

Gargoyle

Constitution Builders:

UW law professors help nations to create their own governance.

SUMMER 2007

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The Constitution

Three UW law professors put their expertise to use helping nations to write their own constitutions.

By Nicole Resnick

They are three individuals with connections extending to three different continents, four vastly different forms of government, and many diverse cultures. Yet they have one thing in common: all teach at the University of Wisconsin Law School. From the corners of South Africa and Southern Sudan, to war-torn Baghdad, to the far reaches of Native American reservations scattered throughout North America, these three UW Law School faculty members are sharing their expertise in one highly specialized aspect of legal scholarship. Constitution “building” is what best describes the work by Professors Richard Monette, Heinz Klug, and Brady Williamson as they have helped shape the written principles adopted by other nations.



INDIAN COUNTRY

Richard Monette was raised in the Turtle Mountain Chippewa tribe, a Native American tribe of 30,000 members in North Dakota. His heritage strongly influenced his educational and professional goals. While he says that once he was torn between living “a regular life and getting a regular job” or becoming a public servant, fortunately for many American Indian tribes throughout North America, Monette chose the latter.

Since graduating in 1988 from the University of Oregon School of

Law, Monette has spent much time traveling to Indian reservations, where he contributes his expertise in the drafting and building of their constitutions. This is balanced by the courses he teaches on the UW campus: Wisconsin Constitutional Law and Federal Indian Law. “My background in constitutional law, combined with my Native American experience, is rather unique,” says Monette.

Having grown up in a tribal community, Monette is better able to relate to and understand the objectives and the nuances that influence the building of other native tribes’ constitutions. For many of these tribes their existing constitutions are, in essence, their culture, which includes their government, religion, and economics. Monette points out that the reshaping or reworking of a constitution that has survived in some form for so long is really just the next logical step.

“I tell them that just as America has created a constitution that stands for these rather abstract components, Indian tribes do this as well,” says Monette. “Like everyone, these tribes want to determine their culture, or their identity, and through their policies and their government they can determine their identity. Their constitution is that benchmark.”

To date, Monette has helped more than 30 different tribes and

attended tribal retreats around the country. He describes his work as being “rather non-stop,” with his constitutional expertise benefiting the Ho-Chunk, Cheyenne, and Arapahoe tribes, among others. One of the more interesting locations he’s traveled to is the floor of the Grand Canyon, home of the Havasupai tribe.

While each tribe embraces a different set of beliefs and strives to establish its own laws and governing principles, there is one key tenet that Monette espouses when guiding any tribe. “I try to convince them that the system of government they currently have in place must be of some merit, otherwise they would never have survived.” In other words, as he explains, all existing tribes must have had some system for making and executing rules, for resolving disputes, and for conducting relations with neighbors. He then draws from these systems in the drafting of a new constitution.

As demanding as this work may be, Monette acknowledges that as a Professor of Law, community service is one his responsibilities — if not his most important responsibility. His past experiences include serving as Staff Attorney with the U.S. Senate Committee on Indian Affairs, Director of the Office of Congressional and Legislative Affairs at the Bureau of Indian Affairs, and President of the National Native

tion Builders

American Bar Association.

Some of Monette's earliest tribal constitution-building experiences took place in this region of the country. Representatives of the Ho-Chunk Nation contacted him in 1992 when the Wisconsin Winnebago tribe was having trouble with government gaming laws. What ensued was a series of 25 meetings with the Ho-Chunk tribe over the course of two years. Monette credits, among others who collaborated with him, UW Law School student Joe Crawford '94, who often ended up sleeping on a couch in the waiting room outside the tribal chambers.

The drafting period took about a year, followed by submission of the document to a large law firm for review and a few revisions before the constitution eventually passed. What followed were public hearings all over the Midwest, eventual adoption, and finally, approval by the Bureau of Indian Affairs. "My job really was just to draft. While I answered the tribe's questions and followed their wishes, I didn't tell them what should go into their document," says Monette. "This can be a difficult proposition, but I've gotten better at it."

When all was said and done, the Ho-Chunk Nation presented an unsolicited check for \$30,000 made out to the UW Law School and its Great Lakes Indian Law Center. In this case the outcome

was favorable, but as Monette points out, success is never guaranteed, and he admits feeling devastation when a particular constitution is voted down. Those emotions are overshadowed by his sense of fulfillment when another one is passed, especially in cases when it's adopted word for word into law, as penned by Monette and others.

Monette says his involvement is most rewarding when he sits on committees with

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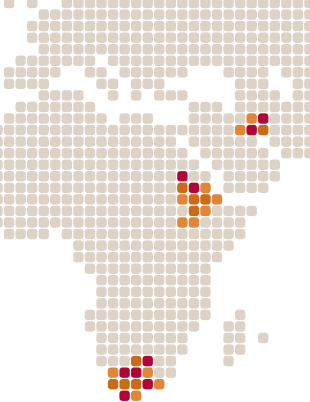
— Richard Monette

others who remark how much they've learned about the process of constitution building. And the experience he's gained by working with tribal elders is invaluable. "The tribal people sitting around the table are

often quite brilliant," he says. "Their values, their norms, their customs — it's who they are — and I help build this into their constitution to show that."



Q&N PHOTOGRAPHY



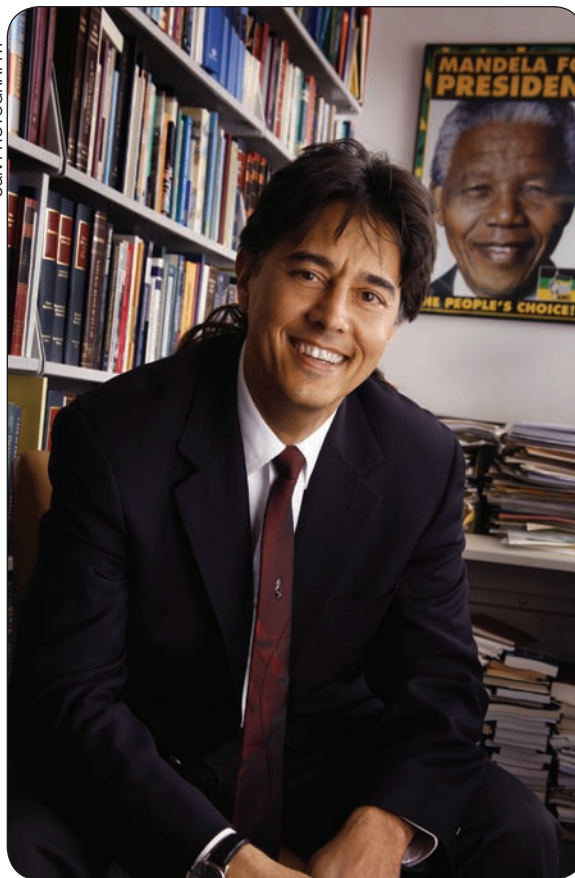
SOUTH AFRICA

Like Professor Monette, Professor Heinz Klug was attracted to the scholarship of constitution building by way of his birthplace and his allegiance to a nation hampered by constitutional problems. Growing up in Durban, South Africa, Klug participated in the anti-apartheid struggle. Following 11 years in political exile, he returned to his native country in 1990, shortly after earning his law degree from University of California Hastings College of the Law. As a member of the African National Congress (ANC) Land Commission, Klug was invited to work as a legal researcher for Zola Skweyiya, Chairperson of the ANC Constitutional Committee, as the committee prepared to negotiate a new constitution for South Africa.

In a period of South African history Klug describes as “extraordinary,” the country was transitioning to democracy. It was also a very tense time, and Klug’s involvement with the ANC Constitutional Committee



C&N PHOTOGRAPHY



Professor Heinz Klug in his Law School office.

included death threats at his home in Johannesburg. He eventually settled into his role working as a legal adviser with the Ministries of Land and Water Affairs and focused on the legal reform necessary to implement the constitutional changes that had passed.

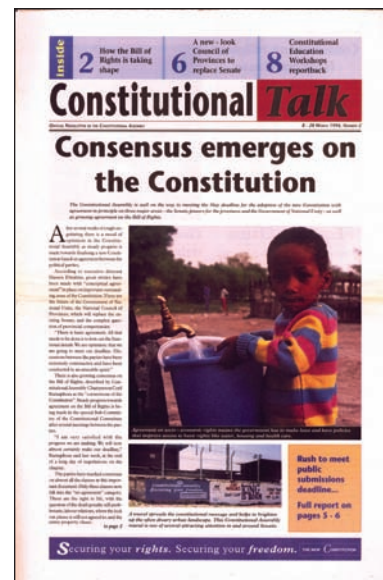
The eventual adoption of South Africa’s new constitution illustrates the importance of process in rebuilding a constitution, Klug points out. Process is especially critical for nations that are working from conditions of intense conflict and hope to achieve peace.

“You have to make compromises that may not look good initially, but for South Africa, a two-step process was what made it possible,” he says. The first step involved the negotiation and creation of an interim constitution, which was implemented by

the South African government after democratic elections in 1994.

Three years later the newly elected Parliament succeeded in creating and passing a final version, which still stands today. Klug says the process of creating a constitution matters just as much as the particular articles in any constitution. While there is a tendency to import information from successful models used by other nations, it is better to consider the present situation of each particular country. “It’s best to pay attention to what the local

conditions will allow at any moment in time,” says Klug. “Really, it is the context of the constitution building that is often just as important as the particular clauses that are written.”



The South African constitution-building experience also highlights the significance of the collective spirit. “The writing involved a cast of thousands, and it is extraordinary how many people around the world lay some kind of claim to producing South Africa’s wonderful new constitution,” says Klug. He learned firsthand that the key to building a constitution successfully is having a large group of people who feel invested in it and are committed to defending it.

The wealth of knowledge Klug gained from his involvement in South Africa’s political and legal transitions is imparted to his students and colleagues alike. His first law school teaching experience was at the University of the Witwatersrand in Johannesburg, where he remains an Honorary Senior Research Associate. Klug accepted a faculty position at the UW Law School in 1996, and still finds time to travel between the two countries.

The need for effective constitutional reform in many unstable nations throughout the world has kept Klug busy. He has had numerous opportunities to share his insight in the process of constitution building in recent years. One example is his involvement with the International Network on Constitutional Development, which has worked with the United Nations Development Program and International IDEA, a Swedish-based intergovernmental organization.

In late 2005, Klug joined experts from 26 African, Asian, and Latin American countries convening in South Africa to participate in an international workshop on constitution building. Most invited participants were members of government or opposition parties trying to negotiate resolutions to constitutional conflicts. Through training, seminars and discussion, they had the opportunity to discuss their experiences with the aim of developing their own ideas about



SOUTH AFRICA IMAGES COURTESY OF HEINZ KLUG

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possible solutions. Such experiences have inspired Klug to bring similar workshops to the UW campus and engage his students in the valuable discussions that ensue.

The most extensive project was occasioned by the Law School residency of Professor Yash Ghai of the University of Hong Kong, a distinguished constitutional lawyer who was subsequently appointed United Nations Special Representative on Human Rights in Cambodia. Ghai shared with students his experiences as Chair of the Kenya

Constitutional Review Commission and as a participant in the constitution building of countries in Africa, Asia, and the South Pacific.

Ghai and Klug co-taught a course in fall semester 2005 on comparative constitution building, and hosted a week-long series of workshops focusing on constitutional issues, including “Constitution Building in Africa Post-1989” and “Constitution Building in Comparative Perspective,” which both drew prominent participants from around the world.

IRAQ AND EAST AFRICA

Nearly 30 years of experience practicing and teaching constitutional law led Brady Williamson, a UW adjunct law professor, to several hands-on opportunities. Between 20-plus years of teaching at the Law School, and his work as a constitutional lawyer at the firm of Godfrey & Kahn, Williamson was well suited to lend his expertise to emerging democracies in the Middle East and East Africa in the process of drafting new constitutions.



“Constitutional and international law are taught in every law school, but rarely do the teachers have the opportunity to watch the soup actually boil,” he says. “It was an opportunity that I didn’t think I could decline because of the benefits it would provide in the classroom.”

In 2005 and 2006, over a 30-month period, Williamson made three trips to Baghdad and six to Sudan. His work, all pro bono, was sponsored by the National Democratic Institute, a Washington, D.C.-based, nonprofit, nonpartisan organization that provides support and technical advice to governments and political parties around the world. While the sponsorship was the same, including financial support from the U.S. government, as Williamson explains, the process in each place was very different.

In Iraq, he and others, working under a United Nations umbrella,

set out to accomplish two main objectives. The first was to provide materials, information, and seminars on the very basics of a constitution: its purpose and what it can and cannot do with respect to governing a nation. The group relied on a number of successful models to illustrate their points and principles; coincidentally, the South African constitution was one of the most important models they discussed.

To achieve their other objective in Iraq, Williamson and colleagues made a final trip to Baghdad while

the Iraqi Parliament was in the process of writing its constitution. Williamson describes his experience as being one of a multi-faceted, international group that provided research and background on particular topics of the constitution-writing process, but only upon request

on specific topics. They served solely as a resource, providing commentary and necessary background, often in the form of short briefing papers. States Williamson, “We did not write the constitutional language. It was not our place.”

It was probably fortunate that Williamson and his colleagues were not expected to contribute draft provisions, as the language barriers in that country proved to be challenging: delegates in the parliament used at least four different languages, with Arabic and Kurdish translation required.

In contrast, the constitution-building process in Southern Sudan was conducted in English, and the expertise lent by Williamson was of a very different nature. In East Africa, he worked closely with the constitution drafters and provided help with the many drafts that preceded the eventual adoption of a constitution for Southern Sudan,

a semi-autonomous part of Africa’s largest country. He has shared this experience with colleagues and students in an article for the *Wisconsin International Law Journal* (see sidebar).

Other contrasts marked Williamson’s international experiences, notably the traveling and living conditions. He describes Southern Sudan as being remote, lacking certain basic amenities such as paved roads and medical facilities. While Baghdad was not as challenging a destination and offered housing and living conditions absent in Southern Sudan, it was not easy being there. “Working in Baghdad — even in the relative safety of the ‘Green Zone’ — presented plenty of challenges,” says Williamson.

The opportunity to help build the constitutions that govern other nations is a significant one, shared by no fewer than three professors at the UW Law School. Their constitution-building work has shaped the courses and the lessons that Professors Monette, Klug, and Williamson now teach, and all recognize the value of being part of a faculty with extensive international experience.

“The UW Law School is an extraordinary community of scholars, and if you look across our group, you’ll find an impressive number who have spent time abroad at different universities,” sums up Klug, who is Director of the new Global Legal Studies Center based at the Law School. “Together there is a real sympathy and understanding of the importance of these experiences on the outside, and our collective international global perspective enriches our training of U.S. lawyers.”

Nicole Resnick is a Madison-based writer whose articles have appeared in numerous publications during the past 10 years. Her profiles of Law School professors Alta Charo and Ann Althouse were published in previous Gargoyle issues.