INTRODUCTION

Preliminary Remarks

Over the last fifteen years, the South African post-apartheid *Transitional Amnesty Process* – implemented by the Truth and Reconciliation Commission (TRC) – has been extensively analysed by scholars and commentators from around the world and from almost every discipline of human sciences. Lawyers, historians, anthropologists, sociologists and political scientists have tried to understand, describe and comment on the 'shocking' South African political decision to give amnesty to all who fully disclosed their politically motivated crimes committed during the apartheid era.

Several delicate issues arising from the TRC experience have gradually been debated, such as the legal functioning of the procedures and the controversial implementation of some of the TRC Statute provisions, the veracity of the type of 'truth' revealed by the Commission, the real impact on the notion of 'reconciliation' and the impact of amnesties on apartheid victims. In the background lurked a question about the moral and political acceptability of the transitional amnesty scheme, which was perceived as a trade-off system of justice. Many surveys discussing the TRC's social and political outcomes have tried to measure the results and the coherence of implementing the entire process in terms of the number of amnesties granted, which applications succeeded and why amnesty was granted. The arguments of TRC supporters and sceptics converge on one point: the South African experience was a highly innovative and, at the same time, disorienting experiment.

The research published in this volume began as a doctoral thesis at the *Ecoles des Hautes Etudes en Sciences Sociales* in Paris focusing on the function of the transitional amnesty process, and it seeks to explore a different path.

From this perspective, it is often claimed that the TRC's mandate – helping to establish the 'truth' about the past and participating in the 'reconciliation' process – was crafted in order to facilitate the post-apartheid nation building process. According to the categories of continental European constitutionalism, the process of nation building is one of the fundamental preconditions of the constitution-making process. Continental European scholars, due to a different usage of the adjectives *constituent* and *constitutive*, define the constitution-making process as a *constituent process*.[1] According to this reasoning, it may be said that the TRC (and in particular the transitional amnesty process) was established in order to perform a *constituent function*. Hence, the main question becomes why was this pivotal function also assigned to a body like the TRC and how was this function carried out? This book tries to answer this question by investigating the basic problem facing South Africa at the end of the apartheid regime: how to bring about the unity of the new post-apartheid political body (the Rainbow Nation).

On the one hand, with South Africa's historical heritage and the asymmetries and divisions between the social groups living there, this feat seemed to be an almost utopian challenge. On the other hand, establishing a new *corps politique unitaire* was necessary because it was the most profound rejection of the apartheid ideology, which was based on the institutionalization of fragmentation, separation and exclusion.

In this context, we can imagine the importance of the historic and 'revolutionary' political decision to build the unity of a new political body that included all segments of South African society despite past conflicts and injustice. This fundamental constituent act[2] was the main objective of the nation-building process and the precondition of the constitution-making process. An effective constitution occurs in conjunction with a political body containing centripetal forces that harmonize the differences within it. In order to achieve this very difficult goal (one of the cornerstones on which the new democratic constitutional structure was to be built), a number of mechanisms had to be activated. The main hypothesis guiding this book is that the issue of the political body's unity is the key to a deep understanding of the very innovative post-apartheid constitution-making and transitional amnesty processes.

For these reasons, the theoretical approach of this book analyses the constitution-making process (to which Part 1 of this volume is dedicated) and the transitional amnesty process (to which Part 2 is dedicated) side by side, while simultaneously investigating how they are interconnected. This approach shows that both processes contain mechanisms encouraging the constitution of the unity of the political body while ensuring future solidity and stability. Indeed, the innovative step-by-step procedure of the constitution-making process and the procedure of public confessions, which was the basis of the amnesty process, were mechanisms activating a similar dynamic: inclusion. If the fragmented constitution-making process was meant to gradually lead all the political actors into the process of writing

down a new constitutional order, the 'natural' attributes of the confession statement sought an analogous goal: to include the perpetrators of political violence under apartheid in the new nation after they accepted the ritual of publicly disclosing their actions. With historical analysis, these general attributes of the confession can be seen in all contexts that have employed this form of spoken act. It is interesting to note that confession has been historically used in circumstances where there is an underlying problem of constituting or preserving the unity of a determined social structure.

The guiding idea of the research published in this volume (the function focused approach) is to bring the transitional amnesty process into the domain of the concept of constitutionalism while demonstrating all the innovative aspects that the post-segregationist experience contributed.

Post-apartheid Constitutionalism: Continuity and Discontinuity with 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 twentieth century, in different geopolitical areas (Latin America, Africa, Eastern Europe and Asia), many countries initiated the difficult journey of democratization with outcomes that are as yet unclear.[3] 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 manner. These constitutional transitions, often under conditions agreed upon 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 the use of 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 carried out 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 book 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 twentieth 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.[4] 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 construction of the constitutional system. At the heart of this transformation is the constitutionalization of a model of transitional justice 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 in order to establish the unity of the political body and, paradoxically, to demonstrate the power of the new post-apartheid 'sovereignty'. Self-restraining (for a limited period of time) its power to punish but simultaneously ordering 'capitulation' before the new constitutional order (through a public confession statement), the new democratic state preferred to show its strength through pardoning and seeking a path to re-include those who had committed political violence (including national liberation movements) in the new political body.

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 organization, 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.[5] However, the central political and juridical issue has always been how to limit public power. This can be seen in a variety of the historical configurations of constitutionalism, from the Anglo-Saxon notion of constitutionalism (based on liberal contractualism)[6], the Jacobin version (based on democratic radicalism), the strictly legal and positivist constitutionalism of the German *Rechtsstaat* of the nineteenth 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)[7] up to the constitutionalism that gained ground in the second half of the twentieth century. This last form established the social dimension of the state and the widespread acceptance of systems of judicial review. 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 the Second World War. 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. On the one hand, the constitutions conceived in the second half of the twentieth century gave 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;[8] on the other hand, 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 on paper) 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 twentieth century.[9] More specifically, the South African Interim Constitution of 1993 as well as the definitive Constitution approved by the Constitutional Assembly, aside from creating a modern Bill of Rights based on the Canadian model, instituted a number of supervising constitutional bodies under the heading 'State Institutions Supporting Constitutional Democracy':[10] the Public Prosecutor (s. 182–83), the Human Rights Commission (s. 184), the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (s. 185–86), the Commission for Gender Equality (s. 187), the Auditor-General (s. 188–89), the Electoral Commission (s. 190–91) and the Broadcasting Authority (s. 192).

Instituted with the Land Claims Act 22 of 1994, the Land Claims Court is another important body in the task of 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 s. 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.[11]

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 s. 167–72),[12] 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 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 an attempt to give the citizen an active role in building and maintaining a democratic system; on the other hand, it reveals the deep wounds in a society that harbours mistrust towards a state that was criminal in the past.[13]

Discontinuity: the Peculiarities of Post-apartheid Constitutionalism

The peculiarities 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 peculiarities 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 peculiarities 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,[14] with a system that was capable of standing up to the centrifugal forces (due to ethno-racial particularism) that tended towards the country's disintegration.[15] This was accomplished using 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[16] – 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; and

d) the creation of unity through an intricate constitution-making procedure, which developed in a series of phases according to formalized rules approved by the Constitutional Court. These features amount to a practice producing a constitutional text that – even if used in other constitution-making experiences – was of a hitherto-unknown 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 authorized 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.[17] 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 peculiarities of post-apartheid constitutionalism such as: a) constitutional suspension of a strictly criminal approach to 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; and 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 proceedings 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 enabled 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 hand, the analysis of the constitutionalization of an innovative form of transitional justice.[18]

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, there was also 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 towards the past, limiting its use of punitive action. This limited form of judicial action towards 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 resided 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.

The Establishment of the Post-apartheid Constitutional System

According to categories of continental European constitutionalism, the multifaceted formation of a constitution has been associated with specific models. In this context, European scholars have drawn a first distinction between external and internal formal constitution-making processes. Within this subdivision, the South African phenomenon falls under the latter process because it took place without influence from foreign countries or international political actors (as was the case, for example, in Germany and Japan after the Second World War).

Implemented with special terms regarding the right to and method of exercising constituent power, the South African constitution-making process was both temporary (the approval of a provisional text) and consensual (the agreement between the old regime's bodies and the de facto political actors of the transition). These two qualities determined the complex evolution of the initiative, preparatory and deliberative phases.[19] As we shall see, the procedure used in South Africa added other complex features in comparison with those produced in other semi-fragmented constitution-making processes, such as in Portugal, in Spain, in the shift from socialist models that took place after the end of the Cold War era in Hungary, Poland and the former Czechoslovakia, or in the negotiated transitions from military oligarchies in Latin America.[20]

During the post-apartheid South African transition, a number of facts/events took place one after another that together defined the framework of

the entire constitution-making process. Simultaneously, a series of strictly constitutional acts determined the framework of the constitution-making procedure.

In this book, a distinction is made between facts/events and acts. Both categories relate to the constitution that was being drafted. However, facts/events were de facto situations that indirectly but substantially impacted and influenced the drafting of the constitution. The term 'act' does not refer to the general legal meaning of statutes or laws made by a legislative body; instead it refers to all those 'moments' in which political decisions or agreements regarding the new constitution were formally set down in written documents. They are an ensemble of fragments that were agreed upon step-by-step and were used to build up the new constitutional system. These constituent acts gradually framed both the Interim Constitution and, later, the definitive Constitution.

The distinction between facts/events and acts with a constituent value is not meaningless or hollow. Indeed, this differentiation is the basis of the distinction between the concept of constitution-making process and constitution-making procedure.[21] According to this distinction, the constitution-making process is a broad concept because it covers historical and political facts and events of constitutional relevance, whereas the concept of a constitution-making procedure is narrower, referring only to those specific decisions or agreements translated in written texts with which the constitution is gradually drafted and adopted.[22]

The process of writing the new democratic constitution of South Africa shows degrees of complexity that have no precedent and cannot be studied by separating historical and political events from strictly legal events. Constituent facts and acts are intimately connected and mutually support each other. The constitution-making procedure and the constituent 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 constituent acts had to be as consensual as possible and include the various players of the transition. These actors gradually determined the legal content of the transitional constituent acts and the procedure for adopting subsequent acts 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 constituent facts dominate); 2) the multiparty forums (in which the constituent acts begin to take the place of the facts); 3) the last phase of adopting the Constitution (dominated by constituent acts).

Over the course of the second phase, very important constituent 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 task of certifying 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 multiracial election in 1994 under the 1993 Interim Constitution and other temporary and definitive constituent acts that had been previously adopted. When the Assembly began to work, the procedure had already reached a high degree of formalization because many basic 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), it seems to be evident that the classic notion of process is insufficient for explaining the constitution-making phenomenon in South Africa. In fact, since a sort of 'supra-Constitution' was already negotiated and drafted (the 34 CPs) along with a body (the Constitutional Court) that could verify the compliance of the definitive text with the constituent acts previously adopted (the 34 CPs), we can see that the Constitutional Assembly worked within a limited space. In other terms, it seems that the Constitutional Assembly's constituent power was partially limited or guided. The Constitutional Assembly was surely carrying out a pivotal step of the constitution-making process, but its creative action was not unlimited; it was performing a fundamental task but within a pre-established procedure.

Notes

1. In this book I will often use the adjectives 'constituent' and 'constitutive' as they are employed in continental European legal theory. Paying tribute to the historical differentiation between 'constituent and constituted powers' made by Sieyès, the meaning of 'constituent' and 'constitutive' is creating, shaping, constituting a new constitutional order. The adjectives 'constituent' and 'constitutive', when used to refer to several nouns such as power, act, pact, instances, assembly, remembrance and confession, recognize that these elements either played a role or performed a function in setting down the new constitutional order. In English, these concepts of continental European constitutionalism are used and discussed in M. Loughlin and N. Walker (eds). 2007. *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford: Oxford University Press.
2. By the expression 'constituent or constitutive act' I refer to a 'moment' that encompasses both the break from the rationale, principles and values of the previous constitutional order and the founding of the basic substantive principles of the new order.
3. G. de Vergottini. 1998. *Le transizioni costituzionali*. Bologna: Il Mulino; L. Mezzetti. 2000. *Le democrazie incerte. Transizioni costituzionali e consolidamento della democrazia in Europa orientale, Africa, America Latina, Asia*. Turin: Giappichelli; L. Mezzetti. 2003. *Teoria e prassi delle transizioni costituzionali e del consolidamento democratico*. Padua: CEDAM.
4. See R. Orrù. 1999. 'Transizione e avvio del consolidamento democratico in Sudafrica: la complessa attuazione della Costituzione del 1996', *Rivista di diritto pubblico comparato ed europeo* 3: 903–28.
5. The term 'constitutionalism', which began to be used in the nineteenth century, has always focused on the problem of defining a system of checks and balances capable

of limiting public power. Generally speaking, the notion of constitutionalism goes hand in hand with principles like the authority of the law, the separation of powers and the creation of representative institutions that can protect individual and collective rights of the people, who, although governed, are the true sovereigns: see A. Lloyd Howell. 1997. 'Le Constitutionnalisme', in J. Burns Handerson (ed.), *Histoire de la pensée politique moderne*. Paris: Presses Universitaires de France, pp. 230–69. For some scholars, constitutionalism as an act formalizing a system of limiting public powers can be distinguished in two forms: ancient and modern. The former dates back to Cicero's definition of the Roman Republic and the latter to eighteenth century revolutions; see H.C. McIlwain. 1947. *Constitutionalism: Ancient and Modern*. New York: Cornell University Press. What changes is the notion of a constitution. Other scholars, however, consider only the modern form of constitutionalism as valid; see G. Sartori. 1990. *Elementi di teoria politica*. Bologna: Il Mulino, p. 12; M. Troper. 1994. 'Le concept de constitutionnalisme et la théorie moderne du droit', in *Pour une théorie juridique de l'état*. Paris: Presses Universitaires de France, pp. 203–21. Interestingly, the concept of constitution is what determines the difference between those who claim that an ancient form of constitutionalism exists and those who recognize only its modern form. For example, McIlwain considers 'constitution' a normative term designating a group of rules limiting political power, whose origin may include tradition or divine right. On the other hand, Troper and positivist doctrine regard constitutions and constitutionalism as only modern because constitutions are texts consciously written by people beginning in a specific historical moment. A constitution's essential characteristics are fundamental rights, the authority of constituent power, hierarchy and stability. According to this approach, the constitution is a *technique de liberté inedite* that appeared only in the eighteenth century; see M. Troper. 1992. 'Le concept d'État de droit', in *Droits* 15: 51–63; Sartori, *Elementi di teoria politica*, p. 23; M. Matteucci. 2003. 'Costituzionalismo', in N. Bobbio, M. Matteucci and G. Pasquino (eds), *Dizionario di politica*. Turin: Utet. A reconstruction of the historical and legal origins and evolution of the ideas of constitution and constitutionalism can be found in M. Dogliani. 1994. *Introduzione al diritto costituzionale*. Bologna: Il Mulino; A. Barbera. 1997. 'Le basi filosofiche del costituzionalismo', in A. Barbera (ed.), *Le basi filosofiche del costituzionalismo*. Bari: Laterza, pp. 3–42; G. Rebuffa. 1990. *Costituzioni e costituzionalismi*. Turin: Giappichelli; A. Larry (ed.). 1998. *Constitutionalism. Philosophical Foundations*. Cambridge: Cambridge University Press; L. Campagna. 1998. *Gli opposti sentieri del costituzionalismo*. Bologna: Il Mulino. See also G. de Vergottini. 2004. *Diritto costituzionale comparato*, 6th ed., Padua: CEDAM, pp. 142–63; G. Volpe. 2000. *Il Costituzionalismo del novecento*. Bari: Laterza; G. Morbidelli. 2001. *Lezioni di diritto pubblico comparato. Costituzioni e Costituzionalismo*. Bologna: Monduzzi. Constitutionalism referred to here in relation to the South African constitution-making process consists in the production of constitutional texts that codify a modern system of public power limitation and establish protection from the abuses and risks of authoritarian regression, which are part of South Africa's past. This point is stressed by R. Orrù. 1998. *La Costituzione di tutti. Il Sudafrica dalla segregazione razziale alla democrazia della Rainbow Nation*. Turin: Giappichelli, p. 181; and by H. Klug. 2000. *Constituting Democracy. Law, Globalism and South Africa's Political Reconstruction*. Cambridge: Cambridge University Press, p. 2.

6. See J.R. Pennock and J.W. Chapman (eds). 1979. *Constitutionalism*. New York: New York University Press.

7. Von Mohl and Stahl were the first theorists of this juridical approach to organizing public powers; the theory was then developed in the nineteenth century by the German public law experts Gerber, Jhering, Laband and Jellineck. According to theories grounding the *Rechtsstaat* in law, the state acts exclusively through the law;

since the state is sovereign, it sets its own rules for limiting its range of action. As such, it implies a type of self-limitation through norms that it self-produces. The state is a source of law, defining its tasks, its attributes and powers without other institutions qualified to verify whether the rules set down are properly applied; see G. Gozzi. 1999. *Democrazia e Diritti. Germania: dallo Stato di diritto alla democrazia costituzionale*. Bari: Laterza; G. Gozzi. 2002. 'Stato di diritto e diritti soggettivi nella storia costituzionale tedesca', in P. Costa and D. Zolo (eds), *Lo Stato di diritto. Storia, teoria, critica*. Milan: Feltrinelli, pp. 260–83; and C. Galli. 1996. *Genealogia della politica. Carl Schmitt e la crisi del pensiero politico moderno*. Bologna: Il Mulino, pp. 283–93. This doctrine deeply influenced the public law of the French Third Republic: see G. Burdeau, F. Hamon and M. Troper. 1995. *Droit Constitutionnel*. Paris: Librairie Générale de Droit et de Jurisprudence; and P. Pactet. 1998. *Institutions Politiques et droit constitutionnel*. Paris: Armand Colin. An analysis of the relationship between the German *Allgemeine Staatslehre* and the legal doctrine of the *IIIᵉ République* can be found in J. Chevallier. 1999. *L'État de droit*. Paris: Montchrestien; P.M. Gaudemet. 1989. 'Paul Laband et la doctrine française de droit public', *Revue de Droit Public* 4: 957 *et seq*.

8. See the theory of H. Heller. 1971. *Gesammelte Schriften, II: Recht, Staat, Macht*. Leiden: Sijthoff. His model of constitutionalism aspired to give full constitutional recognition to the state's social dimension (solidarity and redistribution of economic resources to the least affluent groups of the population); the state should reduce the inequalities within the social structure. The constitutionalism that inspired social state theories established a new constitutional order so as to rebuild the political unity of the European states torn apart by totalitarianism and fascist authoritarianism. Important criticism of this model can be found in E. Forsthoff. 1964. *Rechtsstaat im Wandel*. Stuttgart: Kohlhammer; E. Forsthoff. 1968. *Rechtsstaatlichkeit und Sozialstaatlichkeit. Aufsätze und Essay*. Darmstadt: Wissenschaftliche Buch Gesellschaft.

9. The type of liberal democratic constitutionalism referred to here is made up of many variables that first developed in a British context and later in a North American context. Scholars usually consider it in opposition to the radical democratic constitutionalism that developed after the French Revolution. The main difference between the two concepts is how public powers are checked: C. Friedrich. 1968. 'Constitutions and Constitutionalism', in David L. Sills (ed.), *International Encyclopedia of the Social Sciences*. New York: Macmillan and Free Press, vol. 3, pp. 318–26. The Jacobin model of radical democratic constitutionalism emphasizes the direct control exerted by the *corps social*, which can put pressure on the state's power. With a rather different conception of the judiciary's role and exercise of judiciary power, the different versions of liberal democratic constitutionalism developed the checks and balances system in order to keep sovereignty under control. Here there is quite a different conception of the 'law': based on a system of controlling public power in which the judge has a fundamental role, the law is customarily subject to judicial review. The historical roots of this distinction can be found in the medieval division between *gubernaculum* and *jurisdictio*. According to this doctrine, certain governmental acts of the monarchs were subject (*sub-legem*) to fundamental ethical and moral principles that the government had to comply with. This concept of constitutionalism therefore evolved from the idea that state power is inherently limited: J.G.A. Pocock. 1987. *The Ancient Constitution and the Feudal Law. English Historical Thought in the Seventeenth Century*. Cambridge: Cambridge University Press; McIlwain, *Constitutionalism: Ancient and Modern*; McIlwain. 1939. *Constitutionalism and the Changing World*. Cambridge: Cambridge University Press. The state must recognize and protect fundamental rights (paying tribute to the ideas of Locke, Burke and Hume is very important). The North American version of liberal democratic constitutionalism introduces some radical developments like the

written constitution, enlarging fundamental rights on the basis of freedom and property, the federal model, the presidential system (based on the separation between executive and legislative powers) and especially judicial review. Judicial review was later introduced in Europe in the twentieth century with the development of mechanisms for checking constitutionality (see J. Ely. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge (Mass.): Harvard University Press). North American liberal democratic constitutionalism thereafter developed a strong inclination towards using judicial review procedures and means for checking the public powers (see B. Ackerman. 1991. *We the People, I: Foundations*. Cambridge (Mass.): Harvard University Press; B. Ackerman. 1998. *We the People II: Transformations*. Cambridge (Mass.): Harvard University Press; S.M. Griffin. 1996. *American Constitutionalism*. Princeton: Princeton University Press. In Italy, see G. Bognetti. 1998. *Lo spirito del costituzionalismo americano*. Turin: Giappichelli, vol. 1; G. Bognetti. 2000. *Lo spirito del costituzionalismo americano*. Turin: Giappichelli, vol. 2.

10. See Chapter IX, *Constitution of the Republic of South Africa, Act* 108/1996 (1996 Constitution).

11. See S. Nadesen. 1997. 'Restitution, Reconstruction, Reconciliation and Redistribution: Land Reform Balancing the Interests of the Dispossessed, the Homeless and Development', *Stellenbosh Law Review*, 360–77.

12. See R. Pretorius. 1994. 'Enforcement Mechanisms in the 1993 Constitution', *South African Public Law* 9: 265–77; I. Routenbach and E. Malherbe. 1999. *Constitutional Law*, 3rd ed. Durban: Butterworths; J. Sarkin. 2000b. 'An Evaluation of the Role of the Independent Complaints Directorate for the Police, the Inspecting Judge for Prisons, the Legal Aid Board, the Human Rights Commission, the Commission on Gender Equality, the Auditor General, the Public Protector and the Truth and Reconciliation Commission in Developing a Human Rights Culture in South Africa', *South African Public Law* 15: 385–425. An analysis of how the judicial review bodies functioned in applying the constitutional principle of multilingualism can be found in A. Lollini. 2004b. 'L'isola e l'arcipelago: la Francia ed il Sudafrica post-apartheid come modelli antitetici di tutela costituzionale di lingue minoritarie e regionali', in A. Lollini (ed.), *Pluralismo linguistico e costituzioni. Un'analisi comparata*. Bolzano: Alpha-Beta, pp. 25–84.

13. See M. Chaskalson and D. Davis. 1997. 'Constitutionalism, the Rule of Law and the First Certification Judgment', *South African Journal on Human Rights* 13(3): 430–35; D. van Wyk, J. Dugard, B. de Villiers and D. Davis. 1994. *Right and Constitutionalism: The New South Africa Legal Order*. Cape Town: Juta, pp. 200 *et seq*; P. Olivier. 1995. 'Constitutionality and Society in South Africa: What Sort of Democracy', in G. Conac, F. Dreyfus and J. Montero (eds), *L'Afrique du Sud en Transition. Réconciliation et coopération en Afrique Australe*. Paris: Economica, pp. 88–109; D. Marais. 1993. *South Africa: Constitutional Development. A Multi-disciplinary Approach*, 2nd ed. Pretoria: Southern Book Publishers.

14. The Republic of South Africa was instituted with law of 24 April 1961, promulgated by the Governor-General of the Union of South Africa (see note 41 in Chapter 1) and approved by the Queen of England and the Union's Parliament. Ever since the beginning of the twentieth century, a racist political ideology known as apartheid was practised in South Africa. Under H.F. Verwoerd (1958–66) this ideology had reached an advanced phase of implementation, and it was definitively consolidated under B.J. Voster (1966–78). The spread of Afrikaner nationalism was fundamental to the rise of republicanism; in fact, this movement helped radicalize the discriminatory policies towards the native population, policies that were in place before the National Party took political control. The evolution of these policies gradually created the apartheid system through a series of laws making distinctions about the practice of political and civil liberties (political citizenship) and the enjoyment of

economic and social rights. Up until 1980, South Africa was formally a parliamentary republic, but excluded the majority of the population from political and social citizenship. In 1983 a constitutional reform took place under P.W. Botha. It was a timid attempt to renew the constitutional system that began to show signs of being inadequate (see L.J. Boulle. 1984a. *Constitutional Reform and the Apartheid State: Legitimacy, Consociationalism, and Control in South Africa*. New York: St. Martin's Press; L.J. Boulle. 1984b. *South Africa and the Consociational Option. A Constitutional Analysis*, Johannesburg: Juta). Obviously there was no interest in radically reforming the foundation of the segregationist constitutionalism. The Parliament was changed into a tri-cameral body; one house was made up of representatives elected by the Indian population (House of Delegates, 45 members), one house for those elected by the coloured population (House of Representatives, 85 members), and one house for those elected by the white population (House of Assembly, 178 members). Each of the three houses had an executive body (Ministers' Council) accountable to the Assembly and responsible for issues concerning their particular ethno-racial group (Own Affairs). National issues (General Affairs) required the approval from all three houses. The President (through the President's Council) decided which of the two categories was part of the law in discussion. The House of Assembly had more authority because it could decide on the national interests by potentially vetoing the decisions made by the other houses. The black majority was completely excluded from political participation. The 1983 Constitution did nothing more than recognize the Indian and coloured population as partners in exercising political power based on the exclusion of largest demographic segment of the country. On the South African tricameral parliament in Italian, see P. Biscaretti di Ruffìa. 1986. 'La Costituzione Tricamerale del 1983: una ricetta insufficiente per una conflittuale società plurinazionale', *Rivista trimestrate di diritto pubblico*, 665 et seq; L. Pegoraro and A. Reposo. 1986. 'Repubblica del Sudafrica', *Quaderni Costituzionali*, 197 et seq; R. Orrù, *La Costituzione di tutti*, pp. 52–55.

15. See L. Du Plessis. 2002. 'Legal and Constitutional Means Designed to Facilitate the Integration of Diverse Cultures in South Africa: a Provisional Assessment', *Stellenbosh Law Review* 3: 367–86.

16. Although the political arena was made up of rather distinct units (like an intricate mosaic of paramilitary groups and political movements), the main 'war of liberation' actors who participated in the constitutional negotiations were the African National Congress (ANC), the South African Communist Party (SACP), the Pan Africanist Congress (PAC), the Azanian People's Organisation (AZAPO) and the Inkatha Freedom Party (IFP); the IFP derived much of its support from the Zulu people. Sitting at the other end of the negotiation table was the National Party (NP), the predominantly Afrikaner political party that had institutionalized racial segregation and governed the country since 1948. See L. Thompson. 1990. *A History of South Africa*. New Haven: Yale University Press; T.R.H. Davenport. 1991. *South Africa: A Modern History*. London: MacMillan; W. Beinart. 1994. *Twentieth-Century South Africa*. Oxford, New York: Oxford University Press; R. Abel. 1995. *Politics by Other Means: Law in the Struggle against Apartheid*. New York: Routledge; T.R.H. Davenport. 2000. *The Birth of a New South Africa*. Toronto, Buffalo, London, University of Toronto Press; R. Davenport and C. Saunders. 2000. *South Africa. A Modern History*. London: MacMillan.

17. Some scholars connect the TRC experience directly with the constitution-making process and post-apartheid constitutionalism; see J. Klaaren. 1998. 'The Truth and Reconciliation Commission, the South African Judiciary, and Constitutionalism', *African Studies* 57: 203 et seq; Sarkin, 'An Evaluation of the Role of the Independent Complaints Directorate'; S. Stacey. 1999. 'A New South Africa: The South Africa Truth and Reconciliation Commission's Vexed Nation-building Project', *TRC:*

Commissioning the Past Conference, Johannesburg, 14 June 1999. Johannesburg: University of Witwatersrand. The idea that the TRC was a tool for reconstructing the political body can also be found in South African newspaper debates; see 'The Bringing of Truth', *Mail & Guardian*, 21 March 2003. Amnesty Committee members express a similar idea in *TRC Final Report*. 2003. London: MacMillan, vol. 6, Section I, Chapter 5, 91, §38. A study that partially agrees with the arguments made here can be found in A.M. Gross. 2004. 'The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel', *Stanford Journal of International Law* 40: 47–99.

18. See P. van Zyl. 1999. 'Dilemma of Transitional Justice: the Case of South Africa's Truth and Reconciliation Commission', *Journal of International Affairs* 52: 649 *et seq*.

19. See G. de Vergottini, *Diritto costituzionale comparato*, 164 *et seq*; G. de Vergottini, *Le transizioni costituzionali*; A. Pace. 1997. *Potere Costituente, rigidità costituzionale, autovincoli legislativi*. Padua: CEDAM, pp. 97 *et seq*.

20. See G. de Vergottini. 1977. *Le origini della seconda repubblica portoghese. 1974-1976*. Milan: Giuffrè; G. de Vergottini (ed.). 1978. *Una costituzione democratica per la Spagna*. Milan: Franco Angeli; S. Bartole. 1993. *Riforme costituzionali nell'Europa centro-orientale, Da satelliti comunisti a democrazie sovrane*. Bologna: Il Mulino; S. Bartole and P. Grilli di Cortona (eds). 1998. *Transizioni e consolidamento democratico nell'Europa centro-orientale*. Turin: Giappichelli; de Vergottini (ed.). 1997. *Costituzione ed emergenza in America Latina*. Turin: Giappichelli; G. Rolla. 2001. 'Luci ed ombre dell'esperienza delle transizioni pactdas', *Diritto pubblico comparato ed europeo* 3: 1084–96; M. Carducci. 1999. *Il costituzionalismo "parallelo" delle nuove democrazie. Africa e America Latina*. Milan: Giuffré; L. Mezzetti, *Le democrazie incerte*; and L. Mezzetti, *Teoria e prassi*.

21. On this point, see A. Lollini and F. Palermo. 2009. 'Comparative Law and the "Proceduralization" of Constitution-building Processes', in J. Raue and P. Sutter (eds), *Facets and Practices of State-building*. Leiden: Brill/Martinus Nijhoff, pp. 301–26. In Italian legal scholarship, the distinction between constituent facts and constituent acts is discussed by de Vergottini, *Diritto costituzionale comparato*, p. 186.

22. Here again I pay tribute to legal theory concepts used in continental European thought. These categories and concepts are slightly more precise than those proposed by scholastic traditions of other legal cultures (like the Anglo-American one). In Italy, for example, authoritative scholars divide constitution-making procedures into legal procedures of constitutional amendment according to express laws (*procedimenti giuridici*) and de facto procedures that do not respect a formalized constitutional amendment procedure (*procedimenti di fatto*); see P. Biscaretti di Ruffía. 1988. *Introduzione al Diritto costituzionale comparato*, 6th ed. Milan: Giuffrè, pp. 638 *et seq*. According to this theory, de facto procedures can be anti-juridical (*antigiuridici*) or a-juridical (*agiuridici*). Some contemporary constitution-making procedures that did not respect the formalized constitutional amendment procedure have anti-juridical or a-juridical characteristics. These procedures are generally legally recognized *a posteriori*. De facto establishment of a new constitutional system has been studied by S. Romano. 1950. 'L'instaurazione di fatto di un ordinamento costituzionale e la sua legittimità (1901)', *Scritti Minori*, Milan: Giuffrè, vol. 1, pp. 110 *et seq*; and C. Mortati. 1972. 'La Costituente (1945)', in *Raccolta di scritti*, Milan: Giuffré, vol. 1, pp. 26 *et seq*. This classic scholarly opinion was criticized by Pace, *Potere costituente*, pp. 97 et seq. These scholarly opinions conflict on the concept of constituent power. Romano claims that de facto establishment takes place mostly through anti-juridical means (in contrast with the system in force), but also through a-juridical means (with procedures outside the law in force). Using a

procedure of constitutional amendment excludes de facto establishment because, in Romano's opinion, exercising constituent power in this way falls within a constituted power. Mortati and Pace criticize Romano's claim, especially its contradictory nature. Pace shares Romano's idea that new orders can be established in an a-juridical manner (e.g., after a military defeat, the winning powers dictate a new constitutional text); however, using a procedure of constitutional amendment according to law never leads to the creation of a new constitution and therefore neither does it lead to exercising constituent power. As a result, according to Pace, a new order means a radical break from and abandonment of the old regime's rules (pp. 105 *et seq*). Sometimes the use of constitutional amendment procedures is simply a formality; in this case, if the results give rise to a renewal of the order, then the constitutional amendment procedures were either forced or violated. This leads Pace to reflect on constituent power, the only power that can actually establish a new order. It is a purely de facto power (which cannot be limited by the law) just as constitution-making processes are only de facto. This approach greatly changes the distinction between constituent facts and acts. Establishing a new order is a political journey in which constituent power can be seen in action. According to Pace, the constituent power stimulates constituent facts which, in turn, pave the way for the new order's foundation. Theoretically, the constituent power operates undisturbed until the final outcome, that is, the new constitution, and it is unresponsive to acts calling for formalization or juridical self-limitation. Nevertheless, as we shall see, the South African constituent experience cannot be easily broken down into these categories, demonstrating the need for fresh reflection. The notion of constitution-making procedure used in this study does not always refer to merely any procedure of constitutional amendment provided by the previous segregationist constitutional order. Using the categories suggested by Romano and Pace, the post-apartheid system was established through a-juridical facts occurring in a constitutional void as opposed to through facts violating the norms of the system in force. As we shall see, forces outside of the law acted and governed the events. If we agree with Alessandro Pace that the constitution-making power is a de facto power that cannot be limited by the law (Pace, *Potere costituente*, pp. 122 *et seq*), the empirical study of the post-apartheid constitutional phenomenon shows us that it found a way of limiting itself, of watering down its power and its intensity in juridical acts, which had an increasingly normative nature. These were steps that were taken in order to respond to the particular needs of the political, social and cultural context.