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The national and the international influences on the drafting of the South African Bill of Rights.
A study on the South African transitional legal culture.

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Abstract:

The South African democratic transition in the 1990s represents one of the clearest cases of practical implementation of constitutional engineering. The process was aimed to the creation of the principle of national unity in the fundamental text first, hoping it would be mirrored consequently by a popular sentiment. Within this context, the Bill of Rights, included in the second chapter of the final text, affirmed itself as the most relevant document that emerged from the country's nation-building process. This thesis aims to compare the influences that the national and international components of the South African transitional legal culture had on the drafting of the Bill of Rights, through the investigation of their historical and political dynamics. The analysis highlights that the liberal component characterizes the majority of the text, while being, however, declined on the neo-liberal international doctrine, while the African customary law is recognized within the cultural rights but remains subjected to the requirement of conformity with the liberal provisions.
Keywords:

South Africa, legal culture, Bill of Rights, Constitution, constitutional influences.
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1. Introduction

From the moment it was promulgated, on December 18, 1996, the South African Constitution has become a model of fundamental legislation for the democracies of the world. Upon the culmination of the process of liberation from the apartheid segregationist regime, the Constituent Assembly ensured that the human rights (progressively denied based on racial grounds to the majority of the population since 1948) represented the founding basis of the new nation. Within this context, the Bill of Rights included in the second chapter of the final text affirmed itself as the most relevant document emerged from the country's nation-building process.

The South African democratic transition in the 1990s represents one of the clearest cases of practical implementation of constitutional engineering: in order to set up the specific conditions that allowed a peaceful transition from the segregationist regime to the new democracy, the constituent process was aimed to a transcription of the concept of unity within the legal-constititutional matrix. Through this process the new South African nation was created on paper first, hoping this sentiment would be mirrored consequently by the population.

This ambitious project, carried out mainly by the African National Congress (ANC) and its leader Nelson Mandela, required significant efforts, both political and legislative: three large negotiation tables were put in place in order to involve the other parties, CODESA I and II and MPNP, an interim legislation was created to gradually dismantle the apartheid regime structure, and the newly inaugurated Constitutional Court was entrusted with the final evaluation of the constitutional text. In order to allow this complex transitional structure to function, a sense of harmony needed to be created between the numerous social and political souls of South Africa and, consequently, between the various components of the country's legal tradition.

Moreover, this process took place during a pivotal decade for the international community, the 1990s. The end of the Cold War and the beginning of the globalized era certainly influenced the transition process of a country like South Africa which, for forty years, had gradually isolated itself in the

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1 The notion of constitutional engineering was coined by Donald Horowitz in his book A Democratic South Africa: Constitutional Engineering in a Divided Society. The academic, in fact, suggested that, since in South Africa “the gap between what would be apt and what would be acceptable is often very wide”, “Constitutional engineers should tell South Africans which bridges will and will not stand”. (Horowitz, 1991:32-33)

2 Lollini, 2011:21

3 The ANC was the main opposition party during the apartheid regime. Banned from 1960 to 1990, it became the main political force within the transition process and in 1994 one of its leaders, Nelson Mandela, became the first President of the new South African Republic.
international system. Although the state never suffered a clean cut of the international relations (especially from its commercial partners) the apartheid regime was strongly opposed by the international community for its gross violations of human rights and an arms embargo was issued by the United Nations in 1977. Therefore, external influences linked to innovative ideologies, political necessities, and international strategies unavoidably merged in the South African national transition.

1.1 Objective and Research Questions

The objective of this thesis is to compare the influences that the national and international components of the South African transitional legal culture had on the drafting of the Bill of Rights.

In order to reach this objective, the following research questions will be answered:

1. Entering the transition process in the 1990s, how could the South African legal tradition concerning rights and liberties be defined?
2. What innovations did the post-Cold War era bring to the human rights theory?
3. How were the various components of the South African transitional legal culture reflected in the drafting of the Bill of Rights?

Pursuing the objective of this thesis, the aim is to investigate if the South Africa constituent process in the 1990s managed to include in the final document all the different perspectives of the national legal framework and the international context. The analysis will be conducted through the recognition and comparison of the presence of these different components in the original text, aiming to reconstruct the historical and political dynamics which allowed their co-existence in the legal system and to investigate the potential prevalence of anyone of them over the other.

In the context of this thesis, the study will be conducted exclusively concerning the second chapter of the South African Constitution, the Bill of Rights. This is due to the belief that this particular document can be considered a representative sample of the rest of the text. The South African national history and the international framework during the transition required important efforts by the Constituent Assembly in developing a new fundamental rights system. In this way, the Bill became the backbone of the reconstruction of the national conscience and the international reputation of South Africa.
In this regard, Makau Mutua defines post-transition South Africa as a “human rights state” and claims that its construction was aimed to create “a polity that is primarily animated by human rights norms”\(^4\). However, while the set of rights supported by the post-Cold War international community, exercised a strong influence over the country’s nation-building process, the complex national history and the fragmented (but structured) constituent journey resulted in an intricate system of fundamental norms with various origins and characteristics, which this study aims to disentangle.

### 1.2 State of Research

The research previously conducted on this subject can be divided into two groups: some scholars have studied the contrast within the South African constitutional framework between the liberal and communitarian juridical approaches; while others have focused on the influences of the 1990s international human rights framework on the fundamental text, from a political and juridical perspective.

Among the scholars of the first group, it's important to mention the works of Peter Hudson and Yusef Waghid, which focus on the effect of the liberal ideology on the Constitution. The first scholar, in the article *Liberalism, Democracy and Transformation in South Africa*\(^5\), offers a theoretical analysis of the contrast between liberal individualism and collectivist conceptions in modern South Africa, while the second, in the book *Community and Democracy in South Africa: Liberal Versus Communitarian Perspective*\(^6\), with a historical and philosophical approach, identifies the weakness of the South African liberal tradition. These works place themselves in the wider discussion about the universality of the Western perception of human rights, which, within the context of this thesis, will be discussed in regard to both the South African juridical national tradition and the Post-Cold War international human rights framework.

The works of the second group mainly focus on the international influences on the drafting of the Constitution. The South African High Court judge D. M. Davis, in his article *Constitutional borrowing: The influence of legal culture and local history in the reconstruction of comparative influence: The South African experience*\(^7\), investigates the origins of constitutional borrowings in the South African fundamental law exploring the negotiations which produced the text and focusing on

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\(^4\) Mutua, 2002:126


the South African domestic dynamics within the political body. Davis' approach will be reprised in this thesis because it provides a strategy to analyse international elements with a perspective from the inside to the outside of the South African framework.

Differently, Makau Mutua, in a chapter of his book *Human Rights: A Political and Cultural Critique*, discusses the sustainability of South Africa as a state entity entirely constructed on the post-Cold War human rights system. The author recreates the transition dynamics and their consequences to analyse if a “political edifice of human rights norms and structures” could be capable of sustaining a deeply wounded and ununited nation-state. Mutua's reasoning is therefore based on an assumption, claiming the South African nation-building exclusively relied on the international model of universal human rights. This thesis aims to investigate that claim and will not take it as assumed. Moreover, Mutua's analysis aims to produce a prediction on the long-term repercussions of the construction of a human rights state, which are not part of the delimited area of research of this study.

Finally, John Dugard, in his book *Human Rights and the South African Legal Order*, offers a comprehensive analysis of the South African legal system in regard to human rights and the political dynamics connected to it. This work represents the most complete and in-depth study on the subject between the ones mentioned in this section and it covers the development of human rights norms in South Africa throughout the apartheid regime and up to the end of the transition process. Another noteworthy work from Dugard is the article *International Law and the South African Constitution*, in which the focus is on the relations between the Constitutional text and the various degrees of international law. He makes a particular brief mention about the influences of the human rights theory on the drafting of the Bill of Rights.

The works mentioned explore the South African legal culture, in-depth and from different perspectives, highlighting the influences (both national and international) which characterized the state's post-apartheid nation-building. However, none of them, except for Dugard's *International Law and the South African Constitution*, provides an analysis of the Constitutional text. The article, in fact, analyses the fundamental document investigating exclusively the influence of international law and, therefore, in regard to human rights, he mainly focuses on the interpretation clause provided for in

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9 Ibid, 130
section 39 of the Bill of Rights. Following the same approach, usually explored by jurists and scholars who study constitutional law, a detailed study on the Bill of Rights will be proposed in this thesis.

1.3 Theoretical Framework

This thesis finds its foundation in the notion of “legal culture”, which the South African Constitutional Court defined as “the constitutional, political and social context within which the law of that country is determined”. Lawrence Friedman, who coined the expression, identified it as “the network of values and attitudes relating to law, which determines when and why and where people turn to law or government, or turn away”, claiming that this cultural elements, which surround a legal system, are the ones which actually “bind the system together”. Moreover, Karl L. Klare, while discussing the role of the legal culture in the constitutional interpretation, stated that “the collectively created structures of meaning and recognition in and through which we have experience orient our perceptions, thoughts and feelings, and shape our imagination and belief”. The main argument on which this research is based, therefore, is that any piece of legislation is linked, in its drafting and its interpretation, to dynamics external from its plain juridical existence and that the historical evolution of these dynamics change the perception we have of the legislation itself.

While the concept presents itself as very broad, so that it was considered by some scholars to be misleading within a juridical enquire, it offers a vision of the law as malleable and responsive to social, political and cultural change. In this sense, David Nelken claimed that the notion of legal culture allows the empirical study of the “variation in the way law is conceived and lived rather than to establish universal truths about the nature of law”. Within this thesis, these fluid dynamics will be explored through the elements contained in the text of the Bill of Rights.

In order to do so, however, it's important to analyse the concept of “legal influence” within the constitutional context. Nowadays, constitutionalists generally agree on the existence of a

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12 H v Fetal Assessment Centre [2014] ZACC 34, [42]. The Constitutional Court, called upon to rule on the recognition of the claim of “wrongful life”, referred within its judgement to an essay by Ivo Giesen, The Use and Influence of Comparative Law in ‘Wrongful Life’ Cases (2012), in which the author states that “it has to do with the fact that although the arguments for and against all possible solutions are as such the same everywhere, it is the legal culture in a certain place and at a certain time that determines in the end how a legal system interprets, weighs, rates and values those arguments and thus decides the debate on the topic at hand (...). My basic and simple point is thus that legal culture – or more neutral maybe – the legal politics within a (tort) law system decides how the answer to the moral questions involved will sound.” (Giesen, 2012:54)

13 Friedman, 1969:34
14 Klare, 1998:168
15 Nelken, 2004:2
16 Ibid
phenomenon of “internationalization of constitutional law”\textsuperscript{17}, built on “cross-jurisdictional legal transfers”\textsuperscript{18} between constitutional system, which produce the spread of constitutional models, languages and contents all over the world.

From an historical point of view, the first wave of constitutional migrations was a product of colonization: throughout the whole decolonization process, constitutional structures were inherited by the new nations from their respective ex-colonial powers, which resulted in the emergence of fixed models, like the French fifth Republic model and the Westminster model.\textsuperscript{19} This kind of juridical transfer were presented as elements of modernization for the colonies to which was asked to reach the European standards of development even within their liberation process. Brun-Otto Bryde claims that this kind of imposed transfers failed because they were founded on the blind belief that a standardalized development, based on the European experience, could be implemented to the colonies without any reasoning on the receiving context.\textsuperscript{20}

The second wave of constitutional spreading begin with the end of the Cold War as a global commitment to the rule of law aimed to “the adoption, by nations creating justifiable constitutions, of the universal principle (...) of a 'commitment to limitations on ordinary political power'.\textsuperscript{21} Differently from the past, however, this new process has proved to be “more independent and self-sustaining”\textsuperscript{22} and has involved self-conscious nations which are no longer subjected to specific foreign standards. Generally this process is understood as a consequence of the globalized era, which has “brought about political assimilation and have facilitated constitutional borrowing”.\textsuperscript{23}

Finally, the temporal boundaries of this thesis are set within the South African democratic transition of the 1990s. The word “transition” is used by scholars of democratization to define the phase of the process of regime change characterised by “uncertainty”\textsuperscript{24}: Andreas Schedler finds the blurred boundaries of the expression in the timeframe between the rupture by the democratizing actors of the “certainty of authoritarian continuity” and the establishment by the democratic actors of “reasonable certainty about the continuity of the new democratic regime”.\textsuperscript{25}

\begin{flushleft}
17 Bryde, 2008:10 \\
18 Perju, 2012:2 \\
19 Bryde, 2008:11 \\
20 Ibid \\
21 Klug, 2000:2 \\
22 Bryde, 2008:13 \\
23 Perju, 2012:15 \\
24 Schedler, 2001:2 \\
25 Ibid
\end{flushleft}
Nicolas Guilhot, analysing the historical development of the notion of transition, claims that its origins are found in Marx's evolutionary theory, which breaks down history in distinct but gradual “stages” of development. The expression is, therefore, linked by the scholar to Marx's theory on the transition to communism and the further evolution of the concept within the Soviet Union. According to Guilhot, the notion was, then, reprised within the Western social sciences in relation to the Modernization theory and democratization studies to analyse the processes of social change. Within this thesis, the terms is used partially in line with what Guilhot calls Transition 2, a process which “derives its meaning from a forwards projection of its supposed outcomes”, “occurs only through specific institutional and political mediations”, “is internalization by society at large of new (political, legal, cultural, etc.) norms”, and “is diluted in time and articulated as the composite of successive steps or sequences”.

1.4 Methodology

This thesis aims to investigate the national and international influences on the drafting of the South African Bill of Rights through a qualitative and comparative analysis. As mentioned, the Bill of Rights was chosen as a significant sample of the constitutional text because of its fundamental role in the South African nation-building process. Therefore, the Bill will be examined in its content, formulation, and structure in order to recognise the original components of its sections.

The research will be structured in two main parts. The first will be aimed at the identification of the components of the South African legal tradition and the international dimension of the country's democratization process. This study on the comprehensive legal culture of the transition will be based exclusively on secondary sources but it will represent a crucial step to obtain the objective of the thesis. Once the structure is defined, in the second part of the study, the different legal perspectives will be searched for in the text of the Bill of Rights. The analysis will focus on a legal component at a time and, for each of them, the corresponding sections of the Bill will be highlighted, their evolution will be reconstructed through the text of the Interim Constitution, other historical legal documents,

26 Gulhot, 2002:221
27 Ibid, 231
28 The original definition of Transition 2 by Gulhot includes a neat separation between social and political structures, with the latter being clearly superior to the former, and an overriding dichotomy between state and society. These factors are presented as the most debated within the post-1970s social science studies. I believe these characteristics cannot be applied to the broad process of transition in South Africa, however the analysis presented in this thesis does not evaluate this kind of dynamics, since it rather focuses on the political sphere. (Ibid, 230, Table 1)
and judgements issued by the Constitutional Court during the transition, and, finally, their valence within the text will be discussed.

The use of this method of analysis for each component of the legal framework will allow a valuable comparison between the results to be made and the juridical historical investigation of the fundamental rights included in the Bill of Rights will provide a comprehensive evaluation of the influences to which the Constituent Assembly was subjected.

1.5 Source Materials

Other than relying on secondary sources, mostly literature and academic articles on the South African legal perspectives, this thesis will make significant use of primary sources. These materials are exclusively juridical documents: the second chapter of the South African Constitutional text, known as the Bill of Rights, will represent the main subject of the study, while the juridical documents which preceded it will be used to reconstruct the fundamental rights' historical evolution, among them Chapter 3 and Schedule IV of the Interim Constitution (1993) concerning the Fundamental Rights and the Thirty-Three Fundamental Principles, the Freedom Charter (1955), and the ANC's Constitutional Guidelines for a Democratic South Africa (1989). The interpretation of the fundamental rights during the transition will be included in the analysis with the use of judgements issued by the Constitutional Court between 1995 and 1997. While these sentences refer to the Interim Constitution, they are officially part of the constituent process and they offer important insight on the juridical meaning of the South African system of fundamental rights. Finally, in the study of the constitutional borrowings, constitutional texts and juridical documents of other countries will be mentioned. Each primary source will be consulted in its original form, in the English language, as it was made available by the South African state, the South African Legal Information Institute (SAFLII), and the other countries' respective institutions.

1.6 Structure of the thesis

On these basis, the work of this thesis will be developed in five chapters. In this first introductory chapter, the premises of the thesis have been laid out, particularly its objective and research questions, state of research, theory, method, materials, and, finally, structure. In the following chapter, the historical framework of the research will be presented, particularly focusing on the South African transition towards democracy in the 1990s, unfolding the whole process complete of national and international dynamics. The third chapter will aim to identify the components of the South African national legal tradition up to the 1990s and to analyse the development of the human rights theory
within the post-Cold War international context. Diving into the Bill of Rights, then, in the fourth chapter, the various components of the South African legal culture, both of national and international origin, will be researched within the document, the historical dynamics between them will be reconstructed, and their influences on the final draft of the text will be compared. Finally, the final chapter will summarise the conclusions of the research and present further considerations on the study.
2. The South African transition toward democracy

The efforts to create a new state order, while avoiding popular revolt and containing the ideological confrontation within the political-institutional frame, resulted in the takeover of the constituent power by the hand of the political elites, which took charge of the organization of the transition. A peaceful and common plan for the reconstruction was considered essential in order to establish a solid nation-building structure, that could that be recognized and respected by the masses. The notion of unity, understood as a sentiment of acceptance and sharing of new democratic values, was, therefore, fabricated from the top-down through a complex process of constitutional and social engineering, which was aimed not to the accumulation of popular consensus for the new leadership, but to the creation of an Andersonian “imagined community”.

In order to legitimize this kind of intervention, the political elites organized a "multi-stage model of constitution-making", so to implement a juridical proceduralisation of the constituent power. This aspect of the South African transition is particularly peculiar since it allowed the embodiment of the constituent power within the same state institutions inherited from the apartheid regime which the process aimed to dismantle.

The constituent process was, therefore, meticulously organized into three parts: the first phase involved the organization of a multi-party conference, with the task of determining the rules of the transition up to the appointment of the Constituent Assembly; in the second phase, the multi-party conference would have proceeded with the drafting of an Interim Constitution, which would have regulated the electoral process of the first Parliamentary body of the new South Africa; and finally, in the third phase, the newly elected Parliament would have been conferred with the constituent power for the drafting of the final Constitutional text, based on a list of fundamental principles previously agreed on by the multi-party conference.

As will be described in the following paragraphs, the pre-constituent phases, as well as the constitutional drafting, ended up being enriched of further steps not originally planned. In this chapter, the whole process, complete of national and international dynamics, will be unfolded.

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29 Lollini, 2011:21
30 The anthropologist Benedict Anderson defined the concept of nation as an "imagined political community", which exist in the mind of every individual who is part of it without forcing them to all know each other. (Anderson, 1983: 6)
31 Colón-Riós, 2018:294
2.1 The Apartheid regime

By the time of its demise, the apartheid regime had built an imposing state structure capable of preventing any type of contact between the various South African social components. It can be assumed that a complex and fragmented society such as the South African one represented a fundamental precondition for the rise of such a segregationist regime: the complicated and stratified history of colonization and wars experienced by the South African territory gave meaning and three-dimensionality to the Boer nationalist propaganda, which reflected the social fragmentation inherited from the past.

The National Party, therefore, based its rhetoric equally on both the Dutch and English colonisations of the eighteenth century and the Anglo-Boer wars of the early twentieth century. This resulted, once applied within the political ground, in a separation of South Africa internally, through racial segregation, and internationally, though the refusal of the post-World War II system. The government that emerged from the 1948 national elections, chaired by François Malan, also based its program on an already consolidated tradition of segregationist policies, implemented during the so-called liberal era of the British-style South Africa Union.

The rise to power of the National Party, however, represented an important turning point, as it reflected a popular will consciously in favour of the rhetoric of separation: the ideology behind the party, the “separate development”, provided for the construction of an extreme juridical transposition of the cultural pluralism that characterized the nation. The evolution of each ethno-cultural group was assessed as a distinct experience, isolated from national contexts and interrelations with the outside, in order to be able to deduce its developmental capabilities in comparison with other groups: in this perspective, the Afrikaners, the white minority, believed they had produced better performances than the black majority and the remaining minorities.

For the implementation of such an impressive work of legal transformation to be successful, important regulations had to be adopted: the 1950 Population Registration Act laid the foundations for the

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32 Thompson, 1985:31-61
33 Ibid
34 The ideology of “separate development” was designed by Prime Minister Hendrik Verwoerd to “meet the two dominant needs of the policy of the National Party Government: an ideological demand for race separation to maintain the status quo of white supremacy and an economic demand for rapid industrial expansion with its supposed consequence of future political stability.” (Baldwin, 1975:218)
35 Dubow, 2014:60
36 Population Registration Act, Act No. 30 of 1950
separation of the population into the four main racial groups\textsuperscript{37} by introducing information on identity documents; the Group Area Act\textsuperscript{38} of the same year introduced racial territorial division and the prohibition for the African majority of unauthorized movement; personal relationships were regulated with the Mixed Marriage Act\textsuperscript{39} of 1949 and the Immorality Act\textsuperscript{40} of 1950, which prohibited any type of social contact outside of working relationships between different racial groups; the public areas, such as schools, universities and hospitals, were separated with the Reservation of Separate Amenities Act\textsuperscript{41} in 1953, while the Bantu Education Act\textsuperscript{42}, in the same year, revolutionized the teaching programs in order to reflect the rigid hierarchy of job positions established on a racial basis by the regime.

Finally, a single form of radical institutional pluralism was achieved through the institution in 1951 of the Bantustans or African Homelands, semi-autonomous territorial units conceived to completely exclude the black community from the central state administration, granting them with limited power of self-government and administration. The Bantu Authorities Act\textsuperscript{43}, in fact, provided for the creation of specific government structures for each of the four racial groups, to which were subsequently assigned separate administrative competences by the Promotion of Black Self-Government Act\textsuperscript{44} of 1959. With the promulgation of the Black Homelands Citizenship Act\textsuperscript{45}, in 1970, the status of citizens of the individuals belonging to the black subgroups was recognized only within the respective homelands and movements outside of them were allowed only if previously approved. Finally, in 1976 the Bantustans were proclaimed fully independent.\textsuperscript{46}

Within a decade, therefore, the entire South African social structure had been embedded in a cage that blocked the movement of its components. Any political, economic, and personal mingling of the recognized racial groups and subgroups was prevented and punished. The main opposition parties suffered severe repression, with the Suppression of Communism Act\textsuperscript{47}, first, in 1950 and the ban of

\textsuperscript{37} The apartheid regime divided the population in four main racial groups, Whites, Asians, Coloureds and Africans. This last group, which comprehended the majority of the South African population (about 80%), was further divided in thirteen ethnic sub-groups.

\textsuperscript{38} Group Area Act, Act No. 41 of 1950
\textsuperscript{39} Mixed Marriage Act, Act No. 55 of 1949
\textsuperscript{40} Immorality Act, Act No. 5 of 1927
\textsuperscript{41} Reservation of Separate Amenities Act, Act No 49 of 1953
\textsuperscript{42} Bantu Education Act, Act No. 47 of 1953
\textsuperscript{43} Bantu Authorities Act, Act No. 68 of 1951
\textsuperscript{44} Promotion of Black Self-Government Act, Act No. 46 of 1959
\textsuperscript{45} Black Homelands Citizenship Act, Act 26 of 1970
\textsuperscript{46} Dubow, 2014:106
\textsuperscript{47} Suppression of Communism Act, Act 44 of 1950
the African National Congress, subsequently, in 1960. This last measure, in particular, represented a dramatic turning point for the apartheid regime which, since it followed the killings of sixty-nine demonstrators by the hand of the police during an anti-pass march in Sharpeville: a state of emergency was proclaimed and any type of opposition was violently suppressed.48

The 1980s represented the decade of the decline of the apartheid regime. In fact, when the Total Strategy49, implemented by Prime Minister Botha, proved to be nothing more than a backlash from a decadent leadership, an attempt at regenerative reopening was put in place with constitutional reform of 1983.50 The attempt to revitalize the country involved a restructuring of the governmental and legislative branches, through the replacement of the institutional position of Prime Minister with the one of President, and the creation of a peculiar tricameral parliament.51 The purpose of this last provision was to include the of Asian and Coloured groups in the parliamentary dynamics, assigning to each of them a chamber, but maintaining the assignment of the majority to the white chamber. In fact, despite the illusion of openness, the parliamentary representatives of the Asian and the Coloured group, in total 130, were unable to reach the majority and therefore oppose the white chamber which, alone, reached 178 members. The black population continued to be excluded from any form of representation at the state level and relegated to the small autonomies of the homelands.

A new state of emergency was declared in 1985, following violent clashes between state forces and dissidents, further increasing the tension within the country. Internationally, the financial reactions were very harsh: numerous investors withdrew their capital from the country, fearing risks arising from the difficult social and political climate, while sanctions were introduced at the political level.52 At the dawn of the 1990s, the passage of leadership into the hands of F.W. de Klerk marked the beginning of the transition: opposition parties were re-allowed in the country and political prisoners, like Mandela and the other ANC leaders, were gradually realised from prison. In May 1990, Mandela and de Klerk jointly signed the Groote Schuur Minute, officially inaugurating the negotiations for the new South Africa.53

48 Dubow, 2014:81
49 Botha's Grand Strategy envisaged a series of reforms aimed to reduce the social tension, pacifying the non-white population and reassuring the international market.
50 Constitutional Act No. 110 of 1983
51 Sonneborn, 2010:77
52 Ibid, 81
53 Signing the Groote Schuur Minute, both the National Party and the ANC pledged to stop political violence and find resolution. (Ibid, 85)
2.2 ANC, NP, and IFP: Universalism v. Ethno-nationalism

At the inauguration of the transition the main political parties of South Africa offered very different perspectives on the future system of the state. The main contrast involved the ANC’s commitment to the drafting of a universalistic Constitution and the National Party’s and the Inkatha Freedom Party’s (IFP) ethno-nationalist relativist visions.

The ANC, in fact, strongly supported the creation of a unitary sovereign state that could oppose the ethnic and social centrifugal forces, structured as a multi-party democracy based upon the majority rule. In this context, the Constitution would have established the principle of equality for all the individuals, guaranteeing “all universally accepted fundamental rights, freedoms and civil liberties” to the entire population. The main aim of the party was, therefore, to concentrate the power within the central state institution, so to re-balance the social inequalities through an unified legislation and a redistribution of the resources.

On the other hand, the National Party and the IFP, which represented two minorities, white and Zulu, within the electoral base, supported the construction of a decentralized system, aiming to the ultimate constitution of a federal state. This form of state would have allowed them to acquire, through the control of only parts of the national territory, a wide sphere of exclusive competences and a large financial and fiscal autonomy, granting, on the other hand, to the central state the control of the defence, the national security, and the foreign policy. At a institutional level, a form of power-sharing was required by the two parties to limit the power of a President elected among the ANC leaders. Finally, the IFP strongly advocated, as it will be analysed in the following chapters, for the recognition of collective rights and the so-called African customary law.

2.3 The premises: Freedom Charter and the ANC's Constitutional Guidelines for a Democratic South Africa

On June 25 and 26, 1955, in the suburb of Kliptown, Johannesburg, the most important document that emerged from the resistance to the apartheid regime was drafted by the Congress of the People,

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54 Building a United Nation: ANC Policy Proposals for the Final Constitution
55 Ibid, Part 2, II
56 Lollini, 2011:30
57 Timothy Sisk defined power-sharing as “a set of principles that, when carried out through practices and institutions, provide every significant identity group or segment in a society representation and decision-making abilities on common issues and a degree of autonomy over issues of importance to the group.“ (Traniello, 2008:29)
in the presence of its 2884 delegates.\(^{58}\) The Freedom Charter, as it was called, although born as a political and non-legal document, strongly linked to the ideology of the ANC, actually established the fundamental principles which were then supported during the drafting of the Bill of Rights.\(^{59}\)

The Charter was the result of a process, carried out by the ANC for a year, of collection and identification of the main complaints and aspirations of the oppressed communities.\(^{60}\) The combination of the countless proposals collected composed a document which invokes the principles of equality, unity and democracy since its premises:

> “And therefore we, the People of South Africa, black and white together — equals, countrymen and brothers — adopt this Freedom Charter. And we pledge ourselves to strive together sparing neither strength nor courage, until the democratic changes here set out have been won.”\(^{61}\)

The drafting of the Freedom Charter represented an opportunity for the opposition forces to meet and reflect on the approach that state reconstruction could have undertaken: in a sense, the Congress of the People represented, from an exclusively political point of view, a first constituent meeting of a nation that would have been created only forty years later.\(^{62}\)

The ten sections of the Charter called for the respect of human rights, the unification of the people and of the South African state, the elimination of inequalities between racial groups, and the respect of democratic principles. The sections concerning the implementation of socialist benefits and welfare policies were created in response to the dramatic expropriation policies implemented by the National Party government and its liberal predecessors. In fact, despite being the fourth section of the Charter introduced by the statement “THE LAND SHALL BE SHARED AMONG THOSE WHO WORK IT!”, the socialist land policy is then explained in the sub-paragraph as a response to the apartheid regime:

> “Restriction of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it, to banish famine and land hunger”

At the culmination of the decline of the apartheid regime, in 1988, the ANC released an official document containing the *Constitutional Guidelines for a Democratic South Africa*. The document,

\(^{58}\) To the Congress of the People took part delegates from the ANC, the South African Indian Congress, the Coloured People's Congress, the South African Congress of Trade Unions, and the Congress of Democrats.

\(^{59}\) Suttner, 2007:5

\(^{60}\) Burnham, 1997:45

\(^{61}\) Freedom Charter, Preamble.

\(^{62}\) Suttner, 2007:6
drafted over two years, differed from the Freedom Charter in that it was conceived within the political boundaries of the ANC ideology, and set itself the objective of drawing guidelines for constitutional discussion, rather than presenting a draft of the final text. Nonetheless, the Guidelines were designed to integrate and accompany the Freedom Charter: the reference to the Charter is explicitly expressed in two points, thus introducing, in the constitutional dialogue, the guidelines regarding fundamental rights and economic and social policies. While the Charter is recognized as “the first, systematic statement (...) of the political and economic vision of a free democratic, non-racial South Africa”, the Guidelines were intended to convert this declaration into a constitutional reality.

2.4 The negotiations: CODESA I and II, and MPNP

The first Convention for a Democratic South Africa (CODESA I) was inaugurated on December 20 and 21, 1991, in the presence of 228 delegates from nineteen political organizations. Within this multi-party assembly, the National Party insisted on reaching an agreement regarding the composition of a Constituent Assembly composed of an equal number of representatives for each participating organization. This strategy aimed to rebalance the numerical disadvantage that the party would have suffered as a result of the election of a Parliament on a proportional basis. This last option was, on the other hand, strongly championed by the ANC, which aimed to maximize its influence through the votes of the black population, completely excluded from the electoral dynamics until that moment, and marginalize the political power of the white minority. Stuck at this stalemate, to which internal discrepancies concerning the functioning of the conference itself were added, CODESA I closed down as a failure, only after the parties signed a document of agreement, the Declaration of Intent, through which they proclaimed their commitment to the creation of a unitary state, with a pluralist, multiracial and non-sexist democracy, regulated by a rigid Constitution.

CODESA II was inaugurated on May 15 and 16 1992, the main topic of discussion was the determination of the majority necessary within the Constituent Assembly to be able to approve the constitutional text: the National Party asked to set a higher quorum (75%) hoping to be able to influence the voting dynamics, while the ANC, on the other hand, required a lower one (66.6% or 70%) in order to limit the demands of the white party. Furthermore, the expected time of validity of

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63 Phambili, 1988:56
64 “There will be a bill of rights based on the Freedom Charter” (point 8), “Business must respect the Freedom Charter, and work with the state to make a good society for all the people” (point 16)
65 Phambili, 1988:57
66 Lollini, 2011:49
67 Ibid, 50
the Interim Constitution was strongly discussed, since the National Party aimed to exploit the limbo of power-sharing for as long as possible. Following a clash between the protesters and the police in the township of Boipatong on June 17, 1992, the second attempt of negotiation was also terminated. An agreement, the Record of Understanding, was signed only after three months of informal mediation: the document provided, in addition to agreements concerning the prevention of political violence, the modalities of composition of the Constituent Assembly, to which a period of two years would be granted to complete the drafting of the definitive Constitution. In addition, it was agreed on the appointment of a government of national unity, composed by the representatives of the parties that would reach the electoral threshold in the first post-apartheid elections.  

The works of the third and final multi-party assembly, the Multi-Party Negotiating Process (MPNP), were inaugurated on April 1, 1993. The conference resumed negotiations from the point in which CODESA II was interrupted and carried out the adoption of the Interim Constitution, the formal attribution of constituent power to the Constituent Assembly, the drafting of thirty-four Fundamental Principles, that would have bound the final text, the institution of a constitutional judicial organ in advance of the promulgation of the Constitution, and, finally, the organization of a system of conditional amnesties under the responsibility of the Truth and Reconciliation Commission.

2.6 The interim Constitution

The constituent power of the MPNP, therefore, was based on the belief that a multi-party agreement on a set of binding principles would have offered an concerted direction to the constitutional debate, especially concerning the most discussed subjects. Although the entire MPNP agreed on the need of the development of a set of fundamental principles, the forum was still divided on how in detail the Interim constitutional text should have been drafted: throughout the whole process, the ANC asked for a less in-depth Interim Constitution, while the National Party insisted that this had to contain as many details as possible. This position was based, as mentioned in the previous paragraph, on the advantage that the white leadership could enjoy in a condition of power-sharing, rather than in a proportionately elected Parliament guaranteeing universal suffrage.

The debate culminated in the adoption, on December 22, 1993, of the Interim Constitution, which regulated the functioning of the state structure during the transitional process. Although the ANC

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68 Lollini, 2011:50-51
69 The South African Truth and Reconciliation Commission was instituted as a specific organ dedicated to transitional justice. Its work was aimed to the achievement of national peace through an exchange between public confessions about political crimes and the granting of amnesties. (Ibid, 52)
70 Klug, 2000:105
believed that a comprehensibly negotiated constitutional text would have severely limited the work
of the elected Constituent Assembly, the adopted text ended up addressing all the main subjects
discussed.\textsuperscript{71}

The Interim Constitution, therefore, presents a clear break from the apartheid regime since its
Preamble, which states:

"We, the people of South Africa declare that-
WHEREAS there is a need to create a new order in which all South Africans will be
entitled to a common South African citizenship in a sovereign and democratic
constitutional state in which there is equality between men and women and people of all
races so that all citizens shall be able to enjoy and exercise their fundamental rights and
freedoms;\textsuperscript{72}

The principles of unity, equality and democracy are firmly included in the inaugural premises of the
text, thus setting its structure in its entirety. A strong break with the past occurs, consequently, in
terms of fundamental rights constitutional protected: Chapter 3 of the text, entitled Fundamental
Rights, collects a list of recognized and protected inviolable provisions, the directives for their
interpretation, and the suspension and limitation clauses.

Moreover, it's clear, from the provisions of this text, the commitment of the political elites to a process
of international legal reintegration of the South African system. Since for forty years the apartheid
regime had opposed the United Nations and the Universal Declaration of Human Rights, which was
condemned as communist propaganda, the South African lawyers and judges generally lacked
knowledge regarding the contents of international documents.\textsuperscript{73} Foreign lawyers were, therefore,
consulted for the constitutional drafting process and great inspiration for the composition of the
Fundamental Rights was taken from foreign constitutional texts.\textsuperscript{74}

As previously mentioned, the multi-party forum also agreed on the selection of thirty-four
Fundamental Principles which, in addition to being integrated into Schedule IV of the Interim
constitutional text, were binding for the elected Constituent Assembly in its work of drafting of the

\textsuperscript{71} Klug, 2000:108
\textsuperscript{72} Interim Constitution (1993), Preamble.
\textsuperscript{73} Sarkin, 1998:179
\textsuperscript{74} Davis, 2003:188
final text. Francois Venter defined, this set of principles as a “pre-Constitution”, being them conceived as a pact between parties on the constitutional core.\textsuperscript{75}

\subsection*{2.6.1 The Constitutional Court}

The creation of a court of constitutional justice was agreed on by the MPNP with a document signed on November 12, 1993, and subsequently integrated into Chapter 7 of the Interim Constitution. The peculiarity of the provision, implemented in advance of the promulgation of the definitive Constitution, endowed the judicial body with constituent power, rendering it unique in its kind.\textsuperscript{76}

The debate that led to the creation of an exclusive Court specific to the constitutional matter considered, originally, the possibility of maintaining the previous judicial system, created by the apartheid regime, with a Supreme Court to which constitutional control would have been assigned. The forum, however, defined paradoxical the fact that the same judges who had implemented the apartheid legislation would have to become faithful interpreters of the new constitutional rules.\textsuperscript{77}

The adoption of a centralized system of constitutionality control was, therefore, announced in the seventh Fundamental Principle of Schedule IV, and regulated by section 98 of the Interim Constitution. This article provides for the institution of a Constitutional Court constituted by a President and ten additional judges,\textsuperscript{78} with jurisdiction in the Republic as a final court of appeal on the interpretation, protection and application of the constitutional rules.\textsuperscript{79} In the paragraph (4), it is stated the ability of the Court to bind in its decisions “all persons and all legislative, executive and judicial organs of state”\textsuperscript{80}, based the newly established principle of constitutional supremacy.

During the transition, the functions of the Court included the immediate interpretation of the interim text, to dismantle the legislative structure inherited from the apartheid regime, and the conformity clearance of the final constitutional text with the Fundamental Principles, contained in the Schedule IV of the Interim Constitution.\textsuperscript{81} This approach resulted in the assignment to the Court of a constituent power which assumed a substantial contemporaneity with the one exercised by the Assembly.\textsuperscript{82}

\begin{footnotesize}
\footnotesub{75} Venter, 1995:32
\footnotesub{76} Klug, 2000:154
\footnotesub{77} Rinella, Cardinale, 2019:222
\footnotesub{78} Interim Constitution (1993), section 98(1)
\footnotesub{79} Ibid, section 98(2)
\footnotesub{80} Ibid, section 98(4)
\footnotesub{81} Ibid, section 98(2) and section 71(2)
\footnotesub{82} Lollini, 2011:64
\end{footnotesize}
The entering into force of the final constitutional text, on February 4, 1997, marked the conclusion of the last phase of the constituent process, inaugurated by the 1994 presidential election. Held between April 27 and 29, 1994, in fact, the first free elections in the history of South Africa represented an important turning point for the country: the preferences of the population were registered through a double-voting system for the election of the 400 national representatives and the nine provincial parliaments. The turnout was 90%, with almost 20 million votes collected. Of the nineteen parties participating in the elections, the ANC won the majority with 62.4% of the votes in its favour but failed to obtain the number of parliamentarians needed to approve the Constitution without support from other parties. The National Party dropped to 20.8%, getting 82 seats, while the IFP got 10.5% and 43 seats. Furthermore, the distribution of the National Assembly positions included the Freedom Front (FF-VF) with 9 seats, the Democratic Party (DP) with 7 seats, the Pan Africanist Congress of Azania (PAC) with 5 seats, and the African Christian Democratic Party (ACDP) with 2 seats. The Senate was composed of ten representatives of each province redistributed following the results of each provincial election: in total, its composition included 60 senators from the ANC, 17 senators from the National Party, 5 senators from the IFP, 5 senators from the FF-VF, and 3 DP senators.

The Constituent Assembly was thus inaugurated, receiving the constituent power from the MPNP. Since the Interim Constitution was already in place at the time of the first sitting of the elected Parliament, some scholars claimed that they acted only as a "Constitution Making Body", to which an extremely constrained constituent power was transferred so that the process, already started by the parties, could be concluded. However, the Assembly initiated an important drafting process, granted access to the discussion at the citizens through written documentations. They were, however, subsequently excluded from the process of approval of the text which did not include any form of popular consultation. On this matter, Lollini argues that the elites' decision to act as a mediator between the political body and the constituent process was due to the awareness of the huge fragmentation within the country, which required a significant effort of political mediation in order to overcome the “cultural and economic divisions.” Therefore, once the political body had accepted

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83 Johnston, 1995:87
84 The 1994 electoral data are available at the following http://electionresources.org/za/provinces.php?election=1994
85 Lollini, 2011:148
86 Lollini, 2011:72
the constituent task, it had also assumed the responsibility of carrying out a fragmented but decisional constituent process, with the aim of constructing national unity.

The final constitutional text was finally approved on May 8, 1996, with 86% of the votes in favour, but was, then, twice pushed back by the Constitutional Court for discrepancies with the Fundamental Principles contained in Schedule IV of the Interim Constitution. Nelson Mandela, who had been elected to lead the national unity government, officially promulgated the act\(^\text{87}\) on December 18, 1996.

The preamble to the text opens with a strong statement of break with the past which, finally, put an end to the transition and inaugurated the new South Africa:

"We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity."\(^\text{88}\)

2.8 Summary

This chapter presented a historical reconstruction of the South African transition toward democracy. Coming out of the apartheid segregationist regime, the political elites inaugurated a complex and fragmented process, aimed to the rebuilding of the state structure and the fabrication of national unity, to which numerous social, political, and institutional actors contributed. The negotiations were organized in three multi-party conferences, during which the creation of provisional state institutions was agreed on and an Interim Constitution was drafted. Following the 1994 first free election of the new South Africa, the newly elected Constituent Assembly proceed with the drafting of the final Constitution, which was finally promulgated on December 18, 1996.

\(^\text{87}\) Constitution of the Republic of South Africa, Act No. 108 of 1996
\(^\text{88}\) Ibid, Preamble.
3. The components of the South African legal culture

In order to analyse how the South African legal culture influenced the drafting of the Bill of Rights, it's necessary to find a clear identification of the juridical perspectives developed within the South African national framework and the ones converged from the state's international context. In a country like South Africa, born from a complex history of cultural mingling and contamination, this question doesn't have an obvious answer. The numerous African cultures who inhabited the territory in pre-colonial times were already so different to prevent any attempt of theoretical collective analysis. Then, two very different colonisations completely altered the dynamics of the region by injecting new structures and institutions to the subjected populations. Internal heterogeneity, external intervention and the birth of new crossbred cultural identities, like the white Boers, were at the very base of the country's social and structural foundation. At the same time, the main actors of the South African final constituent process developed in a deeply influential international context, during the Cold War and the main decolonization phase, but were allowed to work on the fundamental text in a completely different international framework. The end of the Cold War, the affirmation of the Western paradigm, and the rise of globalization revolutionised the state-building process to its core, setting new standards and requirements, particularly regarding the human rights protection.

The aim of this chapter is to identify the components of the South African national legal tradition up to the 1990s and to analyse the development of the human rights theory within the post-Cold War international context.

3.1 The national legal culture

3.1.1 The origins of the South African legal tradition

The South African complex colonial history has been strongly argued by scholars to be at the base of the country's legal culture. Today, in fact, the South African legal system encapsulates all the different cultures that have touched its soil, resulting in a new law, unique in its hybrid nature.\(^9\)

The Dutch colonization in the seventeenth century imposed to the Cape region the Roman-Dutch law developed in the United Netherlands: this civil law system regulated the colony's life ensuring the supremacy of the motherland's interests at the expanse of the native populations. The arrival of the British, in the early eighteenth century, didn't mean the cancellation of this legal regime, mainly

\(^9\) Dugard, 2015:8
because of the Boers' migration toward the Orange and Free State and the British tolerance towards the previous enjoyed rights and liberties, however, the adoption of the *Code Napoléon* by Holland in 1809 stopped the transfusion of legal innovations from the European civil law.\(^{90}\)

On the other hand, the arrival of British common law in the Cape coincided with its most fluorescing moment of development: between the eighteenth and the nineteenth century, the principles of individual freedoms, rule of law, and accountable government had found acceptance within the British society and were starting to be exported in the rest of the Commonwealth. The new colonial élite of the Cape saw this process as a modernization of the old system, through the introduction of new “enlightened ideas”\(^{91}\) in their way of ruling the territory. The influence of European missionaries was equally relevant in this phase: at the beginning of the nineteenth century, the London Missionary Society heavily championed liberal ideas, introducing the colony to the principle of racial equality.\(^{92}\)

On this basis, the notion of equal justice was implemented by granting the right to bring cases before the courts to the Khoi people and slaves and by establishing that no arrest was permitted “without legal powers and proofs”\(^{93}\); the notion of human punishment was slowly introduced to limit the use of torture and capital punishment towards the slaves; and limited independence was granted to the black people living in the region by putting an end to the slave trade, allowing the Khoi to participate freely to the labour market and to own land. As the Cape was gaining independence from the empire in 1872, finally, representative institutions and universal suffrage were highly discussed.\(^{94}\)

The right to a free press has represented a unique case in this system: initially supported by the British settlers but opposed by the local colonial government and the head of the empire in London, it finally came into force in 1829 with the promulgation of Cape Ordinance 60 and survived almost unaltered for two centuries, even through the apartheid regime.\(^{95}\)

### 3.1.2 The ambivalence of colonial liberalism

The key to how deep-rooted British liberalism is into the South African national structure is paradoxically its colonial origin: the spread of this ideology, in the eighteenth century, from the higher class of the society, allowed it to be immediately recognized by the structure and, at the same time, by

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\(^{90}\) Tetley, 2015:605 and Dugard, 2015:8  
\(^{91}\) Saunders, 2010:272  
\(^{92}\) Ibid  
\(^{93}\) Ibid, 273  
\(^{94}\) In general, Saunders, 2010  
\(^{95}\) Ibid, 279-280
to permeate towards the rest of the population. Its content, moreover, in the short term was easily used to protect the privilege of the colonial élite but, in the long term, ended up creating a strong and demanding civil society.  

As Sandra Fullerton Joireman highlighted, the common law systems grow on the principle of the “protection of individual rights from the state”, in contrast with civil law systems, which originally saw individuals as subjects of the “supreme” state. This approach focused on a single person allowed the development of a flexible system built to handle disputes between civil parts through dialogue and experience. Moreover, the common law principle of stare decisis creates a legal culture based on background records rather than on institutional principles, which could help a colonial state to distance its system from the colonial power's. Finally, this “adversarial” juridical system resulted in the birth of influential classes of lawyers, to whom Joireman recognized an important role in many independence movements within the British colonies. This could be easily applied to South Africa since Nelson Mandela was the first black lawyer to open his own firm.  

At the same time, it's easy to understand how such an individualistic system could be strongly supported by a minority, British first and then white, to maintain its status quo. During the colonial era, while innovative liberal principles were imported to the Cape colony, their universality was strongly questioned within the British élite: Christopher Saunders reported how the British Parliament put an end to the slave trade in 1807 by intercepting foreign ships and forcing them to disembark the freed slaves in Cape Town to assume the position of apprentices within the local workforce. Similarly, the preservation of the right to private property often translated to expropriations of lands from native populations, such as the ones suffered by thousand of Xhosa speaking people in 1812. Moreover, a strong indirect influence on the universal implementation of liberal rights during the colonial era was related to the white dominance within the positions of power of the juridical system:

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96 Saunders, 2010:281  
97 Joreiman, 2001:573  
98 Ibid  
99 Ibid, 574  
100 The norm stare decisis implies the legal obligation for the judge not to disregard certain judicial precedents based on the binding value these holds.  
101 Joreiman, 2001:573  
102 Ibid, 575  
103 Saunders, 2010:275  
104 Ibid
Despite the law guaranteeing the right to equal justice for everyone by the 1820s, the appointment of only white judges strongly affected the fairness of the trials.\textsuperscript{105}

Finally, the classical liberal ideology instilled in the society the belief that universal rights and liberties needed to be preceded by a civilization process to ensure the equality of the beneficiaries. Therefore, the African populations had to earn their place within the liberal society proving that they were worth to it.\textsuperscript{106} On this basis, the so-called liberal era of the South Africa Union laid out the path for some of the most invasive segregationist policies: the Native Land Act, promulgated in 1913 prevented entire communities to settle outside of specific areas three decades before the infamous Group Area Act of 1950, the Colour Bar Act of 1926 established segregation within certain categories of jobs, and the Slums Act of 1934 implemented the first expropriation of black neighbourhoods.

Once the National Party came to power, despite the vocal contempt of the ruling class toward the international liberal ideology and the national Liberal Party,\textsuperscript{107} the liberal culture was fully assimilated in the state's institutions. The regime didn't feel the need to eliminate these principles from the state framework, just to prevent their universality, contributing in this way to their survival.

3.1.3 The African customary law

Finally, it's important to mention how liberalism was used by the colonists to dismiss the customary law of the African populations of the territory. The Khoi, which, despite being nomads, were recognised by the earliest European settlers as the native people of the Cape, were forced to find a fixed place of abode in order to maintain the order of the colony.\textsuperscript{108} As mentioned, this cultural homogenisation was considered to be a required step in the process toward universal equal rights, and it undeniably prevented the development of these different kinds of law, which we're welcomed in the official system only with the 1993 Interim Constitution.

In fact, in opposition to the liberal individualistic Western values, many scholars and activists believe that ensuring individual rights doesn't fit the universal needs of the world\textsuperscript{109}: it is, to their understanding, required to envision human rights through cultural lenses to really frame what specific populations need. In the African context, what is claimed as the main missing key of the modern

\textsuperscript{105} Saunders, 2010:278
\textsuperscript{106} Fredrickson, 1995:223
\textsuperscript{107} Cardo, 2012:16-17
\textsuperscript{108} Saunders, 275
\textsuperscript{109} Cobbah, 1987:311
international human rights discourse is the “communitarian ideal”\textsuperscript{110}: this expression encapsulates “the importance of kinship in the African lifestyle”\textsuperscript{111} based on the extended-family kind of organization, which represents “a reproductive, economic and socialization unit”\textsuperscript{112} where each family member plays a specific social role. This particular organized and hierarchical system can't coexist with a corpus of laws which only ensures the freedom of the individuals without considering the community they belong to: a system of rights/duties is required to guarantee the safe functioning of the unit, and the principles of restraint and responsibility must be at the base of it.\textsuperscript{113}

Throughout the South African colonial and independent history, customary law of the native populations informally survived as a parallel legal system linked to smaller communities and strongly opposed not only by the official national institutional framework but by the international human rights narrative too. Once the negotiations for the new democratic Constitution were inaugurated in the 1990s, traditional leaders strongly pushed for the recognition of this ignored legal culture without the imposition of limitation.\textsuperscript{114}

3.1.4 The South African hybrid factor

What Dugard defines as South African law is, therefore, a legal system built on the syncretism of Roman-Dutch law, English common law, and African customary law,\textsuperscript{115} with the latter being completely suppressed up to the 1990s democratization of the country. While this is surely the result of centuries of cohabitation between the numerous components of the South African social and national body, it can't be denied how the Victorian liberalism introduced in the territory during the British hegemony transmitted to the country's system the flexibility it needed to achieve this level of hybridization.

\textsuperscript{110} Mutua, 2002:355
\textsuperscript{111} Cobbah, 1987:320
\textsuperscript{112} Ibid
\textsuperscript{113} In this sense, the African Charter on Human and People's Rights, approved by the Organisation of African Unity in 1981, resolutely took a stand by stating in Article 27 that “Every individual shall have duties towards his family and society” and in Article 29 that “The individual shall also have the duty: 1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need”, clearly limiting the individual rights in the familiar context. Article 27 of the Charter, moreover, affirms that “The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest”. (Cobbah, 1987:321-322)
\textsuperscript{114} Deveaux, 2003:166
\textsuperscript{115} Dugard, 2015:7
3.2 The international legal context

3.2.1 The decolonization fronts

South Africa was part of the first group of colonies to obtain independence from the British empire by being declared a self-governing Dominion\textsuperscript{116} by the South Africa Act of 1909. Other than unifying the colonies of the Cape, Natal, Transvaal and Orange Free State into a single national body, the South African Act legitimated a written Constitution for the state, product of negotiations with the British Government and promulgated by the British Parliament. It's clear how this declaration of independence didn't terminate the influence that Britain exerted in the country, since it formally remained a member of the Commonwealth and was, therefore, directly administrated by the Commonwealth Relations Office.\textsuperscript{117}

The English approach to the first wave of decolonization didn't aim to the liberation of the subjected populations but rather to the creation of partly-independent allies through the empowerment of the white communities living on the colonial territories.\textsuperscript{118} This is proved by the fact that a draft of Bill of Rights, proposed in the South Africa Act, was rejected by London because it could have represented an impediment to the “Union legislative power over its non-European population”\textsuperscript{119}: the only two rights granted in the written Constitution were the recognition of English and Dutch as official languages and the protection of the rights of non-European voters, which was easily dismissed by legislative acts of the Union in the following years.\textsuperscript{120} These choices are surely connected to the particular approach of English common law to written constitutions, but, at the same time, they set a clear plan of Britain to maintain his “liberal imperialism” in the early twentieth century.

A completely different approach to decolonization was developing internationally through the most relevant popular ideological trend emerged in the twentieth century, communism. Originated in an exclusive European context and aiming to reach the industrial working class, the Marxist communism initially exported in the colonies seemed to connect with only a specific small portion of the white population. That was mainly due to the Western-centric perspective of society proposed by the father of the ideology, who, while being critical of the British administration of the colonies, didn't value

\footnotesize{\textsuperscript{116} Dominions were defined in the Balfour Declaration of 1926 as “autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic affairs or external affairs”. (Imperial Conference, 1926:2) \hfill
\textsuperscript{117} Parkinson, 2008:42 \hfill
\textsuperscript{118} Kumarasingham, 2018:886 \hfill
\textsuperscript{119} Parkinson, 2008:44 \hfill
\textsuperscript{120} Ibid, 42-44}
the social potential of racial consciousness: colonial society was considered by Marx as inevitably going towards a Western-style modernization process which would have united all the oppressed individuals not as part of a national body but rather as part of the “international proletariat”.  

This vision of social mandatory development process prevented any sort of approach between white working classes and non-European populations in the colonies until the 1920s: following the Bolsheviks revolution in Russia Lenin's innovations to the doctrine framed Western imperialism as the “highest stage of capitalism”, sorely built on the exploitation of the subjugated territories. Lenin's international framing of the capitalist society allowed the communist parties to support emerging national liberation movements, even if they weren't based on a communist ideology. Finally, Stalin provided a “working conception of what constituted a nation” so that the national liberation movements could take a role in the world revolution, associating the notion of nation to “a historically evolved, stable community of language, territory, economic life, and psychological make-up manifested in a community of culture.”

The dynamics of the communist component of the South African political body were strongly connected to the international directions instructed by the Soviet Union and to the ever-changing international landscape of the twentieth century. As mentioned, in fact, in the first decades of the century, the communist movements developed only within the white working class of the country: the African populations engaging in extreme low-wage works were seen as competition by the socialists to the point of organizing massive strikes against their employment and giving support to the first segregating laws.

In the 1920s, the new-found spirit of the communist ideology still found relevant issues in engaging with the South African society: the black majority of the population had been systematically divided into numerous ethnic groups which would have hardly identified themselves in a unique Stalinist nation. Moreover, by that time, the country had already obtained independence by Britain by the hand of the white Afrikaners, preventing any possibility of a national union for that purpose.

121 Fredrickson, 1995:184
122 Ibid, 186
123 Ibid, 188
124 Ibid, 186-187
125 Ibid, 182
126 Ibid, 185
127 Ibid, 189
The South African Communist Party embarked on a mission to recruit black communists by the mid-1920s, officially entering the liberation fight for an ever more segregated country. While, from that moment on, the alliance between Communists and the other liberation parties suffered a tumultuous development, the communist approach to decolonization did offer a new vision of legal structure, opposed to the individual liberalism inherited by the British colonization: the Freedom Charter, as mentioned in the previous chapter, drafted in 1955 by the Congress of the People, included strong socialist proposals to reverse the dramatic expropriation policies put in place by the apartheid regime, like the re-distribution of the lands among the ones who worked it.128

3.2.2 The post-Cold War innovations

The end of the Cold War deeply affected the structure of the international landscape: the downfall of the Soviet Union left half the world in crumble and the other half disoriented on what to expect from the future. Although from the 1950s, the end of every major conflict had been followed by considerable proliferation of the human rights theory, it had mainly remained a peripheral subject of international relations up to the 1990s. Mark Goodale defined it as a “period of liminality”129 during which the vacuum left by the collapse of the global dual system was filled with past legal and moral materials, like the human rights theory developed in the 1950s, allowing them, however, to take centre stage. Human rights gained, therefore, relevance within social and political movements and policies all over the world, reshaping the theory of the international and national dynamics.130

Even the most relevant international organization of the second half of the twentieth century, the United Nations, went through changes regarding its approach to human rights discourse and policies. Jean-Philippe Thérien and Philippe Joly analysed three important shift in the organization's handling of the subject in the 1990s, in comparison to the actions taken at the end of World War II: the first was to move human rights to the highest status of the UN agenda, considerably increasing the attention of the member states to it; the second important step taken was to unify the human rights corpus, which had for decades favoured political and civil rights (the so-called first generation rights) over economic, social and cultural rights (second generation); finally, they strongly supported the principle of universality of the human rights, directing their application to every individual.131 The

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128 See paragraph 2.3
129 This expression is used in relation to Victor Turner's definition of “time when normative structures, especially those that reflect and perpetuate inequalities of power, become undifferentiated” which “create the conditions in which new critical perspectives on existing structures can emerge, and new communities can coalesce around these new perspectives” (Goodale, 2012:8)
130 Ibid, 2012:5-6
131 Thérien, Joly, 2014:378
UN Universal Declaration of Human Rights, adopted in 1948, therefore, already was, in this sense, the main piece of a hypothetical “international constitutional structure”\textsuperscript{132}, but the system it instituted became concrete only half a century later.

For the countries facing institutional and political changes in this period, this new international framework represented an impressive shift in the rules of nation-building: once human rights became the core of the international culture, they also became the “archetypal language of democratic transition”\textsuperscript{133}. As Richard Wilson states, in fact, human rights, gaining the quality of universality, became in the 1990s the principal tool to achieve equality and unity within a population. In this way, national communities could be created through the claim of citizenship rights, rather than on political discourse about race and ethnicity. Human rights became the “antithesis of nationalist modes of nation-building”.\textsuperscript{134}

In the 1990s, South Africa, more than others, represented the perfect candidate to experience this process: it was a multicultural country, unable to build a national consciousness based on ethnic identity, coming out of an extremely strict regime based on inequality. Not only it needed to build democratic institutions, but also to create national unity and, finally, to find a place in the international scene, from which the apartheid had isolated the country.

Another important innovation that the post-Cold War era brought to the international framework, concerning human rights, is the emergence of the so-called third generation rights. This category, which collects numerous and various provisions, actually had its origins within the decolonization process, due to the new expressed needs of the Global South: some of the demands that the subjected populations presented upon their liberation to the international community, like the right to self-determination and the right to sovereignty over their own resources, were, adopted within the international law corpus as universal principles.\textsuperscript{135} The main characteristic of this “first wave”\textsuperscript{136} of third generation rights was the collective perceptive they were based on, which originated from the post-colonial narratives against imperialism.

However, once this new group of values entered the international dominion, it underwent a process of hybridization which resulted in the creation of a second wave of rights that, while still striving for

\textsuperscript{132} Goodale, 2012:8
\textsuperscript{133} Wilson, 2001:1
\textsuperscript{134} Ibid, 1-3
\textsuperscript{135} Freedman, 2014:943
\textsuperscript{136} Ibid, 936
collective needs, aligned itself to the Western perceptive. As observed by Rosa Freedman, in fact, these new provisions touch upon themes which had not been explored within the human rights law before the 1990s and ideologically reflect the requests of the states which had emerged only in the second half of the twentieth century, but, doing that, they present a complex interdependence of subjects and contents, which cannot be directly linked to a specific legal protection toward a potential victim. Differently to the rest of the human rights body, therefore, these rights are broad in their definition and “immeasurable in terms of implementation”, but they set out precise goals for the international community and the national states. Moreover, it’s interesting how one of the main innovations of this new group of rights is the partly adoption by the international human rights law of the African dichotomy of right/duty, previously mentioned regarding the African customary law. These provisions, in fact, impose responsibilities upon the states to take proper measures in order to reach the objective of the rights. A clear example of a third generation right emerged in this second wave is the right to a clean and healthy environment.

Finally, the human rights theory in the 1990s was affected by the phenomenon of globalization producing the development of the trend of global constitutionalism. This practise results in the spread of constitutional principles between different legal systems resultant from the disappearance of the obstacles to cross-border interaction and the growing interdependence of legislations due to the international conventions on the protection of fundamental rights. This innovative trend allowed the creation of communicative channels between the national constitutional structures, which had been traditionally considered separated spheres independently navigating in the international vacuum. The main practical manifestations of this process are the presence of constitutional borrowings in the national constitutional texts, particularly in cases of young democracies, and an active dialogue between courts in regard to the interpretation of fundamental principles.

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137 Ibid, 948
138 Freedman, 2014:949
139 Ibid, 950
140 Tomuschat, 2008:57-58
141 Freedman, 2014:951
142 The first international Charter to classify this right as fundamental was the African Charter on Human and People's Rights which at the section 24 states “All peoples shall have the right to a general satisfactory environment favourable to their development.”
144 Peters, 2009:398
3.3 Summary

The aim of this chapter was to identify the components of the South African national legal tradition up to the 1990s and to analyse the development of the human rights theory within the post-Cold War international context. In the first part, therefore, the South African colonial legal system and liberal tradition were presented alongside African customary law as all playing a role within the South African legal history. It is argued that the survival of such different components through the complex history of the nation was facilitated by the flexibility inherited by the British common law which allowed the creation of an hybrid legal system. The mentioned components, therefore, constituted the South African legal tradition up to the 1990s. In the second part of the chapter, the main international influences which have affected the South African Constitutional structure were analysed. In particular, it was concluded that the end of the Cold War represented a pivotal moment regarding human rights: the theory was presented, in fact, by the international community as the universal foundation for nation-building and democratization.
4. The influences in the Bill of Rights

Based on the intricate entanglement of juridical trends, described in the previous chapter, and within a complex social and political framework, the South African political elites were entrusted with the creation of a new constitutional order, aiming to mend a deeply fragmented nation. The Constitution which resulted from this process, therefore, encompasses in its text very different perspectives, chained together to build unity and harmony among the social components they represented.

Within this context, the Bill of Rights had the critical role of laying the foundations for the structure of the new egalitarian nation. The importance of the document is clearly recognized in its first section, which states, at subsection 1, that

“This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

This chapter, therefore, aims to research within the text of the Bill of Rights the various components of the South African legal culture, both of national and international origin, to reconstruct the historical dynamics between them, and, finally, to compare their influences on the final drafting of the document.

4.1. The liberal tradition

As mentioned in the previous chapter, the colonial liberal tradition, inherited by the British, survived through the South African troubled history thanks to its focus on individuality and its flexibility towards other juridical approaches.

Regarding this last element, an English component is introduced right away in the second section of the Bill of Rights, section 8, which states that, when implementing the fundamental rights, a court is required to “apply, or if necessary develop, the common law to the extent that the legislation does not give effect to that right” and “may develop rules of the common law to limit the right, (...) in accordance with section 36(1)” 146. These provisions, legacy of the British common law system, represent one of the main characteristics of the South African hybrid system and, by including them in the Bill of Rights, the Constituent Assembly laid the foundation for an open and ever-developing fundamental legislation. In this way, an extremely relevant role was assigned to the judicial branch

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145 Constitution of the Republic of South Africa, section 7 (1)
146 Ibid, section 8 (3) (a), (b)
of the state, entrusted with the creation of legal contents through the practice of interpretation.\textsuperscript{147} Within this framework, the approach pursued by the Constitutional Court during the transition gained a unique constituent power, which will be analysed in a following paragraph.

However, in the text, the main traditional liberal elements can be found in sections 15-21, which provide for individual liberties like the freedom of religion, belief and opinion, the freedom of expression, the freedom of assembly and association, the political rights, the right to citizenship, and the freedom of movement and residence.

These provisions follow the Cape liberal tradition, including in the Constitution an atomistic vision of the law meant to safeguard the interests of the individual from the action of the state.\textsuperscript{148} However, while this approach was used, for centuries, by the South African elites, colonial and white, to ensure their privileged \textit{status quo} from the eventuality of subversion by the hand of the majority, in the new legal framework this kind of protection was enlarged to the entire population through the principle of universality.\textsuperscript{149} In the new constitutional order, therefore, these sections act exclusively in contrast to potential discriminations put in place by the state.

A clear example of this approach is provided for by section 13, regarding the prohibition of slavery, servitude and forced labour, which was based on pieces of legislation put into force by the British in the nineteenth century, as mentioned in the previous chapter, but, at the same time, had acquired in the second half of 1900 an extremely bigger ground of interpretation.

This shift toward universality was, therefore, a clear response to the system of the apartheid regime, which gained power from the stratification and restriction of liberties for the citizens of the state. In fact, the strategy put in place by the political body during the transition was to fabricate the feeling of national unity through universally enjoyed fundamental rights, which had the aim to create a balance among the different communities living within the South African borders.\textsuperscript{150} This approach can be easily traced back to the ANC ideology since it is clearly stated in political documents like the ANC's Constitutional Guidelines for a Democratic South Africa, drafted in 1989, which states at point 1 that “All people, black and white, will have the same rights”\textsuperscript{151}, and at point 8 that “The Bill of Rights will protect the rights of all the people - of blacks and of whites, of men and women, and of

\begin{flushright}
\textsuperscript{147} Klare, 1998:150 \\
\textsuperscript{148} Waghid, 2002:84 \\
\textsuperscript{149} Lollini, 2011:24 \\
\textsuperscript{150} Ibid \\
\textsuperscript{151} ANC's Constitutional Guidelines for a Democratic South Africa, point 1
\end{flushright}
people of all religions."  Moreover, the notion of universality was already present in the Freedom Charter, drafted in 1955, which declares “that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people” and that “The rights of the people shall be the same, regardless of race, colour or sex”. Finally, the Fundamental Principles, included in Schedule IV of the Interim Constitution, state that “Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties”; even though this particular phrase will be further analysed within the neo-liberal international framework in a following paragraph.

It's undeniable, however, that the sections mentioned also highlight the willingness of the National Party to find, during the negotiations, the least damaging solution for the white community: in fact, redistribution of the power and resources, that the Afrikaners had gained thanks to their privileged position during the regime, represented the main concern of the party during the transition. The individual liberties, therefore, could have been used to protect the advantage of the outgoing elite, being them presented in the Constitution in their absolute form. This wasn't, however, the case for all the rights.

Section 25 of the Bill, dedicated to the right to private property, prohibits any action of deprivation of it by the hand of the state, in clear contrast with the history of expropriations put in place by the apartheid regime, but also presents some premises in terms of redistribution. Subsection (2), in this respect, states that the

“Property may be expropriated only in terms of law of general application—
   a) for a public purpose or in the public interest; and
   b) subject to compensation, the amount of which and the time and manner of
      payment of which have either been agreed to by those affected or decided or
      approved by a court.”

The expression “public purpose” is defined in subsection (4) as “the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources”. This approach clearly recalls the mentioned provisions of the Freedom Charter and, while the socialist

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152 Ibid, point 8
153 Interim Constitution, Schedule IV, II
154 Lollini, 2011:30
155 Constitution of the Republic of South Africa, section 25 (2)
156 Ibid, section 25 (4) (a)
component was lost at the end of the Cold War, the fundamental law of the South African state expressly set the foundation for redistributive and solidaristic reforms.

A similar contrast between the classical liberal theory of individual freedoms and the needs of the population arising from the South African national history can be observed in the economical and social rights provided for in sections 26 and 27, which respectively establish the right to housing and the right to health care, food, water, and social security. This group of provisions will be analysed in a following paragraph.

4.2 African customary law

As mentioned in the previous chapter, in South Africa, the African customary law survived for centuries as an unrecognized legal culture, developing alongside, but in a submissive position, to the Western style-based official structure. The post-apartheid transition, in this sense, represented for the traditional cultural groups, living within the borders of the state, the opportunity to gain official recognition.

Within the political body, the main promoter of the traditional customary law was the IFP which, advocating for the Zulu nationalist ideals, threatened to boycott the first national elections if their main request were not granted during the negotiations. It’s clear, however, how the collectivist ideology was not completely compatible with the universalistic vision supported by the ANC: a recognition of the collectivist ideals in their absolute form within the constitutional body would have damaged the nation-building strategy based on universal enjoyed human rights. In fact, since these ideals needed to be supported by the principle of social responsibility, by implication, they would have produced limitation of the individual rights.

In its Constitutional Guidelines, the ANC had already expressed its position on the matter at point 4, which, while recognising the leadership of chiefs and traditional rulers, states that their duty was to “serve the people as a whole - and to rule in a democratic way”. The values of unity and democracy

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157 This process followed what Mahmood Mamdani defined as the colonial “indirect rule”, through which the European empires further influenced the subjected population by engaging with local social structures in the colonial establishment to direct the masses unnoticeably from the bottom. The “bifurcated state” that resulted from this process, therefore, “contained a duality: two forms of power under a single hegemonic authority. Urban power spoke the language of civil society and civil rights, rural power of community and culture. Civil power claimed to protect rights, customary power pledged to enforce tradition.” (Mamdani: 1996:18)

158 It has to be noted that a boycott by the IFP could have damaged the ANC electoral results discouraging the support they enjoyed among the African traditionalists and the Pan African Congress. (Deveaux, 2010:166)

159 ANC’s Constitutional Guidelines for a Democratic South Africa, point 4
were, therefore, clearly placed by the party on a higher level in comparison to traditional social norms and their enjoyment by the nation couldn’t be limited by customary provisions.

This ideological crux was untangled by the Constituent Assembly including in the Bill of Rights the recognition of cultural rights, provided for in sections 30 and 31, but subordinating them to the rest of the provisions of the documents. Sections 30, entitled “Language and culture”, recognizes and gives constitutional protection to the cultural identities outside of the national one, providing for to everyone “the right to use the language and to participate in the cultural life of their choice”. 160 Similarly, section 31 provides for the right of every individual to “enjoy their culture, practise their religion and use their language” and “to form, join and maintain cultural, religious and linguistic associations and other organs of civil society”. 161 As mentioned, both the application of these sections must, on the other hand, be consistent with the rest of the Bill of Right and, therefore, cannot prejudice the enjoyment of the liberal rights. 162 This is also proved by the exclusion of the cultural rights from the list of Non-Derogable Rights presented in section 37 (5) (c).

This approach was strongly contested for being based on a purely Western conception of human rights which, based on the presumption of established universality of its values, results in the evaluation of alternative ideologies on the matter as irrational and, therefore, worth of rejection. 163

4.3 The international influences

As mentioned at the beginning of this chapter, the text of the Bill of Rights is defined in its opening section as the “cornerstone of democracy in South Africa.” 164 While this central role surely met the need of safeguard of the fundamental rights expressed by the population, it also highlights the intention of the Constituent Assembly to re-align the national framework to the post-Cold War international neo-liberal system and its universal declarations.

On this regard, the principle of equality, backbone of the entire national reconstruction process, is presented through a complex articulation included in the Bill of Rights, which starts from section 9 with the provisions of the classical duality between formal and substantial equality, included in

160 Constitution of the Republic of South Africa, section 30
161 Ibid, section 31 (1) (a), (b)
162 Ibid, section 31 (2)
163 Namli, 2014:194
164 Constitution of the Republic of South Africa, section 7 (1)
subsections (1) and (2). Particularly worth of deeper analysis in this context is, however, subsection (3) which states that:

“This state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”165

The parameters presented in the above list are particularly broad and innovative: in fact, other than including the classical benchmarks presented in the article 2 of the UN’s Universal Declaration of Human Rights, which are “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth”166, the Constituent Assembly gave constitutional power to the principle of non-discrimination on the base of ethnic origin, pregnancy, age, sexual orientation, marital status, and disability. While some of these elements surely find origin within the process of dismantling of the apartheid practices,167 it’s, at the same time, clear how others were inspired by the development of the international human rights corpus in the second half of the twentieth century.

Another consequence of the international approach adopted by the Constituent Assembly is the inclusion of third generation rights in the text of the Bill of Rights. Because of their relatively recent acceptance within the international landscape, third generation rights don’t usually benefit of constitutional power in national contexts and their presence within the South African fundamental law represents another important innovation of the document. In particular, it’s important to mention the right to human dignity (section 10), the right to life (section 11), the right to freedom and security of the person (section 12), the right to privacy (section 14), the right to an environment that is “not harmful” (section 24 (a)) and “protected” (section 24 (b)), a group of right in protection of children (section 28), and the right to a just administrative action (section 33).

The presence of this group of rights in the constitutional text is surely due to their capacity to respond to the needs of the Global South: as analysed in the previous chapter, in fact, the protections these provisions invoke rest within the post-colonial narratives in defence of numerous historically ignored collective subjects. Even if the process of international elevation of these values resulted in the dismissal of the principle of social responsibility concerning the individual, whose rights are

165 Constitution of the Republic of South Africa, section 9 (3)
166 Universal Declaration of Human Rights, article 2
167 While the apartheid regime was strongly centralize in a vertical structure, the juridical system was built on the exaltation of the ethnic diversity within the state. Mamdani reconnected this strategy to a further evolution of the colonial indirect rule, which subjected the population by dividing it in smaller entities. (Mamdani, 1996:27)
universally guaranteed, as observed in relation to the South African cultural rights, the appointment
of this accountability upon the state institutions in protection of the community resulted in a
significant change in the objectives of the post-Cold War nation-building processes. Within the South
African Bill of Rights, these provisions reinforce, along with the other elements of alignment with
the human rights theory, the willingness of the Constituent Assembly to use the fundamental text as
the main tool to enact a “large-scale, egalitarian, social transformation”.168

Finally, the international law is taken into account in several sections of the Bill of Rights: section 37
allows derogations from the Bill of Rights during a state of emergency only if the legislation is
“consistent with the Republic's obligations under international law applicable to states of
emergency”169, and section 35 states that every accused person has the rights “not to be convicted for
an act or omission that was not an offence under either national or international law at the time it was
committed or omitted”170. But it’s section 39 which really proves the total conformity of the
Constitution to the international system when the interpretation of the Bill of Rights by a court, a
tribunal or a forum is compulsorily subjected to international law and, when it may be required, to
foreign law.171 Differently from section 35 of the Interim Constitution, which represents its
predecessor, section 39 of the final text doesn't allow, through its wording, any degree of discretion
to the judicial branch concerning the use of international law in the interpretation process.172
Following these provisions, the Constitutional Court, already during the transition, often referred in
its judgements to the European Commission, the European Court of Human Rights, and, occasionally,

The tendency of the post-apartheid South African state to align itself with the international human
rights corpus was already stated in point II of the Constitutional Principles, included in the Interim
Constitution, which called for the constitutional recognition of “all universally accepted fundamental
rights, freedoms and civil liberties”174. The notion of universality, already discussed in relation to the
liberal component, needs to be analysed, in this regard, with an international focus: the graft of the
South African transition into the larger process of centralization of the human rights within the
international framework, described in the previous chapter, resulted into the acceptance of the human

168 Klare, 1998:151
169 Constitution of the Republic of South Africa, section 37(4)
170 Ibid, section 35(3) (l)
171 Ibid, section 39 (1) (b)
172 See paragraph 4.3.2. b)
173 Dugard, 1997:85
174 Ibid, 1997:83
rights as the main tool to dismantle the legacy of the apartheid regime. Therefore, as seen in regard to collective rights, the nation-building process was completely founded on the egalitarian enjoyment of fundamental rights by every individual.

Within the political body, this trend was highly influenced by the ANC's diplomatic missions during the apartheid regime. The party, in fact, particularly from the 1960s to the 1980s, based its strategy of resistance on both the mobilization of the masses and the research of support by foreign countries and international organizations, like the United Nations and the Organization of African Unity. This international experience, together with the principle of nonviolent and multiracial struggle, which had been advocated by the party since its creation, matched the post-Cold War international trends previously described. This is highlighted by the clear liberal ideology behind the provisions of the ANC's Constitutional Guidelines for a Democratic South Africa and the strong predominance of the principle of equality within the Freedom Charter.

4.3.1 On social and economic rights

As mentioned in regards to section 25 and the right to private property, the Constituent Assembly's approach toward social and economic rights didn't follow the classical liberal framework: in response to the deep social and economical division created by the apartheid regime, the foundations for an impressive Welfare State were included directly in the Bill of Rights, not only preventing any new piece of legislation providing for unjust social and economical restrictions but also giving a constitutional-based legitimacy to any future law aimed to the redistribution of economic resources among the population.

The concerned rights, therefore, are stated in section 26, which provides for the “right to have access to adequate housing” and declares that the states “must take reasonable legislative and other measures (...) to achieve the progressive realisation of this right” section 27, which states the same obligation for the state but regarding the access to “health care services, including reproductive health care“, “sufficient food and water“, and “social security, including (...) appropriate social assistance” section 28, which provide for the right to “basic nutrition, shelter, basic health care services and social

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175 Mutua, 2008:133
176 It has to be mentioned, however, that the ANC did depart from the original Gandhian ideals after the Sharpeville massacre in 1960. Nonviolence was then considered an “ineffective weapon” against the white rule and an armed wing, uMkhonto we Sizwe, was founded. Nevertheless, the nonviolent ideal remained the main ANC ideological legacy from the apartheid. (Mandela, 1994:330)
177 Constitution of the Republic of South Africa, section 26 (2)
178 Ibid, section 27 (1) (a), (b), (c)
services”\textsuperscript{179} for every child, and section 29, which states the right to basic education and to an “progressively available and excessive”\textsuperscript{180} further education. Finally, also concerning the social and economic dimension and in contrast with the apartheid system, section 22-23 state the right of every citizen to freely choose their trade, occupation or profession and to freely form and participate to trade unions and employers' organizations.

This group of provisions represents another example of how the international trends regarding human rights were proposed by the international system and accepted by the transitioning state as an effective solution to mend a divided and unbalanced society. Comparing the sections of the final text with the provisions of former documents, it's clear how the development of these themes within the national context mirrors the mutation of the international trends: as mentioned, the Freedom Charter, released in 1955, included, in regards to social and economic issues, socialist elements, aimed to the redistribution of national wealth and lands and the nationalization of mineral wealth, banks, and monopoly industry. In the Bill of Rights, meanwhile, drafted in the post-Cold War context, the measures regarding the re-balance of resources within the society aim to build a strong Welfare State within a liberal structure.

4.3.2 The impact of global constitutionalism

As briefly mentioned in the previous chapter, the main constitutional trend resulted from the mutation of the international system following the end of the Cold War was the rise of global constitutionalism, which, following the principle of globalization, produced the spread of constitutional principles between different legal systems.\textsuperscript{181} In regard to the South African Bill of Rights, section 36 and 39, while regulating respectively the limitation and the interpretation of the fundamental rights, specify that these actions need to be considered appropriate for “an open and democratic society based on human dignity, equality and freedom”.\textsuperscript{182} This expression is peculiar because it set a specific instruction for the state institutions, concerning the handling of the founding values of the nation, to follow the international neo-liberal model of society, open to the global world, structured on democratic ground, and completely in line with the human rights corpus.

\textsuperscript{179} Ibid, section 28 (1) (c)
\textsuperscript{180} Constitution of the Republic of South Africa, section 29 (1) (b)
\textsuperscript{182} Constitution of the Republic of South Africa, sections 36 (1) and 39 (1) (a)
Moreover, the influence of global constitutionalism is shown in the Bill of Rights by the presence within the text of constitutional borrowings and the explicit constitutional instruction, included in section 39 (1) (c), to the use of foreign judicial elements in the interpretative process.

**a) Constitutional Borrowings**

The drafting of the final constitutional text, as well as the Interim Constitution, was affected by a strong influence by foreign constitutional theories and models. Constitutional borrowings, particularly referring to common law systems, were mainly due to the presence of numerous scholars from foreign universities in the role of advisors for the Constituent Assembly and, above all, to the particular positive attitude of the political body toward the incorporation of foreign institutions within the new fundamental text of the country. Constitutional borrowings are, in fact, recurrent in cases of emerging democracies since, in these cases, the constituent bodies are more inclined to be assisted by lawyers from states with a predominant constitutional history. 183

The German *Grudgedetz* of 1949 was taken as a benchmark for the South African constitutional drafting, mainly because of historical-cultural affinities, since the German Constitution had often been cited by the South African Supreme Court during the apartheid regime, and similarities of technical nature. 184 The elements imported into the text, therefore, are various, such as the indirect effect of fundamental rights on the private sphere (*Dritwirkung*), the principle of rule of law (*Rechtsstaatprinzip*) and the establishment of a juridical institution intended exclusively for constitutional justice, the Constitutional Court. Regarding the fundamental rights, in the Interim Constitution the provision stated in section 33 (1) b), “The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation- (...) shall not deny the essential content of the right in question” was borrowed by section 19 (2) of the *Grudgedetz*. 185

The Bill of Rights also presents several elements of contact with the Canadian Charter of Rights and Freedoms, both regarding content and structure: Hugh Corden, a lawyer appointed as a technical expert by the ANC during the negotiations, had co-written a document entitled *A Charter of Social Justice* relying heavily on Canadian law, which he was close to. The Charter was later used as inspiration for the definitive Bill of Rights. 186 For this reason, section 33 (1) a) of the Interim Constitution, already mentioned in regard to the German *Grudgedetz*, also presented similarity to a

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183 Sarkin, 1998:177
184 Davis, 2003:187
185 Ibid
186 Ibid, 186
provision of the Canadian Charter of Rights and Freedoms, in which the limitations to the Bill of rights “(a) shall be permissible only to the extent that it is- (i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality”.

The Constitution of the United States of America influenced the wording of section 25 of the final Constitution, regarding the right to private property, which was enriched by the differentiation between deprivation and expropriation of property, already included in the fifth and fourteenth US amendments. Furthermore, the regulation of the compensation process imposed on the state in the event of expropriation, provided for in section 25 (2) b), was borrowed by section 13 of the Malaysian Constitution.\textsuperscript{187}

\textit{b) The international influence on the interpretation}

Closing the Bill of Rights, section 39, following the example of section 35 of the Interim Constitution\textsuperscript{188}, outlines the provisions for the interpretation of fundamental rights by the courts. Reformulated from its previous version, the section, in its first paragraph, states that

\begin{quote}
“When interpreting the Bill of Rights, a court, tribunal or forum
\begin{itemize}
  \item must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  \item must consider international law; and
  \item may consider foreign law.”\textsuperscript{189}
\end{itemize}
\end{quote}

While the provisions of subparagraph a) match with those stated by paragraph (1) of section 35 of the Interim Constitution, except for the addition of the mention of respect for human dignity, subparagraphs b) and c) of the final text presents significant differences: while, in the previous section 35, the courts were invited “to, where applicable, have regard to public international law applicable to the protection of the rights”\textsuperscript{190}, in the definitive version it’s indicated that the courts “must consider international law”. Therefore, as mentioned, the judges are theoretically deprived of the discretion that section 35 of the Interim Constitution left in the evaluation of the application of the rules of public international law.

\begin{itemize}
\item \textsuperscript{187} Davis, 2003:188
\item \textsuperscript{188} Constitution of the Republic of South Africa, section, section 35 (1) states that “In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.”
\item \textsuperscript{189} Ibid, section 39 (1)
\item \textsuperscript{190} Interim Constitution, section 35 (1)
\end{itemize}
Subparagraph c) of section 39, on the other hand, offered the same possibility of its Interim correspondent in the invitation to the judges to integrate foreign juridical elements in their judgments, modifying, however, its definition of this technique: while section 35 uses the expression “comparable foreign case law”\textsuperscript{191}, which appears to refer mainly to comparable constitutional jurisprudence, section 39 mentions the more generic expression “foreign law”. As a matter of fact, in the practical application of the two sections by the Constitutional Court, this linguistic modification does not seem to have produced any change: the Court links both expressions to judgments of both common and civil law as well as constitutional provisions belonging to both legislative families.\textsuperscript{192}

As mentioned in the historical analysis of the transition, the Constitutional Court was entrusted with a direct power of influence on the constitutional process, being it put in charge of the final evaluation of the fundamental text. From 1995 to 1997, however, the institution indirectly contributed to the democratization process through the interpretation of the Interim Constitution. In this context, the comparative tool, made available to the Court by section 35 (1), was widely put to use: since the notorious inaugural judgment \textit{S v Zuma and Others}\textsuperscript{193} in 1995, the Court often relied on the use of foreign references to overcome the lack of domestic jurisprudence on which the judicial reasoning could have been based, incorporating the comparisons in the main structure of the sentences.\textsuperscript{194}

In the first years of activity of the Court, therefore, the mentions of foreign law included in the judgements were extensive and in-depth and referred to various systems and legislations, more or less compatible with the South African ones, but they were always extremely contextualized in the national legal culture.\textsuperscript{195} The optional nature of the use of the comparison, stated in section 35, was integrated into the judicial methodology, providing the Court with the possibility to evaluate every potential comparable foreign case within the reasoning of the judgement and to dismiss it if it was considered not appropriate for the South African framework. This has often been the case regarding the comparison with the United States’ jurisprudence and legislation, which for various reasons the Court considered too distant from the South African context of application. The Canadian and German jurisprudences, on the other hand, were generally accepted with greater frequency, albeit always well contextualized to highlight the compatibility with the Court's legal reasoning.\textsuperscript{196}

\textsuperscript{191} Interim Constitution, section 35 (1)  
\textsuperscript{192} Rinella, Cardinale, 2019:226  
\textsuperscript{193} \textit{S v Zuma and Others} (CCT5/94) [1995] ZACC 1  
\textsuperscript{194} Rinella, Cardinale, 2019:230  
\textsuperscript{195} Ibid  
\textsuperscript{196} Ibid, 259
In this regard, the elements of the Canadian Charter of Rights and Freedoms and the German Grudgesetz included in both the Interim and the final Constitution strongly influenced the work of the Court: for example, the limitation clause, borrowed from the Canadian system, provided for by section 36 of the Interim Constitution and section 33 of the definitive text, resulted in the adoption by the South African judicial institution of the so-called “two-stages approach”, originally developed by the Canadian Supreme Court to evaluate the use of the very same provision.  

While the strong efforts of the Court to anchor the foreign references within the national historical, political, and social South African framework prove that the interpretation of the fundamental rights wasn't uncritically extrapolated from the work of other courts, the massive use of foreign law in cases like *S v Mawkwanyane and Another*, which represented an important landmark in the democratization process of the state, clearly demonstrates the receptivity of the Court towards the arguments foreign to its own system, even regarding important issues relevant within the constituent process.  

Finally, it's interesting to note how foreign references were explicitly used by the Court to align the South African legal culture to the trend of global constitutionalism. This can be observed in the *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* case of 1998, where a clear sentence of unconstitutionality concerning the criminalization of sodomy was enriched by an overview of the positions on the matter of foreign legal systems. These references were used by the Court to highlight an international trend taking place in Western democracies and to affirm the need to align South African legislation to the international standards, demonstrating the tendency of South African law to self-regulate itself following the other “open and democratic” societies.

197 The “two-stages approach” provides to the Court a strategy to correctly implement the limitation clause by firstly identifying the presence of the limitation of a fundamental rights, and, secondly investigating the legitimacy of said limitation. (Rinella, Cardinale, 2019: 259)

198 One of the most important judgements in the history of South Africa, established the unconstitutionality of the death penalty. (S v Makwanyane and Another (CCT3/94) [1995] ZACC 3)

199 Rinella, Cardinale, 2019: 236

200 National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15

201 National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; [52]

4.4 Summary

This chapter aimed to research within the text of the Bill of Rights the various components of the South African legal culture, both of national and international origin, and to reconstruct the historical dynamics between them which led to the final drafting of the document. The analysis revealed that the liberal component of the South African legal culture not only survived almost intact to the transition but was, also, enriched by the provisions of the neo-liberal international trend. This was mainly due to the universalistic approach championed by the ANC, which aimed to create a unitary, open and democratic state where every individual could enjoy the universally recognized human rights. African customary law, on the other hand, was included in the constitutionally recognized rights through the cultural provisions in section 30-31 but remained subjected to the rest of the text. Finally, further international elements identified in the Bill of Rights are the third generation rights, some constitutional borrowings, particularly from the German and Canadian legislations, and, finally, the peculiar provisions of the interpretation clause.
5. Conclusions

The objective of this thesis was to compare the influences that the national and international components of the South African transitional legal culture had on the drafting of the Bill of Rights. In order to reach this objective, the following research questions were investigated:

1. Entering the transition process in the 1990s, how could the South African legal tradition concerning rights and liberties be defined?
2. What innovations did the post-Cold War era bring to the human rights theory?
3. How were the various components of the South African transitional legal culture reflected in the drafting of the Bill of Rights?

Therefore, in chapter 3, the components of the South African legal culture were firstly investigated. On one hand, it was revealed that the flexibility of the British common law, injected in the Cape colony during the nineteenth century, had allowed the creation of a hybrid legal system, which prevented the disappearance of the main legal perspectives present within the state throughout the colonial dynamics. The African customary law, in particular, survived as an unofficial parallel legal system practised within specific community on the territory. Moreover, during the twentieth century, the use of the liberal ideology to ensure the white dominion on the national territory ensured the survival of these components through the apartheid regime, presenting them, at the dawn of the transition, as the components of the South African legal tradition, in relation to rights and liberties.

On the other hand, the analysis of the international legal system revealed that the end of the Cold War represented a turning point for the human rights theory, which became the centre of the reconstruction of the liberal world. The universality principle allowed for the corpus to be presented as the model language for democratic transition and the only tool to achieve equality and unity within the nation state. The rules of nation-building shifted and human rights became the antithesis of nationalist approaches. Within the theory, the corpus was enlarged through the emergence of third generation rights, which represented a syncretistic union between the decolonized Global South's claims and the liberal Global North tradition, and the phenomenon of globalization, which resulted in an internationalization of the constitutional models.

Finally, to reach the objective of the thesis, in chapter 4, the highlighted elements were searched for in the text of the Bill of Rights, reconstructing the historical dynamics between them, and their influences on the final drafting of the document were compared. The analysis showed how the liberal
component characterize the majority of the Bill, while being, however, declined on the neo-liberal international doctrine: in fact, it can be deducted that the classical liberal tradition was enriched, through the universalistic vision of the ANC, with the post-Cold War human rights theory, aiming to rebalance the South African social components through the principle of equality. The African customary law is recognized within the cultural rights but remains subjected to the neo-liberal universal provisions. Through this meticulously planned legal mosaic, therefore, the South African Constituent Assembly managed to create a historical self-conscious fundamental rights corpus, projected into the future, open, and committed to large-scale social transformation.

As mentioned in the introduction, the Bill of Rights was chosen for this study because it is considered the most important document which came out of the South African nation-building process in the 1990s and, because of that, it can represent the rest of the 1996 Constitution. However, while these conclusions can be applied to most of the text, it has to be noted that several critical issues were resolved within the negotiations following different patterns of reasoning. In particular, the dynamics behind the South African territorial organization and the governmental form of the state would represent interesting cases for a further analysis.
Bibliography


H v Fetal Assessment Centre, 34 (ZACC 2014).


