From State Overthrow to State Building: 
Human Rights Discourse and Mobilization in Transitions to Democracy

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Prepared for Conference
Human Rights in an Age of Ambiguity
Fordham University, New York, 2016

Abstract:
The appeal to human rights is a central element in the repertoire of opposition movements against repressive regimes. By framing and reporting regime violence as human rights violation, civil society actors gain effective ways to communicate with international organizations and to form transnational coalitions to pressure their own regimes. While this “regime-undermining” potential has received intense scrutiny, it remains unclear how, if at all, rights discourses and mobilization strategies change once the regime is effectively weakened. In other words, what happens to the strategic uses of human rights once the task is no longer regime overthrow but the founding of a new state? By comparing the Polish (1989-1997) and South African (1990-1996) transitions to democracy – countries with considerable pre-transition and transitional rights mobilization – I argue that the moment of transition effects crucial changes in the type and direction of rights mobilization. Especially in cases in which activists gain positions of power during the transition, a shift from human rights to constitutional rights and from state-undermining to state-legitimizing rights discourses takes place. Now in power themselves, these actors no longer benefit from the anti-political, internationalized, and de-legitimizing nature of human rights mobilization and instead re-direct their efforts to codifying their victory into constitutional law. This suggests that processes of de-radicalization and de-mobilization of human rights discourses after transitions maybe, paradoxically, a function of prior human rights successes.
The second half of the twentieth century has witnessed a “rights revolution” in international law during which fundamental individual rights have arguably become the central normative framework for “human conduct in the world of states,”[Jackson:2000vl]. Today a broad array of international, regional and bilateral human rights treaties assert an increasing number of human rights, from classical civil and political rights, to economic, social, and cultural rights as well as rights to bodily integrity and provisions to protect particularly vulnerable groups.1 In this development, popular actors such as social movements, non-government organizations and advocacy groups are widely acknowledged as crucial norm-generating and norm-interpreting agents.

Despite intensive scholarly engagement with the question of how popular actors formulate, contest and reshape human rights, one crucial question has received insufficient analytical attention so far: What, if anything, happens to human rights discourses and mobilization during transitions to democracy? This research gap is critical for several reasons: First, some of the most important pioneering studies of popular human rights mobilization focus on authoritarian, non-democratic settings. This early generation of scholarship has pointed out the crucial “regime-undermining” and de-legitimization functions of popular appeals to international human rights. Nevertheless, the process of transition itself is usually not part of the analysis.

Second, democratic transitions since the mid-1970s were usually accompanied by profound changes in government structure and legal institutions, most commonly in the

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form of the drafting of a new constitution. Nevertheless, constitution making processes have been largely ignored by human rights scholarship. This absence is puzzling because presumably the central question for human rights, indeed, the central question for the relevance of international human rights, is whether or not they effectively protect individuals on the ground, that is, in local and inevitably national, settings. What is the relationship, if any, between human rights and constitution making during regime change? How, if at all, do human rights discourses and mobilization strategies aimed at under-mining a repressive regime change once the task is no longer regime overthrow but the founding of a new state?

In this paper, I address these questions by comparing rights mobilization and discourses in the pre-transition and early transition phases of democratization processes in Poland (1989-1997) and South African (1990-1996). These pre-transition phase in both countries highlight the “regime-undermining”-dimension potential of human rights mobilization. At the same time, in both cases previous human rights groups achieved positions of power in the new constitutional regime. In these cases, transitions engender a shift from human rights to constitutional rights as well as from state-undermining to state-legitimizing rights discourses. Now in power themselves, these actors no longer benefit from the anti-political, internationalized, and de-legitimizing nature of human rights mobilization and instead re-direct their efforts to codifying their victory into constitutional law. This suggests that processes of de-radicalization and de-mobilization of human rights discourses after transitions maybe, paradoxically, a function of prior human rights successes.

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In the following, I first provide a brief overview of human rights mobilization in non-democratic settings by discussing Polish and South African developments under Communism and apartheid. I show that pre-transition rights discourses and mobilization are multi-dimensional and shift between constitutional rights and human rights depending on the specific phase of anti-regime struggle. In part 2 I briefly discuss how human rights scholarship has addressed the topic of regime transitions. Part 3 compares these characteristics with rights discourses and mobilization during transitional constitution making in both countries. In part 4 I conclude by summarizing the implications of the analysis and discussing several avenues for future research.

1. Human Rights Discourses and Mobilization in Non-Democratic States

The first major studies on popular human rights discourses and mobilization focused on cases in Latin and Central America. Here, local actors utilized international human rights norms to pressure – “shame and name” – repressive governments into ending violent practices such as torture, arbitrary detention and extrajudicial killings. The central starting point of the analysis in these studies is that domestic opposition groups and organized civil society actors are blocked from access to their own regime, which remains non-responsive to their demands and continues its norm-violating behavior. Shut out in this way, domestic groups try to achieve their goals by bypassing their non-responsive governments and directly search out international allies to try to bring pressure on their states from outside.
In this situation, external support from transnational networks and international non-governmental organizations is considered to be crucial for the success of domestic human rights mobilization. These international contacts can help convince donor institutions, international human rights organizations and powerful states to bring pressure “from above” to accomplish human rights changes on the ground. Furthermore, networks provide access, leverage, financial support and information to oppressed domestic groups. In addition to these material resources, the appeal to human rights provides domestic opposition groups with a powerful frame to mobilize supporters, legitimize their own actions and de-legitimize repressive government actions. Here, the great appeal of human rights seems to result from their supposedly non- or anti-political nature: by holding up the banner of human rights, domestic opposition groups can effectively criticize their governments and, at the same time, distance themselves from the corrupt spheres of political power.³

Pre-Transition Poland

Since its inception, the Communist party-state had monopolized social and political space in Poland, with no avenues for meaningful political opposition as well as the frequent imprisonment, intimidation and isolation of dissidents. This situation began to change with the signing of the 1975 Helsinki Final Act, which established human rights as a guiding principle for relations among European states. While initially elite and grassroots voices in the West had condemned the Final Act as a concession to Soviet totalitarianism

³ Moyn, Ost, Havel, Michnik.
and regional hegemony, they gradually began to apply diplomatic pressure on Eastern bloc governments to comply with their human rights commitments.

The transnational support from the West was in part a response to increases in human rights mobilization on the ground. Even though their governments were portraying the Final Act as a ratification of the status quo, to Soviet and Eastern European citizens it represented an unprecedented opportunity to challenge the repressiveness of these regimes and achieve domestic reforms. In Poland, the discursive frame of human rights was initially applied to highlight the state’s failure to implement the relatively liberal provisions of the Polish Constitution. As in many other countries, the human rights discourses took root locally through a progression of constitutional arguments: In early December 1975, fifty-nine of Poland’s intellectual elite delivered an open letter to the government in which they demanded that the fundamental rights already contained in the Constitution be implemented in practice. Their letter was filled with references to human rights commitments undertaken at Helsinki.

After it became clear that the call of constitutional reform was would remain unheard, and encouraged by positive signals of growing attention by Western governments and societies to Helsinki norms, the disparate members of the Polish opposition increasingly shifted their focus from constitutional to human rights. In September 1976, in response to the imprisonment of workers who had participated in strikes, the Worker’s Defense Committee (KOR) was formed in order to provide legal, financial and medical aid for the victims. The strategy of KOR activists to tie their actions to Helsinki principles seemed to be effective: the government response was unusually restrained and the workers were freed within months. From 1977 on, KOR,
renamed as the Social Self-Defense Committee (KSS-KOR), focused almost exclusively on the protection of human rights.

While up until this point human rights activism primarily aimed at condemning and ending concrete incidents of regime violence against workers, through 1978 and 1979 the direction and strategies of activists expanded and transformed to include demands for free association, freedom of thought and expression, and were ultimately channeled into a demand for an independent trade union. KSS-KOR and ROPICO together with other human rights groups formed the nucleus of what would become the largest opposition movement against Communism in the Eastern bloc in beginning of the 1980s, the Solidarity trade union.4

In this period demands to implement human rights as they are codified in the Helsinki agreements as well as demands for fundamental political change existed side by side and were frequently linked. Appeals to human rights took on a central stage in the Solidarity program both in 1980/81, and during the transition to democracy in 1989. The First Congress of Solidarity, which met in Gdansk-Oliwa in the fall of 1981, specifically addressed the subject of human rights and demanded “basic civic freedoms, [and] .. principles of equality of all citizens and all institutions of public life before the law” in Thesis 23 of its final resolution. Human rights debates continued to play an important role in opposition circles, even after the introduction of martial law in December 1981 and the break-up of Solidarity by the regime. In 1982, for example, the Helsinki

Committee for Human Rights was founded, an underground non-profit organization devoted to human rights activism and research.

*Pre-Transition South Africa*

Compared to Poland, where the opposition movement grew out of human rights activism in the mid-1970s, South Africa has a much longer tradition of rights-based mobilization against colonial oppression and systemic racism. In the almost century long struggle for racial equality and political participation, black South Africans employed different types of rights claims, traditional state-granted civil liberties or internationally recognized human rights documents, depending on the specific historical period of struggle, and following the overall development of anti-regime tactics.

The first phase can be located with the rise of segregationist ideology in the 19th and early 20th century that united Afrikaner and English-speakers against South Africa’s black and “coloureds” population, and, as a critical response, the founding of the African National Congress (ANC) in 1912.\(^5\) Even though the ANC at that time was an elitist organization without strong ties to working-class or poor Africans, its demand for equal rights increasingly broadened in the 1920s to include demands for the application of

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\(^5\) After the unification of the four British colonies into the dominion Union of South Africa in 1910, citizenship generally remained unspecified. With no written constitution in place, rights were defined by residual bonds of loyalty to the Crown and by virtue of being a “citizen” of the British Empire. South African citizenship was largely defined negatively and instrumentally, that is, in relation to attempts to control, register, and naturalize immigrants, as well as with the goal to classify the population within strict hierarchical categories. Segregationist ideas, which stressed immutable racial differences between blacks and whites and presumed that Africans were best left to develop in specially delimited rural “native areas,” proved to be particularly detrimental for South African blacks. In the period leading up to the enactment of the 1936 segregationist laws, Africans were increasingly denied civil and political rights in turn for promises of communal land rights in “reserved” areas.
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“democratic principles of equality of treatment and equality of citizenship in the land, irrespective of race, class, creed or origin.”

During WW II the ANC underwent a revival as a mass-based, more politically assertive organization that focused fully on the illegitimacy – rather than unfairness – of white supremacy and the necessity of replacing minority with majority rule. Whereas African leaders had historically petitioned the British monarchy to accept their claims to equal treatment, the wartime ANC now demanded full citizenship rights and political representation. The key documents of this era – such as the *Africans’ Claims in South Africa*, adopted as official policy in 1943 – reflect the growing mass base of the ANC and its incorporation of social democratic, communist and indigenous ideas. This document, especially its Bill of Rights, is often celebrated by ANC members retrospectively as evidence of an indigenous rights tradition that “anticipated by five years the 1948 United Nations Universal Declaration of Human Rights,” and the subsequent evolution of international human rights from political to social and economic rights.

With the Afrikaner nationalists achieving power in 1948 and the subsequent implementation of apartheid, the demand for full democratic rights and participation in government remained central principles of opposition groups. In addition to mass civil disobedience campaigns against new apartheid laws, ANC leaders planned a clear statement on the future of South Africa that would unite the opposition movement and could from the basis for new political initiatives. The resulting 1955 *Freedom Charter* signaled a departure from prior aspirations of the ANC that had demanded equal citizen rights for black South Africans toward a more radical vision of a shared, non-racial South African identity.
Despite the more radical and nationalist aspirations of the Charter and the success of the 1955 Congress to unite domestic opposition forces, its premises were not shared by all allies and members. The Pan Africanists, who split away from the ANC in 1958-59, disagreed with the principle of non-racialism and regarded rights as being rooted in a common African identity rather than in an all-South African identity. Proponents of Marxist thought, on the other hand, both in the ANC and in allied organizations, treated liberal rights with suspicion and viewed them as “bourgeois” empty promises that underwrote class oppression. To them, politics pursued in the name of equal rights or citizenship could be dismissed as irrelevant to the “real” task of anti-capitalist struggle. In this period, especially with the extreme government crackdown on opposition groups, the outlawing of the ANC and its allies, and the imprisonment of almost 2,000 opposition activists in the 1960s, the focus shifted from a reformist path to “revolutionary armed struggle” and the ultimate overthrow of the apartheid regime.

This ambiguous stance toward rights-based mobilization remained a constant feature of the domestic opposition movement even when the struggle against apartheid became increasingly internationalized and embedded in an overall human rights framework from the 1960s onward. While South Africa’s racial policies had raised international concern as early as 1946, it took several severe episodes of human rights violations by the government and important Cold War geopolitical shifts until sustained transnational pressure from state and non-state actors came to bear on the apartheid government.

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Until the mid-1970s, especially following the 1960 Sharpeville massacre, the anti-apartheid movement was primarily supported by governments of the Global South as well as non-governmental organizations in the West. While this support was crucial, it could not prevent a further consolidation of the South African state during the “golden years” of apartheid. Many governments of Western countries, while escalating their rhetorical criticism of human rights violations, remained firmly opposed to economic or diplomatic sanctions and thus came widely regarded as effective allies of the apartheid regime. As a result the South African government was able to retain strong economic, social and strategic links to these powerful countries and continue its repressive policies at home.

It took another episode of extreme regime violence and large domestic counter-mobilization to prod Western governments to adopt a more potent response to the apartheid state. A watershed moment in this process was the brutal government response to student protests in Soweto in 1976 and the following violent insurrections in townships across the country. From this point on, a combination of reenergized domestic as well as exiled anti-regime mobilization, growing non-government pressure as well as varying degrees of sanctions and international isolation forced the apartheid government to tactical and cosmetic but increasingly substantial concessions that culminated in the beginning of the negotiated transition to democracy in 1990.

The discussion of the pre-transition opposition movements and the various shifts in rights discourses in both countries is necessarily schematic and likely to leave experts on both processes unsatisfied. What it hopefully has achieved is to illustrate that rights discourses and mobilization in non-democratic regimes undergo changes and are often combined with arguments for domestic constitutional reform as well as demands for
equal citizenship. In Poland, after an initial phase of demands for domestic constitutional reform based on human rights principles, the focus soon shifted toward the goal of substantial political change and the de-legitimization of those in power. In South Africa the strategic appeal to human rights coincided with a radicalization of the demands of originally anti-racist and anti-colonial groups to an opposition movement aimed at overthrowing the apartheid state.

Furthermore, in both pre-transition phases international actors and contacts to transnational advocacy networks had an important impact on the effectiveness of domestic opposition actors. Blocked from political participation and faced with hostile and repressive state policies, domestic opposition members circumvented their own governments and sought state and non-state allies abroad. These networks provided crucial material resources, leverage and information that sustained opposition activities. For example, it is estimated that by the 1980s the ANC in exile was receiving financial assistance from friendly governments and international organizations of roughly $100 million annually. Similarly, Solidarity received financial support from US government agencies, the Catholic Church, and Western trade unions such as the AFL-CIO.

2. Regime Transitions in Human Rights Scholarship

The pioneering analyses of cases in Latin America highlight the crucial role civil society actors play in leveraging human rights language to not only end human rights violations, but also to weaken and critically undermine non-democratic regimes. In subsequent
research the mechanisms derived from these studies have been applied to a larger set of non-democratic countries such Kenya, Tunisia, Morocco, the Philippines, Czechoslovakia as well as the two cases analyzed here, Poland and South Africa. Even though these studies consider the moment of regime change and a new constitution as possible outcomes of human rights mobilization, the transition process itself has not yet been part of the analysis. In other words, even though it is acknowledged that “regime change often precedes dramatic improvements of human rights conditions on the ground,” there is no discussion as to why these improvements take place.

In another study, it has been suggested that human rights organizations after regime change re-directed their focus from reporting current human rights violations to demanding accountability for what is now “past” state crimes. This argument for a shift toward “transitional justice” is an important contribution to the question of whether or not regime change leads to changes in the content and direction of human rights demands. Nevertheless, here too there is no consideration of the role of human rights during transitional institution building. Instead, the question of how successor governments should deal with the crimes of their predecessors requires engagement with legal-institutional reforms that pertains to the punishing of former leaders, the vetting of abusive security forces and replacing former state secrecy with truth and transparency.

In quantitative scholarship successful transitions to democracy are also considered to be important factors that lead to changes in the scope and quality of domestic human rights policies. The positive impact of transitions to democracy is seen as twofold: On the one hand, democratization processes generate “commitment” and “concession” mechanisms that motivate states to ratify human rights treaties, thus contributing to the
global institutionalization of the international human rights regime. On the other hand, the process of transition itself makes positive reforms in human rights policies more likely because the upheavals and shifts in power in transitioning moments create windows of opportunity for local activists.

Even though transitions and the subsequent creation of new domestic institutions are seen as important moments for improvements in human rights conditions, the process itself is often not subject to analysis. In the next section, I approach this gap by discussing the early stages of the Polish and South African transitions and the beginning of the constitution making processes in both countries.

3. Rights Discourses and Mobilization During Transitional Constitution Making in Poland and South Africa

As I argued in the first section, anti-regime rights mobilization in Poland and South Africa was characterized by alternating shifts between constitutional rights discourses aimed at domestic legal reform as well as human rights discourses aimed at the publicizing and ending violent regime practices. Similarly complex rights discourses can be observed in the post-transition period.

Post-Transition Poland

Under communism, as I stated earlier, the language of human rights provided opposition members with a potent vocabulary to challenge the legitimacy of government and criticize human rights violations. Equally importantly, it allowed the domestic resistance
movement to connect with the international human rights movement and thus to put pressure on their home government more effectively. The growing opposition movement soon abandoned its initial calls for constitutional reform and rejected the Communist Constitution as a sham. Once the transition was underway in 1989, Solidarity activists realized that employing international human rights language as an instrument of protest within a united movement did not necessarily prepare them for the task of formulating judiciable constitutional rights amidst a political transition.

With the beginning of the drafting process in December 1989 activists-turned-politicians increasingly adopted the language of constitutional rights. Nevertheless, it became clear that not everyone believed in the necessity or importance of constitutionalizing fundamental rights provisions. Many former Solidarity activists seem to have thought that the fight for human rights was complete with their victory in the 1989 election. Particularly members of the newly emerging center-right and right parties believed that concerns about human rights should “give way to the fight against new threats, such as corruption and crime” as well as the need to address past crimes. Others believed that the constitutional amendments and laws introduced in 1989 were sufficient because these changes had already created the basis for a modern democratic state and constitution. In this sense, the Solidarity opposition started the drafting process in 1989 relatively unprepared and without a clear constitutional vision. Even though the

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7 In this period, constitutional discourses continued in small circles of legal experts and scholars. In the early 1980s, efforts by researchers at constitutional law departments, the Institute of Legal Sciences at the Polish Academy of Sciences and some individual politicians attempted to improve the system by introducing modest constitutional changes. These efforts led to the formation of the so-called “judicial review movement” which was able to achieve some reforms in the judicial system that introduced elements of constitutionalism: The creation of the High Administrative Court (1980), the Constitutional Tribunal (1982), and the Polish Ombudsperson for Citizens’ Rights (1987).
Solidarity party program of May 1989 had mentioned the importance of constitutional reforms, in reality Solidarity leaders did not have a coherent constitutional proposal at the time when the constitutional commissions of the Sejm and Senate were formed on 7 December 1989.

Even the focus now was on institution building for a new democratic regime, the drafting of a new constitutional bill of rights played a marginal role in the early years of the transition. This can be partly explained by the nature of the Polish transition to democracy. The round table negotiations from February to April 1989 did not aim to end communist rule nor were its result meant to put Solidarity on the road to power. Quite the contrary, the communist party invited Solidarity to share government power as junior partner and made sure, through several constitutional controls, that it would not have to relinquish control any time soon. For example, the April 1989 agreements created a powerful new office of the president, which was devised in order to ensure that the Solidarity opposition in parliament could be controlled effectively.

To compensate for this office, Solidarity gained the right to veto legislation through the Senate – a newly created second chamber of parliament that would be elected freely. The Sejm, in which the government was guaranteed 65 percent of the seats and only 35 percent would be competed for freely, could reject the Senate’s veto with 2/3 of the votes. In a situation of conflict between the two chambers, the president was thus supposed to protect the interests of the communist government. In this sense, the round table agreements were “not created with a democratic post-communist society in mind but rather with a limited authoritarian state.” Solidarity, on the other hand, did initially
not expect or demand to take over power and thus did not “seriously consider the constitution or its revision.”

In fact leading Solidarity members expected a full democratization process to take place only in the next 3-4 years. The unexpected outcome of the June 1989 elections, in which Solidarity’s Citizen Committee (OKP) won 99 out of 100 Senate seats, and all of the free seats in the Sejm (35 percent), as well as the political changes of late 1989 and 1990, led to a rapid transformation of the entire political system. These developments highlighted the Communist Party’s complete loss of legitimacy but also revealed the fragility of the newly empowered Solidarity movement. With the defeat of the opponent, the cracks and conflicts within the opposition movement were revealed and continued to grow.

The political polarization and eventual break-up of Solidarity into ideologically diverse new political parties also influenced the types of constitutional rights courses during constitution making. Whereas under Communism rights mobilization was internationalized both in terms of discourses and strategies, in the process of legitimizing and stabilizing a new democratic regime rights discourses were increasingly mediated by debates around national sovereignty, Polish culture, and the importance of homegrown rights traditions. This development was further exasperated by the political diverse composition of the two constitution writing bodies. The Sejm constitutional commission, because of the 65 percent reserved seats in the Sejm for the communist party and its allies, was composed of former regime and new opposition party members. The Senate constitutional commission, in contrast, because the Senate was composed of 99 percent Solidarity members, was devoid of any post-communist members.
The discrepancies between an ideologically more diverse Sejm constitutional commission, and an ideologically homogenous Senate constitutional commission proved to be especially salient for the formulation of fundamental rights. With the increasing political polarization, that pitted not only post-communists against post-Solidarity parties but also liberal post-Solidarity parties against conservative and Christian post-Solidarity parties, two entirely opposite draft constitutions and bills of rights confronted each other toward the end of the legislative period in 1991. The provisions on fundamental rights in the Sejm draft, the so-called *Catalogue of Constitutional Rights, Freedoms and Duties of Man and Citizen*, were almost entirely based on drafts from the *Human Rights Center of the Polish Academy of Science Institute for Legal Studies* in Poznan.

Initially created with the “aim to propagate the so-called socialist conception of human rights,” the center began to start evolving towards a western concept of human rights. Since 1987 it had been working on the question of the role of human rights in a future Polish constitution. The proposal of the Sejm sub-commission on human and civil rights, because of the more diverse ideological composition of the constitutional commission, tried to reconcile socialist and Christian concepts of human rights with a more liberal western understanding of rights while generally adhering to internationally accepted rights standards of the time. The rights and liberties contained in this draft enjoyed broad agreement in the Sejm commission, except for a few contentious issues that were left unresolved.

The Senate draft’s provisions on fundamental rights shared with the Sejm draft a basic incorporation of the then internationally accepted political and civil rights but also differed with regard to central normative principles and rights. For example, article 9 of
the Senate proposal abandoned the separation of state and church. Instead it proclaimed that these relations should henceforth be regulated by the encyclical *Gaudium et spes*. Similarly, article 8 made distinctions between different religions and their relation to the state. According to this article, only the relation of the Catholic Church (and only that church) to the state was supposed to be regulated by a special agreement, the Concordat. In contrast to the more liberal, Western European-oriented draft of the Sejm, the Senate draft proposed a unified vision of a conservative liberal, Christian democratic state.

*Post-Transition South Africa*

As I discussed earlier, in pre-transition South Africa too a shift took place from a constitutional rights discourse aimed at inclusion to a human rights discourse aimed at de-legitimating, and ultimate overthrowing, the apartheid state. Even though the ANC remained suspicious of the growing international human rights discourse, which it identified with US-American imperialism, cooperation with transnational human rights organizations remained an important part of its repertoire of anti-regime strategies.

But this does not mean that constitutional rights discourses disappeared; rather during most of the time, both rights discourses existed side-by-side and are at times difficult to disentangle. Up until the mid-1980s, constitutionalism, citizenship, or the need for a bill of rights guaranteeing substantive freedoms and liberties was discussed primarily in liberal opposition circles and the legal profession. Early examples of these organizations and think tanks are the Civil Rights League (1948), the National Union of
South African Students, the South African National Convention Movement and the liberal Black Sash.

From the mid-1970s on a number of domestic non-governmental law organizations emerged with the explicit goal to champion human rights in South Africa. These included the Wits University Centre for Applied Legal Studies (CALS, established 1978), whose first director, John Dugard, was an eminent human rights scholar; the Legal Resource Centre (1978-79), which, under the direction of human rights lawyer Arthur Chaskalson, launched direct challenges to apartheid legislation; Lawyers for Human Rights (1979); and the Human Rights Commission (1988). The work of these organizations helped to promote the notion of legal rights as weapons of the weak against the state, and was spread further by the emergent mass democratic movement in the 1980s. The formation of the United Democratic Front (UDF) itself a reaction to then President P.W. Botha’s constitutional reform in 1983, led to a revival of interest in the Freedom Charter.

Parallel to this recourse to rights language in domestic opposition circles such as trade unions and the UDF, some leading figures in the exiled ANC began to argue that the movement should start developing more concrete constitutional proposals in the light of the possibility of political negations. As political negotiations with the regime were approaching, anti-apartheid leaders began to re-introduce the notion of constitutionalism and rights into opposition circles. In the early 1990s thus a change in attitudes took place through which rights are no longer regarded as “manifestations of sickly humanism, as an
instrument of international communism, or as a bourgeois ideology ... but as a necessary component of democratic society.”

The initiative of ANC president Oliver Tambo to set up the ANC Constitutional Committee in 1986 can be seen as the beginning of this process. The initial 1986 draft of the “Constitutional Guidelines” were received skeptically by the ANC leadership; for example National Executive Committee (NEC) member Ruth Mompati noted that this was the first time the ANC had “even attempted to give constitutional expression to its programmatic demands” and the first drafts were flatly rejected as being “too bourgeois.” ANC leadership also raised questions on process and strategy with regard to the Guidelines: were they meant as “mobilizing instrument” or “tactical tool,” and how would the slogan of “The People Shall Govern” translated into an institutional framework that would be responsive to the populace? The second half of the 1980s thus show the challenges of introducing a debate on constitutional ideas in an organization still rhetorically committed to the revolutionary seizure of power.

The ANC Constitutional Committee’s draft bill of rights received similar responses. In a memorandum of September 1987 to the NEC the Constitutional Committee laid out basic constitutional guidelines that included a Bill of Rights based on the Freedom Charter. A year later, the NEC formally endorsed the idea to have a justiciable Bill of Rights enshrining fundamental rights and freedoms and published the

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“Constitutional Guidelines” in 1988. However, in discussing these constitutional ideas with ANC officials and allied organizations during this time, Constitutional Committee members were careful to stress that these were merely proposals and that a final constitution could only be arrived at by elected representatives of all the people in a future parliament.

Taking into account the continued lack of unanimity within the ANC over a constitutional route as well as a tactical need to maintain flexibility in possible negotiations, ANC legal experts also took care to emphasize that a judicially enforced bill of rights was not a reactionary mechanism to entrench white privilege or to curb democratic practices. The ANC’s cautious position toward a bill of rights is not only due to the strength of Marxist thought or its historical commitment to “revolutionary armed struggle” and “peoples’ power.” Another equally potent reason is the “curious” – fact that “the demand for a Bill of Rights ... [came] not from the ranks of the oppressed but from a certain stratum in the ranks of the oppressors.”

Indeed, it was the party of apartheid, the National Party, not the ANC, which first turned to a bill of rights when it instructed the South Africa Law Commission in 1986 to investigate the prospects of any such document for the future. Because this initiative coincided with the declaration of a state of emergency that resulted in large-scale violation of basic rights, it was not taken very seriously. Moreover, most observers
regarded it either as an attempt to legitimize the notion of group rights at the expense of individual rights or as “last-ditch attempt” to forestall sanctions by the US Congress.

The Law Commission’s 1989 and 1991 reports, however, proposed the adoption of a bill of rights to protect individual civil and political rights and rejected the protection of racially defined group interests. By doing so it dismissed one of the central conceptual pillars of the apartheid regime, namely, the primacy of groups that had allowed the white minority to divide the African majority into various “ethnic minorities” and confine them to separate “development” as citizens of their “homelands.” However, the findings were undermined at the beginning of the transition by newly inaugurated State President F.W. de Klerk. Together with Minister of Constitutional Affairs Gerrit Viljoen, de Klerk continued to press for power-sharing mechanisms rooted in group rights, decisions by consensus, and autonomy for each group in its own affairs.

Similarly, the “independent homelands” early embrace of fundamental rights documents was another factor that rendered constitutionalism suspicious for the ANC. With the implementation of the Promotion of Bantu Self-Government Act of 1959 four independent entities – Transkei, Bophuthatswana, Venda and Ciskei – were created with the aim to exclude the majority of black South Africans from South African citizenship and condemn them to “separate development.” Some of the apartheid-created Bantustans, the legitimacy of which the ANC had never accepted, adopted judiciable bill of rights in the 1980s. In the 1970s and 1980s, Mangosuthu Buthelezi, chief executive of the

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KwaZulu territorial authority, had begun to call for constitutional rights guarantees, and to criticize the denial of South African citizenship to black South Africans.\(^{22}\)

While the ANC shared his unifying position, they rejected Buthelezi’s consociationalist course that he seemed to have taken on ten years later: at a KwaZulu-Natal Indaba in 1986 Buthelezi endorsed a federal constitutional package which included a comprehensive bill of rights and plans to govern the region through a form of multi-racial consociationalism.\(^{23}\) The distrust caused by the embrace of “white lawyers, politicians, business people, political scientists,” and traditional leaders of the idea of a bill of rights in South Africa led some young black lawyers even set up an “anti-bill-of-rights committee.”\(^{24}\) To diffuse these fears the ANC Constitutional Committee decided to launch a public debate on its constitutional guidelines and draft bill of rights in 1990. This campaign had the double goal of engaging its own domestic constituency and of reaching out to a broader South African and international audience.

Between 1990 and 1993 the ANC Constitutional Committee organized and participated in a series of broadly inclusive conferences and workshops to discuss its constitutional proposals.\(^{25}\) These events were often co-hosted by number of university-based legal institutes, especially CALS, and attended by members of the tripartite democratic alliance – which consisted of the ANC, SACP and COSATU,\(^{26}\) non-governmental organizations, community-based groups, international and local
Despite intensified efforts of the ANC Constitutional Committee, which continued to produce draft bill of rights, organize workshops and meetings on fundamental rights after 1990, rights issues nonetheless remained controversial throughout the transitional negotiation process and all the way to the drafting of the interim Bill of Rights by the MNPN in 1993.

4. Conclusion

Not all cases of popular mobilization for human rights within non-democratic regimes lead to regime change; nor are human rights activists always part of anti-regime opposition movements. Yet in those cases in which they are, as the discussion of the Polish and South African cases has shown, rights discourses and strategies significantly transform during transitions. Now part of the new elite in power, activists-turned-politicians abandon the aspects of human rights discourses aimed at de-legitimizing and circumventing spheres of government power, and instead turn to building new political power and institutions. In this process, new elites shift from a previously internationalized human rights discourse to a constitutional rights discourse that emphasizes national sovereignty, indigenous rights traditions and aims to build cultural cohesion. Therefore, in order to analyze this transitional period effectively, it is important to consider the diverse and complex nature of pre-transition rights discourses in which debates around human rights and constitutional rights co-exist and intercept.

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Furthermore, processes of regime change are often accompanied by a de-radicalization and de-mobilization of popular rights claims. This outcome, I argue, is a function of prior human rights successes. Of course, human rights activism does not simply disappear because of regime change; human rights groups often re-direct their efforts to topics such as transitional justice. However, human rights mobilization in the post-transition period is likely to differ from pre-transition human rights mobilization under non-democratic regimes. While post-transition human rights groups also have strong connections to international actors and appeal to human rights, their goal is not to by-pass or undermine the regime but to achieve policy and legislative reforms often by cooperating with elites in power.