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# The effectiveness of the transformative constitutionalism project as measured by the Constitutional Court's socio-economic rights adjudication

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## 1.1. Background and Context

South Africa's history is afflicted with gross injustices and unjustifiable atrocities that endured for generations.[1] On 2 February 1990, the then President of the Republic of South Africa, FW de Klerk declared at the opening of the 1990 session of the Parliament of South Africa that the country had embarked on a journey of radical change, and that it was necessary for the leaders of the population to have negotiations that would ensure peace during this transition.[2] The recognition of the need to change the status quo was the genesis of a process that would later come to be known as *transformative constitutionalism*.[3] Following De Klerk's "landmark speech" of 2 February 1990,[4] particular undertakings were required before measures could be taken towards the process of transition. They included assurances that returning exiles would have indemnity and political prisoners would be released,[5] the formal ending of Apartheid,[6] a national peace accord,[7] and a first Convention of a Democratic South Africa (CODESA).[8]

At the beginning of 1992, the official opposition of the National Party (NP) disputed the negotiation process on the basis that the NP required a mandate from the white electorate to conduct the negotiations on their behalf.[9] This led to the referendum of 17 March 1992, in which 68% of the white population

[1] The Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution'), Preamble speaks about the people of South Africa in a constant state of awareness of the injustices of the past. In the *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (hereafter '*First Certification Judgment*') at para 5 the Court gives a general overview of these injustices.

[2] FW de Klerk 'Opening Speech to Parliament' (2 February 1990), Preamble; J Barnard-Naude "The Post-Apartheid Legal Order" in T Humbly, L Kotze, A Du Plessis (eds) 'Introduction to Legal Skills in South Africa' *Oxford University Press Southern Africa* (2012) 14; M Mutua 'Hope and Despair for a New South Africa: The limits of Rights Discourse *Harvard Human Rights Journal (Vol. 10)* (1997) 63-64 on how the negotiation process garnered international attention and was the greatest advancement in the human rights movement since it had began.

[3] See the *First Certification Judgement* (n 1 above) at para 10; See also *Du Plessis and Another v De Klerk and Another* 1996 (3) SA 850 (CC) at para 157: where the Constitutional Court reiterated that the Constitution "is a document that seeks to transform the *status quo ante* into a new order". SM Mbenenge 'Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape' (2018) 32(1) *Speculum Juris* 2-3 explains that transformative constitutionalism requires us to never be satisfied with the status quo. See also Langa who explains that the core idea of transformative constitutionalism is that "we must change". P Langa 'Transformative Constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 352.

[4] Humbly (n 2 above) 14.

[5] See the National Government and The ANC 'Groote Schuur Minute' (4 May 1990), Preamble, paras 1-3.

[6] See the ANC and South African Government 'Pretoria Minute' (6 August 1990), para 3.

[7] See the United Nations Centre against Apartheid 'National Peace Accord' (14 September 1991) *United Nations, New York* Preamble.

[8] Humbly (n 2 above) 15.

[9] Constitution (n 1 above), sec 1(a); *First Certification Judgement* (n 1 above) at para 12; *President of RSA v Hugo* 1997 (4) SA 1 (CC) at para 41; Humbly (n 2 above) 15; FW De Klerk Speech to Parliament (n 2 above), Preamble; D Moseneke 'The

indicated their support of the reform (transformation) process initiated by the speech. From May 1992 onwards, a few minor disputes within CODESA itself,[10] and the tragedy of the Boipatong Massacre[11] were the last few obstacles that South Africa had to overcome at the inception of her "reformative" journey.[12] The record of understanding struck between the African National Congress (ANC) and the national government in September 1992 ensured that South Africa reached the first major checkpoint on her journey - the Multi-party Negotiating Process (hereafter 'MPNP'), which started on 1 April 1993, at The World Trade Centre in Kempton Park, Johannesburg.[13]

The basis of the negotiations was the creation of the new society alluded to in the speech of 2 February 1990.[14] From the MPNP, it was clear that South Africa needed a vehicle or instrument to effectively drive and facilitate the *transitionary process.* Additionally, this vehicle or instrument was to be the foundation upon which the new society would be built.[15] As former Chief Justice Langa averred in an extra-curial publication, the promise to change our society is at the centre of the new constitutional order.[16] It was established that the condition of society was a direct result of the exploitative legal order had been in place since 1652 and had developed to only benefit a minority of the population.[17] In summation, it was an extremely unequal society, in which the majority suffered the most heinous crimes.[18] This was what needed to change. Anything associated with the inequalities the colonial legal order had wrought was also to be eradicated root and stem. This therefore meant that the foundation of the new legal order was to simultaneously change the impact and legacy of the old unequal laws, whilst being the instrument that would shape the new society.[19] Moseneke asserts that the main objective of the Constitution is to disrupt

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Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18(3) *South African Journal on Human Rights* 315.

[10] Humbly (n 2 above) 14-19 provides an overview of the events.

[11] Humbly (n 2 above) 14-19.

[12] FW de Klerk 'Opening Speech to Parliament' (2 February 1990), Preamble.

[13] Humbly (n 2 above) 14-19 on the summary of events from 2 February 1990 to 1 April 1993; E Mureinik 'A Bridge to Where? Introducing the Interim Bill if Rights' (1994) 10 (1) *South African Journal on Human Rights* 32 on the venue of MPNP; Mutua (n 2 above) 63-66.

[14] FW De Klerk Speech to Parliament (n 2 above), Preamble.

[15] Constitution (n 1 above), Preamble, sec 2; K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) South African Journal on Human Rights 150-151 classified this vehicle/instrument as a post-liberal constitution, owing to its commitment to a large-scale egalitarian social transformation – as is explicitly stated in the Preamble of the 1996 Text that would soon follow.

[16] Constitution, (n 1 above) Preamble; Langa (n 5 above) 351.

[17] *First Certification Judgement* (n 1 above) at para 10; Humbly (n 2 above) 23.

[18] Constitution, (n 1 above) Preamble; JM Modiri 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34(3) *South African Journal on Human Rights* 303 identifies nine (9) specific forms of injustices which constituted deplorable crimes.

[19] Constitution (n 1 above), Preamble, sec 2; *S v Makwanyane* 1995 (3) SA 391 (CC) at para 262; Humbly (n 2 above) 23; Klare (n 15 above) 153 put forward the view that in contrast to most classical Constitutions, the post-liberal South African Constitution is capable of facilitating this change through its social, redistributive, caring, positive, partly horizontal, participatory, multicultural and self-conscious characteristics.

unfair, unequal, and forbidden distributions of resources, with the aim of restoring equality and dignity to those previously denied it. In this Klare agrees, citing what he classified as post-liberal constitution as the best means to facilitate this process.[20] Mbenenge J further advises that, we are required to maintain a way of life that is in harmony with the values articulated in the Constitution.[21]

An important consideration, however, was that as of 1 April 1993, South Africa had a legal order (apartheid) that was due to be replaced; and no practical legal order in place (a transformative constitution) to base the new society on. Therefore, as per the Preamble of the Constitution of the Republic of South Africa, Act 200 of 1993 (hereafter 'Interim Constitution'), it was imperative that there be a conducive socio-political climate to foster patriotism and social reform, whilst the governance of the country continued, and an elected Constitutional Assembly drew up a final Constitution.[22] The Interim Constitution was the chosen means for this purpose.[23] The purpose of the Interim Constitution was therefore to create a new legal order in which South Africa would be a sovereign and democratic constitutional state. All South Africans would be entitled to a common citizenship,[24] and men and women, and people of all races would be equal,[25] which was in stark contrast to the position before, where the law had only catered to the white minority.[26]

In addition to serving as the means to usher in the new constitution,[27] the Interim Constitution was to serve as the "prototype model" of the constitution that would ultimately take its place. It was to serve as proof to society that it is possible to change society and to achieve predetermined goals through law. Therefore, if the Interim Constitution was successful in giving birth to a new society which would function under a supreme constitution capable of meeting society's demands, it would stand to reason that it was also possible for that latter constitution to achieve its predetermined goal, which was to create an egalitarian society.[28] As per Kriegler J in *President of RSA v Hugo,* the Constitution is definitively egalitarian based on our collective hopes for the future. It was added that the Constitution was drafted

[20] Constitution (n 1 above), Preamble; Moseneke (n 9 above) 318; Klare (n 15 above) 156.
[21] Mbenenge (n 1 above) 6, goes on to add that "the Constitution should be seen as a living document that guides not only the government and public institutions, but all those who come into contact with it". Langa (n 5 above) 356 adds that people "Should see law for what it is, an instrument that was used to oppress in the past, but that has that immense power and capacity to transform our society."
[22] Constitution of the Republic of South Africa Act 200 of 1993 (hereafter 'Interim Constitution'), Preamble.
[23] Interim Constitution (n 22 above), Long Title.
[24] Interim Constitution (n 22 above), Preamble. See *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) at para 7 for a deeper context of why a common citizenship was required.
[25] Interim Constitution (n 22 above), Preamble; *Du Plessis v De Klerk* (n 3 above), per Kriegler J, at para 132.
[26] Humbly (n 2 above) 19.
[27] Interim Constitution (n 22 above), Long Title.
[28] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10; Langa (n 5 above) 351; K Klare (n 15 above) 150-151.

with equality as its foundational principle, to redress the inequalities of the past.[29] Moseneke asserted that all agree that due to the economically exploitative past, the Constitution was drafted with the purpose of creating a society that is different.[30] The Interim Constitution was assented to on 25 January 1994 and came in to force on 27 April 1994.[31]

This is the day that marked the dawn of the "Constitutional Democracy" in South Africa. It was now the supreme law.[32] It would be both the foundation and driving force of society. It was also the means that would create a suitable environment for such a constitution to emerge. On the early morning of 8 May 1996, a process that had begun just over 6 years prior reached its completion.[33] In just over 6 years, South Africa had formally ended apartheid, and transitioned through an uncertain period *(governed by an "interim constitution")*,[34] right to the doorstep of a better society than the one they had initially imagined.[35] There were a few minor amendments that needed to be made to the final document, which in some forms is similar to its predecessor, with fundamental additions, such as the inclusion of justiciable socio-economic rights. Following the Certification,[36] and Signing of the Constitution, it came into effect on the fourth day of the second month of 1997 *(exactly 7 years and 2 days after the speech to initiate this process had been given).*

### 1.2. Statement of the Research Problem

Following this transition, it was therefore not unreasonable for the South African society to believe that just like everything had changed rapidly in the transition, things under the Constitution would change just as swiftly. It had taken 7 years to bring an end to the legal and political structures that had perpetuated the racial oppression and economic exploitation on which colonialism and apartheid were based.[37] Therefore, not only was the Constitution a beacon of hope for the new society, it was also (and still is) to serve as proof that it is possible to achieve realisable goals through law. As per Moseneke, the

[29] Constitution (n 1 above), Preamble, secs 2, 9, 10; *President of RSA v Hugo* (n 9 above) at para 74; K Klare (n 15 above) 153-155 identified six (6) traits of the Constitution that not only serve to classify it as post-liberal, but also as the means to facilitate transformation and to create large scale egalitarian change, namely (i) Social rights and substantive conception of equality (ii) Affirmative state duties (iii) Horizontality (iv) Participatory governance (v) Multi culturalism (vi) Horizontal self-consciousness.
[30] Constitution (n 1 above), Preamble; Moseneke (n 9 above) 315.
[31] *First Certification Judgement* (n 1 above) at para 14.
[32] Interim Constitution (n 22 above), sec 4.
[33] Interim Constitution (n 22 above), Preamble; *First Certification Judgement* (n 1 above) at paras 14-21.
[34] Interim Constitution (n 22 above), Preamble; *First Certification Judgement* (n 1 above) at para 29; *S v Makwanyane* 1995 (3) SA 391 (CC) at para 307.
[35] K Klare 'Self-Realisation, Human Rights, and Separation of Powers: A Democracy-Seeking Approach' (2015) 26(3) *Stellenbosch Law Review* 452.
[36] *Certification of the Amended Text of the Constitution of The Republic of South Africa, 1996* 1997 (2) SA 97 (CC) at para 4 the court explained its purpose in the certification process. At para 205 the Court gave the order that of certification.
[37] Modiri (n 18 above) 303.

Constitution has the potential to build a different society.[38] A year later, there was no need for Klare to ask the major question of whether drastic social change through law is possible.[39] The answer to his question was the very thing he was writing about. As the supreme law,[40] the Constitution is the new order the Interim Constitution sought to create.[41] As Mahomed J explained in *S v Makwanyane*, the Constitution rejects the unjust parts of the past and only recognises that which is justifiable, hence the need for a new order.[42]

Based on the above, it can therefore be argued that it is possible to realise predetermined goals through law. This, however, was not the problem. The problem was that as the years went by, it started to seem as though the Constitution was not living up to its promise(s).[43]
The Constitution had promised to change society to one in which people had positive relationships and opportunities to realise their full human potential.[44] This reconstruction of state and society was to be made possible through a long-term transformative project, which would have the impact of restructuring the law [enactment, interpretation, and enforcement], institutions and relationships along constitutional guidelines.[45]

The project would therefore entail an initiative of encouraging extensive social change through peaceful democratic processes guided and justified by the Constitution.[46] This initiative of encouraging social change would be identifiable through what Sibanda describes as "preambular commitments."[47] The Constitution that emerged to form the new egalitarian society promised to form the new society by curing the previous divisions in society; building a society founded on egalitarian ideals, social justice, and civil rights; laying the foundations for a free and transparent society; guaranteeing every citizen equal

[38] Moseneke (n 9 above) 313.
[39] Klare (n 15 above) 150.
[40] Constitution (n 1 above), Preamble and secs 1(c) & 2.
[41] *S v Makwanyane* (n 34 above) at para 222: "Implicit in the provisions and tone of the Constitution are values of a more mature society".
[42] *S v Makwanyane* (n 34 above) at para 262.
[43] The following are examples of criticisms against the Constitution by Legal Scholars: Modiri (n 1 above), M Ramose in P Coetzee & A Roux (eds) "Justice and Restitution in African Political Thought" *Philosophy from Africa: a text with readings* (2002) Oxford University Press 1; T Madlingozi 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28(1) *Stellenbosch Law Review* 124; S Sibanda 'Not Purpose Made! Transformative Constitutionalism, Post-Independence Constitutionalism, and the Struggle to Eradicate Poverty (2011) 22 (3) *Stellenbosch Law Review* 482; I Shai 'The Right to Development, Transformative Constitutionalism and Radical Transformation in South Africa: Post-Colonial and De-Colonial Reflections' (2019) 19(1) *African Human Rights Law Journal* 494; P Heydenrych Constitutionalism and Coloniality: A Case of Colonialism Continued or The Best of Both Worlds?' (2016) 75(6) *New Contree* 127.
[44] Albertyn and Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14(2) *South African Journal on Human Rights* 248-49.
[45] Klare (n 15 above) 150.
[46] Klare (n 15 above) 150.
[47] Sibanda (n 43 above) 485.

protection before the law; bettering the standard of living of all citizens; fully realising the abilities of each person; and making a unified and democratic South Africa capable of to taking its rightful place as an independent nation in the community of nations. It was therefore based on these seven standards that the Constitution would fulfil its promise.[48]

Thirteen years after the Constitution had come into effect, legal scholars such as Sibanda started to ask questions of whether the Constitution as currently formulated has the capacity to address the intergenerational racialized poverty that resulted from colonialism and apartheid.[49] Shai further asked whether the notion of transformative constitutionalism could be a vehicle to drive radical transformation if it was read with the right to development.[50] According to these scholars, the lived realities of people were not changing.[51] Sibanda argued that although there were the seven constitutional commitments in place to better the lives of all citizens – the living conditions of those who were disadvantaged before the Constitution had not changed.[52] Madlingozi supported this notion and documented the struggles of the Abahlali movement to emphasise the point he was making.[53] He spoke about the "other side" human, and about how they remain socially excluded from the promises in the Constitution.[54] Madlingozi explains that the "other side human" is characterised by the reality that the majority of black people remain subjected to institutionalized oppression.[55] By 2017, the criticisms were that the Constitution perpetuates apartheid and is a mutation of it.[56] In 2018, these criticisms evolved to calls for an overhaul of the entire system, supporting the pursuit for an alternative jurisprudence instead.[57] Heydenrych posited that because both constitutionalism and colonialism are products of modernity, constitutionalism would inherently have some of the undesirable traits of modernity associated with it, and therefore would

[48] Constitution (n 1 above), Preamble, secs 1,2; Klare (n 15 above) 153-155: the six (6) traits of a post liberal constitution can (and must) be read along side these preambular commitments, as they serve as the practical means to put these commitments into effect.
[49] Mutua (n 2 above) 68-69 had already raised concerns about the chose constitutional scheme; Sibanda (n 43 above) 483.
[50] Shai (n 43 above) 495.
[51] Mutua (n 2 above) 68 on the language of the constitution freezing the structures of apartheid. Heydenrych (n 43 above) 123: Constitutionalism and colonialism are twin products of modernity. Heydenrych (n 43 above) 127; Modiri (n 18 above) 323; Shai (n 43 above) 498; Sibanda (n 43 above) 485; Madlingozi (n 43 above) 126.
[52] Sibanda (n 43 above) 485.
[53] Madlingozi (n 43 above) 124.
[54] Madlingozi (n 43 above) 124 this point is argued with reference to the symbolic and metaphoric "abyssal line" between historic beneficiaries of colonialism and the previously disadvantaged which is characterized by the vast socio-economic and socio-political barriers between the two groups. Those who previously benefitted still do as the law was created for the as per pages 135-140 and those who were previously disadvantaged still are as per pages 124-129. They are considered to be on the "other side" of the abyssal line – which is characterized by harsh living realities with very little protection from the law.
[55] Madlingozi (n 43 above) 124, 126.
[56] Madlingozi (n 43 above) 135.
[57] Modiri (n 18 above) 309.

perpetuate them.[58] Effectively, the argument by legal scholars was that the Constitution cannot be classified as non-racial or egalitarian, because it served to preserve the past, rather than undo it.[59]

Four years later, these views and sentiments were echoed by the Minister of International Relations and Cooperation in a highly controversial post on the Independent Online (IOL) titled, 'Hi Mzansi, have we seen justice?'[60] In it, the Minister asked what the Constitution has done for victims of apartheid, except to relieve the pain without dealing with the actual conditions of apartheid, considering the fact that "we see a sea of African poverty".[61] The Minister asserted that indigenous law had "been reduced to footnotes in textbooks",[62] despite judgments such as that of Madala J in *S v Makwanyane.*[63] The Minister then went on to subtly associate the rule of law with oppressive legal systems, such as Jim Crow Laws, apartheid, and colonialism.[64] Additionally, there was an echoing of Madlingozi's sentiments that only a few black people were benefitting under the Constitution.[65] Two reasons were given for this, namely, the widespread poverty still prevalent today, and the apparent legitimisation of the effects of apartheid by the Constitution.[66] The Minister asserted that the law had done little to change anything.[67] The Minister passed scathing criticisms against the judiciary. It was asserted that the judiciary is occupied by "mentally colonised Africans".[68] Members of the judiciary were accused of associating with the ideologies of those who have dispossessed their ancestors".[69] The conclusion was that the justice system must be overhauled because it does not work for Africans.[70]

In just under 25 years, the Constitution had gone from being the beacon of hope for a better society in the future,[71] to being implicated as one of the means used to preserve the society of the past. It was now widely deemed a failed project, and calls were being made to change the legal order again. It was widely

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[58] Heydenrych (n 41 above) 120.
[59] Modiri (n 18 above) 317.
[60] L Sisulu *'Hi Mzansi, have we seen Justice?'* (Posted 7 January, 2022) Independent Online (IOL) https://www.iol.co.za/dailynews/opinion/lindiwe-sisulu-hi-mzansi-have-we-seen-justice-d9b151e5-e5db-4293-aa21-dcccd52a36d3. Accessed 5 February 2022.
[61] Sisulu (n 60 above) echoing Madlingozi at (n 53 & 54 above).
[62] Sisulu (n 60 above). Ramose (n 43 above) 16 first asked the why ubuntu was excluded from the Constitution.
[63] *S v Makwanyane* (n 34 above) at para 237.
[64] Sisulu (n 60 above). Modiri (n 18 above) 305 had also put the argument forward to implicate the constitution in the preservation and perpetuation of colonial and apartheid norms.
[65] Sisulu (n 60 above); Madlingozi (n 7 above) 124.
[66] Sisulu (n 60 above).
[67] Sisulu (n 60 above); Modiri (n 18 above) 315.
[68] Sisulu (n 60 above).
[69] Sisulu (n 60 above); Whilst not in so scathing a review, Modiri (n 18 above) 315 articulated concerns that with the courts becoming guardians of the Constitution, this inherently shifted the protection of the Constitution to white lawyers, activists, and academics.
[70] Sisulu (n 60 above). Madlingozi (n 43 above) 132; and Modiri (n 18 above) 309 also called for the same thing.
[71] Constitution (n 1 above), Preamble; Moseneke (n 9 above) 313.

believed that the Constitution had not and could not deliver on the promises that it had made, even though it had been advised that some of the promises would only be felt in the long term.[72]

## 1.3. Research Aims and Objectives

In light of the promises of, and criticisms against *transformative constitutionalism,* this proposed study aims to evaluate the effectiveness of *transformative constitutionalism* through an appraisal of the Constitutional Court's socio-economic rights adjudication of vulnerable and previously disadvantaged groups.

The proposed study will do this by establishing the nature, purpose, and characteristics of *transformative constitutionalism*. It will then consider how *transformative constitutionalism* must be implemented. The role of the Constitutional Court in the fulfilment of the constitutional promise will then be determined. The study will then examine whether the Constitutional Court have complied with their constitutional mandate by reviewing key socio-economic rights judgments concerning vulnerable and previously disadvantaged groups.

## 1.4. Research Questions

i. What is the nature, purpose, and characteristics of transformative constitutionalism?
ii. How must transformative constitutionalism project be implemented?
iii. What is the Constitutional Court's mandate in the transformative project?
iv. Can the effectiveness of the transformative project be assessed through the Constitutional Courts' adjudication of the socio-economic rights of vulnerable and previously disadvantaged groups?

## 1.5. Motivation and Hypothesis

It would be most appropriate to answer the above questions by assessing the effectiveness of the transformative project through the Constitutional Court's jurisprudence of the socio-economic rights of previously disadvantaged and vulnerable groups. There are two reasons for this. Firstly, case law is a true-life account of how the law was interpreted to resolve legal disputes. It stands to reason that the Constitutional Court's jurisprudence in the last 25 years has such accounts, and in that, proof of whether

[72] *S v Makwanyane* (n 34 above) at para 221; *President of RSA v Hugo* (n 9 above) at para 112; Moseneke (n 9 above) 311: "[Transformative constitutionalism like] Nationalism is if anything, a means to an end, and before we seek to further it, we must have some idea of the end for which we are striving" (Own emphasis); Langa (n 5 above) 354: "Transformation is not a temporary phenomenon". Mbenenge (n 1 above) 2: "Transformative constitutionalism is thus not an event; it is a process".

the transformative constitutionalism project has changed the lived realities of people.[73] As Moseneke has informed, transformative adjudication entails taking the lived realities of affected persons into account,[74] therefore, an assessment thereof is necessary. Secondly, as guardians of the Constitution,[75] the judiciary has the most unenviable task in society, as they are responsible for giving life to and maintaining the transformative constitutionalism project.[76] As Mokgoro J importantly stated, "one of the functions of the court is precisely to ensure that vulnerable minorities are not deprived of their constitutional rights".[77] Moseneke, added that the constitutional court is required to uphold the constitutional framework with loyalty and distinction.[78] Langa, wrote that "judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values."[79] Mbenenge, concurs by adding that "the duty of judges is to change the law to bring it in line with the rights and values for which the Constitution stands".[80] Therefore, if it can be seen that the judiciary is changing the law in such a way that moves to protect all people, they are fulfilling their mandate. This by extension would indicate that the transformative project is working.

### 1.6. Scope of the Proposed Study (Limitations and Delimitations)

Socio-economic rights are the most appropriate means to assess the effectiveness of the transformative project as they are barometer within which transformation is measured.[81] Regarding the enjoyment of the rights that the Constitution promises, Moseneke states that "it has often been said that fundamental rights are not capable of meaningful enjoyment if not accompanied by substantive fulfilment of socio-economic rights."[82] He adds that an innovative egalitarian model of jurisprudence paired with an in depth assessment of socio-economic rights has the protentional to restore social justice.[83] Langa writes that social justice must "include a levelling of socio-economic conditions."[84] Lastly, previously disadvantaged, and vulnerable groups suffered unjustifiable atrocities under apartheid. Therefore, evaluating how the new legal order treats them [from a Case Law perspective] is pivotal in determining whether the values

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73 *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) (hereafter 'My Vote Counts') at paras 34, 43.
74 Moseneke (n 9 above) 318.
75 Constitution (n 1 above), sec 165 (2).
76 *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para 36.
77 *S v Makwanyane* (n 34 above) at para 305.
78 Moseneke (n 9 above) 314.
79 Langa (n 5 above) 353.
80 Mbenenge (n 1 above) 1.
81 Langa (n 5 above) 352; Moseneke (n 9 above) 318.
82 Moseneke (n 9 above) 318.
83 Moseneke (n 9 above) 314.
84 Langa (n 5 above) 359.

in the Constitution truly are realisable or whether they are a pipe's dream.[85] As we must always remember that the reason for establishing the new legal order is to protect those left negatively impacted after apartheid.[86] Furthermore, we must be cognisant that based on the value of human dignity, we must hold the value and worth of all people in high regard, regardless of our differences.[87]

## 1.7. Research Methodology

The proposed study will follow a doctrinal approach. A doctrinal approach primarily analyses a legal doctrine and how it is formed and used.[88] It requires an in-depth assessment of "legal values, principles, and existing legal texts such as statutes and case law".[89] Additionally, it is a systematic and accurate description of the norms being addressed.[90] In general, it is aimed at evaluating the connection between rules, clarifying challenges in the particular body of law, and, in certain instances, foreseeing future outcomes.[91]

For the purposes of the proposed study, the doctrinal approach will be used to explain the nature and objectives of the transformative constitutionalism project. Particular attention will be given to the influence of the transformative constitutionalism project on the Constitutional Court's decisions when adjudicating the socio-economic rights of previously disadvantaged and vulnerable groups. The proposed study is desk-based. The main source used will be the South African Constitution, as it sets out the constitutional values that inform the transformative constitutionalism project,[92] as well as the role of the judiciary in achieving the goals of transformative constitutionalism – *particularly the judgments of the Constitutional Court relating to the socio-economic rights of vulnerable and previously disadvantaged groups.*[93] Academic commentary will be used to give context and further meaning to the doctrines and principles derived from the Constitution, and to explain the constitutional project. Additionally, it will be used to gain further insight on the criticisms or commendations of the Constitutional Court's adjudication of socio-

[85] *S v Makwanyane* (n 34 above) at para 230; *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) at paras 50; 76-78; 86; 102; 147.
[86] *S v Makwanyane* (n 34 above) at para 88.
[87] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 28.
[88] I Dobinson & F John 'Qualitative Legal Research' in M McConville & W Hong Chui (eds) *Research Methods for Law* (2007) 18-19.
[89] A Kharel 'Doctrinal Legal Research' (February 26, 2018). Available at SSRN: https://ssrn.com/abstract=3130525 Accessed 21 February 2022.
[90] NJ Duncan & T Hutchinson 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 101.
[91] Duncan & Hutchinson (n 90 above) 101.
[92] Constitution (n 1 above), Preamble; Chapter 1 (Founding Provisions) & Chapter 2 (Bill of Rights).
[93] Constitution (n 1 above), sec 165, 167; *My Vote Counts* (n 83 above) par 43; *Minister of Health v Treatment Action Campaign* (n 76 above) par 36.

economic rights cases of the identified groups, examined in the context of the transformative constitutionalism project.

### 1.8. Chapter Outline

Chapter 1 articulates the focus of the proposed study, providing context and the motivations for the study. It concludes by outlining the methodology that will be used to approach the proposed study.

Chapter 2 establishes what transformative constitutionalism is from a doctrinal perspective. It does this by looking at its nature (what is inherently is), characteristics (the elements it is made up of), purpose (what it is supposed to do and how). It then goes on to establish how transformative constitutionalism must be implemented and provides insight into some of the criticisms that have been made against the Courts in socio-economic rights adjudication.

Chapter 3 proceeds to evaluate at the role (nature, characteristics, purpose) of the courts in the constitutional project according to the Constitution and the requirements of transformative adjudication (as described by the courts). This is especially in light of the criticisms leveled against the Judiciary by Legal Scholars (as identified in section 2.4.2). The purpose is to delineate what a create transformative adjudication is according to the Constitution (as defined in case law), rather than on what Legal Sholars argue it should be.

Chapter 4 provides the evaluation of the Constitutional Court's socio-economic rights adjudication against the background of Chapters 2 and 3. The focus of the Chapter is to illustrate the application of the four-stage framework identified in Chapter 2 (through adjudication) by proving the practical application of a transformative adjudication by the Constitutional Court as delineated in Chapter 3. Effectively the focus of this Chapter is to determine whether the courts have complied with their duty as required by the Constitution, or whether the criticisms brought forward by Legal Scholars are of credence.

Lastly, in Chapter 5, the findings of the evaluation will be presented, with recommendations serving as the final points of the proposed study.

## 2.1. The Need for Transformative Constitutionalism

### *2.1.1. The essence of transformative constitutionalism*

Embedded deep in the text and arrangement of the constitutional manuscript is the essence of what transformative constitutionalism is. It is for the courts to explain this to society through adjudication.[1] This Chapter therefore seeks to establish the nature, characteristics, and purpose of transformative constitutionalism through socio-economic rights adjudication. It also highlights some of the concerns of legal scholars to transformative constitutionalism in its first 25 years of operation. The aim is to ultimately determine what transformative constitutionalism is, and how it must be implemented if it is to work effectively.

### *2.1.2. The Fall of apartheid*

The Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution') had an unenviable responsibility even before it was drafted.[2] Tasked with bringing down the old exploitative legal order whilst simultaneously creating the new egalitarian one, such a responsibility was always going to be a difficult one.[3] Through its preambular commitments,[4] the Constitution was the sole hope for a change in the lived realities of all citizens[5] – but more specifically, for those who had suffered before the Constitution, or still remained vulnerable even after its enforcement.[6] It was during the opening session of Parliament in 1990 when the process to end the injustices of the past had started,[7] and it was on the 4th day of February in

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[1] Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution'), Sec 167(3).

[2] Constitution of The Republic of South Africa, Act 200 of 1993 (hereafter 'Interim Constitution'), Preamble states what the purpose of the Constitution that would follow would be to restructure society from the injustices that had preceded it. In the *Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) (hereafter '*First Certification Judgment'*) at paras 5 and 10, the Court gives a more detailed context of the injustices that were suffered which led to the need for the Interim Constitution.

[3] Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution'), Preamble; *Certification of the Amended Text of the Constitution of The Republic of South Africa, 1996* 1997 (2) SA 97 (CC) at paras; D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18(3) *South African Journal on Human Rights* 315: states that the purpose of the Constitution is to build a society that is different from the past.

[4] Constitution (n 1 above), Preamble; S Sibanda 'Not Purpose Made! Transformative Constitutionalism, Post-Independence Constitutionalism, and the Struggle to Eradicate Poverty (2011) 22 (3) *Stellenbosch Law Review* 485: reference "Preambular Commitments".

[5] Moseneke (n 9 above) 313 emphasized the belief that in our Constitution lies the hope of a better society. J Barnard-Naude "The Post-Apartheid Legal Order" in T Humbly, L Kotze, A Du Plessis (eds) 'Introduction to Legal Skills in South Africa' Oxford University Press Southern Africa (2012) 32 on how the South African Constitution sets for itself a goal to redress the injustices of the past. P Langa 'Transformative Constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 352 says that this transformation is a socio-economic revolution goes beyond providing access to socio-economic rights, it also seeks to provide greater opportunities for everyone.

[6] Constitution (n 1 above), Preamble: specifically, where it refers to healing the injustices of the exploitative past and building a better democratic future. In *S v Makwanyane* 1995 (3) SA 391 (CC) at para 88, Chaskalson P highlighted that the very reason for establishing the constitutional order was to protect those who cannot protect themselves. *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) at para 48; L Chenwi, '"Meaningful Engagement" in the Realisation of Socio-Economic Rights: The South African Experience' (2011) 26(1) *Southern African Public Law* 128.

[7] FW de Klerk 'Opening Speech to Parliament' (2 February 1990), Preamble. This led to the Interim Constitution (n 2 above) which according to *S v Makwanyane* (n 6 above) at para 7 was both transitionary and transformative, and led to the new order.

1997 when the process of transitioning from one society to another had finally been fulfilled.[8] With the fulfilment of the "Constitution Making Process" came the promise of a new and equal society in which all living conditions had improved, and where all people could realise their potential.[9] The negotiation process that had birthed the Constitution was like no other before in the nation's history.[10] What was formed, was an innovation of its kind – a constitution that would transcend the definitions present at the time of its drafting, to be classified as a "*post-liberal, transformative constitution".* [11]

*2.1.3. The Rise of Transformative Constitutionalism*

As time went by and the promises of the Constitution were starting to feel as if they were not true,[12] the criticisms that emerged seemed to largely focus on the fact that the Constitution did not deliver on *what* it was supposed to.[13] It almost appears as though discussions of *how* the Constitution would bring an egalitarian society were cast aside,[14] with the focus seemingly being on two (2) main things. The first centred on what transformation was supposed to do to the law (and had not).[15] The second focus was on what transformation was supposed to do to the lived realities of previously disadvantaged persons and vulnerable groups (and was failing to do).[16] It was argued that the Constitution is inherently Western, and is interpreted in a Eurocentric way,[17] the result being that benefits could never be Pan African.[18] In

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[8] The Constitution of The Republic of South Africa, 1996 came into operation on the 4th of February 1997; *S v Makwanyane* (n 6 above) at para 307; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 54.

[9] Constitution (n 1 above), Preamble.

[10] In *S v Makwanyane* (n 6 above) at para 362.

[11] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 150-155: of importance to note is that Klare who is credited for coining the term "transformative constitutionalism" classified the South African Constitution as a post-liberal constitution owing to its commitment to effect a large scale egalitarian change. In particular, Klare identified six (6) characteristics of the Constitution which would be the means to facilitate this social change.

[12] JM Modiri 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34(3) *South African Journal on Human Rights* 317 argued that the Constitution is not transformative. Rather, it preserves colonial interests.

[13] Constitution (n 1 above), Preamble; L Sisulu *'Hi Mzansi, have we seen Justice?'* (Posted 7 January, 2022) Independent Online (IOL) https://www.iol.co.za/dailynews/opinion/lindiwe-sisulu-hi-mzansi-have-we-seen-justice-d9b151e5-e5db-4293-aa21-dcccd52a36d3. (Accessed 5 February 2022) in large parts echoed the views of Modiri (n 12 above) 303, 315; T Madlingozi 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28(1) *Stellenbosch Law Review* 127, 129, 140; I Shai 'The Right to Development, Transformative Constitutionalism and Radical Transformation in South Africa: Post-Colonial and De-Colonial Reflections' (2019) 19(1) *African Human Rights Law Journal* 494.

[14] Constitution (n 1 above), Preamble; Klare (n 11 above) 153-156: the six (6) characteristics of the post-liberal South African Constitution which are the means to facilitate change must be read alongside the seven (7) preambular commitments. Whilst the Preamble states what the aim of the Constitution is, the six (6) characteristics explain how this should be implemented.

[15] Klare (n 11 above) 150, 153; Moseneke (n 9 above) 316, 318; Langa (n 5 above) 354; SM Mbenenge 'Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape' (2018) 32(1) *Speculum Juris* 2-3, all provide insight on what transformative constitutionalism must do to the law.

[16] TF Hodgson 'Bridging the gap between people and the law: Transformative Constitutionalism and the Right to Constitutional Literacy' (2015) 1 *Acta Juridica* 198: criticized judgements and academic articles for not focusing enough on people's lived realities.

[17] Modiri (n 12 above) 306. Shai (n 13 above) 496; P Heydenrych Constitutionalism and Coloniality: A Case of Colonialism Continued or The Best of Both Worlds?' (2016) 75(6) *New Contree* 127.

[18] Modiri (n 12 above) 305; M Ramose in P Coetzee & A Roux (eds) "Justice and Restitution in African Political Thought" Philosophy from Africa: a text with readings (2002) *Oxford University Press* 19.

this regard, Modiri echoed Nkosi that it was too early to talk about apartheid being over, because the social structures it had created were still impacting society.[19] Ramose critiqued that the Constitution upholds concepts such as prescription which are not recognized in African Law.[20] He argued that by allowing such doctrines in law, it justifies the injustices of the past, and serves as a means to legitimize and absolve them.[21] This aligns with Madlingozi's critique that the Bill of Rights was called for by those who had historically benefited before the Constitution as a means to keep the colonial structures intact.[22] In large degrees, the Minister's comments reflected a lot of these criticisms.[23] An assessment put forward in this regard was that viewing the Constitution from these two focal points was resulting in people seeing the Constitution for what it had not done, instead of judging it by its potential.[24]

As can be seen from the criticisms brought forward, they can be summed up in four (4) general themes. Firstly, descriptions of what the Constitution and its Transformative Project were supposed to do. Secondly, arguments on why the constitutional promise was not becoming a reality. Thirdly, how the Courts could do more to realise the constitutional promise. Lastly, where the Courts have fallen short in the performance of their duty. What can also be seen is that these criticisms are based on the fact that transformative constitutionalism is supposed to impact lived realities of people by changing legal doctrines and creating an environment for governance in which the new egalitarian society may emerge.[25] This basis is understandable considering the definitions of transformative constitutionalism that have been brought forward over the years.[26] However, the question of *how* transformative constitutionalism should be implemented still does not seem to be addressed.

It is against this backdrop that this chapter assesses the characteristics, nature, and purpose of transformative constitutionalism with the aim of establishing how it should be implemented. Additionally, the role of the courts in the transformative project will be determined.

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[19] Modiri (n 12 above) 302.
[20] Ramose (n 17 above) 17.
[21] Ramose (n 17 above) 16, 17, 19; Modiri (n 12 above) 323, 325.
[22] Madlingozi (n 13 above) 140.
[23] Sisulu (n 12 above).
[24] Klare (n 11 above) 156 argues that a post-liberal reading of the Constitution is the best way to facilitate large scale social change through non-violent political processes; Hodgson (n 15 above) 196 points out that not knowing the type of change required by the Constitution has lead people to view the Constitution based on the fact that it has not impacted the lived realities of people, instead of by its potential or the change it has brought.
[25] C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14(2) *South African Journal on Human Rights* 248-49; Klare (n 11 above) 150-151, 153-155; Langa (n 5 above) 354; Moseneke (n 9 above) 314, 315; Mbenenge (n 14 above) 2-3.
[26] Albertyn and Goldblatt (n 24 above) 248-49; Klare (n 11 above) 150.

### 2.2. The Characteristics of Transformative Constitutionalism

Inherent in what transformative constitutionalism is, are elements of both the classical and statist-individualist models of constitutionalism.

#### *2.2.1. The Classical View of Constitutionalism*

The classical view of constitutionalism has the following characteristics: the constitution is not a written text that the population must conform their way of life to, but rather, the constitution is the natural way of life in a community or population.[27] The Constitution is based on the social, cultural and political forces that form the relationships between people within a society.[28] Aristotle reasoned that the constitution of a country is the way they live, meaning that the constitution changes owing to custom and education.[29] Hijmans added that the lived reality of a society is a more important source than legislation and case law.[30] Thomas argued that, customs have the power, and are a means to create law.[31] Laws must be adopted, preserved, and administered by men,[32] by deeds and by words.[33] It has been suggested that "in order to acquire a reliable indication of the actual content of the law and the constitution, the socio-

[27] Constitution (n 1 above), Preamble, sec 2; *King N.O. and Others v De Jager and Others* 2021 (4) SA 1 (CC) at para 45-47 speak about how the Constitution is not trapped in the past and requires a sustained development of all law as it also develops; K Malan 'There is No Supreme Constitution: A Critique of Statist-Individualist Constitutionalism' (2019) *African Sun Media* 29; Mbenenge (n 14 above) 6 makes specific reference to the Constitution being a living document. Legal scholars such as Klare (n 11 above) 156, Moseneke (n 9 above) and Langa (n 5 above) all write in a manner that personifies the Constitution.

[28] Constitution (n 1 above), Preamble; Malan (n 26 above) 29; Modiri (n 12 above) 314-316 explains how these relations develop into social structures and institutions and how over time, these structures and institutions develop identities of their own, perpetuating whatever the dominant ideology is at a given time. This is done in the context of South Africa's colonial past. There is a further criticism that the colonial structures are still intact, with the constitutional democracy being the next stage of its development.

[29] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 41 Goldstone J cited precedent where there was a discussion that the equality jurisprudence must be allowed to develop slowly but surely, owing to the way society develops; Malan (n 26 above) 29.

[30] Constitution (n 1 above), secs 7-10 read with secs 26-29; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at paras 18, 24, 31 Sachs J emphasized the importance of considering lived realities in adjudication. Moseneke (n 9 above) 313 added that an innovative jurisprudence as required by the Constitution would inherently consider the impact of the adjudication on the lived realities of those affect by the decision (whether directly or indirectly); Malan (n 26 above) 86.

[31] Constitution (n 1 above), secs 30, 31, 39(2); *Bhe v Magistrate Khayelitsha* (n 6 above) at para 41-45 Langa DCJ explains how the Constitution requires customary law to be considered as part of the framework and to be developed accordingly. At paras 215-16, 219 Ngcobo J added that *Carmichele v Minister of Safety and Security 2001* (4) SA 938 (CC) discussions on the development of common law at paras 31-39 also apply to indigenous law; Malan (n 26 above) 68.

[32] Constitution (n 1 above), Preamble, secs 74-79; *Mazibuko and Others v City of Johannesburg and Others 2010* (4) SA 1 (CC) at para 40 discusses how the state (whose functionaries are people) must put the provisions of the Constitution into effect. Klare (n 11 above) 153 discusses how the Constitution is a written instrument that imagines being put into effect by the collective actions of the people, as inspired by the values in the past; M Du Toit 'Bringing Freire to Socio-Economic Rights: A Pedagogy for Meaningful Engagement' (2018) 33(2) *Southern African Public Law* 2-23 discusses how it is important for all people in society to be involved in changing the realities of old; Malan (n 26 above) 29.

[33] Constitution (n 1 above), secs 2, 7-10, 44, 85, 165; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) at para 16 it was stressed that there is an obligation on everyone to put the aims in the Preamble into action. Mbenenge (n 14 above) 6 says that the values and provisions in the Constitution come alive when we adapt our way of life to conform to them; Malan (n 26 above) 68.

political realities have to be studied".[34] Therefore, according to the classical view of constitutionalism, "the extent that anything might be supreme [are] these socio-political forces, not the written constitution".[35]

The South African Constitution embodies most of these characteristics. Of the six characteristics that make the South African Constitution a post-liberal constitution, elements of "social rights and a substantive conception of equality" are present in the descriptions of a classical Constitution, particularly in requirement that the power of the community be engaged to enforce the social change envisaged by the Constitution.[36] Additionally, the elements of "horizontality", and "participatory governance" are evident, in that the Constitution seeks to insert democratic norms into the private sphere, therefore binding private persons [not only the State] to the requirements of the Bill of Rights.[37] This will practically make possible "inclusive, accountable, participatory, decentralized and transparent institutions of governance" as envisioned by the Constitution.[38] In this it is clear that the South African Constitution derives its supremacy from the people – without whom there would be no constitution to speak of at all.[39]

*2.2.2. Statist-individualist constitutionalism*

Malan however, classifies the Constitution as a "Statist-Individualist" Constitution.[40] By its very nature, the Constitution has the following characteristics that Malan identifies as attributes of a statist-individualist constitution: It is considered a living document with its own identity, that must always be respected.[41] It must always remain consistent and logical in the histories it recognises and the justice it bestows.[42] Mbenenge agrees with this description, stating that the Constitution must be deemed to be a living

[34] Malan (n 26 above) 80. According to Bingham in Malan (n 26 above) 81: the field of the study of law should be […] far wider and more complex than an imaginary system of promulgated or developed stereotyped rules and principles".
[35] Malan (n 26 above) 91 compared with Constitution (n 1 above), secs 1(c), 2. Also contrast with *Pharmaceutical Manufacturers* (n 8 above) at paras 41-46.
[36] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10; Klare (n 11 above) 153-154: This aligns with the first characteristic of a post-liberal constitution, namely, social rights and substantive conception of equality. This characteristic entails that the Constitution envisions that the power of the community be employed for the constitutional project to function.
[37] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10; see also Klare (n 11 above) 155 on the post-liberal constitutional element of "Horizontality".
[38] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10; see also Klare (n 11 above) 155 on the post-liberal constitutional element of "Participatory governance".
[39] Constitution (n 1 above), Preamble in no uncertain terms states this in its opening lines; Mbenenge (n 14 above) 6.
[40] Malan (n 26 above) 47.
[41] Constitution (n 1 above), sec 2; *Pharmaceutical Manufacturers* (n 8 above) at paras 44-45. Malan (n 26 above) 29.
[42] Constitution (n 1 above), sec 1. *Mazibuko v City of Johannesburg* (n 31 above) paras 10-18 explain the importance of history in adjudication. This example was followed in *Molusi and Others v Voges N.O. and Others* 2016 (3) SA 370 (CC) at paras 6, 37-39; Malan (n 26 above) 2.

document that regulates the conduct of all who come in contact with it.[43] It is committed to regulating the relationships and conduct of the state and the individual.[44]

The State is the organised means of power for governance; there are assurances of peace between diverse groups within the population. There is the imposition of uniformity among citizens (The only identity each person has is derived from their citizenship, which is guaranteed and conferred by the Constitution); People are integrated into a state-mandated personality and lifestyle; All people are equal, with any differences between them being considered inconsequential; There are two levels of rights, those of the individual and the state.[45] The Constitution is considered to be in command of the social and political spheres and the actions of all political forces.[46] Institutions not associated with the state are not recognised as having public authority. An understanding of the risks of having unqualified and unchecked public power in a centralized place, therefore put mechanisms in place to divide and regulate such power, for the purpose of protecting individual rights. These are affirmative state duties as identified by Klare.[47]

The Constitution emerged from an acknowledgement of the fact that because of colonialism and apartheid, we have a grossly unequal society.[48] As put forward by Klare, the Constitution has a “historical self-consciousness”.[49] Klare adds to this by saying, “the Constitution envisages equality across the existential space of the social world, not just within the legal process”.[50] He goes on further to commend the Constitution about its awareness that it is “an instrument committed to social transformation and reconstruction”.[51] The very notion of the Constitution is based on the guarantee of fundamental rights and freedoms, with the absence of such a guarantee resulting in there being no constitution at all.[52] It has been argued that statist-individualist constitutionalism is the model that most constitutions the world

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[43] Mbenenge (n 14 above) 6.
[44] Constitution (n 1 above), secs 9-10 & secs 26-29; *President of RSA v Hugo* 1997 (4) SA 1 (CC) at para 113 stresses the importance of viewing the lived realities of people through the constitutional values when interpreting the law in a given case; Klare (n 11 above) 150; Albertyn and Goldblatt (n 24 above) 248-49; Moseneke (n 9 above) 317-18.
[45] Constitution (n 1 above), Preamble, secs 2 and 3 regulate people into mandated a personality and lifestyle. Secs 9 and 10 guarantee equality among all people, with sec 7 and 8 creating rights both at state and individual level; Malan (n 26 above) 28 The Constitution possess all of the characteristics mentioned; Klare (n 11 above) 153-155 this is further emphasis of social rights and substantive conception of equality, horizontality and participatory governance.
[46] *First Certification Judgment* (n 1 above) at para 27 on constitutions inherently having control over political forces. *Carmichele v Minister of Safety and Security* (n 30 above) at para 28 highlights the importance of developing the law to conform with the Constitution. *President of RSA v Hugo* (n 39 above) at paras 11-12 shows how all branches of government are subject to the Constitution; Malan (n 26 above) 50.
[47] Klare (n 11 above) 154 on the post-liberal constitutional element of “Affirmative State Duties”.
[48] Mbenenge (n 14 above) 2-3.
[49] Constitution (n 1 above) Preamble; Klare (n 11 above) 155 on the post-liberal constitutional element of “Historical self-consciousness”.
[50] Klare (n 11 above) 154, 155, see also elements of Multiculturalism and Participatory governance.
[51] Klare (n 11 above) 150-151, 155 as per definitions and descriptions of a post liberal constitution.
[52] Interim Constitution (n 2 above), Long Title and Preamble; Constitution (n 1 above), Preamble, sec 1; *First Certification Judgement* (n 1 above) at paras 15 explain the Constitutional Principles upon which the Constitution is based and their significance. Sibanda (n 4 above) 496 explains how the Constitution is intended to establish a new order, form the basic law and be the sovereign backdrop upon which all state action is conducted.

over are predominantly based.[53] Of importance to note, in contrast to the classical view of constitutionalism, statist-individualist constitutions are contained in a supreme document – not the way of life of the people.[54]

The purpose of all Constitutions as per Mahomed J in *S v Makwanyane* is to communicate five (5) things. The first is the collective hopes of a nation. The second are the ideals that unite its people. Third is how powers of government (judicial, legislative, and executive power) are to be distributed. Fourth are the constitutional parameters of how public power is to be exercised. The last being the moral and ethical path which that state has recognized for its future. (Some, give a historical context of moral and ethical path as developed over time, from a stable and harmonious past to adapt to the demands of the future). [55] Whilst the Constitution [in some shape or form] subscribes to the above elements, the Constitution differs in its purpose and mission.[56]

Mahomed J went on to articulate that there are three (3) additional elements that distinguish the Constitution from all others. In addition to the above, the Constitution preserves from the past only what is justifiable; It is the symbol of a definite departure from the parts of the past which are reprehensibly racist, undignified, and exploitative. Lastly, the Constitution is a robust recognition of, and devotion to the values and aims contained therein. [57] In short, "the contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic".[58] The Constitution was born to be different. It is these 3 additional elements that gave the Constitution the status of *transformative or post-liberal – elements of which can be seen in the description provided.*[59] Moseneke states that the purpose of the Constitution is to remove any unequal relationships or wealth distribution, so as to restore equality to all people.[60]

In light of the above, the Constitution therefore comprises of elements of both a classic constitution and a statist-individualist constitution. The 1996 Text is an expression of the people of South Africa in light

[53] Constitution (n 1 above), Preamble: on South Africa taking its rightful place on the international scene; Malan (n 26 above) 27.
[54] Constitution (n 1 above), secs 1(c), 2; Malan (n 26 above) 30; Humbly (n 4 above) 28 discusses Fuller's Eight Characteristics of the rule of law, which requires that law be written down and easily accessible to all as per sec 1(c).
[55] *S v Makwanyane* (n 6 above) at para 262, 365; Sibanda (n 4 above) 496.
[56] Constitution (n 1 above), Preamble; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 28.
[57] *S v Makwanyane* (n 6 above) at para 262.
[58] *S v Makwanyane* (n 6 above) at para 262.
[59] Klare (n 11 above) 153-155 on the six (6) elements of a post-liberal constitution.
[60] Constitution (n 1 above), Preamble, sec 9; Moseneke (n 9 above) 318.

our history.[61] However, also written in the pages of that document is the fact that the real constitution is the people of South Africa, bound together by the values of human dignity, equality, and freedom.[62]

### 2.3. The Nature of Transformative Constitutionalism

#### *2.3.1. Colonialism: A Historical Self-Awareness*

The written laws which governed South Africa since 1652 simply reflected what was unjustifiably the status quo.[63] There was no supreme document, rather a Sovereign Parliament, based on the British belief and system of governance that the power (to occupy space; to determine reality; to manage time; to control the mind) remains in the hands of the people, who are represented by an elected parliament.[64] Parliament served the people – that was what made them sovereign. The point being emphasised is that what was (and still is) written in Statutes, existed because of the collective mindset of society. The collective mindset of society was not the way it was because of what was written in Statutes – which is very important to note.[65] The legal order and institutions that resulted from the imperialist beliefs of white people, were tools to maintain those very beliefs that were now written down in statutes and developing in case law.[66] Everything that can ever exist must first be conceived in the mind. Understanding this point is critical for the purposes of this evaluation. Everything that existed before the Constitution, existed because of the state of the collective [conscious and/or unconscious] mind of society.[67]

The collective mind of society before the Constitution must be viewed from the two perspectives. These perspectives are the "social relationships" that have been referred to by legal scholars in their descriptions of transformative constitutionalism.[68] Through the one lens, we see the white minority deeming themselves as superior to the black majority, and doing everything possible to assert that belief to the

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[61] Constitution (n 1 above), Preamble; *President of RSA v Hugo* (n 39 above) at para 41; M Mutua 'Hope and Despair for a New South Africa: The limits of Rights Discourse *Harvard Human Rights Journal (Vol. 10)* (1997) 65-67 explains the features of the Constitution; Klare (n 11 above) 155 on the Constitution's historical self-awareness.

[62] Constitution (n 1 above), Preamble, sec 1 (a) and (b); Klare (n 11 above) 153 explains that the Constitution seeks to bind people in progressive communal action towards realizing the constitutional values, which according to Moseneke (n 9 above) 313 are the source that binds the people.

[63] Malan (n 26 above) 68; Madlingozi (n 13 above) 137; Humbly (n 4 above) 101-108.

[64] Humbly (n 4 above) 24-25; Moseneke (n 9 above) 315: It is for this reason that the drafter's intention was important when interpreting law.

[65] Klare (n 11 above) 153-155 on the six (6) characteristics of a post-liberal constitution; Additionally, 185, 186 discussing how people in the private sphere enforced the apartheid laws even when this was not mandatory or required. Hodgson (n 15 above) 194 gives insight into the injustices, particularly how they became part of the way of life of society.

[66] Modiri (n 12 above) 315-316.

[67] *Bhe v Magistrate Khayelitsha* (n 6 above) at paras 61, 72-72 on how white people simply enacted Black Administration Act based on what they knew, and thought was appropriate, but no knowledge of the lived realities of those who would be affected by the legislation. Malan (n 26 above) 29 stresses the point that without human beings, there can be no law. Hodgson (n 15 above) 189 states that transformative constitutionalism must be people-focused to ensure there is no disconnect between the people and the law; Klare (n 11 above) 155 this can be seen as the pre constitutional form of participatory governance.

[68] Albertyn and Goldblatt (n 24 above) 248-49.

point of imposing it on the majority.[69] The means used to "legitimize" this was the law.[70] Colonialism distorted the true nature of constitutionalism, they weren't cut from the same cloth.[71] This is so, because through the other lens, we see the black majority exposed to the worst living conditions;[72] denied access to certain spaces;[73] deprived of a quality education;[74] and deprived of means to have equal employment or access to basic needs.[75] The plan of colonialism which mutated into apartheid, was to make the majority think that they were products of their environment and not the creators of it. The black majority were supposed to *think* they were powerless to change their positions, and to view the law was an external entity, rather than something which flows from the minds of human beings.[76] As this was reinforced over the generations, it became the norm or the way of life (constitution) that existed.[77] This in effect was a distortion of the six (6) elements of post-liberal constitutionalism.[78]

This position changed when the peaceful transition to democracy based on *ubuntu* became the new collective mindset.[79] The majority chose to forgive, and from that, arose a process where a series of agreements were reached to form the Constitution.[80] The Constitution is cognisant of the fact that "colonialism colonized bodies, minds, time, space"[81] (and one might even add souls) – leading to the desecration of reality.[82] Scholars like Shai, emphasize the point that, colonization was more than just occupation of land and minority rule, it was also crimes and injustices against the person. They all assert that the impact of colonialism is epistemic (relates to knowledge) and ontological (relates to the nature of existence).[83] In sum, this means that, societal relations were structured around the fact that white people

[69] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) at para 74 discusses the history of inequality as a whole; Madlingozi (n 13 above) 137; Modiri (n 12 above) 315-317.
[70] *Bhe v Magistrate Khayelitsha* (n 6 above) at paras 66, 68 illustrates the impact of imposing western beliefs on African persons with law as the justification; Hodgson (n 15 above) 194.
[71] Heydenrych (n 13 above) 117 argues that as products of modernity, constitutionalism and coloniality are cut from the same cloth.
[72] *Mazibuko v City of Johannesburg* (n 31 above) at paras 10-18; *Molusi v Voges* (n 36 above) at paras 39-40.
[73] In *Grootboom v Government of RSA* 2001 (1) SA 46 (CC) at para 6, Yacoob J laments on the effects of apartheid on housing today.
[74] *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC).
[75] Madlingozi (n 13 above) 137; Modiri (n 12 above) 303-05, 316-17; Shai (n 13 above) 498.
[76] This is why Madlingozi (n 13 above) 133-34, 137 stresses the importance of demystifying the view that early liberation struggles were for human rights, rather, they were for a consciousness to a system that was designed to keep the black person dominated by the white person.
[77] Hodgson (n 15 above) 194; Modiri (n 12 above) 303-05, 316-17.
[78] Klare (n 11 above) 153-155 on the six (6) characteristics of a post-liberal constitution.
[79] Klare (n 11 above) 155 on the post-liberal element of "multi-culturalism"; Ramose (n 17 above) 16 is critical of this negotiation process and the notion of ubuntu as the basis; Modiri (n 12 above) 319 has similar concerns about the negotiation process.
[80] K Klare 'Self-Realisation, Human Rights, and Separation of Powers: A Democracy-Seeking Approach' (2015) 26(3) *Stellenbosch Law Review* 445, 447 emphasizes that South African's chose the Constitution.
[81] Shai (n 13 above) 498.
[82] *Grootboom v Government of RSA* (n 64 above) at para 6; *Molusi v Voges* 2016 (n 37 above) at para 39; *Mazibuko v City of Johannesburg* (n 31 above) at para 10-18; Klare (n 11 above) 155; Madlingozi (n 13 above) 126; Hodgson (n 15 above) 195; Modiri (n 12 above) 304, 316.
[83] Shai (n 13 above) 501; Modiri (n 12 above) 303.

regarded themselves as racially superior to black people, and so took it upon themselves to define rights, and to determine the bearers of those rights.[84] The crimes and injustices that formed the reality of the oppressor and the oppressed in relation to each other under colonialism and apartheid, were as much a part of their way of life, as the sun is a part of the solar system.[85] This oppressor/oppressed way of life is what the Constitution sought to change.[86]

*2.3.2. The Constitution: Multicultural and Horizontal Participatory Governance*

The task of the Constitution is to "right the wrongs of the past and create a better future for all people (not just some)".[87] Seven (7) preambular commitments were identified to make the fulfilment of the task more than words on paper,[88] and therefore, these would also serve as standards to determine the success or lack thereof of the project.[89] There was reason to hope and believe that the Constitution would accomplish its goal of an equal society with better lives for all,[90] because the very Constitution in which society were putting their hope, was itself the fulfilment of a promise made by the Interim Constitution.[91] It was called a "transitionary" constitution, signalling that "transition" and "transformation" are one and the same thing.[92] Drawing from the best parts of our humanity, the Constitution was drafted to guide society on a journey through space and time, in which at every moment, the lived reality of all people changes for the better.[93] This requires a change of mindset and way of life from what was, to what can be.[94]

*2.3.3. The Purpose of Transformative Constitutionalism: Social Rights and a Substantive Equality*

The Oxford dictionary gives four (4) definition(s) of "constitution",[95] which are all applicable to the South African Constitution. The first is the system of laws and basic principles that govern a state. This is the "written law", such as the Constitution and legislation. Case law (which is written) keeps track of the development of law over time. This is the Epistemological element. The second definition is the condition of a person's body and how healthy it is. This is how law impacts the "lived realities of people", especially vulnerable and previously disadvantaged persons. This is recorded in case law. This is the ontological

[84] Madlingozi (n 13 above) 137; Hogson (n 15 above) 194.
[85] Malan (n 26 above) 68; Modiri (n 12 above) 315-16.
[86] Constitution (n 1 above), Preamble, *S v Makwanyane* (n 6 above) at para 262.
[87] Constitution (n 1 above), Preamble.
[88] Constitution (n 1 above), Preamble; Klare (n 11 above) 156; Mutua (n 53 above) 65-67.
[89] Sibanda (n 4 above) 486.
[90] Langa (n 5 above) 351; Moseneke (n 9 above) 313; Klare (n 11 above) 446.
[91] Interim Constitution (n 2 above), Preamble states that the purpose of Act 200 of 1993 was to serve the instrument facilitate the creation a new order; *First Certification Judgement* (n 1 above) at paras 5, 10.
[92] Langa (n 5 above) 352, 354; Mbenenge (n 14 above) 2-3.
[93] Constitution (n 1 above), Preamble.
[94] Moseneke (n 9 above) 313 on transformative constitutionalism like nationalism is a means to an end, meaning that it must be understood to function effectively; Klare (n 11 above) 153-155.
[95] Oxford 'Advanced Learner's Dictionary' (8th Edition) 2010 *Oxford University Press* 311.

element. The third definition is the way something is organised. This specifically "relates to the relationships" between state and society. The law is an instrument to regulate society. The last definition is the act of forming something. The Constitution is simultaneously the hope and instrument for building a new egalitarian society. In all these definitions, all the elements of post-liberal/transformative constitutionalism can be seen as described in different forms throughout this Chapter.[96]

In summation, *transformative constitutionalism* does not aim to simply change the words on paper that serve as statute, or the customs that became legitimized as doctrine.[97] Nor does it simply aim to be a means to provide resources and equality before the law to those who previously did not have or cannot protect themselves.[98] It aims to show people that they are the law, and that the law is them (however they chose to express it).[99] It aims to show that the power of transformative constitutionalism (change) is not in any written document, but rather, in those who wrote the document.[100] It aims to show that the people are not only the means to, but are the core part of a better society – this is how the constitutional promise will be fulfilled.[101] As Malan continuously stresses, the norm-formulations on paper are not in themselves capable of having any impact without the acceptance of people.[102] The idea of the "supreme constitution" comes from every person in society's consensus to be bound to collective ideals.[103] This is the core message of Malan's book, *There Is No Supreme Constitution,* a point on which I am inclined to agree.

What is special and commendable, is the mindset that the Constitution was built on.[104] What is commendable is that as people, we proved again that we are capable of making a positive difference, and that we can work together. That love is possible, that we are inherently good.[105] That is what the 1996 manuscript is meant to inspire – an understanding that we are all inherently good.[106] It aims to show that when we stand up and take accountability for our actions, and that when we respond to those who admit wrong in love, we can find ways forward that make us better than we previously were.[107] It seeks

[96] Klare (n 11 above) 153-155.
[97] Moseneke (n 9 above) 317; Klare (n 11 above) 153 states the Constitution "intends not merely to proclaim democratic political rights but to commit the people to achieve a new kind of society in which people actually have the social resources they need to meaningfully exercise their rights".
[98] Langa (n 5 above) 353.
[99] Hodgson (n 15 above) 189.
[100] Klare (n 11 above) 156.
[101] Du Toit (n 31 above) speaks about everyone being involved in the transformative constitutionalism process. Particularly the previously disadvantaged, they should have a direct say on what the changes to their lived realities are; Klare (n 11 above) 155 avers that "the Constitution itself is the contingent (even fragile) product of human agency".
[102] Constitution (n 1 above), Preamble; Malan (n 26 above).
[103] Malan (n 26 above); Moseneke (n 9 above) 315.
[104] Constitution (n 1 above), Preamble.
[105] Langa (n 5 above) 358.
[106] Moseneke (n 9 above) 315. Langa (n 5 above) 358 on continuing to strive and push.
[107] Constitution (n 1 above), sec 1; *Port Elizabeth Municipality v Various Occupiers* (n 29 above) at paras 16, 31, 37; Langa (n 5 above) 358 touches on the importance of reconciliation.

to reconcile all people with the fact that they are the law.[108] To empower people to know that they are the creators of their reality.[109] It is to serve as proof that we are capable of massive positive social change – *if we so choose to embark on such an endeavour.*[110] It is to tell us to never stop on such a noble pursuit.[111] In light of the above, this is what the nature and purpose of transformative constitutionalism are – an altered mindset for all in South Africa, from what came before 2 February 1990 (as per 2.3.1).

Therefore, using an understanding of the core purpose of transformative constitutionalism with the definition of constitution, a description of the purpose of the South African Constitution and its transformative project can be described as follows: *progressive changes to the way people think about themselves and view each other, that lead to the development of laws, principles and institutions designed to improve and enhance the lives of all who come in contact with them.*[112]

## 2.4. Implementation of Transformative Constitutionalism – The Role of The Courts

### *2.4.1. The Beautiful Paradox of The South African Constitution*

According to the definition(s) of constitution in 2.3.3 above, the transformative project was meant to be implemented in four (4) stages. The first stage comprises of amendments to the written principles, doctrines and laws currently in place that do not reflect the current values in the Constitution.[113] For example, if there is a law or conduct, that was interpreted in a manner inconsistent with the values in the Constitution, it must be remedied or rectified in adjudication by the courts.[114]

In the second stage, the abovementioned changes should then have the resultant effect of extending the protection of the law to those who previously did not have it.[115] All of this should tangibly manifest in the lived realities of people.[116] Examples of this include, providing access to housing for the previously homeless;[117] access to sufficient water, electricity and provision of health care to those who previously

[108] Hodgson (n 15 above) 191 asserts the need for the development of the right to constitutional literacy. This right entails knowing and understanding our rights in such a way to effectively enforce them.
[109] Hodgson (n 15 above) 208 stresses that freeing that potential of each person (which is a preambular commitment) will require people to fully know understand their rights.
[110] Klare (n 11 above) 150, Shai (n 13 above) 495; Sibanda (n 4 above) 486 all asked if social change through the constitution was possible; Langa (n 5 above) 354 believed that it was possible, contextualizing it as a journey.
[111] Langa (n 5 above) 358.
[112] Klare (n 11 above) 153-155 as delinieanted in all six (6) elements of a post-liberal constitution.
[113] Constitution (n 1 above), sec 1, 2; *S v Makwanyane* (n 6 above) at para 266; 302.
[114] Constitution (n 1 above), sec 9, 10; *S v Makwanyane* (n 6 above) at para 383; *Pharmaceutical Manufacturers* (n 8 above) at para 48-49.
[115] *Carmichele v Minister of Safety and Security* (n 30 above) at para 62; *President of RSA v Hugo* (n 38 above) at paras 36; 80.
[116] *Port Elizabeth Municipality v Various Occupiers* (n 29 above) at para 18; 24.
[117] Constitution (n 1 above), sec 26; *Government of the Republic of South Africa v Grootboom* (n 65 above) at paras 21-25.

could not afford it;[118] changing and contextualizing the law to recognize and accommodate all persons, regardless of region, beliefs, race, culture or sexual orientation, whilst also finding ways to mitigate the lasting effects;[119] and developing the law that the most vulnerable in our society receive the most protection.[120] It was however warned that the benefits of the new society this would likely be the last thing tangibly felt.[121] The third stage entails the way the relationships between the state and society are organised.[122] The Constitution ensures that governance is organised in such a way that each branch of government promotes the values in the Constitution when executing their functions.[123] The final stage must manifest in society's joint and collective actions towards building a better future for everyone.[124] Put differently, the values of the Constitution must be reflective in people's conduct towards each other in the private sphere.[125]

The above encapsulates the nature and characteristics of the Constitution's transformative project. People in both realms of the Constitution (State and Society) must collectively band together in their performance of their various roles.[126] To do this, it is imperative that people understand the beautiful paradox, which is that we the people of South Africa are (both in sum and in part), jointly the Constitution, the State, and Civil Society.[127] It is through the people of South Africa (in these 3 forms) that an equal society will be achieved, as reflected in the 7 preambular commitments.[128]

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[118] Constitution (n 1 above), sec 27; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para 101; *Mazibuko v City of Johannesburg* (n 31 above) at para 40.

[119] Constitution (n 1 above), sec 9, 10, 30, 31; *Minister of Home Affairs v Fourie* (n 60 above) at para 147; *Bhe v Magistrate Khayelitsha* (n 6 above) at paras 41, 43-45, 75, 215-216, 219.

[120] Constitution (n 1 above), sec 28; *S v M* 2008 (3) SA 232 (CC) at para 19; *S v Makwanyane* (n 6 above) at para 332; Klare (n 11 above) 154 on affirmative state duties.

[121] *S v Makwanyane* (n 6 above) at para 221; *President of RSA v Hugo* (n 39 above) at para 112; *Harksen v Lane* (n 28 above) at para 41 where Goldstone J referred to a precedent which stated that the Courts must allow the developing equality jurisprudence to do so slowly, and hopefully surely; *Port Elizabeth Municipality v Various Occupiers* (n 29 above) at para 34. *S v Zuma* 1995 (2) SA 642 (CC) at para 44 cannot change all the past with the stroke of a pen. Langa (n 5 above) 354; Mbenenge (n 14 above) 2-3.

[122] Constitution (n 1 above), secs 7, 8; *Mazibuko v City of Johannesburg* (n 31 above) at para 40; *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) at para 73; *Occupiers of 51 Olivia Road v City of Johannesburg* (n 31 above) at para 16; *Carmichele v Minister of Safety and Security* (n 30 above) at para 62 discusses the states duty to protect women (who remain a vulnerable group); Klare (n 11 above) 154 negative and affirmative duties are imposed on the state.

[123] Constitution (n 1 above), secs 7, 8, 26-29, 165 (bind all branches of government and regulate the relationship between the state and society. Secs 44, 75-77 specifically bind parliament. Secs 32, 33, 85 specifically bind the executive. Secs 34, 39, 165 specifically bind the judiciary; *First Certification Judgement* (n 1 above) confirms this position.

[124] Constitution (n 1 above), Preamble; *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) at para 52; *King N.O. v De Jager* (n 26 above) at paras 46, 75, 201, 213, 234; *Barkhuizen v Napier* 2007 (n 49 above) at para 149.

[125] Klare (n 11 above) 185, 186.

[126] Constitution (n 1 above), Preamble, secs 1, 2, 7-39; Klare (n 11 above) 155 on horizontality and participatory government.

[127] Constitution (n 1 above), Preamble; Hodgson (n 15 above) 189 hence the need for a people-focused approach to law.

[128] *My Vote Counts NPC v Minister of Justice and Correctional Services* (n 110 above) at para 95 gives a practical illustration of the people in South Africa working in harmony in all three forms. This paragraph discusses the right to vote, which has an impact on the socio-economic rights of all affected by the result.

### *2.4.2. The Importance of Interpretation*

As previously mentioned, transformative constitutionalism is widely accepted to be "a long-term project of constitutional enactment, enforcement and interpretation of the law along egalitarian lines".[129] There is a Three Step Implementation Process of Living Law. In this 3-step process, the legislature gives the law a body (enactment), the executive is its mind (enforcement) and the courts give it meaning and declare its purpose – therefore its soul (interpretation).[130] We may have an impressive Constitution, but it must still be interpreted if it is to have any impact.[131]

Interpretation is the beautifully challenging task of advancing and upholding the Constitution's transformative mission and design.[132] It is also the process that determines the extent of the inconsistency and provides reasons for such conclusions.[133] In short, for the Constitution to be a living document, it must be understood, and to be understood, it must be interpreted.[134] It is the courts who have the role of giving and sustaining the life of the Constitution.[135]As Zondo CJ said in response to the Minister's accusations,[136] the work of the judiciary would speak for them.[137] This work is highlighted and documented in Case Law, where proof of the success or lack thereof of the constitutional project can also be found.

### **2.5. Conclusion – The Need for an Evaluation of Socio-Economic Rights Adjudication**

The Constitutional Court's responsibility is of such an importance that it is necessary to assess whether they have complied with the requirements of transformative constitutionalism in the execution of their role as guardians of the Constitution.[138] Of particular importance is the accounts of how the law has changed

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[129] Klare (n 11 above) 150.
[130] Mbenenge (n 14 above) 6 refers to the fact that the Constitution is a living document.
[131] *S v Zuma* (n 110 above) at para 17; *Port Elizabeth Municipality v Various Occupiers* (n 29 above) at para 7; Mbenenge (n 14 above) 3.
[132] Constitution (n 1 above), sec 2; *Pharmaceutical Manufacturers* (n 8 above) at paras 44-45; *Carmichele v Minister of Safety and Security* (n 30 above) at para 28; *S v Makwanyane* (n 6 above) at para 383; *Molusi v Voges* (n 36 above) at para 6 and *Port Elizabeth Municipality v Various Occupiers* (n 29 above) at paras 14-15 on interpretation of legislation.
[133] *Harksen v Lane* (n 27 above) at para 28 provides an example of this.
[134] *S v Zuma* (n 110 above) at para 14, 15; *S v Makwanyane* (n 6 above) at paras 9-10, 13, 37.
[135] Constitution (n 1 above), sec 165(2); *S v Makwanyane* (n 6 above) at paras 257 305; *My Vote Counts v Speaker of Parliament* (n 112 above) at paras 34, 43; *King v De Jager* (n 26 above) at para 166, Victor AJ makes specific reference to the fact that the courts are guided by the principles of Transformative Constitutionalism; Moseneke (n 9 above) 313; Mbenenge (n 14 above) 2, 3.
[136] Sisulu (n 12 above): made an accusation that the judiciary had not done anything to comply with their constitutional duty to uphold the constitutional design and to change the law accordingly
[137] D Erasmus *'Judge Zondo hauls Lindiwe Sisulu over the coals for 'unwarranted attack' on African judiciary'* (Posted on 12 January 2022) https://www-dailymaverick-co-za.webpkgcache.com/doc/-/s/www.dailymaverick.co.za/article/2022-01-12-judge-zondo-hauls-lindiwe-sisulu-over-the-coals-for-unwarranted-attack-on-african-judiciary/ (accessed 27 June 2022).
[138] Constitution (n 1 above), sec 165 (2), 167.

the lived realities of those who were previously disadvantaged before the Constitution, and those who remain vulnerable today.[139]

A look at a sample of the Constitutional Courts socio-economic rights adjudication of these two groups of persons would be the most appropriate forum to conduct this evaluation, as this jurisprudence gives a clear illustration of how the stages of transformative constitutionalism (in 2.3.3 and 2.4.1) are supposed to manifest.[140] Additionally, socio-economic rights are important in determining the progress that society has made in healing the injustices of the past and building a better future for all in South Africa.[141] This is the very thing legal scholars have criticised.

Largely the criticisms against the Judiciary targeted their interpretation of the Constitution.[142] Scholars such as Davis cautioned that the courts strongly rely on legal doctrines such as judicial deference which is closely tied to the apartheid jurisprudential model, and is therefore not capable of effectively promoting transformation.[143] Brand reasoned that the courts use judicial deference as a strategy to defer complex socio-economic rights questions to parliament and the executive, thereby allowing the courts to avoid having to deal with these difficult questions themselves.[144] It was concluded that the judicial deference "has so far in our courts' socio-economic rights jurisprudence operated as an obstacle to effective enforcement".[145] Fou and Du Plessis concurred, adding that specifically the "minimum core" concept had not been embraced because of judicial deference.[146] Davis criticised the courts for being "reluctant to impose additional policy burdens on government or exercise supervision over the executive".[147] Ngang added that the courts had not only restricted their role, but they had also limited judicial enforcement which had slowed down the transformation process.[148] In this regard, Madlingozi emphasised that there were still many poor black South African's who were yet to feel the benefits of the new dispensation.[149] Modiri's view is that the socio-political forces that were present when the Constitution was drafted are still

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[139] *Port Elizabeth Municipality v Various Occupiers* (n 29 above) at para 18.
[140] *Grootboom v Government of RSA* (n 64 above) at para 88 where it speaks about how evictions should be carried out humanely; *Minister of Health v TAC* (n 106 above) at para 57; *Port Elizabeth Municipality v Various Occupiers* (n 29 above) at paras 19, 29.
[141] *Port Elizabeth Municipality v Various Occupiers* (n 29 above) at para 16.
[142] Sibanda (n 4 above) 490, 493; O Fuo & A Du Plessis 'In the Face of Judicial Deference: Taking the "Minimum Core" of Socio-Economic Rights to the Local Government Sphere' (2015) 19(1) *Law, Democracy & Development* 2.
[143] DM Davis 'Adjudicating Socioeconomic Rights in the South African Constitution: Towards "Deference Lite"?' (2006) 22(2) *South African Journal on Human Rights* 3.
[144] D Brand 'Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa' (2011) 22(3) *Stellenbosch Law Review* 615.
[145] Brand (n 133 above) 615.
[146] Fou and Du Plessis (n 131 above) 4.
[147] Davis (n 132 above) 301.
[148] Ngang, CC 'South Africa and the Separation of Powers Objection: The Obligation to Take "Other Measures"' (2014) 14 *African Human Rights Law Journal* 656
[149] Madlingozi (n 13 above) 126.

prevalent today, and therefore impact anything the courts can really do.[150] In sum, the arguments put forward were that the living conditions of many in the population had not changed,[151] and this manner of interpretation was a major contributing factor.[152] Other criticisms were simply such as Malan reflected, that the Judicial Service Commission (JSC) regularly failed to appoint extraordinary candidates.[153] This will therefore be investigated in the next chapter, which assesses whether the Constitutional Courts' adjudication of the socio-economic rights is aligned with the requirements of transformative constitutionalism (as per the four stages of implementation in 2.4.1).

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150 Modiri (n 12 above) 310.

151 Modiri (n 12 above) 315.

152 Sisulu (n 13 above); S Liebenberg 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 *Potchefstroom Electronic Law Journal*; S Van Der Berg 'A Capabilities Approach to Remedies for Systemic Resource-Related Socio-Economic Rights Violations in South Africa' (2019) 19(1) *African Human Rights Law Journal*; B Ray 'Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy' (2010) 9(3) *Washington University Global Studies Law Review*; M Du Toit 'Bringing Freire to Socio-Economic Rights: A Pedagogy for Meaningful Engagement' (2018) 33(2) *Southern African Public Law* all provided prosed solutions to mitigate on these shortcomings.

153 K Malan 'Reassessing Judicial Independence and Impartiality Against the Backdrop of Judicial Appointments in South Africa' (2014) 17(5) *PER/PELJ* 1974.

## 3.1. Constitutionally Imagined Adjudication: The Role of The Courts

### *3.1.1. The Guardians of The Constitution*

The constitutional democracy was the result of South Africans realizing that the injustices that had subsisted until its dawn could no longer be tolerated.[1] From the negotiations that resulted from this realisation,[2] it was decided that a decisive break from the past was necessary to build a new society.[3] In this new society, the atrocities that had come before would be redressed,[4] with the guarantee of

[1] The Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution), Preamble: articulates the peoples' recognition of these injustices; The *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (hereafter '*First Certification Judgment*') at para 5 and 10 give the historical context of the circumstances that led up to the negotiations; The Constitution of the Republic of South Africa, Act 200 of 1993 (hereafter 'Interim Constitution'), Preamble and Long Title: give the reason(s) why the new society was needed; *President of RSA v Hugo* 1997 (4) SA 1 (CC) at para 41 explains how in light of the historical context, the new society was to be built; J Barnard-Naude "The Post-Apartheid Legal Order" in T Humbly, L Kotze, A Du Plessis (eds) 'Introduction to Legal Skills in South Africa' *Oxford University Press Southern Africa* (2012) 101-110 provides an in depth perspective of the injustices of the past; JM Modiri 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34(3) *South African Journal on Human Rights* 303, 304.

[2] FW de Klerk 'Opening Speech to Parliament' (2 February 1990), Preamble, National Government and The ANC 'Groote Schuur Minute' (4 May 1990), Preamble, paras 1-3, ANC and South African Government 'Pretoria Minute' (6 August 1990), para 3 and United Nations Centre against Apartheid 'National Peace Accord' (14 September 1991) *United Nations, New York* Preamble; Humbly (n 1 above) 14-19 gives a detailed account of the negotiation process; D Moseneke 'My Own Liberator: A Memoir' *Picador Africa* (2016) provides a personal account of the negotiation period 299, 301, 302; PW Heydenrych 'Constitutionalism and Coloniality: A Case of Colonialism Continued or The Best of Both Worlds?' (2016) 75(6) *New Contree* 124 states that the Constitution stems from a well-known and praised negotiation process; M Ramose in Coetzee, P & Roux A (eds.) "Justice and Restitution in African Political Thought" Philosophy from Africa: a text with readings (2002) *Oxford University Press* 15-16 articulates his scepticism of the negation process, arguing that the National Party (NP) walked the beneficiaries of the process; T Madlingozi 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28(1) *Stellenbosch Law Review* 140 adds to this by arguing that the Supreme Constitution and the Bill of Rights came from the historical beneficiaries of colonialism; Modiri (n 1 above) 319 argues that the ANC entered into the negotiations from a position of weakness which resulted in the NP leaving with different forms of benefits and securities.

[3] Constitution (n 1 above), Preamble; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 54; *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) at para 59; *King N.O. and Others v De Jager and Others* 2021 (4) SA 1 (CC) at para 46 explains how the Constitution endorses a break from the past; SM Mbenenge 'Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape' (2018) 32(1) *Speculum Juris* (n above) 4 explains that the fundamental concern of the constitutional scheme is to create bridge between and unjust past of human rights violations and a promising future concerned with the protection of human rights; E Mureinik 'A Bridge to Where? Introducing the Interim Bill if Rights' (1994) 10 (1) *South African Journal on Human Rights* 31-33 describes the break of the past by using the 'Historic Bridge' metaphor in the Postamble of the Interim Constitution to explain a movement away from a culture of authority to a culture of justification; TF Hodgson 'Bridging the gap between people and the law: Transformative Constitutionalism and the Right to Constitutional Literacy' (2015) 1 *Acta Juridica* 195 explains the break from the past by contrasting how it was used in the past and how it is used now since the transition to a constitutional democracy.

[4] Constitution (n 1 above), Preamble; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) at para 16.; K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 154-156; S Sibanda 'Not Purpose Made! Transformative Constitutionalism, Post-Independence Constitutionalism, and the Struggle to Eradicate Poverty (2011) 22 (3) *Stellenbosch Law Review* 484, 485.

reparations for persons previously affected by said atrocities.[5] In short, the purpose of the new society was to create an environment in which everyone has a fair and equal opportunity to realise their potential.[6]

The chosen means to facilitate this departure from the past and shape the new society was the Constitution.[7] Additionally, it was to serve as the source from which all law derived its force,[8] and the means to regulate socio-economic and socio-political relations.[9] This purpose became known as the *transformative project* of the Constitution.[10] The fundamental principle upon which the transformative project is based is that we as individuals must change from how we viewed ourselves and each other before the Constitution (as per section 2.3.1),[11] to how the Constitution encourages us to view ourselves and each other now (as per section 2.3.3).[12]

To ensure that this project could practically be realised, the Constitution set for itself 7 preambular objectives and a Four-Stage Implementation Process (as per section 2.4.1).[13] Additionally, to ensure that the integrity of this project remained intact, the Constitution set in place the Judiciary as the guardians of

[5] Constitution (n 1 above), Preamble states that the purpose of the Constitution is make amends for the injustices of the past; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA (CC) at para 16 stresses the point that social justice is a founding constitutional value; P Langa 'Transformative Constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 352, 352, 354; D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18(3) *South African Journal on Human Rights* 318 on the purpose of the Constitution.

[6] Constitution (n 1 above), Preamble, sec 1 states that the purpose of building the new society based on Constitutional values is for the sole purpose of ensuring that everyone has a fair and equal chance to realise their full human potential; *S v M* 2008 (3) SA 232 (CC) at paras 18, 19 explain that the Constitution imagines that this realisation of full human potential must happen at the earliest stages possible. Therefore, all must be done to ensure such a society must continue to be created; Madlingozi (n 7 above) 129 the characteristics of a just society.

[7] Constitution (n 1 above), Preamble, sec 1 explains that its purpose is to build a society based on the recognition of basic human rights and fundamental freedoms, with the guarantee of social justice for all. Interim Constitution (n 1 above), Preamble and Long Title; *S v Makwanyane* 1995 (3) SA 391 (CC) at para 7.

[8] Constitution (n 1 above), sec 2; *Pharmaceutical Manufacturers* (n 3 above) at para 44-45; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paras 35, 140.

[9] Constitution (n 1 above), secs 7-39, 44, 85, 165; *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) at paras 51-52. *First Certification Judgment* (n 1 above) at para 136; K Malan 'There is No Supreme Constitution: A Critique of Statist-Individualist Constitutionalism' (2019) *African Sun Media* 27-29, 50, 54, 56; Langa (n 5 above) 352, 353; Moseneke (n 1 above) 318, 319.

[10] *King v De Jager* (n 3 above) at para 166; Klare (n 4 above) 150.

[11] *Minister of Home Affairs v Fourie* (n 3 above) at paras 74 102, 151 discuss how society has changed from when some laws were enacted, and therefore we must view the laws in the context of these changes, not in the context that the law was enacted; TF Hodgson (n 3 above) 195 explains the South African society's historical perception of the law; Langa (n 5 above) 354 on the core idea of transformation; Mbenenge (n 1 above) 2, 3, 6.

[12] Constitution (n 1 above), secs 1-39 emphasize the fact that we are all equal. *President of RSA v Hugo* (n 1 above) at para 74; C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14(2) *South African Journal on Human Rights* 248-49; Moseneke (n 1 above) 314, 315, 318-19.

[13] Constitution (n 1 above), Preamble; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 1. Largely connects to the definition of "constitution" in Oxford 'Advanced Learner's Dictionary' (8th Edition) 2010 *Oxford University Press* 311, and the definitions of *"transformative constitutionalism"* proposed by K Klare (n 4 above) 150 and C Albertyn & B Goldblatt (n 12 above) 248-49; Sibanda (n 4 above) 485.

its transformative project. This meant that the Judiciary was tasked with protecting the Constitution and all its democratic processes until the completion of its mission and fulfilment of its promise.[14]

As the years went by however, criticisms started to rise against the Constitution, particularly, the fact that it was not designed,[15] nor did it have the capacity to transform society.[16] The basis of these claims was four-fold. The first was that the lived realities of most black South Africans had not changed, only that of a few.[17] The second was that the Constitution was inherently western and therefore was not accommodating of African values and principles.[18] The third was that the Constitution serves as a means to preserve the structures of the past, instead of as an instrument to transform society in the present.[19] The last was that the Constitution and the culture it perpetuates inherently limit the judiciary's effectiveness in the constitutional project.[20] As guardians of the Constitution, the judiciary became implicated in these accusations.[21]

Most of the criticisms against the judiciary focused on their interpretation of the Constitution and its enforcement thereof in adjudication.[22] The judiciary was largely accused of upholding colonial ideals, instead of constitutional values.[23] Essentially, the criticisms centred around the opinion that the judiciary was not performing its constitutionally mandated duty in the manner required, which was having the effect of hindering the progress of the transformative project.[24]

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[14] Constitution (n 1 above), sec 165 (2), (3), (4); *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para 36; Mbenenge (n 1 above) 2, 3; Moseneke (n 1 above) 313, 315, 318-19.

[15] L Sisulu *'Hi Mzansi, have we seen Justice?'* (Posted 7 January 2022) Independent Online (IOL) Available at https://www.iol.co.za/dailynews/opinion/lindiwe-sisulu-hi-mzansi-have-we-seen-justice-d9b151e5-e5db-4293-aa21-dcccd52a36d3 (accessed on 22 February 2022); Ramose (n 2 above) 1; Modiri (n 1 above) 303; Madlingozi (n 7 above) 124

[16] I Shai 'The Right to Development, Transformative Constitutionalism and Radical Transformation in South Africa: Post-Colonial and De-Colonial Reflections' (2019) 19(1) *African Human Rights Law Journal* 495; PW Heydenrych (n 2 above) 116; S Sibanda (n 4 above) 482.

[17] Madlingozi (n 7 above) 129, Sisulu (n 15 above).

[18] Ramose (n 2 above) 19; Modiri (n 1 above) 323; Heydenrych (n 2 above) 117, 120; Sisulu (n 15 above).

[19] Modiri (n 1 above) 317; Sisulu (n 15 above).

[20] D Brand 'Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa' (2011) 22(3) *Stellenbosch Law Review* 615; DM Davis 'Adjudicating Socioeconomic Rights in the South African Constitution: Towards "Deference Lite"?' (2006) 22(2) *South African Journal on Human Rights* 3; O Fuo & A Du Plessis 'In the Face of Judicial Deference: Taking the "Minimum Core" of Socio-Economic Rights to the Local Government Sphere' (2015) 19(1) *Law, Democracy & Development* 2.

[21] Constitution (n 1 above), sec 165 (2), (3), (4); *My Vote Counts v Speaker of National Assembly* (n 9 above) at paras 34, 43; K Malan 'Reassessing Judicial Independence and Impartiality Against the Backdrop of Judicial Appointments in South Africa' (2014) 17(5) *PER/PELJ* 1974; Malan (n 9 above) 29; Modiri (n 1 above) 304-305, Sisulu (n 15 above).

[22] *S v Zuma* 1995 (2) SA 642 (CC) on how the Constitution is a written document that must be interpreted.

[23] Modiri (n 1 above) 311, 312, 313; Sisulu (n 15 above).

[24] S Liebenberg 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 *Potchefstroom Electronic Law Journal* 1-43; S Van Der Berg 'A Capabilities Approach to Remedies for Systemic Resource-Related Socio-Economic Rights Violations in South Africa' (2019) 19(1) *African Human Rights Law Journal* 290-316; B Ray 'Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy' (2010) 9(3) *Washington University Global Studies Law Review* 399-425; M Du Toit 'Bringing Freire to Socio-Economic Rights: A Pedagogy for Meaningful Engagement' (2018) 33(2) *Southern African Public Law* 1-23.

*3.1.2. The Role of The Guardians in Transformative Constitutionalism*

Transformative constitutionalism entails the large-scale harmonization the of law, institutions, and conduct with constitutional values.[25] The intention is for this large-scale harmonization to manifest in the way people engage with the state and each other.[26] As per the classical view of constitutionalism, the Constitution is an expression of the people.[27] In this regard, for transformative project to function, there will require large scale enactment, enforcement and interpretation of all law and conduct – which are tasks performed by people.[28] Enactment and enforcement are functions of Parliament and the Executive, each with its own. Interpretation is *what* the Judiciary does.[29] Adjudication, however, is *how* the judiciary performs its role.[30] Klare emphasises that the Courts and Lawyers must revise judicial "methodology and mindset" for transformation to happen. Additionally, Klare adds that a post-liberal reading of the Constitution is the best approach to interpretation.[31]

In terms of the constitutional project, the adjudication of the judiciary should be judged on two standards. The first standard is whether the aims of the preamble are evident in their interpretation of the law and conduct. The second standard is whether the four stages of implementation (as per section 2.4.1) can be seen manifesting from these adjudications.

It is therefore against this background that this Chapter will assess the nature, characteristics, and purpose of adjudication as part of the transformative project. Par 3.2 will look at, the nature of the Judiciary's role in the implementation process of the transformative constitutionalism project (as per

[25] Klare (n 4 above) 150.
[26] Constitution (n 1 above), Preamble, secs 7-39; *Port Elizabeth Municipality v Various Occupiers* (n 5 above) at para 41; *Occupiers of 51 Olivia Road v City of Johannesburg and Others* (n 4 above) at para 12, 15; Klare (n 4 above) 155 on horizontality; M Du Toit (n 24 above) 1-23 provides recommendations for an effective means of constitutional engagement between historical beneficiaries of the past and those who were previously disadvantaged; Ray (n 24 above) 339-425 provides insight into how the State and vulnerable parties must engage; Van Der Berg (n 24 above) 290, 294 states that the courts play an important role in promoting constitutional values and that public participation is an important part of the transformative project.
[27] Constitution (n 1 above), Preamble: stresses that the Constitution was adopted by the people for the people; *S v Makwanyane* (n 7 above) at para 15 Malan (n 9 above) 27-29; Hodgson (n 11 above) 191 provides an eloquent articulation of this point.
[28] Klare (n 4 above) 156 there are many provisions in the Constitution in which it states it is not self-executing. Klare (n 4 above) 153 the Constitution envisages collective participation of the entire community to realise constitutional goals; Mbenenge (n 1 above) 3 on how the courts are dependent on judges (people) as functionaries.
[29] Constitution (n 1 above), secs 165, 167; *Pharmaceutical Manufacturers* (n 3 above) at para 39: the courts define and articulate the exact content of a right; Liebenberg (n above) 10 explaining the function of the court.
[30] Constitution (n 1 above), secs 165, 167; *Port Elizabeth Municipality v Various Occupiers* (n 5 above) at para 23 explains that the judicial function in adjudication varies depending on the case. *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) at para 76 is an example of delineation of responsibilities in adjudication.
[31] Klare (n 4 above) 152, 156.

section 2.4.1.). Par 3.3 will evaluate the characteristics of the court's role. Par 3.4 will determine the purpose of the courts' role and will also conclude the chapter.

### 3.2. The Characteristics of Transformative Adjudication

#### *3.2.1. A creative jurisprudence*

The Constitution mandates that it must be the starting point of adjudication.[32] It also sets out the requirements the judges must comply with during their adjudications.[33] The purpose of all judges is to restructure the law so as to align it with the rights and values of the Constitution.[34] This requires a creative jurisprudence which entails a new way of thinking, developed within the constitutional framework. As Klare asserts, "judicial mindset and methodology are part of law, and therefore they must be revised so as to promote equality, a culture of democracy and transparent governance".[35] This is what encapsulates a creative jurisprudence – one that is focused on enforcing and perpetuating constitutional values in light of the particular circumstances before the court, instead of a blanket application of the law without consideration of the impact that such application will have on the live realities of those affected.[36]

Transformative adjudication is inherently based on and reflects the *constitutional text* and *constitutional design* in both form and function.[37] It mandates the courts to look at the law in a new way,[38] and to not be happy with the status quo.[39] It is not simply an exercise of determining the meaning of provisions of

[32] Constitution (n 1 above), secs 1(c) 2, 165(2); *President of RSA v Hugo* (n 1 above) at para 10; *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) at para 6; Malan (n 9 above) 27-29, 30, 50, 53 on key features of statist-individualist constitutionalism and how they mandate that the constitution be the source that governs and regulates social and political relationships.
[33] Constitution (n 1 above), sec 7-8, 39, 165, 167; *Port Elizabeth Municipality v Various Occupiers* (n 5 above) at para 23 explains that the judicial function in adjudication varies depending on the case. *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) at para 76 is an example of delineation of responsibilities in adjudication; Moseneke (n 1 above) 318 on how the Constitution has transformed the role of judges in adjudication.
[34] Constitution (n 1 above), secs 1, 2; *Port Elizabeth Municipality v Various Occupiers* (n 5 above) at para 23; *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at paras 28, 31; *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) at paras 31-31, 41, 215-216, 219; Mbenenge (n 1 above) 3 on the duty of judges; this is in line with the first stage of the four-stage framework as identified in section 2.4.1 above.
[35] Moseneke (n 1 above) 314, 315; Klare (n 4 above) 156.
[36] Constitution (n 1 above), Preamble, sec 165(2); Klare (n 4 above) 156; Langa (n 5 above) 353, 354, 355, 356 on how the Constitution requires us to view and approach our enforcement of the law; Mbenenge (n 1 above) 3-4; Moseneke (n 1 above) 315-316.
[37] Constitution (n 1 above), secs 1, 2; *Minister of Home Affairs v Fourie* (n 3 above) at paras 13-17, 147, 167; *S v M* (n 6 above) at para 15; *Molusi and Others v Voges* (n 32 above) at paras 6, 8-10, 39-40; *King v De Jager* (n 3 above) at para 73.
[38] Klare (n 4 above) 150; Moseneke (n 1 above) 313-318; Langa (n 5 above) 356 on how we can no longer turnout law graduates who are unable to apply constitutional values and who refuse to implement them in all sectors of society.
[39] Constitution (n 1 above), Preamble; Mbenenge (n 1 above) 3.

legislation, or whether conduct was constitutionally compliant, it is more than that, it must have the overall effect of inspiring a change in us – the people.[40]

The above entails giving meaning to provisions of law in such a manner that changes the old unconstitutional laws and advances and upholds the constitutional ones.[41] It entails looking at each case both reflectively and prospectively, so that when creating the better society, there is a clear contextual understanding thereof.[42] Additionally, it requires making orders that will have the effect of improving the quality of life of everyone, whether directly or indirectly affected by the decision.[43] Crucially, this creative jurisprudence does not give the courts a licence to prescribe what the law should be or how it should be enacted. The courts are only in a position to point out the extent of the defect in law; it is for parliament to do remedy the defect. This is in step with the constitutional design which has created functions specific to each branch of government and does not tolerate the encroachment or interference of one branch over another.[44]

*3.2.2. A creative alignment: the constitutional text*

Adjudication that is based on the constitutional text means that the courts are limited to the phraseology in the Constitution. The Courts cannot insert provisions that are not there or base their judgements on another text.[45] When interpreting a law against a right in the Constitution, the courts must use the words in the Constitution as they are, and not as they would like them to be.[46] Additionally, these words, phrases and provisions must be interpreted in the context of the right and also against the background and history of the Constitution as a whole.[47] This is not to say public policy is not of importance when developing

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[40] Constitution (n 1 above), Preamble; *S v Makwanyane* (n 7 above) at para 223 makes explicit reference to a shift in mental attitude; Klare (n 4 above) 150 explains that the Constitution requires a new way of thinking. Hodgson (n 11 above) 209; Langa (n 5 above) 356.

[41] Constitution (n 1 above), Preamble; *King v De Jager* (n 3 above) 43; *PE Municipality v Various Occupiers* (n 5 above) at para 29; *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at paras 1, 40; As per the first and second stages of the four-stage framework as per 2.4.1 above.

[42] Constitution (n 1 above), Preamble, secs 1, 2; *Mazibuko v City of Johannesburg* (n 40 above) paras 10-18; *Government of RSA* v *Grootboom* (n 13 above) para 6; *President of RSA v Hugo* (n 1 above) at para 12; As per the third stage of the four-stage framework as per 2.4.1 above.

[43] Constitution (n 1 above), Preamble says it seeks to heal divisions of the past and build a better society at the same time. K Klare 'Self-Realisation, Human Rights, and Separation of Powers: A Democracy-Seeking Approach' (2015) 26(3) Stellenbosch Law Review 445 articulates that the people chose a constitution that would improve the lives of all people; As per the fourth stage of the four-stage framework as per 2.4.1 above.

[44] Constitution (n 1 above), secs 44, 85, 165; B Bekink 'Principles of South African Constitutional Law' (2016) *LexisNexis* 47, 48 50, 57.

[45] Constitution (n 1 above), secs 1, 2; S *v Zuma* (n 22 above) para 14.

[46] Constitution (n 1 above), secs 1, 2; S *v Makwanyane* (n 7 above) at para 8 explains that interpretation is a process of giving meaning to the words as they appear. Para 349 adds on to state that judges interpret the constitutional text as it stands, casting aside person opinion. Klare (n 4 above) 150 on the constitution not meaning what we want it to mean; Mureinik (n above) 32-33 on the culture of justification.

[47] Constitution (n 1 above), Preamble; *S v Makwanyane* (n 7 above) at para 10; *King v De Jager* (n 3 above) at para 141 states that the Constitution should be read harmoniously; *Government of the Republic of South Africa v Grootboom* (n 13 above) at para 21 states that each right must be construed in its own context.

law,[48] but rather to assert that constitutional imperatives take precedence over all other considerations when developing the law.[49]

### *3.2.3. A creative amendment: legislation*

The first manifestation of the four-stage framework (as per section 2.4.1) can be seen when interpreting legislation against the phraseology of the Constitution in which the courts are required to either align pre-constitutional legislation with the Constitution or to assess whether legislation enacted to give effect to the Constitution was complied with.[50]

When aligning of pre-constitutional legislation with the constitutional text, the first step is for the courts to determine the drafting history.[51] Once this is determined, the courts must look at the impugned provisions against the exact wording of the relevant constitutional provisions.[52] The court must then articulate the nature of the inconsistency, and clarify this in the context of the meaning derived from the relevant constitutional provisions.[53] Alternatively, courts may be required to articulate why a provision is not unconstitutional.[54]

In the determination of whether the legislation enacted to give effect to the Constitution was complied with, the first responsibility is to identify the constitutional right or value that is potentially affected.[55] Once identified, the courts are then required to highlight the statutory provisions potentially in conflict with the Constitution.[56] The courts must look at the pre-constitutional background and context of that provision or statute, and then determine what it was intended to change.[57] The courts must weigh out all competing interests in favour of a constitutionally appropriate outcome.[58] Once the extent of non-compliance is found, it is then left to parliament to resolve.[59]

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[48] Constitution (n 1 above), secs 1, 2; *King v De Jager* (n 3 above) at para 1; *Barkhuizen v Napier* (n 8 above) at para 28, 73.
[49] Constitution (n 1 above), secs 1, 2; *King v De Jager* (n 3 above) at para 149.
[50] Constitution (n 1 above), secs 1, 2; *Molusi v Voges* (n 32 above) at para 1; *My Vote Counts v Speaker of National Assembly* (n 33 above) at para 19.
[51] Constitution (n 1 above), Preamble; *Bhe v Magistrate Khayelitsha* (n 34 above) at paras 68, 72; *Min of Home Affairs v Fourie* (n 3 above) at paras 46, 52, 152; First and Second Stages of the Four-stage Framework 2.4.1 above.
[52] Constitution (n 1 above), secs 1, 2; *Bhe v Magistrate Khayelitsha* (n 34 above) at paras 32, 66; *Min of Home Affairs v Fourie* (n 3 above) at paras 147.
[53] Constitution (n 1 above), secs 1, 2; *Bhe v Magistrate Khayelitsha* (n 34 above) at paras 31, 68, 73, 143; *Min of Home Affairs v Fourie* (n 3 above) at para 57.
[54] Constitution (n 1 above), secs 1, 2; *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 58.
[55] Constitution (n 1 above), secs 1, 2; *Molusi v Voges* (n 32 above) at para 6.
[56] Constitution (n 1 above), secs 1, 2; *Molusi v Voges* (n 32 above) at paras 8-10.
[57] Constitution (n 1 above), secs 1, 2; *PE Municipality v Various Occupiers* (n 5 above) at paras 11, 12; *Molusi v Voges* (n 32 above) at para 39.
[58] Constitution (n 1 above), secs 1, 2; *Molusi v Voges* (n 32 above) at paras 40-41.
[59] Constitution (n 1 above), secs 1, 2; *My Vote Counts v Min of Justice* (n 33 above) at para 91; Bekink (n 24 above) 48 on separation of powers.

### *3.2.4. A creative development: common law*

The second manifestation of the four-stage framework (as per section 2.4.1) can be seen in the courts' inherent duty to develop the common law conferred on them by the Constitution.[60] This duty is not rigid, however. Although courts are required to adapt doctrines and principles of common law to the constitutional text where applicable, this does not mandate a separate inquiry in each case to determine whether the common law needs to be developed.[61]

What has come to be known as Common Law must be understood as the Classical Constitution (as per section 2.2.1) that came with the colonisation. The principles and doctrines contained therein were a common part of people's interactions with each other in western culture. Whilst Legislation is deemed to have a higher standing than Common Law, it must be noted that legislation is the transcript of the Common Law for a particular right.[62] The courts have always been the arena that the common law developed in. Now, the courts are an arena specifically for the alignment of the Common Law with the Constitution.[63]

This entails shaping the common law (which is the old western constitution), to be an expression of the evolving ethical, social, and economic fabric of our nation (which is reflected in our constitutional democracy).[64] The judiciary ought to confine itself to the small progressive developments necessary to keep the common law within the constitutional framework.[65] The development of common law therefore takes place in two (2) phases.[66] The first phase is an inquiry to establish whether the common law needs to be developed in line with the wording of section 39(2) of the Constitution.[67] If the answer to this inquiry is in the affirmative, then the second phase is an inquiry to determine how such development should take place. In this regard, transformative adjudication requires judges to be weary of applying doctrines that are no longer in step with the views of society.[68] Judges should rather use common law principles that are consistent with the Constitution as these are not subject to review.[69] A caveat is that whilst the Courts

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[60] Constitution (n 1 above), sec 39(2); *Pharmaceutical Manufacturers* (n 3 above) at para 45 articulates this duty in light of its context. *Carmichele v Minister of Safety and Security* (n 34 above) at paras 29, 34-35.

[61] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Carmichele v Minister of Safety and Security* (n 34 above) at para 39.

[62] *Bhe v Magistrate Khayelitsha* (n 34 above) at paras 61; *Min of Home Affairs v Fourie* (n 3 above) at para 80.

[63] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Carmichele v Minister of Safety and Security* (n 34 above) at paras 29, 34-35; This is the direct manifestation of the first three stages of the four-stage framework identified in section 2.4.1 above.

[64] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Du Plessis and Another v De Klerk and Another* 1996 (3) SA 850 (CC) at para 132; *Carmichele v Minister of Safety and Security* (n 34 above) at paras 36.

[65] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Carmichele v Minister of Safety and Security* (n 34 above) at para 36.

[66] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Carmichele v Minister of Safety and Security* (n 34 above) at para 40.

[67] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Pharmaceutical Manufacturers* (n 3 above) at para 47; *Carmichele v Minister of Safety and Security* (n 34 above) at para 39.

[68] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Du Plessis v De Klerk* (n 63 above) at para 132; *Carmichele v Minister of Safety and Security* (n 34 above) at paras 36; *President of RSA v Hugo* (n 1 above) at para; *Min of Home Affairs v Fourie* (n 3 above) at para 80.

[69] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Pharmaceutical Manufacturers* (n 3 above) at para 42, 44.

have the capacity to develop the law, they must be cognisant of the fact that the primary vehicle for legal reform is the legislature, whose role and functions ought to be respected.[70]

*3.2.5. An innovative enhancement: customary law*

The third manifestation of the four-stage framework (as per section 2.4.1) can be identified in the Court's inherent duty of recognising the injustices of the past.[71] The Constitution insists on Customary Law being respected as part of the Constitutional Framework.[72] It is one of the two pillars/entities/forces that make up the Constitution.[73] This must be understood as the Classical Pan African Constitution that existed before colonialism and was based on the values of *Ubuntu*.

The Courts are required to recognize and consider principles of Customary Law when conducting their adjudications.[74] As the Courts have previously mentioned, Customary Law is of the same status as Common Law, meaning that anything that has ever been said about Common Law equally applies to Customary Law – to the extent of the similarity.[75] Similarly, public policy is informed by common law just as much as it informed by ubuntu,[76] which is the central ideal of customary law.[77] Therefore, like the Common Law, Customary Law is subject to the Constitution and must develop in much the same manner as the Common Law, with its positive features being upheld, enhanced and advanced.[78]

The historical context of South Africa requires that the impact of colonialism of Customary Law be considered when developing Customary Law.[79] This therefore means Customary Law is developed in three (3) ways.[80] The first is judicial notice if it can be established with reasonable assurance, the second is presentation via expert evidence, and the last being case law and textbooks based on Customary Law's status historically.[81] An additional consideration is that customary law is an ever evolving system, and therefore what is written in precedents or textbooks is not always an accurate a reflection of the

[70] Constitution (n 1 above), Preamble, secs 44, 85, 165; *S v Makwanyane* (n 7 above) at paras 107; *First Certification Judgement* (n 1 above) at para H28; *Pharmaceutical Manufacturers* (n 3 above) at paras 12, 17, 20, 33, 76, 89; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at paras 37, 38. Bekink (n 24 above) 47-48, 50, 58.
[71] Constitution (n 1 above), Preamble.
[72] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Bhe v Magistrate Khayelitsha* (n 34 above) at para 41, 43; Klare (n 4 above) 155 on multiculturalism.
[73] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Bhe v Magistrate Khayelitsha* (n 34 above) at para 41, 43-44, 215, 216, 219; *S v Makwanyane* (n 7 above) at para 307.
[74] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); Bhe *v Magistrate Khayelitsha* (n 34 above) at para 43-44.
[75] Constitution (n 1 above), Sec 39 (2); *Bhe v Magistrate Khayelitsha* (n 34 above) at para 215, 216, 219; *S v Makwanyane* (n 7 above) at para 131.
[76] *Barkhuizen v Napier* (n 8 above) at para 51.
[77] *S v Makwanyane* (n 7 above) at para 308, K Malan 'There is No Supreme Constitution: A Critique of Statist-Individualist Constitutionalism' (2019) *African Sun Media* 126
[78] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Bhe v Magistrate Khayelitsha* (n 34 above) at para 43.
[79] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Bhe v Magistrate Khayelitsha* (n 34 above) at para 43, 89.
[80] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Bhe v Magistrate Khayelitsha* (n 34 above) at para 150.
[81] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Bhe v Magistrate Khayelitsha* (n 34 above) at para 82, 89, 150-152.

present lived reality of the people who practice the customs in question,[82] which is of importance because the lived realties of people is a primary consideration of adjudication.[83]

### 3.3. The Nature of Transformative Adjudication

#### *3.3.1. The constitutional design: the constitutional framework*

The characteristics of transformative adjudication are a manifestation of the nature of the Constitution. That is to say, the characteristics of the Constitution articulate the underlying values, and ideologies that make up the Constitution.[84] The way the sections are arranged, structured, and laid out is the Constitutional Framework, which manifests in the *constitutional design.*[85] In addition to reflecting the characteristics (3.2), the adjudication should manifest all the elements that make up the design.[86]

#### *3.3.2. The Constitutional Fabric: The Interaction of Ideologies*

At its core, the Constitution is made up of two ideologies – A Pan-African ideology and a Western ideology, woven together to create the constitutional fabric.[87] These are, *ubuntu* (Customary Law), and *the rule of law* (Common Law).[88] Both must be weighed up accordingly and must be seen as articulating the same thing just in different ways.[89] It is the oppressor repenting and the oppressed forgiving, and both finding a way to work together as equals. This is where the true supremacy of the constitution lies, in these two ideologies working together to change the past and build a better future. Put differently, society must transform from these two ideologies working together.[90] The constitutional fabric is therefore

[82] Constitution (n 1 above), secs 1, 2, 9, 10, 39(2); *Bhe v Magistrate Khayelitsha* (n 34 above) at para 153.
[83] *S v Makwanyane* (n 7 above) at para 223-227. Madlingozi (n 7 above) 124, 126, 129; Langa (n 5 above) 352, 354; Moseneke (n 1 above) 314; Van Der Berg (n 24 above) 293 on the importance of socio-economic rights for the constitutional project.
[84] Constitution (n 1 above), Preamble, sec 1; *Carmichele v Minister of Safety and Security* (n 34 above) at para 54.
[85] Constitution (n 1 above), sec 1 sets out the foundational values. The rule of law is explicitly stated, whist the substance of section 1 is an articulation of ubuntu. *S v Makwanyane* (n 7 above) at para 237, Madala J discusses how the Constitution is an articulation of *Ubuntu,* which is correspondingly what the Constitution is a manifestation of. Similarly, in *Pharmaceutical Manufacturers* (n 3 above) at para 39, Chaskalson P articulates the scope of the rule of law and how it is the source of the foundational values. Contrast with Ramose (n 2 above) 17-19 and Sisulu (n 15 above) who argue that the language of the law does not reflect the value of ubuntu.
[86] Constitution (n 1 above), sec 1; Moseneke (n 1 above) 314 discusses how a creative jurisprudence must be within the Constitutional Framework.
[87] Modiri (n 1 above) 319 states that the Constitution must be understood ideologically; Klare (n 4 above) 156 and Moseneke (n 1 above) 318, 319 speak about a change to judicial thinking and method (ideology); Hodgson (n 11 above) 191-210 speaks at length about the people's perception (idea) of the law; Madlingozi (n 7 above) 126 on the ontological effect of colonialism.
[88] *Bhe v Magistrate Khayelitsha* (n 34 above) at para 215-217, Ngcobo J explains that the rules and principles that apply to the development of Common Law Equally apply to Customary Law because they are of the status.
[89] Constitution (n 1 above), sec 39(2); *Bhe v Magistrate Khayelitsha* (n 34 above) at para 43, Langa DCJ provides much needed context of how in the past Customary Law was marginalized and how this position has now changed. *Molusi v Voges* (n 32 above) at para 40-41, Nkabinde J refers to precedents of the Constitutional Court's equality jurisprudence to explain the process of balancing and weighing out competing interests.
[90] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10; Shared traits like accountability, diversity that works, rule of law and ubuntu - both ideologies are focused on the people and are a direct manifestation of the fourth stage as per section 2.4.1.

the belief that as South Africans, we can be united in our diversity, right down to the ideologies that guide us.[91] This is the purest manifestation of the fourth stage in the four-stage framework (2.4.1).

*3.3.3. The Constitutional Matrix: The Manifestation of Values*

The Constitution articulates the founding values in section 1. These founding values are the ideals upon which the equal society is being built.[92] It must therefore be clear that the courts respect human dignity,[93] are striving towards equality,[94] and are upholding human rights.[95] This must be evident in the way the courts approach race and gender issues.[96] It must be clear from the judgement that it is based on the supremacy of the Constitution and the rule of law.[97] In this regard, it also dictates that the judgements reflect the values of accountability and transparency.[98] Therefore, through the manifestation of the values of the Constitution in the court's adjudication, there can be proof that the best parts of Customary Law and Common Law can be woven together to form one constitutional fabric – which is a unique South African Jurisprudence of Equality (made up of these two ideologies).[99]

*3.3.4. The Constitutional Identity: The Arrangement of the Constitutional Phraseology*

Inherent in the manner in which the provisions in the Constitution are written and arranged is the prescribed identity of every South African.[100] Based on the idea that we are the Constitution,[101] what is written should reflect the manner in which view ourselves.[102] Our identity starts with understanding that we are South African, and by upholding the belief that being South African in South Africa inherently

[91] Constitution (n 1 above), Preamble, sec 9: one of the goals is that we should be united in our diversity; *My Vote Counts v Speaker of National Assembly* (n 9 above) at para 59, Cameron J states that the Constitution envisages one system of law shaped by the Constitution. This echoes Chaskalson P in *Pharmaceutical Manufacturers* (n 3 above) at para 44 where he stressed that there is only one system of law, which is shaped by the Constitution; Du Toit (n 4 above) 1-23; Mbenenge (n 1 above) 6; Klare (n 4 above) 153-156 on the six characteristics of a post-liberal constitution.
[92] Constitution (n 1 above), sec 1; *Barkhuizen v Napier* (n 8 above) at para 28, Ngcobo J articulates the values upon which the Constitution is based.
[93] Constitution (n 1 above), secs 1(a), 10; *Bhe v Magistrate Khayelitsha* (n 34 above) at para 43, Langa DCJ stresses the importance of dignity in the constitutional scheme.
[94] Constitution (n 1 above), secs 1(a), 9; *King v De Jager* (n 3 above) at para 77, Mhlantla J explains how equality is the lodestar of our Constitutional democracy, echoing Goldstone and Kriegler JJ in *President of RSA v Hugo* (n 1 above) at paras 41 and 74.
[95] Constitution (n 1 above), secs 1(a), 2, 7-39, 165(2); *Government of RSA v Grootboom* (n 13 above) at para 88 where it was articulated that evictions should in the very least be humane.
[96] Constitution (n 1 above), secs 1(b); *President of RSA v Hugo* (n 1 above) at para 109-110, 113; *Carmichele v Minister of Safety and Security* (n 34 above) at para 62.
[97] Constitution (n 1 above), secs 1(c), 2.
[98] Constitution (n 1 above), secs 1(d).
[99] Klare (n 4 above) 154, 155, 156.
[100] Malan (n 76 above)27-29.
[101] Hodgson (n 11 above) 208 freeing the potential of each person means incorporating the values of the Constitution into our lives. Mbenenge (n 38 above) 6 explains that our private lives should reflect the values in the Constitution.
[102] Malan (n 76 above) 27-29; Mbenenge (n 1 above) 6; Klare (n 4 above) 153-156 on social distribution and substantive equality, horizontality, participatory governance, multiculturalism and historical self-awareness – the fourth stage of the four-stage framework (2.4.1).

means being bestowed with fundamental rights and freedoms, regardless of our historical background.[103] It requires that we remain cognisant of the impact of the past on the present,[104] and ensure that we always find ways to disassociate with the undesirable parts of our history that will prevent us from building a new society where the wrongs of the past are undone, and the hope for a better future is sustained.[105] It encourages us to strive for the best in ourselves and to do what we can to assist others reach their best - and to uphold values and principles, that will enable us to continually do this.[106]

The arrangement of the constitutional phraseology reflects this by beginning with the preamble which provides context of where we are in light of where we have come from.[107] It also shows us where we are going and how we intend on getting there.[108] It then goes on to affirm who we are, and what this inherently means.[109] Transformative adjudication must reflect and manifest this.[110] Put differently, a similar structure must be present in all cases – this time, explaining what the rights mean (Case Law), which is the next step after identifying what they are (Constitution).

### 3.4. Conclusion: The Purpose of Transformative Adjudication

#### *3.4.1. The Importance of Socio-Economic Rights*

The creative jurisprudence required in transformative adjudication must include the substantive interpretation of socio-economic rights to be effective.[111] The clearest manifestation of the human rights violations of the past was socio-economic inequality.[112] The systems of law introduced by the colonial governments ensured that black people could not acquire land or decent employment.[113] This therefore left a lot of people poor and homeless, with no other options but to occupy lands that were dormant.[114]

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[103] Constitution (n 1 above), Preamble, sec 1; Klare (n 4 above) 155 on historical self-awareness; All stages of the four-stage framework (as per section 2.4.1 above) in operation.
[104] Constitution (n 1 above), Preamble, secs 9, 10; Klare (n 4 above) 155 on social distribution and substantive equality, horizontality, participatory governance, historical self-awareness.
[105] Constitution (n 1 above), Preamble, secs 9, 10; Klare (n 4 above) 155 on social distribution and substantive equality, horizontality, participatory governance, historical self-awareness; all four stages of the four-stage framework in application as per section 2.4.1 above.
[106] Constitution (n 1 above), Preamble, secs 1, 2.
[107] Constitution (n 1 above), Preamble; Klare (n 4 above) 155 on historical elf-awareness.
[108] Constitution (n 1 above), Preamble; Langa (n 5 above) 353-354.
[109] Constitution (n 1 above), Preamble, secs 3-39; Mbenenge (n 1 above) 6.
[110] Constitution (n 1 above), Preamble; Moseneke (n 35 above) 316, 317, 318; Klare (n 4 above) 156. Mbenenge (n 1 above) 2-3.
[111] Constitution (n 1 above), Preamble, sec 26-29; *Government of RSA v Grootboom* (n 13 above) at paras 21-26; Moseneke (n 1 above) 317, 318; Langa (n 5 above) 352.
[112] Constitution (n 1 above), Preamble; *Government of RSA v Grootboom* (n 13 above) at para 2; *Bhe v Magistrate Khayelitsha* (n 34 above) at para 32; *Molusi v Voges* (n 32 above) at paras 1-5; Sisulu (n 15 above); Modiri (n 1 above) 303; Madlingozi (n 7 above) 126.
[113] Constitution (n 1 above), Preamble; Humbly (n 1 above) 23.
[114] Constitution (n 1 above), Preamble; *Government of RSA v Grootboom* (n 13 above) at para 2; *Occupiers of 51 Olivia Road v City of Johannesburg* (n 4 above) at paras 1-5.

Certain beliefs were either ostracised or forbidden – the stigma against same-sex couples serving as an example of this.[115] Additionally, the position of women and children as inferior to men was upheld.[116] Children born within a marriage had a preferential position to children born outside of a marriage.[117] The systems also held other cultures and beliefs above other others, leading to the distortion of the ones considered inferior.[118] Children were considered an extension of their parents, and not individual rights bears, meaning that their protection of the law was largely based on their parents standing, and would only be based on their own upon reaching majority. The law did not provide much protection beyond that.[119]

All these factors had huge social and/or economic implications on the individuals or groups affected. This resultantly had impact on how people viewed themselves and engaged with others because the systems in place predetermined people's social relationships and development. The purpose of transformative adjudication is to keep a record of every case (or real-life story) where the law is developing, and being used as tool for social justice (or proof of the four stage framework in 2.4.1 above in application).[120] It is in the interests of dignity to ensure that the context of the past is kept record of.[121] This guarantees that the experiences of those who were oppressed can be recorded, and that justice is not lost for anyone who suffered in the past.[122] We must always remember that whilst it is beautiful to read the stories of how the law brought a positive change, we must never forget why it became necessary.[123] Viewing the injustices of the past from as many different perspectives as possible (with the understanding that these are real-life stories, not case studies), makes the recognition of the injustices of the past that much more real, and not just words on paper that become routine for us to say.[124]

*3.4.2. Proof of Transformation*

The aim of transformative adjudication is thus to be a gateway into the many different realities of people who suffered injustices in the past, so that we can review our conduct to people in similar positions today, and find ways to help them, instead of perpetuating the problem ourselves.[125] Additionally, it seeks to

[115] Constitution (n 1 above), Preamble; *Min of Home Affairs v Fourie* (n 3 above) at paras 4, 46, 52.
[116] Constitution (n 1 above), Preamble; *President of RSA v Hugo* (n 1 above) at para 113.
[117] Constitution (n 1 above), Preamble.
[118] Constitution (n 1 above), Preamble; Humbly (n 1 above) 24, 39.
[119] Constitution (n 1 above), Preamble; *S v M* (n 6 above) at para 19; *Government of RSA v Grootboom* (n 13 above) at paras 74-76.
[120] Constitution (n 1 above), Preamble; Langa (n 5 above) 354; Hodson (n 11 above) 199; Ramose (n 2 above) 17-19; Modiri (n 1 above) 325.
[121] Constitution (n 1 above), Preamble, sec 10.
[122] Constitution (n 1 above), Preamble, sec 9, 10; Klare (n 4 above) on historical self-awareness.
[123] Constitution (n 1 above), Preamble; Klare (n 4 above) on historical self-awareness.
[124] Constitution (n 1 above), Preamble, secs 2, 9, 10; Klare (n 4 above) on historical self-awareness.
[125] Constitution (n 1 above), Preamble Humbly (n 1 above) 39; Klare (n 4 above) on social distribution and substantive equality, participatory democracy, horizontality, and historical self-awareness.

show us how there is a reason to hope and believe that this transformative project can work.[126] These records show how the State was held accountable, and how the Constitution delivered on its promise to every single person who came in contact with it. If not for these many countless tellings of how the law is being used as an instrument to build a better society and remedy the wrongs of the past, we would have no reason to believe that is possible to transform the law. If we had no proof that the law is being used as the driving force for people to realise their full potential, we would have no reason to hope in the promises of the Constitution. And if we had no proof that it truly is possible for there to be a Supreme Constitution under which both state and society are governed, we would have wasted 30 years on a pipe dream. The underlying mission of transformative adjudication is this – to serve as proof that we did change.[127]

Every generation must be able to look at the changes the law made in previous generations through the jurisprudence of the courts. The judiciary give the Constitution a voice to respond to any who should ever ask, *“what did the Constitution transform?”* or *“how did we get here?”* This is what being the Guardians of the Constitution means, keeping a record of the transformation to serve as inspiration for the hopeful and proof for the questioner. The evidence of whether the transformative project has been effective is literally in the pages of the Court’s jurisprudence, and that is therefore the best forum to conduct such an inquiry.

This is the background against which the appraisal of the constitutional courts’ adjudication of the socio-economic rights of vulnerable and previously disadvantaged groups will be conducted in Chapter 4.

[126] Constitution (n 1 above), Preamble; Langa (n 5 above) 358, 359.
[127] Constitution (n 1 above), Preamble; Langa (n 5 above) 352; Klare (n 4 above) 156; Mbenenge (n 1 above) 2-3.

## 4.1. A Changed Mindset: The Effectiveness of Transformative Constitutionalism

### *4.1.1. The Barometer of Effectiveness*

The Constitutional Court is undoubtedly one of the key and major role players required for the achievement of a truly transformed society as envisioned by the Constitution.[1] Everything done in the execution of said duty will automatically fall under scrutiny to assess whether one of the major institutions that society has put its faith in to realise its collective transformative goals is performing the functions it was entrusted to perform, in the way that it was entrusted to do so.[2] This is particularly so in their adjudication of socio-economic rights. These cases provide insight into the impact of a judgment on the lived realities of people. The realisation of these rights has a micro and macro level impact. On the micro level, people are seen as equal before the law,[3] and this allows previously disadvantaged individuals to live dignified lives.[4] On a macro level, this ultimately contributes towards the achievement of large-scale, egalitarian, social transformation.[5] Through these adjudications, we are provided insight into how the law was developed, and the nature of the development.[6] These testimonies should ultimately have the effect of proving that with every day that passes, South Africa develops more and more into the society imagined by the Constitution.[7] Additionally, through the true tellings reflected in their transformative adjudication,

[1] The Constitution of the Republic of South Africa, 1996 secs 165(2); 167(4); SM Mbenenge 'Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape' (2018) 32(1) *Speculum Juris* (n above) 2-3, 4-5; D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18(3) *South African Journal on Human Rights* 314, 315, 316, 318.

[2] O Fuo & A Du Plessis 'In the Face of Judicial Deference: Taking the "Minimum Core" of Socio-Economic Rights to the Local Government Sphere' (2015) 19(1) *Law, Democracy & Development* 2; DM Davis 'Adjudicating Socioeconomic Rights in the South African Constitution: Towards "Deference Lite"?' (2006) 22(2) *South African Journal on Human Rights* 3; D Brand 'Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa' (2011) 22(3) *Stellenbosch Law Review* 615 provide examples of criticisms of the courts and their adjudications; Of importance is the restated criticisms identified in section 2.4.2 and the duties of the court delineated through out Chapter 3.

[3] Constitution (n 1 above), Preamble; secs 1(a) and 9; B Ray 'Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy' (2010) 9(3) *Washington University Global Studies Law Review* 399-425

[4] Constitution (n 1 above), Preamble; secs 1(a) and 10; M Du Toit 'Bringing Freire to Socio-Economic Rights: A Pedagogy for Meaningful Engagement' (2018) 33(2) *Southern African Public Law* 1-23; See also the first two stages of the four-stage framework as per section 2.4.1 and as delineated in Chapter 3.

[5] Constitution (n 1 above), Preamble; K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 150; Albertyn and Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14(2) *South African Journal on Human Rights* 248-49; P Langa 'Transformative Constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 352, 353, 354 on transformative constitutionalism being a social and economic revolution that is a not a temporary phenomenon; See stage four of the four-stage framework (2.4.1) and explanations thereof in Chapter 3 above.

[6] Constitution (n 1 above), Preamble; Mbenenge (n 1 above) 2-3, 4-5; Moseneke (n 1 above) 314-316; See stage four of the four-stage framework (2.4.1) and explanations thereof in Chapter 3 above.

[7] Constitution (n 1 above), Preamble, sec 1; T Madlingozi 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28(1) *Stellenbosch Law Review* 126, 129, 140; JM Modiri 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34(3) *South African Journal on Human Rights* 315-317, 319; The complete and ultimate manifestation of the four-stage framework (2.4.1) and explanations thereof in Chapter 3 above.

the Court is constitutionally mandated to show us how we must shape our lives to reflect the values of the Constitution.[8]

Arguably, if the courts as guardians of the Constitution are performing their role, then transformative constitutionalism is effective. The purpose of the court's role is to develop the law (based on principles of customary law and doctrines common law being woven together) to form constitutional values that will serve as a unique blend of the two systems operating in concert.[9] Put differently, transformative constitutionalism requires the development of one new system of law from the best parts of two other systems. This development of law must reflect in a positive progression in the way people live their lives. Transformative adjudication must therefore show the development of law as constitutionally required, and the corresponding impact it has had on the lives of people.

It must be noted however that the Courts must achieve these objectives, within the constitutional framework.[10] It is not only the Courts with the duty to facilitate this move, but also its functionaries have the same duty tailored to them.[11] A judge cannot begin to engage with the Constitution without a clear understanding of firstly, the time of history we are in, and secondly, the courts' role (and by extension their own duties) in this particular time in history.[12] This is the reality a judge is faced with before they even start to adjudicate a matter, and it is upon these factors that the jurisprudence of the court is formed. This is the barometer upon which the effectiveness of transformative constitutionalism will be measured.

This chapter seeks to answer the question of whether the transformative constitutionalism has been effective. This question will be answered through an appraisal of the Constitutional Court's adjudication of the socio-economic rights of vulnerable and previously disadvantaged groups. Of importance, is that the four stages of implementation (2.4.1) must be present, as they are the most appropriate medium to illustrate the barometer of effectiveness.

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[8] Constitution (n 1 above), secs 165; 167. Mbenenge (n 1 above); Moseneke (n 1 above); Klare (n 5 above) 153-155 this is ideally how the six (6) characteristics of a post-liberal constitution must manifest in adjudication and by extension society.

[9] *S v Makwanyane* 1995 (3) SA 391 (CC) at para 155 and *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) at para 152 both articulate the court's role in this regard.

[10] Constitution (n 1 above) Preamble, sec 1, 2, 9, 10; Moseneke (n 1 above) 313; Klare (n 5 above) 155 on social distribution and substantive equality, horizontality, participatory democracy, historical-self-awareness; See also the four-stage framework (2.4.1) and Chapter 3 on the practical application of this point.

[11] Mbenenge (n 1 above) 3: *Definition (of transformative constitutionalism) makes judges, other functionaries, and institutions role-players in transformative constitutionalism.*

[12] Constitution (n 1 above), Preamble; Mbenenge (n 1 above) 4-5 speaks of factors judges must consider in adjudication; Klare (n 5 above) 155 this is emphasis on historical self-awareness of the Constitution that judges must recognise; See also the first two stages of the four-stage framework (2.4.1).

*4.1.2. The Method of Appraisal*

Chapter 2 provides an explanation of what transformative constitutionalism is. It explains that it is a changed mindset from the lifestyle imposed by colonialism (2.3.1) to a way of life imagined under the Constitution (2.3.3). Chapter 2 further states that for this change to reflect in Society, there is a four-stage implementation process that must be followed (2.4.1). The Court's role in the four-stage process was explained (2.4.2), and in Chapter 3, the nature, characteristics, and purpose of the court's role was established (3.2-3.4).

This chapter will therefore use the context of the two preceding chapters to assess whether the changes described in Chapter 2, and the method established in Chapter 3 have been implemented and carried out in the court's adjudication of the socio-economic rights of vulnerable and previously disadvantaged groups. It will therefore be determined whether the elements of the four-stage process are evident in the adjudications under appraisal.

This will manifest in the following ways: A reversal of the human rights violations of the past through a change of the law (first stage);[13] Access to rights for those who previously did not have (second stage);[14] Guarantee protection of these rights (third stage);[15] Guarantee that no one in society has the power to infringe on these rights (fourth stage).[16] If all four of these elements are present in the adjudication, it can be argued that the transformative project has been effective. Views and arguments of legal scholars will be considered; however, the primary sources for purposes of this appraisal will be the Constitution and selected Constitutional Court Socio-Economic Rights Adjudication of Vulnerable and Previously Disadvantaged Groups.

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[13] Constitution (n 1 above), Preamble, secs 2, 39(2); *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paras 44-45; Mbenenge (n 1 above) 3 says that the duty of judges is to align all law with the values of the Constitution; *See* under Section 2.4.1 and Section 3.2: The Characteristics of Transformative Adjudication on from pages 33-37 above.

[14] Constitution (n 1 above), sec 26-29, 34; TF Hodgson 'Bridging the gap between people and the law: Transformative Constitutionalism and the Right to Constitutional Literacy' (2015) 1 *Acta Juridica* 207-209; *See* Section 2.4.1 and Section 3.2 above from pages 33-37 for detail on how the law must provide access to rights where previously there was none.

[15] Constitution (n 1 above), Preamble, secs 1, 2, 7-8; Langa (n 5 above) 356; M Ramose in Coetzee, P & Roux A (eds.) "Justice and Restitution in African Political Thought" Philosophy from Africa: a text with readings (2002) *Oxford University Press* 4, 5. *See* Section 2.4.1 and Section 3.3: The Nature of Transformative Adjudication from pages 38-40 for insight on how transformative adjudication must guarantee the protection of rights.

[16] Constitution (n 1 above), Preamble, secs 1, 2, 9; I Shai 'The Right to Development, Transformative Constitutionalism and Radical Transformation in South Africa: Post-Colonial and De-Colonial Reflections' (2019) 19(1) *African Human Rights Law Journal* 502; Moseneke (n 1 above) 314; *See* Section 2.4.1 and Section 3.3 above from pages 38-40 for more on how transformative adjudication must guarantee that there is no infringement of rights.

## 4.2. An Instrument for Change and a Means to Build the New Society

### *4.2.1. The Proof of Transformation*

Previously disadvantaged groups are those groups of persons who the pre-democratic law was designed to restrict from realising their full human potential on an unjustifiable basis.[17] Vulnerable groups are those persons who remain directly affected the impact of the atrocities of the past.[18] Today, we recognize this injustice by prohibiting unfair discrimination.[19] Owing to the scope of this study, this section will focus on persons who were exploited where it specifically related to land and property rights,[20] and those who suffered gross injustices on account of their gender (women).

Through the lens of the four stages implementation, this section (4.2) will assess if the law has changed with regards to how it approaches land and property rights, as well as matters relating gender rights. Additionally, it will be assessed whether there has been a change to lived realities of the affected persons.

Before the Constitution, the state had no obligation to protect or to progressively realise socio-economic rights in anyway.[21] The Courts interpretated the Constitutional Principles as obliging the State to in the very least negatively protect socio-economic rights. This means that at a minimum to ensure these rights were in some shape or form acknowledged and enforceable. This is a minimum core standard.[22] Additionally, it clearly shows the elements for an effective transformative project (4.2.1) manifesting. The

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[17] Constitution (n 1 above), Preamble; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 6; *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at paras 10-18. Madlingozi (n 7 above) 134-139; Modiri (n 7 above) 303-304; W Du Plessis "The Post-Apartheid Legal Order" in T Humbly, L Kotze, A Du Plessis (eds) 'Introduction to Legal Skills in South Africa' *Oxford University Press Southern Africa* (2012) 101-110.

[18] Constitution (n 1 above), Preamble, secs 9, 10; Madlingozi (n 7 above) 126; L Sisulu *'Hi Mzansi, have we seen Justice?'* (Posted 7 January 2022) Independent Online (IOL) Available at https://www.iol.co.za/dailynews/opinion/lindiwe-sisulu-hi-mzansi-have-we-seen-justice-d9b151e5-e5db-4293-aa21-dcccd52a36d3 (accessed on 22 February 2022).

[19] Constitution (n 1 above), Preamble, secs 9, 10; *Harksen v Lane NO and Others* 1998 at paras 91, 94 – read in the context of Sections 3.2 and 3.3 above, one can see that through the adjudication of section 9 based on the constitutional text and constitutional values has resulted in a continued progression away from discrimination. This is in contrast to the state of affairs before the Constitution which have been articulated by Modiri (n 7 above) 303-305, 309, 315, 317 and Madlingozi (n 7 above) 124-140.

[20] Ray (n 3 above) 403 states the court is sensitive to people who remain vulnerable to evictions. This acknowledgement of the vulnerability of poor persons to evictions by the court and attempts to resolve this defect in law is from of transformative constitutionalism. The cases below show the courts have complied with their mandate as per the 4 requirements for a successful constitutional project as per Par 4.1.2: Method of Appraisal.

[21] Constitution (n 1 above), secs 26, 27, 29; The *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (hereafter '*First Certification Judgment*') at paras 26-29 ; *Grootboom* (n 17 above) at paras 12, 20; See the Submission by the Ad Hoc Committee for the Campaign for Social and Economic Rights to the Theme Committee on Fundamental Rights (April 1995) 1– proof that the courts have complied with their role as per Sections 3.2 and 3.3 above.

[22] Fuo & Du Plessis (n 2 above) 3: "One of the main criticisms relates to the Constitutional Court's failure to embrace the minimum core concept."

Court developed the common law position from one where the State did not have to protect socio-economic rights, to a position where it forms part of the inherent duties of the State.[23]

In this regard, the Courts acknowledged that although the layout, structure and values of the Constitution point to a Separation of Powers within the spheres of government, the Constitution correspondingly calls for a Separation of Powers model which is unique to South Africa.[24] The Court added that this unique model will allow encroachment into the other branches of government if such encroachment is constitutionally mandated.[25] The Court has emphasised that socio-economic rights adjudications are one such arena where the Courts are mandated to encroach into the other branches of parliament.[26] Socio-economic rights adjudication deals with basic necessities of a person's life, therefore, they literally affect the lived reality of the individual involved. This is therefore a body of adjudication that requires judges to be creative, because inherently, this type of adjudication did not exist before the Constitution, therefore socio-economic rights are the only rights that have a full constitutional identity and so does this form of adjudication.

*4.2.2. Housing Rights*

Housing rights are the most largely adjudicated socio-economic rights. In adjudicating Land and Property rights, effective transformative adjudication requires the Courts the courts to look at the historical context of the rights in question.[27] The Court has noted multiple times that historically, land deprivation and dispossession as enforced by the common law formed part of the lived realities of most black people in South Africa.[28] During the negotiation process, the inclusion of justiciable land and property rights was a heavily contested matter. Arguments both for and against the inclusion of socio-economic rights were

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[23] Constitution (n 1 above), secs 26, 27, 29; *First Certification Judgment* (n 21 above) at paras 18-20; Langa (n 5 above) 352; Klare (n 5 above) 155 on affirmative state duties.

[24] B Bekink 'Principles of South African Constitutional Law' (2012) *LexisNexis* 47-58.

[25] Constitution (n 1 above), secs 2; *First Certification Judgement* (n 21 above) at para 54; *President of RSA v Hugo* 1997 (4) SA 1 (CC) at paras 20, 29. Bekink (n 24 above) 48, there is an emphasis on the constitutional design providing insight into the constitutional framework as per section 3.2 above. The structure of the constitution is what mandates separation of powers. Read with footnote above.

[26] Constitution (n 1 above), Preamble, secs 1, 2, 26-29, 39(2), 165, 167; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paras 12, 17, 20; Ngang, CC 'South Africa and the Separation of Powers Objection: The Obligation to Take "Other Measures"' (2014) 14 *African Human Rights Law Journal* 655-680 disagrees and argues that the courts use this doctrine in such a way that slows down the transformative process instead of enhancing it; Bekink (n 24 above) 48 explains how the in the *First Certification Judgment* the court confirmed that although there was no explicit mention of separation of powers, the layout of the Constitution was sufficient grounds to conclude that the Constitution endorses the separation of powers. See Sec 3.3. on how constitutional structure mandates a separation of powers model that is unique to South Africa.

[27] Constitution (n 1 above), Preamble; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA (CC) at para 9-10; Klare (n 5 above) 155 on historical self-awareness; *See also* section 2.4.1 the first stage of the framework and section 3.3 above.

[28] Constitution (n 1 above), Preamble, secs 1, 2, 7, 8, 26-29, 39(2), 165, 167; *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) at paras 1-5; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) at paras 1-6; Klare (n 5 above) 153, 155 on affirmative state duties and historical self-awareness; Hodgson (n 14 above) 189-209.

brought forward, with the Court concluding that the Constitution (and by extension the new society it was creating) required the inclusion of justiciable socio-economic rights.[29] In light of this context, the Court has then gone on to state our preambular goals in relation to land and property rights.[30] In this regard, the State's duty which is to progressively address the vast need for housing has also been reaffirmed in many different cases.[31]

The first opportunity for the courts to adjudicate housing rights was in *Grootboom.* The court was required to determine the reasonableness of evictions carried by the government in lieu of the National Housing Policy. This was to be done against the phraseology of section 26 of the Constitution. As part of a developing jurisprudence, the court was required to explain how socio-economic rights are interpreted and enforced within the constitutional framework.

Yacoob J started by articulating the State's preambular commitment to realise progressive housing in light of the history of our country.[32] Yacoob J went on to explain that socio-economic rights must be interpreted through two lenses, their contextual setting as well as their historical background.[33] It was

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[29] Constitution (n 1 above), Preamble, secs 26, 27, 29; *First Certification Judgement* (n 22 above) at paras 18-20; *Grootboom v Government of RSA* (n 17 above) at para 1; Du Toit (n 4 above) 1-23 articulates the importance of justiciable socio-economic rights and how they empower the previously disadvantaged and vulnerable to participate in the construction of the new society. Of note is the discussion of the Freire Pedagogy in meaningful engagement which dictates that in building the new society dialogue must occur 'with' and not 'for' the previously disadvantaged and vulnerable; Klare (n 5 above) 153-155 this brings all the elements of a post-liberal constitution into effect as envisioned by the Constitution; Additionally, this is also the four-stage framework (as per section 2.4.1) operating at its optimum, as laws are being developed according to the needs of the people, and not from the top down, meaning that it will be easier for the changes to manifest in society.

[30] Constitution (n 1 above), Preamble, secs 2, 7, 8, 9, 10, 26; *Grootboom v Government of RSA* (n 17 above) at para 1; *PE Municipality v Various Occupiers* (n 27 above) at para 16; *Molusi v Voges* (n 28 above) at para 6; *Occupiers of 51 Olivia Road v City of Johannesburg* (n 28 above) at para 16; L Chenwi, '"Meaningful Engagement" in the Realisation of Socio-Economic Rights: The South African Experience' (2011) 26(1) *Southern African Public Law* 134 discusses the states duties in light of the preambular commitment to improve the quality of life of every person as per section 7(2) and section 10; Klare (n 5 above) 153-155 social distribution and substantive equality, affirmative statie duties, horizontality, participatory governance and multiculturalism are the applicable in this regard; Again, as per section 2.4.1 above, all stages of the four-stage framework operate if these aims are pursued as required by the Constitution.

[31] Constitution (n 1 above), Preamble; Constitution (n 1 above) sec 26; *Grootboom v Government of RSA* (n 17 above) at para 41; S Liebenberg 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 *Potchefstroom Electronic Law Journal* 1-43 discuses the States duty to meaningfully engage, the courts approach in this regard. Whilst concluding that the development of this duty in case law has been in consistent, there is an acknowledgment that the court has affirmed the important role in different cases brought before it; Ray (n 3 above) 404 also acknowledges that the courts have required the government to develop and keep a public record of their meaningful engagement for the court to review as part of the requirements of transformative adjudication as identified in Chapter 3; Additionally, this is the third stage of the four-stage framework as per section 2.4.1 above; Klare (n 5 above) 153-155 on all aspects of a post-liberal constitution as envisioned by the Constitution.

[32] Constitution (n 1 above), Preamble; *Grootboom v Government of RSA* (n 17 above) at para 1; Klare (n 5 above) on historical self-awareness; Read with section 3.2 and 3.3, we see many of the elements present. This adjudication is characteristic of the constitutional design (3.3.1) and the constitutional matrix (3.3.3).

[33] Constitution (n 1 above), Preamble; *Grootboom v Government of RSA* (n 17 above) at paras 22, 25; Mbenenge (n 1 above) 4-5 explains that judges must adjudicate in context, whilst considering the immediate and future impact of the decision. This is characteristic of the constitutional identity (3.3.4) in that the courts have remained cognizant of the past injustices. In this light, one could argue that the constitution does not uphold colonial structures as Modiri (n 7 above) 303-305 and Madlingozi (n 7 above) 124-126 suggest.

also emphasised that social economic rights must be interpreted against the Constitution as a whole.[34] An explanation of the importance of the Bill of Rights in the pursuit of realising our preambular goals was also provided.[35] A definition of Section 26(1) was provided, and reference was made to the fact that it is important to understand that the state's obligations depend on the context. Lastly, the learned judge added that international law must be considered during the interpretation of socio-economic rights.[36]

As part of defining the constitutional obligation the state has to provide progressive housing, Yacoob J also articulated what reasonableness in the context of Sec 26(2) means and what progressive realisation entails.[37] Additionally, in complying with its international commitments, the court considered the minimum core threshold for socio economic rights. It is important to note that in this regard, Yacoob J said that it was difficult to determine a minimum core standard for a *progressive right* without adequate information available – the court did not refuse to define the minimum core standard.[38] This is evidenced by the fact that the courts established a minimum core standard for evictions in the same case.[39] It was also established that for the government to not meaningfully engage connotes an inhumane eviction, which is in violation of the minimum core standard for evictions. Lastly, consideration was given to the impact of the judgement on the lived realities of those who would be affected by the outcome.[40]

[34] Constitution (n 1 above), Preamble; *Grootboom v Government of RSA* (n 17 above) at para 24.
[35] Constitution (n 1 above), Preamble; *Grootboom v Government of RSA* (n 17 above) at para 23; K Malan 'There is No Supreme Constitution: A Critique of Statist-Individualist Constitutionalism' (2019) *African Sun Media* 27-*29*; Liebenberg (n 31 above) 5-6 identifies four principles of meaningful engagement which align with the explanation of the importance of the Bill of Rights in socio-economic rights disputes This exemplifies the constitutional matrix (3.3.3) in adjudication – specifically what each value means for each person. This is part of what Hodgson (n 11 above) 207-209 believes will free up the potential of each person, as per the constitutional matrix (3.3.3).
[36] Constitution (n 1 above), Preamble; *Grootboom v Government of RSA* (n 17 above) at para 26; Chenwi (n 30 above) 140-144 discusses the importance of considering international law in adjudication, especially when looking to include vulnerable and marginalized groups in the constitutional process; This is reflective of the first two stages of the four-stage framework (2.4.1) and constitutional identity (3.3.4).
[37] Constitution (n 1 above), Sec 26(2); *Grootboom v Government of RSA* (n 17 above) at paras 40-45. This interpretation was based on the constitutional phraseology and values. The court did not shy away from articulating the duties of the State when it comes to progressive housing, as has been argued by Ray (n 3 above) 399-425 and Brand (n 2 above) 614-638. Rather, they have shown they are not happy with the Status quo as Mbenenge (n 1 above) 3 states the Constitution requires of Judges. Klare (n 5 above) 155 on affirmative state duties. Additionally, in providing these definitions, the law was being changed to create a standard of reasonableness that had not be present before, whilst also extending rights to vulnerable and previously disadvantaged groups (2.4.1).
[38] Constitution (n 1 above), Preamble, secs 1, 2, 7, 8, 39(2); *Grootboom v Government of RSA* (n 17 above) at para 31-33; Fou and Du Plessis (n 2 above) 3 expressed concerns that the minimum core standard had not been defined; Brand (n 2 above) 614-638 expressed concerns that socio-economic rights adjudication had not been effective due to the courts hiding behind judicial deference, however here the Court can be seen to be interpreting the rights in such a way to hold the executive branch of government accountable; Klare (n 5 above) 153 the constitutional aims of affirmative state duties and social distribution and substantive equality are also present in the interpretation.
[39] Constitution (n 1 above), Preamble, secs 1, 2, 7, 8, 39(2); *Grootboom v Government of RSA* (n 17 above) at para 88. This was a creative development as per (3.2.4) as the common law on evictions was developed to align with constitutional values, creating a minimum core that evictions must be in the very least humane – this is a policy burden placed on the government, which is in contrast to the criticisms brought forward by Davis (n 2 above) 301 that the courts are reluctant to do so.
[40] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10; *Grootboom v Government of RSA* (n 17 above) at para 83; This is in line with what Liebenberg (n 31 above) 1-43 asserts would be an appropriate approach to meaningful engagement; Additionally, this is reflective of the Freirean Pedagogy deliniated by Du Toit (n 2 above) 1-23; Chenwi (n 30 above) 128-156

Four years later in *PE Municipality,* Sachs J pointed out that the municipality was aware of their duty to provide housing.[41] The municipality argued that there was no inherent duty placed on them to provide alternative housing after evictions, especially evictions carried out according to legislation.[42] Now that there was a jurisprudence to refer to with regards to housing, Sachs J went on to articulate the historical context of the right in question. The starting point was the constitutional values of dignity, equality, and freedom. In this regard the point being emphasised that everyone is an individual bearer of rights with the power to exercise them. From this perspective, he explained how for black people, dispossession was 90% of a legal system that was misused, leading black people to search for dwelling on dormant lands. This dispossession had the added humiliation of being criminalized. Sachs J then went on to state that the Prevention of Illegal Evictions from Unlawful Occupation of Land Act 19 of 1998 (PIE) was enacted to repeal offending legislation that legalized evictions and ended to such gross human rights violations.[43]

Having stated the historical context of the Section 26, Sachs J went on to reaffirm our preambular commitments in this regard.[44] It was emphasised that the Constitution requires everyone to be treated with care and concern, therefore, the courts must infuse aspects of grace and compassion as required by ubuntu.[45] With regards to housing, Sachs J explained that this means that a special regard should be given to a person's dwelling, regardless of where it is.[46] The point was emphasised that it is absolutely

acknowledged that meaningful engagement has been addressed in housing cases despite criticisms raised by Ngang (n 30 above) 655 that the courts had restricted their role in the adjudication process; Klare (n 5 above) 153-155 as all six aims of a post-liberal constitution are present; Of the four-stage framework (2.4.1), all are applicable through this judgement.

[41] Constitution (n 1 above), Preamble, secs 1, 2, 7, 8, 26; *PE Municipality v Various Occupiers* (n 27 above) at para 3. This is reflective of the creative jurisprudence (3.2.1). This was part of the developing law that was aimed at improving the lives of people. This contrasts with Madlingozi's (n 7 above) 124-126 arguments that the courts are not doing enough to alleviate poverty. Also see Sisulu (n 18 above).

[42] Constitution (n 1 above), Preamble, secs 1, 2, 7, 8, 26; *PE Municipality v Various Occupiers* (n 27 above) at paras 6, 8.

[43] Constitution (n 1 above), Preamble, secs 1, 2; *PE Municipality v Various Occupiers* (n 27 above) at paras 9-15; In this the court did not shy away from imposing policy burdens on the government, although criticisms of the court's reluctance to do so were raised by Davis (n 2 above) 301-327. Arguably, this approach to the judgment aligns with the view put forward by Ray (n 3 above) 399-425 on the role municipalities must play in the meaningful engagement process; Again, all elements of a post-liberal constitution as identified by Klare (n 5 above) 153-155 are present; Additionally, the entire four-stage framework can be seen in application (2.4.1). This adjudication therefore involved a creative amendment (3.2.3).

[44] Constitution (n 1 above), Preamble; *PE Municipality v Various Occupiers* (n 27 above) at para 16. The court remaining consistent in reflecting the elements under Section 3.3 in the judgments; Klare (n 5 above) 155 on multiculturalism and historical self-awareness.

[45] Constitution (n 1 above), Preamble, secs 1, 2; *PE Municipality v Various Occupiers* (n 27 above) at para 37; Compare with Sisulu (n 18 above), Ramose (n 15 above) 14; PW Heydenrych 'Constitutionalism and Coloniality: A Case of Colonialism Continued or The Best of Both Worlds?' (2016) 75(6) *New Contree* 130 who argue that Afrocentric values are not present in the jurisprudence who asset ubuntu is note present in the law.

[46] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10, 26, 39(2); *PE Municipality v Various Occupiers* (n 27 above) at paras 17-19. Again, there is regard for the poor in the judgement and their dignity. This is again in contrast to the sentiment put forward by the Minister, Sisulu (n 18 above) as well as legal scholars such as Sibanda (n 4 above), Madlingozi (n 7 above) and Modiri (n 7 above) on the constitution not being a means to fight against poverty; Additionally, this can be seen as a progressive development of the minimum core standard for evictions established in *Grootboom.* Compare with Fou and Du Plessis (n 2 above) 1-28 who argue the courts have not done this. The first two stages of the four-stage framework are evident in this regard (2.4.1); Both the constitutional matrix (3.3.3) and constitutional identity (3.3.4) were manifesting in this judgement.

pivotal that concern is shown for the poor in these process as required by principles of transformative constitutionalism. Sachs J pointed on that in light of these imperatives, courts are no longer mandated to blindly give eviction orders as before the Constitution. Adding to *Grootboom* Sachs J stressed that a Court dealing with a similar situation in future must not give out the eviction order is all the steps from *Grootboom,* and *PE Municipality* are not present.[47]

7 years after *Grootboom* in *51 Olivia Road,* Yacoob J focused more on meaningful engagement, considering the principles of eviction had been laid down. The starting point was reference to the background of the story.[48] This was then followed by reference to *Grootboom* and *PE Municipality,* which was the guiding law for this particular case.[49] The constitutional values of dignity and equality were the basis of judgement.[50] The constitutionally mandated meaningful engagement was developed further as part of the minimum core for evictions (which is that they must be dignified and humane). Context was given of the purpose of meaningful engagement and the necessity thereof. It was stated that it must not be conducted in secret. The Court added that it should be conducted before the litigation process – thereby creating an official procedure for evictions.[51] This time, Yacoob J defined section 26(3) of the Constitution, and found that it must be given a generous construction. According to *51 Olivia Road,* sec 26 (3) of the Constitution means that no one should be compelled to leave their home without an appropriate court order. [52]

In *Molusi,* the Court was required to determine whether evictions were carried out correctly according to the Extension of Security Tenure Act (ESTA) 62 of 1997 which is a legislation enacted to give effect to sec 26 (3).[53] It was reiterated that the Constitution is the starting point of adjudication and went on to say that this case was judged based on the goal to achieve social justice.[54] *Molusi* also referred to precedent

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[47] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10, 26, 39(2); *PE Municipality v Various Occupiers* (n 27 above) at para 61.

[48] Constitution (n 1 above), Preamble; *Occupiers of 51 Olivia Road v City of Johannesburg* (n 28 above) at paras 1-6.

[49] Constitution (n 1 above), Preamble; *Occupiers of 51 Olivia Road v City of Johannesburg* (n 28 above) at paras 10, 12, 17. Aspects of Section 3.2 were present throughout the judgment.

[50] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10; *Occupiers of 51 Olivia Road v City of Johannesburg (n 28 above)* at para 20. This is in step with S Van Der Berg 'A Capabilities Approach to Remedies for Systemic Resource-Related Socio-Economic Rights Violations in South Africa' (2019) 19(1) *African Human Rights Law Journal* 290-316 sentiments, who believes that the courts have the capability to promote dignity, equality, and freedom. The constitutional fabric (3.3.2) and the constitutional matrix (3.3.3) are present.

[51] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10, 26, 39(2); *Occupiers of 51 Olivia Road v City of Johannesburg* (n 28 above) at paras 12, 15-16, 21, 23, 30. This is another example of a creative development (3.2.4).

[52] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10, 26, 39(2); *Occupiers of 51 Olivia Road v City of Johannesburg* (n 28 above) at para 49. Yacoob J's discussions on meaningful engagement largely reflected the sentiments of some legal scholars on the subject, such as Du Toit (n 4 above) 1-23 and Ray (n 3 above) 399-425.

[53] Constitution (n 1 above), 1, 2, 26(3); *Molusi v Voges* (n 28 above) at para 6, 8-10. This serves as another example of a creative amendment (3.2.3).

[54] Constitution (n 1 above), Preamble, secs 1, 2, 26(2); *Molusi v Voges* (n 28 above) at para 6.

to interpret the law.[55] Using the principles from the above cases, Nkabinde J interpreted sections 8-10 of ESTA as rendering the common law doctrine of possession and ownership no longer applicable. Insight was also given into how these sections (based on justice and equity) changed the pre-constitutional position of the landowner in relation to the occupier.[56]

*4.2.3. Women*

The Court has been very intentional about the need to develop the law to specifically protect and empower women. In this regard, the law has looked at the social, cultural, and economic position of woman from a historical perspective, and the many different ways that the law disadvantaged women. [57]

The courts have acknowledged and recognized the patriarchal nature of society and how this inherently served to benefit men and the expense of women.[58] The Courts have further noted that this inherently led to women having an inferior position in society, which was evident in the way the law, institutions, and society inherently regarded and treated women.[59] The Court is aware that in terms of employment, women received the less preferential jobs, as their place was deemed to be in the home. It was considered a man's responsibility to work, meaning that women without male figures caring over them were largely disadvantaged in economic matters.[60] Additionally, women were largely overlooked in matters of inheritance, sometime to the extent of leaving them without shelter or means. To that end, the courts have developed the law in such a way to advance the social position of women along egalitarian lines.[61]

The Courts have been intentional to redefine the role of women in society from being one of domestic affairs and child rearing, to having an equal and fair opportunity in every sphere of life as they may so

[55] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10, 26(2); *Molusi v Voges* (n 28 above) at para 31.
[56] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10, 26(2); 39(2) *Molusi v Voges* (n 28 above) at paras 37-39. This is another example of the first three stages of the four-stage framework in application; This a creative development (3.2.3) on the part of the courts.
[57] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10; *President of RSA v Hugo* (n 25 above) at paras 92-93; *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)) at para 62; *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) at paras 68, 95; *King N.O. and Others v De Jager and Others* 2021 (4) SA 1 (CC) at para 149; Klare (n 5 above) 153-155.
[58] M Mutua 'Hope and Despair for a New South Africa: The limits of Rights Discourse *Harvard Human Rights Journal (Vol. 10)* (1997) 70 raised concerns about the marginalization of black women. The position concerning women has changed since these concerns were raised; Whilst Black Men held preferential positions in a vast array of social instances, it is known and has been further elucidated by this study that in the pre-democratic era, society was designed in such a way to advance the interests of white men above all other demographic groups. *See also* Humbly (n 17 above) 101-110.
[59] *President of RSA v Hugo* (n 25 above) at paras 92-93, 109-113; *Harksen v Lane* (n 19 above) at para 35. Manifesting in these judgements are the elements in both Sections 3.2 and 3.2.
[60] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10, 39(2); *President of RSA v Hugo* (n 25 above) at paras 92-93, 109-113. A creative development (3.2.4) based on the constitutional matrix (3.3.3) and constitutional identity (3.3.4).
[61] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10, 39(2); *Bhe v Magistrate Khayelitsha* (n 57 above) at paras 72-73, 97. This was a case of an innovative enhancement (3.2.5) based on the constitutional matrix (3.3.3) and constitutional identity (3.3.4).

chose. With matters of inheritance, the Court was assertive enough to declare the custom of male primogeniture unconstitutional and went on to even declare it unconstitutional retroactively as of 27 April 1994.[62] This had the effect of stating that although the *Bhe Case* was heard in 2005, the practice of male primogeniture had never been recognised to the extent that it unfairly discriminated women, therefore, no person could claim unfairly disinheriting a woman this way before 2005 was acceptable in law.

The Courts has even been so bold as to develop the testator's common law right to bequeath their property as they wish. The development connotes that it cannot be exercised in any such way that disadvantages women.[63] The Courts also recognize that women were and are still unfortunately exposed to grievous bodily infringement, especially from men. The court has therefore also been upfront about developing the law to enforce the State's special responsibility when it comes to protecting women from violence.[64] The court has also been particular in ensuring that women have access to the basic health care that they need. In doing so, the Courts made an order to government that the policy to make ARVs available to women was unreasonable, and again developed the separation of powers doctrine to reflect the much sought after South African model that allows encroachment where constitutionally mandated.[65]

This illustration of the courts' approach to women's rights serves as an example of the manner in which the court approaches the rights of persons deemed to be vulnerable in society. In this regard the courts have proved that they are willing to approach difficult issues, and to develop the law along constitutional guidelines to ensure that those who were previously not in a position to protect themselves (and still are), have a better opportunity to do so going forward.

### 4.3. A New Egalitarian Society

#### *4.3.1. Consolidating the Appraisal*

In light of the harsh criticisms against about the Constitution, its project and its guardians,[66] this study sought to evaluate the effectiveness of transformative constitutionalism. The Chief Justice (who was still in an Acting capacity at the time of the criticisms), responded by saying that there would be those who

[62] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10, 39(2); *Bhe v Magistrate Khayelitsha* (n 57 above) at para 129; All aspects of a post-liberal reading of the Constitution have been evident in the Court's adjudication of vulnerable persons as per Klare (n 5 above) 153-155; Additionally, this is the most evident example of the entire four-stage framework in operation (2.4.1).
[63] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10, 39(2); *King v De Jager* (n 57 above) at para 149; Van Der Berg (n 50 above) 290-316 on how the court must approach socio-economic rights adjudication.
[64] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10, 39(2); *Carmichele v Min of Safety and Security* (n 57 above) at paras 28-40, 62; Klare (n 5 above) 153-155 on affirmative state duties and multiculturalism; Van Der Berg (n 50 above) 290-316.
[65] Constitution (n 1 above), Preamble, secs 1, 2, 9, 10, 39(2); *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at paras 121-122. The courts did not shy away from the dealing with a difficult separation of powers issue, nor did they defer to other branches of government as they have been accused of by Ngang (n 26 above) and Brand (n 2 above).
[66] Sisulu (n 18 above).

would defend the constitution and the rule of law,[67] whilst the work of judges would speak for the courts.[68] Therefore, the method chosen to assess the effectiveness of transformative constitutionalism (or constitutional project) was the work of the courts (transformative adjudication) – that being, socio-economic rights adjudication of previously disadvantaged persons and vulnerable groups.[69]

The study sought to establish what transformative constitutionalism is. The criticisms against the Constitution were that it had done little to change the ontological structures and patterns of old and had done nothing to reduce poverty in the present, therefore, as a result, the constitutional project was a pipe's dream and a fool's errand. This made it necessary to ascertain whether the purpose of the Constitution and to determine the implementation of the constitutional project (2.4.1).

Chapter 2 looked at the nature, characteristics, and purpose of the Constitution (and by extension, the constitutional project). It was established that in its nature, the Constitution reflects the will of the people (who are themselves the *real* constitution).[70] It was established that transformative constitutionalism embodies the best parts of the Common Law and Customary Law which are woven together create a single jurisprudential fabric that is uniquely South African.[71] Of importance is that these bodies of law largely reflect the ideologies of historically western persons and Pan-African persons respectively, meaning that the law is based on the mind and will of the people.[72] It was resultingly determined that transformative constitutionalism is a changed mindset in the way people live their lives, which must manifest in their material surroundings.[73] It was also established that this would require a four-stage implementation process which would ultimately result in the fulfilment of the constitutional project – this

[67] D Erasmus *'Judge Zondo hauls Lindiwe Sisulu over the coals for 'unwarranted attack' on African judiciary'* (Posted on 12 January 2022) https://www-dailymaverick-co-za.webpkgcache.com/doc/-/s/www.dailymaverick.co.za/article/2022-01-12-judge-zondo-hauls-lindiwe-sisulu-over-the-coals-for-unwarranted-attack-on-african-judiciary/ (accessed 27 June 2022).
[68] Erasmus (n 67 above) this can be linked with Mbenenge's explanation that the court is dependent on judges as functionaries.
[69] Read with Langa (n 5 above) and Moseneke (n 1 above) 318 on the importance of socio-economic rights for the fulfillment of the constitutional project. The illustrations of how Housing and Women's rights have been adjudicated in the constitutional scheme has shown that the court has complied with the factors set out in Chapters 2 and 3 of this study.
[70] Constitution (n 1 above) Preamble; Malan (n 35 above) 29-30, 47, 53 on the difference between a Classical and Statis-Individualist constitutions. From pages 67-70, Malan analyses the teaches of scholars such as Gratian, Azo, Thomas, Cujas and Voet, who all state that the power of the law is in people accepting it and acting in accordance to it. Additionally, Hodgson (n 11 above) 190-210 argues that legal education must focus on what the law can do to the people, so that they can accept and act on it. According to Hodgson, that is when transformative constitutionalism comes alive.
[71] Constitution (n 1 above) Preamble, 1, 2, 9, 10, 39(2); We see a blend of the Common Law and Customary Law in cases like *S v Makwanyane* (n 9 above) at paras 88, 224, 237, 307; *Grootboom* (n 17 above) at paras 1; *Bhe v Magistrate Khayelitsha* (n 57 above) at paras 41-45. They therefore also serve as examples of innovative enhancements.
[72] Constitution (n 1 above) Preamble, Malan (n 35 above) 29-30, 47, 53, 67-70. Klare (n 5 above) 154-56 speaks about the importance of community engagement and participation. Chenwi (n 30 above) 128-156; Du Toit (n 4 above) 1-23; Ray (n 3 above) 399-425 and Van Der Berg (n 50 above) all speak of the importance of constitutional engagements between previously disadvantaged persons and the state, as well as previous beneficiaries – and the impact this will have hone the transformative project.
[73] The reduction of poverty is part of the fulfillment of the Constitutional project, however, owing to the inherently complex nature of the constitutional project, there are many other factors that must be considered in a holistic fashion – as per *Grootboom* (n 17 above) at para 24.

being a changed mindset in that the people become aware that they are the law and that the power of the law is inherently in them.[74]

Having established what transformative constitutionalism is, it became necessary to determine the role of the courts in the constitutional project. Of importance was to determine the nature, characteristics and purpose of the role of the courts to evaluate whether or not they were complying with their constitutional duties – as the criticisms stemmed from the fact that either the language of the law did not reflect the values of the people,[75] nor did it contribute to the eradication of poverty.[76] Judges were said to hide behind the law when it came to holding other branches of government accountable to their functions and that this was in effect slowing down the constitutional project.[77] It established that the courts' role in facilitating this changed mindset is to develop the law to reflect the values in the Constitution and to record the many different cases in which the law has already been used as an instrument for change and how the courts facilitate this process. This is done through transformative adjudication.[78]

It was therefore against the background in Chapter 2 and Chapter 3, that the appraisal was conducted in Chapter 4. It light of the nature, characteristics and purposes of both transformative constitutionalism and transformative adjudication, four (4) requirements were identified to serve as standards that would determine the effectiveness or lack thereof of the constitutional project (4.1.2).[79]

In looking at the court's adjudication of housing rights and women's rights against the context in the preceding chapters, it can be argued that the court performed its role with distinction and unfailing fidelity,[80] and that transformative constitutionalism has changed every space it has touched.[81] The court's jurisprudence continuously shows the four stages of implementation in process. Throughout the different cases used in this study, we see judges using the constitutional phraseology as it is,[82] we also

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[74] Constitution (n 1 above) Preamble; Hodson (n 11 above) 204-209 and Mbenenge (n 1 above) 6.
[75] Constitution (n 1 above) Preamble, sec 1; Sisulu (n 18 above), Ramose (n 15 above) 14-19, Madlingozi (n 7 above) 124, 126, 129, 134-140, Modiri (n 7 above) 310.
[76] Sisulu (n 18 above), Sibanda (n 4 above) 486, 490; Shai (n 16 above) 501-502, Heydenrych (n above) 116-117.
[77] Chenwi (n 30 above) 128-156.
[78] *See* Chapter 3 which explains the nature, characteristics, and purpose of transformative adjudication.
[79] As per (4.1.2): (i) A reversal of the human rights violations of the past through a change of the law (ii) Access to rights for those who previously did not have (iii) Guarantee protection of these rights (iv) Guarantee that no one in society has the power to infringe on these rights.
[80] Constitution (n 1 above) secs 2, 165(2); Moseneke (n 1 above) 319; Mutua (n 58 above) 69-70 argued that this would not be possible.
[81] Constitution (n 1 above) sec 2; Mbenenge (n 1 above) 6 states that as a living document, the Constitution does not only regulate the government – but all who come into contact with it.
[82] Constitution (n 1 above) secs 2, 165(2); *S v Zuma* (n 22 above) at para 14 and *Grootboom* (n 17 above) at paras 21-26 serve as good examples of a creative jurisprudence (3.2.1) and a creative alignment (3.2.2). When explaining interpretation, it was said it must be according to the wording in the Constitution.

see them being creative in their application of the characteristics of adjudication.[83] We see the values of the Constitution present in the adjudications, and we also see these values serving as reasons for the positive changes in the law.[84] These cases are proof that the courts are doing their best to keep records of all the spaces the constitutions has transformed, so that the people may always know, and so that history may always hold each generation accountable for their contributions to the creation of the better society.[85]

Whilst the cases used in this study are, but a fraction of the cases adjudicated, the message becomes clear – the small things always reflect the bigger things. The court has followed the principles of transformative constitutionalism and transformative adjudication, and we have seen it have a positive change. It is for these reason that I firmly conclude that transformative constitutionalism is an effective model for social change. It is also however suggested that unfortunately the constitutional project is not being used effectively. This is the problem. Lastly, inherent in the nature of the constitutional project is the fact that it is a journey that must be measured by the many small steps taken, rather than by the spectacular advancements brought about as a result of the project.[86] That is how we keep the hope of transformation alive, and that is how we change – *by going far together, not fast alone*.[87]

[83] Constitution (n 1 above) secs 2, 165(2); *Bhe v Magistrate Khayelitsha* (n 57 above), *Carmichele v Min of Safety and Security* (n 57 above) and King v De Jager (n above) on extending the law to protect the rights of women and to transform structures of old along egalitarian lines. See Sections 3.2 and 3.3.

[84] Constitution (n 1 above) secs 2, 165(2); All the housing rights cases listed above were based on constitutional values. *Contrast with* Mutua (n 58 above) 68-69; See Sections 3.2 and 3.3.

[85] Langa (n 5 above) in our biggest challenging not being the change of the law, but rather, the period after that.

[86] Mbenenge (n 1 above) 2-3 cautions that transformation is not an event but a process which echoes Langa (n 5 above) on transformation not being a temporary phenomenon but a journey; Contrast with Mutua (n 58 above) 69-70 who raised concerns about the fact that transformative constitutionalism would not be effective, yet there is proof that all the concerns raised have been addressed since their articulation thereof.

[87] African Proverb.

## 5.1. A gap that needs bridging

### *5.1.1. Developing The Right to Constitutional Literacy*

In view of the appraisal in the preceding Chapter, I would humbly put forward that the problem is not the Constitution, its values, or its text. The challenge is the people not fully embracing the Constitution.[1] The Changed mindset required by the Constitution requires that we first embrace it. Values derive their force from the people.[2] People must understand the radically changing nature of the Constitution before they can commit to being a part of the mission.[3] To free the potential of each person in a Constitutional democracy, a person must be equipped with the ability to define themselves and their lived reality, the capacity to develop an identity and to make complicated judgments on matters that affect everyday lives.[4] This requires a legal education,[5] deemed one of the challenges of our generation.[6]

A change of mindset requires a change of education. I echo the sentiments of Klare, Langa, and Hodgson, that the key and correspondingly greatest challenge of transformative constitutionalism is legal education.[7] At this stage, legal culture is still largely sceptical of the law as it was in the past,[8] which is understandable based on the context given in this study of how transformation is a lengthy process. I agree with Klare that the legal community has the power to develop this right, which will serve to advance the constitutional project in leaps and bounds.[9] Whilst the purpose of this study is not to elaborate on the way the right for constitutional literacy should be developed, it is of relevance to state the necessity of developing this right if we are to find solutions for bridging the gap between the people and the law.[10]

It can be argued that the effectiveness of Transformative Constitutionalism can be further seen in Legal Scholars' criticisms of the Constitution. For example, by pointing out that fact that colonialism was not only the theft of land, but of epistemic and ontological forces also, everyone starts to understand the

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[1] The Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution'), sec 2; TF Hodgson 'Bridging the gap between people and the law: Transformative Constitutionalism and the Right to Constitutional Literacy' (2015) 1 *Acta Juridica* 191.
[2] Constitution (n 1 above) sec 2; Hodgson (n 1 above) 191; K Malan 'There is No Supreme Constitution: A Critique of Statist-Individualist Constitutionalism' (2019) *African Sun Media* 67-70.
[3] Constitution (n 1 above) sec 2; Hodgson (n 1 above) 199; K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights*
[4] Constitution (n 1 above), Preamble, secs 2, 7-39; Hodgson (n 1 above) 208; T Madlingozi 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28(1) *Stellenbosch Law Review* 124, 126, 129.
[5] Constitution (n 1 above) secs 7, 8; Hodgson (n 1 above) 197, 198, 204, 205.
[6] Hodgson (n 1 above) 198; P Langa 'Transformative Constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 354.
[7] Hodgson (n 1 above) 198; Langa (n 67 above) 354; Klare (n 3 above) 156.
[8] Hodgson (n 1 above) 195, 196.
[9] Klare (n 3 above) 150, 168.
[10] Constitution of the Republic of South Africa Act 200 of 1993 (hereafter 'Interim Constitution'), Postamble; SM Mbenenge 'Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape' (2018) 32(1) *Speculum Juris* 4 on the fundamental concern and scheme of the Constitution; Hodgson (n 1 above) 193.

impact of colonialism differently.[11] Now, our understanding of the injustices is no longer limited to simply land dispossessions, therefore, social justice can now also be sought on a broader scale.[12] The same applies to looking at colonialism form a long durée perspective and not a 46-year period within the entire colonial period.[13] The work of Madlingozi, Modiri, Sibanda and Shai is very important in understanding the extent of the injustices of the past, and the impact it had on lived realities of people. Additionally, in pointing out where the Constitution is lacking, we as a generation are identifying where we must find solutions for our collective progression. The point being made is that "Decolonial Literature" is a sign of the effectiveness of transformative constitutionalism, and not an indication of its ineffectiveness. It shows that those who were previously silenced now have a voice under the Constitution, and are able to verbalize what happened to them, in such a way that provides context and understanding for all those required. There was a time where the law would have fought to silence these voices. Now, the law requires these insights if it is to enhance its legitimacy. Additionally, at the time of writing, the work of Mutua was of great importance because it pointed out the areas of concern in the early stages of our judicial development.[14] All concerns identified have been addressed as illustrated in the study, which would form a reasonable basis to conclude that transformative constitutionalism is a project with merit if approached correctly.

## 5.2. The Way Forward

### *5.2.1. Transforming Legal Culture*

This study stands with all those that propose a transformation in legal culture and education.[15] Furthermore, said transformation should be in the direction of a people focused legal education.[16] It is proposed that a lot more of the content being taught must focus on what it should do to the people, as at present, it seems largely focused on what it should do to the law.[17] The project must be reframed and

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[11] Constitution (n 1 above), Preamble; JM Modiri 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34(3) *South African Journal on Human Rights* 303-305; I Shai 'The Right to Development, Transformative Constitutionalism and Radical Transformation in South Africa: Post-Colonial and De-Colonial Reflections' (2019) 19(1) *African Human Rights Law Journal* 498, 501; S Sibanda 'Not Purpose Made! Transformative Constitutionalism, Post-Independence Constitutionalism, and the Struggle to Eradicate Poverty (2011) 22 (3) *Stellenbosch Law Review* 483; Madlingozi (n 4 above) 135-139.

[12] Modiri (n 11 above) 303-305.

[13] Constitution (n 1 above), Preamble; Modiri (n 11 above) 313-315; J Barnard-Naude "The Post-Apartheid Legal Order" in T Humbly, L Kotze, A Du Plessis (eds) 'Introduction to Legal Skills in South Africa' *Oxford University Press Southern Africa* (2012) 101-110.

[14] M Mutua 'Hope and Despair for a New South Africa: The limits of Rights Discourse *Harvard Human Rights Journal (Vol. 10)* (1997) 65-72 articulates concerns about the constitutional project and describes what are viewed as limits to the project – giving the basis for the assertions.

[15] Langa (n 6 above) 360; Klare (n 3 above) 164-168; Hogson (n 1 above) 191 on the right to constitutional literacy.

[16] Constitution (n 1 above), Preamble; Hogson (n 1 above) 207, 208, 209.

[17] Constitution (n 1 above), sec 2; Langa (n 6 above) 356; Hogson (n 1 above) 197, 298, 199.

redefined to encapsulate the fact that transformative constitutionalism aims to make the values of the Constitution a part of who we are.[18]

It must be emphasised however, that whilst it is necessary for mindsets to change, there should still be tangible changes in the immediate term also. Housing must be provided where required, and water and health facilities made accessible where necessary. Where schoolbooks and desks are required and can be provided, they must be, and where jobs are available people must be employed. Whilst the Constitution mandates this, it cannot implement it.[19] More of legal education should focus on the implementation of the new laws being developed by the courts and should provide an understanding of what the Constitution being a living document, but not self-executing means. It must also address what seems like miscommunications between decolonial and constitutional scholars. Arguably, the same thing is being said from different perspectives.

In concluding, it must be emphatically stated that this study does not in any way say society has transformed, nor is it satisfied with the progress made.[20] We still have so much more to do. In recognising this, this study sought to put forward that transformative constitutionalism in itself is not a bad thing, and to show that it is working, unfortunately not at the desired rate. It also sought to show that we have reason to hope in better, because the true power to change society is inherent in the people. The Constitution may have great values, and the Court may perform their task, but these are small steps in a process that requires many. In short, this study is a plea to legal academia to not do away with the judicial system as it is, but rather, to come together to navigate our biggest challenge to date, which is informing as many people as possible, that we, the people of South Africa are the key to transformation, and not the written Constitution.[21]

[18] Constitution (n 1 above), Preamble, secs 1, 2; Mbenenge (n 10 above) 6.
[19] Constitution (n 1 above), secs 165, 167; Klare (n 3 above) 156 on the Constitution not being self-executing.
[20] Constitution (n 1 above), Preamble; Mbenenge (n 10 above) 2 on the Constitution mandating that we never be satisfied with the status quo.
[21] Constitution (n 1 above), Preamble.