

Transformative Constitutionalism in South Africa: 20 Years of Democracy

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Abstract

This article reflects on the transformative nature of South Africa's Constitution, looking at the past 20 years of a widely celebrated democracy. The article discusses the successful entrenchment of institutional framework and challenges facing transformative constitutionalism (TC). South Africa's history for the better part of the 20th century reveals a variety of historical phenomena ranging from colonisation, unjust legal systems and other discriminatory practices. This bred a society of extreme imbalances and socio-economic inequalities. Post 1994, a reconstruction and development agenda became a priority, resulting in TC, a project which adopted the stance of transforming the society by redressing the injustices of the past, to create a much just society grounded in law. It has a foundational mandate to heal the wounds of the past. This entails that the societal challenges can best be addressed using the supreme law in the Constitution, as the basis for societal transformation. The 1994 dispensation has had to embrace the notion of democracy, culture of human rights according to established international norms and standards, and uphold the rule of law. While South Africa has made notable progress in many respects, the country faces new challenges that threaten the prospects of the TC. Hence, the survival of TC depends largely on the political will to address these challenges. It is also indispensable to propagate for citizenry education to foster active participation and understanding of democratic system for the sustenance of transformation ideals of the Constitution. Further that the success of TC depends on government's absolute support for chapter 9 institutions and preserving judicial independence.

Keywords: Transformative constitutionalism, constitutional supremacy, democracy, transformation, human rights, South Africa.

1. Introduction

For the past twenty years, South Africa has been under constitutional democracy premised on the supremacy of the Constitution. The system carries with it, an agenda of transformative constitutionalism (*hereinafter referred to as TC*) which effectively became operational post 1994 first democratic elections. Amongst the fundamental epitomes of this agenda has been and remain; to build a country that espouses social justice and substantive justice in social, economic and political realities. It is through this project that the Constitution¹ founded a nation grounded on protecting democratic values and fundamental human rights. Hence, TC derives its presence from the Constitution. It has been given added impetus by the need to change, bury the wounds of the past and build one unified and democratic nation; encompassing freedom and the rule of law, fulfilment of substantive equality, protection of human dignity and the promotion of national unity and reconciliation (Moseneke, 2007). The core business of TC is to guide the nation to a better future (Langa, 2006). TC is essential in three ways; namely, giving the true meaning of democracy, enriching the human rights discourse and reshaping social welfare in the country. It is a project driven by a commitment to transform the country's social, political, economic and legal culture.

Therefore, this paper reflects on TC with specific focus on its significance regarding the normative and institutional establishment necessary to promote the Constitution's transformative agenda. The purpose is to reflect on the notable changes concerning constitutional transformation within the context of the normative and institutional framework post 1994. This is essential as it assists in gauging progress of advancing people's centred governance, safeguarding fundamental freedoms and human rights. I start by providing an outlook of constitutional developments, leading up to the early 1990s when the Constitution carried a transformative agenda, embedding major institutional changes in various respects. This is followed by a reflection of the TC project to clarify on what it means and how it enables institutions to serve democracy better. The paper shall show the significance of judiciary and chapter 9 institutions in entrenching democratic ethos guided by democratic principles.

¹ The Constitution of the Republic of South Africa, 1996, herein after referred to as 'The Constitution, 1996'.

1.1 Constitutional developments in South Africa

It is essential to distinguish between the past and present constitutional governance systems, in studying the notion of TC. Such a contrast position us better in grappling with the meaning of TC, norms and principles that underlie post 1994 constitutional supremacy, a central pillar of TC. This background is limited to periods from 1961 until the early 1990s at the attainment of democracy, to follow the constitutional evolution that culminated in the 1996 Constitution.

South Africa's constitutional history dates back to 1961 when the country became a republic and for the first time had a written constitution (Act No. 31 of 1961). The 1961 constitution wittingly created the three spheres of government, i.e. the executive, legislature and judiciary. The executive and legislative authorities vested in parliament whereas judicial authority vested in the Supreme Court. This constitution gave sovereign powers to parliament, and no court could test any of its legislative actions. This then maintained the discriminatory constitutional intents over many people. During 1983, various legislative reforms took effect. The new constitution (Act No. 110 of 1983) was enacted too. It established a tricameral Parliament comprising House of Assembly, House of Representatives and House of Delegates. This system was nevertheless constituted only by Whites, Indians and Coloureds, continuing to withhold franchise and identity from black South Africans, thus legally discriminative. Most importantly, the 1983 constitution conferred review powers (though very limited) to the Supreme Court of Appeal. It means the Supreme Court or any of its divisions could test the legitimacy of any Act of parliament, however the state president still retained the power to determine whether or not to pass any such laws. The 1983 constitution lasted until early 1990s. Subsequent to international and domestic pressure, the government acceded to dismantle apartheid legal system.

In the aftermath, during the period 1990s, the constitutional system went through comprehensive restructuring. This would be achieved through an all-inclusive dialogue. Subsequently, Convention for Democratic South Africa (CODESA) and Multi-Party National Processes (MPNP) were set up and resulted in a negotiated transition. Central to negotiations was the creation of a new order grounded in just laws; where all South Africans would cherish equality before the law (Khunou, 2009), human dignity protection, freedom and equal access to social services. During November 1993, an Interim Constitution (Act 200 of 1993) was accepted and became law on the 27th April 1994 after first democratic elections. The Interim Constitution created Government of National Unity under constitutional democracy, largely representing a rich case for the study of modern human rights including amongst others, civil and political rights, socio economic rights and programmatic rights. The Interim Constitution broadly entrenched aspects of substantive justice and ensured the existence of appropriate structures that would play the role of safeguarding human rights and adherence to the Rule of Law. It established the Constitutional Court, which was declared the final arbiter on all constitutional matters and as an overseer of human rights protection amongst others. A Constitutional Assembly was set up and tasked with drafting the Final Constitution, which would be submitted to the Constitutional Court to face its first test and to ascertain that it conformed to the agreed constitutional principles. After rejecting the draft constitution on several grounds, the Court approved the text on 04th December 1996 to give effect to the Final Constitution which officially became effective on 04th February 1997. Hence, the role of Constitutional Court cannot be understated as it was very significant in transition to democracy (Christiansen, 2010). Owing to its transformative description, the Final Constitution included chapter 2 detailing the Bill of Rights and also included Chapter 9 institutions to support the constitutional democracy. Most importantly, the Constitution would become the supreme law of the republic, and any law or conduct inconsistent with it is invalid.

South Africa's historic constitutional developments reveal that the law in the post 1994 Constitution was utilized to rid injustices, embed justiciable bill of human rights and statutory substantive testing powers for the courts regarding legislative and executive functions. Against this backdrop, the notion of transformation constitutionalism emerged and was premised on such concepts as the reconstruction and development of the country. Hence, the law in the Constitution was utilized to build democracy and effect transformation.

2. Literature Review

South Africa's 1996 Constitution is recognized as a transformative text mainly because it is founded on historic values of non-racialism, non-sexism, Bill of Rights and the rule of law. Thus, Professor Karl Klare formulated the notion of TC, given the country's system of constitutional supremacy and the Constitution's values. Since then, TC remains a topic for discussions considering the noted legal, social and political developments and challenges in the country. Indeed, TC connotes an enterprise of inducing major social change through nonviolent processes grounded in law. It is an ambitious project. Several articles have been written, addressing various aspects of constitutional law relating to TC. In this paper, five articles were selected. They addressed, amongst others, the issue of embedding legal culture of justification and the

meaning of TC; aspects of interpretation and application of the Constitution; and the need for strong normative and institutional framework and the significance of utilising the institutional authority to promote the course of TC to achieve substantive justice.

Since its inception, TC effectively embedded its inherent importance in various constitutional law and constitutionalism discourse. It has crept in as a core tool for both legal and constitutional developments in South Africa. According to Karl Klare, this notion is "a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country's political, legal and social institutions, and power relations in a democratic, participatory and egalitarian direction" (Klare, 1998). This has since reinforced a common understanding of the essence of the country's Constitution in a new democratic setting. It is discernible that for Klare, the Constitution endeavours to create a society which is totally different from the past in terms of the relationship between the law, public institutions and a people. At glance, his reasoning refers to a distinctive historical process of seeking legal change, culminating in a Constitution that would significantly alter the social and political landscapes. Most importantly, entrenching fundamental human rights and creating institutions that will protect and enforce them. Thus, his writing reveals a robust process of a legally-focused social and political change. Klare (1998) argued that TC is the perfect architect for entrenching a legal culture with which to safeguard the principles of constitutional democracy.

Therefore, what is the essence of legal culture and its relationship with the legal and social institutions of democracy? I refer specifically to courts and chapter 9 institutions, looking into their roles in shaping TC. What is significant is to illuminate on what this legal culture entails. In broader terms, legal culture concerns the broader perspective of how the Constitution is interpreted, how the law is applied and practiced, and how it influences developments in the country. It is about the nature of characteristic legal values, expressions and arguments by legal practitioners, and those in other disciplines. At the time, it was expounded that South Africa's legal culture remained conservative and formalist in form, posing a structural impediment towards a comprehensive realisation of TC ideals, and therefore required a post-liberal approach (Klare, 1998). The argument therefore is that courts should not be constrained in the interpretation and application of the law in the Constitution. The essence being that TC envisages achieving legal and social change in broader terms, which can only be achieved were courts to consider circumstances in each case to give effect to the transformative ideals. Hence, the adjudication process ought to explicitly adapt to activist transformative approach.

Pius Langa, (2006) was notably among the proponents of the TC project, concurring with Klare (1998) in many respects. Reflecting on the 'major obstacles facing the TC project', he argued that the central characteristic of the Constitution has been to fundamentally augment the ideals of transformation in legal realities (Langa, 2006). He was inclined to advocating the TC agenda as that rooted in the epilogue of the Interim Constitution, aimed at providing a historic bridge between the past and present. Also that such a change in terms of norms and institutional establishment is indispensable for an effective democratic setting. This includes entrenching civil and political rights, socio-economic rights and other pragmatic rights, and ensuring that there exist institutions that safeguard a comprehensive realisation of these rights.

For Langa, the project of TC would be a hollow ring if it fails to meaningfully effect change with regards to addressing these aspects. He maintained that it is only through entrenching legal culture of justification that the Constitution would result in meaningful transformation. In this regard, it is essential to consider the extent to which such transformation would encompass and impact on such legal and constitutional developments in the country.

Christianson (2010) makes a good case on the importance of institutional establishment to support constitutional democracy in promoting the transformative agenda. He focused on the central role played by the Constitutional Court in entrenching ethos of constitutionalism which in turn advances the ideals of TC. According to Christiansen (2010), courts and chapter 9 institutions are essential components that ensure that the Constitution retains its prominence of being the supreme law and remain relevant to society. Further that, it is only through creative institutional mechanisms that the system of constitutionalism is able to achieve substantive justice as espoused in the Constitution. Accordingly, an idea of creating an egalitarian society of justice-oriented ideology depends largely on the effectiveness of institutions established to safeguard the interests and rights of all people, particularly the vulnerable groups. This is particularly crucial because a case of South Africa has entrenched fundamental rights in the Bill of Rights, and courts are prepared to experiment their authority to advance national transformation and ensure adherence to upholding constitutional values and the rule of law.

It is important to ask how the Constitution can be made effective to bring about its desired transformative ambitions. In this regard, aspects of constitutional enactment and interpretation as espoused by Klare (1998) are worth attention. This then necessitates the need to look at the role of judiciary and other quasi-judicial function performers such as chapter 9 institutions, and imagine their contribution. According to Klare, (1998) the process of interpreting the Constitution should rely on a specific or preferred method. This defies the interpretive theory of Ronald Dworkin's of

putting the Constitution in its best light (Roux, 2009), enabling it to give greater effect to fundamental constitutional values. Thus, the question which arises then is, what model or approach of interpretation is best suited to advancing the ideals of TC, especially in South Africa where the judiciary is to a large confronted with having to grapple with the issue of political adjudication?

According to Van Marle (2009), the perfect interpretation approach should be that which acknowledges the comprehensive transformative ambition of the Constitution to an extent of giving traditional accounts of the rule of law thereby reaching various disciplines from philosophy, political and social sciences. According to Roux (2009), this accord with the ideals of TC, espousing the idea of altering outlook of the law to change society in legal, political and institutional terms. This is pragmatically viable provided, an all expansive interpretive approach cognisant of the contemporary experiences is adapted to, but of course subject to the doctrines of a democratic law-driven social change.

3. The Meaning of Transformative Constitutionalism

The notion of TC describes the nature of South Africa's post-democratic Constitution. In understanding this notion, it is essential to appreciate that it comprises two distinct concepts, that is, *transformation* and *constitutionalism*. Thus, it is essential to understand these concepts considerate of the aspirations and fundamental values of the Constitution. Though not subject to universally accepted definition, transformation is a notion which denotes '*change*'. What change is desired? The core business of TC is to inculcate psychological change or change things or change how things were/are done in legal terms. It entails that the state should be better positioned to fulfil and strengthen the constitutional ambition of bettering social, economic and justice services indiscriminately. Hence, transformation informed a construction of a new legal order, with opportunities being created for all, particularly to eradicate the material prejudices inherited from the past. It is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected, and in which change is unpredictable but the idea of change is constant (Langa, 2006). Hence, it will be incomplete if it does not encompass change in social, economic and legal perspectives.

To achieve transformation, an appropriate choice in legal system mattered. Premised on the idea of creating a democratic and egalitarian society, constitutionalism became most favourable. Its international prominence carried the hopes of realistically advancing transformation. It achieved international acceptance comparable to concepts of human rights, the rule of law, separation of powers and accountability (Venter, 2000). Constitutionalism refers to the doctrine which governs the legitimacy of government action (Burns, 2003). It requires effective laws and their enforcement to provide a structure to its framework. It is based on the notion of people's sovereignty, to be exercised in a limited manner by a representative government, requiring that those who govern are obliged to conduct the business of government in accordance with publicly articulated, prospective values that enable citizens to assess the legitimacy and propriety of public policies. Succinctly, constitutionalism is premised on making the Constitution the supreme law and the creation of institutional structures to control political power in the interests of all citizens. It guides in determining the extent to which human rights protection subsists, the nature of limitations, how state organs operates and how state officials should exercise and execute public functions. Its basis is to show that state power is defined and subject to restrictions by law to protect civilians (De Villiers, 1994; Cameron, 1997). Constitutionalism is a normative tool, because it identifies the set of values which should be upheld in the process of democratic governance. Therefore, government should derive its powers from the Constitution and its powers should be limited to those set out in the text (Currie, & De Waal, 2005). Consequently, the combination of transformation and constitutionalism proved capable to drive South Africa's democratic ideals.

So, what is the core of TC? It has been described as a permanent ideal concerning openness to the other, a commitment to inclusive, democratic dialogue, and a sharing of the responsibility of transformation between all three branches of government (legislature, judiciary and executive) in partnership with a vibrant, independent civil society (Langa, 2006). Its main purpose is to heal the nation (Moseneke, 2007). It requires an approach to the Constitution and law in general as tools which are committed to transforming political, social, economic and legal culture in such a way that it will radically alter existing assumptions about law, politics, economics and society in general (Davies and Klare, 2010; Van Marle, 2010). It relies on the values and principles underpinning the constitutional supremacy.

4. Constitutional Aspects of TC

By virtue of the Constitution being a progressive text and a beacon for emerging democracies (Colasurdo and Marlin, 2013), it is essential to understand what change accompanied it. Hence, it is crucial to understand the inherent

importance of democratic principles that aid the TC project. In the main, the post 1994 governance pragmatically entrenched the constitutional supremacy, hence the need to discern the differences with parliamentary sovereignty.

4.1 Parliamentary sovereignty and constitutional supremacy

Prior to 1994, South Africa was under parliamentary sovereignty. This is a concept in British constitutional law that a parliament has sovereignty. It entails that parliament reign supreme, wielding supreme legislative authority such that no court(s) could test any of its actions (Burns, 2003). The power and jurisdiction of parliament was so transcendent that it could not be confined. Such sovereign authority existed in the making, confirming, repealing, and expounding on the laws concerning matters of all possible denomination, ecclesiastical or temporal, civil, military or criminal, be it unreasonable or unjusticiable. Thus, parliament was supreme to all other governmental institutions including the courts, and could change or repeal any legislation passed by previous parliaments with a majority. Thus, this system allowed enactment of laws that would be instruments of racial segmentation, repression and disenfranchisement.

In contrast, constitutional supremacy refers to a system where the Constitution is the supreme law of the Republic. The Constitution embraces ideals of a culture of justification than a culture of arbitrary authority. Hence, every exercise of power ought to be justified. The government rests on the strength of the case offered in defence of its decisions, not the fear inspired by the force of its command. The system creates a community built on persuasion than coercion (Mureinik, 1994). This established an entirely new constitutional dispensation requiring a paradigmatic shift in the jurisprudential theory (*Matiso v Commanding Officer PE Prison* 1994 3 BCLR 80 SEC). This system established courts as custodians of the Constitution. Courts can order the government to provide certain services to its citizens in regard of entrenched norms. Courts can also nullify any legislation which is inconsistent with the Constitution. Parliament remain the highest legislative body although, it is no longer the highest state organ which determines the existence of both existing and/or non-existing individual rights and the extent to which they may be curtailed. Courts play a significant role of safeguarding the subsistence of the fundamental principles underlying the Constitution.

The Constitution introduced a new grund-norm for the state and the politics binding all the people, including kings/chiefs or traditional authorities who for decades enjoyed ancient traditional privileges of acting arbitrarily through patriarchal system. All administrative functions will be tested against the Constitution. In *Executive Council Western Cape Legislature v President of the Republic of South Africa* [1995] 10 BCLR 1289 (CC), 1995 (SA) SA 877 (CC), Chaskalson evinced that...

"The new Constitution establishes a fundamentally different order, compared to the parliamentary sovereignty system, that parliament can no longer claim supreme power or authority subject to restrictions imposed by the Constitution. That it is the subject in all respects to the provisions of the Constitution and has only the powers as vested in it by the Constitution expressly or implicitly".

The constitutional supremacy represents a condemnation of the past, committing to creating a better future rich in a sound legal culture guided by democratic principles.

4.2 Democratic principles

The Constitution had to entrench guiding principles with which to safeguard South Africa's democratic constitutional order. Notwithstanding the fact that these principles were never integral to the philosophical approach, plan of democratic tactics and strategies consented to by all parties to negotiation processes, it became apparent that these principles would coincidentally result (De Villiers, 1994). This explains why they find constitutional expression in every constitutional provisions. All state organs are required to abide by these principles and uphold the Constitution. These principles do influence the interpretation and application of the Constitutional provisions, inclusive of all rights in the Bill of Rights.

4.2.1 The Rule of Law

A successful democracy relies on the existence, respect and upholding of the rule of law. It is the supremacy of the law, augmenting the notion of constitutionalism that the Constitution is the mother all laws (Currie and De Waal, 2005), where a society is governed by the law, applicable to all persons and entities within the republic (Corder, 2014). It helps in securing freedom, justice and peace for people. All spheres of government and state functionaries are required to perform their functions within the bounds of the law (Mogoeng, 2013; Malan 2012) in a justified and rational manner. As

originally conceived by A.V Dicey, the purpose of the rule of law is to protect basic individual rights by requiring the government to act in accordance with the pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures (Currie and De Waal, 2005).

In *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa 2002 (2) SA 674 (CC)*, the Constitutional Court held that this principle requires that the exercise of public power by the executive and other state functionaries should not be arbitrary, that decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the requirement of the rule of law and as a result, falls short of standards required by the Constitution. This doctrine gives life to the principle of legality, which finds proponent in *Fedsure Life Assurance Ltd. v Greater Johannesburg Transitional Metropolitan Council 1999 (SA) 374 (CC)* where it was shown that the exercise of public power will only be legitimate in instances where it is lawful and that for as long as it is, then it will be recognized to be a constitutional law principle.

4.2.2 Democracy and accountability

In South Africa, democracy concept necessitated change in attitude between governance and the people. It is used interchangeably with 'freedom', hence it has solid relations with concepts of freedom and fundamental human rights. This is what arguably informed the need for transformation. Notwithstanding lack of universal definition, I venture to reiterate the most commonly used definition, that democracy denotes the government of the people, by the people and for the people. This primarily entails that for the government to exist and be recognized, it must be that which has been elected by the people. There are significant factors which assist in determining the presence of democracy. This includes, the presence of equal protection before the law, the right to human dignity, freedom of expression and association, and most importantly, respect and conforming to the Constitution as the supreme law. Accountability on the other hand entails that the government must be open, transparent and account to the people. The fundamental purpose of this principle is to restrain corruption and maladministration, and ensure that the government is prevented from acting arbitrarily. Further that those elected to government must serve the people. The Constitution recognizes three forms of democracies; representative, participatory and direct democracies (Currie and De Waal, 2005). South Africa adapted to participatory and representative democracy respectively.² Representative democracy is enhanced when direct and participatory democracies prevail (Currie and De Waal, 2005), thus democracy and accountability flourishes.

4.2.3 Separation of powers and Checks and Balances

The doctrine of separation of powers is amongst cardinal features of South Africa's constitutional democracy (Moseneke, 2008). According to this principle, specific functions and duties ought to be given to institutions with competence and jurisdiction; namely, *legislative authority* (parliament and provincial legislatures), *judicial authority* (courts) and *executive authority* (cabinet). The purpose of separation of powers is to constrain a concentration of power in the hands of either of these spheres of government and to also facilitate political accountability. Although no express entrenchment is found in the Constitution, the Constitutional Court held that there can be no doubt that our Constitution provides for such separation of powers in *South African Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC)*, (para18). It encourages that all functions of the state must be performed by different state institutions. This ensures the presence of effective mechanisms of checks and balances, which require that organs of state be entrusted with powers designed to play oversight role on other state functionaries. For instance, judiciary is empowered to review actions of the executive. When these principles are entrenched, established institutions safeguard proper interpretation and application, for a much swifter adherence of the law.

5. Transformative Aspects of the Post-1994 Constitution

Central to the South Africa's post 1994 model has been the subterfuge to ensure autonomous legal order where the law is separated from politics and their influence. The law is required to curb despotism, be responsive to social needs and

² *The Constitution, ss17, 18 & 19. Participatory democracy entails that people or institutions must be given an opportunity to participate in the decision making processes that affect their interests or rights. People participate by democratically voting for representatives of their choice to government. Public hearings and stakeholder consultative forums are also often conducted to afford citizens an opportunity to be part of the process of finding solutions. Direct democracy on the one hand allows people who feel that their interests are being neglected to rise and say so, either in the form of petition, demonstration and other mechanisms.*

substantive justice in the society. This necessitated the creation of structures that would entrench and safeguard South Africa's constitutional democracy, without which it would crumble. This is important in the sustenance of transformative agenda. These institutions augment the pragmatic realization of constitutional aspirations. Thus, it is essential to understand their functioning in advancing the TC project. These are notable transformative facets that resulted from the new constitutional dispensation. This concerns the establishment of the Constitutional Court, inclusion of Chapter 2 (Bill of Rights) and Chapter 9 institutions. This regards checking their role in securing meaningful transformative effects of the Constitution.

5.1 The Truth and Reconciliation Commission (TRC)

Post 1994 democratic dispensation, a strategic manoeuvre towards reconciling the nation had to be initiated. The TRC was established to serve this purpose through its restorative justice mechanism.³ On the whole, the TRC forged a smooth transition 'to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation. Led by Desmond Tutu, the TRC embodied a process of entrenching the significance of legal institutions supporting democratic ethos. This reinforced the significance of having firm and independent justice dispensing institutions. The TRC played a major role in legitimising democracy as a system founded on accepted values that transcended egoism.

5.2 Constitutional Court (CC)

Founded on the Constitution, judiciary symbolized optimism as a crucial constituent of South Africa's constitutional democracy. The Constitutional Court (CC) in particular became repository of judicial authority and would become the custodian of transformation, reconstruction and development agenda in the society. Judiciary is required to give full effect to all rights in the Bill of Rights. For its effectiveness, judiciary ought to be free from executive interference to assert its independence in dispensing justice (Moseneke, 2008). What is essential is that judiciary ought to dispense justice effectively and within efficient court system in accordance with the law. This ensures that government and the people observe and promote the rule of law (Mogoeng, 2013), thus keeping the ethos of TC intact. Since 1994, the CC's judicial activism has been an integral part of TC by essentially influencing the entrenching of the culture of human rights in the society (Christiansen, 2007; Botha, 2009). The CC plays an integral role in ensuring respect, protection and enforcement of entrenched rights in the Bill of Rights. This include among others, the right to life and dignity (*S v Makwanyane* 1995 (3) SA 391 (CC)), the right to equality and protection against discrimination (*Hoffman v South African Airways* 2001 (1) SA 1 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC)), the right to housing (*Government of the RSA v Grootboom and Others* 2001 (1) SA 46 (CC)), the right to health care (*Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC)), the right to education (*Section 27 and Others v Minister of Education and Another* (2012) ZAGPPHC 114), and other social services, upholding of separation of powers (*South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883; 2001 (1) BCLR 77) and the rule of law (*Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC)). Unlike its predecessor, the CC is bestowed with the review powers to test legislative actions of the legislature, executive and/or any state functionary.

Notwithstanding the major successes, the judiciary has had to also grapple with issues of both individual and institutional independence as Chief Justice Mogoeng Mogoeng alluded. Amongst the noted challenges with regards to independence is the retaining of court administration in the hands of the ministry which has resulted in a public perception that the Ministry of Justice and Constitutional Development heads judiciary (Mogoeng, 2013). This was the case under parliamentary sovereignty. Also critical is the issue of judicial appointments. The president still retains discretion in terms of appointing candidates to the bench. This renders the system susceptible to problems, considering dynamics in the contemporary political economy.

5.3 Bill of Rights

South Africa's 1994 transition was essentially guided by the significant need to build a broadly multi-racial democracy as the Constitution espoused. This was necessary to also give effect to international human rights norms (UDHR, 1948, ICCPR, 1966 and ICESCR, 1966). Thus, the Constitution included a Bill of Rights in chapter 2. Amongst the underpinning

³ The TRC was formed in terms of Promotion of National Unity and Reconciliation Act, No. 34 of 1995, see <http://www.justice.gov.za/trc/> for more.

provisions relates to those geared towards entrenching equality before the law, prohibiting discrimination, and protecting human dignity. The Bill of Rights placed human dignity as a touchstone of the post 1994 legal order (Chaskalson, 2000). The notion of human dignity therefore informed the inclusion a variety of other rights. Of importance was the inclusion of socio-economic rights. This enabled the CC to formulate an appropriate approach in dealing with issues of advancing social welfare through the Constitution in pursuit of the transformation ideals. Hence, the constitutional human rights changes constituted a noble course that distinguished post 1994 regime from its predecessor.

5.4 Chapter 9 institutions⁴

Just, as imperative to note is the establishment of chapter 9 institutions and their role in advancing TC. These institutions fundamentally assist in ensuring a government that is accountable and responsive to the public. They perform quasi-judicial functions in that they mostly conduct investigations and make recommendations on what appropriate actions should be taken in remedying a given situation. They also ensure effective oversight of human rights protection and enforcement. The SAHRC is particularly tasked with safeguarding a comprehensive realisation of rights in the Bill of Rights. The Commission is required to annually demand organs of state to furnish information on the measures they took to advance the course of transformation. The Public Protector has been a vibrant arm in ensuring that perpetrators of maladministration and other unlawful practices are held accountable for their actions. In fulfilling the Constitution, the Independent Electoral Commission (IEC) has been facilitating free and fair elections, as observed in the recent polls of the 07th May 2014. Clearly, without these structures efforts to entrench democracy will most likely bear minimal results. Nonetheless, Chapter 9 institutions, particularly the Public Protector led by Adv. Thuli Madonsela have experienced assaults on numerous occasions in the recent past. In most instances, her findings least get implemented, meaning that perpetrators of maladministration and other unlawful acts escape with impunity. A lesson to draw from this experience is that in the crafting of transitional democratic system, it appears indispensable to restrict involvement of political authority in institutions intended to service democracy. To ensure their full independence, the political power should not have a say on appointment of officials to lead these institutions, as is opposite presently.

6. Conclusion

South Africa's post 1994 constitutional supremacy has proved the strength of Hans Kelsen's theory of pure law, emphasising that when the law in the Constitution is premised on the agreed principles, it easily finds legitimacy. This regards the conception that the post 1994 Constitution was a result of a protracted, but yet productive dialogue where parties agreed on fundamental values that would be crucial to the success of democracy. These values became underpinning origins of the law that would create a people centred democratic dispensation. Within this context, it is significant to understand the central goals with regards to what needed to change in view of TC, what necessitated such change and how such change ought to happen. On the whole, the experience reveals that a transition had to first alter the old, and embed new functions of the law. Thus, the project of TC has had to stabilize social, legal and political relations in the country. At most, TC has fostered human rights activism, respect and adherence to the rule of law and separation of powers. Most importantly, how did this happen? The role played by the *Truth and Reconciliation Commission* cannot be understated. This was the first test of the TC project. The establishment of this commission paved a way for a genuine reconstruction and development, particularly with regards to soliciting a societal acceptance of democracy as a tool to heal the nation. It bred tolerance and forgiveness among the people, while also inculcating respect for the established justice serving institutions of the Constitution, resulting in a greater social and political construction. It then became clear from the onset that South Africa's transformation agenda depended on the established institutional framework that safeguards the rule of law.

This article has found that for the past 20 years, the activism of chapter 9 institutions and judiciary has been effective features of the country's democracy. Therefore, the institutional strength should be sustained to reinforce the

⁴ *The Constitution, 1996 ss181 – 194. Chapter 9 Institutions refer to institutions which were established to reinforce principles of checks and balances and that of separation of powers to safeguard the ambitions of a human rights driven state. In terms of s181 of the Constitution, 1996, these institutions' fundamental objectives have been to support, strengthen and defend the country's constitutional democracy.*

They are; The Public Protector (PP), The South African Human Rights Commission (SAHRC), The Commission for Gender Equality (CGE), The Auditor General (AG), The Electoral Commission (IEC), and The Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities. They are meant to be independent, free from political interference and subject only to the Constitution, 1996.

gains of TC in the midst of various challenges, which are arguably necessary as they enable vigour in working towards ensuring a meaningful transformation.

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