OPINION PIECE

Transformative Social Change and the Role of the Judge in Post-Apartheid South Africa

A Lecture by Justice Dunstan Mlambo – Judge President of the Gauteng High Courts, South Africa

University of Stellenbosch, 24 March 2022
(The paper was covered in *Daily Maverick* on 25 March 2022)

Introduction

It has been emphasised many times that our Constitution embraces an aspiration and an intention to realise, in South Africa, a democratic, egalitarian society committed to social justice and self-realisation opportunities for all. In ***Makwanyane***, Chief Justice Mahomed said that our Constitution—

> **"represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic caring and aspirationally egalitarian ethos, expressly articulated in the Constitution."[1]**

Similarly, in ***Soobramoney***[2] Chaskalson CJ said that a **"commitment ... to transform our society ... lies at the heart of the new constitutional order"**.[3]

It is clear that the notion of transforming our society plays a key role in our Constitutional democracy. In this address, I want to briefly discuss transformative Constitutionalism, and why it necessarily requires that, in the Judiciary but legal sector in general, we transform legal culture and judicial mindset in line with Constitutional dictates, and then I want to reflect on how judges have performed in fulfilling the spirit and objects of the Constitution.

Meaning of transformative constitutionalism?

Karl Klare, in thinking about the rule of law and adjudication in the "new South Africa" posed the question whether it is possible, in our democracy to conceive of a form of adjudication that at the same time meets the constitutional standard of interpretative fidelity but is also committed to establishing a society based on democratic values, social justice and fundamental rights. His seminal piece considered whether it was possible for lawyers to be inspired by a commitment to social transformation but also faithful to the norms and expectations of their professional role. For Klare, the answer to this question would predict whether "transformative constitutionalism" – a process of social change through processes grounded in law – was possible. By the term constitutionalism, he meant:

> **"a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive politic developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. *Transformative constitutionalism connotes***

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[1] *S v Makwanyane* 1995 (6) BCLR 665(CC) at para 262.

[2] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998(1) SA 765 (CC); 1997 12 BCLR 1696 (CC). This is also clear from the preamble to Constitution, which provides:

> "We, therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay 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; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations".

[3] Id at para 8.

> ***<u>an enterprise of inducing large scale social change through nonviolent political processes grounded in law</u>*. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform' but something short of or different from 'revolution' in any traditional sense of the word. In the background is an idea that a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere.' The major question underlying the scholarly initiative of which this part forms a small part is whether it is possible to achieve this sort of dramatic social change through law-grounded processes."**[4]

Expanding on this theory, Klare explained that over and above the transformative aspirations of our Constitution, our Constitution also encompasses a less obvious innovation. It invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. Indeed, judicial methodology is *a part of the law* and therefore judicial mindset and judicial methodology must necessarily be examined and revised so as to promote the culture of democracy, the transparent governance and the fundamental rights that our Constitution envisages. Under a transformative constitutionalism, he warned, that traditional legal methods – and the inbred formalism of the legal culture – would act as a brake on the social and legal transformation our Constitution both envisages and requires.

Klare also explained, however, that our Constitution's drafters were alive to this danger, and to avert it, they mandated a process for reconsidering and reworking the common law and the legal infrastructure. The drafters assumed that we would not progress towards social justice with a legal system that rigs a constitutional superstructure onto a common law base inherited from the apartheid past. As a result, the drafters included the so-called "development clauses" into our Constitution. Together, these two clauses place our country's judges under a duty actively to promote constitutional values. They express the clear mandate that, in developing the common law, judges *shall* fulfil the democratic values of human dignity, equality and freedom.[5]

The two clauses are section 39(2) and section 8(3)(a) of the Constitution, which both contain peremptory or commanding language. In terms of section 39(2), Courts "must" promote the spirit, purport and objects of the Bill of Rights. In terms of clause 8(3)(a), when giving effect to a right in the Bill of Rights, Judges "must" develop the common law and fill gaps in legislation to give effect to the rights enshrined in our Constitution. These two clauses therefore require Judges to fulfil and promote the constitutional vision in circumstances, especially where the legislature might have failed to do so, or where the legislature has done so inadequately. While Judges must of course be mindful that the legislature has superior competence to make law, Judges under a transformative constitutionalism must not shy away from developing the common law, given that they are both authorised and bound by a Constitutional injunction to fulfil the constitutional vision. I must also bring in

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[4] K Klare (1998) Legal Culture and Transformative Constitutionalism, *South African Journal on Human Rights* 14:1 at 6.

[5] Section 7(1) of our Constitution explains that the Bill of Rights, which is a cornerstone of our democracy, enshrines the rights of all people in our country and affirms that democratic values of dignity, equality and freedom.

section 172 of the Constitution. That section mandates and authorises judges to strike down any law or conduct that does not comply with the Constitution. This section is important in our constitutional scheme, to enable judges and courts to ensure the achievement of constitutional aspirations in bringing about a socially and economically transformed society.

This authorises an important role for our courts: the Constitution mandates so called "Judge-made" law, by directing judges to develop new methods for approaching adjudication and new criteria for resolving common law questions. This new methodology is one that is underpinned and informed by the values and aspirations of the Bill of Rights, and the constitutional aspiration to lay the foundations of a just, democratic and egalitarian social order. It is also a methodology – and an approach to adjudication – that acknowledges the politics of the law. As Justice Langa explained when he gave this lecture in 2006—

> **"[T]here is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked."**

Klare also understood that a necessary implication of transformative constitutionalism is that the project takes on a political character. On this score, Klare argued that the traditional bright-line framing of the law/politics dilemma in adjudication is simplistic. In short, judges' personal/political values and sensibilities cannot be excluded from the interpretative process of adjudication. In the circumstances, Klare argued that judges – and other legal practitioners – should instead just acknowledge and forthrightly accept their political and moral responsibility in adjudication.[6]

How have judges performed?

Before considering if judges and the courts have lived up to the Constitution's developmental injunction, it may be important to consider some of the constraints that may have influenced the performance of the courts in advancing transformative constitutionalism. I mention two. South African legal practice and, in a sense, the judiciary, have a conservative setting. In fact, borne out of our apartheid past, our legal culture is conservative. This has been referred to by Klare and Liebenberg in their writings. This is also illustrated by the reluctance, and in fact unwillingness, by courts to develop the common law in line with the Constitution. This led to the famous statement by the Constitutional Court that there were no two systems of law – the Constitution and common law but one – the Constitution. That reluctance is dissipating but there is residual deference to common law which should be turned around in the fullness of time.

Another constraint is probably the diverse backgrounds from which current members of the bench are drawn. Our own lived experiences have a huge bearing on how we process legal issues hence the importance of constitutional conscientisation through judicial discussion forums by members of the judiciary. I have elsewhere mentioned the value add of judicial colloquia involving judges and legal scholars such as you have in this University. Such engagements will go a long way into dismantling the conservative legal culture and mindset that most us come from and still adhere to.

With this in mind, it is apposite to ask: how have South African courts and Judges performed? As a judiciary, have we fully embraced the duty implicit in section 39(2), especially at the High Court level?

[6] Klare also tied this in with the requirement in section 41(1)(c) of the Constitution which requires that organs of state at every level must provide transparent, accountable and coherent government.

Klare and Davis, writing in 2010, commented that the full implication of the development clauses were only just beginning to dawn 15 years after the Constitution was adopted. In their assessment, until the Constitutional Court's seminal judgment in ***Carmichele*** our courts were very slow to acknowledge their constitutional responsibility to develop the common law. For the most part, it was business as usual at the courts, and in law faculties which did not revise their approach to teaching the common law. Klare and Davis also noted that while there were significant transformative advances in certain areas of the common law, these tended to be confined to e.g. the law of delict and how we understand the protective duties of the state[7] and the inclusion of outsider identity groups[8]. There was not, in their view, the kind of large-scale renovation of the legal infrastructure and paradigm shift in legal culture that our Constitution contemplated. Finally, the authors noted that while transformative advances were happening at the level of the apex courts, the High Courts had not fully absorbed the message that the development clauses cast the judicial role in a new light.

The ***Carmichele*** case was a watershed moment. Very briefly, a man had already been charged with the rape of another woman when he viciously assaulted Alix Carmichele. Despite the seriousness of the alleged crime and the fact that the man had a prior rape conviction, the police and prosecutor had agreed that the man be released on bail pending trial. The man after his release, violently attacked Carmichele. She sued the Minister for damages, arguing that the police and prosecutors had negligently failed to comply with a legal duty they owed to her to take steps to prevent the man from causing her harm. Both the High Court and the Supreme Court of Appeal – without assessing the current state of the common law – dismissed her claim, holding that the police and prosecution did not owe her a duty of protection. On appeal, the Constitutional Court set aside the orders of the lower courts and remanded the case to the High Court for trial. It held that the State is obligated by the Constitution and international law to protect the dignity and security of women and in the circumstances, the police recommendation for the assailant's release on bail could amount to wrongful conduct giving rise to liability. The Court also held that prosecutors, who are under a duty to place before the court any information relevant to the refusal or grant of bail, may be held liable for negligently failing to fulfil that duty.

Carmichele had an enormous impact in the context of protective duties of the state, as the case confirmed that state actors had a positive obligation to protect people from violence. But outside of cases dealing with state protective duties, other aspects of the common law were much slower to change. A good example is the line of case law dealing with fairness in contract. The Supreme Court of Appeal has handed down a string of cases which reflect a firm reluctance to develop the law of contract in line with the Constitution. See for example ***Brisley***, ***Afrox***, ***Barkhuizen*** and more recently the Supreme Court of Appeal's judgment in ***Beadica*** where the Court simply applied the general common law rule that contracts are enforceable unless enforcement was unconscionable or contrary to public policy. By contrast, the Constitutional Court in ***Beadica***, recognising the opportunity to develop the common law, said that public policy imports values of fairness, reasonableness and justice and that Ubuntu, which encompasses these values, is recognised as a constitutional value and informs public policy. In the course of its judgment the Court emphasised that constitutional values should be used creatively by courts to develop new constitutionally-infused common law doctrines.

[7] In this regard, see *Carmichele, K, Rail Commuters* and *Modderklip.*

[8] As examples the authors cite *Bhe* and *Fourie.*

What should judges be doing?

In order to achieve the kind of transformed society that our Constitution envisages, Liebenberg has argued that our courts and our judges need to engage with the normative purposes and values which our Constitution seeks to achieve. Liebenberg argues that courts and judges need to abandon traditional and formalistic approaches to legal interpretation and rigid understandings of separation of powers. I have no quibble with what Liebenberg advocates up to a point. We operate in a context requiring important deferential approaches. We are, as the judiciary, not superior to the other arms of Government, nor do we possess superior wisdom especially in polycentric matters. Without a doubt, the judiciary has a very different role to the executive and legislature but all the arms of government have the same obligation to promote the "sprit, purport and objectives" of the Constitution.

Regarding the common law, Judges should take note that every common law case is an opportunity to develop the common law and to construct social and economic relationships in one way or another consonant with the transformative agenda of the Constitution. Every common law decision has implications that are political, moral, economic and distributive. In this context, the obligation in section 39(2) is one that must be borne at *all* times, not merely occasionally. In ***Carmichele*** the Constitutional Court said the following:

> **"[T]he courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights . . . this duty upon judges arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under section 39(2)."**

The Constitutional Court in ***Carmichele*** also provided a necessary two-stage enquiry to be taken when a court is to consider whether or not to develop the common law. The first enquiry is whether, given the objectives of section 39(2), the existing common law should be developed beyond the existing precedent. If this is answered in the positive, the next enquiry is how the development should occur.

There are normally at least two instances when the common law is to be developed: when the common law is inconsistent with a constitutional provision or when the common law is not inconsistent with a specific constitutional provision but falls short of the spirit, purport and objects of the Constitution.

Aside from developing the common law, the injunction in section 39(2) also applies when interpreting any legislation. Therefore, the interpretation of *every* law must be through the "prism" or "lens" of the Constitution. In the context of socio-economic rights law, Liebenberg has argued that courts must offer a substantive interpretation of the right in question, not only to develop the content and values of socio economic rights themselves but also in relation to how they are connected to other rights in the Constitution.[9] For example, with reference to the ***Grootboom*** judgment, Liebenberg commended the Court for recognising that the right to housing **"entails more than bricks and mortar."** Justice Yacoob in ***Grootboom*** acknowledged that—

> **"The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in**

[9] Liebenberg Socio-Economic Rights. Adjudication under a Transformative Constitution. Claremont: Juta, 2010.

the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them."

Against this framework, the fundamental values that underpin our Constitution – dignity, equality and freedom – lie at the center of legal interpretation. How these values play out is of course impacted by our current context of South Africa, and as a judiciary we need to navigate some of the stumbling blocks that hold back our appetite to advance the transformative project: systemic and entrenched inequalities, weak public institutions delivering socio-economic rights for the poor, a society that remains divided, corruption and inequalities in accessing justice to name but a few.[10]

Conclusion

I want to conclude by talking briefly about the current socio-political context, especially its impact on the work of the courts and Judges. I also emphasise that I speak about these issues as the leader of a Division of the High Court that has dealt with and continues to process more litigation touching on sensitive political and separation of powers issues, to mention just two. The handling of these matters by judges and courts generally, but specifically the Constitutional Court, has given rise to a number of what I term politically antagonistic themes directed at the courts in particular. Currently there are themes that seek to suggest that our Constitution has been a failure in that it has not resulted in better living conditions for the poor masses; there are themes that suggest that judges and courts have become a Juristocracy that impedes the socio economic development of the poor masses; there are yet other themes that suggest that courts and judges, unelected as they are, have become too powerful and must be reined in and that South Africa could do better under a parliamentary supremacy framework. Propagating these themes are predominantly political party members, members of parliament, members of the executive in the different spheres of Government who openly decry the power of judges and courts. We should also factor the role of the media in all this.

I cannot stand here and deny that there are fault lines on a number of fronts in this country, be it service delivery and worrying levels of corruption especially in state departments and state entities. My Colleague Justice Kollapen, recently stated that for many in this country, the Constitution remains **"an illusion far on the horizon."** He said the masses **"impatiently wait to feel its presence and effect and to deliver on its promise of a better life for all."** Yes, we have also seen unprecedented levels of litigation seeking to hold the state accountable and/or to deliver on a number of service delivery fronts. Such litigation transcends into Government departments, State Owned Entities, political parties and internal political party structures and yet it all comes to the courts to resolve.

This must give us all cause to reflect on why our constitutional project is failing. I offer the following thoughts. In the first place the Diagnostic report of the Planning Commission, released some years ago, listed nine (9) key failings of our constitutional transformative agenda. However, none of the listed failings cite the courts and judges. Instead, almost all of those failings reside elsewhere in our constitutional governance framework. An example is that our Government has spent billions of rands funding a commission that was mandated to

[10] Brickhill and Van Leeve 2015 Transformative Constitutionalism: Guiding Light or Empty Slogan?

investigate alleged malfeasance in the state context of unimaginable proportions. Our Constitution is premised on its supremacy i.e. all levels of government being bound by and subject to its dictates. When all three arms of government function well our Constitution will surely deliver on its promise.

Lest we forget, the Judiciary was not the dominant player in the Constitutional Assembly deliberations that gave us our Constitution. We didn't ask let alone insist on having the developmental provisions of the Constitution and section 172. But this was all the product of indepth political engagements. Let us remember the submission of the dominant party in those engagements, the ANC to this effect:

> **"The supremacy of the Constitution should not be a system against the state, but it should be a system for the democratic state, to guard against the state degenerating into anarchy, arbitrariness, and illegality without a framework of rules. Such a state would undermine democracy and democratic practices."**

In this context, therefore, one truth remains stark and that is, for social and economic transformation including growth to translate into social and economic parity and development, the state, as the duty-bearer, must adopt rights-informed legislation and social justice policies that follow a distributional pattern of focusing on the poor and ensure the availability of financial and human resources for the implementation of such policies. Courts and judges are but one of the three arms of government and holds the others to the boundaries of their power prescripts. It is counterproductive to seek to find blame in what the courts are mandated to do by the Constitution. In any event one searches in vain for policies and other transformative programmes that have been stymied by the courts. All that the courts have done is to point out deficiencies in policies that have come before and referred these back for improvement in line with constitutional dictates. It would augur well for all of us, to soberly engage and identify where the fault lines lie. We cannot as a nation rely on litigation to solve all our problems. Some of them require a simple but profound realization that the solution lies in getting back to our constitutional principles and deliverables. After all there must be a lot of sense in subscribing to the maintenance of comity between us and the other arms of government. That way we will achieve a lot more than screaming headlines that achieve acrimony at best.

In this context the separation of powers principle becomes more important. It is the principle by which we as arms of government can use to ensure that the comity that we need amongst each other remains the glue that binds us together and enables us in our spheres to understand our respective roles and to strive towards achieving our respective objects. We in the judiciary are acutely aware of the separation of powers principle and it is due to this awareness on our part that the Constitutional Court has developed deferential but effective jurisprudence around budgetary and resource allocation matters which firmly reside in the domain of the Executive in particular. I have in mind Constitutional Court decisions such as ***Grootboom***[11] but more importantly, ***National Treasury v Opposition to Urban Tolling***.[12] The following statement by Moseneke DCJ says it all:

> **"Thus the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of executive function and domain. What is more, absent of any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national**

[11] supra

[12] [2012] ZACC 18, 2012 (6) SA 2233 (CC)

executive subject to the budgetary appropriations by Parliament."[13]

Our Constitution is human rights based, forward looking and arms us with developmental tools to advance its constitutional project. This behoves all of us, not just courts and judges, to realize this. As we observe Human Rights Day we should all realize that political hostility towards courts and judges will in time, delegitimise the courts and that will sound the death knell to our constitutional transformative project as a nation.

Thank you

[13] At para 67