Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape*

Justice SM Mbenenge
Judge President: Eastern Cape Division of the High Court

1 INTRODUCTION

Let me take this opportunity to greet everybody gathered in this auditorium this morning, and to express my heartfelt indebtedness to the Law School of this esteemed institution for generously inviting me to participate in today's proceedings. I would also like to acknowledge that this institution has, in years past, demonstrated its excellence in legal education – a fact which finds support from the products of this institution whose presence is felt in the courts' corridors and in other corridors of the legal field. One thing that is worthy to mention about legal academics is their freedom to write and criticise judgments of the courts, an exercise that has proven itself to be vital for the advancement of our jurisprudence. As a judge, I lack that latitude and I should at the outset acknowledge the limitations within which I function. Much as I am allowed to participate in public debate on matters pertaining to legal subjects, the judiciary, or the administration of justice, I am precluded from expressing views in a manner that may undermine the standing and integrity of the judiciary. You will derive comfort from knowing that this disclaimer applies only to me and not to most of us gathered here today. Moreover, if at some point I express a view, let it be known upfront that such a view does not necessarily represent the views of the entire Eastern Cape Bench.

Transformative constitutionalism is the subject of our focus today. I am acutely alive to the fact that the Higher Education Quality Committee (HEQC) has urged the Law Faculty to reflect on the influence of transformative constitutionalism on the curriculum of the law degrees currently being offered around the country. I trust that I shall do justice to my brief by simply focusing, to the best of my ability, on what transformative constitutionalism is, rather

* Public Lecture delivered at the Nelson R. Mandela School of Law, University of Fort Hare on 17 April 2018

than what it is not. In the course of doing so, I shall endeavour to share with you what I believe has been the contribution of the Eastern Cape Bench to transformative constitutionalism. Part of my conclusion challenges students as future lawyers to embrace the notion and to shun activity that effectively negates transformative constitutionalism.

2 TERMINOLOGICAL GYMNASTICS

Before I plunge into the detail of today's topic, let me unpack transformative constitutionalism. The concept obviously encapsulates two notions – transformation and constitutionalism, which have been fused into a single notion: transformative constitutionalism. Three questions immediately come to the fore: what is transformation, what is constitutionalism, and what does transformative constitutionalism denote? In simple terms, "transformation" is bringing about change in a structured way – change for the better. The Merriam-Webster Dictionary defines "transformative" as "causing or able to cause an important and lasting change in someone or something."[1] "Constitutionalism", on the other hand, means adherence to a constitutional system of government. It is the idea often associated with the political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on it observing these limitations.

I join hands with the late former Chief Justice Langa in his analysis of the definition of transformative constitutionalism. He remarked that

> the meaning of transformation in juridical terms is as highly contested as it is difficult to formulate. It is perhaps in keeping with the spirit of transformation that there is no single stable understanding of transformative constitutionalism.[2]

In essence, it is because constitutionalism, in the context of South Africa, is in itself transformative. The late Chief Justice, addressing himself to what change is about, mentioned that it would be the frontrunner in constructing a new legal order, creating equal opportunities for all and space for dialogue where the idea of change is constant, and embraces social, economic and legal concerns. Ladies and gentlemen, allow me to say transformative constitutionalism is thus not an event; it is a process.

3 TRANSFORMATIVE CONSTITUTIONALISM

Lawyers practise law and champion the causes of their clients. In the course of that they apply the law to the facts and must be alert to the question whether there is a valid cause of action or a *bona fide* defence or basis of opposition. Judges pronounce on the disputes serving before them. They apply, interpret and enforce the law. In so doing they do not necessarily label or categorise their pronouncements in accordance with a particular jurisprudential school of thought. More often than not jurisprudential concepts such as positivism, realism, activism etc. are coined by academic lawyers. Little wonder that the concept about which we are talking today has its origins in the writings of Professor Karl Klare[3] who, approximately 20 years ago, described the concept 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]

This definition makes judges, other functionaries and institutions role-players in transformative constitutionalism. Indeed, judges are custodians of constitutional values such as human dignity, equality and freedom, and bear the obligation to ensure that constitutional provisions are applied in ways that "improve the quality of life of all citizens and free the potential of each person."[5] It has also been said that the transformative nature of our Constitution proceeds from a recognition of the reality that – because of the legacy of colonialism and apartheid – inequality abounds in South African society and the Constitution seeks to transform our

1 https://www.merriam-webster.com/dictionary/transformative (accessed 10-04-2018).
2 Langa "Transformative Constitutionalism" 2006 *Stellenbosch Law Review* 351-360 351.
3 Klare "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146-188.
4 *Ibid* 150.
5 Preamble to the Constitution.

society in order to achieve true equality.[6]

Section 9(2) of the Constitution provides that equality "includes the full and equal enjoyment of all rights and freedoms". It further provides that

> 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.

This provision has radical implications for socio-economic transformation in post-apartheid South Africa. It allows positive discrimination, based on prohibited and analogous grounds, as a means of addressing racial and gender inequality in many facets of life. In this respect, Albertyn and Goldblatt[7] have reasoned in the following terms

> We understand transformation to require a complete restructuring of the state and society, including redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systematic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realize their full human potential within positive social relationships.[8]

At the core, transformative constitutionalism teaches us not to be content with the status quo, it is informed by a desire to continuously seek better ways to transform the society in ways that continuously enhances the lives of the people. In this context the courts would seek to interpret laws in a way that promotes, protects and fulfils the rights and freedoms enshrined in the Constitution. Like judicial activism there is no single agreed meaning of transformative constitutionalism, but the courts use their judicial power and interpretive prowess to articulate a progressive approach of how best the laws can be applied to better serve the people. The late former Chief Justice Langa stated the following in an attempt to provide a definition for transformative constitutionalism in the light of the duty of judges 'upholding the transformative ideal of the Constitution requires judges to change the law to bring it in line with the rights and values for which the Constitution stands. The problem lies in finding the fine line between transformation and legislation. He stated further, that, overly activist judges can be as dangerous for the fulfilment of the constitutional dream as unduly passive judges. Both disturb the finely-balanced ordering of society and endanger the ideals of transformation'.[9]

4 ROLE OF COURTS

More often than not, the courts are called upon to make rulings on the application of policies like affirmative action or preferential treatment programmes designed to benefit historically disadvantaged groups. However, the dividing line between reasonable and justifiable affirmative action, on the one hand, and reverse discrimination, on the other, often leads to contestations and often invite courts to determine the correctness of government programmes that would have been allegedly developed to cancel out the unequal access to services caused by institutionalised discrimination against certain classes or social groups in society.[10]

In interpreting the Constitution purposively Friedman J in *Nyamakazi v President of Bophuthatswana*[11] held that

> A 'purposive' construction of a Bill of Rights is necessary in that it enables the Court to take into account factors other than mere legal rules. These are the objectives of the rights contained therein, the circumstances operating at the time when the interpretation has to be determined, the future implications of the construction, the impact of the said construction

6 Justice MR Madlanga "Procurement, Corruption and Their Relevance to, and Impact on, Human Rights" lecture delivered on 19 March 2018, George Washington University.
7 Albertyn & Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 *SAJHR* 248-276.
8 *Ibid* 249.
9 See Langa 2006 *Stellenbosch Law Review* 351-360 353.
10 See *Harksen v Lane* 1997 1 SA 300 (CC) paras 53-55.
11 1992 (4) SA 540 (BGD).

> on future generations, the taking into account of new developments and changes in society.

In what could be interpreted as a principled support of Friedman's approach, Froneman J pointed out that

> ... the fundamental concern and scheme of the Constitution is to form a bridge between an unjust and undemocratic system of the past and a future system concerned with, *inter alia*, openness, democratic principles and human rights.[12]

Against this background and bearing in mind the role that courts must play in transformative constitutionalism let us turn to consider the contribution made by the Bench in the Eastern Cape.

5 CONTRIBUTION OF THE EASTERN CAPE BENCH TO TRANSFORMATIVE CONSTITUTIONALISM

I have identified a few cases that I believe should shed light, the first of which is *Magidimisi v Premier of the Eastern Cape*.[13] In this case, the applicants had obtained court orders entitling them to reinstatement and back pay of social grants, but the respondent had not complied with the orders. The learned Judge held

> I hope by now the respondents realize that their response on the papers [suggesting that the applicants' plight is 'more apparent than real'] was misconceived and wrong. On the face of it the response appears to be arrogant and even callous.[14]

The Judge further stated that

> In this case the constitutional duty of the respondents was to give effect to the fundamental right of the applicant and others to social security and assistance under s 27 of the Constitution, by properly administering the provisions of the Social Assistance Act …The constitutional duty of the courts in this regard is not to tell the respondents how to do this, but merely to ensure that they do take reasonable measures to make the system effective. In this manner the respondents (representing the province), as well as the courts, are enjoined to ensure the realisation of the same goal, albeit in different ways. The respondents do not have a choice but to administer the administration of grants in a reasonable manner making the system effective. The courts have no choice but to give redress when this is not done. And after the courts have made a final pronouncement on the issue in accordance with legal procedures, the respondents have no constitutional choice to disregard the courts' judgments. If they nevertheless do, the courts in turn have no constitutional choice other than to ensure as far as possible that practical effect is given to those judgments.[15]

Another case in point is *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government*.[16] The case concerned the cancellation of social grants in the Eastern Cape. The applicants sought to bring a class action to challenge the cancellation and seek relief. Froneman J held

> Particularly in relation to so-called public law litigation there can be no proper justification of a restrictive approach [to standing]. The principle of legality implies that public bodies must be kept within their powers. It is true that the nature of public law litigation creates problems of its own, namely that of proper representation … these problems are, however, not factors that militate against a broad view of standing. At most they require safeguards to ensure the broadest and most effective representation in and presentation of public interest litigation.[17]

The Judge consolidated his argument and held that

12 *Qozeleni v Minister of Law and Order* 1994 (3) SA 6 2 5 (E) 567H.
13 [2006] JOL 17274 (Ck).
14 *Magidimisi* para 17.
15 *Ibid* para 26 (not appealed).
16 2000 (12) BCLR 1322 (E).
17 *Ibid* paras 619B-F.

> It is against [the background of the difficulties many South Africans have in accessing the courts] that the issues of standing, rights and remedies should be determined. There is evidence that many people in similar circumstances as the applicants are unable to individually pursue their claims because they are poor, do not have access to lawyers and will have difficulty in obtaining legal aid. Effectively they are unable to act in their own name. If there is a clearly defined class of people who have been wronged in the manner required by section 38, it is no answer for either the judicial or the administrative arms of government to say that it will be difficult to give them redress. If it means that Courts will have to act in new and innovative ways to accommodate them, then so be it. What cannot be allowed, however, is the unlawful deprivation of these rights by way of administrative stealth. The Constitution forbids that and has made the Courts the *democratic* guardians to prevent that from happening. Making it easier for disadvantaged and poor people to approach the Court on public issues … serves our new democracy well … The novelty of these proceedings should, however, not be a bar to Courts finding ways to regulate these proceedings in a practical manner in order to ensure that they are expeditiously finalised.[18]

The case became the subject of an appeal to the Supreme Court of Appeal (SCA)[19] which upheld the High Court's pronouncement.

Port Elizabeth Municipality v Various Occupiers[20] was primarily concerned with the lack of adequate consultation with unlawful occupiers before an eviction order was made against them. The case concerned an eviction application brought in terms of section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) by the Port Elizabeth Municipality against about 68 people who were occupying informal dwellings erected on privately-owned land within the jurisdiction of the Municipality. The Municipality was responding to a neighbourhood petition in pursuing the eviction application. The Court, after detailed historical and contextual analysis of the nature and role of forced evictions during the apartheid era, highlighted the transformative purposes section 26(3) of the Constitution was intended to promote. The Court further held that PIE had to be interpreted and applied within a "defined and carefully calibrated constitutional matrix".[21]

The Court held that property rights are not absolute, but incorporate the important social dimension of promoting the public interest, particularly given South Africa's history of colonial and racist dispossession. Significantly, under the Constitution, "the normal ownership rights of possession, use and occupation" have to be balanced with "a new and equally relevant right not to be arbitrarily deprived of a home." The Court pointed out that PIE should not merely be seen as an expression of "judicial philanthropy in favour of the poor",[22] but must be interpreted in the light of the fact that even unlawful occupiers are now bearers of constitutionally enshrined housing rights. The Court further elaborated on the substantive interest's people have in their homes, which are threatened in an eviction context, pointing out that

> Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat.[23]

The Court further explained that the fact that people have housing rights, which may conflict with property rights in an eviction application, fundamentally changes the traditional approach of courts in eviction applications. The Court elaborated on the need for the availability to the unlawful occupier of suitable alternative accommodation as a factor in determining whether it is just and equitable to grant an order for eviction in terms of section 6(3) of PIE. The Court further noted though that there is "no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available." Having said that, the Court stipulated that a court should be reluctant

18 Paras 621H; 622J-623A; 625A-B; 626E; 629F&H.
19 2001 (10) BCLR 1039 (A).
20 2004 (12) BCLR 1268 (CC).
21 *Ibid* para 14.
22 *Ibid*.
23 *Ibid* para 17.

to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.

The significance of the *Port Elizabeth Municipality* decision lies in its insistence that unlawful occupiers, who enjoyed minimal rights under the previous legislative and common-law regime, are now bearers of constitutionally protected rights, specifically the housing rights in section 26 of the Constitution. This confers on them interrelated procedural and substantive protections in the context of legal steps to evict them from their homes. It is also significant to note that the Court provided a pro-poor interpretation of the duties of local authorities in eviction cases. It held that it would not be just and equitable to evict a community without prior consultation with them and without at least considering the possibility that they could be provided with tenure security on any relocation site. The Court's concern for the need to provide the occupiers with some measure of tenure security is clear throughout the judgment. *Port Elizabeth Municipality* accordingly reinforces the view that security of tenure is a constituent of the right of access to adequate housing protected under section 26 of the Constitution. It is noteworthy that the *Port Elizabeth Municipality* case considered an application for eviction at the instance of an organ of State.

We could go on and on citing cases demonstrative of how transformative constitutionalism has been upheld in the Eastern Cape. For present purposes the few referred to seem to suffice.

6 CONCLUDING REMARKS

This presentation would be incomplete without an appeal being made to students, lawyers in the making, to embrace transformative constitutionalism. A question worth posing and answering is whether students have reflected on the importance of transformative constitutionalism insofar as it safeguards socio-economic rights. From time to time, protest action is embarked upon by students, more often than not for the most legitimate of reasons. Protest is legitimate, whilst unlawful and criminal action that has the effect of negating transformative constitutionalism, which is sometimes resorted to is not. The Constitution should be seen as a living document that guides not only the government and public institutions, but all those who come into contact with it. We are expected to shape and align our way of life to be consistent with the values embodied in the Constitution. All law and conduct should be consistent with it; our private lives should reflect the values enshrined therein. Wherever we set our foot we should constantly remember to uphold those values. Our institutions of learning and government departments should not only preach and lecture these values but also take a pragmatic approach thereto. In the words of the late Nelson Rolihlahla Mandela lawyers should always remember that they are leaders of thought in their communities. That admonition applies with more force to a law student, especially in so far as they relate with other fellow students and activities engaged in during protest action.

The Higher Education Quality Committee of the Council on Higher Education has challenged this institution to reflect further on transformative constitutionalism in the law degrees it offers. In this regard, I can do no better than urge this institution to take heed of what Quinot[24] has to say on transformative legal education. He says

24 Quinot "Transformative Legal Education" Inaugural lecture delivered on 19 September 2011, University of Stellenbosch.

> [I]t seems to me that we have a unique opportunity … to respond to various fundamental changes that we witness in society around us. Legal education stands at a unique crossroads in this regard. Thus, for change in legal education in South Africa to proceed responsibly, it must be grounded in theory … I believe that transformative legal education can provide us with such a theoretical framework. This framework embraces transformative constitutionalism as the guiding theory to our discipline. … Seventeen years into our democracy, I think that it is high time that we as law teachers start to critically ask what we are doing in our classes to further the cause of the Constitution's "*enterprise of inducing large-scale social change through nonviolent political processes grounded in law*" towards a "society based on democratic values, social justice and fundamental human rights (author's emphasis).[25]

25 Quinot 13-14.