Introduction

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Up until the early 1990s, it was common opinion that constitutionalism, the rule of law and constitutions in general had very little, if no impact at all on African states. The State in Africa was in question by itself, due to its permanent crisis, its inadequacy and its inappropriateness to suit African political settings. The 1990 transition in Benin, with Matihiou Kérékou compelled to accept a sovereign national conference that dissolved the existing order and opted for a democratic constitution, has marked an important shift from this “tradition”, and “constitutionalism in Africa has entered a phase of intense activity. … Constitutionalism has become an important element of the political life in Africa, that can not be neglected any more. It performs its functions of prevention and regulation of conflicts” (du Bois de Gaudusson, 1996: 251). Of course, we should not overestimate the intrinsic strength and the implications constitutionalism can have in the political space. And yet, the simple assumption that the solution of political conflicts can be settled through other means than violence, that is through the “constitutionalisation” and “legalisation” of the rules governing the public space, is in itself revolutionary.

World-wide, a part few remarkable exceptions, in the last decades every politician, scholar or analyst has proclaimed herself or himself a supporter of some model, type or kind of democracy. The same enthusiasm seems to apply to constitutionalism. Partially due to this enthusiasm, partially to the intrinsic vagueness of the two ideas, both of them have undergone the process that Sartori names “conceptual stretching” (Sartori, 1970). In order to balance denotation and connotation of the two concepts, an effort of both theoretical and empirical redefinition would be required. However, the aim of this book is neither the analysis of the long and complex history of these notions, nor the attempt to forge new definitions. More modestly, the hypothesis is to verify the role of constitutionalism in the South African political transition for the

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“civilization” of non-negotiable and apparently irresolvable political conflicts, and to discuss the contribution the new constitutional model elaborated can offer to the so called “globalizing constitutionalism”. Moreover, we intend to question the idea of a culture of human rights as being the panacea for any social-conflict prevention, to analyse the dialogue between global models and local legal traditions, crucial to assure the sustainability of the new democratic order, and to question the exportability of the South African model, if a South African model exists.

In contemporary liberal democracies, the ideas of constitution and constitutionalism are almost fused, that is constitutions reflect the principles of constitutionalism. And constitution-making is a process of building political consensus around constitutionalism, putting it in the context of the country and the historical moment, adapting its principles to the needs of functional institutions and peaceful coexistence among the different segments constituting the specific social fabric. Unfortunately, that has not been the case in the African political and constitutional experience, during and after the colonial period, as it has probably not been the case in other regions of the planet. “In the African condition, the constitution is primarily a power map than an embodiment of consensus around constitutionalism” (Shivji, 1998: 24). Constitutionalism itself, in a distorted and nominal meaning of the term, has been used in order to legitimise the configuration and use of state power, in its three manifestations: legislative, executive and judiciary.

In fact, as it was the case in the majority of sub-Saharan African countries, the first independent constitutions were simply superimposed to the previous despotic colonial order. Those constitutions were the important symbols of the newly acquired sovereignty in the international arena, they marked the end of the formal political colonial power and the end of colonialism as an ideology and as a form of government. Nevertheless, they were often more a compromise between the colonial ruler and the new national/nationalistic élite than the embodiment of a sort of social pact between the new leaders and their people. No major efforts were made to build consensus around the principles the new constitutions stated, and no major efforts were made to transform previous colonial subjects into competent citizens, using Mamdani’s terms. Moreover, the impetus of modernisation all African leaders perceived as a sort of passpartout and conditio sine qua non to be accepted as legitimate rulers by the international élite pushed them to adopt “imported” constitutional models as such, without trying to integrate them with the legal background and the traditional political setting of the country. The result was a sort of refusal of acknowledging the existence of traditional (or indigenous) ideas and practices of liberty, justi-
ce and good governance. The underlying ideas were, on the one hand, to make the country and its social, political, and economic fabric jump directly from a pre-modern to a post-modern power structure; and, on the other, to make of their modern, democratic and liberal (or socialist) constitutions the passports to get into the international, “civilized” community.

As noted by Oloka-Onyango, such attitudes “reinforce one of the pervasive critiques of the phenomenon of constitutionalism in Africa, namely that it is too closely dictated by forces external to the continent” (2001: 3). Indeed, we should notice that the constitutional tools the African leadership inherited at the independence were not particularly rich. Very few efforts had been made by the colonial powers or by the intellectual community to give constitutional legitimisation to the African legal tradition; little research was made to explore different notions of constitutionalism that could suite more the political and social structure of African societies; the slogans of independence were freedom, sovereignty and development more than rule of law, separation of powers and independence of the judiciary. Finally, the notions of negritude, *authenticité*, or African socialism, elaborated in the quest for more genuine African forms of governance and for solutions better accommodating the existent African reality ended up being inspiring intellectual speculations rather than useful instruments to solve the independence imperatives. But what is more relevant for our discourse here, “the early constitutional instruments in Africa had very little to do either with creating democratic space or in promoting notions of enhanced participation and inclusion on the ground” (Oloka-Onyango, 2001: 5).

It is in this context that Okoth-Ogendo elaborates on the paradox of “constitutions without constitutionalism” (1991). Moreover, for quite a long time after independence, in many sub-Saharan African countries constitutionalism and the related issues were not at the centre of the political agenda. They were not the terrain for any further debate, as more critical questions of development, governance, state-building and consolidation, peace-keeping and enforcing, and finally independence occupied the very heart of the public space in the continent. As it has been noticed for the Namibian case, the liberation movements, SWAPO in this case, had decolonisation on their agenda, not directly democratisation. “From a liberationist perspective, this is understandable, since there can by definition be no democracy under colonialism. Only a decolonisation process provides the necessary framework for democratisation. Even so, liberation and democratisation are neither identical nor necessarily congruent” (Melber, 2003: 268).

Still, towards the end of the twentieth century, we have witnessed a new wave of democratisation processes, almost all characterised by the acknowle-
gment of the crucial role of a new kind of constitution-making as main pillar to build consensus and stability. The central role of constitution-making in the democritisation processes, in South Africa as in Namibia, in Mozambique as in Benin, in Eritrea as in Burundi, shows the fact that all the actors playing a role in the political space of the given country recognise that only the peaceful settlement of the constitutional struggle can provide the appropriate political climate, the legitimacy and the practical instruments to address all other levels of conflict present in the society. Clear signals of this are, first of all, the fact that constitutional negotiations are no more held abroad, no difference if it was in the Lancaster House or in Lisbon. They are internal processes, direct product of the existing political forces and of the political struggles. Secondly, more and more often constitutional changes become the instruments used by different stakeholders to induce some forms of change in their country. Thirdly, there is a growing confidence of civil society organisations in demanding to open the political debates and in claiming more inclusive and participatory constitution-making or constitution-changing processes. Some Afro-optimists, and also “constitutional enthusiasts” even maintain that “it is a triumph for constitutionalism that those rulers that are no longer able to rule as they wish have to seek some form of constitutional cloak in order to legitimise their claims to power” (Raheem, 2001: 59). Indeed, a part from these paradoxical situations, several experiences have shown how the constitutional space becomes a point of confrontation, a place where power relations are negotiated, given shape and legitimisation (Diaw, 2001).

Another important element of African constitutionalism is revealed when we look at the definition or re-definition of state in the continent. In arguing that the state in Africa can not be defined any more as post-colonial, C. Young maintains that “whatever the divergent forms taken by African states, most have long ceased to resemble the colonial state” (Young, 2004: 48). The complex interaction between the pressure of globalization, the contradictory processes of state-rebuilding that several countries have experienced since the 1990s, and the new social forces, especially civil society organisations, may well be producing some new equilibrium, that can not but be influenced by norms of constitutionalism and respect for the rule of law. Developing further Young’s arguments, we are tempted to affirm that the recent African constitution-making wave, despite all its ambiguities, is one of the fundamental features of the new state in Africa, which should be considered no more “post-colonial”.

Hence, the reasons for choosing Africa to verify the hypothesis lying at the centre of our interrogations are multiple. It is exactly through the experience of the African continent that we can question constitutions in the light
of constitutionalism, and question constitutionalism in the light of the real conditions and aspirations of the peoples whom constitutions are supposed to govern. Indeed, we argue it is just when constitutionalism, and constitutions, are permeated by local models, and acknowledge the aspirations of people that the hypothesis of constitutionalism as means to civilize bitter political conflicts becomes pertinent. And the South African case is an extremely pertinent case study for all this.

**Why South Africa matters**

Since its negotiated transition, South Africa seems to have become “the model”; the country has been considered a sort of laboratory for peaceful transition from authoritarian rule to democracy. Its difficult, but still relatively successful, complex system of governing differences is one of the most courageous social, political, constitutional, and cultural experiment in the last decade of the twentieth century. South Africa’s transition and new constitutional dispensation began not only a political, but also a legal revolution. The concomitant of the two revolutions is of crucial interest.

To the question “why South Africa matters” raised by several scholars in the past ten years, the answer is on a triple track. First of all, South Africa does matter in the geopolitical arena of the African continent, not only as an attempt to make democracy a reality in a general context where democracy itself still scarcely exists today. But, and above all, because of the role South Africa is claiming as active agent for democracy throughout the continent and, progressively, in a global perspective. Indeed, after the hopes of a new democratisation trend fostered by the democratic openings in Southern Africa in the early 1990s, at the beginning of the new millennium there are some worrying indicators that the region might be about to embark upon a “reverse wave”, as some analysts maintain (one for all, Southall, 2001). Just limiting the sight to the Southern part of the continent, democracy seems to be under acute pressure in Zimbabwe, in considerable trouble in countries such as Namibia and Lesotho, and democratisation processes appear to have stalled in Swaziland\(^2\) and war-torn Angola.

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2. On the 26th of July 2005, Africa’s last absolute monarch, King Mswati III, signed Swaziland’s first constitution, which still preserves his sweeping powers. The constitution took eight years to be drafted, will come into force in six months and entail fresh elections. The constitution still bans political parties and does not allow the courts to preside over cases that have a bearing on the monarchy and Swazi traditional issues. Mali & Guardian, 27 July 2005.
On the second track, South Africa does matter vis-à-vis the international theoretical debate on the importance of human rights and constitutionalism discourses in the transformation of undemocratic and repressive regimes and in the enforcement and consolidation of the principle of the rule of law world-wide. As noted by G. Seidman, “with the end of legal apartheid, South Africa is poised to move into a new position in the annals of social science. From being an outlier, it is increasingly used as an exemplar in discussions of democratic transitions, development strategies and globalization” (Seidman, 1999: 419). Thus, South Africa may serve as a prism, in part because of the extreme character of both its past and its democratic transition, and in part because of its highly complex socio-economic and political reality. Moreover, South Africa, being in between the so-called developing countries and the developed ones, and above all, being one of the most successful experiment of democratic transition where constitutionalism played a fundamental role, constitutes the most appropriate case-study to analyse in depth the complex dynamics and the reciprocal contaminations between transnational, national and local in the field of constitutionalism.

On a third track, the long history of the struggle against apartheid has contributed fostering a very varied, vibrant and relatively solid civil society fabric. For the purpose of the paper, this element is crucial in a double perspective: on the one hand because where civil society is highly structured into organisations, movements, associations, groups of interests, churches, etc., participation and involvement in the process of constitution-making becomes simpler, civil society’s claims get better support, it is more probable for people’s voice to get heard and to have influence in the process of elaboration of the project of society underlying the new constitution, and in its enforcement. On the other hand, since the very beginning of the struggle, the anti-apartheid organisations and movements have not just been opposing the regime, but they have been proposing alternative models of society, with opposite philosophical foundations, characterised by other economic systems and build upon different legal principles and constitutional systems. It was not a simple common law versus civil law system, which indeed was really not the case, as the South African system already integrated in itself principles and practices of both common and civil law systems. Neither was it a rigid constitution, with sovereignty lying in the constitution itself, versus a flexible one, with the supremacy of Parliament.

3. Typical example of the strength civil society’s claims get if they are channelled through some form of organisation is the campaign the Treatment Action Campaign (TAC) held to prevent mother-to-child infection of HIV, which ended up in a case in front of the Constitutional Court.
And it was not even a cultural clash between the oral tradition and a written, codified system. The project of society elaborated by the anti-apartheid movements, that we consider as having one voice in an effort of simplification, but that does not necessary match reality, was based on multiple sources. The legitimisation strength given to the movement by the struggle, on both a political and moral plan, a relatively consistent number of highly educated leaders, the support given to the movement by the international community, across the West/East and the North/South cleavages, allowed the movement to draw freely its constitutional principles and its political pillars from both the African indigenous tradition and the different constitutional models: from the classical liberal democracies, to the socialist systems, to the “new” democracies like India. But, above all, in our perspective of constitutionalism as embodiment of the spirit of the constitution by society, the most important foundation of the constitutional basis for a new democratic South Africa was the legal background already present in the country.

Thus, the issues South African society is raising *vis-à-vis* contemporary debates concerning the role of law in complex realities as well as the hybridization processes of international political traditions can be extremely revealing. It is our opinion that the challenge consists in a search for a system capable of governing a plural society, as well as managing the richness of diversity, while voicing a common and collective responsibility for the future of the whole national community.

Much has been written on the South African democratic transition, but once the country has been considered “normalized”, the attention for this crucial country has drastically diminished, from a political as well as an intellectual point of view. On the contrary, we consider the “miracle” of the transition lying in its sustainability and durability. A part rare interesting exceptions, since the coming into force of the final constitution in 1996, little consideration has been given to the degree of ordinary people’s satisfaction and, in turn, of willingness to engage in the consolidation of the political and social fabric of that society, which the constitution sets the fundamental principles and the legal basis of.

Moreover, the large majority of analysis of political transitions do not acknowledge the role of law in the process of reconstruction of the state, of its legitimacy, and of reconciliation of the country’s society. And in the few cases in which attention has been given to the role of law, two are the themes explored and analysed. On the one hand the focus is “the constitution-making in the context of the post-cold war transitions, [and] the emphasis has been on the way in which this process represents a new beginning, a foundation act of the new state, or on the nature of the rights these constitutions should protect in or-
der to facilitate their political and economical transitions” (Klug, 2000: 5). On the other hand, the attention is given to what we can resume with “transitional justice” (Teitel, 1997), that is the role of courts, the presence of other forms of justice, such as Truth Commissions, and/or amnesty and impunity. With no pretension of filling the analytical vacuum concerning other conceivable roles of constitutionalism in democratic transitions, through the analysis of the South African transition and of the constitutional “model” elaborated, this study seeks to demonstrate the capacity of constitutional law of integrating competing forces while setting boundaries on the range of viable political options in post cold-war democratic transitions, and to demonstrate that constitution-making processes can never superficially impose international constitutional standards, if they want to be successful. On the contrary, it is in the process of a permanent dialogue between local and global that the values of the given histories of the country, its cultures and its eventual political struggles shape the choices of the legal models available in the globalising political/constitutional tradition.

South Africa in Africa: which lesson?

The analysis of the South African case is integrated by the study of the country’s influence in two crucial regions of the African continent: Southern Africa and the Great Lakes region. The choice of these two areas is not due to an arbitrary decision, but is rooted in the recent and past history of South African engagement in Africa. In Southern Africa, “geography is politic as politic has always constituted the basis for the organisation of space, and as geography has been a political instruments for the racist ideologies” (Gervais-Lambony, 1997: 10). Indeed, geographical contiguity and geopolitical interests have played a dominant role in shaping South African attitude vis-à-vis the other Southern African countries. The region has been the chess-board where the interests of the cold-war and the South African economic and political ones have been interweaving until the early 1990s. Since 1990, Southern Africa has experienced dramatic changes, which impose new ways of conceiving the geopolitical and economic equilibrium of the region. South Africa has become a legitimate regional power and the success of its transition goes further beyond the boards of Southern Africa, to assume a global relevance. The strategic instruments employed by South Africa to structure its international relations, to pursue its economic interests, to affirm and stabilize its political dominance have changed with the democratic transition. It is of great interest to look at this change in the pattern of international relations and to analyse whether constitutionalism has been employed as “soft power”, as argued by David
Monyae in his chapter, and if it has been successful. South Africa political and economic attitude towards Southern African countries is extremely revealing. As it is its commitment in the Great Lakes Region, and especially in Burundi. Why should South Africa get involved in such a little and far away country, why should it expose its army and overburden its already overstretched Treasury, engaging the country in a very difficult peace process? The South African involvement in the solution of the war that has been ravaging Burundi since 1993, claiming more that 350,000 lives out of a population of six millions, is an interesting test to analyse on the one hand the “exportability” of the South African model and, on the other, whether constitutionalism provides viable mechanisms contributing to the solution of very complex situations. Indeed, “it is fundamentally important that South Africa and the moral and material interests of its people become deeply engaged by the difficult quest for peace throughout the entire continent...Democracy and development in South Africa are both inextricably linked to progress towards those goals throughout Africa as a whole... and peace in Burundi id one vital piece of a Central African jigsaw, relating to a much wider peace process that South Africa is busily engaged in constructing” (Bentley, Southall, 2005: 2-3). Indeed, as Devon Curtis will show in her chapter, there are no easy recipes, extrapolated from the South African experience, that can be directly enforceable. This does not mean, ipso facto, that we can not draw any lesson from South Africa. Rather, the Burundi case shows the importance of the local rooting of viable solutions. It shows that it is absurd to make broad generalisations on African constitutionalism. Even if there are recognisable trends and similar legal and constitutional patterns, we have to recognise that every country in Africa has its own history, its own social and economic fabric, its own legal traditions, as elsewhere in the world.