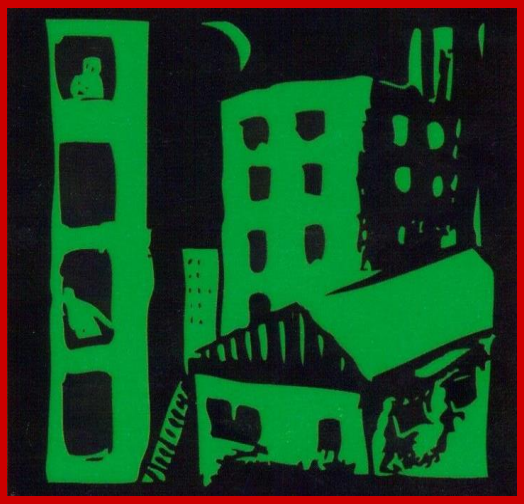
LAW
DEMOCRACY
& DEVELOPMENT



VOLUME 28 (2024)

DOI: http://dx.doi.org/10.17159/2077-4907/2024/ldd.v28.12

ISSN: 2077-4907

Neoliberalism and legal culture: The path of least resistance is what makes rivers run crooked

LINDANI MHLANGA*

Post-doctoral fellow, Free State Centre for Human Rights, University of the Free State, Bloemfontein, South Africa

https://orcid.org/0009-0001-3376-8804

ABSTRACT

This article examines the relationship between neoliberalism and legal culture in South Africa, focusing on how the neoliberal paradigm influences legal interpretation and the adjudication of socio-economic rights. It explores how neoliberalism, defined as the dominance of capitalist forces over weaker oppositional interests, permeates judicial decision-making, shaping how courts address issues of inequality and social justice. The article argues that neoliberalism, in prioritizing market interests, has contributed to a conservative legal inertia that prevents

* This article was drafted as response to a call for papers for the colloquium, "Legal culture 25 years on: Conceived, perceived and lived", organised by the University of the Western Cape's research unit for legal and constitutional interpretation in collaboration with the Free State Centre for Human Rights.

transformative legal outcomes. This dynamic has entrenched existing socio-economic disparities, especially as state power continues to serve the interests of capital, reinforcing apartheid-era economic structures. Despite the transformative potential embedded in South Africa's constitutional framework, the legal system remains constrained by what Karl Klare terms as professional sensibilities, codes, and values, many of which are influenced by neoliberalism. Drawing on theoretical insights of Karl Klare, the article calls for a rethinking of legal culture and a shift towards more relational, metaphorical approaches that challenge hegemonic narratives. Only by resisting these metanarratives can meaningful transformation be achieved in the pursuit of equality and justice.

Keywords: ANC; culture; legal; liberal; power; neoliberalism; socio-economic; South Africa; Karl Klare; transformative constitutionalism; Foucault

1 INTRODUCTION

This article is an extension of the continuing review of Karl Klare's groundbreaking paper on transformative constitutionalism released 25 years ago.[1] Essentially, it highlights the extra-legal factors that place strain on the development of legal culture and value interpretation in the direction of a more proactive constitutionalist practice. To that end, the article makes its contribution by exploring neoliberalism as a normative political rationality that, within the South African context, maintains the status quo of a conversative legal culture where conservatism is already the rule, as Klare observed. This is in reflection of an awareness that the interrogation of ways in which "dominant cultural categorical systems both enable and legitimate [current practice]" is necessary for situating resistance against the "rigid, static, and monolithic" character of such practice.[2] The exploration in this article is based, moreover, on an understanding that South Africa's apparent failure to realise the socio-economic rights set out in the Constitution may have "less to do with the Constitution than with political will and structural constraints", which is why understanding the leveraging of power is critical.[3]

"Transformative constitutionalism" is defined as a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.[4] Klare posits that South Africans have adopted a post-liberal Constitution, one that may plausibly be read not only as open to but committed to large-

[1] See generally Klare K "Legal culture and transformative constitutionalism" *South African Journal on Human Rights* (1998) 14 at 160–171.

[2] See Klare (1998).

[3] Glaser D "National democratic revolutions meet constitutional democracy" (2017) in Webster E & Pampallis K (eds) *The unresolved national question: Left thought under apartheid* Johannesburg: Wits University Press (2019) 274–296.

[4] See Klare (1998).

scale, egalitarian social transformation.[5] More significantly, he asserts the need to place adjudication at the strategic centre of the pursuit of transformative projects.[6]

In that regard, Klare raises the question of the autonomous role of legal culture in shaping and steering adjudication, which he does, inter alia, by identifying what he terms a "disconnect" between the 1996 Constitution's transformative aspirations and the conservative character of South African legal culture.[7] In addition to accurately capturing the character of this culture, Klare's article on transformative constitutionalism is still relevant today, 25 years later, because it situates adjudication as a praxis for the change in culture that would ultimately translate into a transformation of the majority of South Africans' lived reality. However, not much has changed materially since then, in spite of Klare's prescient diagnosis.

South African legal culture remains conservative, notwithstanding some encouraging developments over the last 25 years.[8] In this context, "conservative" is used in the sense in which Klare defined the term: "conservatism" refers to a seeming apathy towards the idea of pushing legal materials past their first sense of limitation.[9] This is exemplified by the tendency to portray legal practitioners as detached individuals who operate outside the realm of social and value-laden contexts in which the law is applied.[10] The liberal inclination is to maintain an illusion of neutrality towards substantive concepts of the good by promoting consistency while ignoring contestation and conflict.[11] This is despite the fact that the notions that underlie these norms – freedom, equality, and the rule of law – are deeply contentious and politically specific.[12] It is the confrontation with the censure that arises when one attempts to rethink norms like freedom, equality, and the rule of law in ways that challenge the politically specific and contentious concepts underlying these values. The consequent experience is that of being perceived as

[5] See Klare (1998).

[6] See Klare (1998).

[7] See Klare (1998).

[8] During the two-day conference, several former and current judges of the Constitutional Court, as well as Karl Klare, acknowledged that conservatism remains prevalent even after 25 years of non-racial democracy in South Africa. The discussions highlighted the courts' reluctance to impose positive socio-economic obligations, as evidenced by socio-economic rights cases decided in the Constitutional Court the last two decades. See *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997); *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009); *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* (CCT 157/20) [2021] ZACC 45; 2022 (8) BCLR 985 (CC) (7 December 2021).

[9] See Mhlanga L "To remain" (LLD thesis, University of Free State, 2022).

[10] Wilson S *Human rights and the transformation of property* Cape Town: Juta (2021) 24–27.

[11] Mouffe C *The return of the political* London: Verso (1993) at 3–5.

[12] Botha H "Metaphoric reasoning and transformative constitutionalism" (2002) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 612 & Mhlanga (2022) 273.

manifestly deviant and, as such, as corrupt, opposed to the rule of law, and against the Constitution.[13]

The analysis of external influences on the behavior of legal actors, particularly judges, is not unique to Klare or this article.[14] This is not intended as a slight to the professionalism of judges; rather, it is an acknowledgment that socialisation – both internal and external – does not end when judges sit in court and that it, like every human experience, is a critical resource for decision-making.[15]

To reiterate, the aim of this article is to consider the influence of neoliberalism on South Africa's legal culture. It looks at how the post-apartheid governance frameworks' embrace of free market politics, or neoliberalism, may have a limiting impact on South Africa's ability to undergo change through transformative constitutionalism. The section that follows considers South Africa's adoption of neoliberalism and its socio-political implications. The impact of neoliberalism on the behaviour of legal actors – specifically through socialisation practices – is examined thereafter. This examination extends to neoliberalism's capacity to influence perspectives on the history, application, interpretation, justification, and reasoning of the law, as well as on politics and morality. In the concluding section, the article considers the challenges that a neoliberal(ised) legal culture presents to the practice of transformative constitutionalism, as envisioned by Klare, and what must be done in response.

2 NEOLIBERALISM: CHOICE OR GRAVITATION?

Neoliberalism, as defined by David Harvey, is the belief that the best way to promote human well-being is to free up individual entrepreneurial freedoms and skills within an institutional framework typified by robust private property rights, free markets, and free trade.[16] It is the understanding that the role of the state is to create and preserve the institutional framework appropriate to such practices.[17]

Globally, the transition to neoliberal politics is attributed largely to internal factors such as economic hardship, which gave rise to external factors like globalisation leverage.[18] Governments, driven by internal pressures, often turn to external sources for resources,

[13] See Mhlanga (2022).

[14] See Hilbink L & Ingram M "Courts and rule of law in developing countries" in *Oxford Research Encyclopedia of Politics* Oxford: Oxford University Press (2019); Robinson R & Swedlow B "Beyond liberal and conservative: Advancing the study of judicial behaviour with a cultural theory of political values" (2018) 6(2) *Journal of Law and Courts* 263.

[15] Robinson (2018) 263–302.

[16] Harvey D *A Brief History of neoliberalism* Oxford: Oxford University Press (2005) 1–3, 64, 65–66, 76.

[17] See Harvey (2005).

[18] Roccu R & Talani LS "Introduction: The globalisation debate – from de-globalisation to the dark side of globalisation" in *International Political Economy Series* London: Palgrave Macmillan (2019).

especially in contexts where international influences dominate their available options.[19] Like clockwork, these internal needs push them to engage with global actors, financial institutions, and foreign markets to address domestic challenges, reinforcing their dependence on international forces. The implementation of international systems of economic governance and stabilisation plans that include bailouts and foreign direct investment reinforces unprecedented levels of market reliance. This reliance paves the way for the transnationalisation of production and the politics that go with it, including among the state, labour, and business.[20] Transnationalisation is based on class and is, essentially, capitalism.[21]

In the twilight of the repressive apartheid system, it was held that the international outlook presented little to no option for a would-be new government to address its inherited internal fiscal problems.[22] The collapse of the Soviet Union confirmed the impracticality of establishing a socialist system of economic governance at the time, allowing neoliberal economics to dominate global politics.[23]

Although the apartheid economic strategy seemed to benefit white capital locally, it was the case, as Lipton notes, that requirements such as mandatory job reservation for white workers in the mining industry had become a thorn in the side of business.[24] From the middle of the 1960s through to the 1980s, South Africa's rate of growth slowed down, causing a loss in real gross domestic product (GDP) per capita.[25] By the 1990s, GDP had decreased in real terms, and the South African economy had collapsed by May 1993.[26]

Not only was the country's growth rate under apartheid low, but the outcomes of any growth that had occurred were, to say the least, unequally distributed, which in turn had an negative impact on business.[27] By applying a public choice model, Kaempfer and Lowenberg found that, although the economy was negatively impacted by international

[19] See Roccu & Talani (2019).

[20] See Overbeek HW "Transnational historical materialism: Theories of transnational class formation and world order" in Palan RP (ed) *Global political economy* (2002) London: Routledge 168–183.

[21] Harvey (2005).

[22] Mamdani M *When does reconciliation turn into a denial of justice?* Pretoria: HSRC Publishers (1998); see also Terreblanche (2002).

[23] See Mamdani (1998).

[24] Lipton M *Capitalism and apartheid: South Africa, 1910–1986* London: Wildwood House Aldershot Hants (1986).

[25] Du Plessis SA & Smit BW "Countercyclical monetary policy in South Africa" (2007) 31(1) *Journal for Studies in Economics and Econometrics* 79.

[26] South African Reserve Bank *South African Reserve Bank Quarterly Bulletin* 205, September 1997.

[27] According to the South African Institute of Race Relations (1992) at 262–263, surveys conducted between 1990 and 1993 found that between 35 and 45 per cent of people in South Africa lived below the officially defined poverty line.

sanctions, apartheid's domestic costs ultimately rendered the system unsustainable, especially when domestic resistance grew in the 1980s.[28] Anti-government lobbying from within the capital-holding protagonists began to emerge as a result of the white capital bloc's deteriorating capital productivity. In reaction to these pressures, the Nationalist Party administration began implementing neoliberal policies in the late 1980s.[29]

Thus, one may contend that a combination of domestic and foreign factors influenced the post-apartheid government's adoption and maintenance of neoliberal policies.[30]

3 THE POLITICAL COST OF NEOLIBERALISM

There has been a rising perception in South Africa that the role of the post-apartheid government is to protect the rich and well-off at the expense of the less fortunate.[31] This has been caused partly by unfavourable attitudes towards the austerity measures that go hand in hand with neoliberal economic policies. These policies have been harmful to the lives of South Africa's impoverished population, who experience increasing rates of unemployment and poverty at a time when there has been hope for the opposite in the post-apartheid era.[32]

This section considers neoliberalism's impact on the prospects of transforming South Africa into a more equal, inclusive, and, ultimately, legitimate society. As the previous section suggests, neoliberalism was not the first choice of courses of action to take given the many other workable alternatives. The post-apartheid administration had little choice but to embrace neoliberalism in order to preserve an economy that was otherwise destined for catastrophic implosion. However, neoliberalism – a system associated with the diminution of state power – also entailed an entrenchment of the status quo in South Africa, a country where resources have traditionally been allocated

[28] Kaempfer W & Lowenberg A "The theory of international economic sanctions: A public choice approach" (1988) 78(4) *American Economic Review* 786.

[29] Gelb S "The politics of macroeconomic policy reform in South Africa" Paper presented to the conference on Democracy and the Political Economy of Reform (1998) Cape Town, South Africa available at https://wiredspace.wits.ac.za/items/08ceaee6-1519-4e6b-ba2d-f5c67aa3fb10 (accessed 20 August 2023).

[30] See Narsiah S "Neoliberalism and privatisation in South Africa" (2002) 57(1/2) *GeoJournal* 3; Feinstein C *An economic history of South Africa: Conquest, discrimination and development* Cambridge: Cambridge University Press (2005) 154–156.

[31] Schneider GE "The post-apartheid development debacle in South Africa: How mainstream economics and the vested interests preserved apartheid economic structures" (2018) 52(2) *Journal of Economic Issues* 306.

[32] Sebake BK "State capture as a manifestation of the historic narrative of oligarchy in selected African countries" (2017) presented at the 2nd Annual International Conference on Public Administration and Development Alternatives, 26–28 July 2017 Tlotlo Hotel, Gaborone, Botswana available at https://studev.mandela.ac.za/studev/media/Store/documents/SGD%20Knowledge%20Resposit ory/5-State-Capture-B-Sebake.pdf (accessed 10 September 2023).

to certain groups – the white population and, later, wealthy capitalists – at the expense of other groups, namely the black population and, by extension the impoverished.[33]

According to Terreblanche, the post-apartheid adoption of neoliberalism by the ANC is significant because it entailed yielding to the power dynamics that characterised the apartheid era.[34] Similarly, Alexander argues that

the capitalist class can be said to have placed their property under new management and what we are seeing is the sometimes-painful process of the new managers trying to come to terms with the fact that they are managers certainly but not by any means the owners, of capital ... Ownership and control of the commanding heights of the economy, the repressive apparatuses of the state ... the judiciary, the top echelons of the civil service, of tertiary education and strategic research and development, [has] remained substantially in the same hands as during the heyday of apartheid.[35]

In the 1990s, Mamdani foresaw the hollowness of a social contract that would merely see the white ruling class give up its political power in exchange for keeping economic power in a way that included a small black elite.[36] Constitutional rights would later be used to protect the rights of the haves at the expense of the have-nots.[37] These assessments arose from the understanding that apartheid and the South African capitalist system were mutually reinforcing in the past and that the white capitalists later dissociated from apartheid only in order to secure their own survival.

When the ANC government took power in 1994, it enacted measures that appear to have served as a cloak loosely covering a con(tro)verted Marxist ideology that had previously served as the movement's banner. The Reconstruction and Development Programme (RDP) emerged from a desire to be perceived as committed, or from a fading determination, that the consequences of decades-long disenfranchisement needed to be addressed as a priority.[38] The RDP was originally a capital- and welfare-inclined economic policy, but as the lack of public resources became more apparent, it transitioned to a solely capital-inclined strategy.[39] The administration that replaced the

---

[33] Soudien C, Reddy V & Woolard I (eds) *The state of the discussion of poverty & inequality: Diagnosis prognosis responses: State of the nation* Cape Town: HSRC Press (2019).

[34] Terreblanche S "Testimony before the TRC during the special hearing on the role of the business sector" *Truth and Reconciliation Commission* (1997).

[35] Alexander N *An ordinary country: Issues in the transition from apartheid to democracy in South Africa* Pietermaritzburg: University of Natal Press (2002) 61–64.

[36] Van Marle K "A 'right' to the university" (2019) 51(1) *Acta Academica* 109; Mamdani (1998).

[37] See Mamdani (1998).

[38] Padayachee V & Van Niekerk R *Shadow of liberation: Contestation and compromise in the economic and social policy of the African National Congress, 1943–1996* Johannesburg: Wits University Press (2019).

[39] Fourie D "The neoliberal influence on South Africa's early democracy and its shortfalls in addressing economic inequality" (2022) 50(5) *Philosophy & Social Criticism* 823.

apartheid government soon had to deal with the terrible economic circumstances it had inherited. It was thus compelled to implement policies and procedures aimed at improving economic growth and the nation's standing in the international lending markets. Along with inheriting debts, the post-apartheid administration had to deal with the capital forces' coercive expectations that had become more intense as apartheid ended. That is, the government had both internal and external forces to placate.[40]

In 1996, the RDP was replaced by the Growth, Employment, and Redistribution (GEAR) policy, which placed greater value on trade liberalisation, deregulation, and privatisation as the main strategies for restoring investor confidence in South Africa's macroeconomic sectors and markets.[41] In 2013, the National Development Plan (NDP), which was said to be primed at relieving poverty and reducing inequality, was adopted. The NDP, in contrast to earlier programmes mentioned above, is not an economic strategy, as former state and ANC officials have noted.[42] This is so because the NDP expresses the government's vision or objectives rather than the practical methods for achieving them.[43]

In my opinion, the NDP represents the height of free market politics post-apartheid, a time when the status quo of free market politics is as unchallenged as it has ever been in the absence of a practical economic strategy. South Africa, like many other post-colonial states over the previous few decades, has defined the politics of the conceivable and the impractical by making market abstraction its centrepiece of governance.[44] In the process, it has greatly reduced the ability of politicians to address the legacy of apartheid.[45]

4 NEOLIBERALISM AND LEGAL CULTURE

Turning away from the political immobilisation that the adoption of neoliberalism in the early years of the South African democratic dispensation dealt to the nationalist government, we now consider the effects of neoliberalism on legal culture, which have hindered the emergence of a culture that would facilitate Klare's vision of a transformed South Africa. At the outset, I note that the South African constitution is increasingly viewed as incapable of bringing about, or at least laying the groundwork for, meaningful

[40] Becker D "A state in transition: The negotiated birth of the post-apartheid state" in Becker D (ed) *Neoliberalism and the state of belonging in South Africa* Springer International (2022) 159–221.

[41] See Fourie (2022).

[42] See Waldimer P "Thabo Mbeki lashes Jacob Zuma era ... and the failure of a number of ANC policies" (2019) *City Press* available at https://www.news24.com/citypress/news/thabo-mbeki-lashes-jacob-zuma-era-and-the-failure-of-a-number-of-the-ancs-policies-20190429 (accessed 1 November 2023).

[43] See Waldimer (2019).

[44] See Becker (2020).

[45] See Becker (2020).

change. It is viewed as the final embodiment of a well-calculated entrapment of any organised desires for reform.[46]

This criticism is based on, among other things, the idea that the conflict over, and, consequently, the struggle for, interest dominance, is more keenly alive today than it was in the past. Yet the playing field is not level in this struggle, and nor has it ever been so. It is not level because, inter alia, the adopted framework (the Constitution and the ensuing neoliberal policies) either neglects, or does not intend, to acknowledge past injustices, consequently prompting the closure and erasure of claims in this regard.[47] Legal interpretation is the expression of a political conflict: one experience of the law prevails and another loses, validating one understanding while repressing another.[48]

The late adoption of the Constitution meant that it would be latest and arguably the most advanced adaptation of the Western concept of limiting government power, also known as constitutionalism. For the most part, African governments seeking independence had to adopt European-modelled constitutions. This was largely perceived as regressive because it would impede the redistribution of resources in post-colonial Africa due to the inherent limitations of these constitutions.[49] However, much of the world viewed African independence as the culmination of a long, drawn-out struggle, initially seeing it more as a singular event rather than an ongoing process.[50] When South Africa adopted constitutionalism, it developed a framework that in character was based on the liberal legacy of the concept but included measures to address the political and socio-economic issues that confronted the nation.[51] The Constitution had the usual objectives of restricting government powers, in addition to promoting social and political reform in order to lend credibility to the new political and constitutional order.[52] Sibanda argues in his critique that this failure stems in part from the fact that, although "constitutionalism" is promoted as "post-liberal," it remains

[46] See also *Soobramoney v Minister of Health KwaZulu Natal* 1998 1 SA 765 (CC) at para 8; *S v Makwanyane and Another* 1995 6 BCLR 665 at para 262; *S v Mhlungu* 1995 3 SA 867; *Du Plessis and Others v De Klerk* 1996 5 BCLR 658 (CC) at para 157 in Mhlanga (2022).

[47] See Kesselring R *Bodies of truth: Law, memory, and emancipation in post-apartheid South Africa* Stanford: California Stanford University Press (2016).

[48] Coombe RJ "Same as it ever was: Rethinking the politics of legal interpretation" (1989) 34(3) *McGill Law Journal* 603 at 604.

[49] Prempeh HK "Africa's 'constitutionalism revival': False start or new dawn?" (2007) 5(3) *International Journal of Constitutional Law* 469 at 469.

[50] Bohler-Muller N "Western liberal legalism and its discontents: A perspective from post-apartheid South Africa" (2007) 3 *Social-Legal Review* 1.

[51] Klug H "Towards a sociology of constitutional transformation: Understanding South Africa's post-apartheid constitutional order" (2016) *University of Wisconsin Legal Studies Research Paper* 1373; Moseneke D "A journey from the heart of apartheid darkness towards a just society: Salient features of the budding constitutionalism and jurisprudence of South Africa" (2012) 101 *Georgetown Law Journal* 749.

[52] Klare (1998) at 146–150.

firmly rooted in liberal discourses and does not prioritize poverty eradication within constitutional debates.[53]

Since the realisation of substantive justice nevertheless requires government intervention, Klare recognised the South African constitution's need for a broader perspective of justice that extends beyond the limited "negative rights" concept.[54] This implied that the legal reasoning techniques employed would have a major influence on how well the quest for substantive justice works in any given situation. Klare proposed that, to guarantee that rights are enjoyed in actuality, the Constitution be interpreted in a "post-liberal" fashion that goes beyond positivism or formalism.[55] This would consequently require a change in the way that legal actors – that is, the "legal culture", which consists in "[lawyers'] professional sensibilities, habits of mind, and intellectual reflexes" – view the law and its role in society and politics.[56]

Since transformative constitutionalism places a lot of faith in the law as an instrument for social and political change, it follows that lawyers, including judges (as well as legislators and law enforcers), must view the law in this way and be prepared to deploy it to achieve the envisaged transformation.[57] This implies that rights and duties established by substantive post-liberal alterations to constitutional foundations cannot be interpreted according to, and therefore constrained by, past intellectual instincts and judicial mindset.[58] Among other things, this would call for what Klare refers to as a "historical[ly] self-conscious doctrine" that takes into account the "legal history, traditions, and usages of the country concerned".[59] Viewing transformation as requiring a shift in legal culture from one focused on power to one centered on justification means recognizing historical injustices and actively working to address them, ensuring they do not happen again.[60] Therefore, under a transformative constitution, judges necessarily have to invoke both the strict letter of the law as well as broader principles and goals to substantiate the decisions they make.[61]

Transformative constitutionalism's demand for substantive justice has drawn criticism for a number of reasons, among them its alleged obfuscation of the law-politics split and

---

[53] Sibanda S "Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty" (2011) 22(3) *Stellenbosch Law Review* 482 at 482.

[54] Klare (1998).

[55] Klare (1998).

[56] Klare (1998).

[57] Klare (1998).

[58] Klare (1998) at 156.

[59] See Klare (1998) at 155.

[60] Mureinik E "A bridge to where? Introducing the interim Bill of Rights" (1994) 10(1) *South African Journal on Human Rights* 31 at 32–33.

[61] Langa P "Transformative constitutionalism" (2006) 17(3) *Stellenbosch Law Review* 351.

the potentially considerable financial impact of ensuring the enforcement of socio-economic rights.[62] De Vos, for example, argues that using history as a guide in interpreting the Constitution is problematic because history is a "profoundly subjective account of selected events in the past", particularly when it is considered as a "grand narrative".[63] He suggests that judges should approach history with an awareness of its "open-ended" nature to reduce the risks posed by differing interpretations of historical events.[64]

For the purposes of this article, however, the focus is not so much on the law itself as it is on the law in the hands of a prospective judge or lawyer, who, like any other person in South Africa, must deal with his or her neoliberal socialisation while striving to promote positive social and economic transformation.

In this regard, Wilson argues that if even the law generates, extends, or contracts chances for action, its role in effecting change is at best secondary.[65] He supports his claim by highlighting the lack of correlation between, on the one hand, legislative reforms and court victories, and, on the other, actual changes in the lives of individuals affected by these outcomes.[66]

Wilson suggests that the law creates opportunities for agency: those who navigate and utilise the law effectively are the ones who bring about change. This does not minimise the importance of the law as a foundation for all of this – changes would be impossible without the law and the space it creates.[67] What Wilson points to is the danger inherent in the liberal tendency that posits an epistemological scheme within which law is wielded by a fundamentally asocial individual standing outside the field to which the legal instrument is to be applied.[68]

In reality, the open-endedness of our law may require individuals who are attuned to the social context in which they operate. This is an acknowledgement that those who wield the law are part of society and therefore not at all immune to its limitations.[69] It also entails that lawyers and adjudicators' approaches to law are not absolutely

[62] Roux T "Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?" (2009) 20(2) *Stellenbosch Law Review* 258 at 260.

[63] De Vos P "A bridge too far? History as context in the interpretation of the South African Constitution" (2001) 17(1) *South African Journal on Human Rights* 1 at 1.

[64] See De Vos (2001).

[65] See Mhlanga (2022).

[66] See Mhlanga (2022).

[67] Mureinik (1994); Van der Walt (2001) 258; Le Roux (2006) 634; Woolman et al. (2008) 32.

[68] Wilson (2021) 24–27.

[69] Moerane M "Judging the judges: Towards an appropriate role for the role of the judiciary in South Africa's Transformation" (2003) 20(4) *Leiden Journal of International Law* 965.

impartial in regard to being in favour of or against power.[70] In the case of South Africa, the argument is that embracing neoliberalism has entrenched old power relations. These underlying power dynamics continue to influence partiality and interests, leading to the reinforcement of anti-transformative positions. I will now add nuance to this argument.

The South African constitution has been described as an instrument to facilitate transformation. This transformation is characterised by an intended sharp break with the past, which upheld arbitrary government policies, discriminatory practices, and inequality;[71] by instituting a new order, the status quo would be altered,[72] and through dedicated effort, South Africa would be transformed into a society characterised by freedom, equality, and human dignity.[73] The Constitution's commitments in this regard are laudable. However, its autonomy, structure, language, and universality encourage natality and rupture, creating a fresh, unrestricted future that is disconnected from the past.[74] Stated differently, the constitutional state declares the dispute and subsequent struggle for interest dominance to be new, distinct, and between equal forces, closing the case and invalidating any claims brought in the future against the unequal past.[75]

The contention is that a democratic system founded on values has been established by the Constitution. The operational legal framework's standard metrics, such non-arbitrariness, reasonableness, and justness and equitability, are assessments that are heavily influenced by values. In order to pass these standards, an interpreter must make the implicit explicit while also considering the conventional meaning of the provisions and the text's intended use as a composite tool of interpretation.[76] It cannot, I argue, be uncontested or dispute-free in defining the local meaning of these values in a society with various and conflicting histories.[77]

This contestation encompasses a struggle for control over history, history as a means of identifying the most urgent needs and demands of society, and over the responses to those demands.[78] When underlying power dynamics shape the discourse, there is an

[70] Gordon A & Bruce D *Transformation and the independence of the judiciary in South Africa* (2016) Johannesburg: Centre for the Study of Violence and Reconciliation at 11*;* Klare (1998).

[71] See *Mhlungu* (1995).

[72] *Du Plessis* (1996) at para 157.

[73] See also *Soobramoney* (1997) at para 8.

[74] See Sibanda (2011) at 482.

[75] Kesselring (2016) 129; Ramose MB "In memoriam: Sovereignty and the 'new' South Africa" (2007) 16(2) *Griffith Law Review* 310 at 320; Van Marle K "Reflections on post-apartheid being and becoming in the aftermath of amnesty: *Du Toit v Minister of Safety and Security*" (2010) 3(1) *Constitutional Court Review* 347–367.

[76] Liebenberg S "The value of human dignity in interpreting socio-economic rights" (2005) 21(1) *South African Journal on Human Rights* 1.

[77] Kontopodis M *Time. Matter. Multiplicity* Los Angeles: SAGE (2009) 5–10 in Mhlanga (2022).

[78] Mhlanga (2022).

inherent gravitation towards the status quo.[79] This discourse then shapes people's sensitivity to these open-ended ideals on a personal and professional level. Even the most repugnant state-enforced ideologies gradually gain traction in society as people learn to accept them, and as result become the boundaries within which society critiques, informs, and provides remedies for the problems at hand.[80]

Klare describes this potential constraint as one which is influenced not only by the interpreter's professional sensibilities, habits, and talents, but also by his or her motivation to go above and beyond to obtain a desired outcome.[81] In contested instances, a "good" or "legally sound" interpretation is determined by the practitioner's training, competence, insight, and decisions about how to direct his or her intellectual energy and resources.[82] This influences lawyers' perceptions of which materials are relevant to a legal topic.[83] Judges and other adjudicators make conscious and unconscious decisions about how to invest their intellectual energy and resources, doing so on the basis of values, perceptions, and intuitions that are unrelated to the legal documents.[84]

The permeation of political ideals such as neoliberalism into personal and professional sensitivities has been studied, inter alia, by Foucault, who has analysed the self-reinforcing nature of the neoliberal subject.[85] In his characterisation, the neoliberal subject is a compound of *homo economicus* – a subject "who appears in the form of individual choices that are both irreducible and non-transferable" – and *homo juridicus*, a subject whose decisions are governed by an overriding obligation to others and or a sovereign.[86] Foucault argues that, while it may appear that *homo economicus* is always free to choose, economic rationality requires that it "[respond] systematically to systematic modifications artificially introduced into the environment".[87] In other words, what would appear to be an exercise in freedom is actually a conditioned response to stimuli based on "economic principles".[88]

Expanding on this idea, Wendy Brown contends that under neoliberalism, economic prosperity can be attained only when it is "directed, buttressed and protected by law

[79] Mhlanga (2022).

[80] See Becker (2020).

[81] Klare (1998) at 160–163.

[82] Klare (1998) at 160–163.

[83] Klare (1998) 160–163.

[84] Klare (1998) at 160–163.

[85] Brown W *In the ruins of neoliberalism: The rise of antidemocratic politics in the West* New York: Columbia University Press (2019) 270–276.

[86] Brown (2019) 273–276.

[87] Brown (2019) 270–276.

[88] Brown (2019) 271.

and policy", and echoed by all members of society as well as all institutions of society.[89] This market "countermovement" is carried out by people against people, in the form of agents of capital acting against agents of society, such as organised labour, in a manner that seeks to subjugate in order to totalise and self-reinforce.[90] Whereas liberalism required "pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it", neoliberalism requires us to be "everywhere homo economicus and only homo economicus".[91] The neoliberal subject, conceptualised as human capital, is "at once in charge of itself, responsible for itself, yet an instrument and potentially dispensable element of the whole".[92] This is reflected by caution to individuals against taking actions or expressing views that challenge dominant, typically capitalist, narratives, as it implies risking opportunities or rewards of upward mobility in work spaces as an example.

What is being highlighted here is the creation of a totalising atmosphere that incentivises individuals to actively follow neoliberal rationalities in all spheres of their lives. This process is termed "economization", a process by which economic rationality is internalised into our (legal) subjectivity to the point where it defines our approach and consideration of alternatives.[93] Klare cautions against the influence of totalising socialisations inasmuch as they can discourage judges or advocates from investing intellectual resources in interpretive projects that might yield "non-obvious" results.[94] These results, while morally or politically appealing, may seem to require a significant leap beyond what the legal materials initially appear to permit.[95] Consequently, this reluctance can hinder constitutional transformation.[96] Put differently:

[G]roups with unequal discursive (and non-discursive) resources compete to establish as hegemonic their respective interpretations of legitimate social needs. Dominant groups articulate need interpretations intended to exclude, defuse and/or co-opt counterinterpretations. Subordinate or oppositional groups, on the other hand, articulate need interpretations intended to challenge, displace, and/or modify dominant ones.[97]

---

[89] Brown W *Edgework: Critical essays on knowledge and politics* Princeton: Princeton University Press (2005) available at http://www.jstor.org/stable/j.ctt7rw47 (accessed 22 November 2023).

[90] Harvey D "Neoliberalism as creative destruction" (2007) 610 *The Annals of the American Academy of Political and Social Science* 22.

[91] Brown (2005) at 40–41.

[92] Brown (2005).

[93] Foucault M *Naissance de la biopolitique: cours au Collège de France* (1978–1979) Paris: Gallimard Translated as *The birth of biopolitics* Graham Burchell (trans.) New York: Picador (2020).

[94] Klare (1998) at 171.

[95] Klare (1998) at 171.

[96] Klare (1998) at 171.

[97] Fraser N "Talking about needs: Interpretive contests as political conflicts in welfare-state societies" (1989) 99(2) *Ethics* 291.

It follows, in essence, that in a society with contested and varied histories, the debate over how values should be understood entails an ongoing struggle for control over the past, where the past serves as a lens through which to define the most important needs and demands of society and the responses to those demands. In as much as certain of these processes neutralise the moral and legitimation imperative – by defining poverty and need concerns as domestic rather than political, as human failings rather than a systemic failings – the goal thereof, Brand argues, is to "domesticate" poverty and need issues.[98]

To this end, the negotiations with the apartheid state and the ideological, discursive, and practical shifts they brought about – such as the uptake of neoliberalism by socialist-speaking nationalists – can be seen to have effectively altered the past, with this past defining our approach in the present. The material demands of running an impoverished state with altruistic goals ate up the socialist ideals that were presented to South Africans in the years prior to democracy in 1994, and possibly so too the moral legitimacy of ever revisiting them at a later stage.

5 CONCLUSION

In this article, I looked at the experience of neoliberalism in South Africa as one factor among many others that could lie behind a conservative legal inertia. By neoliberalism, I mean the domination and assertiveness of capitalist forces over a less organised opposition.[99] I allude to the manner in which capital interests translate into political power in order to institutionalise free market ideological modes of governance and, consequently, make it increasingly difficult for non-market interests to even exist, let alone carve out space for themselves.[100] In the absence of counter-interest bargaining, market interests define state power. State power is then used to define societal norms and interests, consolidating untransformed interest negotiation in a society where apartheid-era access to the means of production persists.

In the face of pervasive economic inequality, the economic and political rationality of neoliberalism is essentially totalising, limiting, exclusionary, and unsustainable for a society in pursuit of change. This pertains to the degree to which neoliberalism and its ways of thinking, doing, and being permeate society's ways of thinking, acting, and being, including within the field of law.

The challenge is not so much neoliberalism's inappropriateness as an ideological outlook; it is the inappropriateness of neoliberalism's application in a context where neoliberalism is practised in an environment that ought to open the gates to human

[98] Brand JFD *Courts, socio-economic rights, and transformative politics* (LLD thesis, University of Stellenbosch, 2009). See also Gibson NC *Fanonian practices in South Africa: From Steve Biko to Abahlali baseMjondolo* Scottsville: University of KwaZulu-Natal Press (2011).

[99] Chomsky N *Profit over people: Neoliberalism and global order* New York: Seven Stories Press (1999) 8.

[100] See Chomsky (1999).

advancement for all, yet where only those with the means can effectively make use of this opportunity. Rawls makes the point that neoliberalism cannot protect or realise the value of political liberty because it allows for the concentration of capital in too few hands, which leads to economic dominance of politics and excludes many people from the benefits of owning and operating at least some of the capital required to enjoy the value of their constitutional liberties.[101] Exclusion at this level serves to perpetuate the unmitigated elaboration and influence of neoliberal metanarratives within spaces where transformation is defined and imagined. The impact of this can be noted in the inability to take decisions towards the recalibration and destratification of the dominance of white apartheid-era interests in the economy.

The South African government has increasingly adopted measures to free up markets through deregulation and privatisation as well as encourage foreign investment through conservative fiscal and monetary policies.[102] As such, the state can be seen to separate anti-poverty measures from its economic policy, treating them purely as assistance for the poor rather than as an integral part of its growth strategy, in the same way as the courts have conservatively treated anti-poverty measures as distinct from justice.[103] The impact of this approach to inequality and poverty is all too clear to see. The statistics reveal that the South African society is not only the most unequal in the world, but also more unequal than it was in prior years.[104]

Certainly, I am not oblivious to the potential that the constitutional framework has to achieve concrete transformative goals. The capacity to generate truly transformative outcomes, however, will remain limited if we reflexively continue to operate in terms of accepted methods and intuitions.[105] This understanding calls for what Cornell and Seely describe as a culture of resistance against hegemonies and metanarratives that aim to provide us with "blueprints or roadmaps that tell us what 'the' revolution must look like based on the way that revolution has been [previously] thought".[106] Such a perspective argues for a shift in how we approach the Constitution—moving away from rigid, structured ways of thinking to more flexible, metaphorical approaches. Instead of thinking in fixed and predetermined categories, we should adopt a more relational, connected way of understanding the law. It also highlights the importance of resisting influences that try to shape our decisions, reminding us that while we are influenced by

[101] Rawls J *Political liberalism* 2nd ed New York: Columbia University Press (2005).

[102] See Narsiah (2002); see 'Media Statement: Privatisation of Eskom a major point of contention during Electricity Regulation Bill hearings in De Aar' (26 October 2023) available at *https://bit.ly/3XsZYEK* (accessed 30 October 2023).

[103] Makgetla NS "The post-apartheid economy" (2004) 31(100) *Review of African Political Economy* 263–281.

[104] World Bank Group Report (2022).

[105] Klare (1998) at 172.

[106] Cornell D & Seely S *The spirit of revolution: Beyond the dead ends of man* Cambridge Polity Press (2016) 162.

the ideas and metaphors we use, they do not completely control us. In this sense, choosing the easiest path, without questioning it, often leads to undesirable outcomes—like a river that flows crooked because it always takes the path of least resistance.[107]

[107] Botha (2002) 612; Botha H "Metaphoric reasoning and transformative constitutionalism (part 2)" (2003) 1 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 20.

BIBLIOGRAPHY

Books

Alexander N *An ordinary country: Issues in the transition from apartheid to democracy in South Africa* Pietermaritzburg: University of Natal Press (2002)

Bond P *Elite transition: From apartheid to neoliberalism in South Africa* London: Pluto Press (2000)

Brown W *Edgework: Critical essays on knowledge and politics* Princeton: Princeton University Press (2005)

Brown W *In the ruins of neoliberalism: The rise of antidemocratic politics in the West* New York: Columbia University Press (2019)

Brown W *Undoing the demos: Neoliberalism's stealth revolution* New York: Zone Books (2015)

Chomsky N *Profit over people: Neoliberalism and global order* New York: Seven Stories Press (1999)

Cornell D & Seely S *The spirit of revolution: Beyond the dead ends of man* Cambridge: Polity Press (2016)

Cornell D *The imaginary domain* New York: Routledge (1994)

Cornell D *The philosophy of the limit* New York: Routledge (1992)

Douzinas C *The end of human rights* Oxford: Hart Publishing (2000)

Feinstein C *An economic history of South Africa: Conquest, discrimination and development* Cambridge: Cambridge University Press (2005)

Foucault M *Naissance de la biopolitique: Cours au Collège de France (1978–1979)* Paris: Gallimard translated as *The birth of biopolitics* Graham Burchell (trans) New York: Picador (2020)

Gibson NC *Fanonian practices in South Africa: From Steve Biko to Abahlali baseMjondolo* Scottsville: University of KwaZulu-Natal Press (2011)

Harvey D *A brief history of neoliberalism* Oxford: Oxford University Press (2005)

Kesselring R *Bodies of truth: Law, memory, and emancipation in post-apartheid South Africa* Stanford: California Stanford University Press (2016)

Kontopodis M *Time. Matter. Multiplicity* Los Angeles: SAGE (2009)

Liebenberg S "Socio-economic rights adjudication under a transformative constitution" Claremont: Juta (2010)

Lipton M *Capitalism and apartheid: South Africa 1910–1986* London: Wildwood House Aldershot Hants (1986)

Lundahl B et al. *Liberals, Marxists, and nationalists: Competing interpretations of South African history* New York: Palgrave Macmillan (2007)

Mamdani M *When does reconciliation turn into a denial of justice?* Pretoria: HSRC Publishers (1998)

Mouffe C *The return of the political* London: Verso (1993)

Padayachee V & Van Niekerk R *Shadow of liberation: Contestation and compromise in the economic and social policy of the African National Congress, 1943–1996* Johannesburg: Wits University Press (2019)

South African Institute of Race Relations *Race Relations Survey* Johannesburg: South African Institute of Race Relations (1992)

Rawls J *A Theory of Justice* Cambridge MA: Belknap Press Revised edition (1999)

Rawls J *Justice as fairness: A restatement* Kelly E (ed) Cambridge, MA: Belknap Press (2001)

Rawls J *Political liberalism* 2nd ed New York: Columbia University Press (2005)

Soudien C, Reddy V & Woolard I (eds) *The state of the discussion of poverty & inequality: Diagnosis prognosis responses: State of the nation* Cape Town: HSRC Press (2019)

Terreblanche S *A history of inequality in South Africa 1652–2002* Pietermaritzburg: University of Natal Press (2002)

Terreblanche S *Lost in transformation* Sandton: KMM Review Publishing (2012)

Whiteford A, Posel D & Kelatwang K *A profile of poverty, inequality and human development* Pretoria: Human Sciences Research Council (1995)

Wilson S *Human rights and the transformation of property* Cape Town: Juta (2021)

Chapters in books

Becker D "A state in transition: The negotiated birth of the post-apartheid state" in Becker D (ed) *Neoliberalism and the state of belonging in South Africa* Springer International (2022) 159–221.

Glaser D "National democratic revolutions meets constitutional democracy" in E Webster E & Pampallis K (eds) *The unresolved national question: Left thought under apartheid* Johannesburg: Wits University Press (2017) 274–296

Hilbink L & Ingram M "Courts and rule of law in developing countries" in *Oxford Research Encyclopedia of Politics* Oxford: Oxford University Press (2019)

Nattrass N & Seekings J "The economy and poverty in the twentieth century" in Ross R, Kelk Mager A & Nasson B (eds) *The Cambridge history of South Africa Vol. 2 1885–1994* Cambridge: Cambridge University Press (2011) 518–572

Overbeek HW "Transnational historical materialism: Theories of transnational class formation and world order" in Palan RP (ed) *Global political economy: Contemporary theories* Routledge (2000) 168–183

Roccu R & Talani LS "Introduction: The globalisation debate – from de-globalisation to the dark side of globalisation" in *International Political Economy Series* London: Palgrave Macmillan (2019)

Southall R "Realism and neoliberalism: Marco-economic policy in South Africa" in Curry J (ed) *Liberation movements in power: Party & state in Southern Africa* Pietermaritzburg: University of KwaZulu-Natal Press (2019) 88–96

Journal articles

Allen T "Liberalism, social democracy and the value of property under the European Convention on Human Rights" (2010) 59 *International and Comparative Law Quarterly* 1055–1078

Bohler-Muller N "Western liberal legalism and its discontents: A perspective from post-apartheid South Africa" (2007) 3 *Social-Legal Review* 1–25

Botha H "Metaphoric reasoning and transformative constitutionalism" (2002) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 612–627

Botha H "Metaphoric reasoning and transformative constitutionalism (part 2)" (2003) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* (2003) 1 20–36

Coombe RJ "'Same as it ever was': Rethinking the politics of legal interpretation" (1989) 34(3) *McGill Law Journal* 603–652

De Vos P "A bridge too far? History as context in the interpretation of the South African Constitution" (2001) 17(1) *South African Journal on Human Rights* 1–33

Du Toit A & Neves D "The government of poverty and the arts of survival: Mobile and recombinant strategies at the margins of the South African economy" (2014) 41(5) *The Journal of Peasant Studies* 833–853

Du Plessis SA & Smit BW "Countercyclical monetary policy in South Africa" (2007) 31(1) *Journal for Studies in Economics and Econometrics* 79–98

Foucault M "Of other spaces" (1986) 16(1) *Diacritics* 22–27

Fourie D "The neoliberal influence on South Africa's early democracy and its shortfalls in addressing economic inequality" (2007) 50(5) *Philosophy & Social Criticism* 823–840

Francis D & Webster E "Poverty and inequality in South Africa: Critical reflections" (2019) 36(6) *Development Southern Africa* 788–802

Fraser N "What's critical about critical theory? The case of Habermas and gender" (1985) 35 *New German Critique* 97–131

Fraser N "Talking about needs: interpretive contests as political conflicts in welfare-state societies" (1989) 99(2) *Ethics* 291–313

Harvey D "Neoliberalism as creative destruction" (2007) 610 *The Annals of the American Academy of Political and Social Science* 22–44

Harvey D "The right to the city" *New Left Review* (2008) 53

Kaempfer W & Lowenberg A "The theory of international economic sanctions: A public choice approach" (1988) 78(4) *American Economic Review* 786–793

Klare KE "Legal culture and transformative constitutionalism" (1998) 14(1) *South African Journal on Human Rights* 146–188

Langa P "Transformative constitutionalism" (2006) 17(3) *Stellenbosch Law Review* 351–360

Liebenberg S "The value of human dignity in interpreting socio-economic rights" (2005) 21(1) *South African Journal on Human Rights* 1–31

Liebenberg S "The application of socio-economic rights to private law" (2008) (3) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 464–480

Makgetla NS "The post-apartheid economy" (2004) 31(100) *Review of African Political Economy* 263–281

Moerane M "Judging the judges: Towards an appropriate role for the role of the judiciary in South Africa's transformation" (2003) 20(4) *Leiden Journal of International Law* 965–968

Moll T "Did the apartheid economy 'fail'?" (1991) 17(2) *Journal of Southern African Studies* 271–291

Moseneke D "A journey from the heart of apartheid darkness towards a just society: Salient features of the budding constitutionalism and jurisprudence of South Africa" (2012) 101 *Georgetown Law Journal* 749

Mureinik E "A bridge to where? Introducing the interim Bill of Rights" (1994) 10 *South African Journal on Human Rights* 31–48

Narsiah S "Neoliberalism and privatisation in South Africa" (2002) 57(1/2) *GeoJournal* 3–13

Peet R "Ideology, discourse, and the geography of hegemony: From socialist to neoliberal development in post-apartheid South Africa" (2002) *Antipode* 54–84

Prempeh HK "Africa's "constitutionalism revival": False start or new dawn?" (2007) 5(3) *International Journal of Constitutional Law* 469–506

Ramose MB "In memoriam: Sovereignty and the 'new' South Africa" (2007) 16(2) *Griffith Law Review* 310–329

Ramose MB "Reconciliation and reconciliation in South Africa" (2012) 5 *Journal on African Philosophy* 20–39

Robinson R & Swedlow B "Beyond liberal and conservative: Advancing the study of judicial behaviour with a cultural theory of political values" (2018) 6 (2) *Journal of Law and Courts* 263–302

Roux T "Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?" (2009) 20(2) *Stellenbosch Law Review* 258–285

Schneider GE "The post-apartheid development debacle in South Africa: How mainstream economics and the vested interests preserved apartheid economic structures" (2018) 52(2) *Journal of Economic Issues* 302–322

Sibanda S "Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty" (2011) 22(3) *Stellenbosch Law Review* 482–500

Van Marle K "Transformative constitutionalism as/and critique" (2009) 20(2) *Stellenbosch Law Review* 286–301

Van Marle K "Reflections on post-apartheid being and becoming in the aftermath of amnesty: *Du Toit v Minister of Safety and Security*" (2010) 3(1) *Constitutional Court Review* 347–367

Van Marle K "A 'right' to the university" (2019) 51(1) *Acta Academica* 109–124

Wilson S & Dugard J "Taking poverty seriously: The South African Constitutional Court and socio-economic rights" (2011) 22(3) *Stellenbosch Law Review* 664–682

Wilson S "Breaking the tie: Evictions from private land, homelessness and a new normality" (2009) 126(2) *South African Law Journal* 270–290

Case law

Du Plessis and others v De Klerk 1996 5 BCLR 658 (CC)

Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC)

S v Makwanyane and Another 1995 6 BCLR 665

S v Mhlungu 1995 3 SA

Soobramoney v Minister of Health KwaZulu Natal 1998 1 SA 765 (CC)

Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others (CCT 157/20) [2021] ZACC 45; 2022 (8) BCLR 985 (CC)

Reports

Du Toit A & Neves D "In search of South Africa's second economy: Chronic poverty, economic marginalisation and adverse incorporation in Mt Frere and Khayelitsha" (2007) *Chronic Poverty Research Centre Working Paper 102*

Gordon A & Bruce D *Transformation and the independence of the judiciary in South Africa* Johannesburg: Centre for the Study of Violence and Reconciliation (2016)

Klug H "Towards a sociology of constitutional transformation: Understanding South Africa's post-apartheid constitutional order" (2016) *University of Wisconsin Legal Studies Research Paper 1373*

Lundahl B et al. "Post-apartheid South Africa: An economic success story?" (2009) WIDER Research Paper, No. 2009/56 *The United Nations University World Institute for Development Economics Research* (UNU-WIDER) Helsinki

South African Reserve Bank *South African Reserve Bank Quarterly Bulletin* 205 (September 1997) available at https://www.resbank.co.za/en/home/publications/publication-detail-pages/quarterly-bulletins/quarterly-bulletin-publications/1997/4752 (accessed 12 September 2023)

Sulla V, Zikhali P, Cuevas P & Facundo S *Inequality in Southern Africa: An assessment of the Southern African Customs Union* Washington, DC: World Bank Group (2022)

Terreblanche S "Testimony before the TRC during the special hearing on the role of the business sector" *Truth and Reconciliation Commission* (1997)

Internet sources

Douzinas C "Seven theses on human rights" (16 May 2013) available at https://criticallegalthinking.com/2013/05/16/seven-theses-on-human-rights-1-the-idea-of-humanity/ (accessed 23 October 2023)

Gelb S "The politics of macroeconomic policy reform in South Africa" (1998) Paper presented to the conference on Democracy and the Political Economy of Reform (1998) available at https://wiredspace.wits.ac.za/items/08ceaee6-1519-4e6b-ba2d-f5c67aa3fb10 (accessed 20 August 2023)

Sebake BK "State capture as a manifestation of the historic narrative of oligarchy in selected African countries" (2017) Paper presented at the 2nd Annual International Conference on Public Administration and Development Alternatives 26–28 July 2017 Tlotlo Hotel Gaborone Botswana available at https://studev.mandela.ac.za/studev/media/Store/documents/SGD%20Knowledge%20Respository/5-State-Capture-B-Sebake.pdf (accessed 10 September 2023)

Waldimer P "Thabo Mbeki lashes Jacob Zuma era ... and the failure of a number of ANC policies" (2019) *City Press* available at https://www.news24.com/citypress/news/thabo-mbeki-lashes-jacob-zuma-era-and-the-failure-of-a-number-of-the-ancs-policies-20190429 (accessed 1 November 2023)

Theses

Brand JFD "Courts, socio-economic rights, and transformative politics" (LLD thesis, University of Stellenbosch, 2009)

Mhlanga L “To remain” (LLD thesis, University of Free State, 2022)