

The Concept of Transformative Constitutionalism in Post-apartheid South Africa

PhD. candidate **Taboko Isaac MOLABA**¹

Abstract

Transformative constitutionalism has emerged as a redefining characteristic of South Africa's post-apartheid regime. Its emergence postulates a paradigm shift, signifying a profound moment in South Africa's history that has been embedded by an institutionalized race politics regime. This by large has been facilitated by the final Constitution of the Republic of South Africa of 1996. Karl Klare, the founding author of this concept has provided an outline of what it entails for South Africa. Since Karl Klare's paper, there has been a proliferation of scholarly discourse on this concept. While interpretations have varied, the underlying core attributes remain central in the discourse. In light thereof, this article explores the idea of transformative constitutionalism in post-apartheid South Africa. It points out that South Africa's 1996 Constitution is a transformative document designed to redress historical injustices that pre-existed before the constitutional dispensation. Central to the argument is that the ultimate goal of transformative constitutionalism is to fundamentally reconstruct South African society and create meaningful improvements in social, political, and economic conditions for all. This paper explores this by examining specific provisions that illustrate the Constitution's transformative character.

Keywords: transformative constitutionalism, human rights, international law, justice.

JEL Classification: K10, K38

DOI: 10.62768/PLPA/2025/14/1/13

Please cite this article as:

Molaba, Taboko Isaac, „The Concept of Transformative Constitutionalism in Post-apartheid South Africa”, *Perspectives of Law and Public Administration* 14, no. 1 (March 2025): 199-217.

Article History

Received: 19 November 2024

Revised: 20 January 2025

Accepted: 21 February 2025

1. Introduction

Transformative constitutionalism has emerged as a redefining characteristic of South Africa's post-apartheid regime. Its emergence postulates a paradigm shift, signifying a profound moment in South Africa's history that has been embedded by an institutionalized race politics regime. This by large has been facilitated by the final Constitution of the Republic of South Africa of 1996.² It has been pointed out by Karl Klare, the founding pioneer of transformative Constitutionalism that this concept entails „a long-term project of constitutional enactment, interpretation, and enforcement

¹ Taboko Isaac Molaba - University of Western Cape, South Africa, ORCID No.: 0009-0008-9375-8887, tmolaba333@gmail.com.

² Hereinafter the Constitution.

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. [It] connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.... In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere'.³ Karl Klare points out that this concept is not neutral, meaning it can be developed in a manner that advances a positive social change or a manner that is of a social good.⁴ Since Karl Klare's paper, there has been a proliferation of scholarly discourse on this concept. While interpretations have varied, the underlying core attributes; carrying a positive effect and being of social good, remain central in the discourse.

As implied by the above, transformative constitutionalism necessitates a reshaping of the social order that pre-existed constitutional South Africa. The ultimate goal is to fundamentally reconstruct South African society and create meaningful improvements in social, political, and economic conditions for all. The desired transformation must therefore address and correct some of the issues identified by Chaskalson over two decades ago when he stated the following: „We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”⁵

In light thereof, this paper points out that South Africa's 1996 Constitution is a transformative document designed to address historical injustices that existed before the constitutional dispensation and it aims to create a more equitable society for all. The paper examines specific provisions that illustrate the Constitution's transformative character for the social and economic good of all. The paper begins by examining the interplay between human rights, specifically the interconnectedness of the right to equality and dignity in achieving transformative objectives in post-apartheid South Africa. This is followed by chapter three which focuses on the obligations placed on the government to ensure that transformative objectives are implemented and protected through socio-economic rights discourse. Finally, the paper argues that the role of the judiciary has evolved beyond neutral adjudication of matters. Courts now play a crucial role in shaping and reinforcing constitutional principles and its mission which is predicated on transformation to achieve social justice and substantive equality.

³ Karl Klare, "Legal Culture and Transformative Constitutionalism" (1998) *South African Journal on Human Rights*, 14(1), p. 150.

⁴ Ibid.

⁵ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) at para 8.

2. Human rights and the pursuit of transformation

The starting point necessitates an understanding of the nature and scope of human rights within the broader context of constitutional objectives. Elkins and Ginsburg assert that human rights are moral claims that are inalienable and inherent in all individuals by their humanity alone.⁶ While their purpose may vary to a certain extent, they carry a positive objective, which Sen Amartya points out encompasses anything like resisting torture and arbitrary laws and the demand for the end of hunger and medical neglect, among others.⁷ The conception and protection of these rights find roots largely in international law. Most of these rights emerged as a result of the struggles and conflicts of earlier eras and were adopted as commitments towards ensuring that such struggles and conflicts do not recur again in the future.⁸ Most of these rights were documented in international legal frameworks. Major milestones include the Universal Declaration of Human Rights of 1948 (UDHR), the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW) and the United Nations Convention on the Right of the Child of 1989 (UNCRC), among others. The UDHR, in particular, has been heralded as a foundational document that has paved the way for the recognition and protection of human rights currently being enjoyed in many jurisdictions today.⁹ Mashele Rapatsa notes that the adoption of South Africa's Constitution sought to give effect to these rights, particularly, the UDHR.¹⁰ These rights are a cornerstone of South Africa's constitutional and democratic dispensation.¹¹ Not only do they play a crucial role in ensuring that there is democracy in South Africa, but they also carry a transformative objective.¹² A comprehensive understanding of this necessitates a critical analysis of South Africa's history and the evaluation of the Constitution's intended purpose in the constitutional dispensation.

South Africa came a long way before it became a constitutional state. For many decades, it was embroiled in a racial discriminative system manifesting through what was known as apartheid. Apartheid was an institutionalized racially discriminative and exclusion system that enforced a racially discriminatory and deeply divisive status quo, treating people unequally and unfairly based on their skin color or race.¹³ This regime

⁶ M.N. Anyabolu, "The Nature of Human Rights" (2021) *Journal Of International Human Rights and Contemporary Legal Issues*, 1, p. 53.

⁷ Sen Amartya, "Human rights and capabilities" (2005) *Journal of human development*, 6(2), p. 151.

⁸ Heyns Christof and Danie Brand, "Introduction to socio-economic rights in the South African Constitution" (1998) *Law, Democracy & Development*, 2(2), p. 153.

⁹ Z. Elkins and T. Ginsburg, "Imagining a World without the Universal Declaration of Human Rights" (2022) *World Politics* 74(3), p. 354.

¹⁰ Mashele Rapatsa, "Transformative Constitutionalism in South Africa: 20 Years of Democracy" (2014) *Mediterranean Journal of Social Sciences*, 5(27), p. 893.

¹¹ Section 7(1) of the Constitution.

¹² Mashele Rapatsa, "Transformative Constitutionalism in South Africa: 20 Years of Democracy" (2014) *Mediterranean Journal of Social Sciences*, 5(27), p. 888 – 889.

¹³ See Pellicer Miquel, and Vimal Ranchhod "Understanding the effects of racial classification in Apartheid South Africa" (2023) *Journal of Development Economics*, 160, 102998, <https://doi.org/10.1016/j.jdeveco>.

oppressed Africans, in particular, the black community, who suffered the worst throughout the system, while the white community benefited.¹⁴ The system thrived on race politics, discrimination, violence, hatred, poverty, unfair labor practices, socio-economic disparities, and a compromised judicial system. It was only in 1994, just over four decades later that apartheid officially ended, culminating in gross human rights violations.¹⁵ To date, the year 1994 stands out as a pivotal year for many South Africans, marking the end of four decades of brutality. The aftermath of apartheid ushered in a “new” era in South Africa underpinned by constitutionalism and democracy. This was made possible by the adoption of the Constitution. A key feature of this new South African dispensation is the supremacy of the Constitution, which means the Constitution is above all laws and any law or conduct found to be inconsistent with it would be declared unconstitutional.

Given the historical backdrop, the preamble to the Constitution provides that the Constitution was designed to “heal divisions of the past” and foster a new society through constitutional and democratic means.¹⁶ While the phrase “heal the divisions of the past” is not defined within the Constitution, it can be argued that the drafters of the Constitution intended this phrase to mean, addressing the systemic issues of racism and inequality deeply rooted in South Africa owing to its history. Kai Horsthemke observes that, while critics of rights-based approaches have been skeptical of rights-based approaches given the human rights violations taking place all over, rights constitute an effective action and policy guide while also contributing to reconciliation.¹⁷ Solange Rosa adds that human rights facilitate the “healing” the Constitution is referring to through transformation and redressing of the injustices of the past.¹⁸ Two notable rights within the Bill of Rights play a significant role in this discourse. These are the rights to equality and dignity, particularly when viewed through the lens of historical factors.

The right to equality and human dignity are protected under section 9¹⁹ and 10²⁰

2022.102998.

¹⁴ Ibid.

¹⁵ Eric Kibet and Charles Fombad, “Transformative Constitutionalism and the adjudication of constitutional rights in Africa” (2017) *African Human Rights Journal*, 17(2), p. 347.

¹⁶ See the Preamble to the Constitution.

¹⁷ Kai Horsthemke, “Redress and reconciliation in South African education: the case for a rights-based approach” (2005) *Journal of Education*, 37, p. 181.

¹⁸ Solange Rosa, “Transformative Constitutionalism in a democratic state” (2011) *Stellenbosch Law Review*, 22(3), p. 542.

¹⁹ Section 9 outlines that: „1. Everyone is equal before the law and has the right to equal protection and benefit of the law. 2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. 3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. 4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. 5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

²⁰ Section 10 acknowledges that „Everyone has inherent dignity and the right to have their dignity respected

of the Constitution, respectively. Mashele Rapatsa emphasizes that these rights lie at the heart of the transformation sought in post-apartheid South Africa.²¹ Mogoeng Mogoeng writing on the latter noted that this right has a history and context to it, holding a significant place in the Constitutional dispensation as it is aimed at repairing indignity, renouncing humiliation and degradation.²² Lawrence Juma further notes that human dignity plays an important role, forming the foundation of a peaceful nation.²³ It is a right that is developmental, acting as a starting point for asserting rights and developing a sense of justice in a transitioning society.²⁴ Human dignity is therefore a right that is aimed at addressing the injustices of the past in which dignity was cruelly denied to Africans, in particular black South Africans.²⁵ Equality, on the other hand, is a distinctive right in the new constitutional era.²⁶ The kind of equality referred to by the Constitution is one that should be able to eradicate racism, gender inequality and address issues of access to justice, socio-economic disparities and development.²⁷ The type of equality that will get South Africa to this objective is substantive equality because of its social impact, more than formal equality.

2.1. Formal equality

Formal equality is basic and abstract often associated with Aristotle who postulated equality to mean treating people alike and recognising differences only among those who are inherently unlike.²⁸ This form of equality treats people equally before the law²⁹ and primarily protects against direct discrimination.³⁰ Notwithstanding this, formal equality tends to be problematic because of its limitations. Harris argues that formal equality primarily focuses on non-discrimination and equal treatment and overlooks structural disadvantages.³¹ This is mainly because formal equality tends to

and protected.”

²¹ Mashele Rapatsa, “The Right to Equality under South Africa’s Transformative Constitutionalism: A Myth or Reality?” (2015) *Acta Universitatis Danubius. Juridica*, 11(2), p. 24.

²² *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* 2020 (1) SA 1 (CC) at para 45.

²³ Laurence Juma, “Human Rights and Conflict Transformation in Africa: Some Thoughts on the Transformative Values of Human Rights” (2012) *Speculum Juris*, 1, p.7.

²⁴ *Ibid*, p.8.

²⁵ Melanie Walker and Carmen Martinez-Vargas, “How dignity matters for life and lifelong learning: insights from participatory story-telling by university students in South Africa” (2025) *International Journal of Lifelong Education*, 44(1), p. 60.

²⁶ Mark Heywood, “The transformative power of civil society in South Africa: an activist’s perspective on innovative forms of organizing and rights-based practices” (2019), *Globalizations*, p.15.

²⁷ Mashele Rapatsa, “The Right to Equality under South Africa’s Transformative Constitutionalism: A Myth or Reality?” (2015) *Acta Universitatis Danubius. Juridica*, 11(2), p. 21.

²⁸ Anna Smith, “Constitutionalising Equality: The South African Experience” (2008) *International Journal of Discrimination and the Law*, 9(4), p. 203.

²⁹ *Ibid*.

³⁰ Anna Smith, “Equality Constitutional Adjudication in South Africa” (2014) *African Human Rights Law Journal*, 4, p.612.

³¹ Harris, C. I. “Whiteness as property” (1993) *Harvard Law Review*, 106(8), p. 1788.

not consider the circumstances or context of individuals or groups, thereby demonstrating its limited effectiveness.³² Cathi Albertyn also argues that formal equality holds no value in addressing inequalities in South Africa and does not offer a comprehensive understanding of these inequalities.³³ Thus, it plays a minimal role in fostering the transformative objectives sought in the constitutional dispensation.³⁴

2.2. Substantive equality

Substantive equality on the other hand presents an alternative and more pragmatic approach to achieving the wishes of transformative constitutionalism.³⁵ In its analysis, it takes into account inequalities faced by individuals while it also acknowledges the dynamics that contribute to these inequalities.³⁶ It recognizes that treating individuals differently may be necessary to ensure a favorable outcome for all.³⁷ It does this by taking into account various factors, including social and economic challenges, and empowers victims of these circumstances. The aim is to break the cycles of subordination and suffering.³⁸ Thus, substantive equality offers a nuanced approach aimed at eliminating inequalities and promoting a fair society.³⁹ It ensures inclusivity, preventing any individual from being denied economic opportunities because of their race, gender, disability, or religion.⁴⁰ As stated by O'Regan J in *President of the Republic of South Africa and Another v Hugo* “insisting upon equal treatment in circumstances of established inequality may result in the entrenchment of that inequality.”⁴¹ It is for this reason that substantive equality appreciates the historical injustices and the victims thereof with the aim of providing protection and removing barriers that hinder access to opportunities.

³² Anna Smith, “Constitutionalising Equality: The South African Experience” (2008) *International Journal of Discrimination and the Law*, 9(4), p. 204.

³³ Albertyn Catherine, “(In)Equality and the South African Constitution” (2019) *Development Southern Africa*, 36(6), p. 756.

³⁴ Mashele Rapatsa, “The Right to Equality under South Africa’s Transformative Constitutionalism: A Myth or Reality?” (2015) *Acta Universitatis Danubius. Juridica*, 11(2), p. 22.

³⁵ Ngwenya Charles and Loot Pretorius, “Substantive Equality for Disabled Learners in State Provision of Basic Education: A Commentary on *Western Cape Forum for Intellectual Disability V Government of the Republic of South Africa*.” (2012) *South African Journal on Human Rights*, 28(1), p. 94.

³⁶ Albertyn Catherine, “Substantive Equality and Transformation in South Africa.” (2007) *South African Journal on Human Rights*, 23(2), p. 254.

³⁷ Mashele Rapatsa, “The Right to Equality under South Africa’s Transformative Constitutionalism: A Myth or Reality?” (2015) *Acta Universitatis Danubius. Juridica*, 11(2), p. 22.

³⁸ Anna Smith, “Equality Constitutional Adjudication in South Africa” (2014) *African Human Rights Law Journal*, 4, p. 613.

³⁹ Ibid.

⁴⁰ See section 9 of the Constitution.

⁴¹ *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 at para 112.

2.3. The effect of substantive equality and dignity on legal frameworks for transformative reasons

South Africa's government, and parliament have enacted and put in place several measures to expedite transformative objectives in order to realize the substantive commitments through legal frameworks and policies. One of these policies is the affirmative action policy. Affirmative action policy gives effect to substantive equality through section 9(2) of the Constitution. These measures target individuals or certain groups of people who were subjected to unfair discrimination as a result of South Africa's apartheid history. It protects their rights by ensuring that they benefit from socio-economic opportunities that they might have missed as a result of the apartheid system.⁴² In labor Law, for example, this policy is advanced by the Employment Equity Act (EEA).⁴³ A key feature of this policy in the EEA is to address inequalities in the workplace and ensure that there is diversity,⁴⁴ and prevent unequal pay on grounds of race, among others.⁴⁵ It also gives preferential treatment to its beneficiaries in various ways, including appointment and promotion preference in workplaces.⁴⁶ The EEA promotes substantive equality, recognizing black individuals, women, and people with disabilities as primary beneficiaries.⁴⁷ Anna Smith argues that this kind of stipulation does not contribute to discrimination, and therefore government or stakeholders cannot be construed to be contributing to direct discrimination against individuals who are not in the designated groups, as these measures are meant to create an equal society in light of constitutional objectives.⁴⁸ Despite that, affirmative action has been controversial in South Africa with others arguing that it is not a fair policy. Nomfundo Ramalekana dealing with some of the critics, argues that those who seek to discredit affirmative action are privileged individuals or groups who are against the redressing of South Africa's inequalities.⁴⁹ Similarly, Albie Sachs points out that without constitutionally structured programs like affirmative action, the Bill of Rights is rendered meaningless.⁵⁰ Albie Sachs argument is that affirmative action should be viewed as an extensive

⁴² S Ebrahim, "Reviewing the Suitability of Affirmative Action and the Inherent Requirements of the Job as Grounds of Justification to Equal Pay Claims in Terms Of the Employment Equity Act 55 of 1998" (2018) *Potchefstroom Electronic Law Journal*, 21, p. 26.

⁴³ 55 of 1998.

⁴⁴ U. Archibong and O. Adejumo, "Affirmative Action in South Africa are we creating new casualties?" (2012) *Journal of Psychological Issues in Organizational Culture*, 3(1), p. 14.

⁴⁵ S. Ebrahim, "Reviewing the Suitability of Affirmative Action and the Inherent Requirements of the Job as Grounds of Justification to Equal Pay Claims in Terms Of the Employment Equity Act 55 of 1998" (2018) *Potchefstroom Electronic Law Journal*, 21, p. 3.

⁴⁶ Ramalekana Nomfundo, "A Critique of the Stigma Argument Against Affirmative Action in South Africa" (2022) *University of Oxford Human Rights Hub Journal*, 4, p.5.

⁴⁷ See section 1 of the EEA.

⁴⁸ Anna Smith, "Equality Constitutional Adjudication in South Africa" (2014) *African Human Rights Law Journal*, 4, p.613.

⁴⁹ Ramalekana Nomfundo, "A Critique of the Stigma Argument Against Affirmative Action in South Africa" (2022) *University of Oxford Human Rights Hub Journal*, 4, p.5.

⁵⁰ Sachs Albie, "Towards a Bill of Rights for a Democratic South Africa" (1991) *Journal of African Law*, 35(1/2), p. 29.

programme that goes beyond being merely corrective, in particular correcting structural injustices of South Africa, but should be seen as a major instrument that converts a racist and oppressive society into one that is democratic and just.⁵¹ It is a programme meant to cause a disturbance of inherited rights by its nature, prioritising the needs of those that have been disadvantaged.⁵²

Another transformative feature under this category is the Black Economic Empowerment (BEE) Programme, which aims to promote and enhance the participation of disadvantaged individuals, particularly black individuals, into the economic affairs of the country.⁵³ The BEE Programme was established under the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE) which articulates objectives such as promoting the empowerment of blacks in the economy and promoting a higher growth rate with increased employment and equitable income distribution.⁵⁴ Under the BBBEE Act “black people” are Africans, coloreds, and Indians.⁵⁵ The Broad-Based Black Economic Empowerment Amendment Act 46 of 2013 expanded this definition to include citizens of the country by birth or descent, those that became citizens by naturalisation before 27 April 1994 or on/after 27 April 1994 who would have been entitled to be citizens by naturalisation.⁵⁶ The broadening of the definition also included the empowerment of women, workers, the youth, people living with disabilities, and those living in rural areas.⁵⁷ The Amendment Act emphasizes the integration of social and economic strategies that are aimed at empowering individuals through, for example ensuring that there is an increase in the number of people participating in the management, ownership and control of enterprises and productive assets.⁵⁸ Importantly, under the Act, fronting, a form of practice intended to create a façade of compliance with BEE requirements while continuing to privilege historically advantaged groups is prohibited.

These legal frameworks are among a few in the Constitutional era that underpin the promotion of transformative constitutionalism through substantive equality. As noted, they do not only give effect to substantive equality but also human dignity because a person’s self-worth is not respected when they live in perpetual economic suffering. These programs therefore strive to build a more equitable society, bridging the gap between historical privilege and present opportunities.

3. Socio-economic rights

Expanding on the previous discourse, the UDHR emphasizes a need for social

⁵¹ Ibid.

⁵² Ibid.

⁵³ Joshi Yuvraj, “Affirmative Action as Transitional Justice” (2020) *Wisconsin Law Review*, 2020(1), p. 12.

⁵⁴ See section 217 of the Constitution.

⁵⁵ Section 1 of the Act.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

and economic rights,⁵⁹ which is complemented by the ICESCR which obligates state parties to recognize socio-economic rights, including rights to adequate food, clothing, housing, and improvement of living conditions.⁶⁰ The ICESCR also asserts that everyone should have a right to be free from hunger,⁶¹ the right to the highest attainable standard of physical and mental health,⁶² and the right to education,⁶³ among others. These international provisions underscore the need for state parties to ensure that socio-economics rights are protected.

South Africa heeded the call, incorporating socio-economic rights in the Constitution. The incorporation of these rights not only reflected a commitment to international law frameworks but also highlights transformative constitutionalism commitments. How South Africa incorporated socio-economic rights is unique.⁶⁴ This is shown by the normative structure of socio-economic rights in the Constitution. Sandra Liebenberg points out that the normative structure of socio-economic rights in South Africa follows three styles.⁶⁵ First, it entrenches basic rights, protecting children's socio-economic rights in a form of affording children rights to basic nutrition, shelter, health care and social services.⁶⁶ This also includes basic rights to education and rights of detained individuals in terms of section 29(1)(a) and 35(2)(e) of the Constitution, respectively.⁶⁷ The second category provides "everyone" with rights, including rights to, social security, health care, housing, food, water, and these rights are to be realized within reasonable resources.⁶⁸ The third category are entrenched in section 26(3) and 27(3) of the Constitution, expressed in a passive tense with no duty holder specified.⁶⁹ These rights give effect to dignity, which Marius Pieterse argues enables people to live "fully human lives."⁷⁰ One of the ways in which people can live "fully human lives" is by the state fulfilling its obligation to respect, protect, promote and fulfil socio-economic rights.⁷¹

The obligation to respect, protect, promote, and fulfil socio-economic rights places both a negative and positive obligation on the state. The positive duty imposed on the state ensures that socio-economic rights are realized,⁷² while the negative duty

⁵⁹ See Article 22 for example.

⁶⁰ Article 11(1).

⁶¹ Article 11(2).

⁶² Article 12.

⁶³ Article 13.

⁶⁴ Heyns Christof and Danie Brand, "Introduction to socio-economic rights in the South African Constitution" (1998) *Law, Democracy & Development*, 2(2), p. 156.

⁶⁵ Sandra Liebenberg, "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?" (2002), *Law, Democracy & Development*, 6(2), p. 162.

⁶⁶ *Ibid*, p. 163.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

⁶⁹ *Ibid*.

⁷⁰ Marius Pieterse, "The Legitimizing/insulating effect of socio-economic rights" (2007) *Canadian Journal of Law and Society*, 22(1), p. 1.

⁷¹ See Section 7(2) of the Constitution.

⁷² Olivier Marius and Linda Jansen van Rensburg, "Protection and enforcement of the right to social security" (2000) *Law, Democracy & Development*, 4(1), p. 89

requires the state not to interfere with these rights.⁷³ The positive duty is encapsulated through the obligation to protect, promote and fulfil. As Heyns and Brand points out, although the terms protect, promote and fulfil are not explicitly explained or defined within the Constitution itself, international law jurisprudence has established the need for state organs to fully realise these rights for all.⁷⁴ Thus, in light of socio-economic rights and transformation in South Africa, section 7(2) of the Constitution has played an important role in safeguarding the rights of victims and redressing socio-economic conditions. The effectiveness of this section is evidenced in several cases, notably in landmark cases like the *Government of the Republic of South Africa and Others v Grootboom and Others*⁷⁵ (*Grootboom*) and *Minister of Health and Others v Treatment Action Campaign and Others*⁷⁶ (*Treatment Action Campaign*). In both *Grootboom* and *Treatment Action Campaign*, the court asserted the state's duty to act positively towards socio-economic rights.

Grootboom focused on the obligations under section 26 of the Constitution, a provision that deals with the right to housing. The matter arose as the result of the respondents, *Grootboom* and others, being rendered homeless after being evicted from their informal homes. In response to these circumstances, the respondents applied to the High Court for an order mandating government to provide them with adequate basic shelter or housing until they attained permanent accommodation. This application was brought against the government of the Republic of South Africa which bears the responsibility to provide housing. The High Court ruled in favor of *Grootboom* and others, making an order that government should shelter them until permanent housing was made available to them. The government of the Republic of South Africa challenged the correctness of the order in the Constitutional Court. The legal question then became, whether the state had fulfilled its constitutional obligation in terms of sections 26 and 28 of the Constitution and whether the state had taken reasonable measures to progressively realize these rights within reasonable resources.

Before dealing with these questions, the court noted that these rights (sections 26 and 28) form part of socio-economic rights in South Africa and are justiciable. Furthermore, the court emphasized that government has a constitutional obligation not only in terms of sections 26 and 28 but also in terms of Section 7(2) of the Constitution which is an obligation that seeks to ensure that the rights enshrined in the Constitution are respected, protected promoted and fulfilled. Expressing this, the court said the following: „Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state “to respect, protect, promote and fulfil the rights in the Bill of Rights” and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution,

⁷³ Dafel Michael, "The negative obligation of the housing right: An analysis of the duties to respect and protect." (2013) *South African Journal on Human Rights*, 29(3), p. 594.

⁷⁴ Heyns Christof and Danie Brand, "Introduction to socio-economic rights in the South African Constitution" (1998) *Law, Democracy & Development*, 2(2), p. 158.

⁷⁵ 2001 (1) SA 46.

⁷⁶ (No 2) 2002 (5) SA 721 (CC).

but how to enforce them in a given case.”⁷⁷

In dealing with the application under section 26, the court applied a contextual interpretation taking into account the textual, social and historical context of the Constitution. The court noted that South Africa’s foundational values which form the basis of South Africa’s constitutional dispensation, which are human dignity, freedom and equality, are violated when people are denied food, clothing or shelter.⁷⁸ The court underscored that the advancement of these rights correlates with the promotion of race and gender equality, ensuring that both men and women are equally able to realize their potential.⁷⁹ The court further emphasized that the interpretation of socio-economic rights should not be read in isolation, but in light of the Constitution read as a whole.⁸⁰ It follows that the state has to ensure that positive action is taken to ensure that the needs of those living in poverty, homelessness, and intolerable housing are met.⁸¹ Lastly, taking into account the social, and historical context, the court noted the significance of the right to be free from unfair discrimination, particularly given South Africa’s racial legacy. Thus, the need to take historical legacies into account underscores the states obligation to facilitate social justice.

Regarding section 28, the court said section 28 of the Constitution should be ascertained to the obligations under section 26, meaning that sections 28(1)(b) and 28(1)(c) must be read together. While section 28(1)(c) does not create an obligation on the state to provide shelter to parents, the court held that the state does incur an obligation about children who are being cared for by their parents.⁸² The interpretation that emerges is that courts should recognize the interplay between various rights contained in the Constitution.

On the issue of progressive realization of rights, although the court noted that the stipulation to “progressive realization” means that socio-economic rights cannot be realized immediately, while the stipulation to “available resources” suggests that the state cannot exceed the resources it has available, this, however, does not take away the requirement that the state should devise and implement a coherent and coordinated program designed to meet section 26 obligations. Consequently, the court found that government failed to provide relief to those in need of housing. The court ordered the state to fulfil its obligations in terms of section 26, which includes the necessity to devise, fund, implement and supervise measures to provide relief to those in need. The South African Human Rights Commission (SAHRC) was ordered to monitor and report on the efforts made by the state.

Sandra Liebenberg points out that this judgment is significant, setting out the importance of socio-economic rights and their protection in post-apartheid South Africa.⁸³ Others scholar also recognize the significance of this judgment, citing its

⁷⁷ *Grootboom*, para 20.

⁷⁸ *Ibid*, para 23.

⁷⁹ *Ibid*, para 23.

⁸⁰ *Ibid*, para 24.

⁸¹ *Ibid*, para 24

⁸² *Ibid*, para 78.

⁸³ Sandra Liebenberg, “South Africa’s evolving jurisprudence on socio-economic rights: An effective tool

transformative role.⁸⁴

In *Treatment Action Campaign*, the case was about the right to access to healthcare. At the time this judgment was handed down South Africa was grappling with a serious case of high rate of HIV and AIDS cases, which was characterised as a pandemic since the birth of the new democracy.⁸⁵ Government in response to this pandemic came up with a programme that was meant to deal with mother-to-child transmission of HIV at birth. Nevirapine was identified as a drug to deal with this problem. However, the programme restricted the quantity in the public health sector, as the administration of this drug was limited only to several sites, specifically two per province.

It was the argument of the respondents, against the state that the restrictions were unreasonable in light of the Constitution, in particular, section 7(2) of the Constitution. The court considered the issue of socio-economic rights and the role the state has to play regarding these rights. The court citing *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) noted that the jurisprudence of South Africa when it comes to socio-economic rights is that the state must positively comply with the obligations under the Bill of Rights.⁸⁶

Considering the provisions of section 27(1)(a) of the Constitution, the court said the policy to limit the drug to research and training sites was not flexible because it denied mothers and their newborns particularly those in public hospitals and those in clinics and outside the research and training sites an opportunity to receive the drug. The court emphasized that this was a breach of the Constitution by the state as obligated under sections 27(1)(a) and 27(2) of the Constitution. The court critiqued the government's decision to wait for a decision on whether the drug should be used beyond research and training sites, finding that it was unreasonable in terms of section 27(2) of the Constitution. The court emphasized that the state has an ongoing responsibility to protect healthcare rights.

Ultimately, the court ordered government to without delay, remove restrictions that prevent accessibility of the drug in public hospitals and clinics.

These two judgments remain landmark judgments in South Africa. They underscore the transformative role of the Constitution, highlighting the on-going duty government has to play to give effect to substantive constitutional objectives. These cases also highlight the significant role section 7(2) of the Constitution plays in facilitating transformative constitutionalism for effective protection of socio-economic rights. Through this mechanism the state is held accountable for its shortcomings.

4. The courts and transformation

South Africa's judicial authority is vested in the courts. They are empowered in

in challenging poverty?" (2002), *Law, Democracy & Development*, 6(2), p. 177.

⁸⁴ Oliver Njuh Fuo, "The transformative potential of the Constitutional environmental right overlooked in Grootboom" (2013) *Obiter*, 34(1), p. 77.

⁸⁵ *Treatment Action Campaign*, para 1.

⁸⁶ *Ibid*, para 23.

terms of the Constitution to uphold the principle of the rule of law and the supremacy of the Constitution. This mandate requires them to act impartially, without fear, favour or prejudice.⁸⁷ These provisions are crucial, entrusting courts with a duty to fulfil constitutional commitments in a manner that aligns with the spirit of South Africa's constitutional democracy, and its objectives. This also highlights the transformational role they have to play as mandated to uphold the rule of law. Pius Langa pointed out that courts play an important role in ensuring that the transformation sought in the constitutional dispensation is achieved through the judiciary.⁸⁸ The purpose of this section is to highlight why and how courts play a role in ensuring that the mission of transformative Constitutionalism is achieved. A historical overview is important in this regard to understand firstly the "why" aspect.

The overview begins with the provisions of the South African Act Amendment Act of 1956. The Act, particularly section 2 dealt with the court's competence to pronounce on the validity of certain laws made by parliament. The provision stipulated the following: "no court of law shall be competent to inquire into or to pronounce upon the validity of any law passed by parliament other than law which alters or repeals or purports to alter or repeal the provisions of section one hundred and thirty-seven or one hundred and fifty-two of the South African Act, 1909."

The provision was further entrenched in the Constitution of 1961 which solidified the exclusion of courts in declaring on the validity of legislations.⁸⁹ These provisions were amongst many others, reflecting the attitude of the apartheid government, which was authoritarian, ruling through parliamentary sovereignty.⁹⁰ This rule effectively restrained courts in the performance of their judicial responsibilities. To date, President Paul Kruger is famously known for the antagonism he expressed about judicial review, saying it is 'a principle invented by the devil.'⁹¹

The apartheid government leveraged its parliamentary sovereignty and white hegemony to compel courts to enforce fundamentally unjust apartheid laws.⁹² Likewise, the application of human rights was largely disregarded, government arguing that the individual interests embedded in human rights would not be in line with the political and religious tradition of the so-called 'Afrikanerdom', favouring state and 'communitarian value' over individual interest.⁹³ The Bill of Rights were also rejected by the Prime Minister Hendrick Verwoerd who said it was unlikeable to adopt them as 'no suggestion was made as to how rights could be effectively guaranteed without sacrificing the sovereignty of parliament.'⁹⁴

⁸⁷ Section 165(2) of the Constitution.

⁸⁸ See Pius Langa, "Transformative constitutionalism" (2006) *Stellenbosch Law Review*, 17(3).

⁸⁹ Section 59 of the Republication Constitution of 1961.

⁹⁰ Felix Dube, "Separation of powers and the institutional supremacy of the Constitutional Court over Parliament and the executive" (2020) *South African Journal on Human Rights*, 36(4), p. 296.

⁹¹ G Devenish, "The independence and effectiveness of Constitutional Courts in Sub-Saharan Africa: the South African experience" (2007) *Botswana Law Journal*, 6(12), p. 5.

⁹² *Ibid.*

⁹³ R Hirschl, "The political origins of the new constitutionalism" (2004) *Indiana Journal of Global Legal Studies*, 11(1), p. 99.

⁹⁴ Kahn Ellison "The New Constitution" (1961) *South African Law Journal* 78, p. 245.

Lawyers and judges who challenged the government and the status quo were subjected to considerable harassment.⁹⁵ Devenish points out that the effect of this status quo was detrimental because it brought the legitimacy of courts to question.⁹⁶ This also affected the independence of courts because an independent court should not have been constrained in the performance of its duties.

When the Constitution was adopted, the powers and jurisdiction of courts were also impacted - the Constitution transformed the role of judges and their judicial functions resulting in their independence and giving them the freedom to perform their duties without interference in light of the doctrine of separation of powers. The element of an independent judiciary is an important one in South Africa, given their constrain of independence in the past.⁹⁷ As Jackie Dugard points out, it enhances South Africa's legal system and its jurisprudence.⁹⁸ Justice Chaskalson emphasis that independence is not only for personal benefit but serves the public interest, because without this protection, judges would struggle to perform their duties without fear or favour.⁹⁹ This is a significant paradigm shift, reinforcing the legitimacy, accessibility, and effectiveness of the legal system in South Africa through the courts.

It is pointed out by Cathi Albertyn and Beth Goldblatt that South Africa has a systemic problem of discrimination that has been institutionalized in laws and society.¹⁰⁰ Addressing these issues requires genuine transformation and the reconstruction of society including the redistribution of power and resources through egalitarian lines.¹⁰¹ It also calls for the eradication of material disadvantages that are based on race, gender, and class inequalities.¹⁰² One of the role players that should facilitate this responsibility are the courts. There are several provisions that support this mandate, and which give courts the power and competence to adjudicate matters in a manner that ensures that the transformative objectives are achieved. This brings up the "how" question.

First, section 172(1)(a) of the Constitution empowers courts to, when handling constitutional matters within their jurisdiction to declare any law or conduct that is inconsistent with the Constitution invalid.¹⁰³ The significance of this provision is that courts can interrogate legislation and declare them invalid on grounds of inconsistency with constitutional objectives, allowing them to actively work towards transformative

⁹⁵ Jackie Dugard, "Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation" (2007) *Leiden Journal of International Law*, 20(4), p. 967.

⁹⁶ G Devenish, "The independence and effectiveness of Constitutional Courts in Sub-Saharan Africa: the South African experience" (2007) *Botswana Law Journal*, 6(12), p. 5.

⁹⁷ Jackie Dugard, "Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation" (2007) *Leiden Journal of International Law*, 20(4), p. 970.

⁹⁸ Ibid.

⁹⁹ Kim Hawkey, "Justice Chaskalson on the future of the profession at the Cape Law Society AGM" (2013) *de rebus* available at <https://www.derebus.org.za/justice-chaskalson-future-profession-cape-law-society-agm/> (accessed on 12 December 2024).

¹⁰⁰ Cathi Albertyn and Beth Goldblatt, "Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality." (1998) *South African Journal on Human Rights* 14(2), p. 246.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ See, for example, section 172(1) of the Constitution.

objectives.¹⁰⁴ This has been witnessed in many cases since the dawn of constitutionalism in South Africa. For instance, in *Rahube v Rahube and Others*¹⁰⁵ the significance of this provision was witnessed when the court confirmed a ruling of the High Court in Pretoria that declared Section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 unconstitutional on the basis that it violated women's rights in terms of section 9(1) of the Constitution. Section 2(1) of the Act provided for the conditional conversion of land tenure rights to ownership but failed to protect women's rights, which the court found to be a direct violation of constitutional rights.

This ruling emphasized the progressive role the courts through the Constitution has to play in driving social change.¹⁰⁶ Anna Parrilli points out how the court recognized and considered South Africa's apartheid legacies, as well as the entrenched patriarchal nature of South Africa and its impact on women, demonstrates the progressive role entrusted to courts to promote transformation.¹⁰⁷

In addition to the provisions of section 172(1)(a) of the Constitution, section 172(1)(b) further provides that the court mentioned in section 172(1)(a) may make an order that is "just and equitable". Eric Christiansen notes that both these sections play an important role in giving effect to substantive Justice.¹⁰⁸ They enable courts to provide remedies that do not only give effect to formal equality, but substantive equality, advancing genuine fairness and justice for all.¹⁰⁹

Another provision that reinforces the transformative objectives is section 39(1) of the Constitution.¹¹⁰ This section seeks to promote an active judiciary that promotes constitutional values, through aid from international law and foreign jurisdictions. This section allows courts to provide value-based interpretations. Jackie Dugard points out that value-based interpretations are transformative, rendering legal positivism irrelevant.¹¹¹ Positivism, which was prominent during the apartheid era, failed to

¹⁰⁴ As stated in *Rahube v Rahube and Others* 2019 (2) SA 54 (CC) at para 34 "when faced with a challenge to the constitutional validity of a provision in an Act, the Court examining the challenge should ascertain whether it is reasonably possible to interpret the section in a manner that conforms with the Constitution."

¹⁰⁵ 2019 (2) SA 54 (CC).

¹⁰⁶ Theunis Roux, "The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?" (2020) *Constitutional Court Review*, 10, p. 1.

¹⁰⁷ Anna Parrilli, "Uncovering Colonial-Apartheid Legal Geography: Women's Right to Land, Housing and Property before the Constitutional Court of South Africa" (2023) *The Cardozo Electronic Law Bulletin*, 29(1), p. 82.

¹⁰⁸ Eric Christiansen, "Transformative Constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice" (2010) *The Journal of Gender, Race and Justice*, 13, p. 587.

¹⁰⁹ *Ibid*.

¹¹⁰ Section 39(1) of the Constitution reads as follows: „(1) When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

¹¹¹ Jackie Dugard, "Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation" (2007) *Leiden Journal of International Law*, 20(4), p. 970.

transform the apartheid situation in South Africa - failing to achieve racial equality.¹¹² Section 39(1) sought to rectify this position by directing courts to promote equality and justice by allowing them to import human rights standards in South Africa and strengthen the protection of these rights through international law standards and foreign aid. This has been evident in landmark cases like *S v Makwanyane and Another* 1995 (3) SA 391 where the court held that the death penalty was unconstitutional deeming it cruel and inhuman against international norms.

Sandra Liebenberg has pointed out that although courts have a limited role to some extent, particularly in dealing with the root causes of some of the problems confronting South Africa, poverty being one of them, they still however have a significant role to play in ensuring transformation is achieved and supporting it through their judgments.¹¹³ Danie Brand further argues that courts have to produce judgments that 'innovate and model intellectual and institutional practices' that works towards achieving a society envisioned by the Constitution.¹¹⁴ In addition, Felix Dube argues that courts, through their judicial supremacy, can, particularly the Constitutional Court, legislate through their decisions and supervise the executive.¹¹⁵ The duty to supervise the executive ensures that the executive respects the Constitution and the orders the courts make.¹¹⁶ Likewise, Erasmus and Hornigold add that judges have to do more than just being neutral adjudicators, they are enjoined to play an active role in collecting information, developing solutions, and managing institutional transformation,¹¹⁷ and this is possible through judicial supervision.¹¹⁸ Therefore it is essential for courts to embody the spirit of transformation, and be aligned with the Constitution's vision.¹¹⁹

5. Conclusion

This paper concludes that transformative Constitutionalism underscores a transformative framework in South Africa through the Constitution to redress historical injustices and reconstruct the South African society. This conclusion draws from various considerations that were considered emanating from constitutional provisions. The arguments presented were built on a discourse of human rights, particularly the right to equality and dignity, as well as socioeconomic rights. The paper went on to argue that

¹¹² John Dugard, "Some realism about the judicial process and positivism-a reply" (1981) *South African Law Journal*, 98, p. 377.

¹¹³ Sandra Liebenberg "Social rights and transformation in South Africa: Three frames" (2015) *South African Journal on Human Rights* 31(3), p. 447.

¹¹⁴ Danie Brand, "Judicial deference and democracy in socio-economic rights cases in South Africa" (2011) *Stellenbosch Law Review* 22(3), p. 622.

¹¹⁵ Felix Dube, "Separation of powers and the institutional supremacy of the Constitutional Court over Parliament and the executive" (2020) *South African Journal on Human Rights*, 36(4), p. 295.

¹¹⁶ *Ibid*, p. 304.

¹¹⁷ D. Erasmus and A. Hornigold, "Court Supervised Institutional Transformation In South Africa" (2015) *Potchefstroom Electronic Law Journal*, 18(7), p. 2464.

¹¹⁸ *Ibid*, p. 2480.

¹¹⁹ Sandra Liebenberg, "Social rights and transformation in South Africa: Three frames" (2015) *South African Journal on Human Rights* 31(3), p. 447.

substantive equality has been critical in advancing South Africa's transformative constitutionalism mission.

Substantive equality, as exemplified by transformative policies such as affirmative action and BEE programmes, demonstrates South Africa's commitment to redressing social and economic inequalities confronting it. The paper further emphasized the crucial role played by the government and the judiciary in ensuring that socio-economic conditions change. The judiciary, in particular, must critically examine laws, policies, and regulations that fail to heal a society still in pain. These shared responsibilities create a framework for achieving an equitable and just society, striving for a better future for everyone. This, in turn, facilitates the societal transformation envisioned by the Constitution.

Bibliography

I. Books and journals

1. Albertyn, Catherine. "(In)Equality and the South African Constitution." *Development Southern Africa* 36, no. 6 (2019): 751-766.
2. Albertyn, Catherine. "Substantive Equality and Transformation in South Africa." *South African Journal on Human Rights* 23, no. 2 (2007): 253-276.
3. Parrilli, Anna, "Uncovering Colonial-Apartheid Legal Geography: Women's Right to Land, Housing and Property before the Constitutional Court of South Africa." *The Cardozo Electronic Law Bulletin* 29, no. 1 (2023): 70-85.
4. Smith, Anna, "Constitutionalising Equality: The South African Experience" *International Journal of Discrimination and the Law* 9, no. 4 (2008): 201-249.
5. Smith, Anna "Equality Constitutional Adjudication in South Africa." *African Human Rights Law Journal* 14, no. 2 (2014): 609-632.
6. Albertyn, Cathi and Beth, Goldblatt. "Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality." *South African Journal on Human Rights* 14, no. 2 (1998): 248-276.
7. Erasmus, D. and A Hornigold. "Court Supervised Institutional Transformation In South Africa." *Potchefstroom Electronic Law Journal* 18, no. 7 (2015): 2457-2501.
8. Dafel, Michael. "The negative obligation of the housing right: An analysis of the duties to respect and protect." *South African Journal on Human Rights* 29, no. 3 (2013): 591-614.
9. Christiansen, Eric, "Transformative Constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice." *The Journal of Gender, Race and Justice*, 13 (2010): 575-614.
10. Kibet, Eric and Charles, Fombad. "Transformative Constitutionalism and the adjudication of constitutional rights in Africa." *African Human Rights Journal* 17, no. 2 (2017): 340-366.
11. Dube, Felix, "Separation of powers and the institutional supremacy of the Constitutional Court over Parliament and the executive." *South African Journal on Human Rights* 36, no. 4 (2020): 7-32.
12. Devenish, G., "The independence and effectiveness of Constitutional Courts in Sub-Saharan Africa: the South African experience." *Botswana Law Journal* 6, no. 12 (2007): 6-26.

13. Harris, C. I. "Whiteness as property." *Harvard Law Review* 106, no. 8 (1993): 1707-1791.
14. Heyns, Christof, and Danie, Brand. "Introduction to socio-economic rights in the South African Constitution." *Law, Democracy & Development* 2, no. 2 (1998): 153-167.
15. Dugard, Jackie, "Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation." *Leiden Journal of International Law* 20, no. 4 (2007): 965-981.
16. Dugard, John, "Some realism about the judicial process and positivism-a reply." *South African Law Journal*, 98, (1981): 372-387.
17. Yuvraj, Joshi, "Affirmative Action as Transitional Justice." *Wisconsin Law Review* 2020, no. 1 (2020): 1-48.
18. Ellison, Kahn, "The New Constitution." *South African Law Journal* 78, (1961): 244-281.
19. Horsthemke, Kai, "Redress and reconciliation in South African education: the case for a rights-based approach." *Journal of Education* 37 (2005): 169-188.
20. Klare, Karl, "Legal Culture and Transformative Constitutionalism." *South African Journal on Human Rights* 14, no. 1 (1998): 146-188.
21. Hawkey, Kim, "Justice Chaskalson on the future of the profession at the Cape Law Society AGM." (2013) de Rebus available at: <https://www.derebus.org.za/justice-chaskalson-future-profession-cape-law-society-agm/> (accessed on 12 December 2024).
22. Juma, Laurence, "Human Rights and Conflict Transformation in Africa: Some Thoughts on the Transformative Values of Human Rights." *Speculum Juris* 1, (2012): 1-20.
23. Anyabolu, M.N., "The Nature of Human Rights." *Journal Of International Human Rights And Contemporary Legal Issues* 1 (2021): 53-65.
24. Pieterse, Marius, "The Legitimizing/insulating effect of socio-economic rights." *Canadian Journal of Law and Society* 22, no. 1 (2007): 1-20.
25. Heywood, Mark, "The transformative power of civil society in South Africa: an activist's perspective on innovative forms of organizing and rights-based practices." *Globalizations*, 13, (2019): 30-52.
26. Rapatsa, Mashele, "The Right to Equality under South Africa's Transformative Constitutionalism: A Myth or Reality?." *Acta Universitatis Danubius. Juridica* 11, no. 2 (2015): 18-35.
27. Rapatsa, Mashele, "Transformative Constitutionalism in South Africa: 20 Years of Democracy." *Mediterranean Journal of Social Sciences* 5, no. 27 (2014): 887-895.
28. Walker, Melanie and Carmen Martinez-Vargas. "How dignity matters for life and lifelong learning: insights from participatory story-telling by university students in South Africa." *International Journal of Lifelong Education* 44, no. 1 (2025): 1-16.
29. Charles, Ngwenya and Loot Pretorius. "Substantive Equality for Disabled Learners in State Provision of Basic Education: A Commentary on *Western Cape Forum for Intellectual Disability V Government of the Republic of South Africa*." *South African Journal on Human Rights* 28, no 1 (2012): 81-115.
30. Fuo, Oliver Njuh, "The transformative potential of the Constitutional environmental right overlooked in Grootboom." *Obiter* 34, no. 1 (2013): 77-95.
31. Olivier, Marius and Linda Jansen, van Rensburg. "Protection and enforcement of the right to social security." *Law, Democracy & Development* 4, no. 1 (2000): 87-99.
32. Miquel, Pellicer and Vimal Ranchhod. "Understanding the effects of racial classification in Apartheid South Africa." *Journal of Development Economics* 160

- (2023): 1-13.
33. Langa, Pius, "Transformative constitutionalism." *Stellenbosch Law Review* 17, no. 3 (2006): 351-360.
 34. Hirschl, R. "The political origins of the new constitutionalism." *Indiana Journal of Global Legal Studies* 11, no. 1 (2004): 71-108.
 35. Nomfundo, Ramalekana, "A Critique of the Stigma Argument Against Affirmative Action in South Africa." *University of Oxford Human Rights Hub Journal*, 4, (2022): 1-32.
 36. Ebrahim, S., "Reviewing the Suitability of Affirmative Action and the Inherent Requirements of the Job as Grounds of Justification to Equal Pay Claims in Terms Of the Employment Equity Act 55 of 1998." *Potchefstroom Electronic Law Journal* 21, (2018): 1-38.
 37. Albie, Sachs, "Towards a Bill of Rights for a Democratic South Africa." *Journal of African Law* 35, no. (1-2) (1991): 21-43.
 38. Liebenberg, Sandra, "Social rights and transformation in South Africa: Three frames." *South African Journal on Human Rights* 31, no. 3 (2015): 446-471.
 39. Liebenberg, Sandra, "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?." *Law, Democracy & Development* 6, no. 2 (2002): 159-191.
 40. Amartya, Sen, "Human rights and capabilities." *Journal of human development* 6, no. 2 (2005): 151-166.
 41. Rosa, Solange, "Transformative Constitutionalism in a democratic state." *Stellenbosch Law Review* 22, no. 3 (2011): .452-565.
 42. Roux, Theunis, "The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?." *Constitutional Court Review*, 10, (2020): 1-42.
 43. Archibong, U. and O. Adejumo. "Affirmative Action in South Africa are we creating new casualties?." *Journal of Psychological Issues in Organizational Culture* 3, no. 1 (2012): 14-27.
 44. Elkins, Z. and T. Ginsburg. "Imagining a World without the Universal Declaration of Human Rights." *World Politics* 74, no. 3 (2022): 327-366.

II. Legislation

1. Broad-Based Black Economic Empowerment Act 53 of 2003.
2. Broad-Based Black Economic Empowerment Amendment Act 46 of 2013.
3. Convention on the Right of the Child of 1989.
4. Elimination of All Forms of Discrimination Against Women of 1979.
5. Employment Equity Act 55 of 1998.
6. International Covenant on Economic, Social and Cultural Rights of 1966.
7. The Constitution of the Republic of South Africa, 1996.
8. The Republic Constitution of 1961.
9. Universal Declaration of Human Rights of 1948.