.[433] Otherwise, they manifested their uneasiness with complexity in rationalizing perspectives through typical, bureaucratic risk management. This took varied forms, from non-interventionist judicial avoidance to deciding fundamental disagreements on constitutional matters at hand without formulating norms if doing so extended significantly beyond the facts of the case. Risks must be viewed as

[432] In the matter of the *Speaker of the Senate & Another v Attorney general and 4 Others* (2013) Supreme Court Advisory Opinion No.2 of 2013 (eKLR) (The Court advised that art.110(3) of the Constitution 2010 required the consultation between the Speaker of the National Assembly and the Speaker of the Senate).

[433] For instance, in *President of the Republic of South Africa vs Democratic Alliance & Others* (2019) ZACC 35, where the Constitutional Court went on to decide a moot appeal on whether power of president to dismiss a cabinet minister was subject to judicial review.

complicated affairs; whatever court actors prioritized, they might still miss significant parts and subsequently lose credibility. (I discuss whether this was strategizing in the next chapter). Ultimately, complexity meant much remained unclear about the constitutions stipulating broad societal changes. Complexity therefore found expression in fragmentation of forms of constitution-building. This included some where court actors attempted constitution-building behind a façade of architectural designs. Ultimately, constitution-building work of South African and Kenyan court actors corresponded to the incoherent complexity of their formal constitutions.

6.3.3 Effect of timing of constitutional change

An issue related to complexity was how far court actors could engage in constitution-building work for extended periods of time. The question highlighted two aspects of timing, notably, timeliness of interventions and problems of lag before the interventions generated an impact, and secondly, the limits of protracted processes of constitution-building. With both issues, time management could be an important but underemphasised element of constitution-building work of court actors. Obviously, complexity meant court actors could not plausibly reduce all immediately implementable actions, to binary decisions of constitutionality versus unconstitutionality. Because court actors favoured their interventions having a practical effect, their constitution-building engagements would have to be predictably fixed for the short-term. Yet, constitution-building entailed concerted processes and activities involving other actors. whose concepts of the significance and assessments of timeliness could be mismatched. Consequently, effects of timing of constitution-building could not be straightforward, and much less so in unfolding contexts of fundamental disagreement on constitutional norms and issues.

Differentiated effects of timing were visible in different forms of constitution-building above – architectural, process-based, symbolic – where links between court actor ideation and remedies could be more truncated with architectural constitution-building during the formative years of a new constitution. With proliferating claims on a wide range of issues, lag between ideation and outcomes was inevitable. Court actors were aware of this. The case studies highlighted evidence of their efforts to accelerate or imbue incrementalism with urgency within process-based constitution-building where court actors became involved in legislative procedures. Court actors sought to prevent undue prolongation under provisions of the South Africa Constitution requiring expeditious performance of obligations,[434] or fixed timelines of the Kenyan Constitution. South African court actors sometimes succeeded to secure amendments to legislation within short durations, but legislative lethargy with numerous discrete pieces of new legislation, was evident as legislators prioritised other considerations. In Kenya, in contrast, court actors failed either to accelerate legislative measures, even after repeatedly handing down judicial orders fixing deadlines, for instance as seen with legislation to implement the gender representation rule.[435] All this illuminated a significant problem with constitution-building work. It was no exaggeration to observe that despite dialogic comity and the overt fusion of law and politics, court actors could not offer reciprocity as

[434] Sec.237, Constitution of South Africa, 1996.
[435] Art. 81, Constitution of Kenya, 2010.

political actors understood it, or as explained in bargaining theory, because the real incentive structures of political actors predisposed them against expediting the requirements of constitutional change as court actors desired.

Inexorable lag between constitutional change and outcomes formed because joint interpretive activities involving structured dialogues and a back and forth of confirming court ordered legislative amendments, produced its own protracted dynamics. On the other hand, even binary processes in some areas produced no immediate practical effects, although their jurisprudential value was significant. For instance, several expansive Bill of Rights guarantees became illustrative of the dilemma of good jurisprudence without material changes, e.g., *Grootboom*,[436] where the South African Constitutional Court declared a right to housing and ordered the state to resolve an urgent situation of homelessness, but the claimant died still homeless a few years later. The problem of lag between constitutional guarantees and outcomes despite court actor intervention was not merely a prosaic matter of delay in hearings. It contributed in part to popular demand for radical reform of Kenyan Constitution, 2010, in conjunction with other factors of fluctuating commitments to constitutionalism amongst leading political actors becoming more evident during the first decade of its implementation.[437] In South Africa, it fed a discourse of negation as discussed below. Timing could therefore be considered a barrier to constitution building work of court actors. Moreover, a deeper concern was forged here, concerning how timing skewed the constitution-building work of court actors to reveal its differentiated impact on potential users and accentuated outcomes, as I discuss further below.

6.4 Constitution-building interpretation: dialogues and reflexivity

6.4.1 Dialogues

South African and Kenyan court actors outlined several premises to encourage dialogue as a distinctive method in their constitution-building work. Firstly, they ideated their constitutions as requiring courts and political branches to develop a vision of interactions and relations that both could facilitate. Typically, this meant the constitution was a special legal instrument and not merely a liberal instrument to limit governmental power. In both states, they characterised the constitution as transformative as shown above and in preceding chapters. Secondly, South African court actors more than Kenya counterparts, pushed the three branches to develop a vision of interactions and relations that modified traditional understanding of separation of power doctrines. Thirdly, all branches, state organs and levels of government could competently decide on and implement constitutional rules in authorised procedures and via procedures that may not be specifically authorised by the constitution. Additionally, court actors acknowledged that the new procedures were still evolving, including parliamentary legislative and oversight as well as executive decision-making procedures. Similarly, procedures for settling disputes at all levels of government and within specialised jurisdictions were also still

[436] *Government of the Republic of South Africa & Others vs Grootboom & Others* (2000) ZACC 19.
[437] Ghai, Yash "Constitutions and Constitutionalism: The Fate of the 2010 Constitution" in Murunga, Okello & Sjogren (eds) (2014) Kenya: The Struggle for a New Constitutional Order, London Zed Books, pp.119-143, concluding that "while at a formal level, many constitutional provisions were implemented, there is scant respect for the spirit and objectives of the constitution." p.138.

evolving and would take time to settle.[438] Fourthly, as both parliament and judiciary became assertive on the orientation of constitutional completion, avoidance of institutional collisions highlighted the significance of interbranch dialogue not only to facilitate formal enactment of legislation mandated by the Constitution, 2010, but additionally to ensure such legislation accomplished the purposes of constitutional change.

Dialogues could cover a spectrum of activity between court and non-court actors. [439] In South Africa and Kenya, they extended from random information-gathering seeking probative material which court actors could synthesise to inform their own decisions, to providing advisory opinions to guide political branches in their own decision-making; from feedback from other branches to court actors concerning the implementation of so-called structured remedies to extra-curial exchanges on collaborative co-design of judicial services in strategic planning meetings etc. It was possible from the case law to distinguish between two phases of dialogue – interpretation and remediation.

The case studies evidenced that South African court actors valued dialogues and dialogic comity with other branches. This was stated variously in obiter dicta, with at least one judge of the South African Constitutional Court appreciating dialogue as a civilised conversation ordained by the 1996 Constitution. [440] What was not explicitly clear was how court actors put dialogue into use and differentiated its utility. Evidence of this would have required access to judicial conferences for purposes of writing decisions, which was beyond the purposes of my dissertation. References to interbranch comity in Kenyan case law was patchier.

Roux portrayed dialogue as something court actors engaged in strategically, to share interpretive activity with other branches as part of "*methods of legal reasoning conscientious lawyers (judges, advocates and legal academics) should adopt if they want to contribute to the creation of (a fairer) a society*".[441] Hence, constitution-building dialogue was distinguishable as something wrought by a new, transformative constitution. To paraphrase the exposition offered by Fowkes, the Constitutional Court adopted a theory of constitutional change, and deliberately chose cases to precipitate a dialogic process aiming to secure a court order with a structured remedy. Fowkes downplayed the tensions involved in this constitution-building work, since both court and political actors were invested in the same transformation discourse.

In contrast, Kenyan constitution-building court actors viewed transformation as a partial, new desideratum of constitutional interpretation, but suggestions of strategizing behaviour were scanty. It is important therefore to understand that constitution-building dialogue in Kenya could take a form of freewheeler collaboration between court actors and other actors who wielded political power and control over public resources. These actors were more

[438] Wachira Maina (2020) The Decline and Fall of Electoral integrity, Nairobi, ELGA, p.56.
[439]See Bateup, Christine (2006) "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue" Brooklyn Law Review Vol.71, Issue 3, pp.1109-1180; See also L'Heureux-Dube, C (1998) "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" Tulsa Law Journal, Vol.34, No.1, pp15-40.
[440] Sachs, J in *Republic of South Africa & Others v Prince.*
[441] Roux, Theunis (2009) "Transformative Constitutionalism and the best interpretation of the South African Constitution: a distinction without a difference"? Stellenbosch Law Review, Vol.20 Issue 2, pp.258-285, p.260.

committed to optimizing forms of legalistic adjudicative relations, to crystallize principles of oversight and accountability in practical routines. In effect, these actors emphasized procedural compliance rather than flexible, dialogic comity. Consequently, Kenyan court actors undertook transformation fueled interbranch dialogues where procedural requirements of either branch permitted, free from the associations of panoptic common programs of constitutional change declared in South African obiter dicta. In some instances, court actors in superior courts objected to devoting time to dialogues, especially on remedial follow up, preferring to reinstate familiar rules of res judicata. In fact, legislative actors seldom met the informational, action and timing thresholds proposed by court actors, as discussed above. However, Kenyan court actors were able to engage optimally in limited constitution-building dialogues by structuring their information needs in the scope of discovery needed according to the circumstances, for instance where legislative actors requested advisory opinions,[442] or court actors submitted oversight reports to parliament.[443]

6.4.2 Reflexivity

Reflexivity in constitution-building interpretive activity would enable a more rigorous approach to decision-making, allowing adaptation by court actors according to self-observed effects of their constitutional change and continuity interventions. Despite this potential, evidence of reflexivity did not clearly emerge in the empirics in either South Africa or Kenya, mirroring the observation on experimental constitution-building above. (On this point though, I note that the scope of judicial decisions considered was also limited, though the main constitutional disputes cases since 2005 were considered).

If South African and Kenyan court actors evidenced greater reflexivity on their own decision-making, they would have revealed a questioning attitude to their complete investment in pursuing constitutional change as entrenchment of liberal constitutionalism in their contexts where liberal governance was historically absent. Which would have aided their ability to escape self-imposed ideation limits, to consider other understandings and approaches to constitutionalism, and adapt or reject them on their own terms.[444] On the contrary, court actors in both states did not fully interrogate their own advancement of liberal constitutionalism projects, which they took to be constitutionally ordained. This remained the case even as these actors deemed their respective constitutions to be non-typical liberal constitutions. Simultaneously, scholarship treated the respective constitutions as contradictory liberal as well as post-liberal, or hybrid instruments, indicating divisions on the issue. This does not mean there was no evidence of self-awareness concerning the limits of court-centric approaches. For instance, court actors routinely pointed out that legislated rules might matter more for transformation. Nonetheless, systemic reflexivity was largely missing concerning what other approaches to constitutionalism could imbue court actors with self-definition beyond liberal constitutionalism. I emphasise here that

[442] For instance, *In the Matter of the Speaker of the Senate & Another vs Attorney-General & 4 Others* (2013) eKLR reference No.2 of 2013.

[443] The Justice and Legal Affairs Committee of the National Assembly receives periodic status reports from the Kenya Judiciary. See http://www.parliament.go.ke/the-national-assembly/committees/12/justice-and-legal-affairs-committee.

[444] See Wilkinson Dowdle (2015) "On the limits of liberal constitutionalism: In search of a constitutional Reflexivity" Working Paper Series 2015/009, National University of Singapore, p.10.

transformative constitutionalism was simply used as a beltway to liberal constitutionalism, and even then, there was little reflexivity on whether this demanded a profusion of context sensitive interpretation methods, or positions where "*transformation would be best served by restoration of the scientific objectivity of law and purging it of pernicious political influences*."[445] On the other hand, other academics lamented that court actors could do more, for instance, to "*take the chance to flesh out the political theory that best interprets the Constitution*"[446]

The *Zuma* contempt decision stood out in the eyes of its critics for the extent to which court actors who were supposedly liberal with interpretational methods were inflexible about domesticating values and principles borrowed with minimal questioning from the western democracies. Other critics perceived sizeable unutilised room for court actors to question the connections between constitutional change and older threads to indigenous, native, or traditional values. If the South Africa Constitution, 1996, should elicit divergent court actor responses to its contradictions, its reflexivity enhancing potential was missed. Accordingly, this sub section found few answers from court actors to the question of what beyond liberal constitutionalism, is an appropriate, meaning legally robust, methodology of a reflexive constitution-building approach in a contemporary, deeply divided African state?

6.5 Constitution-building discourses and critiques

The constitution-building work of South African and Kenyan court actors spurred various discourses of constitutional change in which some strong critiques could be extrapolated. These discourses highlighted that the different forms of constitution-building had two dimensions – ideological and technocratic – in which critiques could be extrapolated concerning the utility and desirability of this constitution-building work. In this section, I shed some light on these critiques and defer critical analysis of utility and desirability to the next chapter.

As noted, several scholars encouraged South African and Kenyan court actors to first formulate political theories to build or prioritise premises for constitutional change and continuity, based on which they could thereafter ideate constitutional change and link it to preferential outcomes. In chapters one and three, I highlighted the pressures on these court actors to prioritise values of human rights, democracy, and institutional arrangements like devolution of power.[447] These discourses went on to encompass encouragement for court actors to think imaginatively about ways to evidence, or to respond to emergent evidence concerning their constitution-building outcomes. South African court actors were evaluated positively on their decisions or jurisprudence on the death penalty, gay rights and socio-economic rights, which was said to best characterise "*African transformative pragmatism*" meaning *a strong anti-subordination principle, the*

[445] Van der Walt, AJ (2006) "Legal History, Legal Culture and Transformation in a Constitutional Democracy" (12-1) *Fundamina* pp1-47. Walt argues the view relied on an "*assumption that apartheid was an ill-conceived political ideology that only tainted the law superficially: a problem that could be rectified simply and cleanly through surgical excision of all apartheid laws from the legal system*." (p.6).
[446] See Roux, Theunis (2009) supra note 441, at p.284.
[447] See for instance, Kangu, Mutakha (2015) Constitutional Law of Kenya on Devolution, Strathmore University Press, Nairobi, arguing for devolution to be declared by courts to be part of basic structure of the 2010 Constitution of Kenya, pp.106-113.

communitarian qualities of ubuntu, pluralism, and some caution" with room for improvement on gender discrimination, freedom of expression, religion and affirmative action.[448] Other assessments praised the decisions of the same actors on housing, same-sex marriage, and access to HIV/Aids treatment, which had moreover assisted "*civil society groups in driving meaningful social change, even in the face of a reluctant ruling elite*."[449] Similarly assessment for Kenya were offered by Ghai[450] and Gathii.[451]

At the same time, an ideological slant could lead to potentially radical directions if pressed further. Consider for instance, the implications of court actors pushing substantive equality to reimagine outcomes of transformative constitutionalism, by addressing wheat they considered to be "*patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved.*"[452] Or reimaging what institutional reform was needed, where per Chaskalson, CJ "*Transformation involves not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to 1994 where largely under the control of whites and, in particular, white men*."[453] Yet while human rights work was used to critique the link between ideation and production of meaningful constitutional change, it tended to be absorbed in imagining measurement criteria. Here it is worth citing at some length the summation of the related discourse by Klug. Klug observed that the nature of rights claims dealt by the Constitutional Court had drawn it "*into the centre of struggles over 'delivery'*" and pushed it to shirk a purely doctrinal approach in favour of "*institutional pragmatism*" in the way it "*explicitly sees litigation and its role*".[454] Elsewhere, however, Klug found that "*Political parties, both in and out of power, challenge the legitimacy of the constitutional order and assert that its failures are a product of its origins rather than its implementation*."[455] As a result, Klug found that a "*rhetoric of nullification*"[456] of the 1996 Constitution had arisen from "*failure to implement the promises of delivery and transformation*."[457] Similar critiques were evidence din Kenya,[458] culminating in the "building bridges initiatives" for radical change to the 2010 constitution.

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[448] Kende, Mark (2009) Constitutional Rights in two Worlds: South Africa and the United States, Cambridge University Press, p.287.
[449] Dixon, Rosalin & Roux, Theunis (eds) (2018) Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence, Cambridge University Press, p.2.
[450] Ghai, Yash "Constitutions and Constitutionalism: The Fate of the 2010 Constitution" in Murunga, Okello & Sjogren (eds) (2014) Kenya: The Struggle for a New Constitutional Order, London Zed Books, pp.119-143.
[451] Gathii, James (2016) "Assessing the Constitution of Kenya 2010 five years later" pp.337-359.
[452] See Sachs, J in *Minister of Finance and Another v Van Heerden* (2004) 11 BCLR 1125, at para 142.
[453] See *Van Rooyen & Others v S & Others* (2002) 8 BCLR 810 at para 50.
[454] See Klug, Heinz (2010) Finding the Constitutional Court's Place in South Africa's Democracy: The Interaction of Principle and Institutional Pragmatism in the Court's Decision-Making" Constitutional Court Review, Vol.3 pp1035, at pp15, 25.
[455] Klug, Heinz (2016) "Challenging Constitutionalism in Post-Apartheid South Africa" Constitutional Studies Vol.2, at p.41.
[456] Klug (2016) supra note 455, at p.56.
[457] Id, at p.50.
[458] See Ghai, Yash (2014) "Constitutions and Constitutionalism: The Fate of the 2010 Constitution" in Murunga, Okello & Sjogren (eds) Kenya: The Struggle for a New Constitutional Order, London, Zed Books, pp.119-143.

It was plausible to observe two discourses exhibited above. One discourse invoked critiques of progress and limitations in devising and implementing the products of constitutional change. It typically adopted a rights-centric prism including the activism-centric perspective unearthed in chapter one. Yet it was preoccupied with a language of evidenced outcomes, assessments, and feedback. Accordingly, what was exhibited was a technocratic discourse of constitution-building. In the South African case study, Klaaren vividly illustrated this discourse in an analysis of the rationalisation arguments around the 17th amendment to the South African Constitution, 1996, and similarly Gathii and others for the same in the Kenyan case study. In addition to elevating assessments of success and failure of the constitution-building work of court actors, this discourse dwelt too on recommendations of how to improve their delivery of constitutional change.

The second discourse hinted at by ideological critiques of the constitution-building work of South African and Kenyan court actors identified clear hegemonies and peripheries, in terms of who and what was addressed, and even privileged, by this work. Starting with what was addressed, technocratic discourses revealed the pressure on court actors to invest in the evidence base of products of constitutional change. Consequently, process-based constitution-building gained a hegemonic position in the work of court actors, particularly in ensuring constitutional change spurred rationalisation that allowed court and non-court actors to access relevant technical and technocratic expertise. Considering the evidence in the case studies of pressure to produce measurable legislation to flesh out constitutions, in conjunction with suggestions that legislation diluted constitutional principles or delayed their actualisation, it was plausible to conclude that while technocratic lenses preferentially biased outcomes of constitutional change that could be evidenced, these lenses could also favour and sustain minimalist and superficial constitution-building ideation, methods and outcomes. Pressure for technocratic pressures came from court and no-court actors who could influence interpretive activity to lean on empirical analyses and uses of data for problem-solving approaches, as well as actors who could conduct related appraisals. This further meant that a problem of constitution-building work, leading to its failure, could be lack of capacity, skills, or willingness amongst court actors to use information or data, and other emerging forms of feedback. This sounded a lot like formalism and legalism, which inhered in the legal or judicial culture of the old constitutionalism. On the other hand, success of constitution-building might mean that court actors were able to obtain and utilise detailed specialist knowledge. More deeply, this meant court actors were able to have and utilise the relationships with non-court actors that could enable them to access and use specialised knowledge. For Fowkes, this obviously meant changed judicial-executive relations in South Africa, changes which therefore deserved greater visibility in research.[459] Yet, this could also accurately refer to relations which civil society actors who appeared in myriad constitution-building case applications as multiple and repeated petitioners as well as amici curiae. These latter actors could therefore play distinct roles, including those that eventually formed the hegemony-periphery axis of who was addressed by constitution-building work.

[459] See Fowkes, James "Re-imagining Judicial/Executive Relationships and their Future in Africa" in Fombad, Charles (ed) (2016) Separation of Powers in African Constitutionalism, Stellenbosch Handbooks in African Constitutional Law, pp.205-225.

As seen in the Kenyan case study, a former Chief Justice appealed to an alliance between constitution-building court actors and civil society actors with the intention of forming or consolidating certain ideological lenses of their constitution-building work. In the South African case study, we observed antagonistic critics to this work pointing out its ideological bias as ostensibly favouring alien concepts. If not all among diverse publics could mount campaigns for court actors to influence constitutional transformation, then the lenses above illuminated the greater inclusion and influence of those actors who favoured technocratic dimensions of constitution-building. If we look at its ideological dimension more closely, we can discern too that civil society actors pushed court actors to articulate constitutional change in terms of hegemonic discourses of human rights, democracy, devolution of power etc., with liberal rationalism in focus. This precluded potentially experimental constitution-building establishing a stimulus for other proliferating constitutional agendas and claims in novel legal fields that could not be fitted into that focus. On the other hand, notions of diverse publics driving constitutional change in more expansive and radical directions could encounter court actors who prioritised technocratic approaches due to some of the reasons I mentioned above which were centred on the weight of bureaucratic decision-making informed by considerations of policy interest and evidence bases.

The main purpose of elevating ideological perspectives of constitution-building via diverse publics as catalysts was to couch the work of court actors in normative considerations that differed from earlier justifications for constitutional change in the old constitutionalism. However, diverse publics brought competing pressures of multiple political agendas that reinforced internal disagreements amongst constitution-building court actors, in conjunction with adversarial procedures of argumentation. Rather than provide objective assessment of ideological ideation, the most promising ideological perspectives could be those profiling politically significant ideas of the day whose visibility was enhanced in the kind of petitions and applications that hegemonic insiders of diverse publics brought to court actors for resolution and remediation. As a result, constitution-building work of court actors released a profusion of debates over omissions, both conspicuous and implicit, concerned with the injustice of leaving various matters in the peripheries of institutionalisation of constitutional change. Accordingly, any expectation amongst diverse divided publics that the respective South African and Kenyan constitutions will be implementable will also cast into relief the residual problem of constitutional centring and marginalisation. It will spur a perceived legitimisation and delegitimization of assorted constitutional claims. Indeed, constitutionalising a broad scope of constitutional change in South Africa and Kenya premised on a claim that varied problems of the state are resolvable by constitutional action, also spawned demands for further constitutional change to eliminate residual problems of peripheralized issues, and a further constitutional discourse of affirmation and negation of constitutional change projects.

6.6 Conclusion

A consistent theme of the South African and Kenyan case studies was that constitutional change triggered by and pursuant to the 1996 Constitution and 2010 Constitution respectively, had potential to power broader societal changes. What could court actors could do to institutionalise this broader change? The answer depended on how these actors

could build understandings of constitutionally required changes in institutions, rules and procedures, i.e., in the system of government that embodied the new constitutionalism.

Based on the case studies, various forms of constitution-building emerged with different rationalising critiques. Some, like process-based constitution-building became entrenched. Others, particularly experimental constitution-building, remained patchy. Consequently, empirical case studies suggested that claims of peripheral actors who pushed radical concepts and ideologies of constitutional change within an under-development experimental form of constitution-building, were less likely to cohere with constitution-building court actors over time via adversarial proceedings. Analogously to their constitution-making roles when constitutional discourses could be very polarising,[460] constitution-building court actors in South Africa and Kenya offered avenues to dampen constitutional disagreement in conjunction with linking constitutional change to practical outcomes. This probably meant outcomes that lent themselves to technocratic evaluation. The extent to which de-constitutionalising of radical claims by displacing them to peripheries of constitution-building was a problem, was further obscured because of the emergence of hegemonic constitution-building discourse and critique. In empirical terms, it was relatively difficult for court actors to move from technocratic process-based constitution-building, which was embedding a new legal culture, to more ideological, experimental constitution-building. Furthermore, this legal culture with its limiting effect on reflexivity amongst court actors was exhibited in both South Africa and Kenya despite differences in organisational features of the institutional judiciary. Consequently, neither their autonomous initiatives nor their structured processes and relations with significant non-court actors contained incentives to enable South African or Kenyan constitution-building court actors to move far from technocratic perspectives of constitution-building. In the next chapter, I will analyse this extent in terms of the emergent tensions of new and old constitutionalism.

[460] Debates on the constitution in divided polities could inflame the disagreement or create new sources of polarization. See also Lerner, Hanna (2011) Making Constitutions in Deeply Divided Societies, New York, Cambridge University Press. Noting examples such as Iraq and Afghanistan, where the "debate over the constitution revealed deep divisions among the framers with regard to foundational norms and values that should underpin the state" p.2.

Chapter Seven: Constitution-building and the production of a new constitutionalism in South Africa and Kenya

Contents

7.1 Introduction

Initiating changes in legal and political culture, and rebuilding fundamental rules and institutions, are some of the most complex aspects of any societal transformation. They require changes in behaviour, expectations, and normative commitments, both for court actors and political actors, as well as the generation of discourses for ideating and rationalising those changes, not to mention significant resource and capacity mobilisation. Against heavy odds given disagreements on constitutional norms, South Africa and Kenya embarked on societal transformation by promulgating constitutions, under which national actors linked this ambitious change to attainment of assorted constitutional obligations for its institutionalisation. Codification of contradictory and ambiguous constitutional promises, however, simply precipitated proliferating expectations of diverse supportive and sceptical publics for differentiated experiences of the impact of constitutional changes. Consequently, the consolidation of constitutional changes that the respective, expansive but contradictory South African Constitution, 1996, and the Kenyan constitution, 2010 ushered in, were bound to be conflictual, convoluted, and contingent on new modes of producing agreement on secondary rulemaking and convergent constitutional discourses. As the empirical investigations in this dissertation revealed, this complexity

was detectable in discursive contestation concerning how and why constitution-building court actors could make the constitutions in discussion to produce the outcomes that diverse publics desired.

These diverse publics have pushed South African and Kenyan court actors into forms of constitution-building work that are intended to provide responsive arenas and avenues to support reflective consideration regarding the deeply problematic difficulties of reconstructing a constitutional order. This provision is both a highly valuable contribution of constitution-building court actors, as well as a source of concern concerning the success of constitutional projects for societal transformation in these states.

In this concluding chapter of the dissertation, I revisit this aspect of availing arenas for deeper constitutional reflection as a significant contributions of court actors, in 7.2. I address the significant scepticism regarding whether such contributions are practicable and realistic considering organisational and discursive limits. In 7.3, I revisit the idea of strategizing constitution-building court actors and question whether it has helped these actors to make their respective constitutions to produce preferential outcomes, if at all. On the other hand, even attenuated contributions may be desirable for purposes of managing tensions of constitutional change and continuity against backdrops of fundamental disagreement on constitutional norms in South Africa and Kenya. With this guiding perspective, and as concluding analysis to my dissertation, I offer summative reflections on the nature of the new constitutionalism produced by constitution-building court actors in South Africa and Kenya.

7.2 Reappraisal of constitution-building court actor roles and contributions

In chapters two and three, several empirical and normative claims surrounded the roles of court actors as constitution-building actors. A consistent overarching claim was that internal transformation of court actors, referring to their institutional culture and interpretation competences, had the potential to be a powerful force for broader societal change by increasing the supply of "good" case law and constitutional decision-making. Another was that constitution-building court actors were engaged in constructing interpretive activity and its discursive elements in ways that enabled convergent discourses amongst the governmental branches, concerning the definitive requirements of constitutional change. A third claim, which was closely related to the second, was that court actors were strategizing with one or more long-term frames of constitutional change, which they deployed in individual cases. Constitution-building could therefore be partly constitutionally ordained and partly a strategic choice of court actors who could muster its projects. Furthermore, from a normative perspective, constitution-building court actor roles and contributions were desirable based on arguments of strengthening a new constitutionalism. Previous chapters considered the practices with which court actors were engaged in South Africa and Kenya. In this section, I reprise the three empirical claims outlined above and reflect on their potential and limits.

7.2.1 Constitution-building court actors and their critical transformation discourses

The claim that institutional change within court systems had the potential to be a powerful force for change both in increasing the supply of good case law and decision-making could be supported if the objective was to consider ways to enhance motivations for value-based judgements, irrespective of evidence of their material effects. Going by the

empirics, South African and Kenyan court actors became preoccupied with internal judicial culture change via shared notions of transformative constitutionalism.[461] As typically framed, transformative constitutionalism had functional value; it would induce internal changes that cascaded to government system change, and onward to wider societal changes.[462] Nonetheless, the empirics suggested that links between this internal change and broader societal changes while intuitive, remained obscure. Two propositions follow below: Firstly, internal changes created opportunities for court actors to exercise agency in leveraging practical outcomes of constitutional change by enlisting or being enlisted by political and civil society actors, but links between internal judicial reforms and broader changes depended on institutional contexts. Secondly, by prioritising instrumental understandings of transformative constitutionalism, court actors dampened its driving forces for more radical orientation of the broader outcomes sought by peripheralized diverse publics.

Judicial culture transformation was evidently addressed through institutional reorganisation via efficiency and effectiveness enhancing changes to constitutional rules, legislation, judicial practice rules, and in documents presented as judicial strategic plans. By linking judicial reorganisation to precipitation of the rebuilding of a new constitutional order, court actors adopted ambitious goals that would need cooperation with non-court actors to develop a constitutional law of transformation. Yet, from repeated obiter dicta, the most vivid aspects of transformation discourse were more concerned with limited discursive elements of constitutional interpretation built on injection of rational choice and specialisation into judicial work. From this perspective, transformative constitutionalism discourses shifted to instrumental techniques of interpretation. This was often done not so much to manage interpretation conflicts, but to encode and to vindicate their understandings of constitutions that demanded substantival motivation of norms and value judgements in secondary rule making, as satisfied by abandoning formalism and legalism, and embracing more creative interpretation methodology. In fact, South African and Kenyan court actors tended in varying degrees to associate formalism and legalism with antecedent constitutional orders, which were to be completely rejected or revised.

In fact, continuity of formalism and legalism was inevitable in part because the respective constitutions legitimised it in constitution-making compromises, to preserve accrued legal rights, privileges, and immunities precisely to limit or circumvent effects of constitutional change.[463] Continuity entrenched in this manner encompassed the relevant legal norms and whatever precedential understandings court actors had previously constructed, concerning their prescriptions. From this perspective, court actors preoccupied themselves with a paradox of the interface between legal continuity and constitution-building. The latter amplified backward and moreover inward-looking judicial interpretation,

[461] As defined by Klare in Klare, Karl (1998) "Legal Culture and Transformative Constitutionalism" South African Journal on Human Rights, Vol.14, No.1 pp.146-188.Roux, Theunis (2009) "Transformative Constitutionalism and the best interpretation of the South African constitution: distinction without a difference?" Stellenbosch Law Review Vol.20, No.2 pp.258-285.

[462] See Roux, Theunis (2009) "Transformative Constitutionalism and the best interpretation of the South African constitution: distinction without a difference?" supra, pp.260-62.

[463] Klug, Heinz (2016) "Challenging Constitutionalism in Post-apartheid South Africa" Constitutional Studies Vol.2, pp.41-62, at p.43.

aided by the fact that doctrines of stare decisis also were constitutionalised, while constitution-building demanded an external, future oriented discursive outlook. How to resolve this paradox preoccupied the constitutional discourses court actors engaged in, with transformative constitutionalism in focus.

Concurrent with the discourse on constitutionalism, key issues of constitutional change between 1996 and 2010 to date, when the respective constitutions of South Africa and Kenya have been in force, involved questions of how court actors and indeed legal scholars could institutionalise constitutional change promises, via interpretation, legislating and recreating various institutions at all levels of government. Court actors were therefore drawn into discourses concerning the proper normative and other dimensions of this recreation. In some instances, this required court actors to provide neutral arenas to adjudicate constitutional precommitments as national actors confronted opposed viewpoints, hence echoing familiar legality aspects of liberal constitutionalism. In other instances, court actors while dealing with fundamental disagreements on constitutional norms, were pushed by diverse publics to contribute arenas for specification of a superior constitutional ethos to play out. Opportunities arose from the proliferation of new claims and demands under expansive constitutions, some of which fuelled the proliferation of plural dispute resolution centres and peripheries. From this perspective, the empirics highlighted much room for court actors to rely on radical understandings of transformative constitutionalism that some diverse publics wanted to recentre. Doing so would mean court actors would surface alternative understandings of their respective constitutions as transformative charters that radically change existing assumptions about constitutions, including either liberal or indigenous conservative assumptions. This kind of radical discourse would approximate a critical transformative constitutionalism, where the proposition was to embrace indeterminacy, questioning reification of rights, taking seriously the limits of law, or accepting fundamental contradictory nature of constitutions.[464]

From the foregoing, internal judicial culture change, if meaning something as technical and inconsistent as abandonment of formalism and legalism, is hardly seriously relatable to produced effects on the system of government and broader societal changes, which could arise from myriad other factors. The more pertinent point is that constitution-building clearly required South African and Kenyan court actors to make analytical sense of the gap between what is and what might be. One sense of this was generated by discourses surrounding formalism, legalism, and legal continuity, and another sense by familiar discourses of liberal constitutionalism. Because the latter might be inapt for deeply divided societies, and because transformative constitutionalism was espoused to make sense of postliberal constitutions, there was room for other kinds of ideation discourses, including in more radical directions. It was intuitive that court actors could contribute in diverse ways to transformation discourses, starting from instrumental ones, like pointing out what should go into specific legislation, creating rules to fill a constitutional gap, ironing out standards and rationales for balancing commensurable values, and contributing value judgements that could shape societal attitudes and behavior. The instrumental premise is that these kinds of case-by-case interventions, whether random or selected discretionally,

[464] Marle, Karin (2009) "Transformative Constitutionalism as/and Critique" Stellenbosch Law Review, Vol. 20, No.2, pp.286-301, at.p.294.

would aggregate to make a new constitutional order more legally explicit. What was missed was a critical discourse of what transformation means when confronted with structural and other problems of deeply divided societies like South Africa and Kenya.

7.2.2 Constitution-building court actors and their convergence discourses

The claim that court actors pushed for joint interpretive activity to spur convergence discourses was central to the definition of constitution-building propounded by Fowkes after observing the work of the South African Constitutional Court.[465] This claim would initially require court actors to ideate an understanding of their constitution that they subsequently deploy to leverage the understandings of other actors, particularly those in political branches. Convergent discourses on why and how to institutionalise the changes required by the respective constitutions of South Africa and Kenya, would compromise the critical outcome envisaged here. In addition to illuminating constitution-building as a concept of organising interbranch and institutional relations via legal discourses at a universal level, convergence discourses served elaborative functions regarding contested norms and issues that were concurrently instrumental to address some root causes of deep societal divisions. By virtue of such discourses, constitution-building could contribute to minimised disagreement on constitutional norms, less interbranch competition in elaborating constitutional change institutionalisation, and more convergent views on the functions of public law in deeply divided societies. From such perspectives, the convergence aspect connoted court actors animated by their own trusted understandings as well as triangulated, repurposed understandings of diverse publics and constitutional audiences as to why a constitution was important.

From the empirics, convergent discourses hinged on two themes – propagation of human rights, democracy, and rule of law propositions, all of them constitutionally stipulated as blueprints or cornerstones of the new constitutional order, and incrementalism as a theory of constitutional change. As discussed in chapter two, incrementalism was relevant on account of pervasive deferral clauses in the respective constitutions, and as a mode of constitutional change observed in deeply divided societies. It also invoked normative concern for democratic deliberation. In the empirics, court actors were observed to prioritise convergence discourses to, among other things, firstly, to embed the constitution in social debates as symbolically unifying of divided diverse publics, akin to all citizens sharing common features and history by virtue of framing a universal constitution; secondly, to recognise fragile institutional commitments to constitutional obligations and therefore to require joint actions of all branches, mediated by legal discourse e.g., interpretive activity, "mutual meanings" [466], or common constitutional projects to improve human flourishing.

In both case studies, court actors were praised by domestic and international constitutional audiences for their human rights, democracy, and rule of law discourses. On the other hand, there was no evidence that South African or Kenyan

[465] Fowkes (2016) supra note 132, at pp.12-15, 41-3, 72.

[466] Mutual meanings can be divided into procedural and substantive categories, and they often are plausible and broad, meaning they are also a strategy centred on avoiding the principled conflict at heart. See Whittington, Keith (1991) Constitutional Construction: Divided Powers and Constitutional Meaning, Cambridge, Harvard University Press, pp.25, 35, 223-228.

court actors could themselves agree on convergent legal meanings of these terms. On the contrary, the case law, which was marked by majority and plurality decision-making in superior courts, revealed familiar disagreements amongst court actors on the rationales, purposes and limits of such terms. Hence, converging discourses on this front can only stand on the proposition of incompletely theorised abstractions on which everyone superficially agrees to mask constitution making disagreements, and thereby avoid need for more substantive agreement forestalling formalisation of constitutional change.[467] A broad consensus to advance constitutional change incrementally, predominantly via legislation, was evident. Even Kenyan court actors who never alluded to common constitutional projects, routinely pushed for legislation, including as means to avoid constitutional amendments. Here, convergence discourses appeared to operate by means of a hidden hand in the structural bedrock of constitutional governance it nurtured. It was up to courts and the political actors to develop and continuously renegotiate a mutual understanding of what sort of constitutional cooperation they wanted to achieve. Consequently, convergence discourses emerged as phenomenological constructs. There was little evidence of explicit formula for legislative-executive-judicial relations which determined the mutual contributions to convergence discourses, and this view was backed up by curial statements of court actors. As the *Zuma*[468] and *BBI cases*[469] demonstrated, even if broad consensus on incrementalism currently existed, placing supreme confidence in communicative reason of liberal constitutional paradigms was not likely to win all diverse publics, some of whom remained deeply invested in alternatives and looked to court actors to also provide spaces to reason out those alternatives.

In addition to the above instrumental functionality, therefore, other diverse publics saw room for court actors to stress production of convergence discourses as the discursive elements of a new constitutionalism as an authorising source for deeper and larger inclusive political measures, and furthermore, as sources of deeper legal and political critique. In both instances, court actors were asked to increase their appetite for experimental constitution-building, a demand that was particulalry vivid in the South African case study. In Kenya, court actors were exhorted to push for convergence discourses on public participation in governmental decision-making and participatory democracy. However, as seen in both empirical chapters these discourses also stressed measurable dimensions of the conceptual outcomes.

Regarding the production of convergence discourses as sources of political critique, the point was to use case law as windows to assess connections between bureaucratic and political discourses and reduction in social inequalities and marginalisation. These could be done by profiling cases that required political actors to provide masses of evidentiary information that diverse publics could dissect. This was information that might be difficult to obtain by other methods

[467] Sunstein, Cass (1994) "Incompletely Theorised Agreements Commentary" Harvard Law Review Vol.108, pp.1733-1772, at pp.1735-6.
[468] *Zuma vs Secretary of the Judicial Service Commission of Inquiry into Allegations of State Capture* (2021) ZACC 18.
[469] *Attorney-General & Others vs David Ndii & Others,* Petition No.12 of 2021 (Consolidated) Supreme Court of Kenya.

except litigation. In practice, opinions of court actors could become points of embarkation to fuel new pressures and demands for actualizing constitutional promises.

Undoubtedly, convergence discourses will remain a feature of the work of constitution-building court actors, and courts have practical and normative reasons to remain committed to them in contexts of unfolding fundamental disagreements on constitutional norms and issues. The proliferation of process-based constitution-building is foreseeable here. On the other hand, convergence discourses will remain conflictual because diverse publics will continue to disagree on the evolution, timing, and impact of incremental change within liberal paradigms. Process-based constitution-building will not escape the multiplicity of such disputes. Furthermore, although the production of convergence discourses hinted at crises that might potentially heighten calls for radical reforms of existing constitutions of South Africa and Kenya respectively, it is important to underline that it also revealed a defensive convergence of court and political actors in both states against threats from outsiders and nominal insiders. Astute court actors and political actors who instrumentalise convergence discourses can elicit more institutional protection for their existing understandings of the constitutional settlement for societal change, but this limits the potential for legal discourse to mediate tensions of constitutional change and continuity.

7.3 Constitution-building court actors and strategizing claims

Claims that court actors were strategizing pushed by Fowkes and Roux concerning constitution-building work of the South African Constitutional Court as evidenced in specific cases, but their point that strategizing was implicitly required to leverage real political actors toward actual problem-solving convergence dialogues, could extend the claims to other courts. On the other hand, there would be several reasons to be sceptical of claims about strategizing constitution-building court actors. Some doubts would flow from the organisational and discourse limits proposed above. Others would pivot on the nature of strategizing behaviour and its demands on court actors. Yet others would hinge on acceptability of strategizing in relation to its outcomes and beneficiaries. After all, if court actors can strategize to link their respective constitutions to their own preferences for constitutional change outcomes, then the question begged is why not aim for more radical or even paradigmatically differently conceptions of constitutional change, i.e., beyond an argumentatively inapt liberal paradigm? Which assumes strategizing could implicitly enable court actors to systematically explore other alternative theoretical approaches. The scepticism warranted interrogation of the plausibility of strategizing claims more important because of the potential range of choices and outcomes that these claims obscured.

7.3.1 Strategizing court actors: theory and practice

As a caveat, strategizing theories emanated from political science and strategizing might be conceptually unclear in terms of legal standards by which to evaluate it. However, a legal evaluation was unnecessary since the point is to interrogate how strategizing as used in claims concerning outcomes of legal development, could explain constitution-building outcomes as conceptualised in the dissertation. Having said that, I recognise that Fowkes and Roux approached strategizing in part from American legal realism and positive political theory backgrounds. Strategizing behaviour of court

actors had been theorised, at least in US contexts, from public/rational choice and socio-psychological perspectives.[470] Moreover, theoretical accounts alternating between focussing either on internal decision-making dynamics or judicial politics in limelight cases, or on a range of judicial behaviour in relations between courts and other branches, had generated trends to unified frameworks.[471] From this perspective, Fowkes offered a strategic account describing the methodology used by the South African Constitutional Court to understand the range of options that would contribute to development of constitutional law via interdependent relationships with other branches, essentially fronting rational choice understandings alloyed with legal realism. Roux additionally highlighted that strategizing by court actors, labelled as pragmatism, helped to avoid retaliation during their formative years, even as they maximised on Dworkian morality in specific cases. As Epstein and Knight underlined, in addition to strategizing being anchored in specific interactions, it could be investigated to explain the preference formation processes court actors utilised to affect the choices of other actors in the political branches, thereby contributing to historical-interpretive approaches to understand the development of the content of constitutional law.[472] The arguments that certain interactions explained the interpretive activity of constitution-building court actors and possibly the rightness of their case law, made strategizing implicit in constitution-building work, if not quite explicit in selected instances.

From the above, the main theoretical understandings which frame extant empirical claims of strategizing constitution-building actors in South Africa and Kenya, are that relevant strategizing behaviour of these actors is exhibited, firstly, in their leveraging strategic interdependent interactions to influence other branches, secondly, in their formation of preferences for certain outcomes in the development of law, and thirdly, in combinations of the two. Additionally, the concern remains with rational choice models, dispensing with judicial politics and socio-psychological explanations of court actor preference formation. In the characterisation by Fowkes and Roux, strategizing in interdependent interactions, which they claim were embodied in dialogues crafted to building convergence discourses, would consist of court actors directly or indirectly emphasising and prioritising achievement of a maximum of their preference outcomes in cases before them, against a minimum of obstruction from and deference to political branches. For these claims, moreover, preference outcomes desired by court actors overlap with axioms of the liberal constitutional paradigm.

The empirics offered evidence of South African court actors explicitly acknowledging their construction of interdependent interactions via civilised conversations. Moreover, there was evidence of their using these dialogues to autonomously push their preferences, for instance in *Sarrahwitz*,[473] *Zuma*[474] and similar cases. In contrast, the empirics showed Kenyan court actor ambivalence about dialogic interactions and that interbranch interactions of court actors and

[470] Epstein, Lee & Knight, Jack (2000) "Toward a Strategic Revolution in Judicial Politics: A Look Back, A look Ahead" Political Research Quarterly, Vol.55, No.3, pp.625-667, at p.627.
[471] Epstein & Knight (2000) supra note 470, at p.637.
[472] Id, at p.643.
[473] 2015 ZACC 14
[474] (2021) ZACC 2

political branches were sometimes acrimonious to a degree not witnessed in South Africa. Such differences could be attributed to differentiated system of government designs. The South African Constitutional Court could be convincingly observed to manipulate processes of repeated interaction with political branch actors, both in interpretation and remediation stages of assorted constitutional applications. Repeated interactions provided the contingency for strategizing behaviour for rationalising court actors. If we distil and iterate the interactions as a crafted contribution to convergence discourses, we can agree with Fowkes that strategizing behaviour would be an emergent characteristic that explains the outcomes of constitution-building work of court actors, and therefore integral to its signature scheme of ideation, processes, and outcomes.

For Kenya, on the other hand, strategizing would hinge more on processes of forming court actor preferences, since the empirics suggested Kenyan court actors were ambivalent on dialogues and strategic interactions. Indeed, other analyses of limelight decisions, such as the invalidation of the 2017 presidential elections on constitutional grounds, suggested Kenyan court actors were not embedded in material power maps and their decision-making processes, i.e., in the dominant political constitutional, despite their formal procedures giving an impression of determinism. We know from the strategy documents published by the Kenyan institutional judiciary that its administration adopted organisational strategy to deploy practices of transformative constitutionalism across all courts. Transformative constitutionalism, an approach first used in South Africa, from where Kenyan court actors borrowed it, would require court actors firstly, to depict an array of pragmatic considerations that societal, organisational, and other institutional contexts shape, and secondly, to form decisional preferences accordingly. By abiding with those preferences in cases before them, court actors could in theory compel choices amongst contradictory understandings of the political branches, for purposes of orienting constitutional change toward desired outcomes. Transformative constitutionalism gave interpretive guidance, but its methods did not necessarily require dialogues or strategic interactions with political branches. From an interpretive-historical approach, we can discern specific instances where Kenyan court actors referenced background preference transformative constitutionalism to form prior preferences that they deployed through their constitutional adjudication. However, the case law cherry picking would offer no firm conclusion on strategizing behaviour across the courts, and assessing this was not entirely germane to my dissertation.

7.3.2 Strategizing court actors: objections and counterarguments

The empirics suggesting that South African and to a less extent Kenyan court actors could initiate interactions with other actors to pursue objectives, not for their own sake, but with reference to their effect(s) with political branches, could also be interpreted using alternative explanations than strategizing. For instance, their elementary convergence discourses could be considered as a heuristic building block of interbranch interactions generally, and not necessarily as something aimed at responses to assorted drivers of constitutional change. However, the contingent explanation of discourses demonstrated their effective association with genuine constitutional issues, even if such discourses could address a variety of non-constitutional norms and issues. Taking this chain of arguments further would generate tautology. Furthermore, the discourses analysed were necessitated by a plausible reason that they were needed precisely because

it was not possible to resolve many assorted fundamental disagreements on the myriad claims proliferating in the wake of codification of new constitutions. Consequently, these discourses demonstrated that having courts at centre or as drivers helped to reduce the intensity of constitutional gridlocks in deeply divided societies. Individual cases like *Sarrahwitz* showed that convergence discourses mattered because they contributed to a specific change in secondary rules for constitutional reasons that a court prescribed on its own amotion. Similarly, preference formation processes could apply across the board and not only for judges, but also for litigating parties, some of whom would be representatives of state organs. What is suggested is some cross fertilisation and calculated tactics to counter argue or pose searching questions in adversarial proceedings. Accordingly, strategizing via preference formation processes could be nothing more than a truism of lawyering. Hence, claims of constitution-building court actors strategizing do require narrowing down to why and how these actors manifested a problem-solving attitude that often exceeded the specific issues litigants filed, sometimes even necessitating modification of evidentiary and procedural rules. For the sake of theory-building, I proceed on the main lines of strategizing in interactions and preference formation without delving into granular detail.

On this basis, counterarguments concerning strategizing constitution-building court actors could be weighed at theoretical and practical levels. For the former, counterarguments against the theory of strategizing constitution-building court actors become pertinent in three forms of determinism, structuralism, and objectivity of political ideology. Determinism, which already surfaced in chapter two as rule scepticism, would still question the possibility of judicial decision-making determining actual outcomes, especially on a scale of societal transformation.[475] The counterarguments would still apply to the case studies. For instance, specifically for South Africa, contextual studies of the productivity of "strategic litigation", which also trended in Kenya, questioned whether strategizing by court actors, dubbed judicial activism, could determine material outcomes, or transformed social ideas and ideals,[476] even after accepting it could produce secondary rulemaking.[477] Additionally, the theoretical assumption concerning the development of law as underscored in the analysis by Epstein and Knight above, typically look at development of law as a linear cumulative system, and therefore too easily discounted by theoretical counterarguments of unpredictability of constitutional change, which I discussed in chapter two. Judicial strategizing could never successfully create certainty for constitutional change even if specific cases could be steered. Moving to structuralism, the pertinent counterargument is that nonlegal surrounding constraints and incentives are more decisive factors for production of preferential outcomes of strategizing, than strategizing per se. In other words, diametrically opposed results could flow from exactly similar strategizing in two

[475] See Tushnet, Mark (2005) "Critical Legal Theory" in Golding, Martin & Edmundson, William (eds) (2005) The Blackwell Guide to the Philosophy of Law and Legal Theory, Oxford, Blackwell Publishing, pp.80-89, at p.81.
[476] See Dugard, Jackie & Langford, Malcolm (2011) "Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism" South Africa Journal of Human Rights, Vol.27, pp.39-64. For instance, the authors noted that strategic litigation could produce secondary rulemaking with an impact in legal recognition of minority rights without visibly changing a massive gulf between this legal recognition and attitudes of many South Africans, at.p.55. On the other hand, citing another study, the authors argued that even judicial decisions contrary to propositions of promoters of social change could spurt transformative social changes by increasing public visibility of a problem (p.64).
[477] Which was the counterargument to determinism by Schauer. See ch.2.

states according to their respectively different structural characteristics.[478] I note additionally that structural counter arguments point out that the liberal constitutional paradigm due to its inherent ambiguities and contradictions, cannot be exhausted in singular strategizing preferences. Meaning that unless court actors are invested in stereotypical orientations, their strategizing can in theory be used to pursue radical purposes within that paradigm. Hence, claims by Fowkes and Roux could be marked for ideological blind spots, but since the premise here is that through strategizing, constitution-building court actors contributed to the plausibility of fair constitutional decision-making[479] which would be a constitutionalism elaborative outcome, I revisit this point together in conjunction with counter argument concerning acceptability of strategizing behaviour, further below.

Obviously, one must object to strategizing constitution-building court actors if this meant conspicuous disregard of axioms of judicial neutrality over divisive questions, especially those with significant social ramifications. Such objections regard with suspicion, the notion of strategizing court actors both ideating the requirements and outcomes of constitutional change while doubling up as proactive agents who struggle to actualise their own constitutional claims. On the other hand, a derivable proposition of these empirical claims, required analysts to consider strategizing as a proper avenue or method for organising expansive and complex constitutional change outcomes amidst proliferating profusion of new rules and new demands of diverse publics. More so when this strategizing was done in part to preserve the autonomy and legitimacy of the constitution despite fundamental disagreements on constitutional norms and issues. Which begged the question whether South African and Kenyan court actors had cognitive capacity and functional will to strategize as theorised above.

From the empirics, Kenyan court actors revealed the challenges of judiciary-wide strategizing because their decisional processes permitted highly fragmented constitutional interpretation. In contrast, the South African Constitutional Court being the only final arbiter of constitutional interpretation, could unify decision-making across the spectrum of court actors, but it too left much room for superior courts to set precedents. A fallacy of composition could be in operation if one consistently viewed court actors in both situations as partaking in the same extended, hierarchically organised strategizing behaviour. Claims of capacity to strategize would be undercut by empirical findings regarding implementation via legislation, where neither South African nor Kenyan court actors managed to induce or incentivise political actors to enact comprehensive legislation where the latter preferred discrete, narrowly targeted pieces of legislation which diluted constitutional promises in some cases. It is correct that court actors in both states could routinely compel political actors to revise and amend legislation for constitutional compatibility, yet even with dialogic comity in play, these actors seldom obtained their preferred results timeously. Once enacted, this secondary rule making could overlap alternately with explicit court actor preferences. Not only would definitive findings of strategizing be based on cherry picking concrete changes attributed to court actor processes, the significant and genuine risk here is that

[478] See Seidman, Michael (2006) "Critical Constitutionalism Now" Fordham Law Review, Vol.75. pp.575-592, at p.579.
[479] See Knight, Jack & Schwartzberg, Melissa (2020) "Institutional Bargaining for Democratic Theorists (or How We Learned to Stop Worrying and Love Haggling)" Annual Review of Political Science, Vol. 23, pp259-276.

claims of strategizing ultimately could amount to ex post rationales developed to explain successful ad hoc decisions with hindsight.

Moreover, the empirics highlighted mixed conditions for strategizing to be backed by cognitive abilities, experience, and available relevant skills amongst court actors. Undoubtedly, assorted domestic and international assessments highlighted praiseworthy jurisprudence of the South African Constitutional Court intertwined with acknowledgement of the high calibre of its judges. Similarly, some decision of the Kenyan Supreme Court, such as the invalidation of presidential election in 2017, a first in Africa, drew wide acclaim. Moreover, superior court actors in Kenya periodically offered legal platform that served to powerfully politicise constitutional change issues, and compel political actors to respond to new dynamics, even though the lasting impact of superior court orders might be debatable. This does not mean some court actors or individual judges did not find it difficult to engage effectively with constitution-building issues since not all judges in apex and superior courts had constitutional law expertise or experience. Nonetheless, despite persistence of divisions and disagreements, the court actors in both states could be generally seen to exhibit transparency, open communication to justify their reasonings in controversial opinions, and responsive collective engagement in matters that had wide social impact. Hence, the court actors ought not to be unfairly accused and blamed for paralysis in production of constitutional outcomes, or constitutional transitions failing to take place, or the public being excluded from governmental decision-making at all levels.

Yet, criticism abounded of court actors in both states failing to create and maintain constitution-building as means for diverse publics to ideate, design, experiment on and address legal dimensions of constitutional change as a complex and genuinely wide-ranging experience of managing deep rooted problems of deeply divided societies. Diverse publics could differ on outcomes, but if they relied on court actors themselves explicitly declaring their expansive constitutions as transformational charters as opposed to a classical liberal constitution preoccupied with limiting governmental power and safeguarding private-public law divisions. As the South African analysis of strategic litigation phrased it, court actors had difficulty elaborating the constitutional subaltern and peripheries because propositions of legal strategizing, for instance of socioeconomic rights, deliberately elevated closed systems of legal logic.[480] With these empirics, the cognitive ability or functional willingness to strategize 'outside the box' is either overlooked, or South African and Kenyan court actors are incapable of mustering it at all. If these actors were implicitly strategizing, the issue that remained obscured was whether this enabled them to adopt critical perspectives to reinvent or reimagine constitutional change outcomes for extended periods. It could be that the apprehension of South African and Kenyan actors to avoid experimental constitution-building, was because they lacked information sources, which might force them to make errors while simultaneously binding themselves to their decision. Or it could be that these actors were only capable of strategizing in a minimal sense of dealing with profusion of claims and demands of diverse publics and minimising the

[480] See Dugard, Jackie & Langford, Malcolm (2011) supra note 476, at p.64.

effects of political and social attacks against themselves on account of their constitutional interpretation in never ending liberal orientations.

From the foregoing, there are reasons to be both sceptical and optimistic concerning empirical claims about strategizing court actors engaged in constitution-building work as interpretive activity. Scrutiny of those claims against the empirics observed in South Africa and Kenya gave mixed findings concerning the function of strategizing to explain why and how court actors can link their respective constitutions to constitutional change outcomes in the two states. Strategizing behaviour was presented without much direct evidence in the claims Fowkes and others made. It was based on a premise that the power imbalances between court actors and political actors in South Africa and Kenya precluded possibilities of the former shaking institutional boundaries without strategizing behaviour in their interactions to leverage convergence discourses and their preference formation processes. Additionally, Fowkes assumed strategizing to be latent in the interpretive activity of court actors who asked themselves how to produce preferential constitutional results in a non-ideal world. From my theorising of strategizing above, it might provide optimal normative standards for what court actors ought to try to do, for instance to foster convergence dialogues. But translating this theorising to either South African or Kenyan constitution-building court actors would require us to discount questions about the practicality of strategizing and the capacity of those court actors to undertake it consistently in the long durée. On this point, the capacity of court actors to muster strategizing is not a prosaic question, going by the denials offered by Justice Sachs, formerly of the South African constitutional Court.[481]

Strategizing would need to explain outcomes that could were achieved through other means, and granted, this is probabilistic as is any account of constitutional interpretation in relation to actual outcomes. This includes both transformational and liberal constitutional interpretation approaches. From a constitution-building perspective, strategizing is erratic and incoherent if it cannot sufficiently explain how and why court actors ought to consider and deal with constitutional change problems of deeply divided societies. Optimistically, strategizing would be enriching of judicial decision-making if it meant going beyond heuristic devices for explaining away constitutional interpretation contests, to elaborating a fuller range of options which court actors can consider to give full bloom to transformational constitutions beyond narrow frames court actors have for viewing transformation. This ends-driven strategizing is suitable for court actors in conditions of unsettling fundamental disagreements that redefine constitutional development as political projects enriched by those actors linking them to rational legal processes. For constitution-building defined as agreement-making interpretive activity pursuant to which court actors may or may not be strategizing, it is problematic for court actors to be both in charge both of identifying and pursuing the aims of the constitution, and then justifying and legitimising its outcomes. Court actors are pivotal to producing agreement on fundamental constitutional norms and cultivating constitutionalism. Nonetheless, they too must remain subject to crucial constitutional principles of accountability that stem from systems of checks and balances.

[481] Sachs, Albie (2009) The Strange Alchemy of Life and Law, Oxford, Oxford University Press, p.7-8, 48. Sachs spoke instead of judgement involving four logics – of discovery, justification, persuasion, and preening.

7.4 Constitution-building court actors and the production of a new constitutionalism in South Africa and Kenya

From the empirics, two inconclusive discourses of constitutionalism were surfaced. One concerned tension between the new and the old constitutionalism. A second dissected this new constitutionalism, showing its multifaceted evolution. In this section, I reprise the tensions between the old and the new constitutionalism.

7.4.1 Tensions between new and old constitutionalism

Tensions between the old and new constitutionalism were evident in all the discursive elements analysed above. For instance, they were evident in polemical value judgements aimed at making the differentiation between old and new constitutionalism more legally explicit, and in ideation of incremental changes in process-based constitution building. Reviewing the case study chapters in light of the preceding conceptual chapters, these tensions were unsurprising. After all, proliferation of new rules and claims in via the inducements of a new constitutionalism might cumulatively consolidate it, or spur new discourses of uncertainty, unpredictability, and even discontented calls for nullification of the constitution.[482] I contend that the tensions above arose too from how constitution-building court actors wrestled with legal justifications of the new constitutionalism and what ideation they offered to make it more legally explicit, against a backdrop of demands to avail deeper reflection of the constitutional problems of deeply divided societies.

Firstly, the empirics showed that South African and Kenyan court actors engaged in ideating a new constitutionalism as the only, or best, way to insulate liberal rights and rights of minorities, under new constitutions, while incrementally improving the welfare of the majority. However, this could in practice be confusing since those protection discourses could echo concerns of the old constitutionalism that protecting liberal rights in practice meant privileging the interests of a minority while the assorted claims of a majority which coalesced in alternative constitutional paradigms were marginalised in judicial penumbras. For instance, some might argue that protection of rights that inhered in customary law, for instance, could be better protected via a radical politics that decentred public authority. Consequently, form such perspectives a new constitutionalism preoccupied with liberal rights would be seen as a cover to legalise privileged interests while de-politicising issues that should be ventilated in other authorising arenas. If constitution-building work that does not politicise what should be political issues, ended up working for the benefit of a few, with the whole debate absorbed by legal outcome discourses, subsequently obfuscating a continuity of the old constitutionalism for all practical purposes.

Secondly, constitution-building court actors could tout the label of new constitutionalism as an antidote to the excessive legalism and formalism of the old constitutionalism, as discussed above. Yet, this new constitutionalism did not completely forestall their resilience in practice. In fact, as the case studies revealed, South African and Kenyan court actors could retreat to legal formalism albeit with novel justifications. Thirdly, the new

[482] Klug, Heinz (2016) "Challenging constitutionalism in post-apartheid Africa" Constitutional Studies Vol.2, p.43-6.

constitutionalism promoted the autonomy of the legal constitution. Yet, in Kenya, and to a lesser degree in South Africa, political elites remained invested in fierce competition for control of the political constitution, underscoring the shaky ground on which court actors elaborated a putatively definitive new constitutionalism. Fourthly, in new and yet old legal spheres like customary law norms recognised by new constitutions, and to a lesser extent, common law, court actors themselves remarked the absence of any material significance in their treatment between the new and the old constitutionalism.

From foregoing, we could draw and emphasise the following deduction. Firstly, court actors found in practice that no easy distinctions could be sustained between old and new constitutionalism. In fact, such distinctions might be increasingly obscured with the effluxion of time. Secondly, responding to tensions between old and new constitutionalism might generate an exaggerated differentiation between the two, that in turn could prove counterproductive in cases that required reliance on decisions of a usable past. Indeed, a new constitutionalism could be undermined by proliferating claims where risks could be better managed by rationales and methods refined by court actors from the old constitutionalism in their interpretive activity. Thirdly, imperatives of legal continuity, e.g., of accrued rights and obligations, meant it would sometimes be necessary to rescue aspects of the old constitutionalism that were undermined by claims of new constitutionalism, as much as by destabilisation and unsettlement occasioned by endogenous variables beyond the control of court actors, e.g., demographic, and economic changes. Paradoxically, therefore, new constitutionalism also entailed reconstructing some aspects of the old constitutionalism. Hence, a summative statement of my deduction here would be that constitution-building court actors seeking practical outcomes could find that making arguments for a new constitutionalism, and counterarguments against the old constitutionalism, was only diversionary obiter dicta, which nonetheless might be useful for symbolic constitution-building purposes.

7.4.2 Multiple facets of the new constitutionalism

From the empirical accounts, I contend that least three facets of the new constitutionalism are amplified by and from the constitution-building work of South African and Kenyan court actors. These three facets, which complicate the simple binary between the old versus new constitutionalism, are liberal constitutionalism, a statutory constitutionalism, and a situational constitutionalism. In this section, I analyse the conceptual and normative effects of these three facets.

7.4.2.1 Liberal constitutionalism

South African and Kenyan court actors evidently approached constitution-building as ideating and articulating derivative notions of liberal constitutionalism. In both states, this ideation encompassed and was moderated by the ubiquitous discourse of transformative constitutionalism. Additionally, judicial practices favouring common law constitutionalism,[483] meaning judge-made constitutional rules in conjunction with widespread recourse in constitutional disputes, to compensatory damages and equitable, as well as declaratory common law remedies, contributed another feature to this

[483] Poole, Thomas (2003) Back to the Future? Unearthing the Theory of Common Law Constitutionalism" Oxford Journal of Legal Studies Vol.23, No.3, pp.435-454.

ideation and articulation. As I defined it in the introduction chapter, I conflated liberal constitutionalism with its classical conceptual terms and normative effects of government limited by law to protect individual rights.

Of interest here is that neither South African nor Kenyan constitutional drafters had expressly resolved to strengthen liberal constitutionalism, being prone to compromise on some of its features and structures, as I observed in chapter one. Moreover, the relevant constitution-makers had not foreseen roles of court actors purely as tools or drivers of a liberal order. However, court actors in both states regularly ideated failure to transition to a new constitutionalism as inhering in breaks in legality, egregious disrespect of the supreme law, and violation of judicial standards for observance of human rights and limits on governmental authority. Furthermore, we encountered empirical claims asserted by some diverse publics for constitution-building processes to prioritise strengthening liberal features of multifunctional and multifaceted constitutions, as an imperative to address any in-built defects or deficits stemming ostensibly from constitution-making compromises.

Why did South African and Kenyan court actors embark on constitution-building to internalise and expound liberal constitutionalism, thereby reinforcing it as a facet of the new constitutionalism? The question resurfaces here considering the empirically grounded claims that as divided societies, they would face onerous challenges to agree on its norms, and that liberal norms at any rate would be unsuited given little antecedence of liberal governance institutions.[484] From the empirics I analysed, my answer is that constitution-building court actors who strived after liberal constitutionalism were not blind to the limits of its effects, particularly extra-legal effects. Indeed, these court actors were immersed in governance systems involving significant diverse publics that valued alternative non-liberal norms as justifications for public authority decision-making. Additionally, the extent of deferral in the constitutions with which these court actors dealt amplified legislative decision-making to manage a prevalent sociological caveat that constitutions are valid primarily because of their producing beneficial material outcomes.

In so far as court actors strived after sharpening rationalist precepts of limited government, they moderated their rationalism by addressing legal limits on authority, human rights, etc, from angles of transformative constitutionalism and common law constitutionalism. I have addressed the former in detail in other parts of my dissertation. Given the historical antecedence of the Common law in both South Africa and Kenya, it was unsurprising that constitution-building court actors could reimagine constitutional change arguments as a species of "constitutional politics centred on common law courts".[485] And because common law constitutionalism denoted gradual improvement of constitutional guarantees through the latent wisdom of precedents,[486] at least in theory, it could favour a practical shift in perspective aligned with prevalent transformative constitutionalism discourses. This practical shift from rigid rules over governmental actors to constrain their powers, to a perspective of the evolving interbranch comity to reach optimal results in constitutional

[484] Lerner, Hanna (2019) supra note 30, pp.19-21
[485] Poole, Tom (2003) supra note 484, at p.436-7.
[486] See Vermeule, Adrian (2007) "Common Law Constitutionalism and the Limits of Reason" Columbia Law review, Vol.107, pp.1482-1518, at p.1483.

therefore reinforced judicial realism, even though ideation of transformative constitutionalism sometimes emphasised its moral philosophic approaches too.

Nevertheless, ideation of liberal constitutionalism was neither straightforward nor uncontested, and attempts to moderate it with common law approaches could be institutionally limited.[487] To start with, liberalism as a facet of the new constitutionalism differed in emphasis between the two states. Kenya, for instance, did not evidence anything like judicial attempts to distil a cross reference between constitutional law and objective criteria descriptors of law, such as propounded by Dunn,[488] like the discreteness of human beings and their capacity for independent thought. In contrast, South African courts actors pursue exertions to distil the new constitutional order as an "objective normative order" as I observed in their approach to architectonic constitution-building.[489]

Secondly, segments of diverse publics objected to the production of liberal constitutionalism as the main preoccupation of court actors. Some counterarguments against liberal constitutionalism found expression in proliferating cultural and identity claims, in ways that were familiar in other contexts of multiculturalism.[490] When court actors tried to deal with these problems from liberal constitutionalism lenses, they instead provoked backlash in South Africa, with calls for more grounded approaches consonant with lived realities of the majority, rather than textbook constitutionalism.[491] In Kenya, liberal constitutionalism produced resistance from political actors in a political culture where they found it increasingly counterproductive to stick to constitutional paths with diminishing electoral returns. Instead, those actors attempted to launch popular initiatives for substantial constitutional amendments. In both South Africa and Kenya, a sense of fatigue and backlash against liberal constitutionalism was palpable, despite its clear gains, as the vignettes in the introduction chapter revealed.

7.4.2.2 Statutory constitutionalism

South African constitution-building court actors sometimes voiced their deliberate avoidance of common law pathways to constitutional issues in favour of legislated constitutional changes. A similar discourse was evident in Kenya where counterpart court actors relied on pervasive constitutional provisions deferring issues to legislation to orient how the new constitutional order was substantiated. Accordingly, I consider a second facet of

[487] As Arato, notes, "While, in theory, constitutions can indeed be created by judiciaries, this method is not likely to exist in isolation. Something must be done by other political mechanisms, perhaps mythological ones, before judges can begin to interpret, and thus create, through interpretation." Arato, Andrew (1995) "Forms of Constitution Making and Theories of Democracy" Cardozo Law Review Vol 17, p.194.

[488] Van Dunn, Frank (1983) Human Dignity: Natural rights versus Human Rights" in Roos, N and P van Koppen eds. Liber Amicorum Maastricht, Metajuridica Publications, 2000 Journal of Libertarian Studies 14 No.4.

[489] See *Carmichele v Minister of State and Security & Anor* (2002) 4 SA 938 (CC). (discussed in chapter four).

[490] See Tully, James (1995) Strange multiplicity: Constitutionalism in an age of diversity (No.1) Cambridge University Press.

[491] See Lindiwe Sisule: Who's Law is it anyway? Mail and Guadian Opinion 8 January 2022, available at https://mg.co.za/thoughtleader/opinion/2022-01-08-lindiwe-sisulu-whose-law-is-it-anyway/.

the new constitutionalism as taking the shape of "statutory constitutionalism", involving processes of achieving constitutional results via a series of statutory enactments.

With statutory constitutionalism, one returns to the continuing relevance of notions and themes of constitutional compliance and consensus. As I observed, building on Fowkes, creative perspectives of constitutional compliance of legislation and administrative acts were a distinct feature of constitution-building which sometimes drew claims that court actors were engaged in strategizing behaviour. From the case law, however, it is evident that compliance themes differed between South Africa and Kenya. An obvious difference was depicted by the interplay between negative and positive obligations, with apparently greater compliance with positive obligation stipulations of court actors in South Africa than in Kenya. Other differences lay in the degree of internalisation of law, with South African executive and legislative branches appearing to have internalised the constitution to a greater extent than their Kenyan counterparts. Finally, there were differences in the contexts of transformation as evidenced by the discourses discussed in chapter six.

As a common theme, compliance perspectives in the constitution-building work of court actors in both states was served by the premise that successful transition to the new constitutionalism lay in focusing on norm producing relationships among the branches, allowing norms to be agreed through some form of joint interpretive activity, and thereafter to be linked to legislation and statutory systems. Compliance denoted that court actors and legislators acted or followed a constitutional mandate to legislate, precisely because it was constitutional, and therefore the constitutional authorisation of a change outcome via legislation made a difference in decision-making.[492] Constitutional consensus, on the other hand, must be seen as an underlying concept at the base of constitutional decision-making where national actors fundamentally disagreed on constitutional norms. It connoted the need for legislation, firstly to reflect and translate into sufficient agreement amongst constitutional actors to prevent their disagreements escalating into political violence. Secondly, consensus conveyed the impetus to incrementally extend the durability of the emerging precepts of the new constitutionalism. Hence, I distinguished statutory constitutionalism as a theoretical facet of strengthening the new constitutionalism from below, i.e., from subsidiary and secondary rulemaking. As it was featured in both South Africa and Kenya, statutory constitutionalism reinforced instrumental understandings of the relevant constitutions. While constitution-building court actors aimed to maintain the autonomy of the constitution while using statutes to avoid gaps in the realisation of its promises, the normative effects of statutory constitutionalism were subject to differences between the two states concerning how statutes were produced and the determinacy of guiding constitutional principles, which arose from contextual opportunities and constraints as I discussed in the preceding chapter.

[492] Against compliance, the alternative would have been enforcement, but also conformity. As Schauer noted, public officials could conform to a constitutional mandate for reasons other than that it was constitutional, but because of overlap with other competing reasons. Alternatively. Non-conformity need not be a product of officials failing to respect what the constitution demanded. See Schauer, Frederick, "Comparative Constitutional Compliance: notes towards a research agenda", in Bomhoff, J (2012) Practice and Theory in Comparative Law, Cambridge, Cambridge University Press, pp.212-229.

7.4.2.3 Situational constitutionalism?

In addition to liberal constitutionalism and statutory constitutionalism, South African and Kenyan court actors further ideated their respective constitutions as resting on a unique model of compromise politics and of value-laden legitimacy bursting with controversial premises, such as justiciable socio-economic rights, affirmative action for historically marginalised groups, and culture-based legitimisation of public authority. As I observed in chapter one, these were constitutions emanating from demands by diverse publics: Some wanted customary law, others traditional rules flowing from native culture, others common law, and yet others sought powers to legislate regulations to remove need for repetitive contracting, etc. All got something in the respective constitution. In their ideation of the migration from the old to the new constitutionalism along these lines, South African and Kenyan constitution-building court actors alike sometimes thought of their constitutions as transformative, non-typical legal instruments, or as having homegrown characteristics distinguishable from the liberal constitutions familiar in western constitutional systems.[493] What formal changes these constitutions ordained in future secondary rulemaking to generate a new constitutionalism, would therefore cut across a spectrum of different societal conflicts and disagreements on foundational norms from which these constitutions emerged. These constitution-building court actors were moreover conscious that attempts to instrumentalise constitutions for social transformation, beyond their capacity to deliver justice, remained inherently precarious in contexts of unfolding disagreement on constitutional norms and issues.

It is worth observing repeatedly that some critics discounted possibilities of new constitutionalism generating modern constitutional democracy in either South Africa or Kenya. As previously remarked, these critics considered fundamental disagreements on notions like liberal citizenship, participatory and inclusive democracy, and legally limited government, as impeding those possibilities. Other critics elevated the importance of societal configurations to urge deconstructive approaches toward the new constitutionalism.[494] Other critics dismissed the inadequate radicalism of the new constitutionalism and rebuked its legal resolution of political problems.[495] For South African antagonistic critics reacting to the *Zuma* contempt of court decision, a genuine worry was that new constitutionalism would be revealed by time as a cruel hoax. In Kenya, constitution-building had normative value and was desirable for spurring constitutionalism, but the constitutionalism thereby produced had imprecise contours. In practice, producing normative choices also affected substantive political options, creating new winners and losers of constitutional change. Therefore, according to Muhula and Ndegwa, "the union between the pursuit of principle-based politics and instrumentalist politics can be uncomfortable. Successful political actors understand that the instrumentality of politics is what makes possible the pursuit, installation, and defence of principles. However, the outcomes are not guaranteed – in part because political actors prefer the instrumental politics of winning elections, forming winning coalitions, preserving unstated rules (such

[493] See Grimm, Dieter (2012) "Types of Constitutions" in Rosenfeld & Sajo (2012) The Oxford Handbook of Comparative Constitutional Law, Oxford, Oxford University Press, pp.125-128.
[494] See Mamdani, Mahmood (1990) "The Social basis of Constitutionalism in Africa" The Journal of Modern African Studies Vol.28, Issue 3, pp.359-374.
[495] Prempeh, Kwasi (2005) *Marbury* in Africa: Judicial review and the Challenge of Constitutionalism in Contemporary Africa" pp.1239-1267.

as those that allow impunity in certain issues) and restricted competition over principles."[496] Furthermore, ideating the non-typical constitution to animate exertions on the part of all branches for unique models of compromise, generated contradictions observable with both liberal constitutionalism and statutory constitutionalism.

The consequence, more organic than by design, has been the emergence of a "situational" constitutionalism as a third facet of constitutionalism in South Africa and Kenya. By this I mean hybrid constitutionalism principles that court actors calibrated from their reasonable understandings of the constitutional context to remind divided national actors of their commitments to why a constitution is important. Situational constitutionalism formed, and continues to form most vividly, when court actors conceded the inadequacy of liberal constitutionalism in which they were invested, and as a manifestation of the complexity of building on non-typical constitutions and their assorted promises of constitutional change over time. Consequently, court actors attempted to accommodate this complexity through agglomeration of auxiliary, organic principles. These organic principles were more weighted on novel repertoires of accelerated interbranch cooperation and dialogues, on judicial procedures that tacked onto political agreement, on amplified public participation in constitutional decision making by diverse publics who made diffuse demands and on the ripostes to constitutional implementation finding amplification in novel constitutional commissions and devolved platforms. In theory, situational constitutionalism in South Africa and Kenya could maintain constitutional change keeping in character with radical popular politics or indigenous norms. Situational constitutionalism means constitution-building court actors can be generative or supportive of alternative, non-judicial mechanisms of institutionalising constitutional change, including those that articulate alternative practices reflecting deeper resonance with more radical conceptions of constitutional change. These conceptions include the cultural assumptions of most of the people.

Several drivers in the empirics fuel this emergence of situational constitutionalism. One driver was the respective non-typical constitution, in so far as it fuelled the proliferation of institutional complexity. A second driver was increased objection by elected politicians to consuming political capital and time in constitutional disputes over textual analysis of fundamental issues, and the interpretation of provisions for constitutionality and compatibility. This driver gained urgency as governing political coalitions in both South Africa and Kenya risked loss of control over constitutional developments that became unresponsive to electoral pressures, pushing them to develop or exhibit convergence discourse fatigue. A third driver was reactionary groups, especially leaders apprehending loss of redistributive patronage systems without corresponding gain in state largesse. Unfortunately, one cannot discount that self-serving populist and ethno-nationalists would emerge among such groups. A fourth driver was

[496] See Muhula & Ndegwa, p.93. On same page the authors observe that "pacts in Kenya have been institutionalised as a solution to the problem of weak aggregation, adjudication, and execution institutions, and have become the preferred method for resolving conflicts that the established institutions are unable to solve. They also pride safe havens in which the political class can craft agreements that circumvent the press of outsiders (civil society, churches, the poor, etc.), who, by their numbers or their rhetoric, can force issues on to the agenda but cannot necessarily conclude agreements that in other circumstances would be executive by the state…"

specialisation in constitutional tasks and pursuit of constitutional results, which as we saw in the empirics was something constitution-building court actors pushed. Lastly on this point, working out details and rules for an operational and efficient constitutional system is not easy. With several approaches to constitution-building appearing as ad hoc, court actor interventions in several cases required deep contextual knowledge and experimentation, rather than something like application of general principles of constitutional law.

From the above description, the emergence of situational constitutionalism seems inexorable because it simply draws from different currents of constitutional projects as they fluctuate through dynamic agreements and disagreements on fundamental norms and issues. Its practical implications might appear to lower the bar to accept an imprecise constitution-building effort by court actors, yet its organic bedding make it desirable as does its recognition of many figurative moving parts when the constitution is in a building mode by several actors. Its hybridity would permit South African and Kenyan constitution-building court actors to escape the straitjackets of ideating constitutional change outcomes within liberal constitutionalism including its transformative constitutionalism strands, or common law constitutionalism, as the durability of their precepts is questioned and tested by diverse publics. Additionally, situational constitutionalism opens room to recognise that exclusive court actor custodianship and proprietorship of the non-typical constitution is not supportable within the reality of deeply divided South Africa and Kenya. Moreover, with situational constitutionalism, the textual constitution is reimagined from many perspectives including those that countenance its position as the singular frame of reference for how ongoing fundamental disagreements over constitutional norms and issues are managed.

Conclusion

In previous chapters of this dissertation, I have surfaced and critically analysed how and why South African and Kenyan constitution-building court actors aimed to make their respective constitutions to produce the assorted outcomes for which they were made and promulgated. While treating these constitutions as a point of embarkation for projects of broader constitutional change, I threaded this analysis with various perspectives of the dilemmas of addressing the inherent unpredictability and uncertainty of constitutional change and continuity via interpretive activity to produce secondary rulemaking and constitution legitimising discourses. My dissertation therefore described, articulated, and evaluating the roles and contributions of South African and Kenyan court actors as constitution-building agents who aim to influence discursive elements of a new constitutionalism. It questioned whether these court actors can resort to successful strategizing behaviour to ultimately link constitutions to desired outcomes of the new constitutionalism. Furthermore, it addressed academic scepticism whether this constitutional-building work is desirable considering the internal institutional and external system-wide conditions that militate against court actors engaging in constitution-building to produce more imaginative and innovative solutions to the problems of deeply divided South Africa and Kenya where national actors hardly agree on fundamental foundational constitutional norms. In concluding, I have considered that the exertions of constitution-building court actors regenerate the significance of compromise driven constitutions

in redressing assorted problems of South Africa and Kenya as deeply divided societies. Furthermore, they produce a new constitutionalism that is multifaceted.

My dissertation has contributed to the theory of constitution-building, treating new constitutions as points of embarkation to fulfil constitutional change and continuity promises, and to manage their tensions, from the perspectives of court actors in South Africa and Kenya. It has critically analysed the delineation and distinctions of constitution-building as a category of constitutional change involving interpretive activity of court actors that is structured within broader political processes of evolving legitimate constitutions. This activity is both novel and significant for cultivating constitutionalism in states like South Africa and Kenya, which lacked deep historical roots of constitutionalism, and which were the central focus for my study. I have offered a descriptive account of their constitution-building court actors who recognise themselves as committed to incrementally fulfilling preferential outcomes of the change ordained by their respective constitutions through politically effective legal processes.

Future scholars could build on my dissertation in two critical ways for similarly placed states. Firstly, the distinction between constitution-building as a normative and prescriptive exercise, and as a managerial exercise for constitutional implementation, can invite further future elaboration, because I have paid more attention to the latter. Secondly, given the undetermined outcome of current constitution-building work, and the level of disagreements among national actors over constitutional priorities and fundamental principles, I decided to focus on roles of court actors. Other researchers could build on the nature of those roles to unearth other legal institutional avenues, because not all constitutional reforms can be implemented within prevailing legal instruments and court systems. Finally, I hope that my dissertation has set out a sufficiently new and cogent account of constitution-building court actors that others can continue to build.

End

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