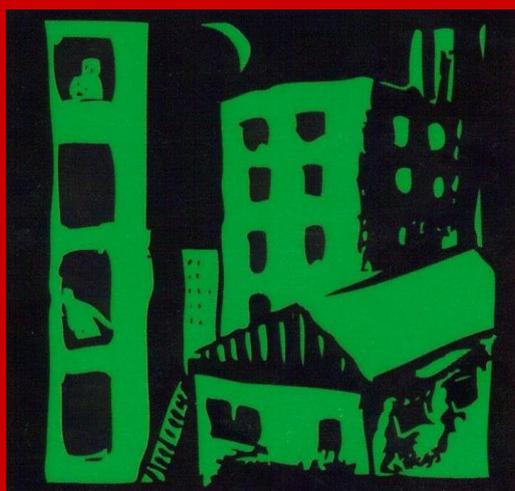


LAW  
DEMOCRACY  
& DEVELOPMENT



VOLUME 24 (2020)

DOI: <http://dx.doi.org/10.17159/2077-4907/2020/idd.v24.16>

ISSN: 2077-4907  
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**When do you call  
time on a  
compromise? South  
Africa's discourse on  
transformation and  
the future of  
transformative  
constitutionalism**

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**ABSTRACT**

*The main thrust of this article is to advance a critique of South Africa's embrace of the grammar of transformation after the official demise of colonial-apartheid, in particular how this grammar has been deployed in a totalising fashion as it is held out to be definitive of the processes, measures and goals of change under the 1996 Constitution. In performing this critique,*

*it is argued that transformation's ability to find wide and enduring resonance has had much to do with its emergence as a transitional site of compromise that allowed erstwhile political and ideological adversaries to navigate a complex social and political transition. A quarter of a century after the moment of transition, this article interrogates South Africa's continuing investment in this idea of transformation and addresses the implications of its continuing dominance in how South Africa constitutes itself and navigates self-understanding. In essence, the article argues that whilst the imperative of constitutional transformation may have formed around a common commitment to constitutional rights and values, its lived manifestation in what has emerged as the hegemonic discourse of transformative constitutionalism with its bias for adjudication driven social change has negated any pretensions it may have projected of being an emancipatory discourse directed at disrupting and undoing the multiple pernicious legacies colonial-apartheid.*

**Keywords:** Adjudication, compromise, emancipation, inequality, liberation, transformation, transformative constitutionalism.<sup>1</sup>

*"We are better placed to move in on the enemy because today we have a popular army, Umkhonto we Sizwe, capable of speaking to the enemy in the language he understands best."*

Oliver Tambo, President of the African National Congress, 1982<sup>2</sup>

*"The violence of our enemies is a warning to us. We who are committed to peaceful negotiation, also have a warning to them. Our warning is that our readiness to negotiate should not be mistaken for weakness."*

PW Botha, President of South Africa, 1985<sup>3</sup>

## 1. INTRODUCTION

After centuries of institutionalised black subjugation and dispossession that culminated in a racist colonial-apartheid State, the protracted constitutional negotiations of the 1990s were widely dubbed a miracle.<sup>4</sup> The popularly held notion of a miracle in many

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<sup>1</sup> I wish to thank Boaventura de Sousa Santos, Tshepo Madlingozi, Mtendeweka Mhango, Joel Modiri and Salim Nakhjavani for the insightful comments that they gave on earlier drafts. I am grateful to Silindiwe Sibanda, my ever faithful and attentive editor, for her inputs that went into finalising this essay. I am also grateful to the anonymous reviewers for their comments and inputs that strengthen the arguments. Any errors or omissions remain my own.

I acknowledge the funding support received during the writing of this essay from the research project "ALICE - Strange Mirrors, Unsuspected Lessons", co-ordinated by Boaventura de Sousa Santos

<sup>2</sup> Tambo OR "Act in unity" – speech delivered on 8 January 1982 on the occasion of the 70<sup>th</sup> Anniversary of the African National Congress available at <https://www.sahistory.org.za/archive/january-8th-statements-statement-national-executive-committee-occasion-70th-anniversary-anc> (accessed 16 April 2020).

<sup>3</sup> Botha PW The infamous Rubicon speech August 1985 at the opening of the National Party Congress available at <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01600/05lv01638/06lv01639.htm> (accessed 16 April 2020).

<sup>4</sup> The idea of a miracle has been used in numerous books, articles and films. A few examples are : Sparks *A Beyond the miracle –inside the new South Africa* Johannesburg : Jonathan Ball (2003); Turok B *Beyond*

ways captures, on the one hand, a transition to a constitutional democracy that has been widely characterised as being relatively peaceful, orderly and by most accounts lawful. On the other hand, less obvious but nonetheless implicit in this idea of a miracle is the transmutation of former “enemies” into co-sponsors of the “new” South Africa in circumstances few would have imagined possible a decade earlier. How did this happen? How was it possible that erstwhile “enemies” emerged from the negotiating table outwardly espousing a shared sense of triumph and commitment to a common non-racial vision, palatable to both black and white people, as to the country’s future? Beyond commitments to constitutional rules, institutions, doctrines and values, how were they able to find each other, let alone establish a common grammar capable of transcending their centuries old history of racial antipathy sourced in colonisation? In the absence of a clear winner or loser, circumstances demanded that the parties establish a grammar of compromise. The primary organising idea at the heart of that grammar, I will argue here, became, and remains, that of transformation, considered by many as being sourced in, delineated and, ultimately, mandated by the Constitution.<sup>5</sup>

In search of a grammar of compromise capable of enduring beyond the exigencies of the initial post-1994 transition, an accommodating discourse of transformation emerged, arguably, as the preferred lexicon around which the co-sponsors of the “new” South Africa could interact to frame an agenda for political, social, economic, organisational, institutional and structural change in both the public and private realms. From education,<sup>6</sup> to sports,<sup>7</sup> to the media,<sup>8</sup> to business,<sup>9</sup> to the economy,<sup>10</sup> to politics,<sup>11</sup>

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*the miracle – development and economy in South Africa: a reader* Cape Town: Fair Share (1999); Friedman S, Moss G, Obery I et al (eds), *The small miracle: South Africa's negotiated settlement* Cape Town: Ravan Press (1992); Waldmeir P *Anatomy of a miracle: the end of apartheid and the birth of the new South Africa* New York : WW Norton & Company (1997); and *Miracle Rising* (2013), a documentary film directed by Brett Lotriet Best.

<sup>5</sup> In this article, I will use the singular “Constitution” to refer mainly to the 1996 South African Constitution, but where the context suggests it such reference will also include the transitional 1994 interim Constitution.

<sup>6</sup> See Vambe M "Opening and transforming South African education" (2005) 20 *Open Learning: The Journal of Open, Distance and e-Learning* 285; Badat S "Transforming South African higher education, 1990-2003: goals, policy initiatives and critical challenges and issues" in Coete N, Pillay P, Badat S et al *National policy and a regional response in South African Higher Education* UK : James Currey (2004).

<sup>7</sup> Desai A (ed), *The race to transform: sports in post- apartheid South Africa* Pretoria: HSRC Press (2010).

<sup>8</sup> Berger G. "Towards an analysis of the South African media and transformation, 1994-99" (2000) 38 *Transformation* 82; Steenveld L. "Transforming the media: a cultural approach." (2004) 18 *Critical Arts* 92.

<sup>9</sup> Iheduru O "Black economic power and nation-building in post-apartheid South Africa" (2004) 42 *The Journal of Modern African Studies* 1.

<sup>10</sup> Terreblanche S *Lost in transformation - South Africa's search for a new future since 1986* Johannesburg : KMM Review Publishing Co (2012).

<sup>11</sup> Sisk T *Democratization in South Africa: the elusive social contract* Cambridge: Cambridge University Press (1995); Cameron R & Tapscott C "The challenges of state transformation in South Africa" (2000) 20 *Public Administration & Development* 81.

to language,<sup>12</sup> to the courts,<sup>13</sup> to policing,<sup>14</sup> I argue here that post-1994 the grammar of transformation emerged as the common vector for negotiating and navigating change.

Therefore, at face value, it is arguable that transformation was widely embraced as a totalising grammar reflective of the nation's collective acceptance of the inevitability of change, notwithstanding the contestation over this grammar of transformation within South Africa owing to its inherent ambiguity as to the exact nature of the change it entails and what remedial action(s) it necessitates from one context to the next. Despite this, as I shall demonstrate, South Africa remains deeply invested in the idea of transformation as process, goal and, above all, a constitutional imperative that has found ultimate theoretical expression in the court-centric notion of transformative constitutionalism. This latter notion has become, it can be said, the pre-eminent conceptual framing typifying post-1994 South African constitutionalism; indeed, the South African Council for Higher Education - during its review and accreditation process of the LLB degree - pronounced the hegemony of transformative constitutionalism by positing it as one of the pillars of South African legal education.<sup>15</sup>

To better contextualise the article's argument it is necessary to take a step back and contemplate where South Africa finds itself in basic political-economic terms 25 years after the official demise of apartheid. Notwithstanding the multi-sectoral expressions of commitment over the past two decades to what has come to be widely known as a transformative constitutional project, it remains extremely difficult to capture in words and numbers as well as with sufficient precision and pathos, the exact nature and extent of the disparities in material living conditions, life opportunities, and social provisioning that stubbornly persist between blacks and whites in South Africa. Numerous studies have sought to detail these disparities rooted in our history and how they continue to be a commonplace feature of contemporary South Africa.

For example, in 1994, Herbst recorded that 53% of all African people were living below the poverty line as compared to only 2% of all white people; also, at that time the education budget for white children was 5 times that spent on African children; whilst

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<sup>12</sup> De Klerk V "Language in South Africa: the role of language in national transformation, reconstruction and development: Vic Webb" (2004) 25 *Journal of Multilingual and Multicultural Development* 83.

<sup>13</sup> Dugard J "Judging the judges: towards an appropriate role for the judiciary in South Africa's transformation" (2007) 20 *Leiden Journal of International Law* 965; Hoexter C "Judicial policy revisited: transformative adjudication in administrative law" 2008 (24) *South African Journal on Human Rights* 281.

<sup>14</sup> Gastrow P & Shaw M "In search of safety: police transformation and public responses in South Africa" (2001) 130 *Daedalus* 259.

<sup>15</sup> In the review process the cross-cutting presence of transformative constitutionalism across law faculty curricula was a stated criterion for the continuing accreditation of law faculties. A failure to demonstrate this was a ground upon which accreditation could be lost or awarded subject to qualification. See Council for Higher Education National Review Manual: Bachelor of Laws (LLB) (2015) at 28 available at [http://nr-online.che.ac.za/html\\_documents/LLB/National\\_Reviews\\_%20Manual\\_20150915.pdf](http://nr-online.che.ac.za/html_documents/LLB/National_Reviews_%20Manual_20150915.pdf) (accessed 27 March 2020).

at the level of tertiary education 4,467 out of every 100,000 white people were enrolled as compared with 665 out of every 100,000 African people.<sup>16</sup> Later, in 1998, the *Poverty and Inequality Report* recorded that 50% of the poorest in the population (overwhelmingly black) received only 11% of the national income whilst 7% of the population (overwhelmingly white) received over 40% of the national income.<sup>17</sup> The Poverty Trends Report reported that between 2000-2011 poverty levels dropped, albeit largely due to government social grants. However, despite this drop, according to the same Report, inequality levels in South Africa remained amongst the highest in the world.<sup>18</sup> Coupled with numerous other socio-economic disparities in education, health care, land distribution, basic sanitation, inadequate infrastructure and rapid urbanisation, as early as 2011 Marais poignantly captured the prevailing state of post-1994 South Africa:

“[I]nequality has widened, precariousness is routine and a palpable sense of unfairness is rampant. The problem is not simply one of ‘poverty’ – a lack of means – but of the glaring disparities that assault people day in and out. A seething sense of injustice exists, generating rancour and insubordination.”<sup>19</sup>

Of course, I should not be read as suggesting that there have been absolutely no changes in material living conditions and life opportunities, nor that there have not been any policies or laws targeted at redressing these disparities in post-1994 South Africa.<sup>20</sup> Indeed, there has been a proliferation of legislated affirmative action, education, employment equity, health care and housing programs targeted at “advancing the equality” of “previously disadvantaged groups”, especially along the axes of race, gender and sexual orientation. However, what has become apparent is that not only have these transformative initiatives failed to deliver a miracle equivalent in structural and material change that matches the much celebrated transformative constitutional “miracle”, but that these initiatives, as is argued here, have largely left intact the racial, economic, cultural, and epistemic hierarchies associated with colonial-apartheid.<sup>21</sup>

<sup>16</sup> Herbst J "South Africa: economic crises and distributional imperatives" in Stedman S (ed) *South Africa: the political economy of transformation* Boulder, Colorado: Lynne Rienner (1994) at 30-31.

<sup>17</sup> May J, Budlender D, Mokate R, Rogerson C & Stavrou A "Poverty and inequality in South Africa: Report Prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality; Summary Report, 13 May, 1998" Singapore: Praxis Publishing (1998).

<sup>18</sup> StatsSA, "Poverty trends in South Africa: an examination of absolute poverty between 2006 and 2011" Pretoria : Statistics South Africa (2014). See also Marais H *South Africa pushed to the limit - the political economy of change* Cape Town: UCT Press (2011) at 205.

<sup>19</sup> Marais (2011) at 4.

<sup>20</sup> See National Planning Commission "National Planning Commission Diagnostic Overview" (2011).

<sup>21</sup> See generally Madlingozi T "Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution" (2017) 28 *Stellenbosch Law Review* 123; Modiri J "Conquest and constitutionalism: first thoughts on an alternative jurisprudence" (2018) 34 *South African Journal on Human Rights* 300; and Dladla N "The liberation of history and the end of South Africa: some notes towards an Azanian historiography in Africa" (2018) 34 *South African Journal on Human Rights* 415.

To further demonstrate my point, the one most illustrative example of how the underlying legacies of colonial-apartheid continue to impact black South Africans, including the so-called “born-frees”, is that of the events surrounding the 2015-16 student revolts usually collectively referred to as the #Feesmustfall movement.<sup>22</sup> Beyond the obvious and immediate protests against unaffordable fees, the social, political, economic and epistemic upheaval of #feesmustfall has rightly been characterised by some commentators as being demonstrative of a generational drift towards profound disillusionment with, if not outright disavowal of, the idea of the “miracle” of the “new” South Africa of which “born-frees” are imagined to be the primary beneficiaries.<sup>23</sup> Commentators have remarked that #feesmustfall actually encapsulated a number of pressing and, often, intersecting existential anxieties reflecting how black students perceived their place within, first, the university and, secondly, more broadly, the South African constitutional project. According to these commentators, #feesmustfall was characterised by, amongst other things, a call to decolonise the curriculum as an implicit rejection of the prevalent grammar of transformation in universities;<sup>24</sup> a critique of the university as a “site of epistemic and ontological warfare”;<sup>25</sup> evidence of the “unravelling of the uncertainty of who we are as a country”;<sup>26</sup> and that, as an overarching movement, it was primarily

“invested in the work of broad social critique of the function of education in relation to the terms of the transition, its failure to escape the long hand of colonial violence and dispossession, and its inability to posit a future into which black students felt willing to step”<sup>27</sup>.

As a historic moment of rupture, albeit a somewhat provincialised one within the university space and its surrounds, #feesmustfall brought into sharp focus questions about the perceived gains of the politics of transition, the compromises made on behalf of future generations, and the transformative project that ensued. #Feesmustfall is a subject to which I will return later in this article.

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<sup>22</sup> Gillespie and Naidoo describe the coming into being of the #fallism movement as follows:

“The mustfall hashtags took their orientation from the call for the toppling of the Rhodes statue, but quickly came to define an attitude of restless, radicalizing critique and a predilection for insistent, sometimes belligerent, political claims in a generation of young black people impatient with the enduring colonial and apartheid logics of South African society.”

Gillespie K & Naidoo LA “# MustFall: the South African student movement and the politics of time” (2019) 118 *South Atlantic Quarterly* 190 at 193.

<sup>23</sup> On born-frees see Chikane R *Breaking a rainbow, building a nation: the politics behind #MustFall movements* Johannesburg: Picador Africa (2018) at 6-8.

<sup>24</sup> Letsoalo M & Pero Z “Historically white universities and the white gaze: critical reflections on the decolonisation of the LLB curriculum” (2020) 14 *Pretoria Student Law Review* 1.

<sup>25</sup> Motimele M “The rupture of neoliberal times as the foundation for emancipatory epistemologies” (2019) 118 *South Atlantic Quarterly* 205 at 211.

<sup>26</sup> See Chikane (2018) at 22.

<sup>27</sup> Gillespie K & Naidoo LA “Between the cold war and the fire: the student movement, antiassimilation, and the question of the future in South Africa” (2019) 118 *South Atlantic Quarterly* 226 at 235.

Taking into account the many political-economic continuities and social tensions that have become a seemingly indelible feature of post-apartheid South Africa, my mission in this article is to interrogate the value or contribution of South Africa's persistence with a grammar of transformation in as far as it has sought to imagine itself as engaged in the work of undoing the pernicious legacies of colonial-apartheid. In particular, I will examine whether, and how, a grammar of transformation contributes, first, to helping us make sense of deepening political-economic disparities, and, secondly, and most importantly, charting emancipatory paths that disrupt colonial-apartheid's legacies and deliver liberation.

Turning my focus to this grammar's most prominent theorised manifestation, namely, transformative constitutionalism, I ask what, beyond a theoretical commitment to human rights, constitutional values, as well as a law driven and court-centric framework of social and political change, does transformative constitutionalism offer in terms of disruptive redistributive and reparatory ideas, measures and strategies to address South Africa's sustained and deepening inequalities?

Against this background that suggests that the everyday reality of a majority of South Africans continues to be structurally and materially precarious in spite of the best transformative reading or theorisation of the Constitution, in the next part I first examine the word "transformation" in etymological terms in order to problematise its emergence as an all-pervasive discourse of change in South Africa. In doing this I pivot on Ronaldo Munck's provocation positing that the appeal of a grammar of transformation, despite its vagueness, was reflective of a political compromise necessitated by the inadequacy of reform and the impossibility of revolution at the time of the transition. In part 3, I illustrate how the grammar of transformation has been variously and contextually deployed despite an apparent lack of consensus as to a common social vision in political-economic terms or even a point of departure in ideological or discursive terms. In part 4, building on the idea of a grammar of transformation, I examine the emergence of transformative constitutionalism as the pre-eminent theorisation and discursive account of contemporary South African constitutionalism. In part 5, I critique transformative constitutionalism for its failure to contribute meaningfully to our ability to make sense of our understanding of contemporary social and political tensions outside of the framework of adjudication. In the concluding part, I call into question the prevailing discursive commitment and investment in transformative constitutionalism and suggest that as a court-centric discourse it has negated any pretensions it may have projected of being an emancipatory discourse directed at disrupting the multiple legacies of colonial-apartheid.

## **2. WHAT IS TRANSFORMATION? DELIMITING TRANSFORMATION'S DEFINITIONAL CONTOURS**

Before proceeding further, I think it appropriate to briefly address some definitional issues. It is notable that few writers deploying a grammar of transformation expend much time or effort on defining it or even offering an understanding of what their own

perspective on transformation is. Without unnecessarily belabouring the matter, I think it useful to start from the most likely point of consensus, namely, that the noun “transformation” is etymologically derived from the verb “transform”. “Transform” has several meanings, namely, “1. to change in form, appearance, or structure; metamorphose; 2. to change in condition, nature, or character; convert; 3 to change into another substance; transmute<sup>28</sup> “. “Transformation” means the following: “1. the act or process of transforming; 2. the state of being transformed; 3. change in form, appearance, nature, or character<sup>29</sup> ”. What should be evident is that there is no implicit value judgment nor a normative proposition in the meaning of “transformation”; it is altogether neutral when viewed in the abstract, merely signifying change in form, substance or nature.

At a conceptual level, it has no inherent philosophical, ideological or political bias nor an implicit set of commitments. Rather, it attains particularised meaning through being deployed in particular contexts in relation to other ideas, conditions, states of being, or historical reference points. Often its assigned meaning is a projection of a speaker’s own commitments, viewpoint or assumptions that imbue “transformation” with meaning in that moment. Therefore, to speak of “transformation” in purely neutral terms is uncommon in practice; “transformation” when used almost invariably harbours an agenda.

Writing in 1996 and speculating as to the discursive traction enjoyed by the notion of transformation at that historical moment, Ronaldo Munck suggested that the then prevailing “uncertain global situation and crisis of perspective” were important factors in the turn towards a grammar of transformation, despite the term’s tendency towards ambiguity and instability.<sup>30</sup> In his own words, Munck vividly captures this as follows:

“...[T]he very nature and meaning of the term 'transformation' itself is quite unclear... My feeling is that the idea of transformation emerged as a response to the inadequacy of the binary opposition reform/revolution in the post-1990 conjuncture...It is at once a goal and a process which is ongoing. *It does, of course mean many different things to different people, some usages being more innocent than others. At the moment, it is tempting to abandon the term altogether given its current (mis)use, and its almost complete devaluation and stripping of meaning.* It seems, sometimes, that transformation and democracy refer simply to the outcome that the user desires. Or, as Lewis Carroll put it in *Alice Through The Looking Glass* - 'When I use a word, it means just what I choose it to mean'...But, in truth, we cannot drop a term for these reasons as all words are a contested terrain for meaning.<sup>31</sup>” (Emphasis mine).

At the heart of Munck’s characterisation, I suggest, is the expression of an initial unease with the grammar of transformation that is in the process of taking root. Munck depicts

<sup>28</sup> See <http://dictionary.reference.com/browse/transform?s=t> (accessed 16 April 2020).

<sup>29</sup> See <http://dictionary.reference.com/browse/transformation?s=t> (accessed 16 April 2020).

<sup>30</sup> Munck R "For a sociology of transformation" (1996) 29 *Transformation* 41.

<sup>31</sup> Munck (1996) at 43.

transformation as a somewhat amorphous, yet non-neutral, notion which whilst contested and contestable retains its currency by straddling seemingly irreconcilable positions espousing revolutionary ends, on the one hand, and more moderate reformism or reconstruction, on the other.<sup>32</sup> As such, Munck can be read to suggest that the appeal of transformation, despite its inexactitude, is to be found in the need for a middle ground in the early 1990s. In short, the appeal of a grammar of transformation is to be found in the fact that, practically, it reflected a social and political compromise of sorts allowing for both those in favour of the least intrusive interference with the status quo and those agitating for revolutionary change, to align themselves with an agenda for a conception of change capable of accommodating their individual senses of what constituted desirable or acceptable social and political change.

In spite of apparent misgivings about its imprecision, Munck's essay unfolds premised on his own, somewhat reluctant, acceptance of transformation's utility in a South African context. Munck says:

"We all start from different subject positions in understanding a term such as 'transformation'. *Its meaning is constructed on a discursive terrain where contradictory articulations play themselves out in a fluid and conflictual process.* My own preference is not to use the term 'transformation' as a covert way of talking about socialism in polite social circles so as not to be laughed out of court ... [Transformation] is a process which is unfolding and whose outcome is uncertain. It is neither (merely) reformism nor (really) revolution. It defines a terrain of struggle and it articulates a strategy for struggle. It calls for democratising all spheres of social life and an empowerment of those hitherto disempowered.<sup>33</sup>" (Emphasis mine).

Of course, the challenge then is to reconcile Munck's ostensible misgivings with his subsequent turn to and use of transformation in the remainder of his essay, albeit subject to his own predispositions as to how it must be understood as promoting far-reaching democratisation and empowerment. One way to make sense of this, I suggest, is, that for Munck a grammar of transformation creates a space of possibility for present and future contestation in which no ideological position can claim undisputed ascendancy. In brief, transformation establishes a compromise space where those engaged in ideological battle can (cordially) co-exist whilst respectively advancing their causes, principally around ideals of democracy and empowerment.

Therefore, I suggest that the essence of adopting a grammar of transformation as a product of the political compromises of the 1990s was in essence an agreement to change the status quo ante without settling the question of what the nature and substance of such change should be in philosophical, political or material terms. Put differently, I advance the view that the grammar of transformation in post-1994 South Africa has emerged as a site of compromise for, amongst others, political, social and economic engagement around universalistic, non-partisan, seemingly all-encompassing

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<sup>32</sup> Munck (1996) at 43.

<sup>33</sup> Munck (1996) at 43.

constitutional rights and values that are accommodative of divergent political visions, and therefore, almost of necessity, preclude any overt or binding ideological and material commitments. Of course, this must be understood in the light of the fact of the prevailing Euro-American hegemony of liberal democracy and the international neo-liberal order that in the 1990s shaped, and indeed continues to shape, debates and imaginaries of what is thought possible politically, socially, economically, culturally and epistemologically.

### **3. THE DISCOURSE OF TRANSFORMATION IN SOUTH AFRICA - A GRAMMAR FOR MOST CAUSES?**

Before eventually turning to transformative constitutionalism, I want to locate the arguments I make here within the context of South Africa's wider discursive turn to a grammar of transformation. It is notable that, despite there being no discursive consensus as to its scope, meaning or range, transformation retains a cross-cutting appeal, variability and utility to people advancing different agendas or ideological standpoints; meaning that in practice, transformation as an idea deployed contextually, beyond advocating for change, has no commonly held conception as to its nature or content, yet it remains widely used. A few examples will bear out this point.

The appeal to a grammar of transformation as part of the South African political landscape precedes the 1994 transition to democracy. Take for instance, Stephen Stedman who, writing shortly before the democratic transition, invokes the notion of transformation with respect to significant political events that occurred in the 1970s and 1980s. According to Stedman, these events were transformational in the sense that they contributed to the eventual demise of the then ruling National Party regime, and created an opening for democratic transition.<sup>34</sup> Transformation as used by Stedman is neither a term of art nor necessarily ideologically loaded; rather, it is invoked in somewhat colourless analytical terms as signifying change from one historical moment to the next. Simply put, transformation here connotes a seemingly ideologically agnostic historical shift. This, therefore, allows Stedman to speak of transformative events during apartheid under the National Party (transformation 1)<sup>35</sup> as well as a future transformation after apartheid's eventual demise and anticipated changes under an incoming ANC regime (transformation 2).<sup>36</sup> This depiction of transformative possibilities under either oppressive historical conditions or (then) future conditions of political freedom, I suggest, is no mere slippage; rather it is reflective of what Stedman terms a "dialectic at work in the creation of a stable democracy"<sup>37</sup>. Stedman's deployment of transformation here is decidedly episodic and descriptive, meaning that it is event and context driven focusing more on a change to the status quo rather than an ideologically driven change.

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<sup>34</sup> Stedman S J "South Africa: transition and transformation" in Stedman (ed) (1994).

<sup>35</sup> Stedman (1994) at 24.

<sup>36</sup> Stedman (1994) at 24.

<sup>37</sup> Stedman (1994) at 24.

Also writing in the pre-democratic era, Neville Alexander's conception of transformation is distinctly ideologically driven and material. In sketching what he believed to be "a radical strategy for the transformation of the university in South Africa into a 'people's university'", Alexander argues as follows:

"Suffice it to say that anti-racist, anti-sexist, anti-elitist, anti-classist, anti-authoritarian, anti-conformist educational practices, new methodologies, new syllabi, new ways of assessment, new attitudes towards language, in short a new concept of the university must needs be realised if we are to break out of the suffocating embrace of the intellectual, political, social and cultural barbed wire which surrounds all universities in South Africa today."<sup>38</sup>

Thus, for Alexander, transformation here entails demanding nothing short of a radical turn away from the practices and prevailing ideas under the ancient regime premised on racist, patriarchal and capitalist ideas. Rather, a transformed university space would have to encapsulate substantive institutional, structural, cultural, epistemic and pedagogical changes. Significantly for Alexander, the question of embarking on any process of transformation required that one also grapple with the question of power and what the power configuration would be after the fall of apartheid as this would undoubtedly determine the realms of what change was possible.

A grammar of transformation is central in Sampie Terreblanche's seminal text, *A history of inequality in South Africa 1652-2002*, and some of his subsequent works. According to Terreblanche, whilst the fall of apartheid brought about a much-needed political transformation, he remains critical of the lack of socio-economic transformation needed to address inherited systemic inequalities. Terreblanche argues persuasively that the perpetuation of systemic economic exploitation and exclusion, in spite of democratic gains, is the result of a failure to transform the nature of power. Terreblanche calls for a deeper transformative power shift premised on ideologically driven socio-economic policy changes designed to usher in an era of social-democracy.<sup>39</sup> In essence, for Terreblanche, transformation, properly conceived, is necessarily multi-dimensional, encompassing, at least, changes on the political, social and economic axes. Ideologically driven transformation, according to Terreblanche, is pivotal for mapping out the substance and method of displacing the prevailing liberal paradigm of "democratic capitalism" adopted by the ANC government post-1994.<sup>40</sup>

Yet another example of the invocation of a grammar of transformation that also illustrates its variability is found in the field of urban transformation. According to John Williams, transformation is *the* "defining concept of the new order in South Africa"<sup>41</sup>, and in order to make sense of its demands, it is best understood by placing the apartheid city at the centre of the problem. According to Williams, to fully appreciate

<sup>38</sup> Alexander N "The politics of national and institutional transformation" in Alexander N *Some are more equal than others - essays on the transition in South Africa* Cape Town: Buchu Books (1993) at 8.

<sup>39</sup> Terreblanche (2012) at 18-20.

<sup>40</sup> Terreblanche S *A history of inequality in South Africa, 1652-2002* Durban: UKZN Press (2002) at 138.

<sup>41</sup> Williams J "South Africa: urban transformation" (2000) 17 *Cities* 167.

the imperatives of transformation in democratic South Africa, it is necessary to grapple with the calculated nature of the legislated spatial segregation that enabled racial separateness via the carving up of towns and cities into prosperous well-served white zones at the centre with depressed under-served black zones at the periphery.<sup>42</sup> Williams argues that successfully achieving South Africa's social, economic and political transformation will depend largely on transforming the country's socio-spatial arrangements so as to bring about equitable access to the city that will then lead to further far-reaching changes.

According to Williams, successful transformation requires nothing less than a paradigm shift that is multi-dimensional, programmatic, and leads to "visible sustainable results of systemic change in the South African legal order".<sup>43</sup> In spite of this ambitious conception of transformation, Williams recognises that transformation has "as many divergent/convergent meanings as there are potential interpreters/decoders of the term", which fact he considers to be a serious limit to the possibilities that it can realise.<sup>44</sup>

Ultimately, these different examples above are but illustrations of how a grammar of transformation has been adopted to advance different conceptions of what the nature and content of change entails or might entail, particularly that engaging with or framing the debates about what the fundamental or overarching nature of change in South Africa should look like. Obviously, these examples are but a sliver of the extensive number of instances that the grammar of transformation has been invoked as writers from different perspectives, worldviews and disciplines address themselves to questions of change. What is worth pointing out at this juncture is that despite different points of departure the grammar of transformation allows for various speakers to appear to be in conversation on a singular concern – transformation – yet the reality is that each one can be driven by different sets of underlying assumptions, concerns and motivations.

This then begs the question as to what work this grammar of transformation is actually performing beyond being a *via media*, a middle ground or place of compromise perpetuating the illusion of a space conceived of around a common (constitutional) vision in which different actors can appear, be seen to engage in common, before retreating to their ideological positions and continuing to defend their own ideas of what the ideal should be. Simply put, we must ask what the value of a grammar of transformation is when it can also serve to obfuscate rather than make clear what its interlocutors really stand for without the need for extraneous decoding. This, of course, then raises some rather pressing questions as to what to make of post-1994 South African constitutionalism that has come to be overwhelmingly framed in terms of this self-same grammar of transformation.

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<sup>42</sup> Williams (2000) at 167.

<sup>43</sup> Williams (2000) at 171.

<sup>44</sup> Williams (2000) at 168-9.

#### 4. FROM SOCIAL, ECONOMIC AND POLITICALLY MANDATED TRANSFORMATION TO TRANSFORMATIVE CONSTITUTIONALISM - THE RISE, REIGN AND PLATEAU OF A PUTATIVE NATION-BUILDING DISCOURSE

Unsurprisingly, the Constitution makes no mention of, nor reference to, transformation. This fact has not stood in the way of a proliferation of literature positing transformation as one of the core ideas around which constitutional meaning making is conducted. According to Cathi Albertyn and Beth Goldblatt, the notion of transformation as “both means and ends” is derived from and encapsulated in the text of the Constitution.<sup>45</sup> As to the nature and form of constitutional transformation, Albertyn and Goldblatt typify it as advancing an agenda of far-reaching change to the make-up of South Africa as the country works to undo the profound inequities of the past. In their own words they assert :

“[W]e understand transformation to require *a complete reconstruction* of the state and society, including *redistribution of power and resources* along egalitarian lines. The challenge of achieving equality within this transformation project involves *the eradication of systematic forms of domination and material disadvantages* based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relations.”<sup>46</sup> (Emphasis mine).

Taking Albertyn and Goldblatt’s account of the type of transformation envisaged by the Constitution at face value, it would be fair to conclude that the transformative outcomes they envisage are nothing short of radical. However, read in the context of their broader call for an “indigenous jurisprudence of equality”, the apparent disconnect between the radical posture implicit in their characterisation of transformation and the limitations inherent in a court-led process of legal interpretation suggests a profound mismatch between means and ends.

Indeed, the embrace of a grammar of transformation is readily discernible in the Constitutional Court’s underlying reasoning in some judgments that the Court has adjudicated to give meaning to the Constitution. For example, in an early Constitutional Court case, transformation as a constitutional imperative was approvingly invoked by Justice Mahomed in *Azanian People’s Organization (AZAPO) v President of South Africa*<sup>47</sup> (AZAPO (1996)). In AZAPO, Mahomed DP typified the Constitution’s transformative imperative as underwriting the impetus in that case to privilege reconciliation over redress. In that case certain sections of the legislation establishing the Truth and Reconciliation Commission (TRC) were challenged by the surviving family members of persons murdered by apartheid forces, including Steve Biko’s family. In holding that the

<sup>45</sup> Albertyn C & Goldblatt B "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality" (1998) 14 *South African Journal on Human Rights* 248 at 248.

<sup>46</sup> Albertyn & Goldblatt (1998) at 248 & 249. See also Moseneke D "The Fourth Bram Fischer Memorial Lecture-Transformative adjudication" (2002) 18 *South African Journal on Human Rights* 315.

<sup>47</sup> 1996 (8) BCLR 1015 (CC).

impugned amnesty provisions did not violate the Constitution, Mahomed DP reasoned thus:

“... [T]he country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the ‘reconciliation and reconstruction’ which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.”<sup>48</sup>

Therefore, according to Mahomed DP, essential to pursuing a transformative agenda on a national scale, was the fostering of an environment wherein human relations between perpetrator and victim were made possible, in spite of victims’, or their survivors’, protestations against what they experienced as a continuing injustice.<sup>49</sup> According to Mahomed DP, the importance of transformation is such that it might render it “necessary in crucial areas to close the book on that past” in the name of nation-building and the promotion of a common future.<sup>50</sup> Jurisprudentially, transformation here can be read as either privileging national interests over holding individual perpetrators to account, or as privileging reconciliation over justice - in essence transformation as demanding compromise.<sup>51</sup>

By way of contrast, in a later Constitutional Court case concerning an administrative decision on the distribution of commercial fishing rights, *Bato Star Fisheries v Minister of Environmental Affairs and Tourism*<sup>52</sup> (*Bato* (2004)), Constitutional Court Justice Ngcobo characterises transformation as being largely concerned with “redressing the historical imbalances caused by unfair discrimination”.<sup>53</sup> In particular, Ngcobo J notes that “the measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities”<sup>54</sup>. In this latter instance, transformation, whilst similarly posited as being forward-looking and in service to the attainment of equality, now interestingly requires that we grapple with the past (rather than look past it) and its consequences as we seek to ameliorate its excesses. Again, in this case a gesture pointing at transformation demanding compromise is discernible in the Court’s reasoning.

Apart from *Bato Star* and other cases involving the transformation of the fisheries industry, such as, *Ocean Ecological Adventures (Pty) Ltd v Minister of Environmental*

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<sup>48</sup> *AZAPO* (1996) at para 17 (emphasis added).

<sup>49</sup> The Promotion of National Unity and Reconciliation Act 34 of 1995.

<sup>50</sup> *AZAPO* (1996) at para 2.

<sup>51</sup> See generally the many essays written in the following collection reflecting upon the *AZAPO* (1996) judgment in Van Marle K & Le Roux W *Law, memory, and the legacy of Apartheid: ten years after AZAPO v. President of South Africa* Pretoria: Pretoria University Law Press (2007).

<sup>52</sup> 2004 (4) SA 490 (CC).

<sup>53</sup> *Bato* (2004) at para 71.

<sup>54</sup> *Bato* (2004) at para 76.

*Affairs*,<sup>55</sup> where the legislative or policy framework specifically invokes a grammar of transformation, it is worth mentioning that the courts have not invested much effort into developing the notion of transformation as an explicit constitutional principle or value.<sup>56</sup> Read against the amount of stock invested by scholars (and public discourses) into the grammar of transformation, this fact of no attempt at the judicial development of a constitutional principle on this score is notable. I would suggest that this may be as a result of the courts' recognition that beyond its rhetorical value, establishing transformation as a justiciable constitutional principle is unworkable owing to its ambiguous nature and the absence of any clearly discernible judicial standards against which to test whether the Constitution's multi-faceted, and sometimes contradictory, transformative commitments are always rationally, and with consistency and coherence, reconcilable.<sup>57</sup>

In legal scholarship, the grammar of transformation has been taken up enthusiastically by many constitutional scholars in recognition of what they perceived as its apparent utility, timeliness and substantive potential insofar as it is believed to capture the Constitution's commitments to fundamentally changing South Africa.<sup>58</sup> In broad discursive terms this has translated into the emergence of transformative constitutionalism.<sup>59</sup> Conceptually, transformative constitutionalism was introduced into the lexicon of South Africa's constitutional discourse by Karl Klare.<sup>60</sup> It has since then become arguably the most frequently and approvingly used term to describe South

<sup>55</sup> *Ocean Ecological Adventures (Pty) Ltd v Minister of Environmental Affairs* [2019] 3 All SA 259 (WCC). See also *New Foodcorp Holdings (Pty) Ltd & another v Minister of Agriculture, Forestry and Fisheries* [2012] 2 All SA 518 (SCA).

<sup>56</sup> For example, reference is made here to the following cases where the Courts' reasoning gestures approvingly to the idea of the Constitution being transformative and is generally supportive of its reasoning, but where very little or nothing in terms of reasoned substantiation of this view is proffered: *Agri South Africa v Minister for Minerals and Energy & others* 2013 (7) BCLR 727 (CC); *City of Tshwane Metropolitan Municipality v Afriforum & another* 2016 (9) BCLR 1133 (CC).

<sup>57</sup> For example, the contradictory readings of what transformation would entail in the majority and dissenting judgments of *City of Tshwane Metropolitan Municipality* (see fn 55 above). See also Modiri J "Race, history, irresolution: reflections on *City of Tshwane Metropolitan Municipality v Afriforum* and the limits of "post-apartheid constitutionalism" (2019) 52 *De Jure Law Journal* 27.

<sup>58</sup> Pieterse M "What do we mean when we talk about transformative constitutionalism?" (2005) 20 *SA Public Law* 155.

<sup>59</sup> For example, see Botha H "Metaphoric reasoning and transformative constitutionalism (Part 1)" 2002 *TSAR* 612; Botha H "Metaphoric reasoning and transformative constitutionalism (Part 2)" 2003 *TSAR* 20; Langa P "Transformative constitutionalism" (2006) 17 *Stell LR* 351; Roux T "Transformative constitutionalism and the best interpretation of the South African Constitution: distinction without a difference?" (2009) 20 *Stell LR* 258; van der Walt A "Tentative urgency: sensitivity for the paradoxes of stability and change in social transformation decisions of the Constitutional Court" (2001) 16 *SAPL* 1; van Marle K "Transformative constitutionalism as/and critique" (2009) 20 *Stell LR* 286; Bishop M & Price A (eds) *A transformative justice : essays in honour of Pius Langa* Cape Town : Juta (2015).

<sup>60</sup> Klare K "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146.

Africa's project of post-1994 constitutionalism.<sup>61</sup> Transformative constitutionalism according to Klare is:

“... [A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word.”<sup>62</sup>

Resonating somewhat with Albertyn and Goldblatt's more general depiction of constitutional transformation, Klare's conception of transformative constitutionalism is similarly a bold and expansive notion whose concerns appropriately span democratic politics, social and institutional power relations, and broadly touches on questions of distributive justice. Sandra Liebenberg echoes similar sentiments, namely, that transformative constitutionalism “implies fundamental changes to unjust economic and social structures”, whilst at the same time seeking “to achieve a more equitable distribution of social and economic resources”<sup>63</sup>. I have argued in earlier work that this framing of transformative constitutionalism, despite its seemingly radical posturing, has established little more than what can be described as a “discourse of hope” in that whilst pronouncing on structural and redistributive material questions, outside of adjudication its proponents rarely pronounce on these questions.<sup>64</sup> I will develop this point below.

As already alluded to above, it is striking that whilst positing expansive and arguably radical notions of change, proponents of transformative constitutionalism frame South African constitutionalism primarily in juridical terms with courts being afforded a central role in giving meaning to, and determining the parameters of, constitutional transformation. Whilst unlikely that it was Klare's intention to limit the conception of transformative constitutionalism to narrow court-centric terms at the expense of cultivating or instilling more popular democratic and egalitarian redistributive ideals, transformative constitutionalism as a distinct discourse has evolved in such a way that it is almost entirely focused on socio-economic and politically infused constitutional adjudication. For example, retired Constitutional Court Justice Moseneke, echoing Klare, asserts that “[t]he transformative enterprise is *of*

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<sup>61</sup> See also Roux (2009) who, whilst sceptical of its value, has made a similar observation about the proliferation of transformative constitutionalism at a conceptual level.

<sup>62</sup> Klare (1998) at 150.

<sup>63</sup> Liebenberg S *Socio-economic rights: adjudication under a transformative constitution* Cape Town: Juta (2010).

<sup>64</sup> Sibanda S "Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty" (2011) 22 *Stellenbosch Law Review* 482 at 487.

course a legal enterprise and it occurs within the context of the law"<sup>65</sup>. Justice Moseneke's view is not an isolated instance; rather, it is the case that many writings within the discourse focus almost exclusively on litigation, case analysis, legal reasoning and justifying the judiciary's role when it comes to attaining the right balance with respect to separation of powers questions and what other branches may experience as an intrusive form of judicial review.

To the credit of proponents of transformative constitutionalism, they have recognised and acknowledged the limits of a legalistic adjudication driven conception of constitutionalism.<sup>66</sup> A commonly held view amongst proponents of transformative constitutionalism is that it is a deeply imbedded traditionalism and conservatism characteristic of South African legal culture that poses a danger to the potentialities of transformative constitutionalism.<sup>67</sup> Legal culture, according to Dennis Davis and Karl Klare, comprises "the characteristic legal values, habits of mind, repertoire of arguments, and manners of expression shared by a group of lawyers at a given, historically situated time and place"<sup>68</sup>. Therefore, the nub of the danger according to proponents is one of proper implementation, namely, that judges may, owing to the prevailing conservative legal culture and/or their politics, interpret and enforce the Constitution in ways that subvert its progressive and egalitarian vision of transformation.<sup>69</sup> An example of how this concern has played itself out in practice is evident in how courts are often charged with failing to develop the common law to accord with the demands of transformative adjudication.<sup>70</sup> In essence, the courts are said to have remained trapped in the ways of old and have thus served to arrest the Constitution's potential to bring about transformation as envisioned by proponents of transformative constitutionalism.

##### **5. BEYOND A COURT-CENTRED GAZE: TRANSFORMATIVE CONSTITUTIONALISM'S REVERBERATING SILENCES**

My observations and the critique I offer here build on some of my earlier work where the nub of my critique was to argue that transformative constitutionalism was afflicted by such major "pitfalls" as to render it ill-suited to deliver the type of emancipatory changes claimed in its name.<sup>71</sup> Whilst I intend to build upon those earlier critical interventions, which I realise upon greater reflection and the passage of time are capable of a sanguine and redemptive reading, I revise those views here as I argue that

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<sup>65</sup> Moseneke (2002) at 317 (emphasis mine).

<sup>66</sup> Klare (1998) at 170.

<sup>67</sup> Klare (1998) at 171-2

<sup>68</sup> Davis D & Klare K "Transformative constitutionalism and the common and customary law" (2010) 26 *South African Journal on Human Rights* 403.

<sup>69</sup> See Moseneke (2002) at 315-316.

<sup>70</sup> See Davis & Klare (2010); Bhana D & Pieterse M "Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited" (2005) 122 *South African Law Journal* 865.

<sup>71</sup> Sibanda (2011); Sibanda "Not quite a rejoinder: some thoughts and reflections on Michelman's 'Liberal constitutionalism, property rights and the assault on poverty'" (2013) 24 *Stellenbosch Law Review* 329.

there is no salvaging of transformative constitutionalism, since as imagined and practised it has exhausted any emancipatory potential I believed it to harbour.

In making this argument, I advance the view that transformative constitutionalism, when confronted with questions of how to address issues of structural and material inequality, offers little beyond a jurisprudence grounded in the balancing of tensions between government policy, programs or conduct and entrenched constitutional rights – an approach whose discursive origins dovetail well with South Africa’s politics compromise.<sup>72</sup> Simply put, I argue here that beyond a legalistic analysis of the constitution/al/ive as interpreted by the courts, transformative constitutionalist scholarship has singularly failed to engage with or offer meaningful critical insights into South Africa’s deepening political, economic, social, cultural and epistemic crisis. In short, the question I believe proponents of the discourse must answer, if it is to have any hope of justifying its current pride of place, is what does the discourse offer as a response to South Africa’s constitutive crisis in the making beyond litigation and decrying poor legal and policy implementation by the government? And most importantly, what or whose interests are served by its prevailing dominance over how South African constitutionalism has come to be construed within this grammar of transformation in the face of an unravelling of the compromises of the 1990s.

Before continuing with my critique, a brief recap of the core claims and characteristics of transformative constitutionalism as *a particular conception of South African constitutionalism* will better contextualize the elaboration of the argument below. At its core, transformative constitutionalism, at least according to its proponents, is a constitutional project that is:

- (i) committed to changing the historically determined political, economic and social institutional power relationships in democratic, participatory and egalitarian ways;
- (ii) political in its nature with its vision of political social and economic change deriving from the Constitution and the history of its making;
- (iii) post-liberal in its orientation, in that it self-consciously departs from “traditional” liberal conceptions of constitutionalism; and
- (iv) a “legal enterprise” under a supreme constitution wherein courts are central and have the ultimate final say on constitutional meaning-making.

Assuming that one accepts these as the core features of transformative constitutionalism, I argue further that contrasted with its claims postulating structural change and re-imagined egalitarian social and economic relations, in practice proponents of transformative constitutionalism have quite curiously set it limited, middle-of-the-road and legalistic intellectual and programmatic horizons. In short, transformative constitutionalism, I argue, has done little to take us beyond what might

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<sup>72</sup> For an early, almost prescient, account of the potential pitfalls or implications of a politics of compromise on undoing the material legacies of colonial-apartheid see: Mutua M “Hope and despair for a new South Africa: the limits of rights discourse” (1997) 10 *Harv Hum Rts J* 63.

be termed enlightened liberal legalism. In other words, despite continuing to live and write in a political, economic and cultural milieu characterised by deepening inequality and social injustice, the radical claims propagated have not translated into much more than rights or law-based approaches to imagining change. From the literature, there is little evidence of other sustained work within the discourse directed at inculcating or influencing institutional or structural power shifts or far-reaching redistributive innovations beyond the courts.<sup>73</sup>

So whilst it is certainly arguable that transformative constitutionalism has successfully established some measure of internal discursive coherence, I argue that this has been possible largely through proponents focusing their discursive interventions on institutional and rights related adjudication, whilst rarely demonstrating how transformative constitutionalism grapples with undoing the realities of South Africa's largely undisturbed racial, social, cultural and epistemic hierarchies that are obviously fertile ground for what is undoubtedly a growing sense of disillusionment with respect to the Constitution and its popular promise to "improve the quality of life of all citizens".

In furthering my critique let me return to what proponents of transformative constitutionalism consider to be its Achilles heel, namely, what they typify as an impeding traditionalist and conservative South African legal culture. Assuming that one accepts this proposition, then it surely follows that a potential solution, or an integral part of it, has to be to work to negate the deficiencies of *this* culture by attending to, amongst other things, transformative legal education, legal reasoning and adjudicative

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<sup>73</sup> For example, see Le Roux M & Davis D *Lawfare – judging politics in South Africa* Johannesburg : Jonathan Ball Publishers (2019). The book, amongst others, concerns itself with the state of transformation and politics in post-1994 South Africa by focusing on "political cases"; with deliberateness it centres adjudication as the a key node of South African constitutionalism. This is of course what is fundamentally at stake with lawfare, the use of courts as a preferred site of political contestation. The authors, from the evidence provided in the book, if not supportive of, are comfortable with, the "good side" of lawfare. In the authors' own words, they write at 19: "Lawfare is a central part of this discussion. As explained above, courts are an important and necessary site of accountability, and *an instrument* for realising the constitutional vision (the good side of lawfare). But they can and, indeed, have been abused by politicians precisely because they may be more decisive and effective than the messy, incremental process of politics (the bad side of lawfare). So while lawfare is a complex and contested concept, the manner in which the South African Constitution has envisaged the governance of the country mandates the courts to become partners with the other two arms of government in the reconstruction of society. In turn, that means that political, economic and social controversies will be fought out in the courts, which is indeed what the constitution envisaged." See for a contrary characterisation of lawfare Handmaker who says : " However, in oppressive and imperialistic societies and political systems, or even in ostensibly liberal democratic regimes, law and even human rights can be a form of lawfare, taking negative, delegitimising and oppressive forms, justifying retrogressive policies and even reinforcing the hegemonic actions of states." Handmaker (2019). *Researching legal mobilisation and lawfare* (No 641). *ISS Working Papers - General Series*. International Institute of Social Studies of Erasmus University (ISS) available at <http://hdl.handle.net/1765/115129> (accessed 22 November 2020).

techniques.<sup>74</sup> If this sounds overly simplistic, that is because it is and exposes a serious shortcoming in transformative constitutionalism's framing of what is at stake as far as the project of the (re)constituting of South Africa in accordance with its tenets is concerned.

By framing transformative constitutionalism's main challenge as being legal culture without taking the next, most obvious step, namely, that of problematising it within the context of larger more pervasive hegemonic Eurocentric culture that overlaps neatly with a capitalist system rooted in colonial-apartheid, transformative constitutionalists (as avowed non-racists) have, most likely unwittingly, contributed to the perpetuation of white cultural and economic dominance despite professed commitments to advancing deep-seated society-wide structural and material change. In other words, by focusing predominantly on legal culture, proponents of transformative constitutionalism omit or fail to confront, what I argue are, the most pressing and urgent questions relating to the (re)constitution of South African society. Questions, such as ,how to dislodge the well- preserved, largely racialised hierarchies of being, as well as the underlying systems, institutions and networks of knowledge, customs, social norms and practices that an adjudication centred conception of constitutionalism cannot in the ordinary course of events reach, let alone impact in a structurally cohesive, strategic and timeous manner.

Writing in a slightly different context, Joel Modiri has poignantly captured the inadequacy of law driven change by remarking that "while the laws of the country have changed considerably, the architecture, framework and logic of colonialism-apartheid remains"<sup>75</sup>. From within the discursive corridors of transformative constitutionalists, there is little evidence of a serious or sustained engagement with deepening lines of social, economic, political or cultural tensions as they have come to manifest. For example, it would be important and welcome to hear a transformative constitutionalist perspective on the #feesmustfall movement. How would transformative constitutionalism help us make sense of the fallists' call for free education as a constitutional right<sup>76</sup> whilst also often calling into question the Constitution's very legitimacy? Or fallists' demands for greater access to the corridors of knowledge that are universities whilst simultaneously denouncing these very same spaces on the grounds that they retain racist, colonial, gendered, alienating and assimilationist institutional cultures that have arguably been the catalysts of many of the "domestic" campus protests that in many instances preceded the coalescence into the nationwide #fallism movement. The #fallism movement, more than being about unaffordable fees as previously mentioned, raised probing questions about the very nature of our South Africa's "transforming" society; what it means to have a place in it and who gets to participate and be in/excluded from shaping what it is becoming. What would

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<sup>74</sup> See Quinot G "Transformative legal education" 2012 (129) *South African Law Journal* 411; Moseneke D "Transformative constitutionalism: its implications for the law of contract" 2009 (20) *Stellenbosch Law Review* 411.

<sup>75</sup> Modiri J "Law's poverty" (2015) 18 *Potchefstroom Electronic Law Journal* 224.

<sup>76</sup> Section 29 of the Constitution provides for a right to education.

transformative constitutionalists have us do? Should the fallists rather have mounted a court case in order to bring the issues they raised within the reach of the courts? Should they have relied on constitutional rights, in which instance it would have to have been the constitutional right to education which, whilst guaranteeing basic education, makes further (university) education subject to progressive realisation much like other socio-economic rights?<sup>77</sup>

In concluding this section, it is worth reiterating the rub of my argument, namely, that transformative constitutionalism betrays its own claims and stated ambitions in that by overly privileging the adjudicative role of courts as *the* idealised site of contesting, determining and enforcing the meaning of the Constitution, it arrogates to the courts the power and right to ultimately control the ebb and flow of constitutional politics. For instance, even where consideration is given to what a transformative role for other branches and State institutions might be under what Liebenberg terms a “reconceptualised separation of powers”<sup>78</sup>, that role seems to centre around that of the courts and their powers to determine final constitutional meaning, and by necessary implication the visioning of what is possible and desirable (influenced, no doubt, by a small but influential group of constitutional law litigators, public interest law groups, and behind them legal academics).

Considerations of constitutional supremacy and counter-majoritarianism notwithstanding, little attention seems to be paid to justifying why the privileging of courts and adjudication is either necessary or desirable, particularly considering the costs of litigation in South Africa.<sup>79</sup> In sum, crucially, this court-centric bias has the natural result of tending to diminish, if not sometimes negating the critical roles of democratic politics; the other branches; constitutional institutions; civil society; and not least the populace; in the framing and development of the constitutional project.

More profoundly in a society where to engage in sophisticated constitutional litigation depends not only on wealth, but also significantly on social and cultural capital, this bias towards adjudication poses difficult questions about how those within the discourse of transformative constitutionalism conceive of constitutional politics; where and how those politics “legitimately” play themselves out beyond the courts; and no less significantly, who is deemed to be a worthy political subject or agent in as far as contesting and determining what a “transformed” South Africa should look like or aspire to be. It is worth recalling that, as Terreblanche so correctly observed earlier, the “political transformation” ushered in by the Constitution has largely failed to disrupt the

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<sup>77</sup> For a useful overview of the limits and possibilities of constitutionalised socio-economic rights in South Africa see the essays in Langford M, Cousins B, Dugard J, & Madlingozi T (eds.) *Socio-economic rights in South Africa: symbols or substance?* Cambridge: Cambridge University Press (2013).

<sup>79</sup> The matter of prohibitively high legal costs in South Africa is currently under investigation by the South African Law Reform Commission under Project 142, Issue Paper 36 “Investigation into legal costs” available at <http://www.justice.gov.za/salrc/ipapers/ip36-prj142-LegalFees.pdf> (accessed 16 April 2020).

racialised disparities of wealth, income, living conditions or life opportunities. Therefore, I argue here that it has been necessary to interrogate the value or the cost of an overly juridicised conception of constitutionalism particularly in the light of South Africa's ever looming structural questions around prevailing redistributive injustice and continuing patterns of producing social, political, economic, cultural and epistemic inclusion/exclusion or insider/outsider status, only now on ostensibly non-racial lines.

## 6. CONCLUSION

As I draw to a close I turn to Tshepo Madlingozi in order to invoke his timely and searing critique of what he provocatively dubs "neo-apartheid constitutionalism" and its assimilationist instincts towards recognition, incorporation and distribution. In proffering this term, Madlingozi characterises post-1994 South Africa as a "society" that has achieved a "transformation" from the colonial to the neo-colonial in formal constitutionalist terms, but where that transformation has delivered a shift in State form rather than a material or substantive one as far as the lived experiences of the black majority, who remain structurally excluded, is concerned. In advancing the reasons for the need to adopt this term, Madlingozi calls our attention to

"the fact that post-1994 constitutional re-arrangements *are transforming* society in ways that do not instantiate a fundamental rupture with the inherited, sedimented and bifurcated social configuration ... that in this time of neo-apartheid the contemporary discourse of social justice, which is transformative constitutionalism's master frame for social emancipation, is actually complicit in the continuation of this anti-black bifurcated societal structure"<sup>80</sup>.

Without elaborating on Madlingozi's well-constructed and richly substantiated argument, I wish to highlight two important points with which I strongly concur. First, that there is no denying South Africa has since 1994 experienced *a* transformation. Secondly, rather than erupt South Africa's racist capitalist socio-economic foundations, transformative constitutionalism, as a "master frame", has presided over and enabled the continuation of largely undisturbed white hegemony along multiple axes. In short, Madlingozi, I suggest, implicitly recognises that it is difficult to imagine post-apartheid South Africa outside of a narrative of transformation. However, beyond that, when examined closely relative to the lived reality of the black majority, one cannot but both recognise and question the work performed by transformative constitutionalism in the perpetuation of social injustice despite claims to the contrary.

The aim of this article has been to advance a critique of South Africa's embrace of a grammar of transformation after the official demise of colonial-apartheid, in particular how the resultant narrative has been deployed in a totalising fashion as it is held out as being definitive of the processes, measures and goals of change under the 1996 Constitution. In performing this critique, I have argued that transformation's ability to find wide and enduring resonance has had much to do with its emergence as a

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<sup>80</sup> Madlingozi (2017) at 125.

transitional site of compromise that permitted erstwhile political and ideological adversaries to navigate a complex social and political transition where there were no clear winners or losers. A quarter of a century after the moment of transition, I have asked in this article why South Africa continues to be invested in this grammar and addressed myself to the implications of this. In essence, I have argued that whilst the imperative of constitutional transformation may have formed around a common commitment to constitutional rights and values, its lived manifestation in what has emerged as the hegemonic discourse of transformative constitutionalism with its bias for adjudication driven social change has negated any pretensions it may have projected as being an emancipatory discourse directed at disrupting the multiple legacies of colonial-apartheid.

In summary, I have argued that as far as the narrative of transformation has been embraced and held out as encapsulating post-apartheid South Africa's constitutive vision, then its culmination in the court-centric discourse of transformative constitutionalism has failed to offer any enduring concrete structural, material or epistemic interventions that gesture towards the disruption of the largely undisturbed patterns of white or Eurocentric economic, social, cultural and epistemic domination. Finally, it is worthy of note to observe that transformative constitutionalism's discursive hegemony has largely come into place in parallel with a growing disillusionment and heightened calling into question of the compromises that underwrote the Constitution. The discourse's conspicuous absence from contemporary debates regarding the growing political, social, and economic unrest that gestures towards the unravelling of these compromises, such as #feesmustfall, surely demands answers of the proponents of transformative constitutionalism as to how it continues to justify itself beyond its current epistemic hegemony.<sup>81</sup>

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