

The University of the Western Cape



Student: Gcina M Matakane (Mr)

Student Number: 3280643

Degree: MPhil in Constitutional Theory



Research Paper (Mode I)

**Topic: The people shall govern: Constituent power and the South African
Constitution**

Supervisor: Prof J de Ville

A Research Paper submitted in partial fulfillment of the requirements of the MPhil in Constitutional Theory degree in the Faculty of Law, University of the Western Cape.

Plagiarism Declaration:

I, Gcina Matakane, declare that '**The People Shall Govern: Constituent Power and the South African Constitution**' is my own work, that it has not been submitted for any degree or for examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Name: Gcina Matakane

Date: 13 September 2016



Acknowledgements:

The compilation and subsequent submission of this research paper would not have been the effort of one person. First and foremost, I acknowledge the hand of God in the final completion of this study. Additionally, Parliament of South Africa contributed to the successful completion of this study by providing funding through its bursary scheme. I sincerely appreciate and acknowledge Parliament's contribution.

I would like to thank my supervisor, Professor Jacques de Ville, for his patience and scholarly advice towards my research. Without his guidance and unparalleled proficiency in constitutional theory and in research, this research paper could not be possible.

Special thanks and appreciation go to the Dullah Omar Institute of the University of the Western Cape for having provided a conducive research and study environment.

I appreciate and acknowledge the support of my family, my wife Nomgcobo Matakane, my two boys, Zukhanye and Mlibo, and my daughter, Inga. I am hugely indebted to them for their support and understanding when I could not be there for them at times due to studies.

To all the above and others, including my colleagues in Parliament, who might have contributed directly and/or indirectly, I say thank you and may God bless you all.

Dedication:

For Zukile Matakane, alias Zakes Khulu, who paid the ultimate price for the freedom we all enjoy today.

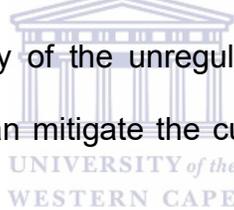


| | |
|---|----|
| 1. INTRODUCTION | 1 |
| 1.1. Background | 1 |
| 1.2. Research problem | 4 |
| 1.3. Research questions | 12 |
| 1.4. Literature survey | 14 |
| 1.5. Section outline | 20 |
| 2. CONSTITUENT POWER AND THE CONSTITUTION | 22 |
| 2.1. Normativism | 23 |
| 2.1.1. The anti-positivist variant | 24 |
| 2.1.2. The positivist variant | 26 |
| 2.2. Decisionism | 30 |
| 2.3. Relationalism | 36 |
| 2.3.1. Relationalism and the pure theory of law | 37 |
| 2.3.2. Relationalism and decisionism | 40 |
| 2.3.3. Assessment | 44 |
| 3. CONSTITUENT POWER AND THE SOUTH AFRICAN CONSTITUTION | 49 |
| 3.1. Legal continuity | 50 |
| 3.2. We the people (shall govern) | 57 |
| 3.3. Pluralism and constituent power | 61 |
| 3.4. Assessment | 65 |
| 4. RE-ESTABLISHING THE PEOPLE AS THE SUBJECT OF CONSTITUENT POWER | 68 |
| 4.1. Constitutionalism and democracy | 68 |
| 4.2. Mechanisms of initiating constituent power and constitutional amendments | 73 |
| 5. CONCLUSION | 76 |



ABSTRACT:

The South African negotiations process, in the true spirit of classical liberalism, emphasised juridical continuity, legality, and gradual political change. But in spite of this and the fact that South Africa's constitution-making process is acclaimed as the most successful negotiated revolution, it is generally recognised that there is incongruity between the promise and hope brought about by South Africa's constitution-making process and the political and social crises that ensued after the advent of constitutional democracy in the country. I argue in this analysis that the South African constitutional discourse must undergo a fundamental shift by abandoning the normative regulation of the constituent power of the people in order to allow for the people to truly govern. The acknowledgement of the possibility of the unregulated exercise of constituent power through people-driven initiatives can mitigate the current malaise facing South Africa's constitutional democracy.



Key words: Constituent power, constituted power, South African Constitution, constitution-making, relationalism, liberalism, normativism, decisionism, pluralism, constitutional democracy.

1. INTRODUCTION

1.1. Background

The pinnacle of the struggle for a democratic South Africa was the negotiations process that was initiated in 1985, through sometimes unpublicised discussions between representatives of the National Party government and its agencies, business elites, academics and individuals, Nelson Mandela who was still in prison at that time, and other leading African National Congress (ANC) figures abroad.¹ These negotiations culminated in 1990 in the unbanning of political organisations such as the ANC, the Pan-Africanist Congress (PAC) and the Azanian People's Organisation (AZAPO), amongst others, which had been waging a resilient struggle against apartheid. Apartheid was a system of government that was institutionalised by the then governing National Party in 1948, which sought to discriminate against and exploit the black and other non-white South African population groups. The unbanning of political organisations was closely followed in 1991 by the official commencement of negotiations for a constitutional democracy through a process that came to be known as the Convention for a Democratic South Africa (CODESA) at the World Trade Centre, Kempton Park. After the collapse of CODESA 1 and CODESA 2, a Multi-Party Negotiation Process (MPNP) was initiated by the ANC and the National Party to pursue the issues that CODESA had failed to resolve.² After a long history of racial oppression and economic exploitation, the negotiations process heralded

¹ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 47.

See also Maharaj M 'The ANC and South Africa's Negotiated Transition to Democracy and Peace. (2008) *Berghof Transitions Series* No. 2 18.

² See <http://www.sahistory.org.za/codesa-negotiations> (accessed on 11 August 2014)

an era of hope and promise, particularly for the majority black South African population. This was the case because the establishment of a constitutional democracy in South Africa, as it is the case in many countries,³ was associated with the redistribution of wealth and social transformation. For the majority oppressed people of South Africa, the negotiations process also marked both the beginning of the end of minority rule and the beginning of an era where the people would govern.

The South African constitutional democracy that emanated from the negotiations process is regarded by some as the best example of a negotiated revolution,⁴ as opposed to populist-democratic revolutions (or the unilateral sovereign constitution-making process)⁵ which have 'an elective affinity for dictatorship so obviously precarious for constitutional democracy.'⁶ Negotiated revolutions are generally a result of the post-sovereign constitution-making model which has been employed in several countries with varying degrees of success, only to be 'perfected in South Africa in the 1990s'.⁷ The post-sovereign constitution-making model is the constitution-making process whereby constituent power is not embodied in a single organ or instance with the plenitude of power, but all organs participating in constitutional politics are brought under legal rules,

³ Oklopcic Z 'Three arenas of struggle: A contextual approach to the constituent power of 'the people' *Global Constitutionalism* (2014) 215.

⁴ Arato A 'Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?' (2010) 26(1) *SAJHR* 20.

⁵ Van der Walt J 'Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities' (2010) 26(1) *SAJHR* 114.

⁶ Arato A 'Multi-track constitutionalism beyond Carl Schmitt' (2011) Volume 18(3) *Constellations* 324.

⁷ Arato A 'Multi-track constitutionalism beyond Carl Schmitt' (2011) Volume 18(3) *Constellations* 324.

wherein the constitutional court plays a significant role in ensuring adherence to legal principles.⁸

In a nutshell, the negotiations and constitution-writing process in South Africa entailed the following: a complete transitional constitution (the interim Constitution of South Africa, 1993)⁹ was to be drafted by negotiation prior to the 1994 general elections; the interim Constitution was to replace the principles of the Westminster system (parliamentary supremacy) with those of a constitutional state; the replacement of the interim Constitution by a new text (the South African Constitution)¹⁰ within the framework of the Constitutional Principles agreed to prior to its coming into operation; and judicial certification by the Constitutional Court that the new text conformed to the Constitutional Principles.¹¹ On the basis of this process, it is claimed by some that the South African negotiations process owes its success to the interruption and fragmentation of the sovereignty of the people¹² and bringing all organs participating in constitutional politics under legal rules.¹³

According to Schmitt's theory of democracy, constituent power, the subject of which is the concretely present people, 'is capable of making the concrete, comprehensive decision over the type and form of its own political existence.'¹⁴ In South Africa during the

⁸ Arato A 'Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?' (2010) 26 *SAJHR* 19.

⁹ Constitution of the Republic of South Africa, Act 200 of 1993 (henceforth the interim Constitution).

¹⁰ The Constitution of the Republic of South Africa, Act 108 of 1996.

¹¹ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 53-54.

¹² Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26(1) *SAJHR* 78.

¹³ Arato A 'Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?' (2010) 26(1) *SAJHR* 19.

¹⁴ Schmitt C *Constitutional Theory* (2008) 125.

founding of the new order that replaced the apartheid order, constituent power, the people's act of will, was absorbed and regulated within existing constitutional forms (constituted power) in the form of the apartheid-era tricameral parliament and the Constitutional Court. In other words, the legal regulation or containment of the people's act of will played a key role in ushering in the constitutional order in South Africa. In fact, legal regulation of the exercise of the constituent power of the people continues to be pivotal in South African constitutional discourse. However, the question of priority or the tension between constituent power and the law is a highly contentious philosophical debate in the field of constitutional theory. I will explore this important debate in Section 2 of the analysis undertaken here.



1.2. Research problem

As hinted at above, the South African negotiations process, in the true spirit of classical liberalism, emphasised juridical continuity, legality, and gradual political change. But in spite of this and the fact that South Africa's constitution-making process is acclaimed as the most successful negotiated revolution, it is generally recognised that there is '[a] gap between the promise of South Africa's constitution-making process and what is described as the 'political and social crises that developed in its wake'.¹⁵ Put differently, there is a contradiction between the 'constitutional wonder of 1994'¹⁶ and the challenges and

¹⁵ Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26(1) *SAJHR* 66. See also Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 45.

¹⁶ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 63.

persistent attacks faced by the South African constitutional democracy and constitutional institutions. On the social front, the promise of a change for the better in the quality of lives of the historically disadvantaged and marginalised black majority of the South African polity is still not realised.

Likewise, the incidence of unprocedural strikes accompanied by high levels of violence, particularly in the platinum mines of South Africa, compound the perceived threat faced by South Africa's constitutional democracy. These incidents of violence and illegal gatherings, as epitomised by the Marikana massacre,¹⁷ can be seen as a revolt stemming from the perceived absence of economic transformation under South Africa's liberal constitutional regime. Those 'who remain excluded from the small circle of benefits generated by [the] quasifeudal 'capitalist' economy'¹⁸ seem to have lost faith that the Constitution and constitutional institutions will change their plight to a better life and they engage in rebellious activities. Furthermore, the illegal land occupations that were seen as early as the 1990s,¹⁹ including the recent ones, for example, in Lwandle and Philippi in the Western Cape province, can be seen as a revolt against 'the property clause'²⁰ enshrined in the Constitution.

Some define the incidents of violent protests and land grabs as sporadic eruptions of mere criminality. However, the emergence of a new political formation, the Economic

¹⁷ This refers to the killings related to the protracted platinum mines' strike led by the Association of Mineworkers and Construction Union, which left close to a total of 100 people dead and about 40 miners killed at the hands of police on 16 August 2012.

¹⁸ Van der Walt J 'Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities' (2010) 26(1) *SAJHR* 106.

¹⁹ Ntsebeza L 'Land redistribution in South Africa: the property clause revisited in Ntsebeza L & Hall R *The Land Question in South Africa* (2007) 116.

²⁰ Section 25 of the Constitution of the Republic of South Africa, 1996.

Freedom Fighters (EFF), in the South African political landscape, which managed to gain 26 seats in the National Assembly, indicates that that view is not entirely accurate. The support gained by the EFF can be ascribed to its employment of a non-normative or anti-liberal rhetoric directed towards South Africa's liberal constitutionalism that continues, in its view, to subject the people to maladies like landlessness, unemployment and economic exploitation of the working class. Furthermore, the EFF's rejection of the property clause by calling for the appropriation of land without compensation²¹ seems to resonate with the sentiments of the historically disadvantaged majority of the South African polity.²² These developments bring the liberal normativist thinking that informed the crafting of the Constitution into question. For the purpose of clarity, liberal normativism refers here to the school of thought that avoids reference to the concept of constituent power and the political conditions under which constitutional authority is established.



Indeed, the misgivings about the constitution-making process, the Constitution and constitutional institutions appear to be gaining ground in South Africa. In fact, Venter hints that there is an 'absence of a national belief in constitutionalism as a mechanism by means of which the challenges facing the country may be met.'²³ He points out that 'the constitutional wonder of 1994 may [be] ... in the process of being shattered by the lack of

²¹ The EFF's rejection of the property clause is captured in its document titled EFF First People's Assembly Resolutions as follows: Expropriation of South Africa's land without compensation for equal redistribution in use is the first pillar of EFF's non-negotiable seven cardinal pillars. See under 'Documents' in <http://efffighters.org.za/index.php/> (Accessed on 31 January 2016).

²² During the second quarter of 2015 the people responded by illegally occupying land in various areas of the country. See for example <http://citizen.co.za/366650/illegal-occupation-of-land-ongoing/> and <http://www.bdlive.co.za/national/2015/04/07/premier-warns-against-illegal-land-occupation-in-gauteng> (Accessed on 9 January 2016).

²³ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 63.

belief in the merits of the [[liberal] foundations upon which the Constitution is built.’²⁴ These observations are instructive, particularly in light of Arato’s assertion that ‘each political community should determine its own constitution contextually, according to its own [social] needs ... and political aspirations.’²⁵ This means that the foundations of a constitution, as a close reading of Venter’s observation also reveals, are equally important insofar as determining whether the Constitution was crafted according to the will of the people. In other words, the foundation of the constitution is important in determining whether the people are governing in a particular regime.

I must, however, point out here that the reference to the observations of Van der Walt, Venter and Arato does not necessarily mean that I concur with their thinking with regard to the concept of constituent power, the Constitution and South Africa’s constitution-making process. For example, I don’t align myself with Arato’s advocacy of the premium role and the important parts played by courts during the constitution-making process.²⁶ My submission is that the advocacy of this feature of the post-sovereign constitution-making model was, as we shall see, at the expense of the political unity of the people as the subject of constituent power. The observations which I just referred to are nonetheless very instructive. What I will do here is to evaluate these observations in the milieu of Schmitt and Colon-Rios’ non-normative thinking of constituent power (or the constitution-making power) and the constitution. I posit as the root cause of the problems faced by South Africa’s constitutional democracy the normativist and liberal foundation of the

²⁴ Venter F ‘Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation’ (2010) 26(1) *SAJHR* 63.

²⁵ Arato A ‘Multi-track constitutionalism beyond Carl Schmitt’ (2011) Volume 18(3) *Constellations* 324.

²⁶ Arato A ‘Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?’ (2010) 26(1) *SAJHR* 44.

Constitution, which initiated the restrictive normative regulation of constituent power and, therefore, the exercise of the political will of the people.

Prempeh instructively argues that '[t]he democratic and liberal openings in Africa will continue to require consistent and persistent nurturing, correction and progressive reform.'²⁷ He further points out that '[t]he inevitable need for additional reform, once the transition has "settled," should, in fact, counsel against the writing of *rigid* constitutions during *fluid* moments of democratic transition [and political eruptions].'²⁸ Noteworthy also is the fact that in *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (henceforth *Weak Constitutionalism*), Colon-Rios makes the same instructive assertions. He, for example, asserts that democracy at the level of fundamental laws is against the objective of fixing in place a constitutional regime with a perpetual constitution, that is, a constitutional regime that hinders both the democratic exercise of constituent power by the people and the popular participation of the people in the constitution and *re-constitution* of the polity.²⁹ In other words, Colon-Rios argues, 'a constitutional regime *should* have a democratic pedigree and ... it *must* not close the door to the future re-emergence of constituent power.'³⁰

Cognisant of the observations of Prempeh and Colon-Rios, which I just referred to, and the fact that South Africa emerged from an acrimonious epoch characterised by

²⁷ Prempeh H K "Africa's "constitutionalism revival": False start or new dawn?' (2007) 5 *Int J of Constitutional Law* 506.

²⁸ Prempeh H K "Africa's "constitutionalism revival": False start or new dawn?' (2007) 5 *Int J of Constitutional Law* 506. (Emphasis in the original).

²⁹ Colon-Rios J Chapter 1 - *Weak constitutionalism: Democratic legitimacy and the Question of Constituent Power Victoria University of Wellington Legal Research Papers* (2012) 6.

³⁰ Colon-Rios J Chapter 1 - *Weak constitutionalism: Democratic legitimacy and the Question of Constituent Power Victoria University of Wellington Legal Research Papers* (2012) 11.

violence, abject poverty and loss of life, a revolution is not an attractive option to consider in an endeavour to initiate and strengthen the democratic exercise of constituent power by the people. The most viable approach in trying to solve the problems and challenges faced by South Africa's constitutional democracy is a non-normative approach to the Constitution and constitutionalism. A non-normative approach to the Constitution and constitutionalism is an approach that is in line with Schmitt and Colon-Rios' thinking of democracy. As we shall see in Section 2, Schmitt's arguments in respect of constituent power and the constitution reveal that the founding of a constitution is not a normative exercise but the manifestation of the will of the people. In the same vein, Colon-Rios emphasises that it is equally important for constitutional regimes to pay attention to 'the second dimension of democracy [which] is not about the daily workings of the state's political apparatus, but about the relation of citizens to their constitution.'³¹ According to Colon-Rios, the second dimension of democracy 'looks at how a constitutional regime came into existence and how it can be altered.'³² In fact, a close reading of Colon-Rios' *Weak Constitutionalism* reveals that even though the problems faced by South Africa's constitutional democracy manifest at the level of daily governance, they originate and relate to democracy at the level of fundamental laws, that is, to the manner in which the Constitution was crafted. This will be the context of my argument in Section 1.4 when I outline scholarly contributions to reflections on South Africa's constitution-making process and the resultant constitutional democracy. The arguments I will put forward in

³¹ Colon-Rios J Chapter 1 - Weak constitutionalism: Democratic legitimacy and the Question of Constituent Power *Victoria University of Wellington Legal Research Papers* (2012) 6.

³² Colon-Rios J Chapter 1 - Weak constitutionalism: Democratic legitimacy and the Question of Constituent Power *Victoria University of Wellington Legal Research Papers* (2012) 6.

Section 1.4 will be carried through to Section 3 where I will discuss how the question of constituent power was handled in South Africa during the constitution-making process.

The non-normative approach to the Constitution and constitutionalism entails the creation of an opening for popular democratic initiatives by the people, which are currently obscured by the notion of constitutionally regulated public participation initiatives. The advantage of popular democratic initiatives as compared to the constitutionally regulated public participation initiatives stems from the fact that the latter comprise of a top-down approach, in the sense that the national legislatures (the National Assembly and the National Council of Provinces) and provincial legislatures are compelled by the Constitution to engage in public participation processes.³³ It is also argued by some that public participation initiatives sanctioned by the legislatures and the executive encounter numerous problems and do not necessarily realise their fundamental objective, i.e., governance by the people. For example, Buccus and Hicks argue that 'citizen participation is often reduced to participation by the elite, organised civil society, in the form of predominantly non-governmental organisations (NGOs), business and other interest groups with access to resources.'³⁴ I am not, however, arguing that public participation processes are not an important feature of democracy or that they should be discontinued. In view of the observation by Buccus and Hicks, and in line with Colon-Rios' thinking, I argue instead that more space must be accorded to popular democratic

³³ Sections 59, 72 and 118 of the Constitution stipulate that the national legislatures and provincial legislature must facilitate public involvement in their legislative and other processes.

³⁴ Hicks J and Buccus I 'Crafting new democratic spaces: participatory policy-making in KwaZulu-Natal, South Africa' (2007) *Project Muse Scholarly Journals Online* 97.

initiatives, outside the confines of the Constitution and government institutions, to ensure the democratic exercise of constituent power by the people.

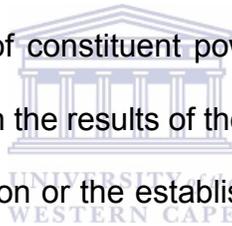
Popular democratic initiatives are people-driven initiatives such as the collection of signatures, referendums (not government-initiated, but those that result from the collection of signatures), izimbizos³⁵ and Constituent Assemblies. The number and frequency of the people-driven democratic initiatives cannot be limited and is dependent on political circumstances which the people must decide upon. The South African constitutional democracy and constitutional discourse must provide a conducive environment for the people to be able to initiate the mooted processes themselves and in their own way, to address fundamental issues such as constitutional transformation. It is in this way, to use Colon-Rios' turn of phrase, that constitutions can claim to enjoy democratic legitimacy, that they can be considered the creation of the people, their work-in-progress, because they cannot only be changed and interpreted by those occupying positions of power.³⁶

The notion of Constituent Assemblies in this context needs to be clarified. Constituent Assemblies mooted here are, as Colon-Rios instructively observes, '[assemblies] which will be convened 'from below', *triggered at the initiative of the citizenry* [through the collection of signatures and calling of referendums] as opposed to [a Constituent Assembly initiated by key role players during the founding of a constitution after a regime

³⁵ Government-initiated izimbizos focus on policy and daily governance matters, see Hicks J and Buccus I 'Crafting new democratic spaces: participatory policy-making in KwaZulu-Natal, South Africa' (2007) *Project Muse Scholarly Journals Online* 103. The izimbizos mooted here will be constituent assemblies that are initiated by the people and are precursors to the major constitution-making Constituent Assembly.

³⁶ Colon-Rios J Chapter 1 - Weak constitutionalism: Democratic legitimacy and the Question of Constituent Power *Victoria University of Wellington Legal Research Papers* (2012) 1.

change or that which is initiated by] the legislature.³⁷ It is important to note that Colon-Rios does not confine the role of a Constituent Assembly only to the initial constitution-making episode that follows a regime change. He points out that a Constituent Assembly ‘may facilitate the exercise of constituent power when [an existing] constitution is to be transformed in important ways.’³⁸ He further maintains that a Constituent Assembly is a ‘mechanism [that] is about recognising a power superior to the constitution [i.e. the constituent power of the people] and giving citizens, acting outside the ordinary institutions of government, the institutional means for exercising it.’³⁹ Therefore, the non-normative approach to the Constitution and constitutionalism mooted here, as it will be shown in Section 4, aims at the birth of a form of democratic constitutionalism that will enable a non-normative exercise of constituent power by the people. This democratic constitutionalism can, depending on the results of the popular democratic initiatives, lead to the amendment of the Constitution or the establishment of a new Constitution by the people themselves.



1.3. Research questions

The Constitution explicitly recognises that the authority of government rests on the will and consent of the people, hence the declaration ‘We, the people of South Africa’ in its preamble. Thus, the most important feature of the post-apartheid state seems to be the acknowledgement that the authority of the state and its continued existence depend on

³⁷ Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012) 161.

³⁸ Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012) 153.

³⁹ Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012) 161.

the constituent power and will of the people. However, can we claim that, in a truly democratic and non-normative sense, the people are governing in South Africa? In other words, is the democratic will of the people, as the subject of constituent power, the sovereign or the determining factor in South Africa's constitutional democracy? Informed by Schmitt and Colon-Rios' thinking of the constitution and democracy, my answer to this question is, as will be shown in the discussion that follows, in the negative. The next question is how the constituent power of the people can be recognised, both in practice and in constitutional discourse.

To answer the question of whether the people are truly governing in South Africa, that is, whether the will of the people is sovereign in South Africa's constitutional democracy, we need to look first at how the Constitution was crafted. Secondly, we need to look at possible ways that can mitigate the faultlines of the constitution-making process and, therefore, the challenges and maladies faced by South Africa's constitutional democracy. It is my contention that a number of factors, as we shall see in Sections 2 and 3, militated against the crafting of the Constitution entirely according to the political will of the people, and place stumbling blocks in the way of the recognition of this power.

As hinted at above, it is my contention that: (1) the persistent attack faced by South Africa's constitutional democracy which originates from the diminishing hope in constitutionalism; (2) the illegal land occupations which signal the rejection of the property clause; and (3) the lack of change for the better of the socioeconomic conditions of the historically disadvantaged majority of the South African polity, underscore the need to strengthen both the foundation and the exercise of democratic constitutionalism in the South African context. This can only be addressed by a non-normative approach to the

Constitution and constitutionalism. In other words, the South African constitutional discourse, as Colon-Rios instructively concludes with regard to democratic constitutions, 'must provide the means for constituent power to reappear ... and, if needed, *to put the entire institutional arrangement into question.*'⁴⁰

1.4. Literature survey

Instructive studies have been proffered by constitutional theory scholars on the issue of constituent power in relation to South Africa's constitution-making process, the Constitution and current socioeconomic maladies. Perhaps the most notable among such studies are the ones that emanated from 'the project [that] was designed by the formulation by Johan van der Walt of two pairs of inter-related questions linking political and constitutional theory.'⁴¹ The project sought to establish whether there was a connection between the current socio-political malaise and the constitution-writing process. It is my submission that the valuable observations made by the various authors in that project reveal not only that the Constitution was not determined entirely according to the political will of the people, but also that constitutional discourse in South Africa does not allow for this will to emerge.

Arato is undoubtedly one of the prominent scholars who have made valuable contributions to reflections on South Africa's constitution-making process and

⁴⁰ Colon-Rios J Chapter 1 - 'Weak constitutionalism: Democratic legitimacy and the Question of Constituent Power' *Victoria University of Wellington Legal Research Papers* (2012) 9. (My emphasis).

⁴¹ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 45.

constitutional democracy. In fact, Arato asserts that he has 'often referred to, and ... reconstructed, the South African constitution-making process as an exemplary implementation of the model of *post-sovereign constitution-making* [which he has] been developing in [his] work in recent years from a comparative theoretical, but also deeply politically committed, perspective.'⁴² In line with this assertion, in 'Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?' Arato reflects on how the South African post-sovereign constitution-making process, in contrast to the Hungarian process, was successful because it perfected all the stages of the post-sovereign constitution-making model.

What is of significance to the question that we are seized with here is that the perfection of the process by South Africa entails, first, allowing the Constitutional Court a prominent role to police not only the procedural but also the substantive requirements of the constitution-making process and the Constitution itself, as stipulated by the Constitutional Principles that were contained in the Interim Constitution.⁴³ Arato points out that '[t]he initial refusal of the South African Constitutional Court to certify (thus invalidating in effect) the final Constitution was extraordinary in this regard, but in line with the basic logic of the method.'⁴⁴ Arato then attributes, albeit noncommittally, the failure of the Hungarian constitution-making process to the lack of this essential element, that is, the significant role of an effective constitutional court. Secondly, the success entails South Africa's success in avoiding sovereign constitution-making that puts emphasis on the

⁴² Arato A 'What I have learned: Concluding remarks' (2010) 26(1) *SAJHR* 129. (Emphasis in the original)

⁴³ Arato A 'Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?' (2010) 26(1) *SAJHR* 21.

⁴⁴ Arato A 'Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?' (2010) 26(1) *SAJHR* 21.

notion of the sovereignty of the will of the people. In fact, Arato states categorically that ‘the post sovereign constitution-making process of the post-sovereign model envisages no instance that can claim to represent in the absolute sense the sovereign will of the people.’⁴⁵ He claims that according to the post-sovereign constitution-making process, the people can only be present ‘in a plural, complex *and always limited way*.’⁴⁶

In ‘Instituting public freedom or extinguishing constituent power? Reflections on South Africa’s constitution-making experiment’ Botha interrogates two major arguments or interpretations that are proffered with regard to the relation between the constitution-making process and the current socio-political maladies that are facing South Africa’s constitutional democracy. Botha points out that the first argument is critical of South Africa’s constitution-making process. He claims that what is key about the first argument is the view that the ‘fragmentation of popular sovereignty and its reduction of constituent to constituted power have ... come back to haunt South Africa’s constitutional democracy.’⁴⁷ To be sure, as Van der Walt also points out, the first argument regards the South African constitution-making process as a failure.⁴⁸ Botha then points out that ‘[t]he second [argument], by contrast, holds that public freedom was instituted precisely by splintering sovereignty, by undermining the supposed unity and identity of ‘the people’,

⁴⁵ Arato A ‘Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?’ (2010) 26(1) *SAJHR* 23.

⁴⁶ Arato A ‘Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?’ (2010) 26(1) *SAJHR* 23. (My emphasis).

⁴⁷ Botha H ‘Instituting public freedom or extinguishing constituent power? Reflections on South Africa’s constitution-making experiment’ (2010) 26(1) *SAJHR* 66.

⁴⁸ Van der Walt J ‘Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities’ (2010) 26(1) *SAJHR* 103.

by affirming plurality, and by subjecting all power (including the power of the Constitutional Assembly) to the demand for justification.⁴⁹

It is important to note that the second argument that Botha refers to is the antithesis of what the analysis undertaken here argues for, particularly with regard to the sovereignty of the people. According to this argument, the assumption of collective selfhood or the notion of the people who could undertake the sovereign exercise of constituent power is problematic in the South African context.⁵⁰ According to this argument, the South African constitution-making process, by allowing the supposed self-presence and sovereignty of the people to be interrupted and challenged, placed indeterminacy, plurality and questionability at the very heart of the new polity.⁵¹ I will return to this argument in Section 3, particularly in respect of the notion of pluralism *vis-à-vis* the political unity of the people.



Furthermore, it is worthwhile to consider the crosscutting analysis proffered by Van der Walt in 'Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities'. Fundamentally, Van der Walt's argument is aligned to the arguments of Arato in terms of being an 'articulation of the essential "plurality of the political" and "plurality of constitutionalism" that the renunciation of apartheid must take as its regulative ideal.'⁵² In other words, Van der Walt advocates a pluralistic thinking of

⁴⁹ Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26(1) *SAJHR* 73.

⁵⁰ Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26(1) *SAJHR* 75.

⁵¹ Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26(1) *SAJHR* 78.

⁵² Van der Walt J 'Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities' (2010) 26(1) *SAJHR* 104.

the political and constitutionalism, as opposed to the sovereignty of the people as the subject of constituent power. This is evident in at least two arguments that Van der Walt advances.

First, Van der Walt argues that pluralism also entails ‘accepting and living with irreducible differences between the people that are *united by a system of law*.’⁵³ Of significance to the analysis undertaken here is that this is the antithesis, as Van der Walt himself refers to it, of ‘Schmitt’s understanding of the political in terms of the *unity of sovereignty*.’⁵⁴ Secondly, Van der Walt’s support of the post-sovereign constitution-making model is premised on his observation that the model is influenced by Arendt’s dualistic understanding of the constitution-making process, ‘in terms of which the process “always” remains “under law” ... and ... constitutes no complete revolutionary rupture with the past, ... thus endors[ing] a dualism of constitutional continuity and legislative change.’⁵⁵ According to Van der Walt, dualism relates to the fact that the South African constitution-making process ‘constitutes no complete revolutionary rupture with the past, despite the fundamentally new constitutional order that the process creates and inaugurates.’⁵⁶ I will discuss further the notion of dualism in Section 3 when I deal with the notion of constitutional continuity. I will show that constitutional continuity or dualism in the South African context was a normative fiction perpetuated to limit the democratic

⁵³ Van der Walt J ‘Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities’ (2010) 26(1) *SAJHR* 115.

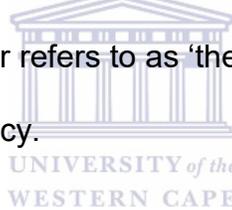
⁵⁴ Van der Walt J ‘Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities’ (2010) 26(1) *SAJHR* 112.

⁵⁵ Van der Walt J ‘Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities’ (2010) 26(1) *SAJHR* 111.

⁵⁶ Van der Walt J ‘Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities’ (2010) 26(1) *SAJHR* 111.

concept of the sovereignty of the will of the people and to safeguard the interests of monopoly capital.

Another scholar who makes important observations about the current socio-political maladies in relation to South Africa's constitution-making process is Venter in his article 'Liberal democracy: The unintended consequence. South African constitution-writing propelled by the winds of globalisation.' In this article, Venter makes a very informative analysis of the question whether the apparent deterioration of South African constitutionalism is to be ascribed to the manner in which the Constitution was written.⁵⁷ One of the fundamental issues that Venter regards as crucial in such an analysis is the attitude of the main role-players in the constitution-writing process, the NP and the ANC, which had a bearing on what Venter refers to as 'the unlikely conversion' of South Africa into a liberal constitutional democracy.



There are at least two issues in Venter's analysis which are of significance to the analysis undertaken here. First, a close reading of Venter's account hints at the connection between the need on the part of the National Party government to safeguard the interests of the minority white South African population⁵⁸ and the Record of Understanding which laid the foundation for the legally binding Constitutional Principles. According to Venter, the negotiations process and constitution-making process actually proceeded after the deadlock of CODESA 1 according to the recommendations of the

⁵⁷ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 45.

⁵⁸ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 52.

National Party government.⁵⁹ These recommendations, which in essence are the characteristic tenets of the post-sovereign constitution-making model, resulted in 'CODESA ... and Parliament as constituted at the time, jointly exercis[ing] the *pouvoir constituant*.'⁶⁰ Secondly, Venter's account reflects on the influence of global liberal constitutionalism that was predominant in the 20th century on South Africa's constitution-making process.⁶¹ In fact, Venter claims that the Constitutional Principles 'represented the epitome of late 20th century constitutionalism in the liberal democratic mode.'⁶²

Thus, the influence of global liberal constitutionalism on South Africa's transition to a constitutional democracy cannot be gainsaid. And my contention is that there is a fundamental link between global liberal constitutionalism and Kelsen's legal positivism (normativism). In fact, the South African constitution-making process demonstrated the fundamental hallmark of legal positivism, namely the emphasis on the priority of law (normative or legal regulation) as opposed to the emphasis on the priority of the constituent power of the people in the form of, for example, a sovereign Constituent Assembly. This link will become clear when I flesh out in the following section (as hinted at above) the philosophical debate about the question of priority or the tension between constituent power and the law (or the constitution).

⁵⁹ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 53.

⁶⁰ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 53-54.

⁶¹ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 55.

⁶² Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 55.

1.5. Section outline

The structure of the analysis undertaken here is as follows: Section 2 will outline further the background to the tension between the concept of constituent power and the constitution (or law) in constitutional discourse. I will elucidate the salient philosophical arguments that pertain to this tension, thereby highlighting the influence of normativism on South Africa's constitutional discourse. The influence that normativism has over South Africa's constitutional discourse is with regard to the concept of the basic norm and the emphasis on the priority of law. The milieu of the discussion of the influence of normativism on South Africa's constitutional discourse will be the three schools of thought, namely decisionism (Schmitt), normativism (Kelsen) and relationalism (Lindahl).

In Section 3 I will explore how the question of the concept of constituent power has been dealt with in South Africa. The aim in this section is to evaluate whether, in a truly democratic and non-normativist sense, the South African constitution-making process did ensure that the Constitution was determined contextually, that is, whether the foundation was properly laid to ensure that the people shall govern. I will do this by discussing the notion of constitutional continuity, pluralism and the concept of the people.

Section 4 will focus on how to re-establish a meaningful role of the people as the subject of constituent power in a truly non-normative and democratic sense. This section will highlight the tension between rigid constitutionalism and democracy as explicated by Colon-Rios. The discussion in this section will show how Colon-Rios' concept of democracy at the level of fundamental laws is more relevant in the South African context, particularly with regard to ensuring that the people are governing. This section will also

flesh out the notion of people-driven (democratic) initiatives in South Africa. Section 5 will conclude with a summary of the salient arguments that are proffered in the analysis undertaken here.

2. CONSTITUENT POWER AND THE CONSTITUTION

Let me now turn to the debate pertaining to the tension between the concept of constituent power and the constitution. It is acknowledged by some that at the heart of the modern conceptualisation of the dilemma of constituent power and the constitution is the Schmitt-Kelsen debate.⁶³ It is my submission that Kelsen's arguments in this debate resonate with the dominant arguments in the South African constitutional discourse, both during the constitution-making process and currently. Fundamentally, in this debate Kelsen advocates the pure theory of law and the notion of the constitution as a norm of norms deriving from the basic norm. Schmitt, on the other hand, advocates the concept of a concretely present people as a political unity,⁶⁴ 'whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence.'⁶⁵ On this basis, the debate is characterised by constitutional theory scholars as a debate between decisionism and normativism.

In grappling with this debate, constitutional theory scholars posit various arguments and concepts to show their agreement or disagreement with either Schmitt or Kelsen or

⁶³ See, for example, Lindahl H 'Acquiring a community: The *Acquis* and the Institution of European Legal Order' (2003) *The European Law Journal* 9 (4).

⁶⁴ Schmitt C *Constitutional Theory* (2008) 255.

⁶⁵ Schmitt C *Constitutional Theory* (2008) 125.

both. Arguing in favour of a decisionist approach to the Constitution, I will also reflect on what other constitutional theory scholars (for example, Loughlin, Dyzenhaus and Lindahl) have written about the arguments of the two authors. The aim is to highlight the basis why, as a result of the influence of normativism (and global liberal constitutionalism), it is difficult to claim that the people are able to freely and democratically exercise their constituent power in the South African constitutional discourse. I submit that it is only when the Constitution is determined as the decision of the people that we can say the people are governing in a truly democratic sense.

2.1. Normativism

In his article, 'The concept of constituent power', Loughlin identifies two variants of normativism, namely the anti-positivist variant and the positivist variant. Loughlin points out that the positivist variant of normativism 'either assumes the existence of a sovereign or else a concept of law as a system of norms authorized by some founding norm whose authority is pre-supposed.'⁶⁶ He claims that the anti-positivist variant, on the other hand, 'focuses on the moral evolution of legality as a social practice but avoids saying anything about the political conditions under which constitutional authority is established.'⁶⁷ According to Loughlin, the central thesis of the two variants of normativism is that constituent power either belongs to the world of myth (the positivist variant)⁶⁸ or is

⁶⁶ Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 223.

⁶⁷ Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 223.

⁶⁸ Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 222.

redundant (the anti-positivist variant).⁶⁹ Let us first consider the anti-positivist variant of normativism.

2.1.1. The anti-positivist variant

Loughlin claims that the anti-positivist school of thought maintains that ‘legality is a moral practice of subjecting official conduct to the governance of principles and values that make up an ideal [normativist] vision of law.’⁷⁰ He argues that the anti-positivist variant of normativism conceives law ‘as an overarching structure of principles [that governs and regulates] all forms of human conduct ... and the acquisition and generation of political power is regarded as intrinsically moral rather than political.’⁷¹ According to the anti-positivist variant of normativism, political power rests not on the constituent power of the people but on ‘a morality of law which promotes certain (intrinsically good) legal values.’⁷² Theorists of the anti-positivist variant of normativism, therefore, reject the concept of a decision by the people which is presented as the ultimate authority of a legal–constitutional order because, they argue, ‘this yields a distorted image of the authority of ‘government under law’.’⁷³

⁶⁹ Loughlin M ‘The concept of constituent power’ (2013) *European Journal of Political Theory* 222.

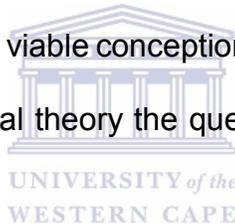
⁷⁰ Loughlin M ‘The concept of constituent power’ (2013) *European Journal of Political Theory* 223.

⁷¹ Loughlin M ‘The concept of constituent power’ (2013) *European Journal of Political Theory* 223.

⁷² Loughlin M ‘The concept of constituent power’ (2013) *European Journal of Political Theory* 223.

⁷³ Loughlin M ‘The concept of constituent power’ (2013) *European Journal of Political Theory* 222.

Dyzenhaus is one of the proponents of the anti-positivist school of thought.⁷⁴ For Dyzenhaus, 'law's authority [is founded] on the intrinsic [good] qualities of legal order.'⁷⁵ Dyzenhaus emphasises that it is the intrinsically good legal values that afford the law its authority. He further claims that the 'qualities and authority [of law] are moral as well as legal, and thus explain why law's claim to authority is justified.'⁷⁶ In this context, Loughlin instructively observes that, according to Dyzenhaus, 'legality is basic in a way that "constitution", let alone constituent power, is not.'⁷⁷ In fact, Dyzenhaus claims that the normative legal theory which he outlines in his article 'The Question of Constituent Power' is basically about 'showing how legal order and law itself are best understood from the inside, from a participant perspective that argues that legal order has intrinsic qualities that help to sustain an attractive and viable conception of political community.'⁷⁸ He claims that according to the normative legal theory the question of constituent power does not arise.⁷⁹



The thinking of the priority of law's authority, particularly the thinking of law's intrinsically good values, can be seen as having had an influence on the South African constitution-making process. It is my submission that this thinking lies at the basis of the declaration in the founding provisions of the Constitution that the South African state is founded, amongst other values, on the supremacy of the constitution and the rule of law.

⁷⁴ Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 222.

⁷⁵ Dyzenhaus D 'Constitutionalism in an old key: Legality and constituent power' (2012) Vol. 1, (2) *Global Constitutionalism* 233.

⁷⁶ Dyzenhaus D 'Constitutionalism in an old key: Legality and constituent power' (2012) Vol. 1, (2) *Global Constitutionalism* 233.

⁷⁷ Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 222.

⁷⁸ Dyzenhaus D 'Constitutionalism in an old key: Legality and constituent power' (2012) Vol. 1, (2) *Global Constitutionalism* 233.

⁷⁹ Dyzenhaus D 'Constitutionalism in an old key: Legality and constituent power' (2012) Vol. 1, (2) *Global Constitutionalism* 233.

As we shall see in Section 3, the thinking of the authority of law and law's intrinsically good qualities are imbedded in concepts and notions such as, for example, constitutional or legal continuity, properly enacted legal authority, and the Constitutional Principles. Thus, the judicialisation of the constitution-making process in South Africa can be seen as being informed by the anti-positivist claim that legality is basic *vis-à-vis* the mythological concept of constituent power.

I must point out here that Dyzenhaus' anti-positivist claim to the overarching principle of legality, as Loughlin observes, is a claim to 'the rule of law', which is premised on the integrity of legal ordering. In other words, as Loughlin points out, the anti-positivist claim is actually a claim 'to a "higher law behind the law" [and a rejection] of the concept of constituent power on the ground that it remains tied to the status of an enacted constitution whose author is an entity known as "the people".'⁸⁰ What comes to the fore here is that the anti-positivist school of thought erroneously perceives legality and legal (and constitutional) authority as self-generating and self-empowering. Loughlin instructively points out in this regard that 'the practice of legality rests on political conditions it cannot itself guarantee.'⁸¹ The observation by Loughlin that legality cannot guarantee prevailing political conditions is all the more the reason that the South African constitutional discourse must undergo fundamental change to enable a non-normative exercise of constituent power by the people.

⁸⁰ Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 222.

⁸¹ Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 223.

2.1.2. The positivist variant

According to Loughlin legal positivism is best illustrated in Kelsen's 'pure theory of law'.⁸² Kelsen's pure theory of law, as we have seen with the anti-positivist variant, entails as its methodological basis 'attempts to eliminate from [the description of law] everything that is not strictly law.'⁸³ Kelsen maintains that law is a science that should not be interpreted according to what is external to it, for example, psychology, political theory, sociology, and so on. The reason according to Kelsen is that 'what turns [an] event into a legal or an illegal act is not ... determined by [something outside law or the] laws of causality prevailing in nature, but the objective meaning resulting from its [legal] interpretation.'⁸⁴ Kelsen posits a presupposed basic norm which 'confers legal meaning to the act ... [and also] functions as a scheme of interpretation.'⁸⁵ In other words, Kelsen's scheme of interpretation, or chain of authorisation, has at the apex a presupposed basic norm or a *Grundnorm*, which is the original constitution and from which the lower norms derive their authority.⁸⁶

In fact, for Kelsen, the basic norm is the origin and matrix of law. Consider, for example, Kelsen's thinking of the reason for the validity of a norm. Kelsen's legal positivism, as a science of positive law, 'limits itself to a question of validity ... [and] eliminate[s] all questions concerning the relationship between legality and legitimacy.'⁸⁷ Kelsen submits that a norm is valid if it is enacted by a competent entity or norm creator

⁸² Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 222.

⁸³ Kelsen H *The Pure Theory of Law* (1967) 1.

⁸⁴ Kelsen H *The Pure Theory of Law* (1967) 3-4.

⁸⁵ Kelsen H *The Pure Theory of Law* (1967) 4.

⁸⁶ Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 222.

⁸⁷ Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 222.

upon whom a higher norm bestowed the authority to create norms.⁸⁸ The higher norm that bestows authority on the entity or personality is itself based on a presupposed basic norm. The presupposed basic norm, Kelsen argues, is the last and highest norm and its validity cannot be questioned because it cannot be posited.⁸⁹ Kelsen points out that this basic norm cannot be posited in the sense that it cannot be 'created ... by an authority whose competence would have to rest on a still higher norm.'⁹⁰ This means that norms are hierarchically related. The higher norm authorises the lower norm, and the latter cannot be in conflict with the former.

What is also significant to note with regard to Kelsen's legal positivism is that 'a legal norm is not valid because it has a certain content ... but because it is created ... ultimately in a way determined by a presupposed basic norm.'⁹¹ According to Kelsen, a norm is valid based on the validity of the higher norm.⁹² This is what Kelsen defines as the dynamic aspect of law, as opposed to the static aspect of law which holds that for a norm to be valid its content must be in conformity with the content of a basic norm.⁹³ What is key to the dynamic aspect of law is the procedure which determines the validity of the norm, the statute or the constitution, as the case may be. This can be illustrated with reference to Kelsen's normative scheme of interpretation as follows: 'That an assembly of people is a parliament, and that the meaning of their act is a statute, results from the conformity of all these facts with the norms laid down in the constitution.'⁹⁴ In other words, the act of

⁸⁸ Kelsen H *The Pure Theory of Law* (1967) 194.

⁸⁹ Kelsen H *The Pure Theory of Law* (1967) 194-5.

⁹⁰ Kelsen H *The Pure Theory of Law* (1967) 195.

⁹¹ Kelsen H *The Pure Theory of Law* (1967) 198.

⁹² Kelsen H *The Pure Theory of Law* (1967) 193.

⁹³ Kelsen H *The Pure Theory of Law* (1967) 196.

⁹⁴ Kelsen H *The Pure Theory of Law* (1967) 4.

parliament is interpreted as a statute because it is executed according to a procedure determined by norms laid down in the constitution.

Of particular interest to the analysis undertaken here is a scenario where the meaning of the act is a constitution in the context of a national legal order. Kelsen points out that if a constitution existed before the one that is being founded, the one being founded may be determined according to the rules of the former constitution by way of constitutional amendment.⁹⁵ If the validity of the former constitution is questioned, Kelsen says that 'we eventually arrive at a historically first constitution that ... cannot be traced back to a positive norm created by a legal authority.'⁹⁶ Kelsen argues that the historically first constitution may have become 'valid in a revolutionary way, that is, either by breach of a former constitution or for a territory that formerly was not the sphere of validity of a constitution and of a national legal order based on it.'⁹⁷ In other words, as Lindahl also observes,⁹⁸ Kelsen acknowledges that the historically first constitution is a manifestation of power that is not legally authorised.

According to Kelsen, however, for the constitution that was created in a revolutionary way to be regarded as binding, its validity must be presupposed as a basic norm because the validity of a norm can only be another norm. In this sense, both the subject (the constituent power) and the act of constitution-making (the procedure) are incorporated within legal positivist parameters. Noteworthy is the fact that the content of the constitution

⁹⁵ Kelsen H *The Pure Theory of Law* (1967) 200.

⁹⁶ Kelsen H *The Pure Theory of Law* (1967) 200.

⁹⁷ Kelsen H *The Pure Theory of Law* (1967) 200.

⁹⁸ Lindahl H 'Acquiring a community: The *Acquis* and the Institution of European Legal Order' (2003) *The European Law Journal* 9 (4) 444.

and of the national legal order created is, for Kelsen, irrelevant when a basic norm is presupposed with reference to the constitution.⁹⁹ I will in Section 3 refer to Kelsen's concept of the basic norm in the context of its influence on the South African post-sovereign constitution-making process.

2.2. Decisionism

Decisionism is associated with Schmitt. In contradistinction to Kelsen's pure theory of law, Schmitt states that a constitution 'originates from an *act of the constitution-making power*'.¹⁰⁰ He asserts that to view a constitution as a norm of norms signifies 'a unified, closed *system* of higher and ultimate laws.'¹⁰¹ To view a constitution as a norm of norms is, for Schmitt, the characterisation of a constitution in an absolutist sense, and, instead of a political unity, 'the state becomes a legal order that rests on the constitution as basic norm.'¹⁰² Schmitt argues that 'the unity and order [of the state] lies in [its] political existence, not in statutes ... [and] ideas and terms that speak of the constitution as "basic law" are for the most part ... imprecise.'¹⁰³ For Schmitt, the unity and order of the state rests on the political unity, i.e., the relative homogeneity of the people that is dependent on some sense of solidarity. The sense of solidarity allows the state to protect itself against other external political unities. As Böckenförde notes, when Schmitt speaks of the state as a political unity he means that the state is constituted of domestic distinctions,

⁹⁹ Kelsen H *The Pure Theory of Law* (1967) 201.

¹⁰⁰ Schmitt C *Constitutional Theory* (2008) 75.

¹⁰¹ Schmitt C *Constitutional Theory* (2008) 62.

¹⁰² Schmitt C *Constitutional Theory* (2008) 62.

¹⁰³ Schmitt C *Constitutional Theory* (2008) 65.

antagonisms, and conflicts which however remain below the level of friend-enemy-groupings.¹⁰⁴

It is important to note that Schmitt makes a distinction between the constitution and constitutional laws or statutes. For Schmitt, the constitution is the political decision about the form and nature of the existence of the people which is normally contained in the preamble or founding provisions of the constitution.¹⁰⁵ To illustrate this in the case of South Africa, we can refer to s 1(c) of the Constitution wherein it is stated that '[t]he Republic of South Africa is one, sovereign, democratic state founded on the ... supremacy of the constitution and the rule of law.' According to Schmitt, this type of provision is not a constitutional law but part of the constitution as such, that is, a political decision that the people have reached about the form and nature of their existence. In other words, the people of South Africa, through their constitution-making will, have reached a decision that they will exist as a democratic republic based on the rule of law.

Constitutional laws, on the other hand, are statutory regulations that have been incorporated into the constitution.¹⁰⁶ There are many examples of such statutory regulations in the Constitution. For example, it is clear that the purpose of s 37(6) of the Constitution is to regulate the detention of persons under a state of emergency.¹⁰⁷ There is no question that the incorporation of s 37(6) into the Constitution is informed by a desire not to have a repeat of the tragic experiences that befell numerous political detainees and

¹⁰⁴ Böckenförde E 'The concept of the political: A key to understanding Carl Schmitt's *Constitutional Theory*' (1997) *Canadian Journal of Law and Jurisprudence* Vol. X, No.1. 6-7.

¹⁰⁵ Schmitt C *Constitutional Theory* (2008) 77.

¹⁰⁶ Schmitt C *Constitutional Theory* (2008) 67.

¹⁰⁷ Section 37(6)(a), for example, states that '[w]henever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, ... [a]n adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.'

prisoners during the apartheid era in South Africa.¹⁰⁸ Schmitt argues that such formalisation of individual provisions results in the relegation of fundamental provisions (for example s 1 of the Constitution) to the level of constitutional law.¹⁰⁹ Evidently, s 1 of the Constitution is of ultimate importance as compared to s 37(6) of the Constitution. This is evidenced, for example, by the fact that the amendment of the fundamental decision contained in s 1 requires extraordinary majorities as compared to *any other* constitutional provision. The phrase 'any other' in s 74(3) implies a hierarchy of the provisions of the Constitution. Schmitt points out that as a result of the formalisation of constitutional law(s) '[t]he constitution (as unity) and constitutional law (as detail) are tacitly rendered equivalent and confused with one another.'¹¹⁰

Schmitt asserts that, '[a] constitution originates from an act of the constitution-making power [and] such a constitution is a conscious decision, which the political unity reaches *for itself* and provides *itself* through the bearer of the constitution-making power.'¹¹¹ In a dynastic state, the bearer of the constitution-making power is the king. Therefore, the political unity in such a state form reaches the decision about its form and type of existence through the king as the constitution-making power. But, in the case of a democracy, Schmitt maintains that the bearer of constitution-making power is the people. This, therefore, means that in a democratic state the people reach the decision for themselves through their own will. In other words, the people 'grant themselves their

¹⁰⁸ Numerous political detainees and prisoners like Bathandwa Ndonga were detained, murdered or made to disappear by the security forces of the then apartheid government's security forces. See <http://www.sahistory.org.za/people/bathandwa-ndonga> (Accessed on 13 February 2016)

¹⁰⁹ Schmitt C *Constitutional Theory* (2008) 68.

¹¹⁰ Schmitt C *Constitutional Theory* (2008) 68.

¹¹¹ Schmitt C *Constitutional Theory* (2008) 76.

constitution'¹¹² according to their own political will and aspirations. The people is the subject of constitution-making power, '*with the will to establish a constitution*'¹¹³ and '*capable of acting*.'¹¹⁴ Schmitt here makes the point that the constitution-making power is an existing political being, hence the emphasis on its capability to will and to act.

To illustrate the concept of the presupposed political unity as a concretely present people capable of acting, Schmitt refers to the philosophical arguments of Sieyès during the French Revolution of 1789.¹¹⁵ Sieyès is the thinker who is most often associated with the concept of the constituent power of the people.¹¹⁶ In 'What is the Third Estate?' Sieyès categorically argues that 'the nation exists prior to everything; it is the origin of everything.'¹¹⁷ In other words, in this instructive tract, Sieyès asserts 'a revolutionary conception of national sovereignty with radical political implications.'¹¹⁸ The most salient of those implications is that he presents the people as the bearer or subject of constituent power.

Schmitt points out that, during the French Revolution of 1789, Sieyès 'developed the theory of the *people* (more precisely the *nation*) as the subject of the constitution-making power.'¹¹⁹ According to Schmitt, attempts during the French Revolution of 1789 to have

¹¹² Schmitt *C Constitutional Theory* (2008) 255.

¹¹³ Schmitt *C Constitutional Theory* (2008) 75. (Emphasis added)

¹¹⁴ Schmitt *C Constitutional Theory* (2008) 75. (Emphasis added)

¹¹⁵ Schmitt *C Constitutional Theory* (2008) 126.

¹¹⁶ Oklopcic Z 'Constitutional (Re)Vision: Sovereign peoples, new constituent powers, and the formation of constitutional orders in the Balkans' (2012) 19 (1) *Constellations* 91.

See also Loughlin M *Foundations of Public Law* (2010) Oxford University Press 224.

¹¹⁷ Sieyès 'What is the Third Estate' in Baker K M, Boyer J W & Kirshner J (eds) *The Old Regime and the French Revolution* (1987) 7.

¹¹⁸ Baker K M, Boyer J W & Kirshner J (eds) *The Old Regime and the French Revolution* (1987) 6.

¹¹⁹ Schmitt *C Constitutional Theory* (2008) 126. (Emphasis in original)

the king as the representative of the people's will did not succeed.¹²⁰ He points out that the French people 'took its destiny into its own hands and reached a free decision on the type and form of its political existence.'¹²¹ For Schmitt, the case of the French Revolution of 1789 illustrates that the constitution derives from a single instance of decision by the people as a concretely existing subject of the constitution-making power. This decision determines the entirety of the political unity in regard to its peculiar form of existence.¹²² So, according to Schmitt, the constitution rests on the authority of the people as the subject of constituent power.

Schmitt also proffers illuminating arguments in respect of the legitimacy and validity of a constitution. He states categorically that a constitution is not legitimate because it 'originated according to previously valid constitutional laws.'¹²³ According to Schmitt, a constitution is valid because it is based on the people's constitution-making power. Schmitt argues that a new constitution, that is, a new fundamental decision, cannot subordinate itself to a previous constitution.¹²⁴ With regard to the question of validity, Schmitt argues that, '[f]or its validity as a normative regulation, every law, even constitutional law, ultimately needs a political *decision* that is prior to it, a decision that is reached by a [constituent] power or authority that exists politically.'¹²⁵ The constitution-making power is a political will and the decision that it reaches defines the existence of the political unity in its totality.¹²⁶ According to Schmitt, therefore, the validity of the

¹²⁰ Schmitt *C Constitutional Theory* (2008) 129.

¹²¹ Schmitt *C Constitutional Theory* (2008) 127.

¹²² Schmitt *C Constitutional Theory* (2008) 75. (Emphasis in the original)

¹²³ Schmitt *C Constitutional Theory* (2008) 136.

¹²⁴ Schmitt *C Constitutional Theory* (2008) 136.

¹²⁵ Schmitt *C Constitutional Theory* (2008) 76. (Emphasis is in the original)

¹²⁶ Schmitt *C Constitutional Theory* (2008) 125.

constitution is based on the 'existing political will of that which establishes it ... [and] ... constitutional law presupposes that such a *will* already exists.'¹²⁷ In contradistinction to what is argued by Kelsen, Schmitt here makes the point that constitutional validity is not self-generating through retrospective attribution to the basic norm. Constitutional validity according to Schmitt rests on the unmediated political will of the people.¹²⁸ He points out that, 'the constitution-making will of the people ... exists prior to and above every constitutional [norm and] procedure.'¹²⁹

In light of the arguments of Schmitt (and Colon-Rios as hinted at above and will be further illustrated in Section 4) as outlined above, it is clear that the South African Constitution was determined in the milieu of the strong influence of normativism. First, s 1(c) of the Constitution entrenches, among other values, the supremacy and priority of the Constitution and the law, instead of the political will of the people. Thus, in a remarkable twist of allegiance, the political declaration contained in the preamble that the Constitution is the creation of the people through their freely elected representatives is jettisoned in s 1(c). The Constitution in s 1(c) attains authority which, in a manner evocative of the thinking of Kelsen and Dyzenhaus, becomes basic in a way that the will of the people is not. The observation that the Constitution's authority becomes basic more than the will of the people is further evinced by s 42(3), wherein it is stated that even the National Assembly that is elected to represent the people must ensure government by the people *under* the Constitution.¹³⁰ Secondly, s 2 of the Constitution states that '[the]

¹²⁷ Schmitt *C Constitutional Theory* (2008) 76. (Emphasis is in the original)

¹²⁸ Schmitt *C Constitutional Theory* (2008) 132.

¹²⁹ Schmitt *C Constitutional Theory* (2008) 132.

¹³⁰ The Constitution of the Republic of South Africa, 1996.

Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.¹³¹ Yet again, the Constitution, and thus the South African constitutional discourse, displays an elective affinity for normativism which, as we have seen, is not compatible with the notion of the will of the people.

2.3. Relationalism

Loughlin identifies relationalism as the third type of legal thought that grapples with the question of constituent power *vis-à-vis* the founding or the constitution of a polity. Loughlin's explication of relationalism is largely fashioned on Lindahl's analysis of the ambiguous nature of the foundational moment of a polity, precisely self-constitution.¹³² Indeed, Lindahl makes profound observations in respect of the paradoxical relationship of constituent power and constituted power, particularly in his comparative analysis of Kelsen and Schmitt,¹³³ as well as Kelsen and Arendt.¹³⁴ The main thesis of Lindahl's analysis of the paradoxical relationship of constituted power and constituent power is that the ambiguous self-constitution of a polity is both a moment of constitution *by* and *of* a collective self.¹³⁵ Lindahl's relationalist theory illuminates key conceptual issues regarding

¹³¹ The Constitution of the Republic of South Africa, 1996.

¹³² Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 222.

¹³³ See Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin W & Walker N *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008).

¹³⁴ See Lindahl H 'The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union' (2007) *Ratio Juris* 20(4).

¹³⁵ See Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin W & Walker N *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 10 and Lindahl H 'The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union' (2007) *Ratio Juris* 20(4) 486. (Emphasis in original)

collective agency, identity, attribution, representation and democracy. But importantly, Lindahl's arguments reveal, as hinted at above and as we will yet again see, the incompatibility of normativism with democracy as a mode of being or identity of a political community. I will first outline Lindahl's analyses of Kelsen's pure theory of law and Schmitt's decisionism. I will then conclude this section with a summative assessment that will deal with Lindahl's pivotal objections to Schmitt's decisionist arguments, which relate to the analysis undertaken here.

2.3.1. Relationalism and the pure theory of law

According to Lindahl, Kelsen's analysis of constituent power is premised on an indirect and regressive approach, i.e., instead of confronting constituent power directly, Kelsen concerns himself with understanding constituted power.¹³⁶ Lindahl argues that, as a result, Kelsen's analysis of collective agency translates into the question: Under what conditions can the act of an individual be interpreted as the act of a collective?¹³⁷ In his reading of Kelsen's analysis of the state as an acting subject, Lindahl observes that the crux of Kelsen's argument is that from a legal perspective it is impossible to conceive of legislation or norm-creation as an act of a collective other than through the acts of constituted power.¹³⁸ Lindahl observes that, for Kelsen, 'the key to constituted power is

¹³⁶ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin W & Walker N *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 10.

¹³⁷ See Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin W & Walker N *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 10 and Lindahl H 'The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union' (2007) 20(4) *Ratio Juris* 487.

¹³⁸ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin W & Walker N *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 11 & 19.

the *attribution* of the act of an individual to a collective.¹³⁹ He further notes that attribution allows Kelsen to link constituted power to *representation*,¹⁴⁰ because ‘to say that the act of an individual is attributed to a collective is another way of saying that the individual represents a collective.’¹⁴¹ In other words, the individual or the state organ engages in an act on behalf of the collective or the state.

Lindahl agrees with Kelsen that the law only understands collective agency when it is exercised through constituted power and in conformity with itself (the law).¹⁴² He points out that, according to Kelsen, the action of an individual or constituted power is regressively attributed to the state in order to link the act of norm-creation to the basic norm (the *Grundnorm*) that authorises it.¹⁴³ The association of the act of the individual with the state then translates into the empowerment of the individual by the law because the act is thereby authorised by the *Grundnorm*. On this basis, Lindahl observes that Kelsen’s analysis centres on a regressive pattern: ‘One moves from the act of norm-creation to the norm that authorises it, and so on.’¹⁴⁴

¹³⁹ Lindahl H ‘Constituent power and reflexive identity: Towards an ontology of collective selfhood’ in Loughlin W & Walker N *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 11. (Emphasis in original)

¹⁴⁰ Lindahl H ‘Constituent power and reflexive identity: Towards an ontology of collective selfhood’ in Loughlin W & Walker N *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 11. (Emphasis in original)

¹⁴¹ Lindahl H ‘The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union’ (2007) 20(4) *Ratio Juris* 487.

¹⁴² Lindahl H ‘Constituent power and reflexive identity: Towards an ontology of collective selfhood’ in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 11

¹⁴³ See Lindahl H ‘Constituent power and reflexive identity: Towards an ontology of collective selfhood’ in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 11 and Lindahl H ‘The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union’ (2007) 20(4) *Ratio Juris* 488.

¹⁴⁴ Lindahl H ‘The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union’ (2007) 20(4) *Ratio Juris* 488.

Lindahl makes it clear that Kelsen's chain of authorisation is not infinite as it reveals that 'relations of empowerment lead back to a "first constitution" enacted by an assembly or an individual ... [that] cannot be empowered to do so by a norm of positive law.'¹⁴⁵ However, even though Kelsen acknowledges that the act of will which gives rise to a novel legal order is not mediated by legal forms, he emphasises, as alluded to earlier, that this act has to always be in conformity with law. Kelsen's insistence on collapsing collective subjectivity into the legal order is problematic because, as Lindahl points out, in the process of enacting the first constitution, the (unauthorised) individual or assembly simultaneously establishes itself according to the very constitution it enacts. Lindahl claims that Kelsen himself realises that this scenario is tantamount to both self-creation and self-empowerment. In agreement with Kelsen, Lindahl points out that self-empowerment is a contradiction in terms because 'an act can only initiate a legal order if it is *retroactively* interpreted as an empowered act [i.e.] the exercise of constituted power [authorised by the law].'¹⁴⁶

Lindahl's analysis reveals that Kelsen has a problem with the basic principle of democracy, i.e., the thinking that presupposes the people as the collective subject of rule. Kelsen's problem with the people as a collective subject that is capable of collective action stems from the fact that, according to him, the people consists more of 'a bundle of groups

¹⁴⁵ See Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 11 and Lindahl H 'The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union' (2007) 20(4) *Ratio Juris* 488.

¹⁴⁶ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 11. (Emphasis in original)

than a coherent mass of one and the same aggregate state (*Aggregatzustand*).¹⁴⁷ To be sure and as alluded to earlier, Lindahl claims that according to Kelsen, the people have no prior political existence sans a legal order.¹⁴⁸ Accordingly, Lindahl correctly observes that Kelsen's theory of approaching constituent power through attribution is not sustainable due to the fact that Kelsen denounces the very subject to whom the constitution is attributed, namely the people as a collective unity.¹⁴⁹ Lindahl further notes that even Kelsen's argument that the notion of a collective as the subject of norm-creation is nothing but the personification of the legal order does not hold.¹⁵⁰ Indeed, if it is only in a normative sense that one can speak of a unity, the claim that legislation can be attributed to a collective subject becomes illogical, and so do the notions of empowerment and representation.¹⁵¹



¹⁴⁷ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 12.

¹⁴⁸ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin W & Walker N *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 10.

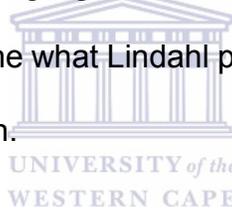
¹⁴⁹ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 12.

¹⁵⁰ Lindahl H 'The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union' (2007) 20(4) *Ratio Juris* 489.

¹⁵¹ See Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 12 and Lindahl H 'The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union' (2007) 20(4) *Ratio Juris* 489.

2.3.2. Relationalism and decisionism

As I pointed out above when I dealt with decisionism, Lindahl also points out that Schmitt rejects Kelsen's consistently normative account of the constitution.¹⁵² Noting the inadequacy of some normativist arguments as hinted at above, Lindahl concedes to Schmitt's pivotal assertion that the only viable account of a constitution is a positive one, i.e., 'a constitution is posited by a political subject.'¹⁵³ In fact, as also hinted at by Loughlin,¹⁵⁴ Lindahl finds Schmitt's arguments to be an adequate springboard to launch his own relationalist theory.¹⁵⁵ Thus, even though he arrives at a different conclusion, Lindahl's analysis of the decisionist objections to a normative account of the constitution or the founding moment of a polity highlights the inaptness of a normativist approach to the constitution. Let me briefly outline what Lindahl presents as the decisionist objections to Kelsen's account of a constitution.



According to Lindahl, the first decisionist objections to a normative account of a constitution relate to constituent power as the originating power. Lindahl's analysis of the first decisionist objection establishes a link between the thinking of Schmitt and Arendt regarding the foundational moment. According to Lindahl, Schmitt and Arendt's accounts of the foundational moment grant constituent power the centre stage. For Schmitt¹⁵⁶ and Arendt, collective agency is the beginning, i.e., a constitution or the founding of a political

¹⁵² Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 12.

¹⁵³ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 12.

¹⁵⁴ Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 227.

¹⁵⁵ See for example Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 16-7 & Loughlin M

¹⁵⁶ Schmitt C *Constitutional Theory* (2008) 75.

community is an act of constituent power.¹⁵⁷ Lindahl points out that, Schmitt¹⁵⁸ and Arendt¹⁵⁹ argue – contrary to Kelsen’s regressive approach – that the constitution is the manifestation of collective agency through the presence and active participation of the constituent subject.¹⁶⁰ What is also important to note here is that Lindahl’s analysis reveals that Schmitt and Arendt reject the connection that Kelsen’s account of a constitution establishes between collective agency and representation. The emphasis of the second decisionist objection is that constituent power is the originating subject of all other powers as well as the subject of the distribution thereof.¹⁶¹ This objection clearly refutes the normativist emphasis on the authority of the *Grundnorm* and is closely linked to Schmitt’s rejection of ‘the possibility of a closed, purely normative constitutional system.’¹⁶²



The third decisionist objection is directed against Kelsen’s rejection of collective agency, precisely collective self-rule. Lindahl correctly points out that the third decisionist objection reflects that the necessary presupposition of political subjectivity presupposes an act of collective self-rule.¹⁶³ The presupposition of collective self-rule is indeed compatible with the concept of a democratic constitution as ‘the concrete political decision

¹⁵⁷ See Lindahl H ‘Constituent power and reflexive identity: Towards an ontology of collective selfhood’ in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 13 and Lindahl H ‘The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union’ (2007) 20(4) *Ratio Juris* 491.

¹⁵⁸ Schmitt C *Constitutional Theory* (2008) 289.

¹⁵⁹ Lindahl H ‘The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union’ (2007) 20(4) *Ratio Juris* 491.

¹⁶⁰ Lindahl H ‘Constituent power and reflexive identity: Towards an ontology of collective selfhood’ in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 13.

¹⁶¹ Schmitt C *Constitutional Theory* (2008) 126

¹⁶² Lindahl H ‘Constituent power and reflexive identity: Towards an ontology of collective selfhood’ in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 12.

¹⁶³ Lindahl H ‘Constituent power and reflexive identity: Towards an ontology of collective selfhood’ in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 13.

of the people capable of political action.’¹⁶⁴ In a manner which resonates with the thesis of the analysis undertaken here, Schmitt correctly points out that a democratic constitution cannot espouse a mythological notion of a personalised legal order; a democratic constitution presupposes ‘a people capable of action.’¹⁶⁵

Lindahl correctly observes that the fourth decisionist objection rejects the notion of representation. According to Schmitt ‘the people cannot be represented, ... [they] are either entirely present and engaged or generally not involved.’¹⁶⁶ Schmitt maintains that ‘representation contradicts the democratic principle of the self-identity of the people present as a political unity.’¹⁶⁷ Lindahl, however, correctly notes that, by acknowledging that ‘there is no state without representation,’¹⁶⁸ Schmitt agrees that constituted powers do represent the people in the execution of certain acts.¹⁶⁹ However, such acts do not include the exercise of constituent power which is the exclusive competency of the people.¹⁷⁰ The fifth decisionist objection deals with the question of identity insofar as it applies to democracy (self-rule). Lindahl claims that Schmitt argues that the definition of democracy as the identity of the governing and the governed means that the governing and the governed are the same.¹⁷¹ As we shall see in the following subsection, Lindahl

¹⁶⁴ Schmitt *C Constitutional Theory* (2008) 268.

¹⁶⁵ Schmitt *C Constitutional Theory* (2008) 268.

¹⁶⁶ Schmitt *C Constitutional Theory* (2008) 289. See also Lindahl H ‘Constituent power and reflexive identity: Towards an ontology of collective selfhood’ in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 13.

¹⁶⁷ Schmitt *C Constitutional Theory* (2008) 289.

¹⁶⁸ Schmitt *C Constitutional Theory* (2008) 240.

¹⁶⁹ Lindahl H ‘Constituent power and reflexive identity: Towards an ontology of collective selfhood’ in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 13.

¹⁷⁰ Lindahl H ‘Constituent power and reflexive identity: Towards an ontology of collective selfhood’ in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 13.

¹⁷¹ Lindahl H ‘Constituent power and reflexive identity: Towards an ontology of collective selfhood’ in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 13.

does not entirely accept Schmitt's arguments regarding the sameness (homogeneity) of the governing and the governed.

2.3.3. Assessment

Lindahl argues that both Kelsen and Schmitt engage in a reductive interpretation of identity because they 'interpret the 'self' of self-rule as meaning that the rulers and the ruled are *the same*.'¹⁷² According to Lindahl, an interpretation of identity has to take into account the two interrelated forms of identity, namely *idem*-identity (What am I?) and *ipse*-identity (Who am I?). What is of particular significance to the analysis undertaken here is that Lindahl's arguments do not only reveal that the two forms of identity are integral to the analysis of collective agency,¹⁷³ but they also reveal that, compared to Kelsen, Schmitt proffers a more viable analysis of collective agency.¹⁷⁴

Lindahl submits that the identity of a human being is distinct from that of a thing because it is reflexive. A human being, Lindahl explains, 'relates to itself as the one who acts and who is ultimately at stake in such acts.'¹⁷⁵ In other words, a human being is a being that in its being is concerned about its very being.¹⁷⁶ To further illustrate the

¹⁷² Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 14. (Emphasis in the original)

¹⁷³ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 15.

¹⁷⁴ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 16.

¹⁷⁵ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 15.

¹⁷⁶ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 15.

reflexivity of the identity of a human being in relation to collective agency, Lindahl makes reference to Ricoeur's submission that the questions 'What am I?' (*idem*-identity) and 'Who am I?' (*ipse*-identity) can also be posed in the first-person plural as 'What are we?' and 'Who are we?'¹⁷⁷ Lindahl points out that the plural pronoun 'We', as part of the question 'Who are we?' (and the anticipated response thereto), not only introduces us to collective agency, but it also introduces an important dimension of collective agency, namely shared intentional activity. According to Lindahl's analysis, shared intentional activity is dependent on the reciprocity of intentions of the individual members of a group. Thus, the unity implied by collective agency is brought about by a shared and reciprocal intention or purpose that allows members to see themselves as being the same or different as members may redefine their purpose.¹⁷⁸ This line of thinking, I submit, does resonate with Schmitt's thinking.



Schmitt makes it clear that the word "identity" refers to 'the existential equality of the political unity of the people [in toto].'¹⁷⁹ Schmitt's emphasis on the existential nature of equality is actually meant to highlight that the identity of the people in a political unity is concrete. The concrete identity of the people is not resultant from norms but from the material and political conditions (the existential quality) of the political unity.¹⁸⁰ The material conditions of the political unity, I submit, necessitate that the political unity takes a decision about its political existence. The realisation of such a decision can only come

¹⁷⁷ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 15.

¹⁷⁸ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 15.

¹⁷⁹ Schmitt C *Constitutional Theory* (2008) 264.

¹⁸⁰ Schmitt C *Constitutional Theory* (2008) 264.

about if the people have the same purpose and engage in a shared intentional activity to ensure their political existence. Schmitt's claim, therefore, that the presupposition of democracy is the substantial homogeneity of a people is premised on the sameness of their underlying will to political existence.¹⁸¹

Furthermore, Schmitt's interpretation of the sameness of the rulers and the ruled rests on an understanding that democracy does not produce a qualitative difference between the rulers and the ruled.¹⁸² Schmitt states categorically that the definition of democracy as the identity of the governing and the governed 'results from the substantial *equality* that is the essential presupposition of democracy.'¹⁸³ For Schmitt, democracy makes the rulers and the ruled equal because the authority of those who rule is derived from the will of those who are ruled. In other words, Lindahl's analysis of the shared intentional activity of the individual members of a group actually vindicates Schmitt's assertion that 'democracy presupposes a people whose members are similar to one another and who have the [same] will to political existence.'¹⁸⁴ I submit that the thesis of Lindahl's analysis of collective agency is an affirmation of Schmitt's assertion that the 'We' of a collective as a unity in action involves a determination of the will to political existence which binds together members of a community in mutuality and reciprocity.¹⁸⁵

It is my submission that Lindahl's assertion that the paradoxical self-constitution of a polity is both a moment of constitution *by* and *of* a collective self can also be located in

¹⁸¹ Schmitt C *Constitutional Theory* (2008) 264.

¹⁸² Schmitt C *Constitutional Theory* (2008) 264.

¹⁸³ Schmitt C *Constitutional Theory* (2008) 264. (Emphasis added).

¹⁸⁴ Schmitt C *Constitutional Theory* (2008) 264.

¹⁸⁵ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 16.

the milieu of shared intentional activity. To elucidate the ambiguous self-constitution of a polity, Lindahl makes reference to an incident that took place at a meeting of the European Social Forum¹⁸⁶ in November 2002, where Vittorio Agnoletto of the revolutionary faction of the forum declared, 'Our movement is not reformist; it is radical.'¹⁸⁷ Lindahl views Agnoletto's act as an attempt by the revolutionary faction of the forum to marginalise an institutional faction comprised of NGOs, because the claim by Vittorio Agnoletto was contrary to the applicable charter of principles of Porto Alegre which barred anyone from expressing 'positions that claim to be those of all participants.'¹⁸⁸ However, Lindahl's articulation of the inappropriateness of Agnoletto's act goes beyond the transgression of the charter of principles. Lindahl claims that there was no people on whose behalf Agnoletto could speak. According to Lindahl, the movement does not satisfy the criteria of a political collective unity, hence his consistent reference to the participants of the European Social Forum as the multitude. Lindahl submits that a multitude must first become a collective subject in order to constitute itself as a political community.¹⁸⁹

Lindahl's thinking regarding the founding moment diverges with the thinking of Schmitt and Arendt in a significant way. The divergence in the thinking of the three scholars pertains to what Lindahl refers to as the untenable character of Schmitt and

¹⁸⁶ According to Lindahl, the meetings of the European Social Forum were the most visible and radical sites of resistance by the multitude to the project of European integration, as given form by the European Union. See Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 17.

¹⁸⁷ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 17.

¹⁸⁸ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 18.

¹⁸⁹ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 18.

Arendt's simple opposition between presence and representation.¹⁹⁰ In agreement with Kelsen, Lindahl emphasises that the "We" (as a reference to a collective political unity) 'is never directly present as a *unity* in action; it must always be represented, even when citizens participate in law-creation.'¹⁹¹ Lindahl points out that even though foundational moments elicit the presence and action of constituent power which '[interrupt] representational practices, this rupture does not – and cannot – reveal a people immediately present to itself as a collective subject.'¹⁹² In other words, Lindahl argues that the exercise of constituent power at the founding moment involves a claim to act on behalf of a non-existent collective because, as Loughlin observes, 'the exercise of constituent power simultaneously constitutes a people.'¹⁹³ Thus, according to Lindahl, the meaning of "representation" as it applies to constituent power does not refer to a "now" in which a political community actively founds itself.¹⁹⁴ Representation, Lindahl argues, refers to 'an act [that] *originates* a community through the *representation* of its origin.'¹⁹⁵

However, what is of particular significance to the analysis undertaken here is that Lindahl submits that Agnoletto's act reflects that there has to be an act that seizes the political initiative provided by the openness in politics. Importantly, the act that seizes the political initiative also determines the objective (shared intentional activity) that unites a

¹⁹⁰ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 17 & Lindahl H 'The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union' (2007) 20(4) *Ratio Juris* 491.

¹⁹¹ Lindahl H 'The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union' (2007) 20(4) *Ratio Juris* 492.

¹⁹² Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 229.

¹⁹³ Loughlin M 'The concept of constituent power' (2013) *European Journal of Political Theory* 229.

¹⁹⁴ Lindahl H 'The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union' (2007) 20(4) *Ratio Juris* 496.

¹⁹⁵ Lindahl H 'The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union' (2007) 20(4) *Ratio Juris* 496.

multitude as a collective political unity. Lindahl instructively concludes in this regard that ‘the price of “radical openness” in politics is the loss of constituent power.’¹⁹⁶ Clearly, Lindahl’s explication of the openness in politics and the constituent power’s ability and power to seize the moment resonates with the thinking of Schmitt and Arendt regarding the foundational moment as outlined above. Notwithstanding his argument to the contrary, Lindahl’s analysis reveals that constituent power has the power to initiate the founding of a political community and also to determine the objective of that political community. The South African constitutional discourse needs to shift focus and accommodate the popular initiatives of the people at the level of fundamental laws.



3. CONSTITUENT POWER AND THE SOUTH AFRICAN CONSTITUTION

Close scrutiny of South African constitutional discourse reveals a privileging of normativism. The discussion in this section focuses on arguments that are raised in respect of the notion of so-called constitutional continuity and the concept of the people in the South African context. These arguments will be juxtaposed to what is argued by Christodoulidis, Mutua and Schmitt, with the aim of showing that in the South African context the influence of normativism makes it difficult to claim that the people are the sole subject of constituent power and are governing.

The discussion of the notion of constitutional continuity will also reflect on the role played by the Constitutional Principles during the South African constitution-making

¹⁹⁶ Lindahl H ‘Constituent power and reflexive identity: Towards an ontology of collective selfhood’ in Loughlin M & Walker N (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 18.

process. I will in this context present the notion of constitutional continuity as an anti-revolutionary strategy that was employed by the National Party government to safeguard minority capitalist interests. The discussion of the concept of the people will reflect on how the normativist thinking of the fragmentation of constituent power (pluralism) militated against establishing the people as the subject of constituent power. The discussion of the notion of constitutional continuity and the concept of the people will be followed by a summative assessment.

3.1. Constitutional continuity

As noted above, there is no question regarding the influence of normativism on the post-sovereign constitution-making model and the dominant scholarly arguments that are proffered in South African constitutional discourse about constituent power and the Constitution. I indicated above that Kelsen's concept of the basic norm does not only establish a hierarchy of laws, but requires that all laws must be traced back to the *Grundnorm*. The employment of the notion of constitutional continuity ensured that there was no break in legality during the establishment of the new South African democratic state.

Arato manifests this line of thought when he states that 'the post-sovereign model of constitution-making generally avoids the notion of a state of nature in which one line of thought from Sieyès to Schmitt situates the *pouvoir constituant*.'¹⁹⁷ He commends the

¹⁹⁷ Arato A 'Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?' (2010) 26(1) *SAJHR* 28.

post-sovereign constitution-making process for avoiding a revolutionary rupture, which basically entails the obliteration of the laws of the previous regime when a new one is being founded. Van der Walt refers to this phenomenon of the post-sovereign constitution-making process as constitutional dualism which ushers in a fundamentally new constitutional order without a revolutionary constitutional rupture.¹⁹⁸ On this basis, Botha observes that the establishment of liberal constitutional democracy in South Africa, together with the requirements and processes of the adoption of the Constitution, present the South African political transition as a legal or *rechtsstaatliche* revolution because it did not initiate or entail a total break in legality. What emerges from the instructive observations of these scholars is the emphasis on the fact that the success of the South African constitution-making process is attributable to the legal containment of the process and avoidance of (illegal) popular democratic initiatives.



The South African political transition was adopted in accordance with normative procedural requirements contained in the solemn pact between the ANC and the National Party government, namely the Constitutional Principles. The legally binding Constitutional Principles, which were contained in Schedule 4 of the interim Constitution, outlined requirements and procedures to be followed in the drafting and adoption of the final Constitution. According to Botha, the 'interim Constitution [was itself] adopted in accordance with the procedures prescribed in the Constitution of the old regime.'¹⁹⁹ In other words, as Botha points out, 'great care was taken to prevent both a legal vacuum

¹⁹⁸ Van der Walt J 'Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities' (2010) 26(1) *SAJHR* 111.

¹⁹⁹ Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26(1) *SAJHR* 68.

and the bearers of political power from acting outside the scope of their properly enacted legal authority.²⁰⁰ Perhaps the most significant manifestation of the so-called great care was the rejection of the ANC's notion of a democratically elected sovereign constituent assembly that would draft a legitimate constitution because that would mean that a successful revolution, which would require a break in constitutional continuity, had taken place in South Africa.²⁰¹ In keeping with the normative notion of a superior law or *Grundnorm*, the South African Constitution was made to originate from within the parameters of the 1983 Constitution. In fact, Mutua points out that 'the validity of the 1996 Constitution rests on the all-white Parliament that approved the Interim Constitution and the Constitutional Court.'²⁰² Thus, premium was put on a normative procedure which, as I hinted at above, is characterised by Kelsen as the dynamic aspect of law.

Due to the triumph of the normative thinking of constitutional continuity, it is difficult to maintain that the will of people as the subject of constituent power was the sole determining factor during the South African constitution-making process. The Constitution originated according to a procedure laid down in previous constitutions and the Constitutional Principles. In his analysis of the Constitutional Principles and the developments around them, Mutua observes that 'the NP got the better of the deal [contained in the Constitutional Principles] as it was protected against the will of the

²⁰⁰ Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26(1) *SAJHR* 68.

²⁰¹ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 53. (My emphasis).

²⁰² Mutua M 'Hope and Despair for a New South Africa: The Limits of Rights Discourse' (1997) 10 *Harvard Human Rights J* 63, 81.

majority to substantially transform the state.’²⁰³ In this context, the project of social transformation in South Africa is proving to be a difficult task because, as Maharaj points out, ‘[s]uccessive apartheid governments enacted and enforced a rigorous race-based set of laws which ensured that social, economic and political power remained a monopoly of the white population.’²⁰⁴ In other words, the Constitution, to some extent, carries into the new dispensation burdens and injustices of the old. As a result, s 25(3) of the Constitution seeks to strike a difficult balance between the interests of the public (the people) and private interests.²⁰⁵ The significance of the balance sought in s 25(3) of the Constitution has given rise to calls that are made from across the political and ideological divide for the speeding up of land reform in view of the fact that lack of progress in this regard is threatening to undo the monumental work that has been done in terms of good race relations and reconciliation in South Africa.²⁰⁶ This does not augur well for constitutional stability in South Africa, hence there needs to be mechanisms in place to allow for popular democratic initiatives to advance the will of the people.

As Christodoulidis instructively observes, the notion of a pre-commitment as evidenced by the Constitutional Principles, which is a determination of an expectation of

²⁰³ Mutua M ‘Hope and Despair for a New South Africa: The Limits of Rights Discourse’ (1997) 10 *Harvard Human Rights J* 63, 81.

²⁰⁴ Maharaj M ‘The ANC and South Africa’s Negotiated Transition to Democracy and Peace. (2008) *Berghof Transitions Series* No.2 7.

²⁰⁵ It is a fact of history that the public interests are the interests of the historically deprived majority, while private interests are the interests of the monopoly capital that owns millions of hectares of land. The balance sought by s 25(3) is improbable because, as Mutua tells us, the protection of private interests was laid down in the Constitutional Principles. The fulfilment of public interests is further curtailed by the demand for compensation (s 25(3)).

²⁰⁶ The Democratic Alliance acknowledges that the land question has an impact on national reconciliation. See <http://www.da.org.za/wp-content/uploads/2014/01/Land-Reform1.pdf> (Accessed on 24 February 2016) The ANC claims that ‘the ineffective willing buyer- willing seller principle has in the past forced government to pay extortionate amounts for land, frustrated the redistribution process and hamstrung its ability to achieve redistribution targets. See <http://www.anc.org.za/caucus/docs/pr/2016/pr0223a.html> (Accessed on 24 February 2016)

the future, is a prominent feature of normativity.²⁰⁷ Normativism reduces the infinite future possibilities to what only *can* and *should* happen. So, in South Africa, through the normativist thinking of constitutional continuity and the Constitutional Principles, the old order hoped to have a grip on the future by laying down a stringent pre-determination of all future constitutional development and political events. In fact, Mutua instructively observes that the Constitutional Principles ‘were an essential link between the past and the present; through them the old order would ensure its survival.’²⁰⁸ Furthermore, watchdog requirements such as the Constitutional Principles were designed to frustrate what would definitely be the black-led government’s objective, namely the redistribution of land and wealth to the people, particularly those oppressed and dispossessed.²⁰⁹

The question that arises here is how the ANC elites could agree to these watchdog requirements (or the so-called properly enacted legal authority) which were clearly meant to protect white monopoly capital. A cogent argument that has been proffered in this regard posits the influence of global liberal constitutionalism and the attendant political developments that were predominant at the time of South Africa’s constitution-making process as some of the reasons. For example, Venter argues that the universal condemnation of apartheid and the collapse of the Soviet bloc were the decisive global developments because ‘an outcome [of the South African constitution-making process]

²⁰⁷ Christodoulidis E ‘Constitutional Irresolution: Law and the Framing of Civil Society (2003) 9(4) *European Law Journal*, 416.

²⁰⁸ Mutua M ‘Hope and Despair for a New South Africa: The Limits of Rights Discourse’ (1997) 10 *Harvard Human Rights J* 63, 81.

²⁰⁹ Mutua M ‘Hope and Despair for a New South Africa: The Limits of Rights Discourse’ (1997) 10 *Harvard Human Rights J* 63, 81.

that bore the marks either of apartheid or of communism was precluded.²¹⁰ According to Venter, the ANC and the National Party government, therefore, had to re-define their short-term political goals, particularly because the government had to face its inevitable abdication of power in a transitional process, and the ANC needed to abdicate its communist doctrine and prepare for the assumption of the responsibility for government.²¹¹

This is indeed an instructive argument. However, my contention is that the global political developments played a peripheral role in the constitution-making process when compared to local political considerations. The major problem of the National Party government was not only that it inevitably had to abdicate power during the transitional process. The other major problem faced by the National Party government was that abdication of power had significant repercussions for its capitalist constituency or the white monopoly capital. The National Party government, therefore, had to have guarantees that white monopoly capital will continue to retain control over the economy, and those guarantees came in the form of the Constitutional Principles.²¹² In fact, Venter also states that 'the [apartheid] government, having 'done the right thing' by opening itself to a negotiated transition, considered itself to be in a position of insisting on the protection of the interests of the white population in a new dispensation.'²¹³ The insistence of the NP

²¹⁰ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 48.

²¹¹ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 48.

²¹² Mutua M 'Hope and Despair for a New South Africa: The Limits of Rights Discourse' (1997) 10 *Harvard Human Rights J* 63, 81.

²¹³ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 52.

on the protection of the interests of the minority white population was a very serious issue which actually resulted in the deadlock of CODESA in June 1992. The deadlock resulted in Mandela writing a letter to De Klerk, the then State President on 4 July 1992, wherein he stated that the ANC 'cannot accept an undemocratic constitution aimed at addressing the fears of a minority party about its own future at the cost of democracy.'²¹⁴ According to Mandela, the National Party government was essentially opposed to the democratisation of South Africa. Since the NP finally had its way by having the ANC agree to its proposal of constitutional continuity, it can be argued that the Constitution was not determined on the basis of the political will of the people as the subject of constituent power. The interests of white monopoly capital and the business sector had a major influence on how the Constitution was crafted.²¹⁵

It must be emphasised that the normative approach to constituent power during South Africa's constitution-making process has culminated in a conundrum, especially in light of the intensifying onslaught faced by South Africa's constitutional democracy. The liberal doublespeak of the Constitution representing both constitutional continuity and a decisive break with the past has come back to haunt South Africa's constitutional democracy. The intensifying onslaught faced by South Africa's constitutional democracy, the riots and land occupations stem from a realisation on the part of the people that the revolution was (as

²¹⁴ <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02046/05lv02092/06lv02093> (Accessed on 23 October 2015).

²¹⁵ Van der Walt's reference to a meeting between the ANC and the business sector, in which Mandela stated that the ANC had no desire to undermine the safety of the property of the national and international monopoly capital, actually supports this view. See Van der Walt J 'Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities' (2010) 26(1) *SAJHR* 124.

Botha hints at)²¹⁶ indeed deferred. There is a growing justifiable sentiment among the South African polity that the framing of the constitution-making process effectively favoured the interests of the privileged liberal monopoly capital at the expense of the masses of black people impoverished by decades of colonial and racist politics in South Africa. What the South African constitutional discourse must do now is to encourage people-driven democratic initiatives, which I will outline in Section 4, to take place outside normative regulation. The disturbing political developments and incidents, which I just referred to, reflect how unsustainable it is to normatively regulate the constituent power of the people through the notion of legal or constitutional continuity and normative pre-commitments.



3.2. We the people (shall govern)

The preceding discussion obviously puts in question the declaration of “We the people” in the preamble of the South African Constitution, which has its genesis in one of the clauses of the Freedom Charter, namely “The people shall govern”.²¹⁷ It is my contention that “We the people”, as it finds expression in the South African Constitution, paradoxically represents a moment of recognition and subjugation of the will of the people. In spite of this declaration, the role of the people as the subject of constituent power is largely subsumed within constituted authority, such as parliament and the courts.

²¹⁶ Botha H ‘Instituting public freedom or extinguishing constituent power? Reflections on South Africa’s constitution-making experiment’ (2010) 26(1) *SAJHR* 70.

²¹⁷ The Freedom Charter is a document or manifesto adopted in Kliptown, South Africa, in 1955 by representatives of various South African political organisations, traditional leaders and civil society opposed to apartheid, which outlined the South Africa the oppressed people aspired for.

For example, parliament has the powers to amend the founding provisions of the Constitution, i.e., the fundamental decision of the people, through set high-threshold majorities. South African constitutional discourse does not encourage, in a non-normatively regulated manner, people-driven initiatives that may lead to the amendment of the founding provisions or that may ratify the decision of the parliamentary super majorities.

I did indicate above that the notion of constitutional continuity as applied in the South African context had a hindering effect with regard to establishing the people as the subject of constituent power. It is nevertheless the case that the argument of constitutional continuity that was advanced by the National Party government, particularly when it rejected the ANC's notion of a sovereign, democratically elected constitution-making body, was fictitious. There was effectively no constitutionalism that could have been at stake in South Africa during the dismantling of apartheid. In fact, Arato points out that "[i]ndeed the legality that is being preserved in many of the cases [of the post-sovereign constitution-making process] is fictional, or is rather created for the occasion, since the old regimes [that are being dismantled in most cases are] dictatorships with paper constitutions that may have routinely disregarded and not only violated their own ritualised legality"²¹⁸ The 1983 Constitution was based on parliamentary supremacy or parliamentary sovereignty as opposed to constitutional supremacy. As Venter points out, South African constitutional law was centred on a written constitution that had no superior

²¹⁸ Arato A 'Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?' (2010), 26(1) *SAJHR* 28.

status, and power was concentrated in the head of government and the state.²¹⁹ In other words, there was in South Africa a constitution without constitutionalism.

Against this backdrop, a close reading of the debate during this trajectory of the negotiations and constitution-making process reveals that what was actually at stake was not constitutionalism but the position of the subject of constitution-making power. The ANC wanted to entrench the people in the position of the subject of constitution-making power through a democratically elected Constituent Assembly that 'will not be subject to the veto or overseeing powers of any other body.'²²⁰ The National Party government, in contradistinction, wanted a constitutionally regulated authority, which eventually came in the form of the Constitutional Assembly, to be the constitution-making authority that would be overseen by the judiciary. There is no doubt that this debate was decisive in the crafting of the Constitution. My contention is that a sovereign Constituent Assembly during the South African constitution-making process would have come very close to being a truly democratic mechanism to ensure that the Constitution was established according to the will of the people. Even the popular democratic initiatives that are mooted in the analysis that is undertaken here have at the apex a sovereign democratic Constituent Assembly that will not be subject to the veto powers of any other body.

Actually, Arato himself makes it clear that, as opposed to the classic European Constituent Assemblies, Constitutional Assemblies that are established in the milieu of the post-sovereign constitution-making model 'are not sovereign constituent assemblies,

²¹⁹ Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 46-7.

²²⁰ <http://www.anc.org.za/show.php?id=4141> (accessed 23 October 2015)

but they are meant to be elected or constituted for the purpose of constitution drafting [*in accordance with an extant constitution and ratification by the courts*].²²¹ The nature of the Constitutional Assemblies of the post-sovereign constitution-making process is in accordance with the fact that the post-sovereign constitution-making process does not allow space for the manifestation of the sovereign will of the people. This observation is evinced by Arato's observation regarding the two-stage character of the post-sovereign constitution-making process *vis-à-vis* the historical and political developments that took place in France, Massachusetts and Philadelphia. According to Arato, the historical and political developments that took place in the specified countries show that 'the post-sovereign model envisages no instance that can claim to represent in the absolute sense the sovereign will of the people.'²²² So, regardless of arguments to the contrary, the South African Constitutional Assembly, a body that supposedly represented the people of South Africa as the bearer of political power, could not have exercised the will of the people. On this basis, Mutua observes that the South African Constitutional Assembly 'essentially rubber-stamped prior political choices, despite projecting the perception that it was making a new constitution.'²²³

As alluded to above, the Constituent Assembly that is envisaged by Colon-Rios and by the analysis that is undertaken here is of a different nature to the one advocated by the post-sovereign constitution-making process. The popular democratic initiatives that

²²¹ Arato A 'Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?' (2010) 26(1) *SAJHR* 27.

²²² Arato A 'Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?' (2010) 26(1) *SAJHR* 23.

²²³ Mutua M 'Hope and Despair for a New South Africa: The Limits of Rights Discourse' (1997) 10 *Harvard Human Rights J* 63, 81.

will precede the mooted Constituent Assembly will, contrary to what transpired in the cases of France, Massachusetts and Philadelphia,²²⁴ ensure that the people can keep in check the compliance of the will of the Constituent Assembly with the will of the people.

3.3. Pluralism and constituent power

Let us now consider the notion of pluralism *vis-à-vis* the democratic concept of the people. In his analysis of the two interpretations of the South African constitution-making process, Botha refers to the notion that by splintering sovereignty and introducing a public participation programme, the South African post-sovereign constitution-making process avoided 'playing into the hands of those who pass off particular interests as the public interest and who seek to reduce the fluidity of individual and collective identities to the relative fixity of semi-official definitions of who belong and who don't.'²²⁵ Botha points out that it is argued that by splintering sovereignty, the constitution-making process 'injected the particularity of needs and the plurality of subject positions which characterise civil society into the constitution-making process.'²²⁶ It is however important to keep in mind here the limitations of public participation programmes as identified by Buccus and Hicks and as referred to in section 1.2 above.

²²⁴ Arato A 'Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?' (2010) 26(1) *SAJHR* 23-4.

²²⁵ Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26(1) *SAJHR* 75.

²²⁶ Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26(1) *SAJHR* 78.

Van der Walt also advocates irreducible plurality as he expresses his rejection of the irreducible unity which is often invoked by Africa's revolutionary Heads of State.²²⁷ Van der Walt argues that the emphasis by several African Heads of State and academics on 'our own constitution' begs the question of 'how indigenous aspirations voiced [by these figures] can seriously hope to become the exclusive foundation for co-existence in social contexts that are 'irremediably' heterogeneous ... without risking a new apartheid; without risking again a purity driven *apartness without partnership*.²²⁸ In Kelsenian style (even though he maintains that his argument is based on Arendt), Van der Walt instead supports a democratic constitutionalism wherein the people are united by a system of law.²²⁹

It is my contention that pluralism in the South African constitutional discourse (and in a manner akin to what Christodoulidis observes about the American constitutional theorists)²³⁰ is resultant from an obsession about the counter-majoritarian problem and the tension between the notion of "the people shall govern" (self-rule) and the rule of law. The notion of civil society organisations partaking in constitution-making (or the instituted public freedom, as one view by Botha refers to this political development) provided the much-needed counter-pole to *the will of the overwhelming majority* which Mandela presented as the ANC's position in accordance with the democratic doctrine of one-

²²⁷ Van der Walt J 'Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities' (2010) 26(1) *SAJHR* 113.

²²⁸ Van der Walt J 'Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities' (2010) 26(1) *SAJHR* 113.

²²⁹ Van der Walt J 'Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities' (2010) 26(1) *SAJHR* 115.

²³⁰ Christodoulidis E 'The aporia of sovereignty: on the representation of the people in constitutional discourse' (2001) *The King's College Law Journal* 111.

person-one-vote.²³¹ It is in this context that Van der Walt's quotation²³² of Arato's 'Post-Sovereign Constitution-Making and its Pathology in Iraq,' ironically highlights the counter-majoritarian dilemma of pluralism *vis-à-vis* the democratic concept of the people:

If 'the people' can be said to be present in th[is] new type of [post-sovereign] constituent process this is so in a plural, complex, and always limited way that has neither the possibility of the absolute no of the referendum, nor the unlimited constituent power incorporated in an assembly.

This quote actually reflects that pluralism does violence to (i.e. limits) the sovereign right of the people by ensuring that the people cannot act as a sovereign unity, because their sovereignty becomes limited and fragmented. During South Africa's transition, the South African people needed to respond as a sovereign unity to the substantive question of how the Constitution should be determined. The employment and advocacy of pluralism, however, ensured that the question about the political existence of the South African polity was decided in the milieu of interventions from civil society and public questioning and the demand for justification.²³³ However, as Böckenförde notes '[e]conomic and social interest groups must be confined to their specific realm and prevented from taking control over political functions of the [people] which itself must be shielded against political pluralism.'²³⁴

Pluralism or the fragmentation of the sovereign constituent power of the people has the traces of Kelsen's normativist thinking of the concept of the people. Lindahl maintains

²³¹ <http://www.anc.org.za/show.php?id=4141> (accessed 23 October 2015). (My emphasis)

²³² Van der Walt J 'Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities' (2010) 26(1) *SAJHR* 113.

²³³ Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26(1) *SAJHR* 78.

²³⁴ Böckenförde E 'The concept of the political: A key to understanding Carl Schmitt's *Constitutional Theory*' (1997) *Canadian Journal of Law and Jurisprudence* Vol. X, No.1. 6-7.

that, according to Kelsen, 'the people in a democracy has no distinct and prior political existence, because its unity is but the unity of the legal order.'²³⁵ In other words, the people without a system of law are formless and exist in a state of nature. However, Schmitt tells us that '[t]he people as the bearer of the constitution-making power are not a stable, organized organ ... [but] they are nevertheless capable of ... willing and are able to say yes or no to the fundamental questions of their political existence.'²³⁶ Schmitt concludes that '[a]s long as a people have a will to political existence, the people are superior to every formation and normative framework.'²³⁷ Accordingly, adopting Christodoulidis' formulation of the question that confronts the American constitutional theorists in respect of the counter-majoritarian problem, it can be asked: How can it be justified that the Constitution is committed to the notion that the South African state rests on the authority of the people whereas that authority was, first, curtailed during the constitution-making process and, eventually, subjected to a constitutional dispensation with a limiting normative framework?

3.4. Assessment

The notion of constitutional continuity rests on the normative thinking of validity and legitimacy. In the South African context, the normative thinking of validity and legitimacy is in turn closely linked to the notion of dualism (the ushering in of a new constitutional order without a break in legality based on the old order). On the question of the legitimacy

²³⁵ Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin W & Walker N *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) 10.

²³⁶ Schmitt C *Constitutional Theory* (2008) 131.

²³⁷ Schmitt C *Constitutional Theory* (2008) 131.

(and validity) of a new constitution, Schmitt asserts that the legitimacy of a constitution is not based on previously valid constitutional laws.²³⁸ According to Schmitt, a constitution, 'as a new, fundamental political decision of the people, cannot subordinate itself to an earlier constitution and make itself dependent on it.'²³⁹ According to Schmitt's thinking, therefore, the basis of the validity of the Constitution did not have to be the 1983 Constitution, but the decision of the people. In light of Schmitt's observations and the challenges facing South Africa's constitutional democracy currently, what is needed is a fundamental shift in the country's constitutional discourse to allow the people more space to assert themselves as the subject of constituent power.

Furthermore, the employment of the concept of constitutional continuity and the establishment of the Constitutional Assembly was, to use Christodoulidis' turn of phrase, paradoxically a moment of the surrender of self-constitution to a pre-constituted order, and a moment of recognition and subjugation of constituent power, respectively.²⁴⁰ What this means is that in the normativist South African constitutional discourse, the post-sovereign constitution-making model is actually commended for containing collective agency within constituted power (the Constitutional Court and the Constitutional Assembly) and then ably attributing the act of constituted power (certification of the Constitution) to the bearer of constituent power, the people. To use again Christodoulidis' turn of phrase, the people as the subject of constituent power (an unstable and disorganised organ in its nature²⁴¹), became institutionalised in that it was operationalised

²³⁸ Schmitt C *Constitutional Theory* (2008) 136.

²³⁹ Schmitt C *Constitutional Theory* (2008) 136

²⁴⁰ Christodoulidis E 'Constitutional Irresolution: Law and the Framing of Civil Society (2003) 9(4) *European Law Journal* 429.

²⁴¹ Schmitt C *Constitutional Theory* (2008) 131.

within a *fore-structure* of norms, namely the interim Constitution with its Constitutional Principles, which bestowed it legal meaning.²⁴²

Indeed, as revealed by one line of thought that Botha refers to, the process of the authorship of the Constitution largely became the preserve of lawyers and judges,²⁴³ and the voice of the people could only be heard through legally regulated presentations. The litmus test with regard to the adoption of the Constitution, therefore, was its compliance with the Constitutional Principles;²⁴⁴ it was not adopted purely on the basis that it represented the social needs and political aspirations of the people. The judicial certification of the constitutional text according to the Constitutional Principles, which is unprecedented in the history of constitutionalism,²⁴⁵ played a prominent role in subjugating the so-called ‘out-dated and destructive’²⁴⁶ constituent power and popular sovereignty.



Furthermore, on close scrutiny, the normativist arguments in respect of the concept of the people referred to above bring to the fore the contentious concept of representation. I argue that the so-called ‘multi-vocal or pluralistic civil society representativeness’ of the Constitutional Assembly (Arato),²⁴⁷ allowed for the entrenchment of established capitalist

²⁴² Christodoulidis E ‘Constitutional Irresolution: Law and the Framing of Civil Society (2003) 9(4) *European Law Journal* 420.

²⁴³ Botha H ‘Instituting public freedom or extinguishing constituent power? Reflections on South Africa’s constitution-making experiment’ (2010) 26(1) *SAJHR* 69.

²⁴⁴ Botha H ‘Instituting public freedom or extinguishing constituent power? Reflections on South Africa’s constitution-making experiment’ (2010) 26(1) *SAJHR* 68.

²⁴⁵ Botha H ‘Instituting public freedom or extinguishing constituent power? Reflections on South Africa’s constitution-making experiment’ (2010) 26(1) *SAJHR* 69.

²⁴⁶ Van der Walt J ‘Constitution-making as a learning process: Andrew Arato’s model of post-sovereign Constitution-making: Editor’s introduction (2010) 26(1) *SAJHR* 3.

²⁴⁷ Arato A ‘Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?’ (2010) 26(1) *SAJHR* 20.

interests, particularly in s 25 of the Constitution. As reflected above through the observations of the various political formations, the country's constitutional democracy now has to urgently contend with land redistribution to avoid the undoing of the monumental gains of 22 years of democracy. The country has to contend with eruptions of political moments in the form of land grabs and violent protests as the people ventilate their aspirations (political will) in non-institutionalised channels. As shown by Venter's observations above, there seems to be a sustained lack of belief in the merits of the liberal foundations upon which the Constitution is built. The eruption of violent protests and land grabs manifest both the resistance of the will of the people to a normativist or constitutional regulation and the tension between democracy and constitutionalism. Mechanisms for the democratic initiation of constituent power need to be found, and that is the subject of the following section.



4. RE-ESTABLISHING THE PEOPLE AS THE SUBJECT OF CONSTITUENT POWER

It is my contention that Colon-Rios' observations in *Weak Constitutionalism* regarding the concept of constituent power in the milieu of the tension between constitutionalism and democracy are relevant to the South African discourse. In light of the challenges faced by South Africa's constitutional democracy, there is a need, as hinted at in Section 1, to ensure that South Africa's approach to democracy puts the emphasis on democracy at the level of fundamental laws.

In this section I will, first, briefly outline Colon-Rios' observations about the two prominent approaches to democracy, namely the substantive and procedural

approaches. The aim here is to show that the two approaches are what South Africa's constitutional discourse is mainly and mistakenly focused on, thereby obscuring democracy at the dimension of fundamental laws. I will also show here how the analysis undertaken here relates to Colon-Rios' analysis. Secondly, relying heavily on Colon Rios' suggestions, I will suggest mechanisms that can be implemented to ensure both that South Africa's constitutional discourse is based on the will of the people and that the people, as the subject of constituent power, are governing.

4.1. Constitutionalism and democracy

According to Colon-Rios, democracy has two dimensions. The first dimension is democracy at the level of daily governance, and the second dimension is democracy at the level of fundamental laws. Colon-Rios draws an instructive distinction between the various approaches to democracy and suggests that these approaches are subject to the perspective one adopts when judging whether a regime or state is premised on the principle of the rule by the people. He identifies two approaches to or interpretations of democracy, namely the substantive interpretation of democracy (Dworkin) and the procedural interpretation of democracy (Waldron).²⁴⁸

Colon-Rios argues that, according to Dworkin's substantive interpretation of democracy, the fundamental question is whether or not a particular regime's 'laws and institutions give citizens equal treatment and allow them to participate in everyday

²⁴⁸ Colon-Rios J 'The second dimension of democracy: The people and their constitution' (2011) Vol. 1 (4) *Victoria University of Wellington Legal Research Papers* 2.

decision-making.²⁴⁹ According to Colon-Rios, what is key to Dworkin is the content of the (liberal) constitution. Colon-Rios states that, for Dworkin, 'if a constitution provides for the rights and procedures that make partnership democracy possible, it does not make sense to be concerned about who adopted it and how, or to worry about the possibility of important constitutional transformations.'²⁵⁰ According to Waldron's procedural interpretation of democracy as outlined by Colon-Rios, the key question is a democratic procedure that is premised on the principle of parliamentary supremacy as opposed to ordinary representative institutions.²⁵¹ Colon-Rios states that, according to Waldron, 'the people have a right to participate in equal terms in all aspects of their community's governance ... [including] decisions of high principle.'²⁵² Decisions of high principle, without doubt, include decisions about the political existence of the people as a political unity. Waldron's procedural interpretation of democracy puts these decisions in the hands of the legislature as the representative of the people. Colon-Rios points out that Dworkin and Waldron's 'conceptions of democracy only operate within the level of democratic governance ... [and they] fail to address ... the question of the democratic legitimacy of a constitutional regime.'²⁵³

In the South African context, constitutional theorists who support Dworkin's substantive interpretation of democracy may argue that there is no need to alter South

²⁴⁹ Colon-Rios J 'The second dimension of democracy: The people and their constitution' (2011) Vol. 1 (4) *Victoria University of Wellington Legal Research Papers* 1.

²⁵⁰ Colon-Rios J 'The second dimension of democracy: The people and their constitution' (2011) Vol. 1 (4) *Victoria University of Wellington Legal Research Papers* 19.

²⁵¹ Colon-Rios J 'The second dimension of democracy: The people and their constitution' (2011) Vol. 1 (4) *Victoria University of Wellington Legal Research Papers* 19.

²⁵² Colon-Rios J 'The second dimension of democracy: The people and their constitution' (2011) Vol. 1 (4) *Victoria University of Wellington Legal Research Papers* 4-5.

²⁵³ Colon-Rios J 'The second dimension of democracy: The people and their constitution' (2011) Vol. 1 (4) *Victoria University of Wellington Legal Research Papers* 2.

Africa's constitutional discourse because (1) the Constitution has the right content in the form of the Bill of Rights (Chapter 2 of the Constitution); and (2) ss 59, 72 and 118 give citizens equal treatment and allow them to participate in everyday legislative decision-making.²⁵⁴ Constitutional theorists who support Waldron's procedural interpretation of democracy may argue that the Constitution is sufficiently democratic. To evince this view, they may refer to ss 53 and 74 and 112 of the Constitution. The specified constitutional provisions regulate the quorum and extraordinary majorities needed when decisions are to be taken in the national and provincial legislatures.

It is evident that arguments such as the ones I just referred to in the South African context are mainly focused on the first dimension of democracy and they ignore constituent power (the will of the people). The mistake here is to equate the will of the people, which actually relates to the fundamental political decision of a polity, to issues of daily governance, such as the need for the legislature to facilitate public participation. This is not to say public participation in this context is not important, but it should not, as Colon-Rios points out, obscure democracy at the level of fundamental laws. Colon-Rios states that the concept of constituent power '[has] a direct relationship with the democratic ideal ... [because it] is the expression of democracy at the level of the fundamental laws.'²⁵⁵ For the theory of democracy at the dimension of fundamental laws the question is: What mechanisms exist for the initiation of popular democratic initiatives or the constituent

²⁵⁴ These constitutional provisions regulate public access and involvement in the national and provincial legislatures. They state in uniform wording that the national and provincial legislatures must facilitate public involvement in the legislative and other processes and conduct their business in an open manner.

²⁵⁵ Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012) 36.

power of the people outside the confines of the Constitution and by the people themselves?

Colon-Rios' explication of the relationship between democracy and constitutionalism highlights (as does the analysis that is undertaken here) the necessity to both determine the Constitution at the level of fundamental laws according to the will of the people, and to re-establish a meaningful role of the people as the subject of constituent power. Colon-Rios states that:

The second dimension of democracy ... is not about the daily workings of the state's political apparatus, but about ... how a constitutional regime came into existence and how it can be altered. In that respect, it revolves around the following two questions: (1) Is this constitution the result of a democratic process?; and (2) Can this constitution be altered through democratic means? To ask about democracy at the level of the fundamental laws, then, is to ask about two different moments in the life of a constitutional arrangement: constitution-making and (the possibility of) fundamental constitutional change. These are the moments in which a juridical order can come closer to affirming the principle of popular sovereignty and in which the question of democratic legitimacy appears more clearly.

It will be noted that, in line with Colon-Rios' observations in this quote, I have dealt in the preceding sections with the question of how the South African constitutional regime came into existence. I argued that the influence of the Kelsenian thinking of the constitution had an expansive influence on the South African post-sovereign constitution-making process to the extent that the South African constitutional discourse does not really acknowledge the people as the subject of constituent power.

What is also important to note is that Colon-Rios' conceptualisation of "the people" in respect of current democracies is not underwritten by normativist thinking. In fact, Colon-Rios rejects the normativist conceptualisation of the people as he states in a Schmittian style that his theory of weak constitutionalism sees a citizen as 'someone who participates in the democratic legitimation of the constitutional regime and knows that ... it can be changed.'²⁵⁶ Here, like Schmitt,²⁵⁷ Colon-Rios is emphasising the capability of the constitution-making subject to act. Colon-Rios, furthermore, rejects the normativist thinking of democracy and asserts that 'democracy at the level of fundamental laws ... [entails] a political practice that takes place outside the confines of the established constitution.'²⁵⁸ Finally, in line with the analysis that is undertaken here (as it will be shown in the subsection below), Colon-Rios rejects Waldron's overestimation of the legislature, that is, the emphasis and overreliance on the legislature to make decisions on behalf of the people.



4.2. Mechanisms of initiating constituent power and constitutional amendments

Colon-Rios argues that 'democracy at the level of the fundamental laws [is not] a regime ... [but] a moment in the life of a democratic polity that a juridical order *makes possible*.'²⁵⁹ This is in line with Schmitt's argument, as Colon-Rios also notes,²⁶⁰ that '[t]he further execution and formulation of a political decision reached by the people in unmediated

²⁵⁶ Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012) 155.

²⁵⁷ Schmitt C *Constitutional Theory* (2008) 268.

²⁵⁸ Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012).

²⁵⁹ Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012).

²⁶⁰ Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012).

form requires some organization, a procedure, for which modern democracy developed certain practices and customs.²⁶¹ Basically, I have nothing to add to the mechanisms suggested by Colon-Rios. Indeed, '[the South African] democracy requires the actual participation of citizens in the positing and (re)positing of the fundamental laws through mechanisms such as [people-driven] constituent assemblies, referendums [and] popular initiatives.'²⁶²

In the South African context the process can be as follows: (1) The collection of signatures which lead to people-driven izimbizos; (2) people-driven izimbizos that should be precursors to people-driven referendums;²⁶³ (3) people-driven referendums to gauge the people's belief in the merits of the current Constitution; and (4) a Constituent Assembly as the apex of this process. I share Colon-Rios' view that a democratically elected Constituent Assembly activated by a popular referendum to deliberate on the merits of a constitution and, if needs be, draft a new constitution based on the will of the people comes closer to an exercise of the people's constituent power.²⁶⁴ The decision of such an assembly would, of course, have to be ratified by the people through another referendum. My submission is that this process can be much more democratic 'than an ordinary legislature engaging in profound constitutional changes.'²⁶⁵

²⁶¹ Schmitt *C Constitutional Theory* (2008) 132.

²⁶² Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012).

²⁶³ Sections 84(1)(g) and 127(2)(f) make the calling of referendums the prerogative of only the President and Premiers in accordance with national legislation.

²⁶⁴ Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012) 157.

²⁶⁵ Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012) 157.

It should be noted that even the Constitutional Review Committee, which is established in terms of s 45(1) (c) of the Constitution,²⁶⁶ is a far cry from the suggested process in terms of the exercise of the people's constituent power. The Constitutional Review Committee is a constitutionally regulated body, which can hardly be sufficient in ensuring that the people exercise their democratic right to govern at the level of fundamental laws. The work of the Constitutional Review Committee is largely resultant from petitions and is deliberated in the committee's meetings wherein invitees are not allowed to vote.²⁶⁷ The Constitutional Review Committee also reports to the different Houses of Parliament on a question which it decided according to the agreement among the majority of its members.²⁶⁸ This means that fundamental decisions on issues that could not be settled during the constitution-making process (as this committee defines its work)²⁶⁹ are taken within a constitutionally regulated environment, allowing no substantive opportunity to ordinary citizens to decide for themselves.

Colon-Rios makes an instructive observation that '[the people's] lack of opportunities to re-create their fundamental laws, to engage in acts of democratic re-constitution, puts into question the democratic legitimacy of the constitutional regimes under which they live.'²⁷⁰ In this context, South Africa should avoid what Lindahl observes with regard to Kelsen's theory of the basic norm, that is, a situation where further acts regarding

²⁶⁶ Section 45(1)(c) states that the National Assembly and the National Council of Provinces must establish a joint rules committee to make rules and orders to, amongst other things, establish a joint committee to review the Constitution at least annually.

²⁶⁷ Joint Rule 100 of the Joint Rules of Parliament, 6th Edition.

²⁶⁸ Joint Rule 103 of the Joint rules of Parliament, 6th Edition.

²⁶⁹ See Announcements, Tablings and Committee Reports (ATC) No 82 of 2013. Also found on <https://pmg.org.za/taled-committee-report/81/> (Accessed on 1 March 2016)

²⁷⁰

fundamental laws move *within* the legal order, such that constituent power is suspended in favour of constituted power.

It may be argued that the Constitution encourages popular participation through provisions contained in ss 59, 72 and 118. However, these provisions are not sufficient for the type of democratic constitutional discourse mooted here because they are operationalised under what may be called strong constitutionalism. The initiative is the prerogative of the legislatures and therefore ss 59, 72 and 118 do not encourage unfettered popular democratic initiative or a bottom-up approach. I share Colon-Rios' view that what is wrong with Waldron's interpretation of democracy is that '[p]opular participation at the level of the fundamental laws cannot merely mean that the people are allowed to have elected representatives take decisions in their name [particularly decisions that pertain to their political existence].'²⁷¹ The ultimate decision about the type and form of political existence of the South African polity should reside with the people. Colon-Rios states that even in terms of Sieyès' notion of the inevitable necessity of representatives of the people, 'representatives did not [and cannot] have the power to create or change the constitution.'²⁷²

5. CONCLUSION

In analysing the concept of constituent power in relation to the South African constitution, I set my discussion in the milieu of the Schmitt-Kelsen debate and argued in favour of

²⁷¹ Colon-Rios J 'The second dimension of democracy: The people and their constitution' (2011) Vol. 1 (4) *Victoria University of Wellington Legal Research Papers* 20.

²⁷² Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012) 84.

Schmitt's thinking. As it is noted by Colon-Rios, 'Schmitt [was] no democrat, and yet [his] theories of constituent power have important democratic implications.'²⁷³ Relying on the instructive observations of Schmitt, Christodoulidis, Mutua, Prempeh and Colon-Rios, I illustrated that the normativist thinking of the constitution, the concept of constitutional continuity (coupled with the attendant notions of Constitutional Principles and pluralism) and the normative concept of the people, militated against crafting the Constitution entirely according to the political will of the people. In order to mitigate the challenges faced by South Africa's constitutional democracy, the constitutional discourse must change to enable concrete people-driven initiatives.

It is my submission that it is possible to re-establish the people as the subject of constituent power through people-driven initiatives that entrench democracy at the level of fundamental laws. Relying on Colon-Rios' thinking, I pointed out that the extant public participation programmes must be accompanied by initiatives such as the collection of signatures, referendums, izimbizos and Constituent Assemblies, to strengthen the foundation of South Africa's constitutional discourse. In other words, in line with Colon-Rios' main thesis in *Weak Constitutionalism*, South Africa must avoid strong constitutionalism to encourage democracy at the level of fundamental laws through popular initiatives. Equally, the legislature, as a representative institution, should not be the subject of constituent power. The people, as the rightful subject of constituent power, must always govern.

²⁷³ Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012) 88.

Colon-Rios states that '[d]emocracy requires understanding constitution-making as an exercise of self-government that must take place in a context of democratic openness and that requires the maximization of [people-driven initiatives].'²⁷⁴ He further notes that the kind of mechanisms he suggests and also put forward in this analysis have an 'uneasy relationship with constitutional forms: as means for the exercise of constituent, rather than constituted power, they always operate against the constitutional regime that contains them.'²⁷⁵ However, as Colon Rios concludes in his instructive reading of Schmitt, 'no democratic constitution and constitutionalism can confer constituent power or prescribe the ways this power [must be exercised]: the constituent subject (the people in a democracy) can (re)determine its form of political existence whenever it decides such an action necessary.'²⁷⁶ Constituent power is an existential political power which finds expression in the will of the people. People-driven initiatives can provide the much-needed mechanisms of preserving the political unity of the South African people. They can also stabilise and pre-empt existing and imminent political tensions and conflicts.

Total Word Count: 23 315

²⁷⁴ Colon-Rios J *Weak constitutionalism: Democratic legitimacy and the Question of Constituent power* (2012) 84.

²⁷⁵ Colon-Rios J 'The second dimension of democracy: The people and their constitution' (2011) Vol. 1 (4) *Victoria University of Wellington Legal Research Papers* 31.

²⁷⁶ Colon-Rios J 'The second dimension of democracy: The people and their constitution' (2011) Vol. 1 (4) *Victoria University of Wellington Legal Research Papers* 31.

REFERENCES

Books:

Baker K M, Boyer J W & Kirshner J (eds) *The Old Regime and the French Revolution* (1987) University of Chicago Press: Chicago.

Colon-Rios J *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent power* (2012) Routledge, London.

Douzinas C *Philosophy and Resistance in the Crisis* (2013) Polity Press: Cambridge, United Kingdom.

Kelsen H *The Pure Theory of Law*



Loughlin M *Foundations of Public Law* (2010) Oxford University Press: United Kingdom.

UNIVERSITY of the
WESTERN CAPE

Loughlin M *The Idea of Public Law* (2003) Oxford University Press: United Kingdom.

Mandela N *Long Walk to Freedom: The Autobiography of Nelson Mandela* (2008) Little, Brown and Co, Boston.

Negri A *Insurgencies: Constituent Power and the Modern State* (1999) University of Minnesota Press, Minnesota.

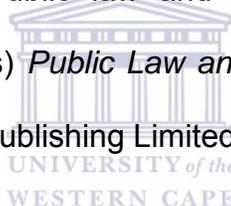
Schmitt C *Constitutional Theory* (2008) Duke University Press: Durham and London.

Book chapters:

Christodoulidis E 'Against substitution: The constitutional thinking of dissensus' in Loughlin M & Walker N (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) Oxford University Press: New York.

Christodoulidis E 'Public law as political jurisprudence: Loughlin's 'Idea of Public Law' in Christodoulidis E and Tierney S (eds) *Public Law and Politics: The Scope and Limits of Constitutionalism* (2008) Ashgate Publishing Limited: England.

Christodoulidis E & Tierney S 'Public law and politics: Rethinking the debate' in Christodoulidis E & Tierney S (eds) *Public Law and Politics: The Scope and Limits of Constitutionalism* (2008) Ashgate Publishing Limited: England.



Dyzenhaus D 'The question of constituent power' in Loughlin M & Walker N (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) Oxford University Press: New York.

Kelsen H, "The Function of a Constitution" trans. by Stewart I in Tur R & Twining W, (eds), *Essays on Kelsen* (1986) Clarendon Press: Oxford.

Lindahl H 'Constituent power and reflexive identity: Towards an ontology of collective selfhood' in Loughlin W and Walker N (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) Oxford University Press: New York.

Nickel R 'Private and Public Autonomy Revisited: Habermas' Concept of Co-originality in Times of Globalization and the Militant Security State' in Loughlin M & Walker N (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2008) Oxford University Press: New York.

Ntsebeza L 'Land redistribution in South Africa: the property clause revisited in Ntsebeza L & Hall R (eds) *The Land Question in South Africa* (2007) HSRC: Cape Town.

Sieyès E 'What is the Third Estate' in Baker K M, Boyer J W & Kirshner J (eds) *The Old Regime and the French Revolution* (1987) 154-179.

Tierney S 'Sovereignty and the Idea of Public Law' in Christodoulidis E and Tierney S (eds) *Public Law and Politics: The Scope and Limits of Constitutionalism* (2008) Ashgate Publishing Limited: England.



Journal articles:

Albert R 'Amending Constitutional Amendment Rules' (2015) 13(3) *International Journal of Constitutional Law* 655-685.

Arato A 'What I have learned: Concluding remarks' (2010) 26(1) *SAJHR* 129-140.

Arato A 'Multi-track constitutionalism beyond Carl Schmitt' (2011) 18(3) *Constellations* 324-351.

Arato A 'Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?' (2010) 26(1) *SAJHR* 19-44.

Böckenförde E 'The concept of the political: A key to understanding Carl Schmitt's *Constitutional Theory*' (1997) 10(1) *Canadian Journal of Law and Jurisprudence* 5-19.

Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' (2010) 26(1) *SAJHR* 66-84.

Colon-Rios J 'The second dimension of democracy: The people and their constitution' (2011) Vol. 1 (4) *Victoria University of Wellington Legal Research Papers* 1-33.

Colon-Rios J 'The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform' (2010) 48 (2) *Osgoode Hall Law Journal* 199-245.

Christodoulidis E 'The aporia of sovereignty: on the representation of the people in constitutional discourse' (2001) 12(1) *The King's College Law Journal* 111-133.



Davis D M & Klare K 'Transformative constitutionalism and the common and customary law' (2010) 26(1) *SAJHR* 403-509.

Dyzenhaus D 'Constitutionalism in an old key: Legality and constituent power' (2012) Vol. 1, (2) *Global Constitutionalism* 229-260.

Hicks J and Buccus I 'Crafting new democratic spaces: participatory policy-making in KwaZulu-Natal, South Africa' (2007) *Project Muse Scholarly Journals Online* 94-119.

Kalyvas A 'Carl Schmitt and the three moments of democracy' (1999-2000) 21 *Cardozo Law Review* 1525-1565.

Kistner U 'Vox populi: On the idea of a popular public, somewhat paradoxically' (2014) 46(1) *Acta Academica* 22-31.

Lindahl H 'Acquiring a community: The *Acquis* and the Institution of European Legal Order' (2003) 9 (4) *The European Law Journal* 433-450.

Lindahl H 'The Paradox of Constituent Power. The Ambiguous Self-Constitution of the European Union' (2007) 20(4) *Ratio Juris* 485-505.

Loughlin M 'The concept of constituent power' (2013) 13(2) *European Journal of Political Theory* 218-237.

Maharaj M 'The ANC and South Africa's negotiated transition to democracy and peace.' (2008) *Berghof Transitions Series No. 2*.

Mutua M 'Hope and Despair for a New South Africa: The Limits of Rights Discourse' (1997) 10 *Harvard Human Rights J* 63.



Oklopčic Z 'Constitutional (Re)Vision: Sovereign peoples, new constituent powers, and the formation of constitutional orders in the Balkans' (2012) 19(1) *Constellations* 81-101.

Oklopčic Z 'Three arenas of struggle: A contextual approach to the constituent power of 'the people' (2014) 3(2) *Global Constitutionalism* 200-235.

Prempeh H K 'Africa's "constitutionalism revival": False start or new dawn?' (2007) 5 *Int J of Constitutional Law* 469-506.

Van der Walt J 'Constitution-making as a learning process: Andrew Arato's model of post-sovereign Constitution-making: Editor's introduction (2010) 26(1) *SAJHR* 1-18.

Van der Walt J 'Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities' (2010) 26(1) *SAJHR* 102-129.

Venter F 'Liberal democracy: The unintended consequence. South African constitution propelled by the winds of globalisation' (2010) 26(1) *SAJHR* 45-65.

Other Publications:

Joint Rules of Parliament, 6th Edition.

