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Andrea Lollini

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Sant'Anna School of Advanced Studies
Department of Law
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Andrea Lollini

Abstract

South African post-apartheid constitutionalism encompassed a number of peculiarities. First, the constitution making process took place in a largely fragmented and negotiated procedure in which the Constitutional Court played a fundamental role. Second, the issue of dealing with crimes of the segregationist was one of the core features of the nation building process.

Key-words

Constitution Making Process; Transitional Justice; Post-apartheid; South Africa; Truth and Reconciliation Commission

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SUMMARY: 1. Post-apartheid constitutionalism: continuity and discontinuity with the “tradition”. - 2. Continuity. - 3 Discontinuity: the particularities of post-apartheid constitutionalism and the problem of the transitional justice system for crimes committed under the Apartheid. - 4. The establishment of the post-apartheid constitutional system.

1. Post-apartheid constitutionalism: continuity and discontinuity with the “tradition”

Many contemporary constitution making processes sprang from crises in authoritarian states and illiberal regimes that were responsible for large scale violations of fundamental rights. During the last two decades of the 20th century, in different geopolitical areas (Latin America, Africa, Eastern Europe and Asia), many countries initiated the difficult journey of democratization with an outcome as of yet unclear. The resulting constitutionalism had to deal with the problem of justice for the crimes committed by military oligarchies or by bodies of the criminal state, though mostly in an implicit way. These constitutional transitions, often under conditions agreed on by the new political players and the protagonists of the previous regime, had to activate forms of *transitional justice* squeezed between two opposing forces: the need to preserve the successful transfer of political power from the old authoritarian system to the new “democratic” political players (which basically meant abandoning taking penal action against those who had committed political crimes under the old constitutional system) and the opposing need of both alleviating the built up tension of the victims for retribution and not

refraining from the use of law (in a judicial perspective) as a means for delegitimizing the old oppressors.

The rapid development of international criminal justice is another variable that makes the structure of these legal and political dynamics more complex, and yet it is also true that transitional justice has only been played on an individual state level. The case of post-apartheid South Africa is undoubtedly the experience that has defined the relationship between justice and the process of building a new democratic constitutional system in a more innovative (and controversial) way. The guiding idea of this paper is that the post-apartheid constitution making process produced a highly innovative constitutional model. In adapting to the political particularities of the transition to a democracy, post-segregationist constitutionalism used techniques for codifying fundamental rules that appear to introduce new elements in comparison with the liberal-democratic constitutionalism that had gained ground in the second half of the 20th century. This particular constitutional phenomenon is suspended between the inclusion of elements that traditionally characterize modern constitutionalism and the working out of innovative substantive and procedural solutions. The new state, through the construction of an intelligent political mythology, transformed the near impossibility of exercising punitive action against crimes of the past in an event that could work in favour of the constitutional system being built. At the heart of this transformation there is the constitutionalization of a model of transitional justice, which is based on the exchange of confession for amnesty. This model is not a tool for justice (for paying the price of the crime), but a complex mechanism enacted for *establishing* the unity of the political body and for demonstrating the *power* of the new post-apartheid “sovereignty”.

Renouncing to demonstrate its *power to punish* but simultaneously ordering “capitulation” before the new Constitution, the new democratic state preferred to show its strength through *pardoning* with the use of public confession for those who had committed political violence (including national liberation movements).

2. Continuity

The concept of constitutionalism traditionally means a legal, political and cultural movement based on the principles and values, formalized in writing, that a certain community considers fundamental. In order to protect individual rights against the latitude of institutional power, the characteristics of state organisation, the form of government and especially the limits of the public authorities have to be put down in legal texts of the highest order. The very notion of constitutionalism, however, has changed throughout the years, evolving according to different theoretical, philosophical, juridical and political approaches. From the Anglo-Saxon notion of constitutionalism (based on liberal contractualism), to the Jacobin version (based on democratic radicalism), to the strictly legal and positivist constitutionalism of the German *Rechtsstaat* of the 19th century (with its theories of state self-limitations, the radical positivist conception of law and the strict separation of state and civil society in accordance with the doctrine of freedom of economic enterprise) up to the constitutionalism that gained ground in the second half of the 20th century establishing the social dimension of the state and the system of judicial review, the central political and juridical issue has always been how to limit public power. In other words, as legal doctrine has often demonstrated, the main problem that constitutionalism (in its various legal, philosophical and political forms) has always sought to resolve is how to control the natural tendency of power to expand chaotically. As a theory that collects strategies for protecting fundamental individual freedoms, constitutionalism has provided legal and philosophical notions that have led to reflection on the meaning of the word Constitution, on the notion of State (in its different meanings as social state, constitutional state or rule of law) and on sovereignty.

The analysis of the elements of modern constitutionalism in post-apartheid constitutionalism cannot ignore the theories that began to establish themselves at the end of World War II. The profound evolution in

constitutional theories, demonstrated by the meeting of the “old” list of fundamental individual rights with the “new” social rights, is the foundation and the starting point of the constitutionalism of the new South Africa. The constitutions conceived in the second half of the 20th century, on the one hand, give importance to the constitutionalization of social rights as part of the fundamental rights making up the new social state, following the model of the Weimar Constitution; on the other, they embraced and developed the idea of constitutional justice as a pillar of the constitutional state. In this context, post-apartheid South African constitutionalism includes a highly evolved *Bill of Rights* that eliminates the kinds of discrimination characterizing apartheid in its political form. By providing an extremely solid social state order (at least in writing) and a model of strong protection of fundamental rights (through a well defined system of judicial review and with the aid of numerous supervising constitutional bodies) and by proposing a form of government that focuses on the problematic issue of the presence of different ethnic, linguistic and racial groups, South African constitutionalism places itself in an evolving dialogue with the liberal-democratic constitutional tradition of the 20th century. More specifically, the South African Interim Constitution of 1993 as well as the definitive one approved by the Constitutional Assembly, aside from creating a modern *Bill of Rights* modelled after the Canadian one, instituted a number of supervising constitutional bodies under the heading *State Institutions Supporting Constitutional Democracy*: the *Public Prosecutor* (ss. 182-183), the *Human Rights Commission* (s. 184), the *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities* (ss. 185-186), the *Commission for Gender Equality* (s. 187), the *Auditor-General* (ss. 188-189), the *Electoral Commission* (ss. 190-191) and the *Broadcasting Authority* (s. 192).

Instituted with the *Land Claims Act 22* of 1994, the *Land Claims Court* is another important body for breaking with the previous order and pursuing constitutional objectives for the gradual redistribution of access to economic resources. The constitutional foundation for the law and the judicial body instituted by it is Section 25 (7) of the *Bill of Rights* of the

1996 Constitution. This provision governs the individual and collective right of persons or communities dispossessed of property due to racially discriminatory laws and policies after 19 June 1913 to restitution of the property or an equal redress, and it is the *Land Claims Court* that is the body designated for the enforcement of this provision.

These constitutional bodies are supported by the introduction of judicial review with different procedures of recourse (among which is the possibility for direct recourse based on ss. 167-172), and the Constitutional Court becomes the new authoritative reference point for justice. In this framework, post-apartheid constitutionalism appears to inherit a legal-constitutional and philosophical-political form rooted in the idea that public powers can be limited through bodies to which citizens may appeal for reporting potential violations of fundamental rights, a situation that in turn could create a conflicting relationship between citizen and state. On the one hand, this shows the attempt to give the citizen an active role in building and maintaining a democratic system; on the other, it reveals the deep wounds of a society that harbours mistrust toward a state that was criminal in the past.

3. Discontinuity: the particularities of post-apartheid constitutionalism and the problem of the transitional justice system for crimes committed under the Apartheid

The particularities of the constitutionalism of the new South Africa are many and should be analysed considering both the political setup of the constitutional transition and the specific needs deriving from the structure of the South African political body. In other words, the peculiarities and innovations of post-segregationist constitutionalism were shaped by the problematic characteristics of the historical, political and social context of dismantling apartheid and the simultaneous *creation* of the new democratic system. Basically, these particularities can be summarized as follows: some of them concern what we can define as

techniques for constructing the unity of the political body. In reality, these are particularities connected to the process of *constructing* (in line with a specific political plan) the preliminary legal and political conditions for drafting the new Constitution. In this sense, post-segregationist constitutionalism sought to substitute the political form of apartheid, which had fuelled the fragmentation of the political body for decades, with a system that was capable of standing up to the centrifugal forces (due to ethno-racial particularism) that tended toward the country's disintegration. This was accomplished with diverse techniques, procedures and ways of constructing the *unity of the political body*. The following pages will analyse: a) the creation of *unity* by making the new democratic rules *acceptable* to all segments of the South African political body; b) building unity around the political myth of the *Rainbow Nation* as a symbol of the new political citizenship; c) the construction of unity through constitutional negotiations held by representatives of opposing political forces during the conflict between the national liberation movements and the forces of the segregationist regime; these talks determined the various stages of the constitution making process and led to the creation of a dialogue between "enemies" aiming to gradually reduce the distance separating them with the common goal of signing the new *democratic constitutional covenant*; d) the *creation* of unity through an intricate *constitution making procedure*, which developed in a series of phases according to formalized rules screened by the Constitutional Court. These features amount to a practice producing a constitutional text that – even if used elsewhere – had never reached such a level of complexity.

Other characteristics of post-apartheid constitutionalism regard the creation of what I define as *supplementary constitution making tools*. These are constitutional bodies authorised to carry out specific constitution making tasks such as reinforcing the process of *constructing the unity of the political body*. The most important body among these is the *South African Truth and Reconciliation Commission (TRC)*, whose analysis makes up a great part of this work. The hypothesis made here is that a detailed analysis of the experience of the TRC reveals its

constitution making role. In fact, according to specific constitutional norms innovatively regulating the issue of “transitional justice” for crimes committed during apartheid, the TRC was authorised to grant amnesty to those who were willing to publicly “confess” crimes committed for political reasons between 1960 and 1997, in the spirit of pacifying the country and opposing any form of revenge as endorsed by the Constitution. In other words, the TRC was the body where an exchange (confession – amnesty) took place in accordance with the Constitution. This exchange was a part of the *democratic constitutional covenant* and the source of a series of particularities of post-apartheid constitutionalism such as: a) *constitutional suspension of a strictly criminal approach* for political crimes in the past; b) the process of constructing the unity of the new South African political body by *including* the “enemy” and therefore creating a kind of *constitutional ban on purging*; c) the use of *confession* as a tool serving the constitution making process. Hence, *testis contra se* (testifying against oneself), a practice used in the proceeding before the Amnesty Committee of the TRC, will be analysed as a dialogue technique used to construct the unity of the political body.

There are two fundamental themes of research that ensure a proper analysis of the constitutional model created in response to the collapse of segregationist ideology: on the one hand, the study of the constitution making process that allowed the confrontation of different constitutional ideas of the various political players who had conflicting ideas on government, state institutions, fundamental law principles and socio-political relationships; on the other, the analysis of the constitutionalization of an innovative form of *transitional justice*.

In this context, the political reasoning of the entire political and constitutional transition was to move away from apartheid, and the underlying political action consisted in rejecting an extreme differentialist and segregationist rationale. There was a need to symbolically break from the past, and, simultaneously, a need to *build* a constitutional system that adopted new rights and guarantees for the individual in the face of public

authorities. Therefore, it was necessary to define the ways in which the new democratic state would act.

This constitutionalized system of transitional justice set out to confine the actions of the new state toward the past, limiting its use of punitive action. This limited form of judicial action toward the past coincided with the removal of a fundamental feature of sovereignty from the state, that is, the power to judge and to punish. It also allowed the new democratic system to differentiate itself from its predecessor by emphasizing a new democratic identity. In the creation phase of the new democratic South Africa a shift was made from sovereignty as authority expressed through the power to judge and punish to a form of sovereignty whose power resides in the choice to limit its ability to punish and purge. Between the power to punish and the power to pardon – the two attributes of sovereignty identified by Bodin – the new South Africa chose the latter by using confession (which, as we shall see, produces a much more ethical state). We therefore find ourselves dealing with a differentiation on two levels: the new South Africa distinguishes itself from its predecessor and, simultaneously, from other states involved in a constitution making process triggered by the fall of authoritarian regimes but that chose to deal with the past by trial and punishment.

4. The establishment of the post-apartheid constitutional system

The constitutional transition in South Africa took place through consensual determination and with the adoption a transitional text. During this transition a number of *facts/events* took place one after another that together defined the framework of the constitution making process. Simultaneously a series of strictly constitutional *acts* determined the framework of the constitution making procedure. The constitution making process is a broad concept because it covers historical and political facts and events of constitutional importance, whereas the concept of a constitution making procedure is narrower, referring only to the specific constitutive *acts* gradually adopted.

The process of writing the new democratic Constitution of South Africa shows degrees of complexity that have no correspondence in the past and cannot be studied by separating historical and political events from strictly legal ones. Constitutive *facts* and *acts* are intimately connected and mutually support each other. The constitution making procedure and the constitutive *acts* were shaped by *facts* of a political, military, cultural and social nature. Due to the necessity of constructing the unity of the political body, the constitutive *acts* had to be as consensual as possible and include the various players of the transition. These players gradually determined the legal content of the transitional constitutive *acts* and the procedure for adopting subsequent ones up until the adoption of the definitive Constitution. The constitution making process and procedure evolved in the following phases: 1) the negotiation phase (in which *constitutive facts* dominate); 2) the multiparty forums (in which the *constitutive acts* begin to substitute the *facts*); 3) the last phase of adopting the Constitution (dominated by *constitutive acts*).

Over the course of the second phase, important constitutive *acts* – individual, interim and definitive – were adopted, such as the approval of the Interim Constitution of 1993 and the 34 Constitutional Principles (CPs) that the definitive Constitution had to comply with, the institution of the Constitutional Court, which had the ability to certify the compliance of the definitive text with the CPs, and the creation of the *Truth and Reconciliation Commission*.

The Constitutional Assembly, which was formally given the task of adopting the definitive Constitution, was summoned only after the first fully multi-racial election in 1994 under the 1993 Interim Constitution and other temporary and definitive constitutive *acts* previously adopted. When the Assembly began to work, the procedure had already reached a high degree of formalization because many essential elements of the definitive Constitution had already been determined. If we add to this the fact that a body already existed for controlling the evolution of the procedure and its final outcome (the Constitutional Court), the notion of procedure perhaps seems insufficient for explaining the constitution making phenomenon in

South Africa. Since a supra-Constitution already existed along with a court that could verify the compliance of the definitive text with the constitutive acts previously adopted, we can sense that the Constitutional Assembly worked within a limited space.

This formalization of the method of exercising constituent power and the process of writing the post-apartheid Constitution appear to have enriched the traditional idea of a constitution making procedure, making it more complex and intricate.