BOOK REVIEW


Though celebrated overseas, the Constitution of the Republic of South Africa, 1996 and the Constitutional Court of South Africa have never been more unpopular at home, particularly in the ruling African National Congress (ANC). Gwede Mantashe, the ANC secretary-general, has repeatedly lambasted the interventions of judges sitting on the ‘highest court of the land’, while the executive announced earlier this year the Court’s decisions would be subject to review. 1 Meanwhile, a basic political right, freedom of the press, seems to be secondary to an ill-defined ‘national security’. Perhaps there is no better time to take a closer look at the seeds of the entire fracas – in the Constitution and the transition to democracy, *writ large*. To this end, Andrea Lollini – now professor of Comparative and Constitutional Law at the University of Bologna, Italy – has provided a valuable service for English-speaking audiences in releasing a translation of his book, titled Constitutionalism and Transitional Justice in South Africa (originally, *Constituzionalismo e Giustizia de Transizione*). This work must be applauded – and will be most appreciated by comparativists, legal theorists, and historians – for applying a nuanced continental European perspective to the South African transition, and for casting light on what makes the ‘Rainbow Nation’ both exceptional and consistent with nation-building projects elsewhere.

Lollini advances at least three provocative arguments here. First, he claims that – beyond any other consideration of justice, truth, or equality – the need to create a unified political body guided the development of the post-apartheid constitutional order. Negotiators in the ANC emphasised inclusion through universal citizenship and individual confession, rather than exclusion through ethnic federalism and criminal imprisonment for political wrongdoing. Second, the South African paradigm cannot be separated from other theories of constitutionalism that have emerged since the end of the World War II. Even the ‘Rainbow Nation’ is a product of its historical context; its oft-cited socio-economic rights attest to the Constitution’s direct dialogue with other liberal-democratic constitutional traditions of the 20th century. Third, supplementary constitution-making tools – the most important being the Truth and Reconciliation Commission (TRC) and its Amnesty Committee (AC) – created an unprecedented web of constitutionalism and transitional justice. Lollini takes pains to break down arbitrary barriers between these fields, and to further integrate politics, law, history, and memory into a single dialectic. For a book just shy of 200 pages, this is a Herculean task, and his synthesis suffers at times from cumbersome diction, unclear transitions between ideas and chapters, and an overt reliance on lengthy footnotes for explanation.

Nevertheless, the arguments merit careful and sustained analysis, both here and in the future.

Of utmost importance, an impressive body of evidence is marshalled to show how building a corps politique unitaire not only represented the ‘most profound rejection’ of apartheid ideology and its emphasis on ‘separateness’, but also served as a basic precondition for the entire constitution-making process. This claim marks a clear shift away from a vast body of scholarship on transitional justice, which analyses and often criticises truth commissions, human rights prosecutions, and ad hoc tribunals as imperfect tools for recovering ‘truth’ and ‘doing justice’ for victims. Focused more on nation-building, Lollini is wise to draw attention to how competing definitions of the nation-state and political community threatened to derail the earliest phases of negotiation in South Africa. He traces how supporters of the ‘ethnic’ nation (represented by the federalist demands for a Volkstaat Afrikaner and independent Zululand) fought against those promoters of a ‘civic nation’ (represented by a universalist political citizenship). From the onset, the ANC espoused the latter, with the qualification that minority cultures and interests would be preserved by a Bill of Rights and ‘a centralized system of constitutional justice with the institution of the Constitutional Court’. Constitutional law would, according to the ANC, simultaneously preserve group identities and bring competing interests under a single umbrella. In order to arrive at this legal consensus, however, Lollini claims that three constituent or supplementary compromises were necessary, namely: (1) suspending a criminal approach to political crimes; (2) including former ‘enemies’ across the entire political and racial spectrum in negotiations; and (3) relying on the principle of testis contra se (testifying against oneself, or confession) in the TRC. Justice – of the transitional, restorative, and retributive flavours – played second fiddle, just one of myriad tools in the construction of a functional, constitutional regime.

To be sure, the story is multi-faceted, and there may be too many balls to juggle in any single text. Some spark more questions than Lollini can answer. For instance, he discusses in some detail the Volkstaat Council, founded under the auspices of the interim Constitution, which served as a consultative government body focused on the possibility of the self-determination of certain Afrikaner enclaves. He argues, in turn, that this particular body reveals how the constitutional order accepted the existence of political positions antithetical to the vision of universality promoted by the ANC. For this same argument, he explains how ‘Afrikaner and Zulu nationalism found common territory in constitutional proposals: shared political intentions requiring a precise political form’. Questions about South Africa’s rich history multiply at this point. Why did these two distinct groups, but not any of eight other minority-language communities, pursue a similar agenda? Can their histories be reduced to political power-plays during the transition – in other words, of the ‘Afrikaner oligarchy’ and supporters of Inkatha Freedom Party both acting

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in defiance of the ANC? On the flip side, what is the intellectual genealogy of the ANC? Were principles of non-racialism and the ‘civic nation’ simply a reaction to apartheid? Answers to these and similar inquiries would require Lollini to take additional steps, both backwards and forwards in time. First, a brief foray into the imperial past, before the 1948 rise of the Nationalists, would help reveal how ‘white’ anxieties about nation-building resonated in the Convention for a Democratic South Africa (CODESA), as well as how earlier responses from indigenous communities inflected the ANC’s stance on non-racialism. Second, a closer examination of contemporary debates over language policy – and court cases for mother-tongue education advocated predominantly by Afrikaner and, to a lesser degree, Zulu families – would help expose the fragility of ‘opposition’ viewpoints in the ongoing nation-building project. Put simply, the transition to a constitutional, multicultural democracy seems to be far from finished and klaar.

Foibles aside, the unequivocal strength of *Constitutionalism and Transitional Justice in South Africa* rests on the comparative method, as well as the treasure trove of non-English sources cited throughout. In the fourth chapter, titled ‘The Constitutional Suspension of a Strictly Criminal Approach’, Lollini places South Africa’s political and philosophical decisions in a continuum between European transitions at the end of World War II, and later human rights after the fall of military regimes in Latin America and Africa. Drawing heavily upon the German legal scholar, Gustav Radbruch, Lollini examines how denazification campaigns addressed issues of state continuity, that is, often by identifying when legal systems lost their democratic nature and hence substantive validity under illiberal rule. This speaks to the bête noire faced by lawyers and the murky field of ‘transitional justice’ before the 1960s, namely: how to reconcile the formal laws of criminal states with notions of ‘justice’, with ‘good’ and ‘evil’ often tied to natural justice. Though useful as historical background, the discussion on Europe also feels dated because, as Lollini notes, a fundamental principle of criminal law – of non-retroactivity – has been progressively chipped away by extending or abolishing statutory limitations for crimes against humanity.³ Partly for this reason, he outlines two other options for transitional states: (a) impunity, or the unwillingness of a democratic state to punish earlier crimes (the classic paradigms of Spain and, until recently, Brazil); and (b) truth commission models and so-called mixed configurations (such as East Timor and Sierra Leone). When compared to these alternatives, the South African example stands apart from other commissions because the TRC boasted far greater investigative authority, legal powers to grant amnesty, and a vital role in the entire constitution-making process. The TRC acted as the gatekeeper for democratic citizenship; the nascent state at

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once limited its own power to punish (by refraining from criminal law), and monopolised the power to ‘pardon’ past injustices. In this framework, the speech act of confession represented a capitulation of political violence – for liberation movements (plural) and apartheid operatives, alike. Perhaps more than any other post-conflict society, the TRC mandate prioritised the future constitutional order, rather than the past.

From a more philosophical standpoint, much more could be said and has been written on the fraught relationships between law and memory, and on the parallels between judges and historians in post-conflict societies. Outside the purely legal sphere, Lollini acknowledges: ‘the constitution-making process is not just the moment in which the new state is created, but it is also when important social elements solidify, such as emerging political myths or the reconfiguration of a national identity that … reconstructs the social bond for future existence’. Indeed, the repeated failure of the criminal justice system to heal fractured social bonds is one of the practical reasons why amnesty laws spread across Europe, and why truth commissions have continued to flourish to the present-day. In a Germany where brothers spied on sisters, or across an Argentina where evidence of complicity defied legal thresholds, no number of purges from the civil service, police, or military would ever satisfy the personal needs of victims. Moreover, the resurgence of the past could cripple the daily workings of the state. That is not to say, of course, that amnesties ever quieted past suffering; the proliferation of Holocaust denial claims since the 1980s represents just one example of how social pacts of remembrance have been violated. As a response, collective memories of war, extermination, and totalitarianism have formed new categories of legal protection; courts across Spain, Austria, and Portugal all prosecute ‘denial’ and thus play the controversial role of solidifying a particular version of ‘historical fact’. On this point, Lollini levels a fascinating provocation: ‘the process of coming to terms with the past seems to be checked by two opposing forces: hypertrophy of history and hypertrophy of law’. What are the costs to the victims when the roles of the judge and historian overlap, and when past events are either simplified for the courtroom or re-examined in ‘new, revised’ histories of suffering? Should the courtroom act as an aide-mémoire? When should the apartheid past become irrelevant for law and public policy?

A takeaway point is that scholars of constitutionalism and transitional justice must further integrate their scholarship – an ideal towards which Lollini has made admirable strides. At times, the tools he uses are much too blunt, as when he writes: ‘By using a native language term [ubuntu], the post-apartheid Constitution incorporates a concept that recognizes the importance of community, reconciliation, forgiveness, and social peace, that is, the interruption of the “state of nature” of civil war and the delegitimization of political violence’. Ubuntu cannot mean everything, however, without meaning nothing at all. Other times, the specific dynamics of the region are lost; the analysis would have been enriched by comparing decolonisation and nation-building processes in neighbouring Zimbabwe, Mozambique, and, above all, Namibia. A meagre footnote mentions that former South West
Africa represented ‘a kind of laboratory that created a model later applied to the South African transition’, which seems a rather significant detail to integrate into the discussion. In the future, legal scholars would also be wise to follow in Lollini’s footsteps and explore how the ubiquitous rhetoric and controversial policies of ‘transformation’ relate to larger, theoretical debates over constitutionalism and transitional justice. What are the intended political, legal, and social outcomes? Does ‘transformation’ open opportunities for greater political inclusion or exclusion? The ground for research is fertile and – as any newspaper attests – the relevant materials are vast.

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4 The views expressed herein are in no way connected to or approved by the US Department of State, US Agency for International Development (USAID), or any other agency in the US government. The information here reflects the author’s personal research, experiences, and ideas.