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## **Twenty Years of Constitutional Democracy: A Preliminary Reflection**

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DENNIS M. DAVIS

## Twenty Years of Constitutional Democracy: A Preliminary Reflection

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This article was originally presented as a keynote address at the *New York Law School Law Review* symposium titled *Constitutional Rights, Judicial Independence, and the Transition to Democracy: Twenty Years of South African Constitutionalism*, on November 15, 2014.

*First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in [section] 71(2) [of the Interim Constitution]: to certify whether all the provisions of the NT [New Text] comply with the CPs [Constitutional Principles]. That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the CA [Constitutional Assembly] in drafting the NT, save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs.<sup>1</sup>*

## I. INTRODUCTION

What did “We, the People of South Africa” expect from the social order that was to emerge from the newly-minted Constitution in 1996? The simple answer is that “we” sought not only to end an authoritarian regime but also to transcend its arbitrary and brutal nature and replace it with a society based on principles of accountability, transparency, and integrity—or, if you wish, the rule of law.

In a typically-thoughtful piece, Stu Woolman<sup>2</sup> suggests that the Constitutional Court’s understanding of our ambition may have been that it was carefully crafted as a modest, incremental journey toward the legitimacy of the legal system, particularly the Court.<sup>3</sup>

Did this suggestion mean that the newly established Constitutional Court should have adopted a legal humility as it approached the challenge of developing jurisprudence and eschewed the imposition of any deep substantive vision of a just political order for a democratic South Africa? According to this theory, the Court’s main role was to undo the egregious damage caused by the caprice and brutality of apartheid by dissenting the new *Grundnorm*—the rule of law.

Questions about jurisprudential direction confronted the newly established constitutional institutions some twenty years ago and continue to challenge our

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1. *Certification of the Constitution of the Republic of S. Afr.* 1996 (4) SA 744 (CC) at para. 27.

2. Stu Woolman is Professor of Law at the University of Witwatersrand.

3. Stu Woolman, *Humility, Michelman’s Method and the Constitutional Court: Rereading the First Certification Judgment and Reaffirming a Distinction Between Law and Politics*, 24 *STELLENBOSCH L. REV.* 281 (2013). In support of this proposition, Woolman cites to Michael Walzer writing about marchers in the streets of Prague carrying signs with the words “Truth” and “Justice.” *Id.* at 291–92 (quoting MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* 1–2 (1994)). Walzer wrote that “[w]hat they meant by the ‘justice’ inscribed on their signs, however, was simple enough: an end to arbitrary arrests, equal and impartial law enforcement, the abolition of the privileges and prerogatives of the party elite –common, garden variety justice.” MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* 2 (1994). In this passage, Walzer is referring to marches that took place in late 1989 as part of a series of events, commonly called the Velvet Revolution—a nonviolent campaign that culminated in a transition of power in then-Czechoslovakia.

assessment of the progress made by the judicial system and in particular, by our constitutional society. It is to the responses to these challenges that I shall now turn.

Agreement on certain issues can be readily reached. The South African Constitution was drafted in response to a history of institutionalized racial oppression and arbitrary and capricious rule.<sup>4</sup> It was crafted with an understanding of the important role that the law played during apartheid's long history and the manner in which it privileged a racial minority.<sup>5</sup> In this sense, the Constitution was to be a transformative document as opposed to a conservative or "preservative" one.

It is here that profound differences of opinion exist. Frank Michelman<sup>6</sup> describes a transformative constitution as:

[F]orward-looking, a charter of direction to a good and a just society that is not here—not now, not yet, perhaps not fully and perfectly ever—but rather is to be pursued by political and other means under the Constitution's guidance and control. But then of course the Constitution speaks not only as a declaration and expression of a national commitment to social transformation but as a legal charter for a constitutional state, meaning a state that pursues its aims—here, its socially transformative aims—by and under laws made and applied in accordance with constitutional supreme law.<sup>7</sup>

It was this idea of transformation that inspired Karl Klare,<sup>8</sup> in arguably the most influential article published to date on South Africa's Constitution, to define a transformative constitution as:

[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.<sup>9</sup>

Under this view, courts were mandated to provide a substantive road map for a journey towards a society prefigured by the Constitution.

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4. See generally RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–1994* (1995); STEPHEN ELLMANN, *IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* (1992).

5. See generally ABEL, *supra* note 4; ELLMANN, *supra* note 4.

6. Frank I. Michelman is a legal scholar and Robert Walmsley University Professor at Harvard Law School.

7. Frank I. Michelman, *Expropriation, Eviction, and the Gravity of the Common Law*, 24 *STELLENBOSCH L. REV.* 245, 245 (2013).

8. Karl E. Klare is George J. and Kathleen Waters Matthews Distinguished University Professor of Law at Northeastern University School of Law and has received recognition for his scholarship on transformative constitutionalism.

9. Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 *SAJHR* 146, 150 (1998).

By contrast, Theunis Roux<sup>10</sup> has argued that South Africa's expectations, as derived from the Constitution, were directed to a judiciary charged with interpreting the Constitution in a far more modest fashion.<sup>11</sup> Post-apartheid South Africa had to shift from a society based on the primacy of the racist and capricious apartheid system to a society based upon the rule of law.<sup>12</sup> Thus, the Constitutional Court's primary goal was not to pursue social transformation through the law but rather to assert its institutional role in the South African political system as a neutral arbiter of major political disputes.<sup>13</sup> Only once this institutional role was secure could the Court turn its attention to decisions which might have the sort of distributive impact that Klare had envisaged in his argument.<sup>14</sup>

Although Klare saw the Constitution as directing courts towards the achievement of social justice through law, he cautioned against an overly optimistic expectation of what jurisprudence would unfold.<sup>15</sup> In his view, a conservative but dominant legal culture could serve to "[discourage] appropriate constitutional innovation and [lead] to less generous . . . interpretations and applications of the Constitution than are permitted by the text and drafting history."<sup>16</sup> Klare's focus on the tension between the egalitarian view of the Constitution and a formalistic legal culture—lacking "a strong tradition of substantive political discussion and contestation through the medium of legal discourses"<sup>17</sup>—was indeed perceptive. Klare correctly, in my view, focused attention on the faith placed by South African lawyers in the "constraining power of legal texts and ritual invocation of the law/politics boundary."<sup>18</sup>

Roux responded that "Klare's call for the judges to [view] . . . the 1996 . . . Constitution as a post-liberal project of fundamental . . . political and social transformation would have been particularly unappealing" to judges at that time who "would have [otherwise] thought that the main drivers [toward social transformation] should be the political branches [of the state]."<sup>19</sup> According to Roux, "[i]f the 1996 Constitution represented a political project at all," it was a project in which the judiciary played but a supporting role.<sup>20</sup> Given the sentiments expressed by

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10. Theunis Roux is Professor of Law at the University of New South Wales and an expert on South African constitutional law. Roux has written extensively and powerfully on the Constitutional Court.

11. See THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005*, at 203–18 (2013).

12. See *id.* at 191.

13. See *id.* at 213.

14. See *id.* at 213–14.

15. Klare, *supra* note 9, at 171.

16. *Id.*

17. *Id.* at 188.

18. *Id.* at 171.

19. ROUX, *supra* note 11, at 231.

20. *Id.*

politicians,<sup>21</sup> the Court, under Roux's line of argument, has done an admirable job in negotiating the law-politics tension to avoid political attacks that would have undermined the Court's legitimacy and prevented it from performing its constitutionally mandated role.

We are thus confronted with two very different visions of the Constitution's role in the reconstruction of South African society and the legal system that underpinned it. As South Africa moves into its third decade of democracy, even Roux has formulated a different demand from the contemporary Court, bringing his approach into far closer alignment with Klare's than would have been expected. In his present position, Roux contends that the "ANC's [African National Congress] loss of political direction and descent into factionalism not only requires the Court to fill the policy gap, but has also created the political space [to achieve this objective]."<sup>22</sup> For example, while *Government of the Republic of South Africa v. Grootboom* set out a reasonableness review approach to social and economic rights,<sup>23</sup> it disappointed those who urged the Court to develop a more substantive test.<sup>24</sup>

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21. Notwithstanding a clear difference in vision between these distinguished academics, politicians have, understandably, adopted a totally different take on both the Court's ambition and its record after twenty years. For example, in 2013, the then-National Assembly Speaker, Max Sisulu, criticized opposition parties, "warning that running to the courts to resolve political issues ran [a] serious risk of [delegitimizing] the judiciary." Wyndham Hartley, *Opposition Parties Told Not to Run to Courts*, BUS. DAY (June 12, 2013), <http://www.bdlive.co.za/national/politics/2013/06/12/opposition-parties-told-not-to-run-to-courts>.

Sisulu further stated:

[T]here is a danger in South Africa, however, of the politicisation of the judiciary, drawing the judiciary into every and all political disputes, as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication.

*Id.*

In 1996, President Jacob Zuma, then-National Chairman of the ANC, reportedly told delegates at a regional meeting in Durban that "once you begin to feel you are above the ANC, you are in trouble"; the "ANC was 'more important' than the [C]onstitution"; "[n]o political force can destroy the ANC—it is only the ANC that can destroy itself "; and that the "[C]onstitution was only there to 'regulate matters.'" Gareth van Onselen, *From the Archives: Jacob Zuma and the Constitution*, BUS. DAY (Dec. 3, 2013), <http://www.bdlive.co.za/opinion/columnists/2013/12/03/from-the-archives-jacob-zuma-and-the-constitution>.

22. ROUX, *supra* note 11, at 395.

23. 2001 (1) SA 46 (CC) at paras. 40–44. The Court in *Grootboom* allowed future courts the room to develop upon its initial test. The *Grootboom* case concerned an application by a homeless community of some 900 people for housing pursuant to section 26 of the Constitution. *Id.* at paras. 3–4, 4 n.2, 13. The Constitutional Court held that the right to access adequate housing in section 26 did not equate to a right for housing. *Id.* at para. 35. Hence, the Court eschewed the idea that section 26 imposed an obligation on the state to provide a minimum standard of housing. *Id.* at paras. 37–38. The Court, however, held that section 26 mandated the state to take reasonable measures within its available means to cater for the needs of the homeless—which included the adoption of measures to deal firstly with the plight of the poorest of the poor. *Id.* at para. 99.

24. For trenchant criticism of the *Grootboom* case, see DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS 197–200* (2007) and KIRSTY McLEAN, *CONSTITUTIONAL DEFERENCE, COURTS AND SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 171–203* (2009).

If the *Grootboom* reasonableness review test was an attempt to create a partnership with the political branches of the state to vindicate the social rights enshrined in the Constitution, Roux now suggests that “the Court . . . needs to focus on spelling out the constitutional basis for this partnership. It needs to be more specific, in other words, about the content of social rights and more forthright about the Court’s legitimate role in setting standards for legislative and executive conduct.”<sup>25</sup>

Roux argues that, even though the Court presently finds itself in a far more fraught political situation than that at the dawn of democracy—as the ANC appears increasingly less committed to the constitutional project—“the Court will need to take some risks” in order to “intrude . . . further into politics.”<sup>26</sup> In assuming this risk, the Court will be required to presume that “the public will accept . . . [an] expansion of [the] law’s domain” in order to preserve democratic politics.<sup>27</sup>

The ANC’s increasing intolerance of the constitutional project is reflected in statements made by senior ANC leaders. In 2008, the Secretary-General of the ANC, Gwede Mantashe, claimed that the Constitutional Court justices were employed by “counter-revolutionary forces.”<sup>28</sup> In 2011, President Jacob Zuma warned the judiciary not to encroach on the domain of policy or the executive’s implementation thereof.<sup>29</sup> In 2012, a year after Zuma’s warning, current Minister of Mineral Resources Ngoako Ramatlhodi reportedly wrote of the Constitution’s flaws that gave the courts too much power.<sup>30</sup>

Irrespective of the divisions of opinion as to the courts’ appropriate role at the dawn of constitutional democracy, the far more fractured state of our present politics requires courts to step up to the jurisprudential plate to ensure that both the procedural and substantive commitments enshrined in the Constitution percolate into the political and economic reality of contemporary South Africa. It is this possibility that I consider in the balance of this paper.

## II. MEETING THE PRESENT CHALLENGE

Whatever the conception of the Court’s role after 1996, this new institution was confronted with a constitutional text that expressed a majestic vision and a bold faith in the establishment of a democratic society predicated on an interrelated series of substantive commitments to a good life for all.<sup>31</sup>

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25. Roux, *supra* note 11, at 395.

26. *Id.* at 398.

27. *Id.*

28. Matuma Letsoalo et al., *ANC Boss Accuses Judges of Conspiracy Against Zuma*, MAIL & GUARDIAN (July 4, 2008), <http://mg.co.za/article/2008-07-04-anc-boss-accuses-judges-of-conspiracy-against-zuma>.

29. *South Africa Must Choose Between Accountability and Blind Trust*, MAIL & GUARDIAN (July 17, 2015), <http://mg.co.za/article/2015-07-17-south-africa-must-choose-between-accountability-and-blind-trust>.

30. *Id.*

31. Michelman, *supra* note 7, at 245.

If a participatory democracy which transcended historically-constructed divisions based on racial thinking, homophobia, xenophobia, and sexism was to be constructed from the ashes of apartheid, then the greatest potential threat to this vision was arguably the state itself. The government is currently dominated by one political party with tenuous commitments to a rights-based culture.<sup>32</sup> An ambivalence that might not have been apparent during the Mandela era has become a reality in present-day South Africa. The Constitution looked to one state institution—the judiciary with its unelected members—and charged it with defending a range of rights against the other state institutions.<sup>33</sup> The Court’s responsibilities include safeguarding the Constitution’s social wage provisions, which are required to ensure, at a minimum, a socially-acceptable and dignified life for all.<sup>34</sup> Roux may have been correct to caution against sweeping judgments that would reflect substantive political commitment at the inception of the project,<sup>35</sup> but far more parlous political circumstances now demand this commitment from the judiciary.

Powerful elements within the private sector represent a second threat to this vision. The constitutional transition left private power intact and in mainly white hands.<sup>36</sup> Those who benefited from apartheid and built powerful private corporations could now replicate their co-optive strategies with the new rulers, safe in the knowledge of constitutional protection. Back in 1996, Justice Tholie Madala reminded the country of this problem in *Du Plessis v. De Klerk*:

Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society.<sup>37</sup>

This observation was echoed recently in the Oxfam<sup>38</sup> inequality report:

In 2010, South Africa had a Gini coefficient of 0.66, making it one of the most unequal societies in the world. The two richest people in South Africa have the same wealth as the bottom half of the population. South Africa is significantly more unequal than it was at the end of Apartheid. Between 1995 and 2006, the proportion of the population living in extreme poverty fell

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32. ROUX, *supra* note 11, at 398.

33. S. AFR. CONST., 1996, § 167.

34. *Id.* §§ 7–39.

35. ROUX, *supra* note 11, at 398.

36. See MICHAEL MACDONALD, WHY RACE MATTERS IN SOUTH AFRICA 132–33 (2006).

37. 1996 (3) SA 850 (CC) at para. 163.

38. Oxfam is a confederation of seventeen organizations working in over ninety countries worldwide to find solutions to poverty and injustice. *Who We Are*, OXFAM INT’L, <https://www.oxfam.org/en/about> (last visited Feb. 15, 2016).

slightly to 17 percent. However, increases in population over the same period meant that the total number of South Africans living in extreme poverty fell by just 102,000. Although real growth in GDP per capita was just under two percent, further progress on reducing poverty was hampered by South Africa's extremely high, and growing, level of inequality. Oxfam projections show that even on the very conservative assumption that inequality remains static, just 300,000 fewer South Africans will be living in absolute poverty by 2019, leaving almost eight million people living below the poverty line. Conversely, if the Gini continues to increase even by one point, this will lead to 300,000 *more* people living in poverty in five years.<sup>39</sup>

Significantly, in *Capital in the Twenty-First Century*—a book that has recently brought inequality into sharp focus—Thomas Piketty provides a description of the South African Police Service intervening in a conflict between mine workers and mine owners at the Marikana platinum mine<sup>40</sup> and notes that “[i]f the capital-labor split gives rise to so many conflicts, it is due first and foremost to the extreme concentration of the ownership of capital. Inequality of wealth—and of the consequent income from capital—is in fact always much greater than inequality of income from labor.”<sup>41</sup>

The point of these observations is not to engage in a lengthy discourse about inequality, its causes, or its solutions. It is, however, to argue that inequality and private economic power in the hands of a mere small segment of society affect our constitutional ambitions and threaten the future of South African democracy—as the Marikana massacre illustrated so clearly.

Courts cannot solve the core problem of inequality or the problems associated with the weakening of some non-governmental sectors that continue to show blind loyalty to the party that led the country into emancipation but may now fail those most desperately in need. Courts need to develop an expanded conception of democracy and therefore participate more vigorously with the other arms of state in order to ensure that the vision contained in the Constitution is at least defended, if not enhanced.<sup>42</sup> Accordingly, there is a similar need to interpret private law together

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39. EMMA SEERY ET AL., OXFAM INT’L, EVEN IT UP: TIME TO END EXTREME INEQUALITY 38 (Mark Fried et al. eds., 2014), <http://www.oxfamamerica.org/static/media/files/even-it-up-inequality-oxfam.pdf>.

40. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 39 (Arthur Goldhammer trans., Harvard Univ. Press 2014) (2013).

41. *Id.* at 40. Equally important is Piketty’s observation that “[t]his episode reminds us, if we needed reminding, that the question of what share of output should go to wages and what share to profits—in other words, how should the income from production be divided between labor and capital?—has always been at the heart of distributional conflict.” *Id.* at 39.

42. See Karl Klare, *Critical Perspectives on Social and Economic Rights, Democracy and Separation of Powers*, in SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 3, 15, 17–21 (Helena Alviar García et al. eds., 2015) [hereinafter SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE]. Klare provides that:

[D]emocracy is not compatible with poverty or steep inequalities . . . [H]uman wants, identities, and life choices are endogenous to social, political, and cultural orders. The experience of democratic participation can enlarge people’s context-transcending

with customary law, which, according to Michelman, provides “the encompassing background law that frames and guides the daily lives and dealings of most South Africans most of the time.”<sup>43</sup>

Any analysis of the courts’ future role must focus upon these questions of democracy and participation. I focus next on a select series of recent decisions delivered by the Constitutional Court and one decision by the Supreme Court of Appeal.

### III. THE CHALLENGES POSED BY THE PUBLIC DOMAIN

*National Treasury v. Opposition to Urban Tolling Alliance* gave the Constitutional Court an opportunity to develop its approach to constitutional review in the context of an e-tolling controversy.<sup>44</sup> The executive Cabinet had decided to upgrade roads in Gauteng to be financed on the basis of a “user pay” principle.<sup>45</sup> In response, the Opposition to Urban Tolling Alliance, among others, sought and obtained an interim interdict restraining the collection of tolls on the roads.<sup>46</sup> In setting aside the interim interdict, Deputy Chief Justice Dikgang Moseneke stated:

[T]he duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of Executive Government function and domain. What is more, absent 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 Executive subject to budgetary appropriations by Parliament.<sup>47</sup>

In similar fashion, the Court in *Mazibuko v. Sisulu* refused to mandate the Speaker of Parliament to hold a debate on a motion of no confidence against the President at a particular time as prescribed by the Court.<sup>48</sup> While the Constitution provides for a motion of no confidence against the President when supported by a majority of the

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capacities. Choices made in giving institutional shape to democracy can therefore affect people’s sense of themselves, their needs, and their possibilities. A democratic society should aspire in its institutional design to awaken and nurture people’s capacities for learning, agency, and self-determination. At the same time, experiences of self-determination in individual life can alter the wants, beliefs, and identities people bring to democratic participation.

*Id.* at 15.

43. Michelman, *supra* note 7, at 246. “Customary law” means indigenous law, and in particular the law of marriage, succession, and property practiced by indigenous communities.

44. 2012 (6) SA 223 (CC).

45. *Id.* at para. 5. For more on the e-tolling and user pay system, see Nickolaus Bauer, *E-tolling Regulations are ‘Overkill,’ Says NCG*, MAIL & GUARDIAN (Jan. 18, 2012), <http://mg.co.za/article/2012-01-18-etolling-regulations-are-overkill-says-ncf>.

46. *Opposition to Urban Tolling All.*, 2012 (6) SA 223 at paras. 7–8. This interim interdict was granted pending a final determination of an application to review and set aside the decision to declare Gauteng roads as toll roads. *Id.*

47. *Id.* at para. 67.

48. 2013 (6) SA 249 (CC) at para. 82.

National Assembly (“Assembly”),<sup>49</sup> neither the Constitution nor the Rules of Parliament provided for a mechanism by which a minority party in Parliament could introduce this kind of motion, hence the litigation.<sup>50</sup> The Court was careful in its justification for intervention in the proceedings of the Assembly. While it required the Assembly to remedy a constitutional defect that threatened the rights of the Assembly members—namely the rights to move a motion of no confidence in the President and to institute a rule which would provide for the holding and conduct thereof—it rejected the idea that a court could instruct Parliament as to when it was to hold such a debate.<sup>51</sup>

Two recent decisions further support the view that the courts have sought to craft a constitutional framework within which the other arms of the state must operate. In *AllPay Consolidated Investment Holdings Ltd v. Chief Executive Officer of the South African Social Security Agency*, the Court insisted on a careful examination of compliance with legal requirements for a tender process.<sup>52</sup> The Court held that compliance with the mandate for black economic empowerment credentials was an important consideration in the ultimate award of the tender and one that required “substantive participation in the management and running of any enterprise.”<sup>53</sup> The Court rejected the deferential approach to procurement that had been adopted by the Supreme Court of Appeal and insisted on a careful scrutiny of compliance with the substance of tender procedures.<sup>54</sup> In the words of Justice Johan Froneman, writing for the majority:

Substantive empowerment, not mere formal compliance, is what matters. It makes a mockery of true empowerment if two opposite ends of the spectrum are allowed to be passed off as compliance with the substantive demands of empowerment. The one is a misrepresentation that historically disadvantaged people are in control and exercising managerial power even when that is not the case. That amounts to exploitation. The other is to misrepresent that people who hold political power necessarily also possess managerial and business skills. Neither situation advances the kind of economic empowerment that the Procurement and Empowerment Acts envisage. Both employ charades.<sup>55</sup>

In more general terms, the Court noted that, in a prevailing context of corruption, the promotion of enhanced principles of accountability and transparency is critical: “[I]t ensures fairness to participants in the bid process . . . enhances the likelihood of efficiency . . . [and] serves as a guardian against a process skewed by corrupt influences.”<sup>56</sup>

49. S. AFR. CONST., 1996, § 102(2) (“If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.”).

50. *See Sisulu*, 2013 (6) SA 249 at para. 61.

51. *Id.* at para. 71.

52. 2014 (1) SA 604 (CC).

53. *Id.* at para. 22.

54. *Id.* at paras. 23–27, 55.

55. *Id.* at para. 55.

56. *Id.* at para. 27.

In *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre*, the Court unanimously ordered the National Commissioner of the South African Police Service to investigate a complaint made by the Southern African Human Rights Litigation Centre involving “allegations of torture committed in Zimbabwe by and against Zimbabwean nationals.”<sup>57</sup> The application called upon the Court to establish South Africa’s powers and obligations, both domestically and internationally, to ensure that perpetrators of international crimes—even when committed by foreign nationals beyond the borders of South Africa—are accountable under the law.<sup>58</sup> The Court found that South Africa was “required, where appropriate, to exercise universal jurisdiction in relation to these crimes as they offend against the human conscience and our international and domestic law obligations” pursuant to “sections 231(4), 232, and 233 of the Constitution and various international, [and] regional . . . instruments.”<sup>59</sup> The Court noted that the International Criminal Court Act, passed by South Africa, provides that torture is a crime against humanity.<sup>60</sup> Under domestic law, the police also have a duty to “investigate . . . high priority crimes [such as] torture.”<sup>61</sup>

These cases reveal that courts have recently sought to take seriously the obligation imposed upon the executive and the legislature to comply with the country’s constitutional commitments and, in particular, the rule of law. For example, when the Court was asked to intrude into executive policy or the business of Parliament, it refused.<sup>62</sup> These decisions, however, did not in any way indicate that the Court is presently not up to the challenge of negotiating a path between the political domain and the legal terrain.

The same may not be said about the Court’s socioeconomic rights jurisprudence. As noted earlier in *Grootboom*, the Court developed a model of reasonableness review which appeared to be both open ended and flexible.<sup>63</sup> The review called for the determination of whether social programs firstly addressed the needs of the poorest

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57. 2015 (1) SA 315 (CC) at para. 4.

58. *Id.* at para. 74.

59. *Id.* at para. 40.

60. *Id.* at paras. 39, 60(a). See generally S. AFR. CONST., 1996, § 232 (“Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”); Implementation of the Rome Statute of the International Criminal Court Act, Act 27 of 2002 § 4 (S. Afr.) (describing the Republic of South Africa’s jurisdiction to prosecute crimes).

61. *Nat’l Comm’r of the S. African Police Serv.*, 2015 (1) SA 315 at para. 60(b).

62. See *Nat’l Treasury v. Opposition to Urban Tolling All.* 2012 (6) SA 223 (CC) at para. 67 (“[A]bsent 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 Executive subject to budgetary appropriations by Parliament.”); *Mazibuko v. Sisulu* 2013 (6) SA 249 (CC) at para. 82 (holding the Rules of Parliament must be amended to provide for the manner in which a debate on a motion of no confidence in the President should be scheduled, but choosing not to order the Speaker to hold a debate on the date specified in the relief sought by the applicant).

63. *Gov’t of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) at paras. 40–44.

of the poor.<sup>64</sup> The default position was that a failure by government to provide for those residents in most urgent need would constitute unreasonable conduct because it amounted to an unfair exclusion of the most vulnerable from key social programs.<sup>65</sup>

The most recent offering by the Court in *Mazibuko v. City of Johannesburg*,<sup>66</sup> however, gives reason for pause. The Court eschewed the argument that the right of access to water would justify a court's determining the minimum quantity of water that must be delivered to residents of a community.<sup>67</sup> In articulating its vision of a court's role in socioeconomic rights adjudication, the Court said:

[I]t is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.<sup>68</sup>

The Court explained its decision not to fix a definitive quantitative standard by offering the following justifications: setting a fixed standard could be counterproductive, given that a standard may vary over time and context; the government is institutionally better placed than a court to set standards for delivery; and it is preferable, as a matter of democratic accountability, for the legislature and executive to formulate such standards.<sup>69</sup>

Much of the criticism of *City of Johannesburg* has focused upon its retreat from the *Grootboom* test. For example, critics Sandra Liebenberg and Katharine Young write: "In celebrating the flexibility of the city's metered, user-pays system for water service delivery above the basic minimum, the Court sanctions the administrative deftness of a market solution."<sup>70</sup> Another critic, Lucy Williams, has compellingly shown that in comparison to German jurisprudence, the Court's reluctance to engage in the budget and its justification for expenditure incurred in provisioning of the socioeconomic rights were extremely deferential and did not meet the test under *Grootboom*.<sup>71</sup>

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64. *Id.* at para. 44.

65. *Id.*; see also SANDRA LIEBENBERG, *SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION* (2010) (providing an in-depth analysis of South Africa's socioeconomic rights jurisprudence).

66. 2010 (4) SA 1 (CC).

67. *Id.* at para. 62.

68. *Id.* at para. 61.

69. *Id.* at paras. 60–61.

70. Sandra Liebenberg & Katharine G. Young, *Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?*, in *SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE*, *supra* note 42, at 237, 245.

71. See Lucy A. Williams, *The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study*, 2 *CONST. CT. REV.* 141 (2010).

The decisions on regulating tenders, the Speaker's duties, and South Africa's international law obligations provide a sound foundation for the Court's supervision of a deliberative democracy. The jury is surely out, however, with respect to whether *City of Johannesburg* will promote an increasingly-deferential approach to social provisioning so that the core of these questions will continue to be left to policy choices made by the legislature and the executive.

#### IV. PRIVATE LAW: A BARRIER LANDSCAPE

If the public law picture is ambivalent, the view is far more gloomy when we turn to private law. In *Carmichele v. Minister of Safety & Security*, the Court suggested that section 39(2) of the Constitution contained an objective normative framework within which all law, particularly the common law, should be developed.<sup>72</sup> More than a decade later, little has been done to tease out the nature of this normative framework.

Some commentators have suggested, with a considerable measure of persuasion, that the focus of attention in the area of common law should not have been on section 39(2) of the Constitution—which provides that “[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”<sup>73</sup>—but rather on section 8 of the Constitution.<sup>74</sup>

Under section 8, all law governing disputes between private parties, whether enshrined in statute or the common law, must be tested against the substantive content of the Bill of Rights in general and the particular provision of the Bill of Rights that has been invoked.<sup>75</sup> It does not follow, however, that if an existing principle of common law is inconsistent with the text, a new rule must be fashioned

72. 2001 (4) SA 938 (CC) at paras. 39, 54–55.

73. S. AFR. CONST., 1996, § 39(2).

74. Stu Woolman, *The Amazing, Vanishing Bill of Rights*, 124 SALJ 762 (2007). Section 8 of the Constitution provides:

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
  - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
  - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

S. AFR. CONST., 1996, § 8.

75. See S. AFR. CONST., 1996, § 8; Woolman, *supra* note 74, at 773.

by the courts. The existing rule may be tweaked in order to ensure compliance with both sections 8(2) and 8(3) of the Constitution.<sup>76</sup> Our private law has suffered the worst of two worlds: very little engagement has taken place with section 8, the primary horizontal provision in the Constitution,<sup>77</sup> and there has been but a vague approach to the normative framework of section 39(2) since *Carmichele*.<sup>78</sup>

Given the nature of common law development, one may argue that we should be more patient and understand that common law adjudication takes place incrementally and not within the context of a transformative gale. Even so, that neither excuses nor justifies the largely incoherent approach that courts have taken to the common law—the Constitutional Court in particular.<sup>79</sup>

Whatever the explanation, the incoherence of the existing jurisprudence indicates that our courts have not understood that the law is deeply imbricated in every dispute. This means that the constitutional mandate to audit the law must be the starting point of analysis for a dispute, particularly a dispute between private parties. Courts are obliged to test that the law sought to be applied passes constitutional muster—that it is consistent with the Constitution in general and more particularly with whatever right may be applicable in the particular case.

An excellent example of the courts' giving constitutional principles a wide berth in the area of private law is the case of *RH v. DE*, a Supreme Court of Appeal case dealing with a married person whose spouse had committed adultery.<sup>80</sup> The question raised was whether it was possible to sue the third party with whom the adultery was committed.<sup>81</sup> The court decided that South African law was out of step with modern

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76. For the text of section 8(2) and 8(3) of the Constitution, see *supra* note 74.

77. To my knowledge, the only case which has sought to apply the approach of section 8(2) and 8(3) is *Khumalo v. Holomisa* 2002 (5) SA 401 (CC), authored by Justice Kate O'Regan.

78. For excellent critiques of this jurisprudence, see Stu Woolman, *Application, in 2 CONSTITUTIONAL LAW OF SOUTH AFRICA* 31-1 (Stu Woolman et al. eds., 2d ed. 2008) and Nick Friedman, *The South African Common Law and the Constitution: Revisiting Horizontality*, 30 SAJHR 63 (2014).

79. See Woolman, *supra* note 74, at 762–63. In *Barkhuizen v. Napier*, the Court was required to determine the legality of a time limitation clause in an insurance contract. 2007 (5) SA 323 (CC) at para. 1. The Court failed to analyze the problem in terms of the Constitution's substantive provisions as required in terms of section 8. Woolman, *supra* note 74, at 772. It also failed to provide meaningful guidance as to the manner in which public policy should be infused with constitutional values. See *id.* at 772–78. In *NM v. Smith*, the applicants claimed that their rights to privacy and dignity were violated when respondents published their names and HIV statuses in a biography of a prominent politician. 2007 (5) SA 250 (CC) at para. 1. In this case, the evidence did not support a finding that respondents had acted with the requisite intent to justify the claim, yet the Court made no attempt to investigate whether the constitutional protection of privacy justified a change of the requirement of intent. See Woolman, *supra* note 74, at 781–83. Without such a change in the law, the Court's finding was at war with the evidence.

80. 2014 (6) SA 436 (SCA). I am indebted to my colleague Professor Jaco Barnard-Naudé for his draft article "The Pedigree of the Common Law and the 'Unnecessary' Constitution: a Discussion of the Supreme Court of Appeal's Decision in *RH v DE*." (on file with author).

81. *RH*, 2014 (6) SA 436 at para. 15.

views on the relationship between the law and adultery and concluded that the time had come to abolish the action as far as non-patrimonial damages are concerned.<sup>82</sup>

The result is not particularly controversial. It is the Supreme Court of Appeal's approach which is problematic. The opinion engaged in a lengthy analysis as to whether the rule—which permitted an action for non-patrimonial damages against the third party involved in the adultery—found its origin in Roman Dutch law or English common law.<sup>83</sup> Satisfied that English common law was the source of this action, Judge of Appeal Fritz Brand said that there was no need to engage in any constitutional analysis because pure Roman Dutch law did not embrace the action.<sup>84</sup> In developing the argument that the *boni mores*<sup>85</sup> dictated against the continuation of such an action, Brand stated:

Experience teaches us that different jurisdictions provide more or less the same answer to a particular legal problem, albeit that they sometimes arrive at that answer in different ways. Where our law therefore gives an answer that appears to be directly at odds with what has happened in most other jurisdictions, it makes one stop to think: are the morals and the needs of our society so different from most others? And if so, why?<sup>86</sup>

Reading this judgment as a whole, it appears that members of the Supreme Court of Appeal consider the common law to have an independent existence. They accept that there may be occasions where the common law must be developed according to section 39(2) of the Constitution, but the common law can also be developed for reasons independent of the Constitution that represent the *boni mores* of the community.<sup>87</sup> This, in turn, illustrates the idea of a public morality which informs our law but which is not necessarily sourced in the fundamental normative framework that underpins the entire legal system—namely the Constitution.<sup>88</sup>

## V. CONCLUSION

After twenty years of democracy, South Africa possesses a political system dominated by one party that is unlikely to lose political office in the foreseeable future. This development, combined with the lack of unification within the non-governmental sector—many components of which still see the governing party as a

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82. *Id.* at paras. 40–41.

83. *Id.* at paras. 20–28.

84. *See id.* at paras. 38–40.

85. *Boni mores* refers to “good mores” or “a combination of traditions, customs and various unwritten rules . . . held in high regard by Roman jurists.” Roberto Perrone, *Public Morals and the European Convention on Human Rights*, 47 *ISR. L. REV.* 361, 361 (2014).

86. *RH*, 2014 (6) SA 436 at para. 28.

87. *See id.* at paras. 17–18.

88. This approach shows a remarkable degree of continuity with that adopted in *Nat'l Media Ltd. v. Bogoshi* 1998 (4) SA 1196 (SCA).

liberation movement—has rendered political warfare ineffective in promoting the core constitutional vision.

Politics appear to deliver little to many, and, as evident in the plethora of cases that have descended upon the courts, lawfare has become the default strategy.<sup>89</sup> Given the current political terrain, this turn to lawfare is unlikely to abate over the next decade. This raises the question as to whether the constitutional structure which has been developed—particularly during the first decade of democracy—is sufficiently sturdy to carry the weight of these demands.

By way of recourse to two leading approaches, one by Roux and another by Klare, this paper has sought to examine the constitutional possibilities for the next two decades. Even if Roux is correct that the Court was required to develop an institutional legitimacy in its first decade, the political context in that first decade is manifestly no more. The challenges are greater, the strain is more evident, and the demands for the Court to keep alive the transformative constitutional vision, as described by Klare, have become more apparent.

The jurisprudence developed to meet these challenges can be fairly described as ambivalent. When considering the background rules of private law—which play such an important role in the distribution of wealth in society—the reluctance of the courts to forge ahead more courageously and develop a better and more coherent jurisprudence is truly regrettable. Whether courts will obtain another chance in the presently-fraught political circumstances is open to question. To date, the courts have held the line against intrusions by the executive and legislature into the domain of deliberative democracy, but key and more demanding challenges lie ahead.

Not all is lost, but increased political pressure coupled with new judicial appointments pose unpredictable challenges in the constitutional roadmap for South African democracy.

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89. See generally *Nat'l Comm'r of the S. African Police Serv. v. S. African Human Rights Litig. Ctr.* 2015 (1) SA 315 (CC) (addressing the government's duty to promote human rights in its foreign affairs); *Mazibuko v. Sisulu* 2013 (6) SA 249 (CC) (addressing the Rules of Parliament with regard to a motion of no confidence); *Democratic All. v. President of the Republic of S. Afr.* 2013 (1) SA 248 (CC) (addressing the appointment of the National Director of Public Prosecutions); *Glenister v. President of the Republic of S. Afr.* 2011 (3) SA 347 (CC) (addressing Parliament's obligation to create an independent anti-corruption unit); *Judicial Serv. Comm'n v. Cape Bar Council* 2013 (1) SA 170 (SCA) (addressing procedures for appointment to judicial office); *Democratic All. v. S. African Broad. Corp.* 2015 (1) SA 551 (WCC) (addressing the pension of the Chief Operations Officer of the South African Broadcasting Corporation).