TRANSFORMATIVE CONSTITUTIONALISM*

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1 Introduction

Both the Constitutional Court[1] and other courts[2] view the Constitution as transformative. The previous Chief Justice has written that a "commitment ... to transform our society ... lies at the heart of the new constitutional order".[3] It is clear that the notion of transformation has played and will play a vital role in interpreting the Constitution. The main purpose of this address is to determine what barriers exist to the achievement of that transformation.

2 What is transformative constitutionalism?

Before I attempt to analyse the problems that transformative constitutionalism faces in South Africa, it is necessary to say what I understand the concept to mean. Unfortunately, there is no single accepted definition. The current Deputy Chief Justice[4] has said in this regard: "the meaning of transformation in juridicial terms is as highly contested as it is difficult to formulate". It is perhaps in keeping with the spirit of transformation that there is no single stable understanding of transformative constitutionalism.

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[1] See, eg, *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 262: "What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting ... future."; *Du Plessis v De Klerk* 1996 3 SA 850 (CC), 1996 5 BCLR 658 (CC) par 157: "[The Constitution] is a document that seeks to transform the status quo ante into a new order".

[2] See, eg, *Rates Action Group v City of Cape Town* 2004 12 BCLR 1328 (C) par 100: "Ours is a transformative constitution. Justice Scalia of the US Supreme Court has said that "the whole purpose of a constitution, old or new ... is to impede change or pejoratively put 'to obstruct modernity'... Whatever the position may be in the USA or other countries, that is not the purpose of our Constitution. Our Constitution provides a mandate, a framework and to some extent a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity." (references omitted) (per Budlender AJ); *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 6 BCLR 728 (W) pars 51-52: "Our Constitution encompasses a transformative provision. As such, the State cannot be a passive bystander in shaping the society in which individuals can fully enjoy their rights? [T]he full transformative power of the rights in the Bill of Rights will only be realised when they are interpreted with reference to the specific social and economic context prevalent in the country as a whole, and the social and economic context within which the applicant now finds itself in particular." (per Jajbhay J).

[3] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC), 1997 12 BCLR 1696 (CC) par 8.

[4] Moseneke "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" 2002 18 *SAJHR* 309 315.

There must, however, be agreement at any rate on some basis for an understanding of transformative constitutionalism. I would suggest that the Epilogue, also known as the Postamble, to the interim Constitution provides that basis. The Epilogue describes the Constitution as providing:

> "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".[5]

This is a magnificent goal for a Constitution: to heal the wounds of the past and guide us to a better future. For me, this is the core idea of transformative constitutionalism: that we must change. But how must we change? How does the society on the other side of the bridge differ from where we stand today?

First, the new society is one based on substantive equality. Writing in the *South African Journal of Human Rights* in 1998, Albertyn & Goldblatt make the point that the movement from the one side of this bridge to the other will

> "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."[6]

Transformation then is a social and an economic revolution. South Africa at present has to contend with unequal and insufficient access to housing, food, water, healthcare and electricity. As former Chief Justice Chaskalson wrote in *Soobramoney v Minister of Health, KwaZulu-Natal*,[7] "[f]or as long as these conditions continue to exist that aspiration [that is, of substantive equality] will have a hollow ring". The provision of services to all and the levelling of the economic playing fields that were so drastically skewed by the apartheid system must be absolutely central to any concept of transformative constitutionalism.[8] Transformation in this sense does not only involve the fulfilment of socio-economic rights, but also the provision of greater access to education and opportunities through various mechanisms, including affirmative action measures.[9]

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[5] Constitution of the Republic of South Africa, Act 200 of 1993.

[6] Albertyn & Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 14 *SAJHR* 248 249.

[7] 1998 1 SA 765 (CC), 1997 12 BCLR 1696 (CC) par 8.

[8] See *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 6 BCLR 728 (W) pars 51-52.

[9] See *Van Rooyen v S* 2002 8 BCLR 810 (CC) par 50: "[T]ransformation involves not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to 1994 where largely under the control of whites and, in particular, white men." (per Chaskalson CJ); *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC) par 142: "The substantive approach [to equality], on the other hand, requires that the test for constitutionality is not whether the measure concerned treats all affected by it in identical fashion. Rather it focuses on whether it serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved. It roots itself in a transformative constitutional philosophy which

3 The objective — a truly equal society

In this sense then, the establishment of a truly equal society and the provision of basic socio-economic rights to all are a necessary part of transformation. That is, however, not the whole story. And this leads me to the second part and this is the transformation of the legal culture.

It was Mureinik[10] who pointed out that the true shift from apartheid to post-apartheid South Africa is a move from "a culture of authority" 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 of its command. The new order must be a community built on persuasion, not coercion."

The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.

This approach to adjudication requires an acceptance of the politics of law. There 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. At the same time, transformative adjudication requires judges to acknowledge the effect of what has been referred to elsewhere as the "personal, intellectual, moral or intellectual preconceptions"[11] on their decision-making. We all enter any decision with our own baggage, both on technical legal issues and on broader social issues. While the policy under apartheid legal culture was to deny these influences on decision-making, our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions. This is vital if respect for court decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given.

So far I have referred to two basic ideas of transformation: economic transformation and a change in legal culture. Some critical scholars[12] have offered a third conception that builds on, but also goes beyond the first two. For them, the traditional metaphor of a bridge is misleading as

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acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved. In this respect, the context in which the measure operates, the structures of advantage and disadvantage it deals with, the impact it has on those affected by it and its overall effect in helping to achieve a society based on equality, non-racialism and non-sexism, become the important signifiers." (per Sachs J).

[10] "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 10 *SAJHR* 31 32.

[11] Moseneke 2002 18 *SAJHR* 309 317.

[12] See, eg, Botha "Metaphoric Reasoning and Transformative Constitutionalism (Part 1)" 2002 *TSAR* 612, "Metaphoric Reasoning and Transformative Constitutionalism (Part 2)" 2003 *TSAR* 20; Le Roux "Bridges, Clearings and Labyrinths: The Architectural Framing of Post-Apartheid Constitutionalism" 2004 19 *SAPL* 629; Van der Walt *Law and Sacrifice* (2005).

it seems to suggest that transformation is a temporary event, that at some point we will reach the other side of the bridge. Transformation then ends because we have reached our desired destination. According to Van der Walt,[13]

> "[i]n this vision of transformation there is no longer room for imagining that things could be different, that there might be further options and more complex alternatives to the two places between which we have chosen to choose".

What is contended is that we should instead view the bridge of the interim Constitution as a space between an unstable past and an uncertain future. There is no preference for one side over the other, rather, the value of the bridge lies in remaining on it, crossing it over and over to remember, change and imagine new and better ways of being.

On that view, transformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is a perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.

This conception of transformation reminds me of the old Nissan slogan: "Life's a journey. Enjoy the ride." What the slogan tells us is that we should enjoy the driving itself rather than seeing it merely as a means to arrive at a destination. What Van der Walt is telling us is that we should promote and sustain transformation itself, rather than view it merely as a means to construct a new society.

4 Challenges

Let me now, finally, turn to the main theme of this address: the challenges facing transformative constitutionalism in South Africa. Many of the challenges are inter-related. Taken together they create a substantial impediment to the realisation of our constitutional dream. My list is by no means conclusive. There are many others and many more that will arise only in the future. However, these are to my mind the most pressing obstacles at the moment.

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[13] "Dancing with Codes — Protecting, Developing and Deconstructing Property Rights in a Constitutional State" 2001 118 *SALJ* 258 296.

4 1 Access to equal justice

I have already mentioned that one of the central tenets of transformative constitutionalism is a commitment to substantive equality and improving socio-economic conditions. It is no surprise then that perhaps the biggest obstacle to attaining a truly transformative constitutionalism is the continuing disparities of wealth and power that pervade our country. I do not, however, wish to focus on that aspect, we are all well aware of the extent and seriousness of these problems. I prefer to confine myself to one specific symptom of this inequality: access to justice. Kofi Annan, the Secretary General of the United Nations, recently wrote the following about the necessity of protecting the rule of law and access to justice:

> "The United Nations has learned that the rule of law is not a luxury and that justice is not a side issue. We have seen people lose faith in a peace process when they do not feel safe from crime. We have seen that without a credible machinery to enforce the law and resolve disputes, people resorted to violence and illegal means. And we have seen that elections held when the rule of law is too fragile seldom lead to lasting democratic governance. We have learned that the rule of law delayed is lasting peace denied, and that justice is a handmaiden of true peace. We must take a comprehensive approach to Justice and the Rule of Law. It should encompass the entire criminal justice chain, not only police, but lawyers, prosecutors, judges and prison officers, as well as many issues beyond the criminal justice system. But a 'one-size-fits-all' does not work."[14]

South Africa has its own unique problems when it comes to access to justice. In the face of high levels of crime, the criminal justice system faces a serious challenge to ensure that victims have the satisfaction of knowing that those who harmed them or their loved ones are brought to justice. Legal representation remains beyond the financial reach of many South Africans and it is true that more money ensures better representation. That is not equal access to justice and the challenge we face is what strategies we should adopt to rectify the position. The Constitution should not become a tool of the rich. Equal justice means that the fruits of justice are there for all to enjoy. The provision of equal access to justice is therefore a priority in reaching our transformative goal.

4 2 Legal education

The next challenge I see to transformation is in the sphere of legal education. The way we teach law students and the values and philosophies we instil in them will define the legal landscape of the future. Most of us here today are familiar with a traditional legal education that focuses predominantly on private and commercial law and rewards the rational deduction of inevitable conclusions from unquestionable principles. That is how we were taught and it is a vital part of any lawyer's arsenal. We would be failing in our duty to both the students and the public if we did not pass on the tradition of analytical argument

[14] United Nations Development Program *Access to Justice: Practice Note* (2004) 2.

and a full knowledge of the legal principles that govern everyday human interaction and form the main part of a lawyers work.

However, that education is no longer enough. We can no longer teach the lawyers of tomorrow that they must blindly accept legal principles because of the authority. No longer can we responsibly turn out law graduates who are unable to critically engage with the values of the Constitution and who are unwilling to implement those values in all corners of their practices. A truly transformative South Africa requires a new approach that places the Constitutional dream at the very heart of legal education. It requires that we regard law as part of the social fabric and teach law students to see it as such. They should see law for what it is, as an instrument that was used to oppress in the past, but that has that immense power and capacity to transform our society.

Much has been done to bring legal education in line with these ideals. Constitutional and human rights law now form a much greater part of the curriculum and the vast majority of courses and text-books on traditional private or commercial areas devote sections to the impact of the Constitution on that field of law. However, we must be careful that the influence of the Constitution does not become simply another set of cast-in-stone legal principles. The change to legal education is a change in mind-set, not simply a change in laws.

4 3 Legal culture

But what of the existing legal community that has already received their legal education and training? In his article "Legal Culture and Transformative Constitutionalism",[15] Klare highlights what he terms the inherent conservatism of South African legal culture and he compares it with what he believes it should be. "Conservatism" in this context applies to a jurisprudential approach, not a political outlook. When he talks about "legal culture", Klare is referring to "the professional sensibilities, habits of mind and intellectual reflexes" of lawyers or those ingrained ideas about how the law works and what arguments are and are not convincing. Our recourse to this culture is often subconscious as it is such a basic part of how we approach legal problems.

According to Klare,[16] there is a tendency to follow a formalistic or technical approach to law. He sees this approach to legal interpretation as "highly structured, technicist, literal and rule-bound" as opposed to the "policy-oriented and consequentialist" approach that he favours. A number of other scholars[17] have written about what they see as the conservatism of South African legal culture and argue that it is still based

[15] 1998 14 *SAJHR* 146.

[16] 1998 14 *SAJHR* 146 168.

[17] See, eg, Botha "Freedom and Constraint in Constitutional Adjudication" 2004 20 *SAJHR* 249; Van der Walt "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" 1995 11 *SAJHR* 169.

on formal rather than substantive legal reasoning. This formal reasoning prevents an inquiry into the true motivation for certain decisions and presents the law as neutral and objective when in reality it expresses a particular politics and enforces a singular conception of society. Froneman[18] refers to this as a "delusional danger" and states that it has not been wiped away by the advent of the new Constitution. The Constitution, like any law, can be interpreted formally and thus allow judges to avoid engagement with substance and evade the search for justice.

Let me, however, make two important caveats. First, not all South African lawyers are guilty of the conservatism and formalism they seem to be accused of. Indeed, much of the resistance to apartheid was built on the idea that, to be enforceable, laws must be substantively just. That spirit still inspires many lawyers and judges and they continue to play an incredibly invaluable part in taking us forward in constitutional interpretation. Secondly, there is much to be said for sticking to the rules when they are clear and good. It is when adherence to the word is taken too far, when the upholding of a law obscures or ignores that law exists to try, however difficult, to ensure justice, that formalism becomes dangerous.

It is this type of conservative or formalist approach to law that is inconsistent with a transformative Constitution. At the heart of a transformative Constitution is a commitment to substantive reasoning, to examining the underlying principles that inform laws themselves and judicial reaction to those laws. Purely formalist reasoning tends to avoid that responsibility.

However, while it is vital that we embrace the idea of substantive adjudication, there is a distinct limit as to how far we can go. Judges do not have a free rein to determine what the law is. Laws, including the Constitution, do not mean "whatever we wish them to mean".[19] This limit on judicial law-making is encapsulated in the idea of the separation of powers. The Constitution itself entrenches the notion of different roles for the different arms of Government: the legislature makes the law, the judiciary interprets the law and the executive enforces the law. Were the courts to completely discard any adherence to the text they would enter squarely into the domain of the legislature as creators rather than interpreters of the law. That is clearly not what the Constitution envisages.

This is not to suggest that the courts have no law-making responsibility. Upholding the transformative ideal of the Constitution requires judges to change the law to bring it in line with the rights and values for which the Constitution stands. The problem lies in finding the fine line between transformation and legislation. Overly activist judges

[18] "Legal Reasoning and Legal Culture: Our 'Vision of Law'" 2005 16 *Stell LR* 1.

[19] *Mistry v Interim National Medical and Dental Council of South Africa* 1998 7 BCLR 880 (CC) par 49.

can be as dangerous for the fulfilment of the constitutional dream as unduly passive judges. Both disturb the finely-balanced ordering of society and endanger the ideals of transformation.

4 4 Responsibility for transformation and reconciliation

From this it follows that transformation is not the responsibility that must be borne by the courts alone — it is a task for all three arms of Government to perform in partnership. Widespread transformation of economic and social conditions is beyond the powers of the courts alone. Only when our judicial commitment is coupled with legislative reform and appropriate executive action can the vast disparities that continue to exist in South Africa be eradicated.

Finally, transformation is not something that occurs only in court-rooms, parliaments and governmental departments. Social transformation is indispensable to our society. In South Africa — it is synonymous with reconciliation. If there is no reconciliation between the people and groups of South Africa we will simply have changed the material conditions and the legal culture of a society that remains fractured and divided by bitterness and hate.

That is what the late Chief Justice Mahomed had in mind when he wrote that if certain steps are not taken,

> "both the victims and the culprits [of apartheid] who walk on the 'historic bridge' described by the epilogue [to the interim Constitution] will hobble more than walk to the future with heavy and dragged steps, delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge".[20]

Reconciliation and forgiveness are beyond the power of the law. We cannot legislate reconciliation and we cannot order forgiveness. In his recollections on the TRC, Borraine writes that he agrees with Einstein's pronouncement that "as long as there will be man, there will be war". "Nevertheless," Borraine continues, "I still believe that goodness and beauty, compassion and new beginnings, can triumph over the evil which seems to be all-pervasive." This hope stems "from the courage and generosity of spirit of those South Africans who had been hurt the most and who had been regarded and treated as less than human" but had "expressed their willingness to forsake revenge and commit themselves to forgiveness and reconciliation. It is this truth that gives me hope for the future."

I should not be understood as saying that all those who were wounded by apartheid must forgive. Many cannot forgive and we cannot fault them for that. There is no right way to deal with the immense violation that was apartheid. But, as a society, we must keep alive the hope that we can move beyond our past. That requires both a remembering and a

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[20] *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 671 (CC) par 18.

forgetting. We must remember what it is that brought us here. But at the same time we must forget the hate and anger that fuelled some of our activities if we are to avoid returning to the same cycle of violence and oppression.

4 5 Creating a climate for reconciliation

There is a final point I wish to make on this score. The call for reconciliation is not only for the ears of the victims of apartheid, it is equally important that those who benefited from apartheid take responsibility for creating a climate in which forgiveness, and ultimately reconciliation is possible. Mamdani[21] has written about the distinction between a narrow political reconciliation between victim and perpetrator and a broader and lasting social reconciliation of the entire nation. He describes the need for that distinction as follows:

> "Where the focus is on perpetrators, victims are necessarily defined as the minority of political activists; for the victimhood of the majority to be recognized, the focus has to shift from perpetrators to beneficiaries. The difference is this: whereas the focus on perpetrators fuels the demand for justice as criminal justice, that on beneficiaries would shift focus to a notion of justice as social justice. ?A focus on power that links power to privilege links perpetrator to beneficiary, racialized power to racialized privilege, and puts at center-stage the relationship between beneficiary and victim as the majority. To recognize this difference is, I think, key to thinking through how to make the reconciliation durable."

Social reconciliation does not mean that we increase the blame on the beneficiaries of apartheid. What it does recognise and require is that beneficiaries take responsibility for ensuring that reconciliation is possible. Beneficiaries cannot stand on the sidelines as having no role to play in reconciliation as they do not need to forgive or be forgiven. All South Africans, beneficiaries, victims and perpetrators, must work together to create a climate of reconciliation. There are many ways to foster that climate: through public dialogue, art and music. But the most effective manner to summon the rain of forgiveness is, as Mamdani notes, through social justice which must include a levelling of socio-economic conditions. Reconciliation therefore supplements, but also requires an improvement of socio-economic conditions. Creating a climate for forgiveness as one of our national projects means that no one takes forgiveness for granted. It can never be a one-sided exercise. That is why I believe that national reconciliation cannot be divorced from the reconstruction of the socio-economic conditions of the country. The responsibility for that, however, goes beyond the Government of the day. It is, as I have indicated, a national project — for all of us.

5 Conclusion

These then are the challenges that I see facing transformative

[21] *When Does Reconciliation Turn into a Denial of Justice?* (1998) 14.

constitutionalism: access to equal justice, legal education, legal culture, maintaining the separation of powers while ensuring that all arms of Government work together, and reconciliation. Can we overcome these dilemmas? I do not know. But I take solace in the idea that perhaps rather than obstacles, these factors can be viewed as enabling conditions for transformation. For as long as they exist there will be a drive to overcome them, there will be a tension that keeps alive the idea that things can be different. When all the challenges are gone, that is when the real danger arises. That is when we slip into a useless self-congratulatory complacency, a misplaced euphoria that where we are now is the only place to be. That is when we stop dreaming, imagining and planning that things could be different, could be better. That, for me, is the true challenge of transformation.