TWENTY YEARS OF CONSTITUTIONAL DEMOCRACY: A PRELIMINARY REFLECTION

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

What did 'we the people of South Africa' expect from a social order which was to emerge from the newly minted Constitution back in 1996? The simple answer would be to suggest that 'we' sought not only to end an authoritarian regime but to transcend its arbitrary and brutal nature and replace it with a society based on principles of accountability, transparency and integrity or, if you wish, the rule of law.

In a typically thoughtful piece Stu Woolman suggests that the Constitutional Court's understanding of our ambition may have been more carefully crafted; that is commenced at modest, incremental journey towards the legitimacy of the legal system, particularly the Court. In support of this proposition Woolman cites Michael Walzer writing about marchers in the streets of Prague who were carrying signs 'truth' and 'justice'. Walzer claimed that '*what they meant, by either 'justice' inscribed on their signs however was simple enough: the end of arbitrary arrest, equal and impartial law enforcement; the abolition of the privileges and prerogatives of the party elite – common garden variety justice*'.[2]

Did this argument mean that the newly constituted Constitutional Court should adopt a humility as it approached the new jurisprudence and eschew the imposition of any deep substantive, vision of a just political order for a democratic South Africa? Expressed differently, the Court's main role was to undo the egregious damage

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[1] Ex Parte **Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996** in 1996 (4) SA 744 (CC) at para 27

[2] Michael Walzer as cited by Stu Woolman "*Humility, Michelman's method and the Constitutional Court: Rereading the first certification judgment and reaffirming a distinction between law and politics*" 2013 (24) Stellenbosch Law Review 281 at 292

caused by the caprice and brutality of apartheid by disserting the new grundnorm – the rule of law.

These questions about direction confronted the newly established constitutional institutions some twenty years ago. They continue to challenge our assessment of the progress made by the judicial system in particular and our constitutional society in general. It is to the responses to these challenges that I wish to turn.

On certain issues agreement can be readily reached. The South African Constitution was drafted in response to a history of institutionalised racial oppression and arbitrary and capricious rule. It was crafted on the understanding of the important role that law played during the apartheid and the manner in which law privileged a racial minority.[3] It followed from this premise that the Constitution was to be a transformative as opposed to a conservative or 'preservative' document. It is here that profound differences of opinion in the advocated response to the challenge are to be found.

Professor Michelman describes a transformative constitution such as South African document of 1996 as a '*forward looking, a charter of direction to a good and a just society it is not here – not now, not yet, perhaps not fully and perfectly ever, but rather as to pursued by political and other means under the Constitutions guidance and control. But then of course the Constitution speaks not only as a declaration and expression of a national commitment to social transformation but as a legal charter for a constitutional state, meaning a state that pursues its aims – here, its socially transformative aims – by and under laws made and applied in accordance with constitutional supreme law.*'[4]

It was this idea of transformation that inspired Professor Karl Klare, in arguably the most influential article which has been published on our Constitution. He defined a transformative constitution as,

> 'A *long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation of course, but in the historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and*

[3] See in particular S Ellmann *In time of trouble: law and liberty in South Africa State of Emergency* (1992); Richard Abel *Politics by the means: Law in the struggle against apartheid* 1980-1994 (1995)

[4] Frank Michelman "*Expropriation, eviction and that gravity of common law*" 2013 (24) Stellenbosch Law Review 245

egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large – scale social change through non – violent political processes grounded in law'.[5]

On this view, Courts were mandated to provide a substantive road map for the journey towards a society prefigured in the Constitution. By contrast, Theunis Roux argued that South Africa's expectations, as derived from the Constitution was directed to a judiciary charged with an interpreting the Constitution in a far more modest fashion. [6]

The critical element of social change in a post-apartheid South Africa had to be ensure a change in social attitudes to law; that is a society based on the primacy of a racist and capricious idea of apartheid should be transformed into a society based upon the rule of law. Thus the Constitutional Court's primary goal was not to pursue social transformation through the law but rather to assert its institutional role in the South African political system, as a neutral arbiter of major political disputes. Only when this institutional role had been secured could a court turn its attention to decisions which might have the sort of impact which Karl Klare had envisaged in his argument.[7]

Although Klare saw the Constitution as directing Courts towards the achievement of social justice through law, he cautioned against an over optimistic expectation of what jurisprudence would unfold. In his view, a conservative but dominant legal culture could discourage appropriate constitutional innovation and lead to less generous interpretations and thus applications of the Constitution than were permissible in terms of the text and the drafting history. Klare's focus on the tension between the egalitarian commitments of the Constitution and a formalistic legal culture without a strong commitment to substantive political discussion and

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[5] Karl Klare "*Legal Culture and transformative Constitutionalism*" (1998) 14 SAJHR 146 at 150

[6] Roux has written extensively and powerfully on these question the most comprehensive of his expositions in contained in Thuenis Roux "*The politics of principle the Constitutional Court of South Africa"* 1995 (2005- 2013)

[7] Business Day 12 June 2013. This clear difference in vision between these distinguished academics notwithstanding, politicians understandably have adopted a somewhat different take on both the ambition and the record after twenty years. Last year, the then National Assembly Speaker Max Sisulu criticised opposition parties, warning that running to the courts to resolve political issues ran a serious risk of the delegitimising the judiciary. He said:

> '*There is a danger in South Africa, however of the politicisation of the judiciary, drawing the judiciary into every and all political disputes, as if there is no other forum to deal with the political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication.'* Business Day 12 June 2013

In 1996 Jacob Zuma then National Chairman of ANC was called on November 17th to speak to delegates at a regional meeting in Durban. It was reported that he told delegates '*Once you begin to feel you are above the ANC you are in trouble*.' Before going on to state that the ANC was 'more important' than the Constitution. He said '*no political force can destroy the ANC – it is only the ANC that can destroy itself*'. He added that the Constitution was only there to 'regulate matters.'

contestation through the medium of legal discourses,[8] was indeed perceptive. Klare correctly, in my view, focussed attention on the faith of South African lawyers in the 'constraining power of legal texts and ritual incantation of the law / politics boundary.' [9]

To return to Roux: he argues that Klare's call for the judges to conceive of the Constitution as a post-liberal project of fundamental, vertical and horizontal social transformation would have been particularly unappealing to the judges, at that time in that they would have thought that the main driver toward social transformation should be the political branches of the State. If the 1996 Constitution represented a political project at all, it would have appeared to the judges to be a project in which the judiciary played but a supporting role.[10] Given the sentiments which were expressed in 1996 by Mr Zuma, as noted, the Court, on Roux's line argument, has done an admirable job in negotiating the law-politics tension to avoid political attacks which would have undermined the Court's legitimacy and prevented it from performing its constitutionally mandated role.

On the face of it, we are confronted with two very different visions of the role of the Constitution in the reconstruction of South African society and the legal system which underpinned it. As South Africa moves into the third decade of democracy, even Roux has seen a different demand from the contemporary Court, bringing his approach into far closer alignment with that of Klare than would have been expected from the earlier exchanges

In his present position, Roux contends that the ANC's loss of political direction and descent into factionalism imposes obligations on the Court to fill certain policy gaps, while at the same time creating political space for it to achieve this objective. Take social and economic rights. While the reasonableness review approach to social and economic rights which was first set out in the **Grootboom**[11] case disappointed critics who urged the Court to develop a more substantive test for socio and economic rights, the Court in **Grootboom** allowed Courts the room to develop this initial test. If the origins of this test were to be found in an approach that sought to constitute a partnership with the political branches of the State to realise the social rights enshrined in the Constitution, Roux now considers that the court *'needs to focus on spelling out the constitutional basis for this partnership. It needs to be more specific; in other words, about the context of social rights and more forthright about*

[8] Klare at 188
[9] Klare at 171
[10] Roux at 231
[11] **Government of the Republic of South Africa and others v Grootboom and others** 2001 (1) SA 46 (CC)

the court's legitimate role in setting standards for legislative and executive conduct'.[12]

Roux argues that, even though the court at present finds itself a far more fraught political situation, than it might have been at the dawn of democracy now that the ANC now appears less committed to the constitutional project than was the case in the first decade of democracy, the Court will now need to take certain risks in order to intrude further into politics on the basis that the public will accept the expansion of law's domain in order to preserve democratic politics.

An overlapping consensus has thus begun to engage which can be defined thus: irrespective of the divisions of opinion as to what the courts' appropriate role was at the dawn of constitutional democracy, in the context of the far more fractured state of our present politics, courts are required to step up to the jurisprudential plate, to ensure that both the procedural and substantive commitments enshrined in the text are able to percolate into the political and economic reality of contemporary South Africa. It is this possibility that I wish to consider in the balance of this paper.

Meeting the present challenge

Whatever the conception of the role of the courts after 1996, this newly constituted institution was confronted with a constitutional text which expressed a majestic vision and a bold faith in the establishment of an equal democratic society predicted on an interrelated series of substantive commitments to a good life for all.[13]

Briefly, an expanded conception of democracy, that is a participative democracy which transcended the true divisions based on racial thinking, homophobia, xenophobia and sexism was to be constructed from the ashes of apartheid. Arguably, the greatest potential threat to this vision could come from the State itself, dominated by one political party with ambivalent commitments to a rights based culture, an ambivalence that might not have been apparent during the Mandela years but has manifestly become a greater reality in present day South Africa. The Constitution looked to one State institution, the judiciary with its unelected members, and charged it with defending a range of rights against the other State institutions, which rights included the safeguarding of the provisioning of a social wage which is required to ensure, at least a minimum socially acceptable dignified life for all. Roux may have been correct to caution against sweeping judgments which reflected

[12] Roux at 395
[13] See Michelman at 245

substantive political commitment at the inception of the project. But this commitment is now demanded of the judiciary in far more parlous political circumstances.

A second and important threat to this project comes from powerful elements in the private sector. The constitutional transition left private power intact, in mainly white hands. Those who had benefited from apartheid and built powerful private corporations now could replicate their co-optive strategies with the new rulers, safe in the knowledge of constitutional protection. Back in 1996 Judge Madala reminded us of this problem when in **Du Plessis and others v De Klerk and another**[14]

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

This observation was reflected recently in the Oxfam inequality report which records that in 2010 South Africa had a gini coefficient of 0.66, making it one of the most unequal societies in the world. The reports notes that the two richest people in South Africa possess the same wealth as the bottom half of the population and that South Africa is significantly more unequal than what it was at the end of apartheid. Between 1995 and 2006 the proportion of the population who live in extreme poverty fell slightly to 17%. However, increases in the population over the same period meant that the total number of South Africans living in extreme poverty fell by just 102 000. As real growth in GDP limps at under 2%, further progress in reducing poverty was hampered by South Africa's extremely high and growing level of inequality. Oxfam projects that even on the very conservative assumption that inequality remains static, just 300 000 fewer South Africans will be living in absolute poverty by 2019, leaving almost 8 million people below the poverty line. If the gini-coefficient continues to increase, even by one point, this will lead to 300 000 more people living in poverty in five years.[15]

Significantly, in the book which has brought inequality into recent sharp focus, Thomas Piketty commences with a description of the South African Police

[14] 1996 (3) SA 850 (CC) at 163
[15] Oxfam Even it up: time to end extreme inequality (2014)

intervening in a labour conflict between the workers at the Marikana platinum mine near Johannesburg and the mine owners. He writes:

> *'If the capital-labour giving rise to so many conflicts, it is due first and foremost to the extreme concentration of the ownership of capital. Inequality of wealth and of the consequent income from capital is in fact always much greater than inequality of income from labour.'*[16]

The point of these observations is not to engage in a lengthy discourse about inequality, its causes and solutions. It is however to argue that an equally considerable threat to the future of South African democracy is the nature of inequality and the consequent manner in which private economic power, possessed by a small segment of society, has an ominous effect on our constitutional ambitions, as the Marikana massacre has illustrated so luminously.

Courts cannot solve the core problem of inequality nor the problems which are associated with inadequate politics or the weakening of some non-governmental sectors, which continue to have blind loyalty to the party which led the country into emancipation but which may now fail many of those most desperately in need. It is to argue that the courts need to develop an expanded conception of democracy and therefore participate more vigorously with the other arms of State in order to ensure that the vision contained in the Constitution is defended, at worst, and enhanced at best. That means that there is a similar need to interrogate private law together with customary law which as Professor Michelman notes provides '*the encompassing background law that frames and guides the daily lives and dealings of most South Africans most of the time'.*[17]

It is upon these two questions that any analysis of the role of the courts 'going forward' must focus. To do so I shall focus on a select series of recent decisions delivered by the Constitutional Court and the Supreme Court of Appeal.

The challenges posed by the public domain

The controversy relating to e-tolling gave the court an opportunity to develop its approach to constitutional review. Briefly, a decision was taken to upgrade roads in Gauteng to be financed on the basis of a 'user pay' principle. A number of bodies

[16] Thomas Pikkety *Capital in the twenty first century* (2013) at 39- 40. Piketty at 38 observes:

> *'This episode reminds us, if we needed reminding, that the question of what share of output should go to wages and what share to profits – in other words, how should the income from production be divided between labour and capital? – has always been at the heart of distributional conflict.'*

[17] Michelman at 246

sought and obtained an interim interdict restraining the collection of tolls on the roads, pending a final determination of an application to review and set aside the decision to declare Gauteng roads as toll roads.

In setting aside the interim interdict, Moseneke DCJ said that the '*duty of determining how public resources are to be drawn upon and reordered lies in the heartland of Executive Government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policies on how to finance public projects reside in the exclusive domain of the National Executive subject to budgetary appropriations by Parliament.'*[18]

In similar fashion, in **Mazibuko v Sisulu and another**,[19] the Court refused to uphold an application which would have mandated the Speaker of Parliament to hold a motion of no confidence against the President at a particular time as prescribed by the Court. The Court was careful in its justification for intervention in the proceedings of the Assembly to require the Assembly to remedy a constitutional defect that threatened the rights of members of the Assembly, namely to move a motion of no confidence in the President and to have a rule which would provide for the holding and conduct thereof. But it rejected the idea that a Court could instruct Parliament as to when it was to hold such a debate.

Two further recent decisions support the view that the Courts have sought to craft a constitutional framework within which the other arms of the State must operate. In **All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and others**[20] the Court insisted on a careful examination of compliance with legal requirements for a tender process. In this case, compliance with black economic empowerment was an important consideration in the ultimate award of the tender. The Court held that this required the substantive participation in the management and running of any enterprise. Hence careful scrutiny was required by court before could uphold a decision to award the tender to the particular party. In this finding the Court rejected the deferential approach to procurement which had been adopted by the Supreme Court of Appeal and insisted on a careful scrutiny of compliance with the substance of tender procedures. In a prevailing context of startling levels of corruption, the promotion of enhanced the principles of accountability and transparency is critical.

[18] **National Treasury v Opposition to Urban Tolling Alliance** 2012 (11) BCLR 1148 (CC) at para 67
[19] 2013 (6) 249 (CC)
[20] 2014 (1) SA 604 (CC)

Most recently in **National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and another**[21] the court unanimously ordered the National Commissioner of the South African Police to investigate a compliant laid by the South African Human Right Litigation Centre, where the complaint involved allegations of torture committed in Zimbabwe against Zimbabwean nationals. The application called upon the Court to establish South Africa's domestic and international powers and obligations to ensure that perpetrators of international crimes, albeit committed by foreign nationals beyond the borders of South Africa, were to be held accountable in law. The Court found that because of the international nature of the crime of torture, South Africa, pursuant to sections 231 (4) 232 and 233 of the Constitution together with international and regional instruments which it had signed, was legally required, where appropriate, to exercise universal jurisdiction in relation to these crimes as '*they offend against the human conscience and our international domestic law obligations'*.[22]

The Court noted that South Africa had passed the International Criminal Court Act[23] which provides that torture is a crime against humanity and, under our domestic law, in terms of s 232 of the Constitution and s 4 (1) of the ICC Act. Further the police had a duty, in terms of the domestic law, to investigate high priority crimes such as torture which is a crime against humanity.

All cases reveal that the courts over the past few years have sought to take seriously the obligation imposed upon the executive and the legislature to comply with the country's constitutional commitments and, in particular, the rule of law in general. Where the court felt that it had been asked to intrude into a policy domain such as in the e-tolling case or the case dealing with the Speaker's prerogative as to when exactly to order the business of Parliament it refused to do so. But these decisions, did not, in any way, indicate that, at present, the Court is not up to the challenge of negotiating a path between the political domain and the legal terrain.

The same may not however be said about the Court's socio-economic rights jurisprudence. As noted earlier in **Grootboom**, the Court had developed a model of 'reasonableness review' which appeared to be both open ended and flexible; the default position being that the failure by government to provide for those residents in most urgent need would constitute unreasonable conduct because it amounted, to

[21] [2014] ZACC 13
[22] At para 40
[23] Act 27 of 2002

an unfair exclusion of the most vulnerable from key social programs.[24] Social programmes had firstly to address the needs of the poorest of the poor.

However, the most recent offering by the Court in **Mazibuko v City of Johannesburg**[25] gives reason for pause. The court eschewed an argument that the right of access to water would justify a finding as to the minimum quantity of water that must be delivered to residents of a community. In articulating its vision of the role of a court in socio economic rights adjudication, the Court said:

> *'[I]t is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights*.'[26]

The Court justified its decision not fix a definitive quantative standard, by offering these reasons: setting a fixed standard could be counterproductive, given that a standard may vary over time and context; government is institutionally better placed than a court to set standards for delivery; it is preferable as a matter of democratic accountability that the legislature and executive formulates these standards.

Much of the criticism of this case has focussed upon the retreat from Grootboom. For example, Liebenberg and Young write, '*In celebrating the flexibility of the City's metered, user payers system for water service delivery above the basic minimum, the Court sanctions the administrative deafness of a market solution.*'[27] Lucy Williams has compellingly shown that in comparison to German jurisprudence, the Courts reluctance to engage in the budget and the justification for the expenditure which was incurred in the provisioning of the socio economic rights which was the subject of litigation was extremely deferential and did not meet its own test, that is a

[24] See Sandra Liebenberg *Socio Economic Rights: Adjudication under a Transformative Constitution* (2010): Chapter 4
[25] 2010 (4) SA 1 (CC)
[26] At para 61
[27] Sandra Liebenberg and Katherine Young "*Adjudicating Social and Economic Rights: Can democratic experimentalism help?*" In Helena Alviar, Karl Klare and Lucy Williams (ed) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) at 245

reasonableness standard in which primacy of importance was given to the poorest of the poor.[28]

While the decisions were taken in regulating tenders, the Speaker's duties and South Africa's international law obligations all provide a sound foundation for the Court's supervision over a deliberative democracy, the jury is surely out with regard to whether the court's decision in **Mazibuko** will not promote an increasingly deferential approach to social provisioning and that the core of these questions should be left to policy choices made by the legislature and the executive.

Private law: A barrier landscape

If the public law picture is ambivalent, the view is far more gloomy when we turn to private law. In **Carmichele v Minister of Safety and Security and another**[29] the court suggested that the Constitution contained an objective normative framework within which all law, particularly the common law, should be developed. More than a decade little has been done to tease out the nature of this normative framework.

Some commentators have suggested, with a considerable measure of persuasion, that the focus of attention in the area of common law should not have been on s 39 (2) of the Constitution; that is the interpretive clause which provides 'when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights'. Rather courts should have concentrated on s 8 of the Constitution. In terms of s 8, all law governing disputes between private parties, whether enshrined in statute or the common law, must be tested against the substantive content of the Bill of Rights in general and the particular provision of the Bill of Rights which has been invoked in the particular dispute.

The manner in which s 8 was crafted mandated that the existing body of common law would be rigorously tested against the demands of the Bill of Rights. It does not follow, however, that if an existing principle of common law comes up short against the text, a new rule has to be fashioned by the courts. It is possible that the existing rule may be tweaked in order to ensure compliance with both sections 8(2) and (3) of the Constitution. But, our private law has suffered the worst of two worlds: very little engagement has taken place with the primary horizontal provision in the

[28] See LA Williams "The role of courts in the quantative – implementation of socio economic rights: a comparative study 2010 (3) Constitutional Court Review 141

[29] 2001 (10) BCLR 995 (C)

Constitution, namely s 8[30] and there has been but a vague approach to the normative framework to s 39 (2) since **Carmichele**.[31]

It may be argued, given the nature of common law development, that we should be less impatient and understand that common law adjudication takes place incrementally and not within the context of a transformative gale. But that does not excuse nor justify the incoherence of much of the approach to the common law which had been taken by the courts, in particular the Constitutional Court.[32]

Whatever the explanation, the incoherence of the existing jurisprudence indicates, to date, that our courts have not understood that law is ultimately deeply imbricated in every dispute. This means that the constitutional mandate to audit all law must be the starting point of any analysis for all disputes, particularly between private parties. Courts are obliged to test the extent to which the law which is sought to be applied passes constitutional muster and is congruent with the Constitution in general and whatever right could be applicable in the particular case.

An excellent example of the manner in which the courts have sought to give constitutional law a wide berth in the area of private law is the case of **RH v DE.**[33] This case dealt with a married person whose spouse had committed adultery. The question raised was whether it was possible to sue a third party with whom the adultery had been committed. The court decided that South African law is out of step with modern developments on the subject of the relationship between adultery and the law and concluded that the time had come to abolish the action as far non-patrimonial damages are concerned.[34]

The result is not particularly controversial. It is the approach of the Court which is interesting. The judgment engaged in a lengthy analysis of the origin of the rule, whether it was Roman Dutch law or English common law. Satisfied that it was

[30] The only cases which have sought to apply the approach of s 8 (2) and 8(3) are in two judgment of O'Regan J in **Khumalo v Holimisa** 2002 (5) SA 401 (CC); and a minority judgment in **NM v Smith** 2007 (5) SA 25 (CC)

[31] For excellent critiques of this jurisprudence see Stu Woolman "Application" in Woolman et al Constitutional Law of South Africa. Loose-leaf Volume 2. Chapter 31; Nick Friedman 'The South African Common Law and the Constitution: Revisiting Horizontality" 2014 (30) SAJHR 63

[32] See for example **Barkhuizen v Napier** 2007 (5) SA 323 (CC) and **NM v Smith 2007** (5) SA 250 (CC), See also Stu Woolman "The amazing, vanishing Bill of Rights" (2007) 124 SALJ 792

[33] Supreme Court of Appeal decision in Case no 594/2013. I am indebted to my colleague Professor Jaco Barnard-Naudé for his draft article 'The pedigree of the common law and the "unnecessary" constitution: a discussion of the Supreme Court of Appeal's decision in **RH v DH'.**

[34] See para 40

English law which is the source, Brand JA said that there was no need to engage in any constitutional analysis because pure Roman Dutch law did not embrace the action. In developing his argument that the *boni mores* dictated against the continuation of such an action Brand JA says:

> '*Experience teaches us that different jurisdictions provide more or less the same answer to a particular legal problem, albeit that they sometimes arrive at that answer in different ways. Where our law therefore gives an answer that appears to be directly at odds with what has happened in most other jurisdictions, it makes one stop to think: are the morals and the needs of our society so different from most others? And if so why?*' [35]

Reading this judgment as a whole, it appears that members of the Supreme Court of Appeal, consider that the common law has an independent existence of its own. They accept that there may be occasions where the common law must be developed in terms of s 39 (2) of the Constitution. But the common law can also be developed on the basis of reasons which are independent of the Constitution and which constitute the *boni mores* of the community. This in turn illustrates the idea of a public morality which informs our law but which is not necessarily sourced in the fundamental normative framework which underpins the entire legal system, namely the Constitution. [36]

Conclusion

After twenty years of democracy, South Africa possesses a political system which is dominated by one party which is unlikely to lose political office in the foreseeable future. This development and the lack of unification of the non-governmental sector, many components of which still see the governing party as a liberation movement have resulted in political warfare in South Africa being ineffective. Politics appears to deliver little to many and lawfare has become the default strategy, as is evident in the plethora of cases which have descended upon the courts: from appointments of the National Director of Public Prosecutions, the Chief Operating Officer of the SABC, the establishment of an anti-corruption unit, rules of Parliament with regard to a motion of no confidence, procedures for appointment to judicial office, obligations of the government to promote human rights in its foreign affairs, expulsion from political parties, the running of local councils to name but a few. Given the current political terrain, it is unlikely that this turn to lawfare will abate over the next decade. This raises the question as to whether the constitutional structure which has been

[35] At para 28

[36] This approach shows a remarkable degree of continuity with that adopted in **National Media Ltd and others v Bogoshi** 1991 (1) BCLR 1 (SCA)

developed, particularly during the first decade of democracy, is sufficiently sturdy to carry the weight of these demands.

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

The jurisprudence, as I have outlined it, which has been set out to meet these challenges can be described as ambivalent. When it comes to the background rules of private law, which rules play so important a role in the distribution of wealth in the society, the reluctance of the courts to have forged ahead far more courageously and developed a better and more coherent jurisprudence is truly regrettable. Whether courts will obtain another chance in the presently short political circumstances is open to question. To date the Courts have held the line against intrusions by the executive and legislature into areas of the domain of deliberative democracy. But key and more demanding challenges lie ahead. This paper shows that not all is lost but increased political pressure coupled to new judicial appointments pose unpredictable challenges.