What do we mean when we talk about transformative constitutionalism?

1 Introduction

In much of contemporary South African human rights and constitutional law scholarship, the constitutional project is termed a 'transformative' or 'transformation-oriented' one. The pages of law journals and scholarly books abound with articles and chapters detailing various difficulties associated with building a constitutional jurisprudence that resonates with this 'transformative' vision, and often lamenting the failure of the judiciary in high-profile cases to embrace the full transformative potential of a particular provision or of the Constitution as a whole (prominent examples of these include Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146; Albertyn and Goldblatt 'Facing the challenges of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248; Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *SAJHR* 309 and the various chapters in Botha, Van der Walt and Van der Walt (eds) *Rights and democracy in a transformative constitution* (2003)).

This notion of the Constitution as guiding and/or requiring transformation is understandable given that transformation has become a popular buzzword in many sectors of post-apartheid South African society. In legal circles especially, the word 'transformation' is used to denote a wide array of processes or programmes, ranging from affirmative action and black economic empowerment to the complete overhaul of South African legal culture. While this is both understandable and appropriate, the ease with which this many-nuanced term is used in a variety of overlapping contexts runs the risk of deflating or over-generalising its meaning in a particular context. To avoid 'transformation' becoming nothing more than a buzzword, it is necessary to contemplate its meaning and implications in each of the contexts of its use.

So what do we mean when we speak about 'constitutional transformation' or 'transformative constitutionalism'? Is it right to term the Constitution 'transformative'? What does this mean, and what does it require of our community of constitutional interpreters? In this note, I attempt a tentative investigation of the content of 'constitutional transformation' and defend an essentially social-

democratic understanding of the concept as mandating the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships and the fostering of a 'culture of justification' for every exercise of public power. I do not pretend that this conception is a novel none. Indeed, many of the scholarly works referred to at the outset of this note emphasise one or more of these 'elements' of transformative constitutionalism and several seem implicitly to share my understanding of the concept. Nor do I pretend that my understanding is the only tenable one, or that it is necessarily correct. I accept that holding forth a uni-dimensional theory of the tenets and objects of transformative constitutionalism runs the risk of self-defeatingly limiting the potential of transformation by insisting that it conform to a particular, preconceived political model and by rigidly dictating firstly that it should achieve particular outcomes, secondly what those outcomes should be and thirdly how they should be accomplished. (On the dangers of such a 'closure-centered' or 'closed' conception of transformation, see for instance Van der Walt 'Closure and openness on difference and democracy – a response to justice Johan Froneman' (2001) 12 *Stell LR* 28 at 37-39; Van der Walt 'Dancing with codes – protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *SALJ* 258 at 294-297).

This said, I nevertheless believe it useful to present an explicit and integrated formulation of 'constitutional transformation', if only constructively to inform debates on the content of its terms and on the appropriate role for constitutional interpreters in its achievement. This note accordingly articulates what I perceive to be central concerns to the ongoing project of transformation envisaged by the Constitution and puts forward a particular formulation of these concerns which may plausibly (though not uncontrovertibly) be grounded in the constitutional text.

Section 2 below proceeds to situate the South African constitutional project within an understanding of transitional and transformative constitutionalism, secondly to identify the driving force behind the South African constitutional project and thirdly to present my understanding of the concept of transformation inherent to this project. Section 3 elaborates on this by briefly listing and discussing the various provisions of the 1996 Constitution that may be said to embody the dictates of transformation identified in section 2. Finally, section 4 briefly contemplates the significance of the understanding of transformation presented here to South Africa's community of constitutional interpreters, and argues that it also requires the transformation of many of the central assumptions underlying South African legal culture.

2 Political transition, transformative constitutionalism and societal transformation

> Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the intrusions of apartheid and its manifest effects

> on life and living for so many. ... It will take many years of strong commitment, sensitivity and labour to 'reconstruct our society' so as to fulfill the legitimate dreams of new generations exposed to real opportunities for advancement denied to preceding generations initially by the execution of apartheid itself and for a long time after its formal demise, by its relentless consequences (*Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) para 43).

Apartheid, through its intentional and persistent marginalisation, exploitation and oppression of black people, has combined with the remnants of colonialism and the pervasiveness of patriarchy to concretely shape severe patterns of social, economic and political vulnerability and deprivation in South Africa, and its aftereffects continue to do so. As was to be expected, South Africa's political transition to majority rule and democracy, and its accompanying legal transition from parliamentary sovereignty to constitutional supremacy was infused both by a commitment to ensure that the wrongs of its apartheid past are never repeated and an undertaking to eradicate the legacy of that past (see Liebenberg and O'Sullivan 'South Africa's new equality legislation: A tool for advancing women's socio-economic equality?' 2001 *Acta Juridica* 70 at 71; Roux 'Understanding *Grootboom* – a response to Cass R Sunstein' (2002) 12 (2) *Constitutional Forum* 41 at 43). Law, and specifically South Africa's first truly democratic Constitutions, were to play a central role in cementing these resolutions.

In a society undergoing political transition (and few would argue with the assertion that South Africa, at the time of the drafting of its constitutional texts, was such a society), constitutionalism defies the typical categorisation of constitutional law as either preservative or transformative. Indeed, transitional constitutionalism is often (and in case of the South African constitutions, certainly) both – it typically aims to preserve stability through maintaining legal continuity and simultaneously to facilitate change in the societal fabric through transforming the legal, political and economic tenets of society (see Teitel 'Transitional jurisprudence: The role of law in political transformation' (1997) 106 *Yale LJ* 2009 at 2014; Klug *Constituting democracy: Law, globalism and South Africa's political reconstruction* (2000) 7; Van der Walt 'Tentative urgency: Sensitivity for the paradoxes of stability and change in the social transformation decisions of the Constitutional Court' (2001) 16 *SAPR/PL* 1 at 2; Roux (2002) 12(2) *Constitutional Forum* 42).

In relation to the second, transformative, aspect of transitional constitutionalism (or, as it may be termed, transformative constitutionalism), the specific context of the constitutional transition would logically inform both what transitional/ transformative constitutionalism aspires to transform *from*, and what it seeks to transform *into*. In this sense, transformative constitutionalism departs from the liberal depiction of constitutions as representing a view of state and society that is fixed in time and is to be preserved for future generations, in that it is at once forward- and backward-looking, it is historically self-conscious whilst simulta-

neously embodying an as yet unrealised future ideal (Teitel (1997) 106 *Yale LJ* 2009 at 2014-2015; 2052; 2059; 2076-2078; Klare (1998) 14 *SAJHR* 146 at 155-156; Du Plessis 'The South African Constitution as memory and promise' (2000) 11 *Stell LR* 385 at 385, 388; De Vos 'A bridge too far? History as context in the interpretation of the South African Constitution' (2001) 17 *SAJHR* 1 at 32; De Vos '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *SAJHR* 258 at 260). Accordingly, transformative constitutionalism provides historical justification for transformation while at the same time representing one of the primary means through which such transformation is to take place (Teitel (1997) 106 *Yale LJ* 2009 at 2078; Du Plessis (2000) 11 *Stell LR* 385 at 388).

This Janus-like characteristic of transformative constitutions is evident both from the postscript of the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993) and the preamble of the 1996 Constitution (Constitution of the Republic of South Africa, 1996), which give specific content to the South African constitutional transformation project (Teitel (1997) 106 *Yale LJ* 2009 at 2059-2060; Du Plessis (2000) 11 *Stell LR* 385 at 387). The postscript of the interim Constitution determined:

> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. ... The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

The preamble of the 1996 Constitution states:

> We ... adopt this Constitution as the supreme law of the Republic so as to - [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; [i]mprove the quality of life of all citizens and free the potential of each person; and [b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

Accordingly, it would seem that South African constitutionalism attempts to transform our society *from* one deeply divided by the legacy of a racist and unequal past, *into* one based on democracy, social justice, equality, dignity and freedom (see Davis *Democracy and deliberation: Transformation and the South African legal order* (1999) 44; De Vos (2001) 17 *SAJHR* 1 at 9-10; De Vos (2001) 17 *SAJHR* 258 at 262; Davis 'Elegy to transformative constitutionalism' in Botha *et al* (eds) (2003) 57; Klare (1998) 14 *SAJHR* 146 at 153; Du Plessis (2000) 11

Stell LR 385 at 388; Moseneke (2002) 18 *SAJHR* 309 at 315). One should of course guard against viewing South African history as a fixed, uni-dimensional 'grand narrative' which emphasises only certain aspects of its past in which various forms of societal oppression interacted and overlapped (De Vos (2001) 17 *SAJHR* 1 at 14-15; 22; 31-32). Furthermore, to view the transition described here as a finite journey with fixed starting and end points is overly simplistic (see Van der Walt (2001) 18 *SALJ* 258 at 260-261) – rather, what must take place is a complex metamorphosis where elements of 'old' and 'new' are interlocked in an ongoing process of redefinition. Exactly how the end product of this metamorphosis should look and when, if ever, it will be achieved must necessarily remain uncertain and dependent on the outcomes of this continuous interaction, but should simultaneously not be conceived as so vague as to preclude meaningful and deliberate participation in the process.

For the moment, Albertyn and Goldblatt submit that transformation as envisaged by the Constitution must be understood to require

> ... a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships (Albertyn and Goldblatt (1998) 14 *SAJHR* 248 at 249. See also 272; Moseneke (2002) 18 *SAJHR* 309 at 315).

Accordingly, it may be said that constitutional transformation in South Africa includes the dismantling of the formal structures of apartheid, the explicit targeting and ultimate eradication of the (public and private) social structures that cause and reinforce inequality, the redistribution of social capital along egalitarian lines, an explicit engagement with social vulnerability in all legislative, executive and judicial action and the empowerment of poor and otherwise historically marginalised sectors of society through pro-active and context-sensitive measures that affirm human dignity (see Moseneke (2002 18 *SAJHR* 309 at 318-319; De Vos (2001) 17 *SAJHR* 258 at 267; Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) 6 *Law, Democracy and Development* 159 at 160, 162; Pieterse 'Beyond the welfare state: Globalisation of neo-liberal culture and the constitutional protection of social and economic rights in South Africa' (2003) 14 *Stell LR* 3 at 18).

Underlying this concept of transformation is the ideal of an egalitarian society and the accompanying value of substantive equality, which Albertyn and Goldblatt describe as involving

> ... examining the context of an alleged rights violation and its relationship to systemic forms of domination within a society. It addresses structural and entrenched disadvantage at the same time as it aspires to maximise human development (Albertyn and Goldblatt (1998) 14 *SAJHR* 248 at 250. See also

Albertyn and Kentridge 'Introducing the right to equality in the interim Constitution' (1994) 10 *SAJHR* 149 at 152-153; De Vos 'Substantive equality after *Grootboom*: The emergence of social and economic context as a guiding value in equality jurisprudence' (2001) *Acta Juridica* 52 at 59-60; Moseneke (2002)18 *SAJHR* 309 at 316-317; Albertyn 'Equality' in Cheadle, Davis and Haysom (eds) *South African constitutional law: The Bill of Rights'* (2002) 55-56).

It has come to be accepted that the traditional, 'formal' conception of equal treatment for all (regardless of social context) may serve to entrench, rather than to challenge, structural forms of domination and vulnerability within society. In order for the transformation envisaged by the Constitution to be meaningful, equality must be conceived as concerned with the broader societal context of domination and vulnerability, the impact of measures and conduct on socially vulnerable groups and the upliftment of such groups through remedial measures (Albertyn and Goldblatt (1998) 14 *SAJHR* 248 at 250-251, 253; De Vos (2001) 17 *SAJHR* 258 at 266; Moseneke (2002) 18 *SAJHR* 309 at 318-319; Liebenberg and O'Sullivan 2001 *Acta Juridica* 70 at 81).

In particular, the achievement of substantive equality will be impossible without addressing the material consequences of social and economic vulnerability, and as such is tied up inextricably with the alleviation of concrete hardship occasioned by poverty and material deprivation. For this reason, the socio-economic upliftment of the majority of South Africans and the concomitant achievement of social justice may be classified as integral components of the constitutional transformation project. As the Constitutional Court has famously stated in *Soobramoney v Minister of Health, KwaZulu Natal* 1998 1 SA 765 (CC) para 8:

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

Furthermore, much of substantive inequality is rooted in private interrelations. So for instance, the consequences of racism through the wielding of private power (by, for example, employers) have been as pernicious as that occasioned by public structures (see for instance the remarks of Davis in Botha *et al* (eds) (2003) 57) and the patriarchal undertones of (private) family relations have contributed tangibly to women's vulnerability to physical and sexual violence and to their experiences of social and economic dependency and hardship (see, for example, Olsen 'The family and the market: A study of ideology and legal reform' (1983) 97 *Harvard LR* 1497; Boshoff 'The fractured landscape of family law' (2001) 118 *SALJ* 312). Indeed, it is the so-called 'private sphere', traditionally argued to be sacrosanct from public law interference, where oppression of all kinds is often at

its most pervasive and the effects of vulnerability at their most concrete. Addressing imbalances in private power is accordingly integral to the constitutional transformation project, since leaving these unchallenged would entrench and reinforce socially structured patterns of domination (infused with gender, race and other related forms of disadvantage) and as such undermine the creation of a substantively equal society (see Pieterse (2003) 14 *Stell LR* 3 at 18 and authorities cited there).

This is not to deny the potentially destructive impact of public power on the achievement of substantive equality, social justice or private law justice, nor to say that societal transformation is possible without rethinking the manner in which public power is kept in check. Given the virtually untested (and uncontested) manner in which the organs of the apartheid state could encroach upon even the most basic freedoms of the majority of the population, it is necessary to ensure that every exercise of public power may properly be scrutinised for compliance with human rights standards. This need is perhaps best encapsulated by Mureinik ('A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31)'s now-famous statement:

> If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion' (32).

While there may be others, and while reasonable disagreement on their content and the method of their achievement should be encouraged, I would submit that the constitutional requirements discussed here (the attainment of substantive equality, the realisation of social justice, the infusion of the private sphere with human rights standards and the cultivation of a culture of justification in public law interactions) present central features of the metamorphosis envisaged by the 1996 Constitution. These are represented by several provisions in the 1996 Constitution, as will now be illustrated.

3 'Transformative' provisions of the 1996 Constitution

Several provisions in the 1996 Constitution supplement, directly or indirectly, its preamble's commitment to transformation. Read together, these provisions also indicate a marked departure from 'traditional' liberal conceptions of constitutionalism. In section 1, human dignity, the achievement of equality, non-racism and non-sexism are proclaimed as values upon which the Constitution and the Republic of South Africa are founded. Section 7 firstly affirms the centrality of the values of dignity, equality and freedom to the South African conceptualisation of democracy and secondly belies traditional conceptions of human rights (as requiring merely state restraint) by determining that the State must 'respect, protect, promote and fulfil' all the rights in the Bill of Rights. In doing so, the provision

> ... implies that the Bill of Rights is not merely a document that preserves and protects entrenched privileges and freezes the status quo, but that it also aims to facilitate the extension of the enjoyment of rights to all. Because the rights are not viewed merely as pre-existing entitlements that are activated as soon as a justiciable Bill of Rights comes into existence, the state is required to act positively to ensure the progressive realisation of *all* rights' (De Vos (2001) 17 *SAJHR* 258 at 261).

The extension of the constitutional transformation project to the so-called 'private sphere' is affirmed by section 8(2) and (3) of the Constitution, which acknowledges that rights may in appropriate circumstances apply also to private parties, hence allowing for constitutional standards to infiltrate (and intervene in) private relationships (see Klare (1998) 14 *SAJHR* 146 at 153, 155; Pieterse (2003) *Stell LR* 3 at 9, 11). Additionally, section 39(2) mandates and facilitates the gradual transformation of South African common law (which regulates the bulk of private interactions) by determining that courts 'must promote the spirit, purport and objects of the Bill of Rights' when developing the common law.

Perhaps the most pivotal of the transformation-orientated provisions in the Bill of Rights is section 9(2), which indicates beyond question that the right to equality should be seen as representing the value of substantive, rather than formal, equality (see Albertyn in Cheadle, Davis and Haysom (eds) (2002) 76-77). The subsection determines:

> Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Section 9(2) accordingly indicates that the notion of 'constitutional transformation' includes, but also extends beyond, the concept of transformation typically associated with 'affirmative action' measures and other types of material redress of past disadvantage. By aspiring to the 'full and equal enjoyment of all rights and freedoms', the provision requires a more far-reaching social project aimed at identifying and remedying the causes and consequences of social, economic and political vulnerability in all their intersecting manifestations. Elsewhere in the equality right, its substantive character is clear from, for example, section 9(3)'s determination that only unfair discrimination is prohibited (hence allowing for treatment which fairly differentiates or discriminates in resonance with section 9(2)) and section 9(4)'s explicit extension of the prohibition on discrimination to private relationships (on the transformative message and potential of s 9, see Klare (1998) 14 *SAJHR* 146 at 153-154; De Vos (2001) 17 *SAJHR* 258 at 262; De Vos 2001 *Acta Juridica* 52 at 64; Pieterse (2003) 14 *Stell LR* 3 at 9-10).

That the transformation envisaged by the preamble extends also to social and economic realms is undeniably indicated by the Constitution's entrenchment of a variety of seemingly fully justiciable socio-economic rights, including rights of

access to housing, health care services, food, water and social security (Klare (1998) 14 *SAJHR* 146 at 153-155; Pieterse (2003) 14 *Stell LR* 3 at 10-11; Bilchitz 'Placing basic needs at the centre of socio-economic rights jurisprudence' (2003) 4(1) *ESR Rev* 2). Their entrenchment alongside civil and political rights not only underscores the constitutional commitment to address the social and economic legacies of apartheid (Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *SAJHR* 451 at 454; Gutto *Equality and non-discrimination in South Africa: The political economy of law and law-making* (2001) 238), but also acknowledges and explicitly targets the social component of individual vulnerability, by requiring that the State ameliorate the consequences of such vulnerability in a variety of sectors. Maintaining a dichotomy between civil rights (depicted as enforceable rights) on the one hand and social rights (depicted as unenforceable aspirations) on the other assumes that the individual is responsible for and in control of her social status, thus denying the social causes and effects of vulnerability (Scott and Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African constitution' (1992) 141 *Univ Pennsylvania LR* 1 at 35-37, 39-41; Haysom (1992) 8 *SAJHR* 451 at 460; De Vos (2001) 17 *SAJHR* 258 at 262, 274). This is significant since, in the quest for substantive equality, political empowerment (and the concomitant protection of civil rights) is in itself insufficient to counter the pernicious effects of social vulnerability and oppression (see Haysom (1992) 8 *SAJHR* 451 at 460-461; Liebenberg 'Social and economic rights: A critical challenge' in Liebenberg (ed) *The Constitution of South Africa from a gender perspective* (1995) 81-82, 91; Liebenberg and O'Sullivan 2001 *Acta Juridica* 70 at 75). Through in principle placing social rights on par with their civil and political counterparts, the Constitution further avoids the real possibility that the unfettered operation of the latter category of rights may thwart institutional attempts at the economic and social empowerment of vulnerable sectors of society (Scott and Macklem (1992) 141 *Univ Pennsylvania LR* 1 at 31-35).

Finally, arguably the most significant provision enabling the fostering of a 'culture of justification' is section 36 of the Constitution, which determines that rights may only be limited by laws that are reasonable and justifiable in 'an open and democratic society based on human dignity, equality and freedom'. This provision serves not only to indicate that there are limits to the rights of citizens, but also that such limits need to be carefully conceived in light of the values underlying the Constitution and will not pass constitutional muster unless they can be justified as furthering the goals of the constitutional enterprise or as serving some other equally fundamental purpose.

4 The significance of 'constitutional transformation'

Reading the transformative provisions of the Constitution collectively, Klare ((1998) 14 *SAJHR* 146 at 153) concluded that South African constitutionalism may most accurately be termed 'post-liberal' in its simultaneous entrenchment

of the hallmarks of liberal democracy and the basic tenets of transformation. It would seem clear that the Constitution intends to play a pivotal role in the political, economic and social transformation of South African society. If we accept this transformation as consisting, at least in part, of the components presented in this note, what does this mean for South Africa's community of legal interpreters?

It has been said that the Constitution contributes to transformation in primarily three ways. Firstly, it does not stand in the way of political projects aimed at social transformation. So for instance, it explicitly allows for restitutional or remedial state action in order to achieve equality and it is possible for the state to rely on the dictates of the Constitution's transformative provisions in order to justify limitations of certain civil liberties (the unfettered exercise of which might otherwise have retarded transformation). Secondly, the Constitution mandates the State to prioritise and actively pursue transformation, by for instance mandating the state to 'fulfil' all rights in the Bill of Rights and to realise socio-economic rights progressively through adopting legislative and other measures. Thirdly (and perhaps most controversially) the Constitution itself functions as a tool of transformation by requiring that its provisions are interpreted and applied in a manner that furthers their transformative purpose (the three manners in which the Constitution contributes to transformation are identified and briefly discussed by De Vos 2001 *Acta Juridica* 52 at 68-69; Liebenberg (2002) 6 *Law, Democracy and Development* 159 at 160).

It is in this third contribution to transformation that the Constitution poses the most significant challenge to the South African judiciary and legal community. Constitutional provisions come alive mainly through interpretation and by being applied in particular concrete contexts. This becomes controversial when the provisions that are to be interpreted and applied require that those tasked with interpretation and application aspire to achieve the political goals embodied by the provisions.

South African legal culture, with its pronounced preference for 'political neutrality' in adjudication (which requires lawyers and judges to remain 'neutral' in their interpretation and application of legal texts by abstaining from interpretations or orders that have 'political' (or social, or economic) significance or consequences) has, like other Anglo-Saxon legal cultures, rightly been accused of masking a strong preference for the political structures and rights discourses associated with classical liberalism (I have discussed the classical liberal undertones of South African and Anglo-saxon legal cultures in Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383 at 396-399. See also Teitel (1997) 106 *Yale LJ* 2009 at 2056; 2075; Klare (1998) 14 *SAJHR* 146 at 152; 166-167; West 'Rights, capabilities and the good society' (2001) 69 *Fordham LR* 1901 at 1931; Ferejohn 'Judicializing politics, politicizing law' (2002) 65 *Law and Contemporary Problems* 41 at 49-50) and accordingly of condoning the inequalities occasioned, reinforced and sustained by the unfettered operation of classical liberal economic and social structures (Cassels 'Judicial activism and

public interest litigation in India: Attempting the impossible?' (1989) 37 *American Journal of Comparative Law* 495; Liebenberg in Liebenberg (ed) (1995) 84; Ewing 'Social rights and constitutional law' (1999) *Public Law* 104 at 122-123). Particularly, like all others rooted in the liberal tradition, South African legal culture frowns on the achievement of social or political projects through adjudication – '[l]iberal legalism balks at the idea of transformative adjudication' (Moseneke (2002) 18 *SAJHR* 309 at 315; see also 316; Dlamini 'The political nature of the judicial function' (1992) 55 *THRHR* 411).

Of course, it has been pointed out time and time again that both constitutionalism and adjudication are distinctly political – 'the issue is not *whether*, but *what type of*, political values should enter into adjudication' (Cassels (1989) 37 *American Journal of Comparative Law* 495 at 512. See also Dlamini (1992) 55 *THRHR* 411 at 411-413, 421; Teitel (1997) 106 *Yale LJ* 2009 at 2058; Davis *Democracy and Deliberation* 14, 47; Ferejohn (2002) 65 *Law and Contemporary Problems* 41, 52-53; Pillay 'Law's republic, democracy and the South African Constitution' (2002) 17 *SAPR/PL* 319 at 323). In South Africa, I would argue, there can be little doubt as to the answer to this question. The South African Constitution, as is common for constitutions in transitional societies (Teitel (1997) 106 *Yale LJ* 2009 at 2035, 2062-2063, 2076), unashamedly dictates the political vision required from its interpretative community by articulating unequivocally the political goals to which those tasked with its interpretation and concrete application must aspire. It enjoins them to 'uphold and advance its transformative design' (Moseneke (2002) 18 *SAJHR* 309 at 314, see also 318-319) and hence to participate actively in the political project of transformation.

This means firstly that South African judges must aim in their judgments to further (or at least not to hinder) the achievement of substantive equality and social justice. This would often require that judges (in interpreting rights in the Bill of Rights, measuring state compliance with the duties these impose and remedying non-compliance with such duties) transcend traditional conceptions of their role under a liberal model of separation of powers – a transition for which the provisions of the Constitution discussed above well equip them (I have set out the tenets of what I believe to be an appropriately transformative model of separation of powers for post-transition South Africa in Pieterse (2004) 20 *SAJHR* 383).

Furthermore, judges must demand, in every constitutional matter, that the other branches of government present adequate justification for all their actions that impact on the constitutional rights of the citizenry. Where justifications advanced do not reverberate with the tenets of constitutional transformation, they should not pass constitutional muster. Insisting consistently on justification which reverberates with the spirit, purport and objects of the Constitution requires not only that these are expressly articulated in judgments but also that the judiciary abandons the remnants of a culture of extreme deference to the executive which it has cultivated over years of adjudicating the actions of the sovereign apartheid state.

Finally, judges should guard against a knee-jerk reluctance to impose the dictates of the Constitution to private relationships and concomitant power structures. Contrary to their depiction in liberal legal culture, these may no longer remain immune to the impact of rights-discourses and the tenets of transformation. The Constitution has made judges responsible not only to protect citizens from the effects of public power unjustly wielded, but also to alleviate the adverse consequences of private power for those rendered vulnerable by its exercise.

All in all, the Constitution would seem to require a rather radical departure from the assumptions underlying South African legal culture and accordingly to compel the transformation of this culture and of the manner in which lawyers and judges conceive of their role in society. Far from being passive spectators to constitutionally driven transformation, we have been tasked with active participation in the process.

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