THE BUILDING OF SOUTH AFRICA'S CONSTITUTION ON THE RUINS OF ITS PAST: THE INDIGENISING OF PUBLIC LAW IN POST-APARTHEID SOUTH AFRICA*

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I INTRODUCTION

A Constitution reflects a country's soul and is a mirror in which it views itself.[1] This is because constitutions, by their nature, capture and record the collective memory and past fears of a country, while simultaneously espousing the hopes, vision and ambitions of the future. South Africa's Constitution[2] is no different. It is a constitution that is acutely mindful of the racist, sexist and oppressive ruins of the apartheid regime and which sets the foundation for a country that is based on equality, dignity and freedom. The interim Constitution of South Africa characterised itself as a—

> *historical bridge between the past of a deeply divided society, characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans.*[3]

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* By 'indigenising' I mean the adaptation or refashioning to accord with present norms. The term will be explicated further in the article. Readers should note that this article is adapted from an original paper I delivered at a conference on 'The Making (and Re-Making) of Public Law' held on 6–8 July 2022 at the Sutherland School of Law, University College Dublin, Ireland.

[1] Mahomed CJ in *S v Acheson* 1991 (2) SA 805 (Nm) 813; referred to with approval in, amongst others, *Matatiele Municipality v President of the RSA* 2006 (5) SA 47 (CC) para 97 (per Sachs J). See further; J Hatchard 'Some Lessons on Constitution-making from Zimbabwe' (2001) 45 *Journal of African Law* 210 and H Ebrahim *The Soul of a Nation* (Oxford University Press 1998).

[2] The Constitution of the Republic of South Africa, 1996 (the Constitution).

[3] The Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution). See also E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

This powerful imagery persists and carries through to the Constitution. Recognising the reflective nature of a constitution, the former Chief Justice of South Africa, Justice Ismail Mohamed remarked:

> *The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the people, it is a 'mirror of the national soul', the identification of the ideals and aspirations of the nation, the articulation of the values binding its people and disciplining its government.*[4]

Our Constitution is not bereft of feeling, value and purpose. It calculatedly implores those applying and interpreting it to ensure transformation in the social and economic spheres of life. Judges are thus duty bound to remould our society from one ravaged by the ruinous effects of the brutal repressive apartheid regime to that visualised by the Constitution with its founding values of dignity, equality, human rights and freedom and the supremacy of the Constitution and the rule of law.

The notion that a constitution reflects the soul of a nation is a simple but powerful proposition. It implicitly illustrates the importance of domesticating or indigenising public law generally and constitutions specifically. The notions of justice, freedom, dignity and equality as enshrined in any constitution must resonate and be in harmony with the overriding indigenous juridical principles of that jurisdiction.

This article attempts to explore this idea – the domestication of constitutions and the value that this adds to their legitimacy. Allied to this idea is how the past of a country shapes its understanding and interpretation of a constitution and the general public law. By domestication or indigenisation of a constitution and public law, I am referring to the act of altering the 'DNA' or composition of those laws in order for them to reflect the prevailing social, political and economic conditions of a particular jurisdiction. Wholly transplanting legal systems without more will most likely not be seen as legitimate and may be rejected. For the transposition to be successful, the recipient society must view the laws as legitimate, practicable and relevant and the law must be consistent with the prevailing socio-cultural norms of that society and not misunderstand the systems of that society. To advance this central argument, I focus specifically on South Africa. I endeavour to demonstrate that the South African Constitution was born out of intense and inclusive negotiations that led to a settlement agreement on core constitutional principles. The country's apex court carefully and comprehensively analysed the interim and final Constitutions and eventually declared them to be compliant with the core constitutional

[4] Hatchard (note 1 above) 210.

principles agreed upon after the negotiations. There can thus be no question of the Constitution's legitimacy. But, as we know, law is dynamic, flexible and adaptive. This is crucial in a nascent evolving democracy. But, understandably, South Africa's pre-democracy statutes and common law remained law (unless of course struck down for unconstitutionality) when, first, the interim, and then the final Constitution came into being. How do existing statutory and common law principles adapt, evolve and develop in consonance with the supreme law with which it must comply? How is their assimilation into and adaptation to the Constitution attained? This is to be explored in the article – what I prefer to call the indigenising of the law, to make it fit with the present legal landscape. The article will be divided into three parts.

Part A of this article examines South Africa's oppressive apartheid past, which was predicated on parliamentary sovereignty. After detailing the past, it then provides, in Part B, an exposition of the current Constitution, which has been lauded as one of the most progressive constitutions in the world. Here, there will be a discussion of some of the salient features of the Constitution, which illustrate the importance of indigenising public law, through the notion of transformative constitutionalism, constitutional supremacy and the South African legal principle of *ubuntu*. Finally, Part C is a discussion of selected cases which demonstrate some of the points raised in Part B. These cases will look at socio-economic rights such as housing and the election regime in South Africa. What will be illustrated in this article is that in South Africa, indigenisation takes place through laws passed by the legislature or through the interpretation of laws by the judiciary.

II PART A: THE LONG ROAD[5] TO CONSTITUTIONAL SUPREMACY

To properly understand South Africa's Constitution, it is necessary to consider the oppressive legal order that operated in South Africa prior to its adoption. This is particularly unavoidable, because the Constitution was intended to be a decisive break[6] from the past and usher in a future based

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[5] For a personal, enthralling account of the prolonged struggle against apartheid, which resulted in the end of apartheid in 1994 and the beginning of a democratic South Africa, see Nelson Mandela *Long Walk to Freedom: The Autobiography of Nelson Mandela* (Little Brown & Co 1995).

[6] In *S v Makwanyane* 1995 (3) SA 391 (CC) 220, Justice Langa held that:

> 'When the Constitution was enacted, it signalled a dramatic change in the system of governance from one based on rule by Parliament to a constitutional State in which the rights of individuals are guaranteed by the Constitution. It also signalled a new dispensation, as it were, where rule

on human rights.[7] In this sense, it is a backward- and forward-looking Constitution. This is evident in numerous provisions that are historically self-conscious.[8] For instance, the Preamble of the Constitution recognises the need to redress the injustices of the past and honour those who struggled for freedom for South Africa.[9] The Constitution is backward-looking because the contours of justice (today and in the future) are informed, in part, by the peculiar injustices of the past.[10] Perforce, I take a moment to reflect on South Africa's history.

(a) The legal nature of apartheid: Parliamentary sovereignty

Prior to the advent of the Constitution, South Africa adhered to the doctrine of parliamentary sovereignty and the principle of executive prerogative. These were inherited from the English monarch under colonialism. Parliamentary sovereignty empowered the legislature to make any statute or measure it deemed necessary, without regard to its arbitrariness or unreasonableness. Thus, the legislature was the supreme law-making body and there was no law or measure beyond its purview. The import of this doctrine was captured by AV Dicey in the following terms:

> *Parliament has under the English constitution the right to make or unmake any law whatever, further that no person or body is recognised by the law of England as has a right to override or set aside the legislation of parliament.*[11]

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by force would be replaced by democratic principles and a governmental system based on the precepts of equality and freedom.'

[7] Justice Mahomed, at 262, in *Makwanyane,* remarked:
'The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.'

[8] The notion of 'historical self-consciousness' is taken from Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 155.

[9] P de Vos 'Looking backward, looking forward: Race, corrective measures and the South African Constitutional Court' (2012) 79 *Transformation: Critical Perspectives on Southern Africa* 144.

[10] K Asmal 'Peace, multiculturalism and development' in J Hume, TG Fraser & L Murray (eds) *Peacemaking in the Twenty-first Century* (Manchester Scholarship Online 2013) 190.

[11] AV Dicey *Introduction to the Study of the Law of the Constitution* 10 ed (St Martin's Press, 1959) 70.

Apartheid[12] was a complex arrangement of legal, social, political and economic practices of subjugation, oppression and domination. Its aim was to segregate people on the basis of race and gender and it discriminated on those grounds.[13] It denied people who were classified as 'non-Europeans' basic rights and stripped them of their humanity.[14] As noted by the Constitutional Court in *Brink v Kitshoff NO*,[15] apartheid systemically, through law and policies, discriminated against black people in every facet of life, literally from the cradle to the grave. Black people were prohibited from attending well-resourced schools and were denied the opportunity of attending university. Their access to public transport, libraries and civic amenities were severely restricted and, in some instances, entirely denied.[16] A simple pleasure of walking on a public beach was something 'non-Europeans' were not permitted.[17] Black people were also legally prohibited from owning land, and in certain instances, were proscribed from residing on land that was reserved for white people. The enforcement of discriminatory land and spatial legislation caused mass dispossession and forced removals of black people, resulting in white people owning nearly 90 per cent of land in South Africa.[18] In many respects, dispossession,

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[12] Apartheid means 'apartness' in Afrikaans.

[13] MS McDougal, HD Lasswell & L Chen *Human Rights and World Public Order* (Oxford University Press 1980) 523.

[14] J Dugard *Human Rights and the South African Legal Order* (Princeton Legacy Library 1978) 93–94 and M Higginbotham, L Higginbotham & S Ngcobo 'De Jure Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice' (1990) 4 *University of Illinois Law Review* 763.

[15] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 40.

[16] *Brink* (note 15 above) para 40. See also *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 74.

[17] See JM Rogerson '"Kicking Sand in the Face of Apartheid" Segregated Beaches in South Africa' (2017) 35 *Bulletin of Geography: Socio-economic Series* 93.

[18] Land dispossession in South Africa occurred first through the barrel of the gun and trickery and then subsequently through an array of oppressive legislation such as the Native Land Act 27 of 1913, Native Trust and Land Act 18 of 1936, Prevention of Illegal Squatting Act 52 of 1951, Group Areas Act 41 of 1950 and the Group Areas Act 36 of 1966. See also *Western Cape Provincial Government: In Re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC) para 41; *Daniels v Scribante* 2017 (4) SA 341 (CC); *District Six Committee v Minister of Rural Development and Land Reform* [2019] 4 All SA 89 (LCC); T Ngcukaitobi *Land Matters* (Penguin Random House 2021); B Atuahene 'Paying for the Past: Redressing the Legacy of Land Dispossession in South Africa' (2011) 45 *Law & Society Review* 955; R Davenport 'Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the State to impose

for black people, was nine-tenths of the law[19] and many of them were rendered strangers in their own country.[20]

There was no facet of social life that was left untouched by apartheid. The Prohibition of Mixed Marriages Act 55 of 1949 prohibited marriages between 'whites' and 'non-whites'. Accordingly, the law dictated who individuals could permissibly marry. Similarly, the Immorality Act 23 of 1957 proscribed sexual intercourse or 'immoral or indecent acts' between white people and people who were not white. All these statutes were based on and made possible by the Population Registration Act 30 of 1950, which imposed a duty on people to identify and register as one of the four distinct racial groups created by the apartheid state: white, coloured, black and other.[21] Strangely, under apartheid a person could be racially classified differently for different purposes.[22]

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political and economic control' (1985) *Acta Juridica* 53; R Hamilton 'Role of Apartheid Legislation in the Property Law of South Africa' (1987) 10 *National Black Law Journal* 152; SB Nxumalo 'Revisiting the relationship between property rights and land reform legislation in South Africa: *Grobler v Phillips and Others*' (Oxford Property Law Blog, 22 December 2021) *https://www.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2021/12/revisiting-relationship-between-property* (accessed 14 February 2022); and B Bhandar *Colonial Lives of Property* (Duke University Press 2018).

19 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 9.

20 S Plaatje *Native Life in South Africa* (Picador Africa 2007) 21.

21 The Population Registration Act was not a model of clarity and was poorly drafted. In section 1, it defined the four distinct races in the following terms:

> '"Black" means a person who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa;
>
> "coloured person" means a person who is not a white person or a Black;
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> "ethnic or other group" means a group prescribed and defined by the Governor-General in terms of sub-section (2) of section five
>
> "white person" means a person who—
>
> *(a)* in appearance obviously is a white person and who is not generally accepted as a coloured person; or
>
> *(b)* is generally accepted as a white person and is not in appearance obviously not a white person,
>
> but does not include any person who for the purposes of his classification under this Act, freely and voluntarily admits that he is by descent a Black or a coloured person unless it is proved that the admission is not based on fact.'

22 PQR Boberg *The Law of Persons and the Family* (Juta 1977) 126: *'[the] Chameleon-like quality of race'*.

There was a plethora of statutes passed by the apartheid state to further its racist and gendered ideology, including segregating even graveyards based on race.[23]

(b) The common law under apartheid

Outside of legislation, another important source of law was the common law, which still operates today.[24] South Africa's common law is a mix of Roman-Dutch law and English law, which has been applied and developed through the courts.[25] This amalgamation of the common law is a result of two conquests – the arrival of the Dutch East India Company at the Cape in 1652, which led to imposition of the Dutch-inspired legal system, underpinned by Roman law;[26] and the British conquest of the Cape in 1795, which interrupted Dutch rule.[27] The court in *Campbell v Hall* held that the Dutch legal system should remain in place, subject to incremental alterations made by the British colonial authorities.[28] Thus, Roman-Dutch law persisted and English common law was introduced incrementally, particularly in the areas of court procedure, the structures of government and criminal and mercantile law.[29] While English law had little to no impact on the law of persons, the English administrators introduced changes to various definitions of crimes and delicts and imposed the notion of a 'reasonable man' and 'the duty of care'.[30]

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[23] Reservation of Separate Amenities Act 49 of 1953 and the provincial Reservation of Separate Amenities by Local Authorities Ordinance of 1955.

[24] R Zimmermann & D Visser 'Introduction: South African law as a mixed legal system' in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon 1996) 1–30.

[25] J Sarkin 'The Common Law in South Africa: Pro Apartheid or Pro Democracy' (1999) 23 *Hastings International and Comparative Law Review* 1 and H Corder *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary 1910–1950* (Juta 1984).

[26] See PJ Thomas, BC Stoop & GC van der Merwe *The Historical Foundations of South African Private Law* (LexisNexis 2000) 96–97; J Wessels 'The future of Roman-Dutch law in South Africa' (1920) 37 *South African Law Journal* 265; and PT Mellet *The Lie of 1652* (NB Publishers 2020).

[27] E Zitzke 'The history and politics of contemporary common law purism' (2017) 23 *Fundamina* 185, 191.

[28] *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045.

[29] HR Hahlo & Ellison Kahn *The South African Legal System and its Background* (Juta 1968) 576–577.

[30] Sarkin (note 25 above) 2–3.

Some jurists are of the opinion that the common law, even under apartheid, was grounded in principles of justice, equality and fairness.[31] It was contended that absent the legislation promulgated by the apartheid state, the principles of justice, equality and fairness as espoused by the law would provide the guiding spirit of the law. Equality before the law and the protection and promotion of personal freedom by advancing certain rights and freedoms (such as the freedom of contract) were recognised. On this construction, the apartheid state did not rewrite the common law, but rather overrode the common law.[32] Recently, Nxumalo and Mafora remarked:

> *[I]t is important to point out that the common law under apartheid was a social tool employed in the service of abhorrent and racist objectives but that that does not mean that the common law is itself essentially racist. It operated alongside legislation which was repressive and racist.*
>
> *Most of that legislation derogated from the common law and its application. However, everything is in flux and the law is no exception. It adapts itself to new environments, reflects the ideas and feelings of the society, contracts and expands, grows and declines.*[33]

The common law was restricted by the repressive legislation in place at the time.[34] Notwithstanding this, the common law has a strong sense of justice. English law further entrenched principles of impartiality and natural justice.[35] The court in *Mpanza v Minister of Native Affairs*, for instance, held that the right of personal liberty was a highly prized right, and our courts will always strive to uphold it.[36] However, this right could only operate and have force to the extent that it was permitted by an Act of Parliament. In other words, despite the importance of the right to personal liberty, the legislature could enact a statute that would have the effect of denying this right.[37]

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[31] J Trengove 'Perspectives on the Role of Judges in a Deeply Divided Society' in H Corder (ed) *Democracy and the Judiciary* (IDASA 1989) 125–126.

[32] J Dugard *Human Rights and the South African Legal Order* (1978) 382–283 and J Dugard 'Using the Law to Pervert Justice' (1983) 11 *Human Rights* 22.

[33] S Nxumalo & D Mafora 'Mpofu-Walsh's book "The New Apartheid" misses the point on common and contract law' *Mail & Guardian* 22 August 2021 *https://mg.co.za/opinion/2021-08-22-mpofu-walshs-book-the-new-apartheid-misses-the-point-on-common-and-contract-law/?utm_medium=Social&utm_source=Twitter#Echobox=1629659419-1* (accessed 14 February 2022).

[34] Nxumalo & Mafora (note 33 above).

[35] Sarkin (note 25 above) 3.

[36] *Mpanza v Minister of Native Affairs* 1946 WLD 225, 229.

[37] See Dugard *Human Rights* (note 32 above) 108 and Dugard 'Using the Law to Pervert Justice' (note 32 above) 38.

(c) The role of the courts during apartheid

Both Roman-Dutch law and English law provided judicial recourse for any infringements on the civil liberties. For instance, Roman-Dutch law provides an *interdictum de homine libero exhibendo,* a remedy to individuals who have been arbitrarily deprived of their liberty. Similarly, under English law, a person deprived of their liberty can approach a court and invoke a writ of *habeus corpus*. At the core of these remedies is the desire to protect personal freedom from undue, irrational and arbitrary government invasion. The court in *Principal Immigration Officer v Narayansamy* unequivocally stated that everyone was entitled to invoke a writ of *habeus corpus* pursuant to Roman-Dutch and English law.[38] This was buttressed in *Wood v Ondangwa Tribal Authority*, where the court held that an action of *habeus corpus* could be brought by any person on behalf of someone who has been imprisoned and that the laws pertaining to *habeus corpus* ought to be construed in favour of the liberty of an individual.[39] Regardless of these common law protections, the apartheid state enacted an assemblage of legislation that frustrated these protections.

This begs the question regarding the role of courts. During that period, the power of courts to review legislation and government action was significantly constrained. Courts were denuded of the power to review the substance of statutes. They could mostly adjudicate whether Parliament adhered to the prescribed procedure in the legislative process.[40] In *Johannesburg Consolidated Investment Co v Johannesburg Town Council*,[41] the court held that the overarching justification for judicial intervention is the doctrine of *ultra vires*. Courts, according to this rationale, could only interfere on the basis that the state exercised power that went beyond its purview, as prescribed by Parliament. Courts were not allowed to second-guess the purported wisdom of the legislature. So, if the law was clear and certain, a court plainly did not have power to interfere with the propriety of the legislation.[42] Courts could not strike down or set aside laws that

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[38] *Principal Immigration Officer v Narayansamy* 1916 TPD 274.

[39] *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A).

[40] There are instances where courts attempted to invalidate laws on substantive grounds. See the landmark cases that formed part of the constitutional crisis of the 1950s: *Harris v Minister of the Interior* 1952 (2) SA 428 (A), *Minister of the Interior v Harris* 1952 (4) SA 769 (A) and *Collins v Minister of the Interior* 1957 (1) SA 552 (A).

[41] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111.

[42] M du Plessis 'The Legitimacy of Judicial Review in South Africa's New Constitutional Dispensation: Insights from the Canadian Experience' (2000) 33 *Comparative and International Law Journal of Southern Africa* 227, 228.

were morally unconscionable and unjust. As Centlivres CJ asseverated in *Ndlwana v Hofmeyr*, the 'court has no power to pronounce upon the validity of an Act of Parliament duly promulgated and printed and published by proper authority'.[43] In this regard, courts were inferior to the legislature and executive and were subordinate to them.

Unfortunately, the apartheid state was able to perpetrate many substantive injustices by merely following the correct procedure[44] and its successes were also exacerbated by a supine judiciary, which was not necessarily keen on upholding civil liberties, failed to guard its independence and permitted the legislature to step into its terrain.[45] Baxter described the South African judiciary under apartheid as an enigma, which was emasculated by a host of hostile legislation. He also stated that the judiciary had 'degenerated into a compliant auxiliary' of the other branches.[46] This criticism of courts can be seen in the so-called emergency cases, discussed next.

The Public Safety Act 3 of 1953 empowered the President to declare, by proclamation in the *Government Gazette*, that a state of emergency existed within the Republic or South West Africa (today Namibia) or any of their areas.[47] This broad power included the prohibition of gatherings and processions, the forced dispersal of illegal gatherings, the creation of broadly defined crimes and the suppression of publications and organisations.[48] Dugard argues that the Public Safety Act gave the apartheid state an unencumbered 'free hand' that permitted it to arrest anyone without warrant and detention without trial.[49] The apartheid state enthusiastically invoked this broad 'emergency' power and the case law reflects that the courts not only failed to recognise the injustice perpetuated

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[43] *Ndlwana v Hofmeyr NO* 1937 AD 229 at 231. See also E Griswold 'The "Coloured Vote Case" in South Africa' (1952) 65 *Harvard Law Review* 1361.

[44] L Boulle, B Harris & C Hoexter *Constitutional and Administrative Law: Basic Principles* (Juta 1989) 131–143.

[45] Du Plessis (note 42 above) 228.

[46] L Baxter 'A Judicial Declaration of Martial Law' (1987) 3 *South African Journal on Human Rights* 317, 317.

[47] Namibia was under South Africa's administration from 1915 to 1990 and was called 'South West Africa'. See J Dugard *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations* (University of California Press 1973) and AM Fokkens 'The Suppression of Internal Unrest in South West Africa (Namibia) 1921–1933' (2012) 40(3) *Scientia Militaria* 109.

[48] S Morton 'States of Emergency and the Apartheid Legal Order in South African Fiction' (2010) 46 *Journal of Postcolonial Writing* 491, 492.

[49] Dugard *Human Rights* (note 32 above) 110–111.

by this Act, but actively aided the apartheid state. I briefly focus on three 'emergency' cases.

First, in *Minister of Law & Order v Dempsey*, a nun had been physically restrained by a policeman, who had assaulted a mourner at a funeral. The nun was detained under emergency regulations. A *habeas corpus* application was sought to obtain the release of the nun. Under South African law, it was well-established that every invasion of personal liberty was *prima facie* unlawful and thus should be justified by the detainer. In other words, the burden of proof was on the detainer to prove that the detention was lawful and justified. However, in *Dempsey*, the court held that the burden of proof rests with the applicant in *habeas corpus* proceedings. In other words, the nun had to prove that the state had abused its powers by detaining her.[50]

Second, in *Omar v Minister of Law and Order*, a case involving our first Minister of Justice in the new democracy in President Mandela's Cabinet, Dullah Omar, the court upheld certain regulations, which were promulgated under the emergency powers referenced above. These regulations deprived emergency detainees of their right of access to counsel and their right to be heard before a decision was made to further their detention. Lamentably, the court upheld these draconian regulations. Axiomatically, the rights of access to counsel and to be heard before a decision regarding continued detention is taken, are fundamental rights in many jurisdictions. Prior to this decision, the law was clear that any exercise of delegated legislation that infringed a fundamental right was impermissible. But the court overlooked this and held that Parliament could exclude the rights to *audi alteram partem* and legal counsel.[51]

Finally, in *Staatspresident v United Democratic Front*, numerous emergency regulations were challenged on the basis that the term 'unrest', which had been used in the regulations, was so vague as to render the regulations null and void. In terms of section 5B of the Public Safety Act, courts were not competent to inquire into or to give judgment on the validity of these regulations. In other words, these regulations were subject to an ouster clause. The court dismissed the challenge to these regulations and held that to be protected from being declared invalid by section 5B, a regulation does not have to comply with all the requirements for validity. Ergo, the doctrine of *ultra vires* was rejected in this case.[52]

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[50] *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A).

[51] *Omar v Minister of Law and Order; Fani v Minister of Law and Order; State President v Bill* [1987] 4 All SA 556 (AD).

[52] *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A). Another case that rejected the doctrine of *ultra vires* is: *Lipschitz v Wattrus NO* 1980 (1) SA 662 (T).

In summary, under apartheid, Parliament was sovereign and could make any law it deemed fit. These laws were oppressive and deeply unjust. Courts had no power to declare legislation invalid, let alone strike it down. It merely applied the law as it was, regardless of how unjust the law may be. Courts therefore merely served as a rubber stamp for the legislature. It is against the backdrop of these ruins that the Constitution must be understood.

III PART B: A COUNTRY REIMAGINED: A CONSTITUTIONAL DEMOCRACY

The Constitution came about through a complex and protracted negotiation process including the Convention for a Democratic South Africa (CODESA), the adoption of the initial 34 Constitutional Principles, the interim Constitution and then the final Constitution which included two judgments of the Constitutional Court, certifying its provisions.[53] As alluded to in the introduction, the South African Constitution carries a promise of a new society. The Preamble affirms the supremacy of the Constitution and declares that South Africa belongs to all those who live in it.[54] Importantly, it displaces parliamentary sovereignty. To this end, the Constitution signifies a break from a past characterised by inequality, oppression and exclusion to a future founded on justice, equality, dignity and equality.[55] Such a break must be understood in the context of

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See also C Forsyth 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 *Cambridge Law Journal* 112.

[53] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC).

[54] Mhlantla J in *Speaker, National Assembly v Land Access Movement of South Africa* 2019 (6) SA 568 (CC) para 1 stated:

> 'It aims to right historical wrongs, resolve unjust dispossession and heal the 'trauma of deep, dislocating loss of land' that has taken root in our country. It entails the practical disruption of racialised privilege in respect of land ownership. But it also incorporates a symbolic function of recognising histories and legacies of injustice that influence the lives of individuals, families and communities.'

[55] AJ van der Walt 'Transformative Constitutionalism and the Development of South African Property Law I' (2005) *TSAR* 655, 658 and AJ van der Walt *The Constitutional Property Clause* (Juta 1997) 79.

'transformative constitutionalism'. While there is no universally accepted definition of transformative constitutionalism,[56] Klare described it as:

> *[A] long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.*[57]

The transformative nature of the Constitution means that there must be political, social and legal reform, with an awareness of the historical injustices which ought to be redressed. It is an enterprise of inducing large-scale social change through non-violent processes, grounded in law.[58] Transformative constitutionalism has two potential conceptions. First, transformation could refer to achievements of specific outcomes such as poverty reduction and eradicating inequality through adjudication. Second, it could refer to a fundamental change in institutions and systems, producing results.[59] At the heart of transformative constitutionalism is the demand for a change in legal culture and socio-economic conditions. Former Chief Justice Pius Langa plainly stated that our Constitution espouses the idea that 'we must change'.[60] In this sense, the Constitution is both backward-looking in that it is a break away from 'our socially degrading and economically exploitative apartheid past',[61] and forward-looking in that it facilitates the construction of a new political, social and economic order 'based on democratic values, social justice and fundamental human rights', which is concerned with bettering and improving the quality of life and freeing the potential of everyone.[62]

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[56] P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351, 351.

[57] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 150. See also J Brickhill & Y van Leeve 'Transformative Constitutionalism – Guiding Light or Empty Slogan?' (2015) *Acta Juridica* 141, 146 and S Sibanda 'Not Purpose-made! Transformative Constitutionalism, Post-independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22 *Stellenbosch Law Review* 482, 486.

[58] Klare (note 57 above).

[59] D Brand 'Courts, Socio-Economic Rights and Transformative Politics' LLD thesis, University of Stellenbosch 2009.

[60] Langa (note 56 above) 352.

[61] D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309, 315.

[62] S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta 2010) 27.

(a) The status of the common law in South Africa's constitutional supremacy

In light of the new constitutional order, what is the status of the common law? Did the common law collapse with apartheid? The short answer is no. The common law continues to occupy a central place in our country's legal landscape. That is because we apply the principle of subsidiarity, meaning that—

> *it does not follow that [resorting] to constitutional rights and values may be freewheeling or haphazard . . . The Constitution is primary but its influence is mostly indirect. It is perceived through its effects on legislation and the common law – to which one must look first.*[63]

The common law is not trapped within the limitations of the past. It is now imbued with and informed by the Constitution and its values. It is interpreted in light of the conditions of social and constitutional ossification.[64] This is particularly so because there is a constitutional injunction that requires courts, when interpreting legislation, to promote the spirit, object and purport of the Bill of Rights.[65] Thus, the common law, once used to achieve racist and repressive ends, has now been re-invigorated and revitalised by the Constitution.[66] The interaction between the Constitution and the common law has been described by the Constitutional Court as follows:

> *The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims – thus, the command that law be developed and interpreted by the courts to promote the 'spirit, purport and objects of the Bill of Rights'. This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply.*[67]

In respect of the development of the common law, more particularly in indigenising public law,[68] it bears consideration that:

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[63] *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC).

[64] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).

[65] Section 39(2) of the Constitution.

[66] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

[67] *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the RSA* 2000 (2) SA 674 (CC) para 49.

[68] One could also call it 'decolonising our common law'.

> *There are notionally different ways to develop the common law under s 39(2) of the Constitution, all of which might be consistent with its provisions. Not all would necessarily be equally beneficial for the common law. Before the advent of the IC, the refashioning of the common law in this area entailed 'policy decisions and value judgments' which had to 'reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people'. A balance had to be struck between the interests of the parties and the conflicting interests of the community according to what 'the (c)ourt conceives to be society's notions of what justice demands'. Under s 39(2) of the Constitution concepts such as 'policy decisions and value judgments' reflecting 'the wishes . . . and the perceptions . . . of the people' and 'society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.*[69]

The need to develop the common law under section 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second instance would occur even when a rule of the common law is not inconsistent with a specific constitutional provision, but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the objective normative value system found in the Constitution.[70]

But there is a caveat to the development of the common law. It was expressed thus by the Constitutional Court in *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd*:

> *Our common law evolved from an ancient society in which slavery was lawful, through centuries of feudalism, colonialism, discrimination, sexism and exploitation. Furthermore, apartheid laws and practices permeated and to some extent delegitimised much of the pre-1994 South African legal system. Courts have a duty to develop the common law – like customary law – to accord with the Bill of Rights. . . . Caution is called for though. It is tempting to regard precedents from the pre-democratic era with suspicion. This may be more so when language is used, which some may regard as archaic and reminiscent of a patriarchal feudal era, as when the court in Kala Singh said that 'it does not lie in the mouth of the lessee to question the title of his landlord'. However, the mere fact that common-law principles are sourced from pre-constitutional case law is not always relevant. Age is not necessarily a reason to change. Some of the lessons gained from human experience over the ages are timeless and have passed the logical and moral tests of time. The Constitution indeed recognises the existing common law and customary law. In Zuma,*

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69 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 56.

70 *S v Thebus* 2003 (6) SA 505 (CC) para 28.

> *Kentridge AJ said that it is not the case that under our constitutional dispensation – 'all the principles of law which have hitherto governed our courts are to be ignored. Those principles obviously contain much of lasting value.' Furthermore, legal certainty is essential for the rule of law – a constitutional value. It is also understandable that litigants who find themselves on the wrong side of the common law or customary law will – often at a late stage in proceedings – seek what they would call its 'development'.*[71]

Thus, the common law is not inherently unconstitutional. Our courts are still required to robustly engage with the Constitution and its values. The Constitution must reinvigorate the common law to ensure that it is not at odds with constitutional promises. Excising the common law from our system of law would cause great uncertainty and disrupt our legal system. Developing the common law must take place when necessary and incrementally.

Development of the common law may also occur in terms of section 173 of the Constitution.[72] This may be the case where the common law has a shortcoming not at odds with the Bill of Rights, but its development in the interests of justice is nonetheless justified.[73]

(b) The powers of the judiciary under the Constitution

The Constitution entrenches a generous, and justiciable Bill of Rights, which includes the right to access to adequate housing,[74] the right to basic education[75] and the rights to healthcare, food, water and social security.[76] Further to this, it has clothed the judiciary with expansive powers to review governmental actions and strike them down where it is of the opinion that such action is constitutionally necessary. Van der Schyff argues that judicial review is an integral part of a constitutional democracy. The constitutional text is open-ended and generously worded, giving courts the broad jurisdiction to interpret and give content to the

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71 2016 (1) SA 621 (CC) paras 36–37.

72 '173. Inherent power

The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice'.

73 *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) paras 31–32; *Mokone v Tassos Properties CC* 2017 (5) SA 456 (CC) paras 40–41.

74 Section 26 of the Constitution.

75 Section 29 of the Constitution.

76 Section 27 of the Constitution.

constitutional text. While South Africa adheres to the separation of powers doctrine, the doctrine is not rigidly defined and is generally unfixed. In many instances, the courts themselves determine the content and meaning of the doctrine of separation of powers.[77] Recently, in *Mwelase*,[78] Justice Cameron cautioned that 'the bogeyman of separation of powers concerns should not cause courts to shirk from [their] constitutional responsibility'.[79]

The importance of the adoption of the Constitution was aptly summarised by Mureinik, who described it as a shift from a culture of authority to a culture of justification.[80] Under apartheid, the state acted through authority and punishment. It could enact repressive and unjust statutes without fear of being held accountable and needing to justify their exercise of public power.[81] Today, a culture of justification prevails, which requires courts to ensure that every Act or exercise of public power by the government is not only procedurally compliant, but substantively justifiable.[82] Thus, there is a constitutional demand on courts to ensure that the Bill of Rights is upheld and that the state does not act in any way that denigrates or makes inroads into these rights without providing substantive justification. Of considerable import, is that courts cannot be value-neutral or defer questions of social justice to other arms of government, because the Constitution is a repository of values that bind people.[83] These values are explicitly reflected in section 1 of the Constitution, and in particular, include human dignity, the advancement of human rights and freedoms and the achievement of equality. As Justice Kriegler in *President of the Republic of South Africa v Hugo* put it, our Constitution is emphatically

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[77] See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) paras 113–127; *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) and F Dube 'Separation of powers and the institutional supremacy of the Constitutional Court over Parliament and the executive' (2020) 36 *South African Journal on Human Rights* 293.

[78] *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 (6) SA 597 (CC).

[79] *Mwelase* (note 78 above) para 51.

[80] Mureinik (note 3 above) 33.

[81] Mureinik (note 3 above) 33.

[82] Mureinik (note 3 above) 33. See also K Möller 'Justifying the Culture of Justification' (2020) 17 *International of Constitutional Law* 1078 and R Forst 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120 *Ethics* 711, 734.

[83] Moseneke (note 61 above) 315; *Makwanyane* (note 6 above) 262.

egalitarian,[84] and courts must be alive to this. Therefore, courts have the task of achieving social redistributive justice.[85] Courts, without more, are at the centre of the constitutional project. As Langa notes:

> *Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.*
>
> *This approach to adjudication requires an acceptance of the politics of law. There is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked.*[86]

The Constitution therefore promotes a deliberative democracy through a constitutional dialogue between the three arms of government. All three arms of government are continuously engaged in a dialogue pertaining to the roles of each arm and their interaction with each other. Each arm is tasked with upholding the Constitution. The dialogue is continuous, because that permits for the role of each arm to be defined and redefined in light of the prevailing circumstances of the time. Thus, the South African Constitution is not a mere document that contains hollow shibboleths.[87]

(c) The indigenisation of the Constitution

South Africa's constitutional framework is deeply rooted in the recollection of its collective historical injustice. It is only logical that our public law is indigenised, through the Constitution, to take into account the memory of denial of certain people's humanness, which resulted in the undignified, unequal treatment of people considered to be not white. For example, the right to access to housing is specifically entrenched as a justiciable socio-economic right because of our long history of forced removals and dispossession. The Constitution's promise that everyone is entitled to basic education is based on the fact that education was reserved for a particular elite few. The demand for a progressively realisable right to healthcare is a response to systemic inequality that existed under apartheid. If the Constitution had not directly confronted these issues, it would have faced a legitimacy crisis. It would have led many to question who the 'people' referred to in the Constitution are, if it ignored the painful past of South Africa.[88]

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[84] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 74.

[85] Moseneke (note 61 above) 318.

[86] Langa (note 56 above) 352.

[87] The idea of 'hollow shibboleths' emerges from *Trop v Dulles* 356 U.S. 86 (1958) 103.

[88] The Preamble of the Constitution refers to 'We the people of South Africa' and acknowledges the injustices of the past.

A failure to indigenise public law generally, and the Constitution specifically, to reflect the domestic social, political and economic conditions may result in the vehement rejection of public law and the Constitution. Or at best, it may yield poor results. Thus, infusing the public law with local realities may enhance its normative force and legitimacy. Writing in the context of human rights, Mahao argues that:

> *[T]he values underpinning the dominant rights paradigm are, by and large, removed from notions of justice as understood and lived by the vast majority of people previously colonised in places such as Africa. Thus, mainstreaming indigenous juridical principles in the legal system holds the promise of going some distance towards legitimising the system. Inherently, however, this entails an epistemological shift in world outlook.*[89]

This proposition must be true even for constitutions and public law. It provides a complementary response to Lord Denning's observation that '[j]ust as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England'.[90] Legal systems of one jurisdiction cannot simply be transplanted to another jurisdiction without some form of domestication and infusing that legal system with some indigenous legal principles and doctrines.

One such indigenous principle which has been interpreted into our constitutional framework is the doctrine of *ubuntu*. The simplest formulation of *ubuntu* is the isiZulu expression, *umuntu ngumuntu ngabantu*, which literally means 'a human being is a human being through (the otherness of) other human beings'.[91] *Ubuntu* is a powerful concept which emphasises the communal nature of society and espouses in it the ideas and notions of humaneness, social justice and fairness, and envelopes the core values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity.[92] This principle has been accepted as a crucial

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[89] NL Mahao 'Can African Juridical Principles Redeem and Legitimise Contemporary Human Rights Jurisprudence?' (2016) 49 *Comparative and International Law Journal of Southern Africa* 455, 456.

[90] *Nyali Ltd v Attorney-General* (1955) 1 All ER 646, 653.

[91] NM Kamwangamalu 'Ubuntu: A Sociolinguistic Perspective to a Pan-African Concept' (1990) 12 *Critical Arts* 24 and CBN Gade 'What is Ubuntu? Different Interpretations Among South Africans of African Descent' (2012) 31 *South African Journal of Philosophy* 486.

[92] *The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC) paras 164–165, 168, 210 and 216–218; *Le Roux v Dey* 2011 (3) SA 274 (CC) para 200; *Van Vuren v Minister of Correctional Services* 2012 (1) SACR 103 (CC) para 51; *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671

value that underpins our Constitution. In *S v Makwanyane*, a landmark case that declared the death penalty unconstitutional, the court held that the death penalty offended the principle of *ubuntu*, because of the value a community puts on life and human dignity. The death penalty is bereft of *ubuntu*.[93] The principle of *ubuntu* has also been held to be a valid principle to govern contract law and possibly vitiate a contract found to be wanting on the grounds of *ubuntu*.[94] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,[95] the Constitutional Court recognised the concept of *ubuntu* as underlying the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act), and that it is relevant to their interpretation. The court referred to the following passage from *PE Municipality*[96] with approval:

> *Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.*[97]

(CC) paras 3, 19 and 48; Y Mokgoro 'Ubuntu and the Law in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 15; and Y Mokgoro & S Woolman 'Where Dignity Ends and Ubuntu Begins: An Amplification of, as well as an Identification of a Tension in Drucilla Cornell's Thoughts' (2010) 25 *Southern African Public Law* 400, 406.

93 *Makwanyane* (note 6 above) 223–225. A powerful passage by Mohamed DP at para 263 is worth quoting:

> '[Ubuntu] expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.'

94 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 71. See also the judgment of Victor AJ in *Beadica 231 CC v Trustees, Oregon Trust* 2020 (5) SA 247 (CC).

95 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

96 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

97 *Blue Moonlight* (note 95 above) para 38.

IV PART C: CASES EVIDENCING THE INDIGENISATION OF PUBLIC LAW IN SOUTH AFRICA

The Constitutional Court has affirmed the relevance of our history in the process of interpreting the rights in the Bill of Rights.[98] In addition to the principle of *ubuntu* and common law, the South African Constitution and its interpretation by the Constitutional Court has domesticated public law to reflect the material conditions of South Africa as well as the social, political and cultural realities through, amongst others, the right to access to adequate housing and the electoral regime in South Africa. I now turn to those two examples.

(a) The Sisyphean struggle for housing

There is a housing crisis in South Africa.[99] As highlighted above, the right to exclude (given effect through the *rei vindicatio*), was used by the apartheid state to evict people, and to establish and sustain unjust racial territorial segregation to advance its political objectives.[100] Thus, the right to exclude, bolstered by the oppressive legislative framework, operated not just to uphold ownership and the rights to own, use or exploit the land, but also to achieve particular ideological and political objectives on racial segregation.[101] In short, the right to exclude was politicised and was essential to the apartheid property regime.[102] This led to the dispossession

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[98] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC); and *Brink* (note 15 above).

[99] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); NK Marutlulle 'A Critical Analysis of Housing Inadequacy in South Africa and its Ramifications' (2021) 9 *Africa's Public Service Delivery and Performance Review* 372 and A Kumar & K Shika 'South Africa's housing crisis: A New Breed of Honest Politicians is Needed to Unlock the Land' *Daily Maverick* 21 June 2021 *https://www.dailymaverick.co.za/opinionista/2021-06-21-south-africas-housing-crisis-a-new-breed-of-honest-politicians-is-needed-to-unlock-the-land/* (accessed 12 May 2022).

[100] AJ van der Walt 'Towards the Development of Post-apartheid Land Law: An Exploratory Survey' (1990) 23 *De Jure* 1 and Z Boggenpoel '(Re)defining the Contours of Ownership: Moving Beyond White Picket Fences' (2019) *Stellenbosch Law Review* 234.

[101] AJ van der Walt 'Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-reform Legislation' (2002) 2 *Tydskrif van die Suid-Afrikaanse Reg* 254, 261.

[102] Van der Walt (note 101 above) 261.

of millions of indigenous people. It was a continuation of the dispossession that commenced at the beginning of colonialisation.[103] Justice Froneman eloquently explained this in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape*:

> *[T]he pre-constitutional conception of property . . . entailed exclusive individual entitlement. Put simply, that is largely a history of dispossession of what indigenous people held, and its transfer to the colonisers in the form of land and other property, protected by an economic system that ensured the continued deprivation of those benefits on racial and class lines. That history of division probably also explains the concerns both the previously advantaged and disadvantaged still have. The former fears that they will lose what they have; the latter that they will not receive what is justly theirs.*[104]

Under apartheid, property followed abstract, syllogistic reasoning predicated on an immutable, hierarchal rights arrangement. Ownership reigned supreme at the top of the hierarchy. This meant that a property owner had the right to exclude and evict from their property any person who had no right on the land. The right to exclude was used in accordance with racial and class lines, which led to the mass and brutal dispossession of black people.

The Constitution squarely confronts this issue through section 26.[105] Section 26(1) provides a right to access to adequate housing. Implicit in this statement is that there is a duty on the state and people not to interfere with this right. However, section 26(2) goes further and places a positive duty on the state to take reasonable legislative and other steps, within its available resources, to progressively realise this right. While this places a duty on the state, it also limits the right by the caveat of available resources. Recognising the constitutional importance of a person's place of abode, section 26(3) provides that no person will be evicted from their home without a court order and that no legislation may permit arbitrary evictions.

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[103] Ngcukaitobi (note 18 above).

[104] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern* Cape 2015 (6) SA 125 (CC) para 34.

[105] Section 26 provides:

'(1) Everyone has the right to access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

To give effect to these constitutional promises, four interlocking statutes were enacted, two of which are the Extension of Security of Tenure Act 62 of 1997 and the PIE Act. As Justice Cameron recognises in *Mwelase*, these statutes were devised to 'fulfil the overall constitutional promise of restitution to those deprived of rights in land by racial subordination'.[106]

In the landmark decision of *Government of the Republic v Grootboom*,[107] the Constitutional Court had to confront the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. In this case, the applicants were living on a sports field, in deplorable conditions. The community comprised 390 adults and 510 children and the whole community lived in shacks.[108] There was no water, no refuse and sewage removal services and only five per cent had electricity. The land on which they lived was close to a main thoroughfare and was partly waterlogged.[109] The applicants approached the court on the basis that these conditions limited their rights to access to housing, as well as the right of children to shelter as set out in section 28 of the Constitution. The High Court found in favour of the applicants and held that the state had failed in fulfilling its obligation to provide shelter to children and that the state had failed to take all reasonable legislative and other measures to achieve the right to adequate housing. However, the High Court only ordered that the state provide housing to children and their accompanying parents, but did not make an order relating to childless adults.[110]

On appeal, the Constitutional Court, in a unanimous decision, emphasised that the foundational values of human dignity, freedom, and equality are denied to those with no food, clothing or housing.[111] It held that the nationwide housing programme fell short of the obligations on the state under section 26 of the Constitution.[112] The state had dismally failed to take into account and make provisions for the immediate temporary amelioration of the circumstances of those in desperate need.[113] The court, in its order, declared that section 26 of the Constitution imposes on the national government obligations to devise, fund, implement, and supervise

106 *Mwelase* (note 78 above) para 6.

107 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

108 *Grootboom* (note 107 above) para 4, with reference to footnote 2.

109 *Grootboom* (note 107 above) para 7.

110 *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C).

111 *Grootboom* (note 107 above) para 23.

112 *Grootboom* (note 107 above) para 66.

113 *Grootboom* (note 107 above) paras 66–69.

measures to provide relief to those in desperate need. Of note, the court expansively interpreted 'access to adequate housing' in these terms:

> *[H]ousing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in s 26. A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.*[114]

In *Grootboom*, the applicants argued that the right to access to housing comprised a minimum core.[115] In essence, a minimum core means that each right has a quintessential base, which requires the state to fulfil certain minimum essentials contained in the 'core' of the right, failing which the state is *prima facie* in violation of its obligations.[116] A minimum core obligation to rights necessitates recognising basic subsistence levels in respect of each socio-economic right and insisting that the provision of core goods and services enjoys immediate priority.[117] Therefore, this approach consists of finding the 'floor' of immediately enforceable entitlements, which are justiciable. Importantly, the minimum core ought to apply regardless of the availability of resources of the particular country or other factors and difficulties.[118]

The court in *Grootboom*, and in subsequent cases,[119] decidedly rejected this approach and preferred the reasonableness approach. The court has proffered at least four principal reasons for rejecting the minimum

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[114] *Grootboom* (note 107 above) para 35.

[115] *Grootboom* (note 107 above) para 18.

[116] D Bilchitz 'Judicial Review in Practice: The Reasonableness Approach and its Shortcomings' in D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007) 140.

[117] M Pieterse 'Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services' (2006) *South African Journal on Human Rights* 473, 481.

[118] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22–26, 1997 para 9.

[119] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) paras 26–39; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 48–56; *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).

core standard: (a) the difficulty of defining the content of minimum core standard; (b) the needs and opportunities for the enjoyment of the minimum core vary and are diverse, depending on the economic and social history and circumstances of a particular country; (c) it is impossible to give everyone access to a 'core' service immediately; and (d) courts are not institutionally equipped to make the wide-ranging factual and political inquiries necessary for determining what the minimum core standards should be.

Furthermore, the court held that a minimum core standard would be incongruent with the text of the Constitution, which provides that the positive obligation on the state is to take reasonable legislative and other measures to *progressively* realise the right of access to housing within available resources, and that in that section, there is no right to water or housing immediately.[120] Thus, the addition of the 'progressive realisation' caveat within the available resources makes it plain that rights cannot be achieved or enforced immediately.[121]

The court further held that it would be institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. Courts can enforce socio-economic rights in two ways. First, if government takes no steps to realise the rights, the courts will require government to take steps. Second, if the measures adopted by government are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness.

The reasonableness approach is grounded in the explicit wording of the Constitution.[122] As the court held in *Grootboom*, all that could be expected from the state was that it act reasonably in progressively realising socio-economic rights[123]. A criterion in determining whether the state is acting reasonably was set out by the court.[124] Notably, the court also emphasised that the reasonableness of the measures will be determined in light of the availability of resources.[125]

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120 *Mazibuko* (note 119 above) para 56.

121 *Mazibuko* (note 119 above) para 57.

122 Not all socio-economic rights in the South African Constitution are subject to progressive realisation. For instance, the right to basic education is immediately realisable. See section 29 of the Constitution.

123 *Grootboom* (note 107 above) para 33.

124 *Grootboom* (note 107 above).

125 *Grootboom* (note 107 above) para 46.

This is a domestication of public law in the sense that it differs substantially from international law instruments that embrace the minimum core standard. This standard was introduced by the UNCESCR[126] to assess the compliance of states with the ICESCR[127] when it issued its General Comment. To this end, the UNCESCR recognises that states have a minimum obligation to ensure the satisfaction of, at the very least, minimum essential levels of socio-economic rights (for instance rights to food, healthcare, housing and education and until recently the right to water).[128] It ought to be noted that the UNCESCR has started fleshing out the minimum content of rights in its General Recommendations. It has been argued that the specification of a minimum core is one of the key elements in finding an effective and feasible means of determining whether a state has violated its obligations under the ICESCR.[129]

Recently, the Constitutional Court dealt with a severe failure by the state in providing housing. In the matter of *Thubakgale v Ekurhuleni Metropolitan Municipality*, the applicants were living in dire conditions, which in certain circumstances, consisted of houses of up to ten people with little to no water, sanitation or electricity.[130] The applicants were terribly poor and did not have the financial means to sustain themselves. Without delving into the facts, which are a morass, the state had failed to provide the applicants with access to adequate housing for a period of 20 years. To make matters worse, the local authority had unlawfully given possession of the subsidised houses intended for the applicants, and to which they were still matched on the national housing database, to other residents, through either fraud or sheer incompetence.

The High Court made an order requiring the local authority to provide the applicants with housing. Ultimately, the state failed to comply

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126 United Nations Committee on Economic, Social and Cultural Rights (UNCESCR).

127 International Covenant on Economic, Social and Cultural Rights (ICESCR).

128 General Comment No 3.

129 A Chapman '"A Violations Approach" for Monitoring the International Covenant on Social, Economic and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23, 43–55. Furthermore, following from the UNCESCR, the African Commission has also acknowledged the minimum core standard. See Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights at para 17 and *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (Communication 155/96) (2001) AHRLR 60, 65–66.

130 *Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 (8) BCLR 985 (CC).

with this court order and the applicants were in no better position. After various court proceedings in the lower courts, the applicants applied to the Constitutional Court for an order compelling the local authority to provide them with housing and then also for constitutional damages. I wrote the first judgment, which held that the local authority had failed to discharge its duties under section 26 of the Constitution. Thus, I found that the municipality had failed under the legislative framework to provide housing to the applicants. In my view, the matter was not the same as the case in *Grootboom*, where the question pertained to whether the content of the nationwide housing policy was reasonable. In this matter, the court was concerned with the implementation of the legislative framework. In other words, the question to be determined was whether the state acted in accordance with its own legislative requirements. Thus, the court was required to travel beyond the terrain covered in *Grootboom*.[131] Furthermore, I reasoned that the state had failed to comply with a court order which required it to provide housing. In light of the magnitude of the state's failures, I ordered the local authority to pay constitutional damages as an effective and appropriate remedy.[132] Unfortunately, mine was the minority decision.

My colleague, Justice Jafta, who penned the second judgment, found that this was not a case that called for constitutional damages. In his view, constitutional damages are not appropriate in cases that concern breaches of socio-economic rights.[133] No proper case was pleaded for constitutional damages and there was no proof of any damages, let alone constitutional damages.[134] That second judgment has elicited fierce criticism from legal commentators, with some viewing it as a regressive step in the evolving of our socio-economic rights jurisprudence.[135]

It must be noted that this case illustrates that the substantive content of the right to housing has not been fully delineated and is consistently

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131 *Thubakgale* (note 130 above) para 7.

132 *Thubakgale* (note 130 above) paras 72–83.

133 *Thubakgale* (note 130 above) para 122.

134 *Thubakgale* (note 130 above) para 122.

135 Professor Balthazar 'The Jury is Still Out on whether South Africa's Constitutional Democracy Will Survive Another 25 years' *Daily Maverick* 10 December 2021 *https://www.dailymaverick.co.za/opinionista/2021-12-10-the-jury-is-still-out-on-whether-south-africas-constitutional-democracy-will-survive-another-25-years/* (accessed 9 May 2022) and SB Nxumalo & T Jeewa 'Thubakgale: Obscuring the Right to Access to Adequate Housing' Oxford Human Rights Hub (22 December 2022) *https://ohrh.law.ox.ac.uk/thubakgale-obscuring-the-right-to-access-to-adequate-housing/* (accessed 9 May 2022).

being revisited in order to ensure that it is robust enough to address the changing circumstances facing South Africa. It illustrates that the flexible reasonableness standard encourages courts to recognise that there are various policy mechanisms to the issues that South Africa faces and there must be a deliberate process between the state, the judiciary and the broader public The struggle for a better society cannot fall solely on the shoulders of courts. A democratic process requires an accountable state in all three its different arms to act proactively, collaboratively and in line with the dictates of the Constitution.

(b) The electoral regime in South Africa

Much like the right to housing explored above, the Constitutional Court's jurisprudence on political rights is similarly a site where South Africa's past informs the nature and scope of rights contained in the Bill of Rights. Political rights are enshrined in section 19 of the Constitution which states that—

> *(1) Every citizen is free to make political choices, which includes the right—*
>
> *(a) to form a political party;*
>
> *(b) to participate in the activities of, or recruit members for, a political party; and*
>
> *(c) to campaign for a political party or cause.*
>
> *(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.*
>
> *(3) Every adult citizen has the right—*
>
> *(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and*
>
> *(b) to stand for public office and, if elected, to hold office.*

Regarding the importance of the right to vote in our constitutional democracy, memorably, in *August v Electoral Commission*,[136] Justice Sachs declared that the vote of each and every citizen is a 'badge of dignity and personhood. Quite literally, it says that everybody counts.'[137] The precious value of the vote in South Africa arises in no small measure from a history in which the right to vote was denied to the majority of our citizens. Sachs J went on to note that in a country of great inequality such as South Africa, the right to vote declares that we all belong to the same nation and

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136 *August v Electoral Commission* 1999 (3) SA 1 (CC).

137 *August* (note 136 above) para 17.

that 'our destinies are intertwined in a single interactive polity'.[138] This was later confirmed in *Richter*[139] where Justice O'Regan held:

> *[T]he right to vote, and its exercise, has a constitutional importance in addition to this symbolic value. The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues, as millions patiently and unforgettably did in April 1994, democracy itself will be imperilled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values. We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails.*[140]

With this historical context in mind, I will consider three further judgments regarding the importance of political rights in South Africa. The first judgment is that of *AParty v Minister for Home Affairs; Moloko v Minister of Home Affairs*.[141] This matter concerned a challenge to the constitutional validity of section 33(1)*(e)* of the Electoral Act 73 of 1998 (Electoral Act) and regulations promulgated thereunder. The challenge was brought on the basis that section 33(1)*(e)* unfairly denied certain categories of South African citizens living abroad, who were registered voters, the right to vote. The applicants sought a declaration that South African citizens abroad who were not registered voters be allowed to register and vote in the upcoming general elections. The court emphasised that the constitutional questions raised by the applicants were 'of the highest importance' and ultimately declared the provisions of the Electoral Act and the impugned regulations unconstitutional.

The second case I will explore is *My Vote Counts NPC v Speaker of the National Assembly.*[142] It was a matter concerning whether Parliament had failed to fulfil its constitutional obligation to enact national legislation which gives effect to the right of access to information by requiring political parties to disclose, proactively and regularly, the sources of their

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138 *August* (note 136 above).

139 *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC).

140 *Richter* (note 139 above) para 53.

141 *AParty v Minister for Home Affairs; Moloko v Minister of Home Affairs* 2009 (3) SA 649 (CC).

142 *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC).

private funding. The court considered the earlier judgment of *Ramakatsa*[143] which highlighted the centrality of political parties in South Africa's constitutional democracy, stating that they are 'the veritable vehicles the Constitution has chosen for facilitating and entrenching democracy',[144] and that they are the 'indispensable conduits for the enjoyment of the right given by section 19(3)*(a)* to vote in elections'.[145]

The majority in *My Vote Counts* held that the Promotion of Access to Information Act[146] (PAIA) is the legislation – envisaged in the Constitution – meant to give effect to the right of access to information. As a result, the majority concluded that, in accordance with the principle of subsidiarity, the applicant should have attacked the constitutional validity of PAIA. This principle enjoins a litigant who is complaining about shortcomings in legislation enacted to give effect to a constitutional right to challenge the constitutional validity of that legislation instead of relying directly on the constitutional right. The majority judgment held that, since the essence of the complaint by the applicant was that PAIA has certain shortcomings, it ought to have attacked its constitutional validity in the High Court. Its failure to do so was dispositive of the case. The majority judgment accordingly dismissed the application.

The last case I consider here is *New Nation Movement NPC v President of the Republic of South Africa*.[147] It is a seminal judgment, giving scope to the nature of political rights enshrined in section 19 of the Constitution, and further emphasises the break that these rights envisage from South Africa's apartheid history. The application concerned whether the Electoral Act was unconstitutional to the extent that it did not provide for adult citizens to be elected to the National Assembly and Provincial Legislatures as independent candidates. The argument advanced by the applicants was that the Electoral Act is unconstitutional for unjustifiably limiting the right to stand for public office and, if elected, to hold office, as conferred by section 19(3)*(b)* of the Constitution. In addition, some applicants submitted that the Electoral Act infringes their right to freedom of association protected by section 18 of the Constitution.

Again, confirming *Ramakatsa*, Justice Madlanga emphasised:

> *The scope and content of the rights entrenched by [section 19] may be ascertained by means of an interpretation process which must be informed by context that is both historical and constitutional. During the apartheid order, the majority*

143 *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC).

144 *Ramakatsa* (note 143 above) para 67.

145 *Ramakatsa* (note 143 above) para 68.

146 2 of 2000.

147 2020 (6) SA 257 (CC).

> *of people in our country were denied political rights which were enjoyed by a minority. The majority of black people could not form or join political parties of their choice. Nor could they vote for those who were eligible to be members of Parliament. Differently put, they were not only disenfranchised but were also excluded from all decision-making processes undertaken by the government of the day, including those affecting them.*[148]

Given the importance of political rights within the South African context and the far-reaching implications that such rights have on the right to human dignity, the first judgment held that the rights in sections 18 and 19(3)*(b)* of the Constitution must be interpreted generously, rather than restrictively. The court held that the Electoral Act is unconstitutional to the extent that it requires that adult citizens be elected to the National Assembly and Provincial Legislatures only through their membership of political parties.

Political rights are therefore a clear example of how public law has been indigenised in South Africa, particularly in light of how political rights were used as a tool of exclusion under apartheid.

V. CONCLUSION: NEVER AGAIN

My aim in this article has been to explore the domestication of constitutions and the value this adds to their legitimacy. I have endeavoured to consider this, specifically in the case in South Africa, to show how the domestication of its public law has been shaped by its past. South Africa's Constitution signifies a decisive break from the past and has ushered in a future based on human rights. This is clear, not only from the wording of the constitutional text itself, but also through the jurisprudence of the Constitutional Court. South Africa is forever mindful of its past, having adopted a 'never again' paradigm. Justice Sachs eloquently puts it as follows: 'the "never again" principle, which I feel should be one of our guides to interpretation, applies not only to bitter experiences of former state enforced segregation, but also to those of past compulsory assimilation'.[149] Thereafter, in *Garvas*, the Constitutional Court confirmed that 'ours is a "never again" Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away'.[150] It is therefore South Africa's past that has provided the foundation for the domestication of its public law.

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148 *Ramakatsa* (note 143 above) para 64.

149 *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) para 46.

150 *SATAWU v Garvas* 2013 (1) SA 83 (CC) para 63.

Having regard to events beyond our own shores, it bears emphasis that the rule of law and democratic gains must never simply be taken for granted. The calamitous reversal of *Roe v Wade* by the US Supreme Court must be a clarion call to all of us to remain vigilant and steadfast in our endeavours to uphold democracy and the rule of law. That is particularly true of my beautiful but troubled[151] beloved homeland. The gains made in 28 years[152] of democratic rule and 27 years of widely admired constitutional jurisprudence must be zealously protected. Because today it may be the right to early termination of pregnancy and then, tomorrow? Our revered global icon, Nelson Rolihlahla Mandela said at his inauguration, a glorious moment for South Africans:

> *Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another and suffer the indignity of being the skunk of the world.*[153]

[151] I say 'troubled' because not only are we the most unequal country in the world (see: The World Bank *New World Bank Report Assesses Sources of Inequality in Five Countries in Southern Africa* (Press Release No 2002/055/AFE, March 2022), but a recent survey also suggests that only 32% of South Africans are satisfied with how democracy is working (JS Kotze 'Democracy loses its glow for South Africans amid persistent inequality' *The Conversation*, 25 April 2022 *https://theconversation.com/democracy-loses-its-glow-for-south-africans-amid-persistent-inequality-181489* (accessed 12 May 2022)).

[152] At the time this paper was presented in July 2022.

[153] Nelson Mandela, Inauguration speech as President of the Republic of South Africa *http/www.sanews.gov.za* (accessed 8 May 2022).