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A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa

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2012 Annual Senator Philip A Hart Memorial Lecture

A Journey from the Heart of Apartheid Darkness towards a Just Society-

Salient features of the budding constitutionalism and jurisprudence of South Africa

“He cried in a whisper at some image, at some vision ----- he cried out twice, a cry that was no more than a breath ----The horror! The horror! ”

--Joseph Conrad, Heart of Darkness

Introduction and salutations

My host, Dean and Executive Vice President William Treanor, I am grateful for this precious prospect of delivering the 2012 Senator Philip A Hart Annual Memorial Lecture, at the instance and invitation of Georgetown Law Centre. I am humbled by the task at hand because Senator Phil Hart was a great man in many senses. He is a celebrated alumnus of this esteemed University, a law school graduate and consummate professional lawyer. I gather that he was, a liberal Democrat from Michigan. He served in the Senate for no less than 18 years. He was blessed with towering intellect matched only by his integrity. He was known to hold deep personal convictions and demanded exacting public morality.

Animated by his well formed sense of right and wrong, Senator Phil Hart is said to have steadfastly advanced the interests of the common man and of justice. In an engaging biography, Michael O’Brien takes us through a broad range of political and
social justice issues Senator Phil Hart championed and concludes that in his time he was the conscience of the Senate.¹

For one thing, he detested racial exclusion and oppression. Within 9 years of his discharge from the United States Army, which he served with distinction during the Second World War, he led the fight for the passage of the 1965 Voting Rights Act. That of course, was that landmark statute that halted many of the Jim Crow era practices that disenfranchised African-Americans in the South. The story is told of how Senator Phil Hart confronted segregationist Governor George Wallace by publicly asking him: “Do you think that heaven is segregated?”²

Beyond racism he pursued many other public causes of great importance. Even though he was from Michigan; as Chair of the Anti Trust sub-committee, he took on automobile industry issues like automobile safety and fuel efficiency standards. He was concerned about unbridled corporate consolidations. He expressed himself on proliferation of crime and its adverse impact on the liberty of American people. He detested poverty and its deleterious impact on under-nourished children. Long before the current crusades on green issues, he had a keen concern over the environment. To that end, Senator Phil Hart warned that “every time another lake or stream is polluted, we have lost some freedom of choice.” The golden thread of his public life it seems was advocacy for education, civil rights, the environment and economic opportunities for all citizens.

I have been assured that it was open to me to speak on a topic of my choice on this memorable evening. However it quickly became plain to me that the annual Memorial Lecture has been set up to interrogate topics that were of special interest to Senator Hart.

I venture the proposition that had Senator Phil Hart lived in South Africa; he would have weighed in on the side of those who opposed racial exclusion and social injustice of colonialism and apartheid. He would have cheered us on and backed our struggle for democracy and social justice. He would have been well pleased to see a downtrodden people taking up cudgels in order to liberate themselves. He would have well understood that it takes the solidarity of good women and men to overcome an oppressive regime. I must quickly add that had he pursued his crusades of the 1960s and 70s in my country, like Nelson Mandela, and like me at the age of 15, he would have fallen foul of the retrograde orthodoxy of apartheid. Put bluntly, he would have been jailed for a few decades in that infamous prison, known as Robben Island.

I therefore trust that it would be a befitting tribute to the memory of this great Michigan Democrat to tell how we are transforming our land from the heart of apartheid darkness towards our cherished just society. To that end, I set out briefly the juridical features of apartheid shortly before its demise in 1994. This I do only to pave the way for my core concern. In broad brush strokes I hope to trace key trends of our nascent constitutionalism and jurisprudence that have supplanted the evil apartheid legal order. As I draw close to the end, I highlight the primary challenges to our evolving democratic constitutionalism followed by a few concluding remarks.
A conflict ridden past

The history of colonial dispossession and racial conflict in South Africa spanned 342 years starting with the Dutch occupation of the fair Cape in 1652. The Dutch occupation was short-lived but many Dutch people settled permanently in the Cape and later further north. The Dutch occupation was superseded by British colonial rule over nearly two and a half centuries marked by intermittent wars of resistance to land dispossession between colonialist and indigenous kingdoms. By 1910, when the British Empire granted home rule to four provinces that formed the Union of South Africa, the colonial conquest of indigenous kingdoms had been accomplished. The Union constitution denied franchise to all save adult white males. Shortly after the formation of Union a plethora of segregation statutes consolidated the colonial conquest by putting firmly in the ground the apartheid legal edifice.

These statutes wrought deep scars on a disenfranchised indigenous majority within a racially divided and unequal society. 87% of all land was reserved for white ownership or use. Access to economic opportunities was exclusive to white people. The discovery of diamond and gold was good and bad: good because, besides triggering a gold rush, it stimulated industrial development and urbanisation; bad because it destroyed the social fabric of indigenous people and spawned untold poverty and social squalor. Mines required constant and cheap labour. A migrant labour regime, guarded by criminal sanction, controlled labour influx into “white areas” as it kept unwanted blacks in impoverished reserves.
Agrarian and communitarian social order of indigenous communities succumbed. The now landless and often unskilled migrant workers had to contend with increasing urban squalor. Homelessness swelled and soon matched urban influx. Traditional family values and self sufficient communities disintegrated. More than anything else, the racial oppression and its antecedent colonialism led to trenchant poverty, lack of skills and education, a high burden of disease and lives robbed of human dignity and equal worth.

Odd as it was, the repressive regime placed a premium on law and order; on rule based formal legalism. It cared not about justice. They priced a version of the rule of law even as they perpetrated widespread violations of fundamental rights and freedoms of its inhabitants. They always sought to source the power to violate rights in formally valid laws. They established and maintained a court system. And yet the entire regime was premised on inequality before the law and on the endemic violations of social, economic, civil and political rights.

Of course, there was no catalogue of constitutional human rights. Parliament was supreme and entitled to override any rights that may be located in the common law or prior statutes. The sovereignty of Parliament meant that courts could not invalidate any law passed by the un-representative parliament. Judicial review was virtually absent. In any event, the dominant judicial culture required courts to defer to lawmakers. Although, administrative law of the time permitted the review of subordinate legislation and administrative decisions, judges rarely set them aside.
Thus judges implemented racially discriminatory laws and also gave full effect to punitive measures aimed at the repression of popular revolt. Judges routinely imposed long term imprisonment sentences and even the death penalty on people indicted for political resistance. Often they gave effect to laws that authorised long periods of detention without trial. They rarely conducted fulsome probes into the torture or deaths of political prisoners in detention. Also there was no legally recognised recourse to international law norms. Judicial policy resisted the notion that national legal norms could be susceptible to the influence of international law principles.3

Some academic commentators argue that if one would define the rule of law as mere obedience to laws adopted through formal procedures irrespective of the substance of the law, then apartheid was a regime implemented according to a minimum (thin) rule of law. I want to suggest that on any version of the rule of law, whether “thin” or “thick”, it must display a modicum of rationality. No law may be blatantly irrational and demand to be observed. At the barest minimum all law must recognise the innate equality of human beings.4 Beyond the formal motions of enacting statutes, creating formal legal rules and exacting compliance through courts, law must strive to advance, within the context of a particular jurisdiction, some justifiable public good.

The domestic and international resistance to the horrific oppression of apartheid was inevitable. 100 years ago, in 1912, the African National Congress became the first

liberation movement on the African continent. Its avowed object was to dismantle colonialism and apartheid. This is the centenary year of the founding of our ruling party – a milestone well deserved. It must be immediately added that ours was a mass based struggle. Other veritable liberation movements, such as the Pan-Africanist Congress and the Black Consciousness Movements, made a sterling contribution. So did organised labour, civil society, grassroots people, and many white compatriots who espoused progressive values of non racialism in an egalitarian setting.

A people united and resolute defeated the scourge of colonialism and apartheid. The price in human lives was high as many were judicially executed, others died in exile or in detention, and many were maimed and killed in protest marches as other activists disappeared at the behest of state agents. There are indeed many credible and moving accounts of this heroic struggle.5

We must add and acknowledge, with considerable gratitude on our part, global solidarity and support. It took diverse forms: moral censure, cultural and social isolation and economic sanctions and even open support for liberation movements. Perhaps the high point of international solidarity was when the United Nation declared apartheid a crime against humanity.6

As we look back, like the protagonist, Marlow in Joseph Conrad’s *Heart of Darkness* all we can say is: “The Horror! The Horror!”

*Smoking the peace, truth and reconciliation and amnesty pipe*

The transition from apartheid to a constitutional democracy has been described in many terms. Some attribute it to the deal-making genius and compassion of Mr Mandela and the pragmatism of the erstwhile president, Mr FW De Klerk. A man of the cloth, like Archbishop Tutu would attribute this remarkable transition to a miracle wrought by brought by divine intervention. Regime secuorcrats were probably cheerful as they opted for a negotiated settlement rather than an unwinnable war against popular revolt and a stalling economy. Hard-nosed activists against apartheid characterised the transition as an outright victory of the forces of liberation against a tottering minority regime that had lost it way.

It matters not how one characterises the transition. In the end significant domestic actors had firmly resolved to negotiate a new constitutional framework. It is so that the African National Congress and the ruling Nationalist Party were the key protagonists, and yet the multi-party negotiation process was inclusive of all political tendencies. The process was internally driven and led by trusted leaders of the people. The negotiating process was highly transparent. Much of the proceedings of the multi-party negotiation process were open to the public and televised. The legitimacy of the outcome of the negotiations was drawn from widespread public participation on the features of the new constitution and a genuine public desire to end centuries’ old strife.
Two additional features reassured many activists. First was the unilateral unbanning of all liberation movements and the release of political prisoners. Second, the primary demands of the pro democracy forces – an unqualified franchise for all and the constitutional entrenchment of a bill of rights – were conceded by the minority ruling clique upfront. These were confidence building masterstrokes. They meant that there was a legitimate basis for conducting further negotiations. But for the timely concessions on non-negotiable bottom lines, the negotiations would have floundered. Many activists would have returned to the streets in order to heighten public revolt against the regime.

Third, was the separation of the constitution-making process into two phases. The Interim Constitution would be agreed upon first, but by political parties with untested democratic support. This meant that only a constituent assembly of elected representatives of the people would adopt the final constitution. So to speak, we the people, through our elected representative, would usher in a new constitution.

To these considerations must be added the shared belief in the relevance of the law in the process of a transition. Academic commentators attribute the confidence of the domestic negotiators in the utility of the law in the transition to a variety of factor.\(^7\) I think that beyond the fact that Mr Mandela and Mr De Klerk were trained lawyers –a factor often raised–, there were significant practical and legacy considerations that impelled negotiators towards resorting to a formal legal process in order to give effect to the transition.

First, the minority legislature, so to speak, undertook to fall on its sword. It had to
disestablish itself. It had to adopt an interim constitution that would lead to its
demise and usher in majority rule. Second, the uppermost practical concern was
that the transition had to occur in an orderly fashion. It was thus imperative that it
occurred on “a going concern basis.” Any significant disruption of governance and of
daily administration would have threatened and discredited the transition to
democracy. Properly so, the transitional provision of the Interim Constitution
preserved all laws which immediately before its commencement were in force
subject to any subsequent repeal or amendment by a competent authority.8

8 Section 229 of the Interim Constitution (Constitution of the Republic of South Africa, Act 200 of
1993).

Third, the Interim Constitution carried three vital protections for the ruling minority.
The final constitution adopted by the constituent assembly had to be consistent with
34 constitutional principles that were agreed and entrenched in the Interim
Constitution.9 Thus the inaugural duty of the newly established Constitutional Court
was to certify the Final Constitution for consistency with the constitutional principles
enumerated in the Interim Constitution.10 Third, the epilogue of the Interim
Constitution envisaged national unity, reconciliation and an amnesty process. It is
crafted in poignant words:

“The adoption of this Constitution lays the secure foundation for the people of South
Africa to transcend the divisions and strife of the past, which generated gross

9 Section 74(1) of the Interim Constitution.
744 (CC); 1996 (10) BCLR 1253 (CC) and Certification of the Amended Text of the Constitution of the
violations of human rights, the transgression of humanitarian principles in violent conflict and a legacy of hatred, fear, guilt, and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of conflicts of the past. To this end Parliament under this Constitution shall adopt a law . . . providing for the mechanism . . . through which such amnesty shall be dealt with any time after the law has been passed.”

The curtain fell and the horrific drama of apartheid came to a formal end. We, who were born in and lived through our revolution, were presented with the historic privilege to be the founding mothers and fathers of our supreme law.

Salient Features of the final Constitution

Introduction

In the time and space at my disposal I must limit my commentary on our final Constitution, 1996, to selected salient features and related jurisprudence. Before I do so, allow me to display patriotic vanity about our constitutional architecture. Respectable academic and judicial opinion, other than South African, considers our final constitution a reasonable model for progressive, modern constitution-making.

\[11\] Epilogue of the Interim Constitution. See also Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others [1996] ZACC 16; 1996 (4) SA 672; 1996 (8) BCLR 1015 on a judicial interpretation of the Epilogue.
A fascinating law journal article: ‘The Declining Influence of the American Constitution’\textsuperscript{12} penned by two American Law Professors,\textsuperscript{13} bemoans the decline of American constitutionalism around the world. The article reports on an empirical study of constitutions of the world and finds that most no longer emulate the American Constitution. The comparative study turns to four constitutions that it regards especially influential as benchmarks for modern constitution-making. In this regard, it lists the constitutions of Canada, Germany, South Africa and of India.

Now this flattering reference to our Constitution seems to have been echoed quite recently by US Supreme Court Justice Ruth Bader-Ginsberg who is reported to have said only a few weeks ago on a television interview whilst visiting Egypt that “I would not look to the United States Constitution if I was drafting a constitution in 2012”. In the wake of the Arab Spring, she recommended to the Egyptians to look, in her words, to “the South African Constitution and perhaps the Canadian Chapter on Rights and Freedoms, and the European Convention on Human Rights.”\textsuperscript{14}

\textit{(a)Emphatically transformative}

The first striking feature of our Constitution is that it is emphatically transformative.\textsuperscript{15} As we have seen it sprung like a phoenix from the ashes of a thoroughly discredited system of apartheid, exclusion and oppression. In other words, it is a post conflict

\begin{itemize}
  \item Prof David Law and Prof Mila Versteeg.
  \item New York Times, article titled “We the people’ Loses appeal with people around the world” published, February 6 2012.
  \item Preamble to the Constitution in relevant part states:
  
  “We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—
  
  Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

  . . .

  Improve the quality of life of all citizens and to free the potential of each person.”
\end{itemize}
accord to secure reconciliation and to undertake a reconstruction of the economic and social ruins of the previous regime. Thus one thing is clear; the Constitution is avowedly transformative. It retains from the past only the good and defensible and turns its back firmly on the rest. Many constitutions of the world merely regulate the dispersal and exercise of public power. Others also record justiciable fundamental rights and freedoms. Our Constitution does these things too. But it goes much further than any other Constitution I know around the world.

We have seen that it was crafted and adopted unanimously by elected representatives of the people in order to usher in a just society. Thus, it represents the common convictions of our people. It records our joint hope to create not only a non-racial, non-sexist and open democratic society but also to arrest and reverse deepening poverty and inequality spawned by our dark and unequal past.

It bears repetition that our properly acclaimed supreme law goes well beyond the ordering of exercise of public power and the protection of fundamental rights and freedoms against state action. It aims to influence not only the vertical relationships between the state and its subjects, but also the horizontal relationships between private parties. It is thus intolerant to private apartheid in public spaces. Put simply, the exercises of public power and of private power are both subject to constitutional control. Thus as legislature, the executive and indeed the judiciary go about their constitutionally mandated business they are obliged to give full effect to the overarching transformative mission of our supreme law. Even our common law of

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16 Constitutional Court said about this in *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241.
Dutch and English origins and indigenous law must now be adapted to echo the values of the Constitution.

(b) Constitutional supremacy and the rule of law and judicial review

To some jurisdictions constitutional supremacy may be a self evident part of effective constitutional architecture. It was not to us who had to endure the devastation of repressive laws sanctioned by a sovereign legislature.

In 1934, in Sachs v Minister of Justice; Diamond v Minister of Justice,\(^1\) the Appeal Court upheld “the plain principle that Parliament may make any encroachments it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of courts of law to enforce its will.”\(^2\)

The change to one of constitutional supremacy is well captured by Prof C. Hoexter:

“Constitutional supremacy, which is asserted as one of the founding values of the Constitution, entails that all organs of the state are bound by the Constitution and that it takes precedence over any other law. As stated in s 2 of the Constitution, ‘law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled’. It no longer matters, as it did before 1994, whether the inconsistency is of a procedural or substantive nature.

The advent of constitutional supremacy has had enormous implications for administrative law, and indeed all other branches of public law. As Chaskalson P indicated in Pharmaceutical Manufacturers Association\(^3\), the interim Constitution was a ‘legal watershed’ which ‘shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the

\(^{1}\) Sachs v Minister of Justice; Diamond v Minister of Justice 1934 AD 11.

\(^{2}\) Id at page 37.

\(^{3}\) [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 45.
prescripts of a written constitution which is the supreme law."20 (footnotes omitted)

This is emblematic of a revolutionary shift from our past positivistic legal culture in which parliament was sovereign and beyond judicial review or other forms of constitutional scrutiny.

In order to safeguard its supremacy, our Constitution has inducted a rigorous doctrine of repugnancy in relation to "any law or conduct" and has conferred on courts wide remedial power. It requires that, when deciding a constitutional matter, a court of competent jurisdiction "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency" and "may make an order that is just and equitable. . .".21

Our 18 year old jurisprudence serves as testimony that our superior courts have grasped the mettle. They have invoked the doctrine of repugnancy in numerous momentous decisions. Some declarations of invalidity related to old order statutes starting with the criminal code that sanctioned judicial executions or capital punishment.22 Others related to post democracy statutes.23 Courts have also

21 Section 172(1)(a) and (b).
confronted the legacy of spatial apartheid and land use\(^{24}\) and the resultant homelessness and unlawful occupation of land for residential use.\(^{25}\) They have pronounced on access to education and medium of instruction in public schools.\(^{26}\)

Moved by the founding values of non-discrimination, equal worth and dignity to all, courts have struck down or reformulated the common law and allied statutory exclusions such as race\(^{27}\) gender,\(^{28}\) marital status\(^{29}\) and sexual orientation.\(^{30}\) Courts have also sought to enforce the protective obligations of the state by extending the boundaries of delictual liability under the common law of delict.\(^{31}\)

(c) Social justice-socio economic rights (pro poor stance)

Our founding mothers and fathers were well alive to the daunting legacy of poverty and inequality resulting from segregation and systematic denial of socio-economic

\(^{24}\) Zondi v MEC for Traditional Affairs and Local Government Affairs [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC); Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC); Jattha v Schoeman and Others, Van Rooyen v Stoltz and Others [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC).

\(^{25}\) Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).

\(^{26}\) Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC); Western Cape Minister of Education and Others v Governing Body of Mikro Primary School and Another [2005] 3 All SA 436 (SCA) and Christian Education South Africa v Minister of Education [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051.

\(^{27}\) Moseneke and Others v Master of the High Court [2000] ZACC 27; 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC).

\(^{28}\) Bhe and Others v Khayelitsha Magistrate and Others [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC); Shilubana and Others v Nwamitwa [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC); Gumede (born Shange) v President of the Republic of South Africa and Others [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC).

\(^{29}\) Daniels v Campbell and Others [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC).

\(^{30}\) National Coalition for Gay and Lesbian Equality v Minister of Justice [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC); Fourie and Another v Minister of Home Affairs and Others 2005 (3) SA 429 (SCA); 2005 (3) BCLR 241 (SCA), and Minister of Home Affairs and Another v Fourie and Another [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC).

\(^{31}\) Rail Commuters Action Group v Transnet t/a Metrorail [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC); K v Minister of Safety and Security [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC).
rights to the vast majority of our population. Social transformation loomed large in our quest for a just social order. A sizeable component of our reconstruction project is to create a caring and sharing society that values social justice alongside other internationally recognised fundamental rights and freedoms. That explains why our Bill of Rights warrants explicit obligations on the part of the state to confront structural injustice caused by poverty, disease and inequality. In order to meet or defeat a socio economic right claim, the government bears the burden to demonstrate that it has taken reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right in issue.

Constitutionalism in South Africa has undoubtedly and commendably taken a pro-poor stance, though it is often the Constitutional Court that has been at the forefront of this rather than government. Examples of the Court’s pro-poor stance include Grootboom,32 Treatment Action Campaign,33 Khosa,34 Jaftha35 and Glenister36, where the Court’s judgments extended socio-economic rights benefits to the poor, protected them from discrimination or unfair treatment, or placed duties on the government to fight corruption. According to Prof Pierre de Vos,37 a telling case of the Court’s stance is Abahlali Basemjondolo Movement SA and Another v Premier of

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33 Minister of Health and Others v Treatment Action Campaign and Others (No 2) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).
34 Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).
35 Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC).
36 Glenister v President of the Republic of South Africa and Others [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).
the Province of Kwazulu-Natal\textsuperscript{38} in which this Court struck down sections of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act. An Act representing a “full frontal attack on the poor, homeless and those living in informal settlements”, it required landlords to evict all “slum dwellers” and was thus found to be inconsistent with the right to have access to adequate housing and therefore unconstitutional. Most recently, the Court’s decision in \textit{Maphango}\textsuperscript{39} gives validity and life to the Rental Housing Act\textsuperscript{40} (and the Tribunal established in terms of the Act) which seeks to regulate rental housing in order to give effect to the constitutional right to housing; to prevent arbitrary evictions; and to balance the rights of tenants and landlords.\textsuperscript{41}

The Court’s equality jurisprudence has also played a significant role. Equality as a value has infused this Court’s pro-poor stance. The Court’s jurisprudence on equality has focused on substantive rather than formal equality,\textsuperscript{42} laying the foundation for a pro-poor approach. This interpretation of equality has been pivotal to the Court’s pro-poor stance and to its understanding of transformation. This we affirmed in \textit{Bato Star} where we unanimously held.\textsuperscript{43}

\textsuperscript{38} \textit{Abahlali Basemjondolo Movement of South Africa and Another v Premier of the Province of KwaZulu-Natal and Others} [2009] ZACC 31; 2010 (2) BCLR 99 (CC).

\textsuperscript{39} \textit{Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd} [2012] ZACC 2 (13 March 2012).

\textsuperscript{40} Act 50 of 1999.

\textsuperscript{41} Preamble to the Rental Housing Act 50 of 1999.

\textsuperscript{42} In \textit{National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others} [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 at para 62 the Court held: “Section 9 of the 1996 Constitution, like its predecessor, clearly contemplates both substantive and remedial equality. Substantive equality is envisaged when section 9(2) unequivocally asserts that equality includes “the full and equal enjoyment of all rights and freedoms.” The State is further obliged “to promote the achievement of such equality” by “legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination,” which envisages remedial equality.”

\textsuperscript{43} \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others} [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 74.
“The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one in which there is equality between men and women and people of all races. In this fundamental way, our Constitution differs from other constitutions which assumes that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.”

The Court’s pro-poor stance through equality jurisprudence is well illustrated in the following two cases:

44 In *Pretoria City Council v Walker*46 the Court’s decision “established the principle that administrative policies and practices aimed at redressing apartheid’s socio-economic legacy, even if they impacted negatively on previously advantaged groups, would be constitutionally supported.”46 Thus, through the right to equality, the Court upheld the constitutional imperative to reverse socio-economic wrongs arising from apartheid. In *Premier, Mpumalanga v Executive Committee, Association of State-aided Schools, Eastern Transvaal*47 the Court approved of an executive’s policy favouring previously disadvantaged groups – the province had, under the policy, discontinued paying bursaries to formerly white schools.

(d)Affirmation of Diversity

45 *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257.
47 *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools, Eastern Transvaal* [1999] ZACC 20; 1999 (2) SA 91; 1999 (2) BCLR 151.
The preamble to our Constitution records that South Africa “belongs to all who live in it, united in our diversity”. Whilst the predominant majority of the populace is drawn from indigenous Africans, South Africans are a truly diverse nation. We boast of 11 official languages. The Constitution requires respect for 8 other non official languages and 3 other languages used for religious purposes. Our Bill of Rights is replete with warranties for the protection of cultural, religious and linguistic rights.

The constitutional affirmation of diversity is a subset of the founding value of equality which subsumes the prohibition against discrimination. The value of diversity has been affirmed in the Constitutional Court’s earliest decisions. Kriegler J, writing a separate concurrence in *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*48 noted that while the dominant theme of the Constitution is the achievement of equality, “considerable importance is also given to cultural diversity and language rights, so that the basic problem is to secure equality in a balanced way which shows maximum regard for diversity.” Later cases have also recognised that diversity was a salient feature of our constitutionalism.

48 [1996] ZACC 4; 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) at para 52.

49 See *MEC for Education: KwaZulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at 65 where the Court held:

“The protection of voluntary as well as obligatory practices also conforms to the Constitution’s commitment to affirming diversity. It is a commitment that is totally in accord with this nation’s decisive break from its history of intolerance and exclusion. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it. That falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains. As this court held in *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*:

“...The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.”” (Footnotes omitted.)” (Emphasis added).
Diversity affirmation also importantly includes the right to self determination. “These more or less hidden aspects of the right to self-determination in the South African constitution include several limitations on majority rule, regulations aimed at multiculturalism, and the federalist features inherent in the devolution of competencies to levels of government closer to the people. These techniques tend to enable the different population segments of a state to live their lives according to their own values and customs.”50

Moving from a regime characterised by suppression on the basis of our differences, the Constitution therefore infuses equality with diversity, ensuring South Africa’s commitment to being a nation characterised by its unity through diversity.

(e) Value drenched constitutionalism (moral citizenship)

It is often said that law floats on a seabed of morality. We have made an open election to entrench the founding values of our constitutionalism and jurisprudence.51 Thus our constitutionalism is value-drenched. Legal norms or juristic acts may survive judicial scrutiny only if they do not violate any of the founding values we have set for ourselves. Put otherwise, all law or conduct with legal consequences must be obedient to or be informed by the normative scheme. The scheme is the ultimate litmus test for constitutional compatibility. When a law or conduct limits a

51 Section 1 of the Constitution states—
“The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”
fundamental right or is at odds with a founding value, it may pass constitutional muster only if it is reasonable and justifiable in an open and democratic society in accordance with the proportionality criteria the Constitution has prescribed.

It is in this context that my esteemed colleague, Justice Cameron in his Lord Scarmen lecture\textsuperscript{52} used the term *moral citizenship* to mean “a person’s sense that he or she is a fully entitled member of society, undisqualified from enjoyment of its privileges and opportunities by any feature of his or her humanhood.” He explained that “[i]t does not consist in mere freedom from criminal penalties and other legal burdens, but is something richer, subtler and perhaps deeper. It is the sense of non-disqualification, and of positive entitlement that freedom from disqualification and from official sanction engenders.”\textsuperscript{53}

Our jurisprudence illustrates how our Court’s infusion of dignity into equality has given people moral citizenship. In *August v Electoral Commission*\textsuperscript{54} the Court recognised the prisoners’ right to vote, and consequently their right to participate in society, notwithstanding their incarceration. This can be contrasted to the position in Miami, where prisoners, regardless of why they are being detained, may not vote. *Makwanyane*\textsuperscript{55} is another example of this Court recognising the inherent self worth of persons, and their membership in society even when they are convicted murderers.

(f) Institutional integrity

\textsuperscript{52} Soon to be published by the European Human Rights Law Review.
\textsuperscript{54} *August and Another v Electoral Commission and Others* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC).
\textsuperscript{55} *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).
Another remarkable feature of our Constitution is that it creates ample and meaningful institutions to oversee its mission. In this way it insists that the obligations it imposes and protections it grants must be respected, protected and promoted. Because democratic and social reconstruction of society is so paramount, nothing was left to chance. Besides ample powers of judicial review, checks and balances and separation of powers amongst branches of the state, there are state institutions\(^{56}\) that are said to be “independent and subject only to the Constitution and the law,”\(^{57}\) and that “must perform their functions without fear, favour or prejudice.”\(^{58}\) Their primary task is to support, strengthen and guard constitutional democracy. It is in that light that we must see the offices such as the Public Protector, Human Rights Commission, the Auditor General or the Electoral Commission and other state institutions of the same ilk.

In Glenister\(^ {59}\) the Court affirmed the need for independent institutions. Specifically, the Court held that the Constitution’s scheme, taken as a whole and in the light of international law agreements that are binding on the state, imposes a pressing duty on the state to set up a concrete, effective and independent mechanism to prevent and root out corruption. In addition, the Court found that the new corruption-fighting unit did not meet the constitutional requirement of adequate independence because it was insufficiently insulated from political influence in its structure and functioning

\((g)\textit{International norms}\)

\(^{56}\) Section 181(2).
\(^{57}\) Id.
\(^{58}\) Id.
\(^{59}\) Glenister v President of the Republic of South Africa and Others [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).
In its preamble, the Constitution announced the intention that our new democracy takes its rightful place as a sovereign state in the family of nations. Given where we came from, our prime object was to cleanse the international status of our country from a pariah or rogue state to a worthy participant in the international scene. The second object was to embrace globalised standards and norms set by international law.

To that end, the Constitution has adopted a mixed approach to the incorporation of international law into our domestic law. It assumes a dualist approach in relation to treaties and a monist stance in respect of customary international law.

This the Constitution does at an interpretive and substantive level. It creates two mandatory cannons of interpretation. The one requires that “when interpreting the Bill of Rights a court . . . must consider international law and may consider foreign law.”60 The other cannon provides that when interpreting any legislation “every court must prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.61

At a substantive level the Constitution incorporates customary international law, as law in our country.62 This monist incorporation of customary international law is subject to consistency with municipal law. In contrast, international agreements bind South Africa only when they have been approved by our national legislature or have been enacted into law or are self-executing. International treaties may be given

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60 Section 39(1)(b).
61 Section 233.
62 Section 232
effect to only if they are incorporated into municipal law and are consistent with the Constitution.\textsuperscript{63}

In \textit{State v Makwanyane}\textsuperscript{64} our Court was called upon to pronounce upon the constitutionality of the death penalty. International human rights norms on capital punishment and in particular on the construction of the right not to be subject to cruel and inhumane punishment played a significant role in the conclusion of the Court that the death penalty is inconsistent with our constitutional dictates.

In \textit{Mohamed v President of South Africa}\textsuperscript{65} US authorities sought the extradition of the applicant for violence committed against the US embassy in Tanzania. The issue was whether a fugitive from justice found on South African soil may be handed over to the US FBI without access to a lawyer and without US authorities giving prior assurance that the suspect would not be subjected to capital punishment. The Constitutional Court declined the request for extradition.

In \textit{Azanian People’s Organisation (AZAPO) v The President of South Africa}\textsuperscript{66} the facts showed that past state officials perpetrated violence against its own citizens during the apartheid era and the issue was whether in the light of international law norms, a law which grants the perpetrators amnesty is permissible. The Court concluded that the legislative amnesty is not at odds with our constitutional setting.

In \textit{State v Basson}\textsuperscript{67} a South African army official was charged for past violence

\textsuperscript{63} Section 231. For an application of the provisions see: \textit{Glenister v President of the Republic of South Africa and Others} \textsuperscript{[2011]} ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).
\textsuperscript{64} \textsuperscript{[1995]} ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).
\textsuperscript{65} \textsuperscript{[2001]} ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).
\textsuperscript{66} \textsuperscript{[1996]} ZACC 16; 1996 (4) SA 672; 1996 (8) BCLR 1015 (CC).
\textsuperscript{67} \textsuperscript{[2004]} ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC).
against nationals of a neighbouring country. The question to be decided on appeal by the prosecution was whether the decision of the trial court to acquit the accused took proper account of the international duty of the state to prosecute war crimes.

Lastly, more recently in *Kaunda v President of South Africa*[^68] South African mercenaries, who had been captured in a neighbouring state and threatened with prosecution and capital punishment after a likely unfair trial in a third state, approached the Constitutional Court claiming a right to be extradited back to South Africa and a right to be given diplomatic protection by South African authorities whilst detained in a foreign country. The majority of the court held that traditionally international law acknowledges that states have the rights to protect their nationals beyond their boarders but were under no obligation to do so.

**Challenges and threats**

Well, after this dream post conflict transition followed by an incredible burst of jurisprudential energy, is all still well? I pose only a few protruding challenges and threats.

**(a)"Political Questions Doctrine" and separation of powers**

In the US, the Courts have elected not to exercise jurisdiction over issues that constitute political questions and should be resolved by the political branches. In South Africa, the Constitutional Court has not adopted such a doctrine. This is because our Constitution has made a different election. If a dispute is properly raised as a constitutional question, it would not be open to the Court to take refuge in the Political Questions Doctrine. For instance, besides the generic power to

[^68]: [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC).
decide on any constitutional matter, the Constitution obliges the Constitutional Court to decide disputes on whether provincial or national legislation or the conduct of the President is constitutional; on disputes between organs of state in the national or provincial spheres concerning their constitutional status, powers and functions; on whether Parliament or the President has failed to fulfil a constitutional obligation; on the constitutional validity of executive decisions; on the constitutional validity of any parliamentary or provincial bills if requested in a prescribed manner and on the constitutionality of any amendment to the Constitution. In addition to these vast powers of judicial review, courts must police violation of the bill of rights.

All these disputes have political implications. They impugn decisions of politically elected or appointed representatives. The judiciary is required to police far-reaching state governance and political decision-making for constitutional compliance. Conflict between the judiciary and the executive or the legislature is therefore inevitable. This is illustrated through cases like Zuma, Shaik.

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69 Section 167(3)(a)
70 Section 167(5)
71 Section 167(4)(a)
72 Section 167(4)(e)
73 Section 167(4)(b)
74 Section 167(4)(d)
75 Here, I am however not using the word politics in the narrow sense of the express or implied support for specific political party or formation.
76 Thint (Pty) Ltd v National Director of Public Prosecutions and Another; Zuma and Another v National Director of Public Prosecutions and Others [2008] ZACC 13 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC); and Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions and Another; Zuma v National Director of Public Prosecutions [2008] ZACC 14; 2009 (1) SA 141 (CC); 2009 (3) BCLR 309 (CC).
77 S v Shaik and Others [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC).
Masetha;\textsuperscript{78} Glenister,\textsuperscript{79} where the Court was willing to weigh in on cases that have significant implications for political actors or the political process.

This contestation, however, has been foreshadowed by the Constitution. It seems to have made an express election in resolving the inevitable political implications of judicial activity. Ours, I want to suggest, is not a contestation over judicial activism. In effect, the Constitution has installed the Constitutional Court as the final arbiter and a forum that will give full voice to our constitutional norms.

Prof Max du Plessis raises the legitimacy dilemma sharply in a journal article: The Constitutional Court and Public Opinion.\textsuperscript{80} The essence of the dilemma is that courts are duty bound to give full effect to the Constitution in order to transform society. However, if their judgments are substantially at odds with the dominant political and social views of society they may lose the respectability they so sorely need to function well.

I do think that there is a nuanced response to this dilemma. Our model of separation of powers must strike equilibrium between rigorous judicial review, on the one hand, and the historic need for effective executive government to pursue reconstruction and development of society. This observation is prompted in part by ‘counter-majoritarian dilemma’.\textsuperscript{81} Judges are not elected democratically and yet the

\textsuperscript{78} Masetha \textit{v} President of the Republic of South Africa and Another [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC).

\textsuperscript{79} Glenister \textit{v} President of the Republic of South Africa and Others [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).


\textsuperscript{81} Moseneke “The Fourth Bram Fischer Memorial Lecture” 2002 SAJHR 310; Chaskalson and Davis “Constitutionalism, The Rule Of Law, And The First Certification Judgment : Ex Parte Chairperson Of
Constitution itself entrusts them with the authority to invalidate any law or conduct that is unconstitutional. However, the balance must be struck without relinquishing the substantive and procedural rule of law requirement that all public power must be sourced from the law and must only be deployed to pursue a legitimate public good. Our system of separation of powers must give due deference to the popular will as expressed legislatively or through executive decisions and policies provided that the laws, decisions and policies are consistent with constitutional dictates. If they are not consistent, the judiciary should display fidelity to the Constitution, without fear or favour of prejudice.

(b) Misperceptions of the role of constitutionalism and attacks on the Constitution

The volume of political criticism of judicial review and of constitutionalism has been increasing. A recent article on our judiciary describes the criticism thus:

“The political focus on the judiciary which has ensued in the past 18 years has taken many forms. There have been strident attacks on individual judges, on the courts as an institution and on particular judgments. These attacks have not been confined to disgruntled litigants. Sometimes they have emanated from powerful political figures and in the main, have been explicitly sanctioned by silence from the powers that be. The judiciary is, after all, a soft target. Many of the attacks have had a decided political flavour. Accusations of racism or, its euphemism, lack of transformation, have abounded. And, most concerning of all, senior political leaders have questioned the very idea of constitutional review.”

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82 Gilbert Marcus and Jason Brickhill “The Fall and Rise of two Chief Justices” –paper delivered to the South African Reading Group, 5 April, New York
Recently the state has announced an executive initiated review of our jurisprudence of the Constitutional Court and the Supreme Court of Appeal amid political chants that the judiciary is untransformed or that it impedes transition to a socially just society. Sometimes the criticism veers towards blaming, not state inaction and ineffective economic policies, but the Constitution itself for deepening poverty and inequality.

I do accept that certain political actors often express dissatisfaction with certain judicial outcomes that they consider to have adverse political implications for them or to trench upon executive power. I do not for one moment however accept that our two apex courts, the Constitutional Court and the Supreme Court of Appeal have acted beyond their constitutional duties or that they have lost their judicial way or public legitimacy.

The suggestion that courts stand in the way of transformation, in my view, is mischievous and opportunistic. The record will show otherwise. By and large, our jurisprudence has paid remarkable homage to the newly found high values of our constitutional democracy and stood by the pursuit of social justice. It has protected workplace justice, upheld fundamental rights, adopted the notion of substantive and not formal equality; pushed back patriarchy and other forms of exclusion; promoted access to justice for the poor, and protected the sick, poor, homeless and vulnerable when it mattered most. Properly so, courts have insisted on the rule of law and on executive transparency and accountability. They have protected an upheld freedom of expression, alongside privacy and human dignity. Lastly, it is the courts that have
repeatedly warned that the scourge of public corruption and patronage imperils the war against poverty, disease and inequality.

The charge is ironic and baseless. It is anything but uncommon for members of the public to approach or threaten to approach our apex courts in order to vindicate rights against their government. Civil society and grass roots organisation often seek relief in the courts. Political actors too, from time to time, resort to courts to mediate internecine conflicts. The Court had to mediate increasing conflict between the state and its citizens on matters that may loosely be described as service delivery. We have had to make determinations on access healthcare\(^{83}\), worker rights\(^{84}\) to water,\(^{85}\) to sewage and electricity,\(^{86}\) education in the language of choice,\(^{87}\) arbitrary eviction\(^{88}\) and access to electricity by tenants.\(^{89}\) In each of these cases, entrenched socio-economic rights were invoked. The Court was well alive to the importance of allowing the executive a margin of appreciation in the execution of their constitutional duty, to diminish poverty and to facilitate a better life for all. However, where there had been blatant violation of socio-economic rights in issue; the claims of the citizens concerned have been properly upheld.

\(^{83}\) Minister of Health and Others v Treatment Action Campaign and Others (No 2) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).

\(^{84}\) Sidumo and Another v Rustenburg Platinum Mines Ltd and Others [2007] ZACC 22; 2008 (2) SA 24 (CC) and Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others [2011] ZACC 39; 2012 (1) SA 321 (CC); 2012 (2) BCLR 117 (CC).

\(^{85}\) Mazibuko and Others v City of Johannesburg and Others [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC).

\(^{86}\) Mazibuko and Others v City of Johannesburg and Others [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC).

\(^{87}\) Mazibuko and Others v City of Johannesburg and Others [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC).

\(^{88}\) Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others [2009] ZACC 31; 2010 (2) BCLR 99 (CC); Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC); Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC).

\(^{89}\) Joseph and Others v City of Johannesburg and Others [2009] ZACC 30, decided on 9 October 2009, as yet unreported.
(c) Are court orders complied with?

It must be said that despite its occasional disquiet over judicial review or threats to amend the Constitution, the executive government has always re-assured the populace that it will comply with courts order. This it says even when it is in public disagreement with a particular judicial outcome. Parliament too, invariably adopts legislative measures to correct defects that led to a declaration of constitutional invalidity. To this extend, we have a vibrant constitutional democracy.

My concern is narrow but serious. It concerns remedial implementation and the practical effects of judgments. The tardiness of government institutions in implementing court orders promptly and effectively remains a consistent threat to our constitutionalism. Mrs Grootboom of the celebrated socio economic rights decision in which the state was ordered to provide her with adequate housing, died several years later before the house was provided.\(^90\) The Minister's initial resistance to anti-retroviral rollout in response to the TAC case\(^91\) is such an example. Further, the occupiers in Blue Moonlight\(^92\) have recently filed papers in this Court to remedy the City’s failure to comply with this Court’s judgment of 1 December 2011. This has resulted in the Court seeking novel remedies, such as in Olivia Road\(^93\) where this Court ordered the disputing parties to engage meaningfully. In Nyathi a successful paraplegic litigant died years after the judgment debt had been entered and before the government had discharged it. When the Court’s attention was drawn to scores

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\(^90\) See note 32
\(^91\) See note 33
\(^92\) City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another [2011] ZACC 41; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).
\(^93\) Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC).
of other unpaid judgment debts against it, we issued a structural interdict and a supervisory order against the government to ensure that the debts are paid timeously.\textsuperscript{94}

(d) Constitutional literacy and ‘fetishism’

The lack of constitutional literacy has resulted in misconceptions around what the Constitution lays down. The fact that the Constitution is perceived to be obstructing land reform is alarming. The Constitution has extensive provisions on land expropriation subject to just and equitable compensation,\textsuperscript{95} land restitution,\textsuperscript{96} land, water and related reform.\textsuperscript{97} However, it is the duty of the state to take reasonable measures to enable citizens to gain access to land on an equitable basis\textsuperscript{98} and on restoration of legally insecure land tenure as a result of past racial discrimination.\textsuperscript{99} Well, the question that begs to be answered is what practical measure has the state taken to achieve these land equity related constitutional goals; what were the impediments and how have the courts frustrated their fulfilment?

Equally startling is that the Constitution is perceived to have sunset clauses that favoured certain minorities. There are none. We must empower our citizens through greater constitutional education. Greater awareness of rights and available remedies would also enhance people’s ability to vindicate rights, to utilise state organs set up to protect democracy and to hold public office bearers accountable. In

\textsuperscript{94} Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC).
\textsuperscript{95} Section 25(2) and (3)
\textsuperscript{96} Section 25(7)
\textsuperscript{97} Section 25(8)
\textsuperscript{98} Section 25(5)
\textsuperscript{99} Section 25(6)
the end, it is the citizenry that must enjoy the protection and defend the integrity of the Constitution.

Turning to ‘constitutional fetishism’, the *Moutse*\(^{100}\) case is one such example – where people ‘fetishised’ the scope of the Constitution’s powers. In that case, the democratic process failed the community. Their elected representatives made policy decisions that the community opposed. Rather than responding to these decisions through the political process by electing other leaders or challenging these leaders to change the policy, they sought relief through the Court. As there was nothing irrational about the process followed in adopting the policy, the Court ultimately dismissed the application. The ‘fetishisation’ here was the belief that the constitution and the Court process could supersede the political process.

I must add that our political actors often resort to “lawfare” and in the process, in effect, ask the courts to enter the political terrain. John and Jean Comaroff\(^{101}\) describe “lawfare” as follows:

> “politics in many societies is played out more in the courts than it is in the streets, more by the use of law and is disguised violence than by unfettered brutal force, absent of any legal constraint. In an age of constitutionalism and a dominant discourse of human rights, conflicts once joined in parliaments, by means of street protests, mass demonstrations and media campaigns, through labour strikes, boycotts and blockades and other instruments of assertion, tend more and more if not only, in just the same way everywhere – to find their way to the judiciary. Lastly, class struggles seem to have metamorphosed into class actions”.

\(^{100}\) *Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others* [2011] ZACC 27; 2011 (11) BCLR 1158 (CC).

\(^{101}\) See Davis and Le Roux “Precedent and Possibility” at page 185.
Understanding the Constitution and its scope, is therefore key to understanding what can be achieved through the Courts, and what requires political or other process. This remains a key challenge to our constitutionalism.

**Concluding remarks**

Our Constitution is avowedly transformative in its overall purpose. It represents a new beginning and brave beginning. It promises renewal. Its salient features, which I have discussed this evening, have set new cornerstones upon which many post-conflict states are modelling their constitutions, and other, well-established constitutions are being measured. If I may repeat what I said in another context, the scaffolding is up, the edifice of constitutional jurisprudence is rising and may justice for all be the outcome.

The current skirmishes over whether the Constitution or the Courts are reactionary or counter-revolutionary and thus stand in the way of transformation are baseless and at best a transitory diversion. Our courts have been more progressive that any jurisdiction I know in the world. Our pedigree of a long struggle and the quest for a just and equal society should stand us in good stead to withstand narrow political expediency. The working class and civil society movements and social and other forms of media are natural allies of vulnerable citizens and the broader populace who must opt for constitutionalism as against unbridled misrule and public corruption. Perhaps what we need urgently are intensive and honest measures to arrest the deepening poverty, poor education, unemployment and the resultant inequality through lawful, honest, dedicated and corruption-free governance and economic development.