



Re-thinking the Constitution's Rights-based Approaches and Klare's Social Change Phenomenon: A View towards Securing Human Well-being and Societal Stability¹

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Abstract: This article proffers a critical reflection of South Africa's post-1994 constitutional trajectory, with specific emphasis on interpretation, application, enforcement and realization of first, second and third generation rights as potential panaceas to challenges inhibiting socio-legal transformation. It forges an adoption of an interdisciplinary approach, relying extensively on theoretical connotations founded in Klare's conceptualization of Transformative Constitutionalism and social change, the traditional rights-based approaches to human development and well-being, and Amartya Sen's and Martha Nussbaum's Capabilities Approach. It utilizes these theories as tools of analysis, to essentially evaluate their potential impact when tested against prime values grounded in the doctrine, Ubuntu, which informs Africans' philosophy of life, often distinguishable amongst proletariats. These tools are utilised to make an assessment of material socio-economic conditions afflicting indigent communities, in an effort to provide explanations regarding identifiable gaps existing in social policy and strict legal norms and/or instruments. It is asserted that Klare's TC and the Constitution's rights-based approaches will remain hollow lest not augmented by strong ideological instruments that are people-centered. Thus, it is indispensable that the Constitution's social transformation agenda, as an ongoing process, be complemented by ideologically sound approaches that adequately safeguard the well-being of humanity.

Keywords: Constitutionalism; legal norms; human rights; social change; human well-being

1. Introduction

At the center of attention in this article is the idea of inspiring better thoughts in respect of Ronald Dworkin's (2001) notion of putting the Constitution in its best light as far as South Africa's processes of social, political and legal transformation

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are concerned. Fundamentally, the article borrows from Dworkin's interpretation theory, which is grounded in constitutionalism. It also relies on section 39 of the Constitution which obligates courts to promote foundational values that underlie a democratic setting founded on dignity, equality and fundamental freedoms. According to Van Marle (2009), the Constitution of the Republic of South Africa, 1996 (*hereinafter, the Constitution*) requires interpretation strategies that resonate the country's socio-economic transformation agenda. This is mainly because South Africa has a distasteful history of social and economic exclusion under which people's social security were determined on racial basis. Distribution of resources was also premised on discriminative planning strategies, which inherently stifled human development on the part of majority of people.

But, eventually, and when apartheid became untenable, South Africa transited into a dispensation which envisioned a comprehensive societal transformation. This would have to be an all-encompassing change which would be bound to essentially alter material social and economic conditions created by the erstwhile apartheid system of governance, and which inadvertently had to be inherited by the constitutional democratic state amongst its primary responsibilities. This entails that the post-1994 legal systems inherited an enormous duty to secure societal stability and human well-being in the end. Worth mentioning is the fact that the well-being of society can best be attained when every person has adequate access to basic commodities needed to sustain a healthy prosperous living. This illustrates that there ought to be notable acceptance that every human being is worthy of respect, protection, and should thus be afforded an enabling environment within which to exercise their freedoms and simultaneously develop their own capabilities.

Fast forward, and twenty-three years later, South Africa is still struggling to uproot such social challenges inherited from apartheid. Instead, the country remain besieged with acute social inequalities, rising poverty levels, economic deprivations and diminishing employment prospects, all of which represents the contemporary prime challenges in as far as social development and human welfare are concerned. Indubitably, these phenomena were deeply entrenched under apartheid, and somewhat, it is difficult to measure the presence of any notable improvements in practical sense owing to never ending population dynamics in particular. Thus, it is crucial to engage in a continuous process of interpreting and navigating the law in the Constitution in the direction that, when put in its best

light, it will enable the country and its citizens to, in a meaningful way, destroy social and economic structures embedded under apartheid.

Therefore, this article attempts to provide an alternative thinking through which to augment the Constitution's and Klare's 'social transformation' anecdote. This is significant in an effort to destroy a gradually settling narrative that the local democracy accepted and or legitimized apartheid's social inequalities under which the previously disadvantaged communities stand no chance of meaningfully escaping destitution.

2. Rationale and Research Approach

This article interrogates Klare's narrative of 'social change' in his famous conceptualization of Transformative Constitutionalism (TC). Klare's TC distinctively describes South Africa's constitutional change and transition into the post-1994 democratic dispensation. The article fundamentally highlights that lack of proper ideological framework, and an understanding and implementation of constitutional dictates, especially those relating to foundational values and rights-based approaches and basic human entitlements that underpinned the struggle against apartheid, is responsible for slow pace towards the realization and enjoyment of human rights. In the end, this adversely affects prospects of attaining human well-being, stability in society and sustainable livelihood. The article intends to illustrate that lack of commitment by, in the main, the political leadership and other public functionaries, both in public and private entities, whose functions impact on peoples' lives is responsible for sluggish pace of the country's social transformation. It evinces that there is lack of clear and coherent ideological strategies informing how the Constitution ought to be applied, and the fundamental functions and/or ambitions for which it is destined. Eventually, the Constitution will become a quiet conservative instrument, most favorable to those better positioned to understand systems of governance. Further, the Constitution would be perceived as favoring those in possession of resources to enforce it. And, in the extreme, it will incessantly be perceived as an instrument which protected social arrangements established under apartheid. Philosophically speaking, no efforts have been made to empower state functionaries, in order that they may understand dogmas that inform law and service to people.

At the center of attention, this article addresses the research questions; what ought to be understood as fundamental constitutional imperatives that prompted the

‘social transformation’ narrative, which was essentially relied upon in the coining of Transformative Constitutionalism by Klare? Further, does the Constitution pragmatically support socio-economic transformation? And how does it envisage that this be achieved? It also laments why Klare did not clearly explain the ‘social change’ in full?

Against this backdrop, I shall identify specific aspects that feature as strong legal norms and social change imperatives, without which social change will hardly be realized. The article intends to inspire new thoughts about prospects of augmenting strict rights-based approaches to human development with realistic approaches that embraces diversity, yet directly addressing imminent challenges afflicting society. It is for this reason that the article stresses the need to encourage formulation of combined strategies when it comes to interpretation, application, enforcement and realization of the Constitution social transformation and human rights ideals. It formulates a new model named, ‘*Mashele Rapatsa’s Fundamentals of Life Approach*’, an approach which emphasizes on the need to identify basic resources needed for human beings to constantly achieve and sustain a better life, and then creating an enabling environment within which such can be consistently maintained. This approach stresses that rights, as basic human entitlements, require going beyond simply documenting them in legal texts.

3. Theoretical Framework

This theoretical framework comprises two parts. The first section critically describes legal anecdotes drawn from Klare’s Transformative Constitutionalism (TC), especially its position on social change. It should be noted that although social change became an essential part South Africa’s post 1994 legal systems, Klare, in his conceptualization of TC, did very little if not nothing, to explain the content of this crucial phenomenon. The second section discusses specific elements of Amartya Sen and Martha Nussbaum’s Capabilities Approach as they concern human well-being, and is relevant to discourses that deal with societal stability.

3.1 Transformative Constitutionalism (TC)

The post-1994 legal structure opted for the constitutional supremacy system of governance, which subscribed to the theory of constitutionalism. Under constitutionalism, government action must be legitimate and subject to justification at all times (De Ville, 2003; Burns, 2003). In terms of section 2 of the Constitution,

settling for constitutional supremacy entailed that the Constitution would be the supreme law of the republic, and that any law or conduct inconsistent with it is invalid. Most importantly, at the center of attention was and still remain the whole question of transforming the country from its repugnant past, to build a united and socially coherent nation. In the main, the Constitution embedded fundamental legal and normative frameworks that accentuated the post-1994 dispensation's primary duty to alter social and economic conditions of ordinary South Africans, particularly the previously disadvantaged communities (Rapatsa, 2015, p. 1).

Subsequently, Klare coined Transformative Constitutionalism, which he used to describe the nature of the post-1994 Constitution. He posited Transformative Constitutionalism as 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' (1998:146). Klare emphasized that the Constitution offered an enterprise to induce major social change through non-violent political processes immensely grounded in law (1998:150). However, it should be noted that Klare did not fully explain the narrative or content of such social change and how the Constitution ought to drive it. Hence this article.

Van Marle (2009, p. 288) perceived Klare's Transformative Constitutionalism as a theory which encompasses an approach to the Constitution and law in general that is committed to transforming political, socio-economic and legal practices in a manner that it will radically alter existing assumptions about law, politics, economics and society in general. Further that the Constitution is made transformative not only because of its traditional accounts of the rule of law, but because of its capacity to reach out to other disciplines such as philosophy, political theory and sociology. But how is this helpful if socio-economic situations of majority of those who were excluded by apartheid remain unaltered? It might as well suggest that alternative strategies ought to be sought in order to effectuate the Constitution's legal and social norms.

Interpreted from socio-political and legal perspectives, Pius Langa (2006, p. 352) asserted that TC epitomizes a constitutional commitment to heal wounds of the past and guide us to a better future. He posited that it encompassed transformation as a process, a continuous ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly feasible, where new mechanisms 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, p. 354). While it

may be accepted that the Constitution carried an essential function of building a new nation, this is not realizable in the absence of a nationally accepted ideological connotations by all citizens.

3.2 The Capabilities Approach (CA)

The Capabilities Approach, at least, offers fundamental doctrines that may be relied upon in order to properly interpret and analyze the effectiveness, or lack thereof, of Klare's Transformative Constitutionalism narrative on social change. The CA was first conceived by Amartya Sen. It is concerned with *functionings* (person's achievements or what a person may value doing or being), *capabilities* (freedoms a person enjoys) and *agency* (ability to act in pursuit of what one values) (Sen, 1985, p. 203). Sen formulated the CA as a tool to evaluate human well-being in society. That is, to determine successes in human life, certain elements ought to be accepted as primary determinants. Sen constructed a strong relationship between education, development and freedom (Sen, 1999), and the rights language.

The CA was later expanded by Martha Nussbaum as a special species of human rights approach (2007, p. 21) and a normative tool to serve and enrich our common humanity (1992, p. 214), owing to its ability to resolve deprivations afflicting humankind, the previously disadvantaged, women and the poor (2006, p. 48). Both Sen and Nussbaum emphasizes that the CA is best suited to evaluate well-being, and in this case, it can be used to assess whether social change has meaningfully permeated the Constitution's rights-based approaches. The CA embraces a humanist stance which seeks to safeguard '*a better life for all*', a popular slogan which was adopted by the African National Congress (ANC) after nine-teen nineties. The CA also offers an alternative discourse in policy terms, concerning modern instrumental practices (Wright, 2012, p. 421). Hence, the CA possesses an intuitive strength to reinforce legal norms if applied concurrently with the Constitution's fundamental values of human dignity, equality and fundamental freedoms. The CA theoretical underpinnings provide coherent methods in terms of which to assess social change.

Because this article identifies specific elements that are considered as crucial preconditions for social change, it is essential to relate such aspects with those propounded upon by Sen and Nussbaum. Such aspects include access to education, which plays a significant role in increasing people's chances of achieving better social security, protection of human dignity, achievement of equality and security of persons in general. Sen (1992, p. 44), in one of his founding texts, held that

education is a crucial basic capability, which is essential for human development, human well-being and social change. Nussbaum (2007) uses phrases such as sense, imagination, thought and practical reason on her list of central capabilities, to express education as a crucial capability, which she identifies as significant towards enhancing other central capabilities. Wright (2012, p. 417) has also emphasized the integral nature of education in regard to expanding other capabilities.

4. Constitutional Norms and Social Change

Philip Hamburger (1989, p. 240) asked if the framers of the United States Constitution understood that changes in society would also require change in terms of how the US Constitution is interpreted and applied. This question is also relevant to South Africa, where it is crucial to question how the crafters of the post-1994 Constitution perceived and anticipated the law in the Constitution to be at the forefront of facilitating alteration of social arrangements established under apartheid. This is essential because the Constitution is perceived as being transformative in nature, even though it does not, understandably though, in clear terms, provide a clearly defined ideological framework needed to facilitate such social change, which Klare also did not appropriately conceptualize. But the question which would have been critical at the time, and which is still relevant today, is, on establishing the potential impact of clear ideological strategy, inclined to such social change in practical terms? Nonetheless, it is somewhat understandable why Klare did not postulate such a framework, and it is attributable to the fact that, in his own words, he was skeptical whether a comprehensive social change could be achieved through law-grounded processes, while he of course and emphatically believed that large-scale social transformation was indispensable (1998, p. 150).

It is indubitable that the Constitution embedded normative and institutional frameworks that support rights-based approaches to human development. The author argues that this is, discernibly, one of the most salient strategies of attempting to facilitate social change as espoused by Klare. Such a setting is indeed convenient for strategic social change movement, which ought to fundamentally alter past injustices. Under these circumstances, and according to Summers-Effler (2002, p. 41), social structures must get repositioned, in which case social change will intermittently happen. The Constitution promised transformation whose

mission amongst others would be to achieve societal equality and social justice. Whether these ideals have been achieved it remains debatable but the challenges outlined in the section below may be suggestive that these objectives remain distant. The following aspects are considered as crucial legal norms and social values that are recognized as social change precursors, mainly because they are premised on safeguarding social justice and sustainable human development.

4.1 Constitutional Legal Norms and Social Change Preconditions: The Basis of ‘*Fundamentals of Life Approach*’

a) Human Dignity and Social Change

Section 10 of the Constitution entrenched the right to human dignity. Respect for humankind, and restoration of people’s human dignity essentially informs South Africa’s social transformation. The country’s past necessitated a universal and non-discriminate restoration of human dignity as a precondition for social change. This concept of human dignity is touted as a guiding instrument in the interpretation and understanding of all other human rights (Rapatsa, 2015, p. 43). Dignity on its own accepts that human beings are exceptional creatures whose human worth should never be suppressed (Cohn, 1983), and no person may deliberately be devalued or treated in a humiliating manner (Chaskalson, 2002, p. 137). Much reliance on the law to protect human dignity derives from the fact that law emanates from social construction of what is perceived as correct and normatively acceptable. It is for this reason that the crafters of the Constitution inadvertently and somewhat got preoccupied with the idea that protecting dignity is necessary to facilitate social change. This dignity, both as a legal norm and a human right, ensured that all rights in the Bill of Rights find expression with ease.

b) Equality as a Legal Norm and Social Virtue

The Constitution protects the right to equality through section 9. The need for equality in society emanates from an ideal which sought to destroy harmful social-grouping hierarchies that are deliberately premised on disadvantaging other persons. It is a justice orientated aspiration of law (Sturm, 2003, p. 51). It is described as a substantive legal norm which carries a strong moral force, and which requires that all persons be respected and protected by their governments (Greenawalt, 1983, p. 1183). Under apartheid, law was effectively used to entrench inequalities and social instabilities. This created huge social and economic disparities, mostly affecting the natives, which culminated in widespread material disadvantages that remain noticeable even today. Therefore, the Constitution

inherited a fundamental duty to disentangle inequalities in order to advance social transformation, and extend the reach of wide arms of the law to those in desperate need. It is for this reason that there is a direct connection between equality as a legal norm and a social virtue.

c) Education as a Right

The right to education is protected in terms of section 29. It is trite that every country needs an educated citizenry in order to register significant progress on issues such as social cohesion and social justice (Rapatsa et al, 2016, p. 42). According to Sen (1992, p. 44), education is a crucial basic human capability. Hence, the Constitution entrenched it not only as a right, but as a human capabilities enhancer. The role of education in advancing social change derives from its ability to safeguard cognitive empowerment. To articulate education as a basic capability, Nussbaum uses phrases such as *Senses, Imagination, Thought, Emotions and Practical Reason* as central capabilities. Nussbaum's view begins on assumption that human nature allows persons to possess and use own senses, forming into imagination and thoughts, to have freedom of expression and practice all these entitlements freely (and in an educated manner).

This entails that education enables citizens to understand dynamics that play out in society's developmental and transformational issues. But how must education and its entire access question be conceptualized? To effectuate education of society, it is indispensable that all factors that make learning environment conducive become what will form the basis of capabilities enhancing. That is, we ought to remove all structural obstacles that impede effective teaching and learning. It entails that states ought to ensure that social conditions are conducive for such a right to be fully claimed and enjoyed. For instance, states need to build institutions, create the much needed schools' infrastructure, and provide materials and technical assistance to advance effective teaching and learning. In turn, this advances social change.

d) Right to Social Security

Section 27 of the Constitution entrenched social security as a right, and obligated the state to ensure its progressive realization. Since then, the state's provisioning of access to basic necessities has permeated every sphere of decision making in government, which Thabo Mbeki thenceforth linked with the concept of restorative justice (MacGregor, 2006, p. 53). Access to social security would have been perceived as a precondition for progression of social change and societal stability. When majority of citizens lack social security, the social change cannot be realized.

The inclusion of social security as a right was underpinned by the need to progressively eradicate trends in inequalities and the disturbances emanating from the poverty phenomenon. In a nutshell, social security would encompass ideals which Scott and Macklem (1992) described as social rights, which if realized, would guarantee access to adequate quality of life. Social security covers items such as quality education, health care, housing or shelter, food, water and harmless environment among others.

e) Safety and Security of Persons

In terms of section 11 of the Constitution, everyone must be protected from torture, violence, cruel and inhumane punishment and detention without trial. The state carries the utmost obligation to safeguard these entitlements and ensure that no person or institution infringes on them against any person. This derives from, among others, apartheid experiences under which people were tortured and or detained unreasonably for merely being in town or racially demarcated areas. To advance social change, the Constitution entrenched an intuitive normative value system which prohibited the use of force, either by the state or private persons or entities against any person.

5. Challenges

5.1 Lack of Coherent and Sustained Ideological Strategy

The emergent of the Truth and Reconciliation Commission (TRC) of the mid-nineties produced some understanding that there was a need for harmony, that both the victims of apartheid and its perpetrators had to reconcile and forge towards building one unified nation. Desmond Tutu famously described the aftermath of the TRC as a 'rainbow nation'. The TRC, and in furtherance of the Constitution's foundational values, attempted to embrace and propagate the view that we are one nation and shall live side by side with each other. However, other than the hollow 'rainbow nation' slogan, no national ideology was subsequently formulated and embraced by all. This void in terms of national ideology has resulted in discrepancies in terms of national identity, social identity and social direction. It is for this reason that numerous social and economic problems are still predominantly race-based, and this is because nothing informs our common humanity and how communal solutions ought to be invented. Despite the presence of long lasting principle of Ubuntu, no adequate effort was also made to inculcate common ideals

about what we represent as a nation. The doctrine of Ubuntu is accepted as resonating universal values of human worth and dignity, and has helped advance the transformative ideals in society thereby fostering social cohesion (Eliastam, 2015:2) and social change in the end. Hence, this article evinces that the *Fundamentals of Life Approach* acquires its strength from Ubuntu because it provides dependable normative guidance regarding interdependence of humankind.

5.2 Racial Biases and Stereotypes

Just as it was under apartheid, there is still a challenge of ‘us’ and ‘them’ among all race groups. Although the Constitution envisioned burying wounds of the past, racial conflicts in particular, as propounded by Pius Langa, racially motivated tensions remains a widespread reality. Even though causes of such tensions have not been officially studied and analyzed, the author argues that they supposedly range from misconceptions on racial supremacy and or inferiority stereotypes, skewed land ownership patterns, pervasive historical underdevelopment, systematic patterns of racial privilege and so forth. Thus, this is purely a psychological issue, which requires creative responses that recognizes the need for interventions geared towards a psychological healing process.

5.3 The VIPsm Quagmire

Rapatsa (2016) has coined VIPsm, and argues that it emanates from a trending phenomenon known as ‘VIP(s) - *Very Important Person(s)*’. VIPsm is characterised by an abnormal state of categorizing or classifying human beings according to status or wealth or positions they occupy in society. It is particularly rife among political parties, and in government where political leaders or state functionaries/officials demand extra-special treatment and recognition by virtue of position, wealth or status, rather than their contribution towards serving humanity. Invariably, this trend cannot be congruent with the social change aspiration, especially because a substantial amount of (public) state resources (often limited), get budgeted for and or at times diverted from where they are needed most, to service egos of the elite capitalists. In fact, this is the most awful when compared with apartheid deliberate racially repressive laws, because often resources that are supposed to improve the livelihood of indigent communities are diverted to fulfil egocentric desires of politicians and or such other public functionaries. Often opulence is prioritised, at the expense of access to primary goods, all of which contradicts Karl Marx’s (1844) ideas on freedom, emancipation and access to basic necessities of life, whose works are heavily cited during campaigns for votes.

5.4 The Dual System of Service Delivery: Public-Private Service

South Africa suffers yet from another soundless sickness known as public-private service. That is, a system under which there are public institutions and private institutions, both of which deliver essential services to citizens. However, such public institutions, which are intended to serve everyone, predominantly poor communities, are poorly resourced and generally underperforming. This is in contrast to private entities that are generally better performing, partly because they are highly funded and well-resourced (financially, infrastructure and human resource). This is particularly rife in relation to access to health (private hospitals or health care clinics), education (private schools), security (private security), food and several others basic amenities of life. Under such circumstances, it is impossible to realize real social change particularly because majority of citizens remain excluded from the enclave of better life and social security safety net.

6. Conclusion

This article has validated the argument that the constitutional inclusion of social and economic rights, alongside civil and political rights, epitomized the Constitution's transformative outlook, particularly in terms of social relations, and molded its ability to facilitate social change, attainment of human well-being and societal stability in general. Thus, it is indisputable that the Constitution successfully embedded resilient normative frameworks which entrenched a wide range of solid legal norms, that are also capable of resolving social challenges if properly conceptualized. It is therefore deducible that the crafters of the post-1994 Constitution were unwittingly conscious of the well enunciated social transformation imperative, without which legal norms would be effectively meaningless.

However, the past twenty-three years of the democratic dispensation tells that the country still faces multiplicity of social, economic and political challenges, all of which have a significant bearing on the well-being of humans, social peace, social justice and social stability. In fact, things seem to be getting out of hand on a daily basis. Certainly, this presupposes that there is a huge void, and the author believes that the absence of practical ideological connotations aimed at reinforcing constitutional legal norms is one such missing link. Hence, the *Fundamentals of Life Approach* is proposed, which advocates for a socio-legal approach to interpretation of first (civil and political rights), second (social, cultural and

economic rights) and third (right to development, environmental rights etc.) generation rights. The *Fundamentals of Life Approach* operates on the premise that the Constitution, in isolation, irrespective how strong its rights-based legal norms are, would not sufficiently advance social change. Therefore, there is an urgent need to harmonize legal tools and social thinking, and ensure that crucial elements dictating on human development are all embraced and given true effect in practical sense. Most importantly, the *Fundamentals of Life Approach* entails looking at rights, and linking them with social issues and understanding their impact on social change and human well-being. In this article, only a set of five indicators of social change were selected. That is, human dignity, equality, education, social security and security of persons. Accordingly, the *Fundamentals of Life Approach* emphasizes that whereas these norms should be embraced as key rights, they should also be understood as central elements that are capable, and thus needed for facilitating real social change. It is asserted that such an approach is panacea to noted challenges.

The *Fundamentals of Life Approach* stresses that, henceforth, all rights in the Bill of Rights ought to be interpreted and understood as precursors of social change, a departure from the apartheid awful past to a newly defined common future. Further, that rights must not only be understood as legal entitlements and legal tools through which to hold government accountable, but should equally be perceived as means to greater social ends. Lastly, the concept of Ubuntu embodies prime values underpinning social change. It is asserted that the application of the Constitution's transformative agenda must be interpreted in such a way that it gives effect to the *Fundamentals of Life Approach*, which generates an added impetus from the doctrine of Ubuntu, whose primacy is on securing human worth, interdependence, social peace and justice and sustainable human development among others.

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