The Mindanao Question: Constitutional Dialogue in Southern Philippines

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I. OVERVIEW

In this Article, I analyze strikingly parallel constructive negotiations and constitutional dialogue between Northern Ireland and South Africa in post-conflict reconstruction. In particular, I examine their political milieu and gauge what might be termed as "transformative" and "dialogical"

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communicative activities. I then suggest four constitutional opportunities for
the Philippines in light of the Mindanao question.

On a more general level, I address the question of constitutional design
and negotiation in post-conflict settings. I argue in favor of the adoption and
application of the "dialogical" model of democratic constitutionalism as
opposed to the "enforcement" model which characterizes much of
contemporary legal ordering both here and abroad. In discussing their
features, I chart a normative apparatus for making the constitutional choice
between the two, and, thereafter, I test theory into practice by undertaking a
comparative analysis of what might well be successful policymaking and
constitution-making practices in Northern Ireland and South Africa. The
findings show remarkable dialogical politics occurring in both countries
during post-conflict transition and reconstruction. Considerable lesson-
drawing between Northern Ireland and South Africa had indeed taken place,
intertwined as they are in a "transnational cooperative political order." In
particular, constitutional engineers resorted to constructive ambiguity in the
resolution of issues, characterized by theoretical minimalism qualified by
strategic conceptual ascents. In light of the constructive constitutional
practices of Northern Ireland and South Africa, as a final point, I suggest four
opportunities in approaching the Mindanao question, as intimated above.

II. CONSTITUTIONAL LEGITIMACY

What makes a constitution worthy of our respect? Is it because the
constitution had been written, in the heat of things, by a group of experts so
commanding of our respect that it would be unthinkable for us to doubt
them and their intentions?[1] Or is it because we find etched on the face of the
constitution the bold transcendental principles of justice reminiscent of
higher law?[2] And how about the view that the best constitutions are those
that are so flexibly worded, or so susceptible to revision, that we can write

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1. *Compare* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991)
    [hereinafter ACKERMAN, FOUNDATIONS], *and* BRUCE ACKERMAN, WE THE
    PEOPLE: TRANSFORMATIONS (1998) [hereinafter ACKERMAN,
    TRANSFORMATIONS] (for an argument on the merits of constitutional moments
    as instances of popular sovereign mobilization), *with* Paul Brest, *Constitutional
    Citizenship*, 34 CLEV. ST. L. REV. 175 (1986) (for a plausible rejoinder).

2. *See* EDWARD CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN
    CONSTITUTIONAL LAW (1955) (for a classic account of constitutional law as
    "higher law);" *see also* Cass Sunstein, *Naked Preferences and the Constitution*, 84
    COLUM. L. REV. 1689 (1984) (for a plausible rejoinder predicated on *Lochner*-
    style majoritarianism).

and re-write our values unto their provisions as we see fit, like a magic mirror?[3]

In the history of the world, there are at least as many constitutions[4] as there have been nations. The human condition puts us in no position to assert for all time that one is better than the rest, given our intractable differences situated in time and place, changing cognitive awareness, and not to mention our multicolored, but assertive, cultural heterogeneity.[5] Neither can we even hope to nail down a theory that could universally "fit" and "justify," or "criticize," the extant constitutional orders that happen to be the objects of our study.

We can at least suppose that the Herculean question[6] of what can and should make a constitution "respect-worthy" may vary from place to place and time to time.[7] That question becomes even more pressing when we put on our thinking caps as constitutional engineers in a deeply divided post-conflict world.[8] Whether you like it or not, as a constitutional thinker you

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3. *See* Frank Michelman, *Borrowing: Reflection*, 82 TEX. L. REV. 1737, 1761 (2004) [hereinafter Michelman, *Reflection*] (discussing the "particularist," "universalist," and the "dialogical" approaches to constitutional comparison and interpretation (using the metaphor "magic mirror")); Larry Kramer, *Popular Constitutionalism, circa 2004*, 92 CAL. L. REV. 959 (2004) (discussing popular control over constitutional interpretation).

4. I use the term "constitution," "constitutional system," "constitutional regime," "constitutional order," and "legal order" loosely and interchangeably. These are notionally different from "government totality." *See* Michelman, *Reflection*, *supra* note 3, at 1737, 1756-57.

5. *See* Donald Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685 (1976) (arguing in favor of comparative constitutional analysis on the basis of shared principles of justice), *but see* Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985) (arguing against Kommers); *see also* John Bell, *Comparing Public Law*, *in* COMPARATIVE LAW IN THE 21st CENTURY 235-47 (Andrew James Harding & Esin Orucu eds., 2002).

6. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105-30 (1977) [hereinafter DWORKIN, RIGHTS] (depicting "Judge Hercules").

7. I borrow this text from a comment made by Prof. Frank Michelman. Email from Frank Michelman, Robert Walmsley University Professor, Harvard Law School, to the author (Sep. 24, 2007) (on file with author).

8. *See* DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT 95 (1985) (for a comprehensive survey of definitions of conflict); DIASPORAS IN CONFLICT: PEACE-MAKERS OR PEACE-WRECKERS? 26-27 (Hazel Smith & Paul Stares eds.,

must field an answer to that question before society descends into another cycle of violence.9 In the face of an enduring conflict, you and I must come up with a plausible — and hopefully a modest — blueprint for constitutional design, and this blueprint must somehow do the job. If we can catch a glimpse of what makes a constitution respect-worthy even in post-conflict settings, then we might be able to devise better ways to engineer specific outcomes through constitutional negotiation and design.10

As I cannot claim any expertise in constitutional theory, I must approach these questions tentatively. But I take on these questions because of the simple sense of urgency the subject itself brings into being: all constitutional negotiators and designers must have the skill to act in haste.11 In the post-conflict setting the sense of urgency for scrupulous constitution-making is at its highest ebb. We see here, as Frank Michelman does, a starker landscape of that "deep, intractable, normative disagreement that recent liberal theory posits as endemic in modern political societies,"12 an epidemic of moral

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2007) (for a graphic depiction of the phases of conflict dynamics and suggestion of strategies to which outside parties may resort).

9.   *See* Michael Schoiswohl, *Linking the International Legal Framework to Building the Formal Foundations of a "State at Risk": Constitution-Making and International Law in Post-Conflict Afghanistan*, 39 VAND. J. TRANSNAT'L L. 819, 863-64 (2006) (describing the "breathtakingly short" time-frame for constitutional drafting in Afghanistan); Luka Biong Deng, *The Challenge of Cultural, Ethnic and Religious Diversity in Peacebuilding and Constitution-Making in Post-Conflict Sudan*, 7 CIV. WARS 258, 260 (2005) (discussing "kitchen-sinking" European models in indigenous Africa).

10. *See* Kirsti Samuels, *State-building and Constitutional Design After Conflict* (International Peace Academy (IPA), IPA Report, June 2006), *available at* http://www.odi.org.uk/events/states_06/18thMay/Presentations%20&%20Pape rs/State-building%20&%20Constitutional%20Design%20After%20Conflict%20- %20Samuels.pdf (last accessed May 3, 2009) (for a synthesis of the practical lessons drawn from comparative studies of six constitutions and peace agreements).

11. *See* Richard Simeon & Luc Turgeon, *Constitutional Design and the Construction of Democracy: A Citizenship Regime Perspective*, *in* THE CONSTRUCTION OF DEMOCRACY 92 (Jorge Dominguez & Anthony Jones eds., 2006) ("Born of crisis, there may be insufficient time for the careful refection necessary to develop an enduring constitution.").

12. Frank Michelman, *Ida's Way: Constructing the Respect-worthy Governmental System*, 72 FORDHAM L. REV. 345, 353-54 (2003) [hereinafter Michelman, *Ida's Way*] (citing JOHN RAWLS, POLITICAL LIBERALISM 54-58 (1996)) [hereinafter RAWLS, LIBERALISM].

vectors that must be quarantined at once by calculated policy choices or else the brief window of peace recedes and hostilities commence yet again.[13]

In the post-conflict phase, the aim is to modulate conflict to the degree that normal social activities can be resumed for reconstruction.[14] Surely over a longer time horizon a reasonable control of violence is necessary for establishing a constructive relationship among the parties.[15] But for

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13. For an illustration of how temporary cessation of hostilities arising from a peace accord might relapse into conflict, see David McDonough, *From Guerrillas to Government: Post-Conflict Stability in Liberia, Uganda and Rwanda*, 29 THIRD WORLD Q. 357-74 (2008). *See also* Paul Collier, *Ethnic Civil Wars: Securing the Post-Conflict Peace*, HARV. INT'L REV., 2007, at 56-60 (discussing sense of urgency within the window of peace).

Listen to Horowitz:

> Part of the explanation for the many shortcomings in our understanding of ethnicity is the episodic character of ethnic conflict itself. It comes and goes, suddenly shattering periods of apparent tranquility. The suddenness of the phenomenon helps explain the lag in understanding it. As scholarship is reactive, the spilling of ink awaits the spilling of blood.

HOROWITZ, *supra* note 8, at 13.

14. *Cf.* HO-WON JEONG, PEACEBUILDLING IN POSTCONFLICT SOCIETIES 4 (2005). The post-conflict phase has been depicted as

> the final phase of a conflict cycle. It describes patterns of activities and interactions that occur after a conflict has ended and a settlement of sorts or a compromise has been agreed to, when efforts are made to ensure that the conflict will not erupt again. Hence, there is a need at this stage to create structures and mechanisms to ensure that not only compliance with the terms of an agreement but a radical rebuilding of a more peaceful structure.

DIASPORAS, *supra* note 8, at 26-27, 33-34.

The various phases of inter-state or intra-state conflict are as follows: stable peace, conflict emergence, conflict continuation, conflict escalation, serious conflict and violence, conflict termination, de-escalation, and post-conflict restructuring. *Id*. at 26-27.

15. *See* Selver Sahin, *Building the State in Timor-Leste*, 47 ASIAN SURV. 250, 261 (2007). I wish to flag the question, how are we to determine who or what should be a "party" to the negotiation process? There are many ways how "framers" had come to occupy positions of constitutive power. The nature of this paper precludes an in-depth inquiry into this question. Suffice it to say, however, that when the cycle of political violence has attained relative peace and enters the post-conflict stage, constitutional negotiators are prone to take

constitutional negotiators "[d]ecisions must be made rapidly in the face of apparently intractable social disagreements on a wide range of first principles."[16] And, in facing severe time pressure constitutional negotiators must engender enough mutual respect among the warring parties so as to "entail a reluctance to attack one another's most basic or defining commitments."[17] For mutual respect no doubt is a precursor to peace, and with peace, social reconciliation.

In this Article, I hope to show that in post-conflict constitution-making constitutional engineers should shift attention away from what might be termed as the "enforcement model" and embark instead on a "dialogical" enterprise. I further divide my argument as follows: In Part III, I contend that the enforcement model bears the trappings of an unprincipled and excessively deferential fixation with the teachings of a dominant historical individual or a selection of intellectual elites on whom we routinely accord binding virtue — even sovereign intent — for no greater reason than their perfunctory association with a "supreme law" of a given place and time. It is difficult to exaggerate how pervasive or how dominant this obsession can be for today's generation of thinkers. One might say that anyone's normative attachment to this *static corporeal depiction* of the legal order can be borne of the conviction that the normative utterances of the "framers" precisely reflect a uniform popular will. Another might conclude that the framers acted under no such pretense; rather, their authoritative function — at least as our generation is apt to think — can be derived from a heightened sense of an imminent and propitious intellectual revolution and hence all future constitutions should bear their mark. Whatever the case, whether in adjudication or constitutional design, along every exertion of enforcement politics a dangerous token appeal is made to past static corporeal utterances as normatively self-given and undeserving of a more critical normative reflection.

In Part IV, I argue that the key normative features of dialogical constitutionalism are undeniably more compelling than those of the enforcement model: through rhythmic patterns of postponement and settlement, dialogical constitutional negotiators spread out the making of the constitution beyond the act of ratification and thereby encourage lesson-drawing. Through strategic use of *constructive* or *principled ambiguity*,

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the existing distribution of power as starting points for constitution-making, and then take it from there.

16. Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995) [hereinafter Sunstein, *Agreements*].

17. *Id.* Note that Sunstein mainly had in mind the adjudication process.

constitutional diplomats can institutionalize self-revisionary normative dialogue through which warring parties might interpret the most sensitive issues *however they wish*, and even undergo transformative possibilities through a process of reflexive criticism. Turning theory into practical form, in the framing of the most divisive issues constitutional negotiators should aim for *less ambitious theorizing*, but they may take the conceptual ascent *if and only if* the parties are receptive to higher-level abstractions.

In Part V, I suggest and analyze three case studies where we might see the operational dynamics of dialogical politics: the constitution-making experiences of South Africa, Northern Ireland, and Southern Philippines. After laying out a plausible basis for functional comparative analysis[18] on these deeply divided societies, I suggest specific opportunities for normative constitutional-learning among the three countries. I then attempt to describe and explain the Philippine political milieu in light of the dialogical normative framework.

III. THE ENFORCEMENT MODEL

That peace follows consensus is a proposition so widely acceptable, that by the strength of its own inner logic, most of us would think it foolish to doubt the connection. In constitutional design under post-conflict settings, the "consensus" model of democracy, a close cousin of the "majoritarian" model,[19] is thought to be "the more attractive option for countries designing

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18. For a functional approach to comparative constitutional law, see Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225 (1999); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 794 (1997) (defining, first, a common problem; second, considering different solutions offered by different courts; and third, passing judgment on best approaches); MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 3-14 (3d ed. 2008).

19. For a distinction between the two, see AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 2 (1999) [hereinafter LIJPHART, PATTERNS OF DEMOCRACY] ("[T]he consensus model ... differ[s] from the majoritarian model in [that] it accepts majority rule only as a *minimum* requirement: ... it seeks to maximize the size of these majorities [and] aim at broad participation in government and broad agreement on the policies. [T]he majoritarian model of democracy is exclusive, competitive, and adversarial, whereas the consensus model is characterized by inclusiveness, bargaining, and compromise; for this reason, consensus democracy could also be termed 'negotiation democracy.'"). *See also* AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES (1984) (arguing for the merits of consensus-style democracy); AREND LIJPHART, POWER-SHARING

their first democratic constitutions or contemplating democratic reform."[20] For deeply divided societies, or societies afflicted with deep cultural, ethnic, or sectarian cleavages, consensus-building is not pertinent for it is only urgent.[21] At least to Arend Lijphart, broad consensus may even explain why progressive democracies such as Britain and New Zealand are happier without "formal" constitutions.[22]

Not only consensus, but "coherence," "certainty," "uniformity," "finality," and "closure" are likewise thought to be normatively compelling indices for constitutional engineering.[23] The more "advanced" the putative legal system and the "thicker" its rules, the greater then the likelihood for

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IN SOUTH AFRICA (1985) (discussing the four broad categories, namely, majoritarian, non-democratic, partitionist, and consociational political systems, as proposals for reform). Lijphart associates the majoritarian conception with the "Westminster style" of government, apparently referring to the United Kingdom and New Zealand.

20. LIJPHART, PATTERNS OF DEMOCRACY, *supra* note 19, at 302. *See* Schoiswohl, *supra* note 9, at 824 ("A Constitution that does not adequately reflect the will of the majority and thus is not commonly accepted will suffer from a lack of effectiveness that threatens to undermine the emergence of a culture of constitutionalism."); *but see* Sunstein, *Agreements, supra* note 16, at 1769 ("Consensus or agreement is important largely because of its connection with stability, itself a valuable but far from overriding social goal.").

    I wish to stress that the study of consensus theory is key for understanding the notion of a constitutional state; questions such as, what "consensus" is; how "consensus" develops within a society; and how to explain the "source" of "consensus" in light of "political culture." *See* POLITICAL CULTURE AND CONSTITUTIONALISM (Daniel Franklin & Michale Baun eds., 1994).

21. *See* LIJPHART, PATTERNS OF DEMOCRACY, *supra* note 19, at 302.

22. *Id.* at 217 ("The absence of a written constitution in Britain and New Zealand is usually explained in terms of their strong consensus on fundamental political norms, which renders a formal constitution superfluous.").

23. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE (1999) [hereinafter RAWLS, JUSTICE]; RONALD DWORKIN, LAW'S EMPIRE (1986). For a plausible case for the failure of rational constraint in liberal theory, see Richard Parker, *The Past of Constitutional Theory — And its Future,* 42 OHIO ST. L.J. 223 (1981); Karl Klare, *Law-Making as Praxis,* 40 TELOS 123 (1979); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law,* 11 REV. L. & SOC. CHANGE 369 (1982-83); Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976). For a plausible rejoinder, see Laurence Tribe, *The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of Lawmaking,* 10 CREIGHTON L. REV. 433 (1977); Lon Fuller, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 353 (1978).

final settlement, and with it, peace. The linkages between peace and finality, between peace and coherence, are captured not only in empirical studies,[24] but enjoy strong theoretical support as well.[25]

Even among political liberal theorists there is a widespread contemporary preference for what has been called the "enforcement model," or the assertion of strong authoritative and definitive outcomes, of ultimate authority, and of self-contained totalizing narratives. At its core the enforcement model, according to Sarah Harding, "privileges finality and certainty over dialogue."[26] In the context of common law constitutional adjudication she charges the United States (U.S.) Supreme Court of taking a jurisprudential approach "[too] centered on local, independent, and final decision-making ... [C]ourts adhering to the enforcement model view themselves not as mediators or partners in an active dialogue, but rather as *local law enforcers* whose position with respect to legislatures and other courts is clearly defined."[27] And, unsurprisingly, when American constitutionalism, including its strong variant of judicial review, has gone global,[28] it should come as no surprise that many foreign legal systems too would find normative virtue in legal certainty, authoritative and clearly-defined legal outcomes, and legal finality.[29]

Whether in constitution-making or constitutional adjudication, if we look to uniformity, predictability, and certainty, and, if we can achieve these ends by encouraging the univocality of authors and authorities, then it might follow that the reverse, or the multivocality of authorship and the protraction of dialogue towards an indefinite future, will undermine the achievement of those ends.[30] In other words, if we aim for certainty by making the public sphere exclusive to a smaller political elite, conversely then, by expanding the public sphere so as to include more political actors through time would likely propagate uncertainty, unpredictability, and

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24. *See* LIJPHART, PATTERNS OF DEMOCRACY, *supra* note 19, at 4 (arguing for the need of "exact lines" of division and allocation of powers in a federal system).

25. *Cf.* Sarah Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 451 (2003) (discussing "coherence" and "authority" under the "enforcement model") (citations omitted).

26. *Id.* at 424.

27. *Id.* (emphasis supplied).

28. *See* Heinz Klug, *Model and Anti-Model: The United Sates Constitution and the "Rise of World Constitutionalism,"* 3 WIS. L. REV. 597 (2000).

29. One might observe that the jurisprudential behavior of the Israeli and Philippine Supreme Courts follow enforcement politics.

30. *Cf.* Harding, *supra* note 25, at 457.

informational asymmetry in legal ordering. Under enforcement politics, these qualities are the very normative evils that every scholar of law must seek to eradicate.

Given the jurisprudential trend towards finality, are we now seeing a glimpse of the conditions for that overlapping consensus, which John Rawls claims is essential for stable liberal societies?[31] If so, can the enforcement model be looked upon as normatively appealing for constitutionalism in general, and for post-conflict reconstruction in particular? Are "coherence," "certainty," and "closure" by themselves higher order normative conceptions for constitutional engineering? Surely there are thinkers who invest their entire lives perfecting the great corpus of institutional architecture and design.[32] As no expert in the field I enter this debate modestly, even nervously, but all the same hoping to expose an alarmingly dangerous habit of constitutional practice clearly turning out to be too anti-transformative, too historically and programmatically entrenched, and too unmindful of the self-critical, imaginative, and revisionary properties that all respect-worthy social and political institutions could and ought to have. In the course of this exposition, I hope to offer a potentially more transformative account of legitimacy in the legal ordering of fragile communities — one that might be plausible and sensible enough to better meet the present emergencies without being too ashamed of it.

IV. DIALOGICAL CONSTITUTIONALISM AND PRINCIPLED AMBIGUITY

In what follows, I develop the thesis that constitutional engineers in post-conflict reconstruction should abandon the enforcement model and adopt a more dialogical enterprise.

By dialogical,[33] I mean, as Michelman does, an institutionalized conception of deliberative politics[34] as a "self-revisionary normative dialogue

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31. *See* RAWLS, LIBERALISM, *supra* note 12, at 133-72 (1993) (discussing "overlapping consensus."). For a plausible endorsement of this principle, see Sunstein, *Agreements, supra* note 16; VICKI JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 188 (2006). For a critical view, see Michelman, *Ida's Way, supra* note 12, at 364 ("the … hope for an overlapping consensus cannot be held out, in the same way, for Rawls' own, constitution-focused liberal principle of legitimacy … because Rawls' proposed principle contains an indissoluble kernel of legalism and contractualism.").

32. *See supra* notes 8 & 19.

33. The terms dialogic and dialogical can be traced to the literary works of the Russian philosopher Mikhail Bakhtin. *See generally* MIKHAIL BAKHTIN, THE DIALOGIC IMAGINATION: FOUR ESSAYS (Caryl Emerson & Michael Holquist trans., 2004).

through which personal moral freedom is [best] achieved."[35] The idea is that political actors — whether they be duly constituted government authorities, private entities, or even social movements[36] — all engage in constitutional discourse. There is a tangible back-and-forth communicative discursive dynamic between and among political actors.

The dialogical conception is thought to be a "proceduralist" form of constitutional democracy[37] whose institutional features might indeed be shared by other legal systems as well. But the emphasis is different. Dialogical constitutionalism involves the "ongoing revision of normative histories"[38] that is not indissolubly tied to any "static," "parochial," or "coercive constitutionalism;"[39] rather, through the dialogical enterprise, and by

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Dialogic (or dialogical) literature is said to be in contrast with "monologic" literature. The basic idea, as the term suggests, is to engage in continual dialogue with previous and contemporary texts in the reading and writing of literature. The dialogical method looks upon past works by using the lens of the present, and considers transformative possibilities or shifting notions of prior ideas in light of present understanding. In this sense the dialogical method, which by no means is restricted to literary analysis, is reflexive and self-revising, as I shall later explain. Reflexive argument presupposes knowledge-formation as dynamic, as opposed to punctual; relational, as opposed to predetermined; and collective, and not individualistic.

34. KENNETH BAYNES, DELIBERATIVE DEMOCRACY AND THE LIMITS OF LIBERALISM, DISCOURSE AND DEMOCRACY: ESSAYS ON HABERMAS'S BETWEEN FACTS AND NORMS 15-16 (René Von Schomberg & Kenneth Baynes eds., 2002) (discussing Habermas' notion of procedural democracy as a "public reasons" approach where democratic norms and procedures are said to be based on reasons that citizens can publicly affirm in view of a conception of themselves as free and equal persons).

35. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988) [hereinafter Michelman, *Republic*] (positing the dialogic-republican constitutional theory in light of *Bowers v. Hardwick*). For an interesting application of Habermasian dialogical theory to post-conflict Eastern Europe, see Rory Conces, *The Role of the Hyper-intellectual in Civil Society Building and Democratization in the Balkans*, 59 STUD. EAST. EUR. THOUGHT 195 (2007).

36. *Cf.* Jack Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005) [hereinafter Balkin, *Social Movements*].

37. For a discussion of "proceduralist" deliberative democracy, see JURGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY (Ciaran Cronin & Pablo De Greiff eds., 1998).

38. Michelman, *Republic, supra* note 35, at 1495.

39. *Id.*

strategic constitutional mediation and negotiation, it is hoped that political actors of deeply divided societies may retain their normative collective identity — a shared liberal ethos — even while undergoing transformation through a process of reflexive criticism.[40]

In differentiating enforcement from dialogue, to simply say that one is "static" while the other is "dynamic" just won't wash. As intimated, the flaw of the enforcement model lies in its normative fixation with a static corporeal depiction of the legal order, one which assigns too much conceptual weight on the final act of voting and entrenchment of a "supreme law" of a given dramatic historical moment.[41] As a consequence, the individual preferences of historical personae are left unfiltered and

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40. *Id.* (citing ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 15-16 (1986)). This might normatively imply that not only do constitutional settlement and design by themselves tend to carve out the foundational zone of dialogue; the system itself borne of the prior accord is meant to sustain the dynamic and momentum of relative peace over time.

For what I take to be other plausible arguments in favor of transformative dialogical democracy and its application, see Jose Marques & Ian Bannon, *Central America: Education Reform in a Post-Conflict Setting, Opportunities and Challenges* (Environmentally and Socially Sound Sustainable Development Network, Social Development Department, Conflict Prevention & Reconstruction Working Paper No. 4, Apr. 2003), *available at* http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/2 14578-1111661180807/20488027/CPRWPN04.pdf (last accessed May 3, 2009). To exemplify, according to Marques and Bannon:

> As in most post-conflict societies peace brings not just a cessation of hostilities, but also the opportunity for transformation, especially in terms of addressing the root causes of the conflict and building a better future for the next generation. The immediate post-conflict period offers a window of opportunity, often brief however, to undertake these transformations by adopting bold and longer term reform processes. Transforming as well as rebuilding education systems is often at the center of post-conflict reconciliation and reconstruction agendas.

Id.; see also Rob Aitken, *Cementing Divisions? An Assessment of the Impact of International Interventions and Peace-Building Policies on Ethnic Identities and Divisions*, 28 POL'Y STUD. 247-48 (2007) (discussing the entrenchment of discrete ethnic lines: "Peace processes and international interventions have too frequently accepted the claim that ethnic identities are relatively fixed and form the basis of stable political identities.").

41. *See* ACKERMAN, FOUNDATIONS, *supra* note 1; ACKERMAN, TRANSFORMATIONS, *supra* note 1.

aggregated under the posthumous belief that the outcome reflects a uniform but phantomized popular will.[42]

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42. *See* BAYNES, *supra* note 34, at 17. Baynes, following Habermas, makes a distinction between "deliberative politics" and what I term as a "static corporeal depiction" of political will-formation:

> [t]he idea of a suitably interpreted "deliberative politics" thus lies at the core of Habermas's procedural democracy. In deliberative politics attention shifts away from the final act of voting and the problems of social choice that accompany it. *The aim of a deliberative politics is to provide a context for the possible transformation of preferences in response to the considered views of others and to the "laundering" or filtering of irrational and/or morally repugnant preferences in a manner that is not excessively paternalistic.* For example, by designing institutions of political will-formation so that they reflect the more complex preference structure of individuals rather than simply registering the actual preferences individuals have at any given time, the conditions for a more rational politics (i.e., a political process in which the outcomes are more informed, future-oriented, and other regarding) can be improved .... What is important for this notion of deliberation, however, is less that everyone participate — or even that voting be made public — than that there be a warranted presumption that public opinion be formed on the basis of adequate information and relevant reasons and that those whose interests are involved have an equal and effective opportunity to make their own interests (and the reasons for them) known.

Id. at 16-18 (emphasis supplied) (citing JOHN HART ELY, DEMOCRACY AND DISTRUST (1980)).

It must be noted that Habermas' idea of procedural democracy should not be confused with the binary categories of "procedural" or "substantive" process under John Ely's account. I also wish to juxtapose Habermasian deliberative theory with Unger's idea of transformative, or self-revising, nature of institutional structures:

> To imagine and establish a state that had more truly ceased to be hostage to faction, in a society that had more truly rid itself of a background scheme of inadequately vulnerable division and hierarchy, we might need to transform every aspect of the existing institutional order. The transformed arrangements might then suggest a revision of the democratic ideal with which we had begun. *From the idea of a state not hostage to a faction, existing in a society freed from a rigid and determinate order of division and hierarchy, we might move to the conception of an institutional structure, itself self-revising, that would provide constant occasions to disrupt any fixed structure of power and coordination in social life.* Any such emergent structure would be broken up before having a chance to shield itself from the risks of ordinary conflict.

In contrast, at the heart of the dialogical enterprise lies the capacity to welcome transformative possibilities[43] yet concurrently preserving one's normative ethical identity. Through the medium of law "the task of an opinion-forming public sphere," in the words of Roberto Unger, "[is] that of laying siege to the formally organized political system by encircling it with reasons without, however, attempting to overthrow or replace it."[44] This disruptive, self-revising and reflexive character of deliberative politics works from within a rooted liberal tradition rather than appealing to transcendental

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UNGER, *supra* note 40, at 30-31 (emphasis supplied).

Unger might be read to suggest that democratic institutions can be consciously fashioned to accommodate large-scale transformative possibilities, which, in turn, can unsettle even our very understanding of democracy. *See also* UNGER, *supra* note 40, at 39-40 (discussing the notion of solidarity rights as legal entitlements of communal life to be defined in two stages, first, the initial moment of the right as an incomplete definition, and, second, the completion of its definition through which "the rightholders themselves ... set in context the concrete boundaries to the exercise of the right according to the actual effect that the threatened exercise seems likely to have upon the parties to the relationship.").

For a colorable plausible basis for the claim that the understanding of legal rights, among other legal concepts, are socially situated and subject to changes in one's situation sense, see KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); Fuller, *supra* note 23.

43. For a discussion on the nature of "transformative occupation," see Jean Cohen, *The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for "Interim Occupations"*, 51 N.Y. L. SCH. L. REV. 497 (2006-2007).

44. BAYNES, *supra* note 34, at 18; *see also* Michelman, *Republic, supra* note 35, at 1531 (To Michelman, "much of the country's normatively consequential dialogue occurs outside the major, formal channels of electoral and legislative politics, and that in modern society those formal channels cannot possibly provide for most citizens much direct experience of self-revisionary, dialogic engagement.").

In post-conflict settings the most obvious institutional structures are nominally symbolic of current power structures. To be sure, not all are bound to be problematic. The sources of conflict may lie outside them: how one perceives the contours of the public sphere might be outcome determinative. To the extent that the existing *corpus juris* is reflective of power structures, it may thus be regarded as critical starting points but no more. Clearly, dialogical constitutionalism embraces a "non-state centered notion" of democratic discourse and institutional design: it is not "exclusively and immediately tied to the coercive exercise of centralized majoritarian power." Michelman, *Republic, supra* note 35, at 1531.

insight of the good and the right.[45] But, in the end, the dialogical model can turn out to be more normatively attractive for post-conflict reconstruction than the enforcement model because the former seeks to generate an intersubjective account[46] of basic rights, to facilitate discussion based on mutual respect, and to institutionalize these reflexive normative practices.[47] Enforcement politics on the other hand must first predicate legal compulsion on a conceptually unified sovereign will and only then would require a power-holder to carry out and univocally impress upon society the objects of a fantastical mandate.

In contrast, dialogical deliberative democracy is a conceptual constitutional blueprint that exhorts one to shift attention away from *punctual* acts of ratification to *processes* of ongoing normative conversation where the legitimacy of a constitutional order projects forward to the future by redeeming the past.[48] Then again, the enforcement model would draw its legitimating power from finality, certainty, and global coherence. If one were to defend enforcement constitutionalism, might one rather look beyond the virtues of finality and perhaps find better normative support in practical necessity, political or business expedience or even human convenience? Are these not better reasons for institutionalizing enforcement politics? If they are, could the same pragmatic concerns be reconciled with notions of transformative, imaginative, and self-revising constitutional politics?

We can turn to some noteworthy examples. In light of Polish and Hungarian constitutionalism Jacques Rupnik rightly observes that "[s]preading out the making of the constitution ... creates a *process* of constitutional education, a diffusion of constitutionalism's values among the

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45. *Cf.* UNGER, *supra* note 40, at 15-16.

46. *See* Carlos Santiago Nino, TRANSITION TO DEMOCRACY, CORPORATISM AND PRESIDENTIALISM WITH SPECIAL REFERENCE TO LATIN AMERICA, CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg et al. eds., 1993) (arguing in favor of contextualizing the intersubjective dimension of deliberative democracy in Latin American societies); *see also* John Heathershaw, *Peacebuilding as Practice: Discourses from Post-conflict Tajikistan*, 14 INTERNATIONAL PEACEKEEPING, at 219-36, 233 (2007) (making a parallel contextualization in Tajikistan).

47. *See* BAYNES, *supra* note 34, at 26.

48. *Cf.* Jack Balkin, *Respect-worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485, 494-95, 497 (2004) [hereinafter Balkin, *Respect-worthy*] (discussing the "transtemporal collective subject"); *see also* Simeon & Turgeon, *supra* note 11, at 96 (constitutional design as an "ongoing conversation").

political elites."[49] While Rupnik did not avowedly associate this process with the dialogical conception of democracy, his description of grassroots constitutional learning then occurring in the transitional democracies of Central and Eastern Europe captures the idea no less: "[C]onstitutionalism can become more important than the constitution itself, since it contributes to the transformation of political culture, without which the rule of law can never gain a solid foothold."[50] At the risk of oversimplification one can suppose that the great lessons of constitutional learning in countries such as Poland and Hungary would occur in stretching out the founding of constitutional democracy so that constitutionalism would always remain imperfect and incomplete.[51] Constitutionalism is not an act but a process. Constitutionalism can be thus notionally disassociated with the contemporary idea of punctualistic and episodic sovereign will-formation, swallowed up as it is by a notionally vast and boundless sea of constitutional change.

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49. JACQUES RUPNIK, THE POST-TOTALITARIAN BLUES, THE GLOBAL RESURGENCE OF DEMOCRACY 370 (Larry Diamond & Marc Plattner eds., 1996).

50. *Id.*

51. *Id.* At a more abstract level one might distinguish majoritarian from consensus democracy as follows: the first appeals to "the majority" while the second appeals to "as many people as possible." One might argue that both in effect *aggregate* the naked preferences of the "people" the outcome of which would constitute the primary and ultimate justification for the products of democratic decision-making:

> Preferences as such do not need to be justified, and aggregative conceptions pay little or no attention to the reasons that citizens or their representatives give or fail to give. They regard reasons as significant only insofar as the reasons help predict or correct preferences. Aggregative theorists thus believe that the collective outcomes produced by their various methods need no further justification beyond the rationale for the method itself. The majoritarian or utilitarian assumptions underlying the method provide its justification. Reasons can be given for the outcomes, but they are to be found not in the preferences but in the rationale for the method of combining the preferences.

AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 15 (2004).

For a brief discussion on the inclination to demarcate, and therefore "constitutionalize" ethnic cleavage along lines of political division, see HOROWITZ, *supra* note 8, at 13.

A. Liberal Legality as a Fighting Faith

While I have no quarrel with the consensus or majoritarian models of democracy as such,[52] I part ways insofar as scholarship about them might attribute *finality*, in the sense discussed, as an *overriding* normative feature for constitutional engineering in post-conflict settings.[53] As the fatigue of a drawn-out war bears down on the self it is only humanly natural for combatants to dream of a kind of perennial tranquility that follows a decisive cessation of hostilities. But hunger is not food; romantic endings alone can be no source of mortar; right from the start constitutional engineers know that portrayed on their drawing boards shall always be unfinished constitutional designs.

A key feature that is certainly common to consensus, majoritarian, and dialogical democracy is a robust liberal democratic spirit. Indeed, the Rawlsian notion of a sufficiently overlapping moral-political consensus over substantive principles of liberal legality might be taken to be the very liberal ethos — a normative *impulse* toward the notions of mutuality, reciprocity, respect, or the conviction that each individual is morally free and equal.[54]

But, as with other competing strains of political thought, one cannot deny that the normative disposition of liberal legality can only amount to a fighting faith among many. Indeed as history shows there may come a time when once all conceivably reasonable alternatives have been foreclosed nation-builders might have to resort to a relentless and unmitigated deployment of the public force as a precondition for political conciliation. Regrettably in these cases, the ancient paradoxical "imperial dilemma" can be unavoidable. Sujit Choudhry concludes that even

> present-day occupiers with the noblest of liberal democratic motives are faced with a dilemma largely indistinguishable from that which faced their imperial predecessors. And as the situation in Iraq makes clear, this is a dilemma that an occupying power that acts as a trustee cannot possibly avoid. Certain imperial dilemmas inhere in the very project of nation-building, and no amount of liberal democratic reinterpretation can make

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52. *See* Kirsti Samuels, *U.N. Reform: Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 672 (2006) [hereinafter Samuels, *U.N. Reform*] (arguing that a pure majoritarian democratic model is unsuited to conflict-prone and highly divided societies; discussing choices of constitutional models in post-conflict environments).

53. *See supra* notes 23-25 and accompanying text.

54. *See* RAWLS, LIBERALISM, *supra* note 12.

them disappear. In this fundamental respect, the distinction between the new and the old nation-building does not always hold.[55]

In taking this a few steps further, one might have to insist that combatants who appeal to norms of self-determination in a way that is fundamentally irreconcilable with core liberal convictions cannot — must not — enter the great channels of constitutional dialogue. However, and as the argument goes, once the normative foundations of our enemies begins to jive with the ideals of liberal constitutionalism then as with all friends the gates should be flung wide open.

How can a liberal-minded citizen even begin to make sense out of a willful impressment of the public force unto those whose ethos happen to be fundamentally at odds with liberal convictions? How can one preach a notionally universal liberal culture to those who genuinely, freely, and thoughtfully disagree with it, and who, in similar vein, are also as willing to use force to propagate what they likewise think to be the highest order of normative conceptions for all peoples? The imperial dilemma is simply a case where the occupier finds itself with no other reasonable option but to forcibly lodge a code of purportedly universal human rights into the occupied belligerent community and then hope for the best.[56]

These questions are certainly no less pervasive in post-conflict regimes than in pre-conflict. To a lesser degree, or with less intensity, the same problems are certainly endemic in liberal polities whose citizens struggle on a daily basis to modulate the tension between mutual respect and individualistic (and collective) convictions, both of which lie within the spectrum of liberal values no less!

Jeremy Waldron might have provided a thoughtful clue. Reading Immanuel Kant, he names one advantage of positive law-making as such:

> [I]n the transition from moral philosophy to political philosophy, Kant insists that we now take account of the fact that there are others in the world besides ourselves. And he insists that we are to see others not just as objects of moral concern or respect, but as *other minds, other intellects, other*

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55. Sujit Choudhry, *Old Imperial Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multi-national Polities*, 37 CONN. L. REV. 933, 936 (2005).

56. For a classic case of importing Western principles of criminal justice in a non-Western context, see M. Cherif Bassiouni & Michael Wahid Hanna, *Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein*, CASE W. RES. J. INT'L L. 21, 26-27 (2006-2007) (arguing that political actors who either created or critiqued Iraq's post-conflict justice framework were not well-versed in the history of the Iraqi legal system).

agents of moral thought, coordinate and competitive with our own. When I think about justice, I must recognize that others are thinking about justice, and that my confidence in the objective quality of my conclusions is matched by their confidence in the objective quality of theirs. The circumstance of law and politics is that this symmetry of self-righteousness is not matched by any convergence on substance [about justice, the right or the good], that each of two *opponents* may believe that they are right. If nevertheless there are reasons for thinking that society needs just *one* view on some particular matter, to which all its members must defer at least so far as their external interactions are concerned, then there must be a way of identifying a view as the community view and a ground for one's allegiance to it, which is not predicated on any judgment one would have to make concerning its rectitude. That I contend is the basis of Kant's doctrine of positive law.[57]

In speaking for and acting in the name of the community, as Waldron (through Kant) maintains, one can or should make no direct appeal to substantive (and perhaps particularistic) notions of the good and the right. To ascribe public authorship to one's statements, he would have to prescind from a strictly merits-based discourse about substantive notions of justice and anchor one's normative basis elsewhere. On the one hand, we might imagine how proponents of enforcement politics are apt to respond — they will likely invoke sacred names and dates, as well as emblems and artifacts associated with those glorious moments of sovereign mobilization, and thereupon engage in genealogical retracing[58] to show how the utterances of the present are somehow, someway, coercively rooted, no matter how far back, to the dim parochial past.

On the other hand, how might dialogical constitutionalists enter the debate? What kind of constitutional toolkit could they use? In building consensus over hotly contested issues constitutional diplomats might find value in the strategic use of principled ambiguity. While enforcement theorists hearken the certitudes of history, dialogical constitutionalists look to a transformative future.

B. *Dialogical Democracy in Constitutional Form*

1. Partial Indeterminacy

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57. JEREMY WALDRON, THE DIGNITY OF LEGISLATION 61–62 (1999) (emphasis retained).

58. For a discussion on genealogical, universal, and dialogical comparative analysis and interpretation, see Sujit Choudhry, *Globalization in Search of Justification*, 74 INDIANA L.J. 819 (1999).

If we are to turn theory into practice, how might we incorporate dialogical constitution-making in young democracies? What might be its constitutional essentials?

In addressing these questions, we must now take a conceptual descent into a world of deep conflict where you and I, as constitutional negotiators, are asked to come up with concrete results in time before the incidence of violence rips apart the initial articles of peace. We should be aware of the statistical probability to keep the peace deal lasting is nearly hopeless. Because only a tiny fraction — between 15% and 30% — of the civil wars of recent memory had been permanently settled through negotiation, and, even less, through constitution-making. The great majority of the most vicious conflicts had ended through unilateral military victory.[59] Two-thirds of peace settlements fail as the parties recommence armed conflict just after two or three years.[60]

In addition, toward the end of the 20th century the more prevalent, devastating, and enduring conflicts had been intrastate rather than interstate.[61] Strikingly, "civil wars settled by negotiation," confirms Anthony Oberschall, "are less likely to be stable than those settled by military victory," especially those with ethnic or religious overtones.[62] What is more, civil wars are longer — they last about 10 times the duration of international conflicts.[63] How should a constitutional engineer then proceed with the Herculean task of post-conflict reconstruction? In cultivating liberal legality in unfamiliar terrain how deeply ingrained must one's fighting faith be to escape the imperial dilemma?

In a world of social pluralism surely a great variety of constitutional design and technique have been tried and tested. Constitutional engineers are asked to reconcile the sundry claims of self-determination of different

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59. *See* ANTHONY OBERSCHALL, CONFLICT AND PEACE BUILDING IN DIVIDED SOCIETIES: RESPONSES TO ETHNIC VIOLENCE 2 (2007) (citations omitted). This statistical observation is particularly true for ethnic civil wars.

60. *Id.* (citations omitted); *see also* Charles Call & Elizabeth Cousens, *Ending Wars and Building Peace: International Responses to War-Torn Societies*, 9 INT'L STUD. PERSP. 1 (2008) ("By most accounts, a significant number of armed conflicts relapse to war."); Samuels, *U.N. Reform, supra* note 52, at 663. ("On average, more than 50% of states emerging from conflict return to conflict. Moreover, a substantial proportion of transitions have resulted in weak or limited democracies.").

61. *See* GABRIELLA BLUM, ISLANDS OF AGREEMENT 15 (2007 ed.).

62. OBERSCHALL, *supra* note 59, at 2-3; *see* Collier, *supra* note 13, at 59.

63. *See* Collier, *supra* note 13, at 59.

peoples in conflict, each confidently bearing opposing conceptions of sovereignty.[64] No doubt in periods of existential conflict "[s]ome of the relevant disagreements are explicitly religious in character," observes Cass Sunstein, while "[o]thers might be described as quasi-religious in the sense that they involve [the] people's deepest and most defining commitments."[65]

In our hands rests an incipient democracy. Should there be a bill of rights and judicial review? What kind of educational system should we put up for the youth? What kind of criminal courts? Religious courts? Will there be amnesty for political offenders? Truth commissions?[66] How do we reconcile the legitimacy of past "official" conduct in the present tense?[67] How are we to treat mass atrocities carried out in the name of the state? And, not to mention the unavoidable technical fine print: How should the membership of the legislature be composed? What should be the age of universal suffrage? How are general elections to be held? And under whose terms?

Providentially for constitutional diplomats the detailed provisioning of whole catalogues of rights along with the structure and powers of government forms no immediate item in the post-conflict agenda. While these matters certainly occupy no lesser station than any other portion of an incipient constitution, in the inclement stages of political-will formation constitutional negotiators are concerned less with substantive *policy*-making than the *convergence* of assessments[68] over what might be the very issues ripe for political deliberation. In fixing the range of moral vantage-points for the

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64. *See* OBERSCHALL, *supra* note 59, at 10-11.

65. Sunstein, *Agreements*, *supra* note 16, at 1734.

66. For a comprehensive discussion on the function, design, and viability of truth commissions in various post-conflict settings, see Ariel Meyerstein, *Transitional Justice and Post-Conflict Israel/Palestine: Assessing the Applicability of the Truth Commission Paradigm*, 38 CASE W. RES. J. INT'L L. 281 (2006-2007).

67. For an interesting argument that the process of remembering and memorializing plays a crucial role in post-conflict reconstruction of identity, power, and place, see Sara McDowell, *Armalite, the Ballot Box and Memorialization: Sinn Fe'in and the State in Post-conflict Northern Ireland*, 96 THE ROUND TABLE 725 (2007).

68. On the theory of a "convergence of assessments" of political will, see A. Edsel C. F. Tupaz, *The Constitution of the Revolutionary Assembly: A Theory of Convergence of Assessments*, 2-3 BUDHI 123 (2003) (formulating a theory on the rule of majority during popular sovereign mobilization); A. EDSEL C. F. TUPAZ, THE LAW ON PEOPLE POWER: A JURISTIC THEORY OF SOVEREIGNTY 205-273 (2004) (formulating "the theory of convergence of assessments independentaly made by strategic sectors of society" as the foundation of the normative framework for the exercise of popular sovereignty).

contestants, it might be well for constitutional diplomats to initiate dialogue on the normative premise that the putative constitutional order should always be relatively indeterminate in scope and application. As intimated, in light of dialogical theory the relative indeterminacy of constitutional issues, whatever might be their final form and meaning, make the essential conditions for any sustainable normative self-revision or critical reflection. In other words, in providing moral vantage-points it falls upon the constitutional negotiator (and designer) to fashion the putative provisions that touch upon the most serious issues in a manner purposefully and sufficiently vague in order to facilitate ongoing, deliberative, self-revising politics.[69] *Through strategic drafting constitutional negotiators dispatch roving moving targets[70] into the public sphere, focal points unto which warring parties project their moral assessments, permitting them to interpret the most troublesome issues however they wish.*

2. Downstream Bias

Constitutional negotiators might be able to elicit constructive dialogue by deflecting attention away from the great questions of political and moral ideology to questions of low-level, rudimentary — even vulgar — concrete particulars.[71] If the parties quarrel over the release of prisoners, the one in favor of the release may argue in light of international human rights, while the other, purely in terms of military strategy. Territorial boundaries might be drawn with one side aspiring for self-determination, while the other would appeal to the intrinsic merits of devolution and local autonomy. One might be inclined to adopt Shari'a Law to govern local disputes because of

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69. Negotiation theory has labeled this practice somewhat pejoratively as the "art of fudge." *See* Jonathan Stevenson, *Irreversible Peace in Northern Ireland?*, 42 SURVIVAL 5, 9-11 (2000).

    It is suggested that an "objective" observational standpoint is required for comparative constitutional analysis and institution-buidling. *See* Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 YALE L.J. 401, 404 (1993) (arguing that observers must (1) maintain a consistent observational standpoint; (2) understand themselves and the forces that operate on them; and (3) suspend, insofar as possible, their own culturally supplied categories).

    For a colorable rejoinder, see UNGER, *supra* note 40.

70. *See* Balkin, *Respect-worthy*, *supra* note 48 (Balkin uses the phrase "moving targets" in discussing the idea of "constitutional protestantism.").

71. By "low-level theorizing," I refer not only to sequential or singular putative provisions but to intertextual interpretation among provisions as well, and, hence, following Sunstein, the level of abstraction, high or low, is thus relational or relative. *See* Sunstein, *Agreements*, *supra* note 16.

deep religious *convictions*, while the other, on the basis of the freedom of religion *clause*. One may agree to a cease-fire because of dwindling popular support for the insurgency, while the other, on religious holidays. In all these "islands of agreement"[72] mutual respect is generated, even if unconscious or disavowed, by allowing the other room to fit and justify the particular formality on the table to one's higher belief system. *In all these instances, as Sunstein puts it, the parties concede to relatively particular outcomes or low-level principles without giving up their deepest and most defining commitments.*[73] What is to be emphasized here is *relative* rather than *absolute* particularity, or, *relative* rather than *absolute* abstraction.[74]

As indicated, while the enforcement model seeks finality and closure, dialogical practice requires that the issues put to the table are to be articulated with enough plasticity to allow each party to insist that key propositions mirror their own rational expectations. Like brilliant crystals, our puzzle pieces can adjust to an assortment of interpretative possibilities. The moment contestants feel confident that the formal matter at hand accommodates their deepest commitments and world views, once they vindicate their greatest aspirations by finding the lowest common denominator that squares with their unique rational expectations, once they can write and re-write their fundamental values unto these provisions as they see fit, then, like magic mirrors, these provisions begin to reflect their own values, beliefs, and deepest ideals. Legal indeterminacy cast in this light can be a precondition for dialogical discursive constitutionalism:

> [L]egal form [in light] of plurality is *indeterminacy* — the susceptibility of the received body of normative material to a plurality of interpretive distillations, pointing toward differing resolutions of pending [outcomes] and, through them, toward differing normative futures. Legal indeterminacy in that sense is the precondition of the dialogic, critical-transformative dimension of our legal practice variously known as immanent critique, internal development, deviationist doctrine, social criticism, and recollective imagination.[75]

While it cannot be denied that political actors in divided societies would sharply diverge on high-level propositions, through strategic low-level consensus-building negotiators can "create a basis for mutual dealings, in

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72. *See generally* BLUM, *supra* note 61.

73. *See generally* Sunstein, *Agreements, supra* note 16.

74. *Id.* at 1736 (Sunstein also recognizes the possibility that people may agree on an abstraction while disagreeing on particulars, but he leaves this question for another time.).

75. Michelman, *Republic, supra* note 35, at 1528-29 (emphasis supplied).

feeding divergent positions with a common formal language to borrow from and build on."[76] In other words, through strategic mediation the parties might be able to come to an agreement if they lower the level of abstraction — the less Herculean the abstraction and the more particularized the formal outcome, the more susceptible parties are to agree.[77] The provisions read intertextually must be relatively partially indeterminate. We can call this "constructive ambiguity," "principled ambiguity,"[78] or, to Sunstein, "incompletely theorized agreements."[79] The basic point is "to promote a major goal of a heterogeneous society: to make it possible to obtain agreement where agreement is necessary, and to make it unnecessary to obtain agreement where agreement is impossible."[80] There should be no premium to reach for global horizontal and vertical coherence.

People may agree to a rule of strict liability under tort law for various and divergent reasons, from economic efficiency to rights-based justifications. As Sunstein illustrates, one could agree to the holding of *Roe v. Wade*[81] without coming up with a monistic theory that would fit and justify the holding.[82] The downstream bias in favor of low-level abstraction allows political actors, even citizens, to find commonality without producing unnecessary antagonism. So too does low-level abstraction reduce the political cost of enduring conflict. This way, the warring parties end up

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76. BLUM, *supra* note 61, at 44.

77. *See* Sunstein, *Agreements*, *supra* note 16, at 1768 (describing Herculean theory-building as "extra-human"). It is highly likely that Sunstein had been influenced by Alexander Bickel: in light of the "passive virtues" of the judicial branch judges might avoid decision-making if they can find a narrower substantive basis. *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962).

78 . Heinz Klug, *Constitution-Making, Democracy and the "Civilizing" of Unreconcilable Conflict: What Might We Learn from the South African Miracle?* (U. Wis. Law School, Legal Studies Research Paper Series, Paper No. 1046, May 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm? abstract_id=987302 (last accessed Apr. 28, 2009).

79. *See* Sunstein, *Agreements*, *supra* note 16, at 1738 (while Sunstein contextualizes his discussion in the collegial courts, he was open to the idea that "[t]he virtues of incompletely theorized agreements extend as well to social life, to workplace and familial life, and even to democratic politics.").

80. *Id.* at 1743.

81. Roe v. Wade, 410 U.S. 113 (1973) (Roe v. Wade is a landmark decision by the U.S. Supreme Court where it was held that a pregnant woman had the "qualified right to terminate her pregnancy.").

82. *See* Sunstein, *Agreements*, *supra* note 16, at 1742-43.

respecting each other's deepest and most defining commitments *by taking them off the table.*[83]

This is no new practice. In adjudication, judges are reluctant to propound high-level principles if they can dispose of issues through theoretical minimalism. They stay at the lowest level of abstraction necessary for the decision of the case. Hence, the greater the likelihood the rationale of their decision can be compatible with an array of deeper and more complex reasoning. The same practice can be found in negotiation theory.[84] While modern society prizes reason-giving,[85] seamless coherence, and self-contained argument, post-conflict constitutional engineering on the contrary can do more with less theoretical friction. By lowering the threshold for consensus, constitutional negotiators can stage a continuing and open-ended revisionary constitutional discourse between and among key political actors. By opening up communicative political channels, constitutional diplomats are able to expand the public sphere, which, in turn, can enclose more and more participants through time. The parties become morally optimistic[86] as new channels of communicative[87] and shared cooperative activity[88] open up.

Northern Ireland and South Africa are instances where we might see dialogical constitution-making in action. To briefly illustrate: in the case of Northern Ireland all parties quarreled over whether "decommissioning" meant "actual" or "constructive" decommissioning for so long a time that all stakeholders became more and more reluctant to abandon the victories of

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83. *Id.* at 1746-47.

84. *See* Orde Kittrie, *Intellectual Relations: More Process Than Peace: Legitimacy, Compliance, and the Oslo Accords,* 101 MICH. L. REV. 1661 (2003).

85. *Cf.* Sunstein, *Agreements,* supra note 16, at 1754.

86. I borrow Fried's idea of "moral causation" to avoid any suggestion that that legitimacy or respect-worthiness is somehow irreducibly tied to an irrational basis. In what follows, I argue that one's understanding of the "moral pull to consensus" as well as "moral optimism" in the dialogical process is fundamentally tied to this idea of moral causation. For the moment we can be satisfied with an initial statement of what moral causation is: "[T]he perception of the moral rightness of an action may be a motive sufficient, alone or in conjunction with other motives, to move persons to perform that action." Charles Fried, *Moral Causation,* 77 HARV. L. REV. 1258, at 1269-70 (1964).

87. *See* BAYNES, *supra* note 34, at 15-26 (discussing Habermas' model of procedural democracy).

88. *See generally* Jules Coleman, *Conventionality and Normativity, in* 1 LEGAL AND POLITICAL PHILOSOPHY 157, 172-73 (Enrique Villanueva ed., 2002) (discussing Bratman's notion of Shared Cooperative Activity as irreducibly normative).

peace gained along the way. The fact that no party to the Good Friday and St. Andrews Agreements could not be on the same page on every page sublimated hostile action to rational discourse based on mutual respect. The fact that such basic terms were so elusive to pin down had the effect of indefinitely extending political dialogue and of welcoming newcomers to the table. To be sure, the Stormont Assembly, the seat of all devolved powers under the Good Friday Agreement, had been suspended by Westminster many times because the parties "failed" to share power in the executive body and "failed" to decommission their weapons after missing more and more "important deadlines." But where the parties were so sharply focused on *moving*, elusive targets, the fact that they kept chasing the meaning of key provisions, and the fact that each insisted that those provisions *mirrored* their *own* rational expectations all in all fueled the political discourse until a time came when the parties earned so much mutual respect that the prospect of fighting simply faded away.

3. Punctual Corporeal Static Depictions

Much of today's scholarship operates under the following binary, polar, or zero–sum algorithms: peace-building through constitution-making must distinguish between "heterogeneous" and "homogenous" societies, "divided" and "integrated" polities, "partisan" and "conciliatory" politics, "progress" and political "deadlock," the "act" of voting and electoral "process."[89] The point is to achieve certain milestones situated in time and that those milestones should be somehow etched in parchment.[90] Behind this is the implied assertion that constitutional engineers should function under punctualistic, corporeal, and static depictions of "peace" and "war,"[91] marking out those defining moments of popular sovereignty — the "will of

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89. *See* Sahin, *supra* note 15 (discussing the "failed state," in a conscious effort to steer clear from binary categories); Meyerstein, *supra* note 66, at 306 (criticizing the "legal fetish" of fixing historical limits on the period in which atrocities are to be considered by a government, alluding to the South African Truth and Reconciliation Commission).

90. For an argument that the project of social engineering in Afghanistan, replete with timetables and benchmarks for international monitoring, had brought about tension associated with social change, see Astri Suhkre, *Reconstruction as Modernisation: the 'Post-conflict' Project in Afghanistan*, 28 THIRD WORLD Q. 1291 (2007).

91. *Cf.* Wolfram Lacher, *Iraq: Exception to, or Epitome of Contemporary Post-conflict Reconstruction?*, 14 INT'L PEACEKEEPING 237, 238 (2007) ("The term feigns a clear distinction between war and peace that, in Iraq as elsewhere, is difficult to make.").

the People"[92] — in a peace accord, a constitutional blueprint, the constitution itself, a referendum, election, or in some outcome of power-sharing.[93] Much attention is paid to whether deadlines are met. Successes are defined according to the extent the political actors have met their pre-agreed targets over time. Normative indices are pegged to solidaristic, coercive political objectives. In contemporary legal ordering warring factions try to round up every particle of popular sovereignty whom they think sufficiently competent to exercise the right of suffrage, aggregating all their raw preferences into one phantom popular will,[94] and proceed from there to build upon myth after myth.[95] The parties are obsessed to come up with a "higher law" whose substance is thought to command universal assent and to sanctify that conviction into corporeal form durable enough for all time.[96]

The predisposition to consecrate punctual constitutional moments into corporeal form is a key normative aspect of enforcement politics. And, it is well to remember that while the enforcement model is indeed being associated with constitutional adjudication, the same normative predisposition is in no way confined to the courts alone as it can typify other constitutional processes as well.[97]

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92. For an argument that "popular will" in exercises of direct democracy might be but a phantom construction made possible through strategic drafting of legislation, see Jane Schacter, *The Pursuit of "Popular Intent": Interpretative Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995).

93. *Cf.* Collier, *supra* note 13, at 59-60 (expressing skepticism over the legitimizing function of elections in post-conflict regimes).

94. *See generally* Schacter, *supra* note 92.

95. For a discussion about the normative and legitimating function of "collective myths," see OBERSCHALL, *supra* note 59, at 21.

96. *Cf.* Aitken, *supra* note 40; HOROWITZ, *supra* note 8, at 568-70 (discussing the risk of institutionalizing and perpetuating ethnic politics in post-conflict situations via consociational democracy).

97. Ackerman might be read to endorse these extra-judicial moments (of popular deliberation) as the great constitutional moments with which the highest public authorities must be in lockstep. *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 1070-71 (1989) [hereinafter Ackerman, *Constitutional Politics*].

   What underwrites Ackerman's "constitutional moment" is the normative claim that the constitutional order should reflect the "periodic, exceptional episodes of relatively public-regarding popular politics [which] issue higher-law declarations that become and remain fixed as constitutional-legal authority until revised by another such episode." Michelman, *Republic*, *supra* note 35, at 1507.

4. Upstream Bias

We can now come up with a *prima facie* case: the more *divided* the society, the more the constitutional negotiator should be inclined to *lower* the level of abstraction put to the table. Again, this is only a strategic presumption. If the parties can agree to a more coherent, monistic principle, then by all means they should make the conceptual ascent.[98] In a deeply divided world it would be wiser however to place caution before theoretical ambition.[99] When constitutional negotiators aim for theoretical modesty, "[t]he agreement on the core contested issues," observes Blum, "[can be] deferred to a later, then to a still later, stage."[100]

On the other hand, an inflexible commitment to theoretical modesty can lead to idle practices and even destructive ones. Perhaps you and I can find consensus over the right to equal protection, or equality, and yet disagree over the merits of affirmative action. We can agree to constitutionalize the right to life, but disagree on capital punishment. In these examples, the former instance can be said to occupy a higher level of abstraction than the latter, which is more particularized and less theorized.

While well-articulated comprehensive views on religious doctrine or conscience might find strong support among certain individuals, even among liberals, "the fact of reasonable pluralism," says John Rawls, "implies that there is no such [comprehensive or Herculean] doctrine ... on which all citizens do or can agree to settle the fundamental questions of political justice."[101] A more realistic conception of political affairs therefore might

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See generally Michelman, *Republic*, *supra* note 35, at 1525 (suggesting that Ackerman's account of spreading founding moments over continuous political time where the "vicariate of We The People, the founding authority" awaken after "Our long vacations"!); Frank Michelman, *Constitutional Authorship by the People*, 74 NOTRE DAME L. REV. 1605, 1624-25 (1999) [hereinafter Michelman, *Constitutional Authorship*] (discussing the demerits of the "authority-authorship" syndrome).

98. *See* Sunstein, *Agreements*, *supra* note 16, at 1760.

Sunstein does not suggest that theoretical ambition should be all together abandoned. *Id.* at 1738 (positing that "ambitious theories" are "an important part of the academic study of law, which can influence legal and political institutions ... such theories are legitimately a part of democratic deliberation."); *Id.* at 1750 (acknowledging that in some cases "fuller theorization — in the form of wider and deeper inquiry into the grounds for legal judgment — may be valuable or even necessary to prevent inconsistency, bias, or self-interest.").

99. Sunstein, *Agreements*, *supra* note 16, at 1738.

100. BLUM, *supra* note 61, at 47.

101. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 32 (2001).

refer to what Rawls terms as a "well-ordered society" typified by "a reasonable overlapping consensus" among notionally "reasonable" and "rational" individuals.[102] For a well-ordered society it is not necessary for there to surface a perfect moral-political consensus among autonomous citizens, rather, it suffices Rawls "that the political conception [of a reasonable overlapping consensus] is supported by the reasonable though opposing religious, philosophical, and moral doctrines that gain a significant body of adherents and endure over time from one generation to the next."[103] While Sunstein can certainly make a good case to aim for "the least common denominator," he leaves the question of how high should one take the "conceptual ascent," whenever appropriate, for another day. It is precisely at this moment where Rawls might timely provide important normative criteria: Rawls' political conception of an overlapping moral-political consensus might be taken to refer to an *upstream* conceptual predisposition, or, a Dworkinian predisposition towards grander, higher-level principles. But not too high.

5. Optimal Intermediate-level Theorizing?

To be sure, Rawls might find meta-theory building as too ambitious an aim even among liberal-minded citizens. But it must be made clear that irreconcilable large-scale disagreement in no way precludes the Rawlsian "political conception from being a shared point of view from which [citizens] can resolve questions concerning the constitutional essentials [of a respect-worthy legal order]."[104] In other words, Rawls's idea of a reasonable overlapping consensus might be taken to explain and justify a felt normative pull towards an optimal *intermediate*-level abstraction — regardless of one's theoretical baseline — that might characterize the Rawlsian conception of a well-ordered society.

6. Strategic Implications

Can we now reasonably suppose that once the parties concede to an issue deftly bracketed through strategic negotiation, whether that concession has been the result of an upstream or downstream theoretical tug, they will have then succeeded to generate greater mutual respect, enabling them to move on to the more sensitive, more deeply divisive issues?[105] Can ex-combatants and their diplomats wade through bit by bit the stickiest and most divisive

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102. *Id.*

103. *Id.*

104. *Id.*

105. Or revisit those issues that had been postponed for future settlement?

issues through the same normative, programmatic, and self-reinforcing strategy? Taking cue from Sunstein, we might come across some signs of what could amount to *a rhythmic normative pattern of contestation, resolution, retreat, and rest*: argumentation can in fact

> reflect profound respect. [O]bjections to judgments based on prejudice may reflect respect for the person at the same time that they attempt to overcome the judgments at issue. When defining commitments are based on demonstrable errors of fact or logic, it is appropriate to contest them. The same is true when those commitments are rooted in a rejection of the basic dignity of all human beings, or when it is necessary to undertake the contest to resolve a genuine problem [106]

To be sure, in the immediately preceding passage Sunstein holds that it could be a sign of respect for one to lodge an objection on the basis of sincere and thoughtful reasoning. But once a party does object, Sunstein is silent on the question of how propitious or timely her objection should be. Should she make her case immediately, or should she wait until the lapse of a cooling-off period? And how long should that period be? There is no doubt that Sunstein chose to leave these questions elsewhere. After all, they might find greater relevance in other disciplines such as mediation or even cognitive psychology. Even so, I take Sunstein's point as a cue for *what I suggest to be a situated calculated response: in moments of contestation it might be well for constitutional negotiators to keep the parties in lockstep with a comfortable rhythmic progression of resolution and rest, advancement and retreat, argument and acquiescence.* And yet how harmonious or discordant this sequencing might be would undeniably depend on how accurate one's situation sense is in real-time negotiation. For indeed it took no less than the melodic style and cadence of the great constitutional diplomats of history to turn even the most vicious conflicts of the world into prescriptive accord.

V. CASE STUDIES

I now turn to some case studies where we might see dialogical constitutionalism in practice. No doubt there are other names for the same thing. Some have given it a somewhat pejorative connotation or portrayed it in a manner devoid of principled considerations. For instance, before the advent of liberal normative analysis politicians had dubbed constructive ambiguity simply as "the art of the fudge."[107] Others were less concerned with its potential normative or theoretical underpinnings and focused solely on its practical consequences. As intimated, principled or constructive

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106. Sunstein, *Agreements, supra* note 16, at 1747.

107. *See* Stevenson, *supra* note 69, at 9.

ambiguity is a term in currency in negotiation theory and practice. In fact it had gained usage well before "dialogic" or "dialogical" democracy had caught the attention of mainstream thinkers. But in any case, one might be able to see in hindsight a normative pattern that had grown sufficiently distinctive to earn it a name, and, by that reason alone it would be well for all scholars of the law to take a closer look. It must be stressed however that a mere recourse to principled or constructive ambiguity does not necessary imply an underlying belief for dialogical, or even liberal, ideals. To conflate, the two would be to admit the implied causal assertion that mere empirical or factual obedience to a polity's laws and rules would make its constitutional order as normatively self-given.

A. South Africa

South Africa is a clear case of dialogical constitutional practice. During the South African constitution-making and negotiation process it is hard to exaggerate how often negotiating parties had consciously made use of principled ambiguity as they waded through issue after issue. Given the nature of this essay, I draw selectively and avoid what would otherwise be too vast a narrative of history and politics.

There are two important moments that might best exemplify recent South African constitutional experience. The first pertains to the proceedings leading up to the formulation of the 34 Constitutional Principles (Principles) and the enactment of the 1993 Interim Constitution, which, in turn, had incorporated the former.[108] The second refers to the South African constitutional court's certification proceedings over the proposed Final Constitution on the basis of the Principles as well as some jurisprudence that followed certification. The former is a case of constitutional negotiation, mediation, and design; the latter, a case of judicial minimalism in the interpretation and application of the Principles that formed the crux of the Solemn Pact. Both feature the important role of principled ambiguity and its application to key political and constitutional issues.

1. Pre-Certification Negotiation

In the transitional phase between apartheid and post-apartheid South Africa, it became more and more evident that, as a condition for the National Party (NP) to cede majority rule to the African National Congress (ANC), some sort of constitutional safeguard over the NP's core socio-economic interests had to be entrenched. These demands led to an innovative development where an interim constitution would be set up as the very litmus test for the

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108. 1993 INTERIM S. AFR. CONST. (superseded by 1996 S. AFR. CONST.).

"constitutionality" of a future constitution which had to be determined by a future constitutional court.[109] This intellectual revolution in constitutional law attracted intense scholarship and debate, and, while there is no question that social unrest persists today, so far, however, the "South African Miracle" is living up to its name.[110]

As stated, in the negotiation and framing of the 1993 Interim Constitution the lead representatives of the two main political parties had made a conscientious appeal to theoretical minimalism; in substantiating the Principles constitutional negotiators oscillated between postponement and immediate decision. In the face of what were seen as "non-negotiables" the parties consciously deferred these questions to future resolution.[111] To be sure, the act of postponement by itself would guarantee no resolution, and, even less, a revisiting of the same issue. But it is clear at least in hindsight that the momentum of moral optimism shared by the constitutional negotiators had surpassed a critical point that made the path to conciliation irreversible. What might explain the momentum towards peaceful settlement? As Heinz Klug aptly observes, it is now apparent that no less than

> [constructive] ambiguity allowed the process to go forward. One of the effects of the process of negotiating constitutional principles is to slowly entrap the constitutional conflict in a process of argumentation and alternative legal propositions. This has the result of both precluding some outcomes and mediating the differences between what might be considered acceptable alternatives.[112]

In framing a normative framework for a future constitutional order the Principles were deliberately ambiguously framed so that opposing factions could jointly engage in constitutional imagination and learning, and which, in turn, had made the ongoing transition more politically manageable and rationally constrained. The Principles were the parameters in which constitutional negotiators could imagine divergent opinions; their norms had come to accommodate what might have otherwise been seen as hopelessly irreconcilable agendas. It was furthermore observed that notwithstanding the fact that the Principles might have even caused ethnic "traditionalists" to field sectarian claims of a kind so fundamentally inconsistent with the

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109. *See* Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861 (2004).

110. *See* CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 221-43 (2001).

111. *See* Klug, *supra* note 28.

112. *Id.* at 21.

democratic spirit of the whole process, it was the very same Principles that had quarantined, and diffused, any imminent political detonation.[113]

2. Some Operational Dynamics

In the event that the parties had failed to muster sufficient consensus over a certain issue, it did not follow however that absolutely no kind of settlement was reached. In other words, while the parties might have failed to reach perfect accord over a given issue, there were still traces of "partial" agreement — when confronted with what might appear to be "non-negotiable" issues, the parties did not really "completely" set them aside. In these cases they opted for a *broader* principle which served as a reference point for future resolution. Klug keenly observes that the recourse to broad principles "allow[ed] the conflicting parties to put aside an issue for further debate while [allowing them to] work on issues over which there might be greater agreement."[114]

Conceivably there can be many scenarios that might depict this dynamic. It is entirely plausible that Klug's "non-negotiable" account — which is just one narrative among many — refers to a deadlock where negotiators would then make a conceptual descent and lower the threshold of abstraction to the extent necessary for a "partial" consensus. This "partial" consensus is a consensus over an abstraction no less, whether low or intermediate-level, and it is an abstraction that is less completely theorized relative to the original position. One could also imagine a counterfactual scenario where parties might have initially reached a much lower abstraction, say, the decision to set up a school, but they are unable to agree exactly where to place the school for a host of reasons, which can be anywhere from poor terrain, access to public highways, or the high incidence of crime in the area contemplated. In other words, they might happen to be at odds over a more particular outcome and yet they find themselves agreeing over relatively higher ground. *In this case they will ascend to a higher abstraction, say, affirmative action, regardless of whether the original position — the question of school location — had been settled.* Moreover, if we suppose that there are even higher theoretical possibilities relative to affirmative action, thus making the latter issue a relatively intermediate one, the parties are yet again faced with a choice to search for consensus at another theoretical level.

Now you might say that in light of all possible permutations it would be pointless to chart out the conceptual terrain — after all, the parties might find consensus over an issue, or they might not. What could be the incentive

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113. *Id.* at 23.

114. *Id.* at 20.

(or disincentive) for parties to expedite consensus-building? On the one hand, one answer lies in the fact that parties in post-conflict reconstruction face extreme resource and time constraints. Policy-makers do not have the leisure to attain Pareto optimality and explore other options that may appear the more reasonable only through hindsight. It was remarked that the South African constitution-making process had been overwhelmed by "a flurry of social policy formulation."[115] Recall that the post-conflict environment is typically volatile and may relapse into another cycle of violence at any given moment. Hence, policymakers will want to dispose of as many issues as soon as possible, whether they happen to be low, medium, or high in theoretical density. Cast in this light, once the parties successfully bracket an issue and once they see a plausible, if not probable, consensus on that issue, they will try to capture the moment, close the debate, and move on to the next hurdle. If, on the other hand, they fail to concur on an issue, whatever its conceptual density, they will find it well to postpone its resolution for another day. On the condition that the parties find their joint pursuit respect-worthy — that is to say, the government totality in which they are situated continues to be respect-worthy in their eyes — they will likely revisit the issues which they had chosen to postpone. There is more to it than the fear of imminent war: Klug observes that the parties' "[normative] commitment to constitutional principles promotes constitutional engagement over exit and the ever present threat of violence this implies."[116] The steadfast commitment to constitutional principles might be anchored on a sufficient and widely held belief in the continuing respect-worthiness of the government totality of South Africa, a moral warrant forcible enough to fuel the moral optimism of political actors in their continued collaboration with legal ordering and in partaking in the goods of political union, even if they find some of its laws odious or immoral. All told, despite diametrically opposite views in the South African experience "[i]t was principled ambiguity that allowed the conflict to be 'civilized'"[117] and contained.

In brief, we might be able to portray the dynamics of dialogical constitutionalism this way:

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115. Helen Brocklehurst et al., Paper delivered at the 2000 Annual Meeting of the American Political Science Association: Lesson Drawing from Negotiated Transitions in Northern Ireland and South Africa 15 (Aug. 31 - Sep. 3, 2000), *available at* http://www.hull.ac.uk/futgov/Papers/APSAHamberBran.pdf (last accessed May 3, 2009) (citations omitted).

116. *See* Klug, *supra* note 28, at 21.

117. *Id.* at 20-21.

Upstream: if the original position of the debate is one involving relatively low-level principles, constitutional negotiators will seek consensus on that level and then ascend the conceptual ladder; if on the other hand their minds fail to meet, they will *nonetheless* take the theoretical ascent with the aim of disposing *another* issue. Higher and higher they go, according to this dynamic. Regardless of whether the original position was in a state of consensus or dissensus, the parties will exert best efforts to close the debate at hand and move on to higher ground, perhaps out of fear of a return to conflict, or because of a shared commitment to the rule of law, or even both.

Downstream: if the parties start from a relatively high-level of abstraction, and by applying essentially the same dynamics but this time in counter-flow, the parties will proceed downward.

Under either scenario, if the parties utterly fail to find agreement in all aspects of the conceptual penumbra of any given issue, and if our analysis so far holds, they will postpone the *entire* subject matter to a future date. On the other hand, if they find only partial agreement, say, only on the bottom tier of the abstraction, they will defer the *remaining* tiers for future disposition.

While the foregoing exercise can be patterned more comprehensively, this Article simply aims to provide a working notion of how constitutional negotiators might strategically apply principled ambiguity through rhythmic patterns of postponement and settlement. And, as a normative matter, Klug reveals that

> [t]his postponement with continuing engagement between the parties is an important element in building the basic elements of trust between opposing groups which is central to the ultimate success of a democracy-building project. Constitutional principles are rarely definitive and contain in most cases a degree of constructive ambiguity which enables all parties to feel that they might be able to live with the outcome of the process.[118]

3. Certification and Post-Certification Proceedings

For various reasons the South African constitutional court denied certification to the first draft constitution submitted for review. Shortly after, and on the second try, a revised draft passed muster. To Iain Currie, during and beyond the certification proceedings it became clear that the South African constitutional court had willingly embraced "decisional minimalism" whereby its judges would avoid large-scale theorizing, or, as Currie terms it,

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118. *Id.* at 20.

"first-order reasoning."[119] Alluding to Sunstein's idea of incompletely theorized agreements, Currie observed that the constitutional court in the recent past had adopted a jurisprudential approach to adjudication in a manner that is cautious, incremental, and particularistic.[120]

What might explain the South African Court's "settled orthodoxy" of decisional minimalism? To be sure, it was not always the case. Earlier we suggested a normative basis for such practice, but it is still unclear what made some (but certainly not all) members of constitutional court (and still less clear its lower courts) unlearn the habit of first-order reasoning. To Currie, this upstream theoretical bias might well be associated with the adjudicative model developed by Ronald Dworkin, which is thought to be a method of "[c]onstructive interpretation [which demands] the hard work of developing a consistent and coherent set of principles which most adequately justify and make sense of our intuitive moral judgments" in the quest for the "right answer."[121] Dworkin famously introduces his construct of "Judge Hercules" who, as his namesake suggests, would approach all hard cases with theoretical ambition: "Herculean judges [aim] to find comprehensive legal, moral, philosophical and economic justifications for a decision."[122] In light of Sunstein's framework, Hercules-style adjudication can be portrayed as an opposite of theoretical minimalism. After examining the Court's jurisprudence in the past five years, Currie notes, and endorses, its characteristically minimalist decision-making, its inclination to defer or even foreclose the resolution of unnecessary comprehensive issues even to the point of invoking "rules of justiciability and the procedural rules [which would] allow the Court to decide not to decide a case."[123] This way, if the Court found it necessary to decide the matter, a conservative, "theoretically modest" decision will make it unlikely for conceptual disasters as well as political blunders to occur.

But Currie also observed that the Court on many occasions had chosen to climb the conceptual ladder, extrapolated over matters of higher abstraction, and, as a consequence, achieved relatively "thicker" jurisprudence. It is plausible that theoretical ambition might have been driven by reasons extrinsic to the merits or demerits of conceptual

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119. Iain Currie, *Judicious Avoidance*, 15 S. AFR. J. ON HUM. RTS. 138, 138 (1999).

120. *Id.* (citing Prinsloo v. Van der Linde, (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 (Apr. 18, 1997)).

121. Currie, *supra* note 119, *interpreting* DWORKIN, RIGHTS, *supra* note 6.

122. *Id.* at 145.

123. *Id.* at 147.

uniformity alone. One such case is *S. v. Makwanyane*[124] where the Court perceptibly went beyond minimalist reasoning required for the complete disposition of the case. Briefly, *Makwanyane* involved the invalidation of the death penalty on at least four broad constitutional grounds, namely, the violation of the life, dignity, cruel punishment, and equality doctrines. Had the Court chosen only one of these grounds the result would have been just the same, and yet to Currie "the combined judgments of Chaskalson … and the ten concurring judgments of his colleagues end up considering all the lines there are, in the result holding the death penalty to be an unconstitutional violation of *four* rights."[125] (Currie likewise points to *National Coalition for Gay & Lesbian Equality v. Minister of Justice*[126] as a "rough equivalent" of *Makwanyane*.[127]) If indeed this was the case, what could have been the reasons for the judges to opt for Herculean-style decision-making? Conceivably there are times when,

> a constitutional court will make decisions on matters of great public concern and may see a need to address its reasons for the decision to the public at large, rather than, as is the case with more routine decisions, to other courts and legal professionals. In such cases the need for explanation may outweigh concerns about the consequences of saying too much.[128]

As discussed earlier, faced with the same circumstances wouldn't a court whose members are in the habit of judicial minimalism be even *more* modest? If much more is at stake, wouldn't cautious thinkers be more hesitant to expend intellectual (and political) capital?[129] In following Currie (and Sunstein) to the letter we can conclude that by raising the stakes judges might be inclined in the short run to risk some political capital under a calculus to gain greater legitimacy in the long run. But then, these would be reasons extrinsic to the merits of heroic theorizing, and, as such, this

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124. S. v. Makwanyane, 1995 (3) SA 391 (CC).

125. Currie, *supra* note 119, at 159 (remarking that "[i]n addition, *Makwanyane* remains the *locus classicus* on the interpretation of the limitation clause, laying down a proportionality test for the justifiability of limitations along the lines of Canadian jurisprudence.") (emphasis supplied).

126. National Coalition for Gay & Lesbian Equality v. Minister of Justice, 1999 (1) SA 6 (CC).

127. Currie, *supra* note 119, at 160.

128. *Id.*

129. Currie might respond: "Even if the stakes are higher in constitutional adjudication, the consequences of a decision more far-reaching, this mandates more caution rather than less." Currie, *supra* note 119, at 165.

question would indubitably open up another can of worms.[130] Pragmatic considerations aside, a normative account to which Currie refers is the political philosophy of Rawls. Noteworthy is Currie's claim that Rawls is a case in favor of minimalism:

> John Rawls's idea [is] that political philosophy should avoid advancing theories claiming to explain large areas of human existence and should settle instead on seeking consensus at the level of practice. The problem with any comprehensive theory is that it is incompatible with other comprehensive theories: "A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines."[131]

4. Mid-level Theorizing

To be sure (at least in Currie's reading), Rawls might be taken to suggest a *downstream* bias. (In this sense Rawls and Sunstein appear to be in accord.) But this is unlikely the case. It is one thing to say that Rawls wanted to avoid meta-theorizing since, as discussed, a consensus over deep convictions is unrealistic in a well-ordered society composed of liberal-minded citizens. It is quite another to say that Rawls was absolutely normatively predisposed to theoretical minimalism. Under our (hopefully) familiar graduated scale of abstraction, Rawls's political conception of an overlapping consensus would more suitably conform to "intermediate" or "mid-level" theory-building: it would be unlikely for Rawls to concede to a strong form of downstream theorizing to the degree Sunstein might have it. In arriving at his political conception of a well-ordered society, Rawls had in mind the *reasonable* and *realistic* expectations of a liberal-minded citizenry. Considerations of practical objective import were clearly made a part of the Rawlsian conception; there can be no suggestion that a well-ordered society exists only as an ideal type or purely in a conceptual vacuum.[132]

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130. I allude to the skeptic strain of legal realism. For a classic humorous statement about American legal realism, see Charles Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 236 (1990) (quoting Roscoe Pound and stating that the outcome of a case would at bottom depend on what the judge ate for breakfast).

131. Currie, *supra* note 119, at 148 (citing RAWLS, LIBERALISM, *supra* note 12, at viii).

132. In similar vein, Michelman's conception of what would or could make a respect-worthy government totality would depend on both a subjective and an objective (inter-subjective) moral assessment of the extant deposit of legal formality read in relation to its individual laws and rules. For a brief discussion

B. South Africa and Northern Ireland

One can find plausibly functional characteristics common to both Northern Ireland and South Africa. Both have similar public policy needs. Their communities face similar struggles, such as state-sponsored segregation, systemic discrimination, political violence and terrorism, decades of social conflict and emergency rule, domination by a "foreign" or "alien" majority, and liberation movements under the rubric of self-determination. Both countries are also strategically positioned in a vast network[133] of international actors constantly engaged in comparative analysis, constitutional borrowing and lesson-drawing. Most importantly, they enjoy the same climate of transition that favors transnational cooperative dialogue.

1. Lesson-Drawing[134]

Even more noteworthy is the fact that despite substantial differences situated in time and place both countries had been subject to systematic and sustained comparison for almost two decades now.[135] In the search for answers, key actors from South Africa and Northern Ireland would deliberately enter and sustain both informal and formal channels of communication. Direct transposition of concepts is still taking place today. Insights are freely shared and subjected to trial and error. Once the participants find a good fit, synergistic lesson-drawing would immediately follow. In many occasions the transpositions of lessons from one context to another frequently led to positive and ground-breaking impressions in the negotiation and transition process.

For instance, the notion of a "sufficient consensus" developed in South African negotiations was transposed and adopted by lead delegates from

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of the subjective-objective notion, see Michelman, *Reflection, supra* note 3, at 1737, 1756–57.

133. The widespread consensus that South Africa has become a repository of some of the most progressive legislation and policy in the world might have been in part due to the ANC's international exposure while in exile. This allowed South African representatives to benefit from a wide range of international policy developments and communicative channels all of which would otherwise have been unavailing. *See* Brocklehurst, et al., *supra* note 115, at 9; *see generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2005) (discussing global transgovernmental networks).

134. Brocklehurst et al., *supra* note 115, at 13 (defining lesson drawing as "*conscious* efforts to learn from another jurisdiction, made in an environment of complex inference, with a particular emphasis on the context of transition, non-traditional agents and on non-linear understandings of policy making.").

135. *Id.* at 1–3.

Northern Ireland:[136] the Good Friday Agreement itself had come to incorporate the concept of "international best practice" with respect to the treatment of child victims.[137] Discussions ranging from the "creat[ion of] a climate for negotiations," "leveling the playing fields," and "talks about talks," among many other topics, had comprised what essentially amounted to an informal interaction between and among the representatives of adversarial groups, whether state or non-state. Lesson-drawing of this sort encouraged all parties to further develop a kind of negotiation practice which one might now refer to as "Track Two Diplomacy."[138]

On the whole, the concurrent formation of islands of agreement across the seas can be evinced by a marked proliferation of administrative bodies tasked to implement strikingly similar functions. Essentially, these institutions, common to both countries, were mandated to pursue "disaggregated" tasks, or line functions diffused across different topics, jurisdictions, and life spans. Not only tasks but the institutions themselves were typically disaggregated. Institutions in both countries would have matching titles; they each had electoral commissions, commissions for gender equality, human rights commissions, and civilian police secretariats. There was a tendency towards multivocality and decentralization.[139] Their disaggregated features were thought to be "critical determinants and creators of much of the social and public policy in the post-conflict period."[140] In particular, evidence of disaggregation can be gathered from the multi-tiered, overlapping, and extensive array of councils, assemblies, inter-state and cross-border structures such as the North/South Ministerial Council and the East-West Council under the Good Friday Agreement.[141] The multitude of governmental organs and their functions in no way emerged as a single monolithic structure in form and substance, rather, they checkered the constitutional landscape in smaller but discrete segments.

If we were to compare the state of political transition of South Africa with that of Northern Ireland, we might conclude that given priority in time the former is noticeably more developed or advanced in the conciliation process. On this fact alone it would follow that, of the two, the net gainer would be Northern Ireland: by some conceptual osmosis knowledge would

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136. *Id.* at 4.

137. *Id.* at 10.

138. *Id.* at 4.

139. *Id.* at 2-4.

140. Brocklehurst et al., *supra* note 115, at 5.

141. *See* Etain Tannam, *Explaining the Good Friday Agreement: A Learning Process*, 36 GOV'T & OPPOSITION 493, 500-03, 509 (2001).

pass from the elder to the junior. However plausible this conclusion might be, it cannot be gainsaid that lesson-drawing, essentially intangible in the making, will likely elude even rough measurement — how can one possibly tally up the conceptual scoreboard? Apart from this predicament there is no doubt that much lesson drawing had taken place between the two countries, and, more importantly, it was the burgeoning *perception* of comparability that sparked much learning among and between their respective policymakers.[142] If we were to recast the whole phenomenon in light of dialogical political theory, we can point to the South Africa-Northern Ireland symbiosis as one characterized by a steady and gradual expansion of the public sphere in which unofficial channels had become the principal vehicles for transnational cooperative dialogue where *informal* institutions had much to contribute.[143] Informal, unofficial (but in no way illegal), and dispersed cooperative activity typified much of the peace processes concurrent in both countries.

So too did exchange take place in higher, more formal political channels. In 1994 and 1995, delegates from the ruling party and the opposition of their respective countries had convened several times in order to study more thoroughly the South African experience. Apparently the aim of this Northern Ireland-South African engagement was to "show how against all odds a negotiated settlement and a negotiated solution is the only option to resolve seemingly insurmountable conflicts."[144] The series of engagements between the two deeply divided societies had captured some attention from the international media, whose participation effectively amplified the channels of dialogue to include players in the academia, NGOs, politicians of all kinds, foreign and international observers, and visitors from all levels of civil society.

However solemn these conferences were planned to be, the features of informality and disaggregation nonetheless pervaded the political landscape. It was clear to all participants that the most crucial developments were those

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142. *See* Brocklehurst et al., *supra* note 115, at 5.

143. In what might be called a "transnational cooperative order," the traditional boundaries of international law and domestic law are blurred and lose their distinctions; direct international intervention in civil war, the domestication of inter-state conflicts, and the transnational effects of intra-state dispute resolution, have all been fused. *See* Ulrich Preuss, *Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Though External Constitutionalization,* 51 N.Y.L. SCH. L. REV. 466, 491-94 (2006-2007); *cf.* Benjamin Schiff, *Do Truth Commissions Promote Accountability or Impunity? The Case of the South African Truth and Reconciliation Commission, in* POST CONFLICT JUSTICE 325-43 (M. Cherif Bassiouni ed., 2002).

144. Brocklehurst et al., *supra* note 115, at 6.

that happened behind the scenes. More significantly, the expansion of the sphere of dialogue gave the delegates of Northern Ireland the psychological and political space to itemize the agenda on their own, free of state impulsion, as well as to expand their network well beyond the British Isles.[145]

The eagerness of the representatives from both countries, including members of their respective civil societies, to share experiences and draw lessons elsewhere can be explained by the fact that both sympathized with their foreign counterparts and identified with their causes. Both found value in the narratives of third-parties suffering from similar political violence.[146] Despite having no clear link to either country, many foreign groups were drawn to Belfast to recount their histories.[147]

According to Northern Ireland representatives, the more recent forms of lesson-drawing include community policing, criminal justice, restorative justice, police accountability, and victim-support mechanisms that dealt with past political violence. Delegates gave serious consideration over whether a South African-style truth and reconciliation commission might be viable for Northern Ireland.[148] In the area of police reform, their respective senior officers appear to have been dramatically influenced by their visits in other countries, as they drew lessons from the police services of Canada, Spain, Netherlands, Belgium (notably the Belgian *gendarmerie*), and the U.S., among others. It was observed that the South African police system was clearly influenced by the Canadian concept of "community policing." Indeed South Africa in particular had much to gain from the Canadian practice of volunteered assistance, especially if there is a strong history of citizen involvement.[149] More recently, soon after the restoration of the Stormont Assembly[150] on 8 May 2007,[151] lesson-drawing between Northern Ireland and South Africa had moved beyond *pre*-settlement and entered the *post-*

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145. *Id.* at 7.

146. For parallelisms between Israel and Northern Ireland on the use of constructive ambiguity, deferral, and social transformation, see GUY BEN-PORAT, GLOBAL LIBERALISM, LOCAL POPULISM: PEACE AND CONFLICT IN ISRAEL/PALESTINE AND NORTHERN IRELAND 192, 203, 205 (2006).

147. *See* Brocklehurst et al., *supra* note 115, at 8.

148. *Id.* at 7.

149. *Id.* at 10-11.

150. This is the seat of devolved legislative and executive authority under the Good Friday and St. Andrews Agreements.

151. *See* Northern Ireland Assembly, *available at* http://www.niassembly.gov.uk/ (last accessed Apr. 28, 2009).

settlement phase.[152] It remains to be seen what kind of implications might follow from this progression.

2. Dialogical Constitutionalism in Northern Ireland

Again it must be stressed that the "Northern Ireland Solution" should not be confused with the Good Friday Agreement. The former more aptly resembles a drawn-out process of conflict management, while the latter, a supranational political settlement of constitutional character.[153] The Good Friday and St. Andrews Agreements could be seen as punctual or piece-meal moments of a longer-term transformative conciliatory process. In what follows, I hope to describe and explain how the strategic use of principled ambiguity, in particular, had the effect of protracting the negotiation process so much so that despite failing to meet key deadlines the parties had nonetheless succeeded to transform a culture of pervasive political violence to one of mutual respect. "The Good Friday Agreement," opines Stevenson, "is probably not a sustainable solution: unionists regard it as permanent, while nationalists consider it transitional." Yet it is precisely the equivocal character of the provisions of the Good Friday accords, as well as the Irish peace process seen in its entirety, that ushered in an age of non-violent dialogue.[154]

The more conservative politicians might dismiss the victories of Good Friday as a classic case of "reform fatigue." Others might attribute the same relative stability to Ireland's rapid economic growth in the 1990s as it reaped the benefit of economies of scale following its induction into the European Union. Perhaps the victories of peace of Northern Ireland owes much to the

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152. *See* Brocklehurst et al., *supra* note 115, at 9.

153. *See* Colm Campbell et al., *The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland*, 66 MODERN L. REV. 317 (2003) (arguing that the Good Friday Agreement represents a unique "hybrid" combination of municipal law and international treaty law); *see also* Stevenson, *supra* note 69, at 5.

154. *See* Stevenson, *supra* note 69, at 5; Campbell et al., *supra* note 153, at 317 ("The Agreement was the culmination of a tortuous process of negotiation, which had its roots in the Anglo-Irish Agreement signed in 1985 by the Irish and British governments. [I]ts unresolved and ambiguous portions have remained the location of contested political interpretation over the intervening years.").

For a study suggesting that the use of ambiguity and symbolism in speeches made by 12 key politicians in the 1998 Good Friday Agreement had provided a political, cultural, and social identity in Northern Ireland, see Alexandra Forsythe, *Mapping the Political Language of the 1998 Good Friday Agreement*, 23 CURRENT PSYCHOL.: DEVELOPMENTAL LEARNING PERSONALITY SOC. 215 (2004).

fact that the constitutional system introduced by Good Friday was consciously designed to clarify universally shared values to be determined on a "cross–community basis."[155] Or perhaps the relative social stability we see today might be more confidently attributable to social variables at work even *prior* to the formal ratification of Good Friday: these variables may range anywhere from sustained political pressure by the European Union, American interventionism and diplomacy, increasing foreign aid, a robust civil society, to the presence or absence of charismatic leaders, among other causes,[156] all of which, to repeat, may have well been operating independently of, or concurrently with, the negotiation process — or perhaps even regardless of the normative or intrinsic force, if any, of the Good Friday settlements. One might plausibly argue that some, or even all, of these "extrinsic" social variables might have in fact been the principal causes of the relative peace now acclaimed by the media. In other words, one should consider the likelihood that the peace settlements as well as the constitutional changes they introduced, by themselves, had little to do with the social conditions we see today.

Whatever the case, the entire Northern Ireland peace process has certainly turned out to be a staple case-study on how to resolve sectarian violence and entrenched terrorist problems[157] — it is pretty much established that the Good Friday and St. Andrews Agreements ended more than three decades of war and one hundred years of strife.[158] On these facts alone other zones of conflict might be able to benefit from the Northern Ireland

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155. *See* The Good Friday Agreement, §§ 5 (d) (i-ii) (Apr. 10, 1998):

> (d) arrangements to ensure key decisions are taken on a cross-community basis; either parallel consent, i.e. a majority of those members present and voting, including a majority of the unionist and nationalist designations present and voting; or a weighted majority (60%) of members present and voting, including at least 40% of each of the nationalist and unionist designations present and voting.

156. For an excellent empirical evaluation of the social variables leading to the Good Friday Accords and de-escalation of political violence, see Dominic Beggan, *State Repression and Political Violence: Insurgency in Northern Ireland*, 23 INT'L J. ON WORLD PEACE 61 (2006).

157. *See A Survey of Ireland: The Luck of the Irish*, THE ECONOMIST, Oct. 16, 2004, at 3-4 ("Some may argue that it is premature to pass judgment on the Irish peace process at the time of this writing. However, public opinion today is clear that the people of Northern Ireland are grateful for the peace and prosperity the Good Friday Agreement has brought them."); *see Bagehot: Paisley's Game*, THE ECONOMIST, Dec. 13, 2004, at 50.

158. *See Still Troubled*, THE ECONOMIST, Apr. 15, 2006, at 55-56.

Solution in many ways; in drawing lessons from Good Friday, countries such as Haiti, Cyprus, Afghanistan, Iraq, Myanmar, Israel, Lebanon, Sudan, and much of sub-Saharan Africa will have much to gain. In fact, with a government barely up and running, Northern Ireland's Catholic and Protestant delegates, once the most bitter of enemies in history, have partnered up to advise Iraqis on sectarian conflict resolution.[159] Former British Prime Minister Tony Blair, then the official Middle East envoy, even proposed the same "Northern Ireland Solution" for the West Bank.[160] In the same spirit, representatives of the Irish Republican Army had met with ETA in Spain's Basque country, the Sri Lankan government, and the Tamil Tigers. Has the Irish formula become so transformative that former terrorists are now exporting their expertise in conflict resolution?[161] Is it really that extraordinary?

Some have remarked that "the dominant legal paradigm does not capture the complexity of the [Good Friday] Agreement or its politics."[162] The mixed international-domestic legal status of the Good Friday Agreement as well as its equivocal provisions in relation to sovereignty might be considered as sources of political transformation, sublimating conflict to non-violent discourse.[163] So, too, might be said of the provisions on self-determination.[164] Ambiguity and partial indeterminacy were pervasive both within and beyond the four corners of the constitutive documents. And of all "fudges," decommissioning was perhaps the stickiest of all issues. Incidentally, while the adoption and use of constructive ambiguity as a "wholesale brokering strategy" as well as the use of "obscure precatory formal terms" (such as "beyond use") had been associated with U.S. Senator

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159. See Richard Willing, *N. Ireland Imparts Lessons Learned*, USA TODAY, Sep. 20, 2007, at 9A.

160. See Joel Pollak, *A Northern Ireland Solution for the West Bank?*, 14 PALESTINE-ISRAEL J. POLITICS, ECON., & CULTURE 62 (2007).

161. For an affirmative claim, see *Blessed are the Peacemakers*, THE ECONOMIST, Sep. 9, 2006, at 58.

162. Campbell et al., *supra* note 153, at 318.

163. *Id.* at 344. For a further discussion on the constructive ambiguity surrounding the provisions of sovereignty under Good Friday, see Tannam, *supra* note 141.

164. For an argument that constructive ambiguity surrounded the provisions relating to self-determination under the Good Friday Agreement, see Christine Bell & Kathleen Cavanaugh, *'Constructive Ambiguity' or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement*, 22 FORDHAM INT'L L.J. 1345 (1999).

George Mitchell, virtually all key players had resorted to such practices even before Mitchell had entered the scene.[165]

C. South Africa, Northern Ireland, and Southern Philippines

It is unfortunate that the more affluent countries of the "North" are inclined to downplay the merits of lesson-drawing from the lesser developed countries of the "South." A bias exists for emulating "successful" Northern states. After all, there could be good reasons why, for instance, Western health officials should ignore what might very well amount to "success stories" in Uganda during its AIDS campaign.[166] Differences in ethnicity, literacy rates, and even economic standing must be taken into account. But whatever the case, the fact of the matter is that one can only point to a handful of South-South transfers.[167] Can we conclude that transnational cooperative dialogue that is happening in South Africa and Northern Ireland — two deeply divided societies mired in poverty — can amount to one such transfer? Is this an exemplary case of constitutional learning taking place between two Southern polities? If so, are the differences in circumstance sufficiently negligible as to enable the North to find transcendent value in the Irish peace process? And how might the North draw lessons from developing countries in other contexts? Needless to say there is no one-size-fits-all solution to complex phenomena in divided societies, yet there are

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165. *See* Stevenson, *supra* note 69, at 12. In addition, Belloni & Deane argue:

> The foremost problem for implementing the [Good Friday Agreement] has been the issue of paramilitary weapons. The implementation of the [Good Friday Agreement] has been hindered by the delay in the decommissioning of Republican weapons, with successive arrangements for 'putting weapons beyond use' stopping short of success. This has amplified the role of politically relevant elites and the way in which they interpret their situation. The political space afforded to the blocs with paramilitary affiliation has resulted in a degree of ambiguity and with it increasing difficulties for the implementation of the [Good Friday Agreement].
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> The ambiguity over the issue of breaching ceasefires stems from the respective leaderships' definition of a ceasefire as "a cessation of military operations."

Roberto Belloni & Shelley Deane, *From Belfast to Bosnia: Piecemeal Peacemaking and the Role of Institutional Learning*, 7 CIVIL WARS 219, 229 (2005); *see also* Stevenson, *supra* note 69, at 9 (briefly tracing the historical roots of "the art of fudge").

166. *See* Brocklehurst et al., *supra* note 115, at 17-18.

167. *Id.* at 24.

lessons to be drawn from each case, even if there are stark differences in geopolitical context. There is no doubt Good Friday and the South African Miracle invite closer examination, but one must certainly avoid any facile comparison.[168]

1. Reasons for Sufficient Comparability

We turn to the Philippines. The 10,000-strong Moro Islamic Liberation Front (MILF) — many of them trained under al-Qaeda — has been waging a rebellion for the establishment of an independent Islamic state since 1978 in the southern island of Mindanao, where they are a minority.[169] But Muslim politicians are having a hard time coming to terms with atrocities mounted in the name of Islam.[170] Peace talks started on 7 January 1997, but gained momentum only a few years ago when Malaysia joined as a third party mediator and set up an international monitoring commission to monitor the ceasefire.[171] The MILF proposed the establishment of a "Bangsamoro Juridical Entity" to govern what they claim as their ancestral homeland. At first it demanded that no plebiscite should be held.[172] But recent developments indicate a softening of this position as the MILF now appears to be amenable to a plebiscite, which, in turn, shall determine the political composition of the Bangsamoro Juridical Entity. Home to three million Muslims, the proposed territory is said to encompass 712 villages in five provinces, all located in the Autonomous Region in Muslim Mindanao, the present political unit.[173]

Up to now the MILF has consistently denied any terrorism links — terrorist bombings may have been caused by rogue elements.[174] Many believe its leaders exert only shaky control over their rank and file; others

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168. *See* Pollak, *supra* note 160.

169. *See Al-Qaeda and the Separatists*, THE ECONOMIST, Feb. 28, 2004, at 33–34; *Bali Again*, THE ECONOMIST, Oct. 8, 2005, at 33–34.

170. *See* Yusop Jikiri, Representative, Sulu-First District, Privilege Speech at the House of Representatives: Hope and Future of the Bangsamoro Homeland (Sep. 17, 2007).

171. *See* John Unson, *Moro Rebs Accuse Military of Strafing Lanao Positions*, THE PHIL. STAR, Oct. 27, 2006, at A30, A32.

172. *See* Saeed Daof, *GRP-MILF Peace Talks*, THE PHIL. STAR, Oct. 28, 2006.

173. *See* Nikko Dizon & Inquirer Mindanao, *Plebiscite on MILF Deal*, PHIL. DAILY INQUIRER, July 18, 2008, at A1, A8.

174. *See* Alcuin Papa, *AFP Blames Abu Sayyaf, JI for Bombings*, PHIL. DAILY INQUIRER, Oct. 12, 2006, at, A1, A5.; *MILF Says It Will 'Separate' Members With Terrorist Ties*, PHIL. DAILY INQ., Oct. 9, 2006.

criticize the MILF itself, or it "lost commands," as more interested in gangsterism than peace.[175] While much progress has been made in cleaning up its ranks, the lingering imprecision and shifting nature of the MILF's command structure remains to be stumbling blocks for transparency, accountability and uniform collective action.

Like South Africa and Northern Ireland, the Philippine Republic faces what has been observed as "the longest running conflict" in South East Asia; threats to its existential and effective sovereignty; and ethnic, religious, and ideological cleavages.[176] But since the fall of the Marcos dictatorship in 1986, never before has the collective aspiration towards liberal legality and the rule of law been so robust. There are signs of welcome international involvement, notably by Malaysia as the official third-party mediator, and by the U.S. in developmental assistance and security measures.

While South Africa, Northern Ireland, and the Philippines, one way or another, can be classified as deeply divided societies, of the three it is still unclear whether the Philippines is under a climate of transition conducive for lesson-drawing to take place. There is little sign of transnational dialogue among the representatives of the Philippine government, the MILF, and, much less, either South Africa or Northern Ireland. There is much to gain in any comparative study of all three; there is much to learn from the lasting achievements of two Southern countries by the people of Southern Philippines; and there is no doubt that the stakes today are at their highest. Could the lessons of the South African Miracle and the Northern Ireland Solution apply, or even be directly transposed, to the Philippine insurgency and terrorist problem?

Before addressing these questions one must first find at least a plausible justification for their joint comparison. If there is enough common ground for comparative analysis, then, in the words of Donald Kommers, later in the day we might stumble upon certain "principles of justice and political obligation that transcend culture-bound opinions and conventions of a particular political community."[177] The constraints of this Article however would allow for only a modest analysis of the constitutive documents and the political and social context in which these documents were made.

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175. *See War Without End*, THE ECONOMIST, May 3, 2003, at 30.

176. *See* THE MINDANAO CONFLICT xi (Kamarulzaman Askandar & Ayesah Abubakar eds., 2005).

177. *See* Kommers, *supra* note 5 (arguing in favor of comparative constitutional analysis); *but see* Frankenberg, *supra* note 5.

With these in mind I find that the following observations to justify no less than a plausible comparison among the three: (1) Northern Ireland, South Africa, and the Philippines are all committed (at least nominally) to the principles of liberal legality, political democracy and constitutional government, especially in the area of civil liberties and human rights; (2) they are pluralistic societies facing similar problems of political disorder; (3) they are deeply divided societies ridden with sectarian violence; (4) they suffer from an acutely unequal distribution of wealth; and, most importantly, (5) there appears to be a steady proliferation of both formal and informal linkages among their representatives even to the extent that other international intervenors are welcome to participate.

2. Philippine Lesson–Drawing

If the foregoing conditions can bring about a favorable climate for lesson-drawing, we might be able to point out at least six lessons from the South Africa–Northern Ireland dialogue that might be valuable for conflict management, negotiation, and other strategic constitutional processes in the Philippines:[178]

(1) accommodative practices which require a dispersion or disaggregation of political institutions and their functions (as opposed to centralization or hierarchical configuration);

(2) international or transnational cooperation in constitutional negotiation and design;

(3) constructive ambiguity or partial indeterminacy;

(4) theoretical modesty (downstream bias), qualified by strategic conceptual ascents (upstream bias);

(5) rhythmic patterns of postponement and settlement; and

(6) constitution-making consistent with, or within the parameters of, liberal legality and the rule of law.

These six lessons might comprise the transformative normative essentials for dialogical constitutionalism whose continued practice can sublimate the incidence of political violence into one of political conversation. Is the Philippine geopolitical milieu ripe for the MILF's transformation into an unarmed political movement composed of religious moderates?[179] Is there

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178. *Cf.* Brocklehurst et al., *supra* note 115, at 20-21.

179. For an argument that this transformation is an essential component for the peace process, see MALCOLM COOK & KIT COLLIER, MINDANAO: A GAMBLE WORTH TAKING 61-62 (2006).

anything that Sinn Fein or the ANC could export to the Philippines? In what follows, I discuss the Philippine insurgency and terrorist problem in light of the foregoing six-point normative framework.

3. Facial Analysis of Constitutive Documents

The following comprise the more recent and pertinent documents:[180]

(1) Article X[181] of the Philippine Constitution (the "Constitution");

(2) Republic Act No. 6734 (1989), entitled "An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao" (the "Organic Act");[182]

(3) The Implementing Guidelines on the Security Aspect of the GRP-MILF Tripoli Agreement of Peace of 2001 (the "Tripoli Guidelines");[183] and

(4) The General Framework of Agreement of Intent Between the Government of the Republic of the Philippines and the Moro Islamic Liberation Front dated August 27, 1998 (the "Agreement").[184]

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180. The cited documents might be taken to be sufficiently representative of numerous others, such as The GRP-MILF Agreement for General Cessation of Hostilities dated July 18, 1997, including its Implementing Administrative Guidelines dated Sep. 12, 1997 and Implementing Operational Guidelines dated Nov. 14, 1997; GRP-MILF Agreement on Safety and Security Guarantees dated Mar. 9, 2000; Agreement on the General Framework for the Resumption of Peace Talks between the GRP and the MILF signed on Mar. 24, 2001 at Kuala Lumpur, Malaysia.

181. Entitled "Local Government."

182. *See also* An Act Amending Fixing the Date or Regular Elections for Elective Officials of the Autonomous Region in Muslim Mindanao Pursuant to Republic Act No. 9054, Entitled "An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao, Amending for the Purpose Republic Act No. 6734, Entitled an Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao, as Amended," Republic Act No. 9333 (2004).

183. Implementing Guidelines on the Security Aspect of the GRP-MILF Tripoli Agreement of Peace of 2001 (Aug. 7, 2001), *available at* http://www.usip.org/library/pa/philippines/implement_guide_08072001.html (last accessed Apr. 28, 2009) [hereinafter Tripoli Implementing Guidelines].

184. General Framework of Agreement of Intent Between the Government of the Republic of the Philippines (GRP) and the Moro Islamic Liberation Front (MILF), *available at* http://www.usip.org/library/pa/philippines/gen_frame_08271998.html (last accessed Apr. 28, 2009).

A brief facial analysis of the foregoing texts would yield an impression of high particularity or dense formality. In other words, within their four corners one could find little trace of high-level theorizing; on the contrary, concrete and comprehensive particulars litter the text. To exemplify, Article II of the Tripoli Guidelines not only purports to define key terms;[185] its sections and subsections enumerate "prohibited hostile acts"[186] as well as "prohibited provocative acts,"[187] regulating — even criminalizing — specific activities ranging from the establishment of checkpoints,[188] unreasonable search and seizure,[189] and troop movement,[190] to common and ordinary criminal acts which clearly replicate those found in the existing criminal code[191] and special penal laws, such as kidnapping, grenade throwing, robbery, and destruction of property.[192] The provisions spell out numerous security arrangements, including such bodies as the Local Monitoring Team, the composition of its membership, and the parties' respective Coordinating Committees on Cessation of Hostilities.[193] Multiple annexes are attached and further define the functions of committees, subcommittees, their chairs, and their privileges and immunities.[194] Police and military action as well as mundane administrative and logistical activities are detailed even further;[195] exceptionally exhaustive listings, too, are carved out of these provisions, such as "cattle rustling," "hot pursuit," and "police investigations."[196] Even the

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185. *See* Tripoli Implementing Guidelines, art. II, §§ 1–3.

186. *Id.* § 3.1.

187. *Id.* § 3.2.

188. *Id.* § 3.1.3.

189. *Id.* § 3.1.1.

190. *Id.* §§ 3.1.2 ("unjustified massing of troops"), 3.2.3 ("Massive deployment and/or movement of GRP and MILF forces which are not normal administrative functions and activities").

191. An Act Revising the Penal Code and Other Penal Laws, [REVISED PENAL CODE], Act No. 3815 (1932).

192. *See* Tripoli Implementing Guidelines, art. II, § 3.1.1.

193. *Id.* art. III, §§ 3–5; *see also* Tripoli Implementing Guidelines, art. III, § 6 (provisions allowing the Organization of Islamic Conference to field representatives to observe and monitor the implementation of peace settlements).

194. Tripoli Implementing Guidelines, Annex "A" (structuring the Independent Fact-Finding Committee and its particulars) & Annex "B" (creating a Quick Response Team).

195. *Id.* art. III, § 9.

196. *Id.* §§ 9.1–9.3.

Constitution itself lists down a comprehensive set of "enumerated powers" of autonomous regions.[197] The Organic Act, or the enabling law of pertinent constitutional provisions, bears more of a resemblance to local government codes than typical founding laws.[198] Unlike the Good Friday and St. Andrews Agreements,[199] with very few exceptions there is virtually no sign of hortatory or perambulatory declaratives in many of the foregoing documents. This might be viewed as an odd feature especially considering their foundational nature and importance. The excessive definitions give one the impression that the documents themselves resemble complex commercial or financial contracts — a great majority of all provisions seek to define terms and conditions and bear multiple cross-references to other instruments and treaties. Is this necessarily a bad thing?

Furthermore, there are clear signs of institutional disaggregation, given the numerous committees, bodies, and bureaus they purport to set up. This is especially the case of the Organic Act of Muslim Mindanao. It is well to recall that traces of institutional disaggregation or dispersion are likewise characteristic of the Good Friday accords as well as the 1993 Interim Constitution of South Africa.

And, like Northern Ireland and South Africa, the international or multi-governmental character of the Philippine constitutive documents and the international political milieu that surrounded their negotiation, formulation and implementation are all evident within and beyond their four corners. In the case of the Philippines, international actors undertook clearly delineated roles and functions: as the armed conflict increasingly took on international dimensions, in 2006 the Australian government released a white paper singling out southern Philippines as one of four security flashpoints in the region, and, as a consequence, development aid from AusAid was reallocated (as high as 60%) to conflict management in Mindanao;[200] Japan is still the Philippines' largest bilateral aid donor;[201] not far behind, and catching up, is

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197. *See* JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY (2003 ed.).

198. *See generally* An Act Providing For An Organic Act for the Autonomous Region in Muslim Mindanao, Republic Act No. 6734, as amended (1989).

199. *See* The Good Friday (Belfast) Agreement (Apr. 10, 1998) ("Declaration of Support," "Constitutional Issues," "Human Rights," etc.); Agreement at St. Andrews (Oct. 13, 2006).

200. The other three are eastern Indonesia, Papua New Guinea and certain Pacific Island countries. *See* COOK & COLLIER, *supra* note 179, at 56-59.

201. *Id.* at 55-56; *see* Lam Er, *Japan's Human Security Role in Southeast Asia,* CONTEMP. S.E. ASIA, Apr. 2006, at 141-59.

China[202] despite strained diplomatic relations and occasional scuffles with Philippine gunboats near the Spratly Islands;[203] a growing interest by members of the Organization of the Islamic Conference;[204] the assumption of Malaysia as the official third-party mediator;[205] and not to mention the continuing joint military exercises held by the Philippine and U.S. armed forces, which, no doubt, affirm the sense of heightened security in the region as well as a continuing exertion of emergency powers.[206]

4. Political Milieu

A survey of current scholarship in Philippine matters yields at least four exploratory findings:

a. Inconsistency in political will

Like other divided societies, there is no doubt that the Philippines today has become a garrison state.[207] The MILF is just one of the many insurgent groups[208] questioning the legitimacy of the state. The recurring socio-political disturbances disrupt not only the *effective* sovereignty of the country but its *existential* sovereignty as well.[209] The Philippine polity exemplifies the

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202. *See* COOK & COLLIER, *supra* note 179, at 55.

203. *See* Greg Austin, *Unwanted Entanglement: The Philippines' Spratly Policy as a Case Study in Conflict Enhancement?*, SECURITY DIALOGUE, Mar. 2003, at 41-54; *Special section on the politics of the South China Sea*, SECURITY DIALOGUE, Mar. 2003, at 7-70.

204. *See* COOK & COLLIER, *supra* note 179, at 54-55.

205. *Id.* at 53-54.

206. *See, e.g.* Larry Niksch, *Abu Sayyaf: Target of Philippine-U.S. Anti-Terrorism Cooperation*, Jan. 24, 2007; Thomas Marks, J. COUNTERTERRORISM & HOMELAND SECURITY INT'L, Summer 2007; COOK & COLLIER, *supra* note 179.

207. *See* Harold Lasswell & Myres McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 208 (1943) (comparing the "balanced skill state" to the militarized "garrison state").

208. The others are the Abu Sayyaf, an MILF splinter group, and the National Democratic Front, the military arm of the Communist Party of the Philippines. Both are on the U.S. terrorist watch list.

209. *See* BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 4-5, 46, 89 (2006) [hereinafter CKERMAN, BEFORE THE NEXT ATTACK]; Laurence H. Tribe & Patrick Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004) (discussing the application of emergency powers when the effective sovereignty or existential sovereignty of a nation is under threat).

dangerous normalization of emergency powers, and, with it, the propensity for abusing executive war powers.[210] "National crisis," "constitutional crisis," and "states of emergency" are progressively turn into stale political rhetoric; they can no longer elicit the strong passions of its citizenry necessary for popular mobilization against existential threats. There is no doubt that there remains an inflexible determination on the part of the government to restore the social contract through effective measures. But the nation is facing a historical giant. It took Spanish colonizers three centuries to subjugate the Muslims in Mindanao. Then, by their American successors, 50 years. Recently, by Filipino strongmen such as Ferdinand Marcos, and the liberal democracy that succeeded him, 50 more. All so far have failed.[211] Some hope glimmered when President Fidel Ramos secured a peace accord in 1996 with the Moro National Liberation Front (MNLF), the biggest insurgency group. The peace accord granted autonomy and devolved many powers. But two splinter factions, the MILF and the Abu Sayyaf, insisted that nothing but a fully-fledged independent Islamic state would do.[212]

Do these socio-political disruptions persist because the government has had no clear and consistent strategy in conflict-resolution fit for this magnitude? A recurrent inconsistency in the formulation and implementation of political will has checkered much of Philippine history.[213] Much hindsight would reveal that the *ad hoc* diplomatic strategy that characterized past administrations had been inherited by virtually all succeeding governments: President Corazon Aquino tried to negotiate; then came Ramos, who is seen to have pacified the insurgents if only briefly; and after Ramos, President Joseph Estrada, a former B-movie actor, launched an aggressive military strike; and now, President Gloria Macapagal-Arroyo appears to be confused between firm action and conciliation.[214] A similar kind of inconsistency can be imputed to their predecessors — the American- and Spanish-run governments.

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210. *Cf.* ACKERMAN, BEFORE THE NEXT ATTACK, *supra* note 209, at 47, 59, 80; Tribe & Gudridge, *supra* note 209, at 1815.

211. *See Estrada's Risky Strategy*, THE ECONOMIST, Sep. 23, 2000, at 37-38.

212. *Id.*

213. *See* MINDANAO CONFLICT, *supra* note 176, at xiv-xv.

214. *See No Peace, No Talks*, THE ECONOMIST, May 10, 2003, at 28; *A Need for Firm Action*, THE ECONOMIST, Apr. 27, 2002, at 30-31; *Sorting Out the South*, THE ECONOMIST, July 7, 2001, at 34.

b. Uncreative constitutional imagination

There is a stubborn insistence on the part of the government on strict interpretation and application of the Philippine Constitution, especially on questions of territory, devolution, and self-determination.[215] However, there are welcome signs that government negotiators are more amenable to looser language (and thus making the conceptual ascent) in order to accommodate divergent views on the same issue. To exemplify, in recent discussions on the issue of ancestral domain both sides agreed to replace the word "freedom," with the more inclusive "aspiration of the Bangsamoro people."[216] This is certainly a promising maneuver — in prior talks the parties had obstinately avoided the substantive matters of ancestral land and ancestral domain.[217] The continued legal, political, and economic marginalization of indigenous peoples in the Philippines and elsewhere, which, as Owen Lynch observes, would take the form of "legally sanctioned usurpation and profiteering by domestic elites oftentimes rationalized in the name of nationalism"[218] have swelled the ranks of the MILF and facilitated recruitment by other insurgents as well.[219] The accommodation of such fundamental questions would certainly diffuse anti-government sentiment especially in the rural areas where much of the MILF's rank-and-file are in hiding.

c. Deficient communicative political channels

Despite signs of religious integration,[220] existing channels of communication still fail to sustain constructive dialogue among ethnic groups and competing

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215. *See,* e.g. Abhoud Syed Lingga, *Mindanao Peace Process: The Need for a New Formula, in* MINDANAO CONFLICT, *supra* note 176, at 34-46.

216. *See* Dizon & Inquirer Mindanao, *supra* note 173, at A8.

217. *Cf.* Lualhati Abreu, *The Bangsamoro Ancestral Domain: The Bangsamoro Continuing Past Anchored on Customary Adat and Islamic Thinking, in* MINDANAO CONFLICT, *supra* note 176, at 99-114.

218. Owen Lynch, *Legal Challenges Beyond the Americas: Indigenous Occupants in Asia and Africa,* 9 ST. THOMAS L. REV. 93, 95 (1996).

219. *See* Terence Jones, *The United Nations Development Programme and the Indigenous Peoples,* 47 ATENEO L.J. 562 (2002) (discussing the situation of indigenous peoples in light of internal conflict and sustainable development); A. Edsel C. F. Tupaz, *A Synthesis of the Colloquium on Indigenous Peoples,* 47 ATENEO L.J. 775 (2002) (for a synthesis of a colloquium on indigenous peoples of the Philippines under the auspices of the United Nations Development Programme).

220. *See* P.M.T. Nell Twair, *Christians, Muslims Discuss Their Commonality,* WASH. REP. ON MID. E. AFF., Apr. 2001, at 53.

political elites in the long run.[221] As discussed, the development of informal channels along with institutional disaggregation should not be ignored.[222]

d. Manifold formations of islands of agreement

According to Gabriella Blum, amidst an enduring sea of conflict one might find isolated pockets of cooperation and non-violent interaction among warring parties.[223] To be sure, the management of the underlying conflict itself should be accorded no lesser status, but in the periphery the cultivation and growth of different kinds of islands of agreement, from water rights to transportation routes, might be a more effective, though indirect, way to weaken the main sources of conflict. The proliferation of self-reliant "peace zones," or isolated conflict-free areas, at the grassroots level[224] can indicate a de-escalation of overall political violence. Cast in this light, "[o]ut of the zone of turmoil [might] emerge a zone of tranquility which," to David Forsythe, would enable "a complicated system of humanitarian assistance to respond to civilian suffering."[225] New channels for international humanitarian intervention would open up. As a matter of fact the formation of various islands of agreement evinces the kind of shared cooperative activity thought to be — at least to Jules Coleman — irreducibly normative,[226] and, by that reason alone one might find the propagation of autonomous peace zones as the most appropriate, if not the last, confidence-

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221. *See, e.g.* Miriam Coronel Ferrer, *The Philippine State and Moro Resistance: Dynamics of a Persistent Conflict, in* MINDANAO CONFLICT, *supra* note 176, at 2-26; *see also* A. B. Villanueva, *Parties and Elections in Philippine Politics,* CONTEMP. S.E. ASIA, Sep. 1996, at 175-92 (depicting contemporary political elite structures in the Philippines).

222. *See also* A. T. M. Nurul Amin, *The Asian Setting of the Informal Sector's Growth Dynamics,* REGIONAL DEV'T DIALOGUE, Spring 1996, at 70-96.

223. *See* BLUM, *supra* note 61, at 19, 243.

224. *See* Landon Hancock & Pushpa Iyer, *The Nature, Structure, and Variety of Peace Zones, in* ZONES OF PEACE 1-4, 29-33, 51-53 (Landon Hancock & Christopher Mitchell eds., 2007); Kevin Avruch & Roberto Jose, *Peace Zones in the Philippines, in* ZONES OF PEACE, *supra.*

225. David Forsythe, *International Humanitarian Assistance: The Role of the Red Cross,* 3 BUFF. J. INT'L L. 235, 235 (1996-97) (citations omitted).

226. *See* Coleman, *supra* note 88, at 19 (discussing the "internal point of view" as "irreducibly normative); *Id.* at 21 (exemplifying cooperative activity).

    I borrow from Coleman to tie up Bratman's idea of shared cooperative activity as having an irreducibly normative property.

building measures[227] with significant policy implications on either side. Moreover, peace zones indicate a burgeoning awareness of civility and responsible grassroots citizenry, and, perhaps most importantly, they can be evidence of an ever-expanding public sphere. "[P]eace zones succeed in creating a space for dialogue and in keeping the violence out, but more important, they achieved some success as a link between local and national peace efforts."[228]

If indeed peace zones dampen enduring rivalries over time, how might future administrations make good use of them? Complex as these issues seem, one essential feature for policymaking would be to spread out informal channels of political dialogue and encourage shared communicative activity. Indeed this prescription might seem too abstract — or worse, too simplistic a measure — for those who consider themselves members of the intellectual political elite. But we have so far seen too few alternatives and good ideas. While there are considerable shortcomings in creative constitutional imagination and learning (principled ambiguity), and in accommodative dialogical practices (excessively centralized political will-formation), as well as traces of enforcement-style politics (enforcement model), the manifold formations of islands of agreement in the midst of conflict are clear signs of a growing democratic culture in the Philippines in general, and the social convergence over principles of liberal legality in particular.

VI. CONCLUSION

In the reconstruction of fragile societies reeling from conflict, it would certainly be praiseworthy for constitutional engineers, mediators, and designers, in whose hands much of the fate of whole nations lie, to be aware of the normative underpinnings of their constitutional blueprints. By perfunctorily imputing sovereign intent to a given historical narrative, by according supreme binding virtue on the teachings of an historical intellectual corps, and by privileging finality over dialogue, enforcement politicians forestall the very constructive political-constitutional processes that might have otherwise incited the limitless transformative opportunities for cooperative constitutional learning, conciliation, and lesson-drawing. Political will-formation need not be so restricted by constitutional choices that followed the glorious revolutions of history. Today's generation of

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227. *Cf.* James Wilets, *Lessons From Kosovo: Towards a Multiple Track System of Human Rights Protection*, 6 ILSA J. INT'L & COMP. L. 645, 649, n. 10 (2000) (observing instances of cooperation in MERCOSUR even beyond strictly economic issues).

228. Hancock & Iyer, *supra* note 224, at 33.

constitutional thinkers might instead find dialogical politics to be the wellspring of moral optimism: by strategic use of linguistic plasticity, and by modulating constitutional negotiation between postponement and settlement, we might be able to find better ways to engineer specific outcomes. To be sure, more cases are needed; more elaborate simulations must be conducted; and more critical studies on normative political theory must be pursued. Unfortunately the acquisition of such knowledge might come at too great a cost. But in moments of extreme urgency, an unwillingness to undertake the necessary constitutional choices will be disastrous. By suggesting a theoretical apparatus for normative self-revision as a predicate for constitutional design, we might be able to offer more concrete and more effective proposals for constitution-making and peace-building in fractured states. But to succeed in such far-reaching legitimation project, one need not be staunchly ambitious. In propounding constitutional choices and their solutions in the Philippine setting, what is needed is less an idyllic consensus than a "working misunderstanding."[229] Constitution-making as seen in Northern Ireland and South Africa need not aim so high.

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229. *See* Stevenson, *supra* note 69, at 22.