Remodeling the Constitution's Transformation Trajectory: From Normative Legal Instruments to Normative Moral Approaches

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Abstract: The Constitution of the Republic of South Africa, 1996 has been described as one of the best in the world. According to Karl Klare, this Constitution is a transformative instrument which offers an enterprise to induce major social change. It is for this reason that various normative approaches, guided significantly by various interpretive methods, including Dworkin's, emerged from the reading of every constitutional provision. This has been prevalent since the early days of the post-1994 democratic dispensation, under which the courts have been actively involved in attempting to ensure meaningful realisation and enjoyment of civil and political rights, socio-economic rights and third-generation rights. The Constitutional Court, which inadvertently became both a constitutional and human rights activist, has particularly been at the forefront. However, the extent to which the Constitution is the "best" is a matter that has not been expansively dealt with. Thus, this article proffers a critical reflection of the 'best Constitution' narrative, especially within the context of transformation and distribution of constitutional law knowledge. This derives significant impetus from Klare's conceptualisation of a social change phenomenon, with the view towards finding strategic mechanisms of reformatting legal knowledge (constitutional and human rights knowledge) in the contemporary South Africa. At the center of attention is the idea of explaining constitutionally entrenched norms that subscribes to strict legal approach, whereas aspects deriving from morality could have been opted for, in order to mutually locate solutions or mechanisms that would effectively advance noble agendas of reconciliation, transformation and decolonisation. The article addresses two prime research questions: first, why the Constitution is described as the best? and, second, why there is a need to harmonise law and morality to realise social and economic transformation. The article adopts a theory-based analysis, relying fundamentally on theoretical connotations founded in Fanon's conception of change and leadership, Klare's Transformative Constitutionalism and Nussbaum's Capabilities Approach.

Keywords: constitutionalism; social transformation; legal norms; human rights and human wellbeing

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1. Introduction and Context

Like never before, South Africa's transformation trajectory desperately requires reorientation. Such adaptation must creatively invent normative moral strategy in order for the post-1994 constitutional order to continue to preserve a genuine societal legitimacy. Meaningful post-apartheid social, political and economic transformation cannot be substituted with unsubstantiated, hopeless semantics such as the "best constitution" narrative, which does nothing big, except attempting to render the awful past injustices inconsequential. In this regard, Villa-Vicencio (1991, p. 141) vehemently warned that any nation which ignores history is most likely to become victim of the same history. This view is more applicable to South Africa. Therefore, does the post-1994 Constitution manifest necessary cognizance that there remains an urgent need to uproot the diabolical effects of the historic policy of apartheid, which was spearheaded through legislation, and which caused socio-economic palpitations on most South Africans? According to Hugh Corder (1994, p. 491), the extreme disparities of socio-economic welfare occupied a central position during negotiations for transition from apartheid to democracy. This entails that the Constitution of the Republic of South Africa, 1996 (*hereinafter*, *the Constitution*), inherited an inherent obligation to prioritise addressing the question of safeguarding human wellbeing in a manner that would reinforce efforts of normalizing society. The Constitution also had to oversee a departure from a deeply divided past characterised by strife, conflict, untold suffering and injustices that are reckoned as the worst transgressions of humanitarian principles. Yes, the Bill of Rights promotes liberty and equal justice under law (Goldstone, 1997, p. 451), but would a constitutional enshrinement alone be capable of delivering immediate or progressive redress of pervasive historical deprivations?

It is worth noting that South Africa is amongst notable countries of the world that have traversed a multiplicity of notorious phases in history. This is with reference to matters of governance, construction of governance structures, social relations and human sufferings, and the establishment of both normative and institutional frameworks. For instance, a Constitutional Convention of 1908-1909 produced the union-level institutions (Celerant, 2014, p. 627), which culminated in the Union of South Africa, whose laws would thenceforth entrench racial discrimination and social injustices. And, during every such phase, the law was constantly deployed either as a tool to provide normative guidance and regulatory mechanism, or as an instrument to effectuate such human oppression, subjugations and denial of

fundamental freedoms. For example, the promulgation and enforcement of the Natives' Land Act 27 of 1913 was utilised to deprive the natives of land ownership, thus haphazardly imposing hardship and physical sufferings (Plaatjie, 1916, pp. 176-178), with the subsequent apartheid system later in nineteen forty-eight (1948) becoming an official government policy whose prime purpose was to entrench pervasive inequalities, deprivation of human dignity and fundamental freedoms, and disenfranchisement amongst others. When sharply scrutinised, one realises that for the better part of the twentieth century, South Africa's natives have been engaged in a constant struggle to uproot unjust laws and eliminate racial prejudice, in order that people's human dignity, equality as a virtue and as a right, and fundamental freedoms may be restored. Whether these ideals were to be achieved within or outside the bounds of the law would be immaterial. Hence, it has been argued that majority of South Africans deeply supported the cause against apartheid because they wanted the law, if ever there were to be laws, to protect them and preserve their worth as humans (Currie & de Waal, 2005; Rapatsa, 2015, p. 19). Therefore, and most importantly, our sustained discourses in constitutional law would be incomplete lest we shy away from confronting cold realities that seek to challenge the role of the present Constitution and its variety of statutory instruments promulgated to give effect to it, when it comes to eradicating past injustices and normalising society. This article is one such contribution which seeks to understand why the Constitution is labelled as the best in the world whereas those historical social and economic quandaries remain prevalent.

Comparable to the Constitutional Convention of 1908, several constitutional negotiations were held during the early nineteen-nineties, when apartheid became unsustainable and began crumbling. In the main, processes such as Convention for Democratic South Africa (CODESA) and Multi-Party Negotiating Process (MPNP) were held, with the MPNP said to have culminated in a new Constitution being negotiated and drafted. The crafters of such Constitution and its post-1994 democratic dispensation designed the law in the Constitution and presented it in such a way that it would be viewed as a soul provider and a precursor of peace. But did they realise that inherent to the struggle against apartheid was the whole idea of fighting to achieve social and economic wellbeing? These ideals would, once achieved, in turn foster the advancement of social justice in an egalitarian setting. Therefore, this article attempt to deal with the above critical question in order to properly locate the role of the Constitution and its strength towards securing social justice in the contemporary South Africa. Perhaps, it is worth mentioning at the outset that the struggle against apartheid was essentially not about constructing the

best Constitution in the world. Liberation movements were born because social justice activists and philosophers such as Sol Plaatjie, Prixley ka Isaka Seme, Bantu Biko, and many more were austerely opposed to racially motivated policies that entrenched material disadvantage. They wanted an end to oppression, elimination of poverty and realisation of a better life for all.

Fast forward, the Constitution has been and is now being hailed as one of the best in the world. However, very limited discourses nor constitutional law scholars have convincingly dared explain the meaning of this "*best Constitution narrative"*, except that there have been numerous attempts to justify this by citing the inclusion of certain constitutional elements in it (such as justiciable socio-economic rights) as adequate tenets to validate describing it as the best. Yes, the Constitution captures all forms of human rights (*civil and political rights, socio-economic rights* and *developmental and environmental rights*), and went on to establish Chapter 9 Institutions[1] to support democracy, which entails, reinforcing the ability of the state to recognise and protect these rights, while also ensuring a progressive realisation of such rights. Also significant is the fact that the judiciary, especially the Constitutional Court, is bestowed the authority to be the custodians of all constitutional matters, but must ensure that all its actions conforms with the doctrine of separation of powers and upholds the rule of law. As far as I am concerned, these aspects, among others, are inherent preconditions for any constitutionalist state to be judged as being properly functional, especially within the context of ensuring effective and accountable people centered governance. Thus, why was/is South Africa's Constitution said to be best in the world?

2. Problem Statement and Research Question

It has been twenty-four years since South Africa changed from being an apartheid state into a democratic state. It is trite that under apartheid, human rights could not develop (Klotz, 1995; Sarkin, 1999; Langsberg & Mackay, 2006), largely because the characterisation of the system was squarely that it stood opposed to fundamental human freedoms. Most importantly, the much yearned non-racial human wellbeing and swift social development could not be realised. The apartheid system was disdain of established constitutional law principles, while advocating racial oppression,

[1] The Chapter 9 Institutions refer to state entities such as the Public Protector, the South African Human Rights Commission, The Auditor General, The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, The Commission for Gender Equality and the Electoral Commission.

acute inequalities, poverty, underdevelopment and disenfranchisement of native African masses amongst others. On the other hand, the post-1994 democratic state was envisioned to become a different establishment. In the main, it ushered in a constitutional supremacy system of governance, which entailed that the law in the Constitution reigns supreme over all other laws, and that all fundamental values enshrined in it must be given effect to by all state functionaries and non-state social justice activists alike. As a result, such noticeable changes that came with the 1994-dispensation promised hope, and left many amongst the previously oppressed communities ululating with the understanding that their livelihood would change for the better. Twenty-four years later, things still look the same, and in fact, getting worse in various instances.

One of the major questions that this article poses is actually about establishing the context within which the Constitution is described as the best in the world. That is, how best is South Africa's Constitution if it cannot speedily facilitate social and economic transformation, tenets which are essential towards normalising society? What criteria was used to determine this? In this regard, it is significant to understand the purpose of a Constitution. The article further seeks to deduce if strict legal norms can be relied upon to resolve socio-economic problems inherited from the apartheid regime? Further, it questions the significance of having the best Constitution in the world while majority of people in society remain stuck in shackles of poverty and underdevelopment. Subsequently, it begs a question whether the crafters of the Constitution appreciated the inherent relationship between universal human intuitive moral obligations, and the strict legal norms that are embedded in the Constitution.

3. Research Approach

Frantz Fanon's *Pitfalls of National Consciousness,* in his *The Wretched of the Earth* is what necessitated this article. Fanon stated that the colonial domination, which was accompanied by imperialism, culminated in the destruction of the humane spirit and fundamental personality of the oppressed "leader", the would be "liberator", who grew to become a so called democratic leader of a constitutional state. Drawing from Fanon's philosophy, a democratically elected leader who lacks a clear social and political program for the future is a threat to post liberation social stability and human wellbeing. In this case, it is crucial to question the extent to which such a leader will positively impact on the lives of the proletariat and how the Constitution enables such a leader to do so. That is, in the midst of South Africa's Constitution being

described as the best, how do we envisage to see such a tool being deployed to eliminate social strife and inequalities inherited from the past? This article challenges this narrative of the 'best Constitution' with the view to highlighting key social and constitutional issues which the post-1994 democratic dispensation should have pursued, instead of wanting to rely on the "best Constitution" phraseology as a beacon of hope, a flawed one for that matter. Therefore, I exposit better constitutional thinking that could have been adopted in order to ensure that the post-1994 leaders and the state would rapidly fast-track a process of detaching themselves from the colonial power structure which does nothing to alter people's living conditions, except for entrenching the 'leader', the so called "liberator", as demigod. Therefore, I proffer some intense anti-colonial perspective, but still require from the elected representatives and state some extent of alignment concerning what should constitute the best for the people particularly with regards to espoused transformative ideals that underpinned the struggles against colonialism, imperialism and apartheid.

This article is analytical in approach, and relies on secondary data obtained from scholarly written texts. It essentially adopts a theory-based analytical approach, relying on Franz Fanon's view on liberation fighters who emerge as leaders after struggle for freedom. Second, Klare's Transformative Constitutionalism and Nussbaum's Capabilities Approach in order to describe key elements that should define what is required of strict normative legal norms in a society ravaged by poverty, inequalities and unemployment. Such elements are used to explain the gaps that exists within South Africa's twenty-four year old constitutional edifice. To strengthen the arguments on decolonising the system and dissemination of knowledge, I employ Fanon's philosophical thoughts on the need for building a leader who possesses such a pedigree, whose main focus is developing a clear social program that alters people's lives for the better, as opposed to building a leader who remain stuck in a domain of praising normative texts that do little or nothing to serve the people. This methodological approach is best suited for explaining the post-liberation trends and the pitfalls of blanket implementation of externally drawn normative instruments that operates on the basis of foreign sympathy or supposed instruction, with no discernible intent to alter people's lives.

4. Theoretical Framework

4.1. Franz Fanon on Change and Leadership

Fanon (1961; 1963, p. 148) posited that under normal circumstances, leadership which emerges from post liberation struggles should resemble an epitome of hope, at least in the eyes of the mass proletariat on the ground. This entails that those who were/are involved in the fight for democracy against oppression of humankind ought to understand such transitions from oppression to freedom as precursor of human empowerment, freedom and an intrinsic need to safeguard human wellbeing. Most notably, Fanon laments the thinking of unconscious liberators whose attitude is more preoccupied with replacing the former oppressor. That is, they often lack a strategic plan except perfecting a takeover paradigm, which is frequently filled with nothing but rhetoric and symbols of envying the former oppressor. As a result, the masses are left with a system which remains virtually unchanged, except that the face of government seem different. Fanon describes this as having a willing national bourgeoisie who steps in the shoes of his former oppressor, and who is wholly willing to be a transmission line between the nation and the capitalism captains. He attributes this to lack of sufficient material and or intellectual resources needed to facilitate an effective social and economic transition. Because such a liberator becomes an intermediary, a transmission line, his role in capacitating the state to ensure the welfare of its citizens will be restricted. And owing to limited intellectual prowess, the liberator gets told what normative framework, through the Constitutions, is perfect for his country. This is particularly applicable to South Africa, where the post-1994 dispensation inherited systems that were not invented to service all citizens, yet a peculiar normative legal rules were invented and implemented under the guise of departing from an awful past. But when closely scrutinized, one deduces that the Constitution, which has been elevated to a status of the best constitution in the world, does nothing about practical altering of social arrangements. Instead, it still leaves it up to the mass proletariat to devise survival techniques notwithstanding the perverse historic deprivations that restricts any such attempts. So, deducible from Fanon is an ideal that the post-liberation leadership must be intellectually equipped, and be ready to craft its own normative and institutional frameworks that advances motive forces that underpinned such struggles against human oppression. Further, legal norms that does little to alter people's living conditions are superfluous.

4.2. Transformative Constitutionalism (TC)

Drawing from Fanon, one notices that the Constitution and all its accompanying legislative frameworks have a significant role to play in a post-liberation struggle state. Most specifically, law, which also brings political changes, must help in transforming and improving living conditions of the poor electorate. Hence, the need to continuously scrutinise South Africa's social transformation and how this impact human wellbeing and societal stability. In this regard, Karl Klare's coined Transformative Constitutionalism (TC), which has added an unprecedented impetus to the "*best Constitution*" narrative. 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, p. 146).

Klare emphasized that the Constitution offered an enterprise to induce major *social change* through non-violent political processes immensely grounded in law (1998, p. 150). Nevertheless, noticeable is the fact that Klare did not fully explain the narrative or content of such social change and how the Constitution ought to advance it. This has created a lacuna, which necessitates continuous discourses on how Klare envisioned the Constitution to facilitate such change. In fact, the social change concept is central to this article because it has become clear that the law is struggling to deliver meaningful social change. According to Van Marle (2009, p. 288), Klare's Transformative Constitutionalism is a project 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. Further, does this Constitution do enough to effect such envisioned social change?

4.3. The Capabilities Approach (CA)

It has become apparent that there is an indispensable need to locate alternatives that augment the constitutional outlook on social issues. Nussbaum's Capabilities Approach is one such an example of an instrument which offers alternative doctrines that may be relied upon in order to properly interpret and analyze the effectiveness, or lack thereof, of Klare's TC narrative, especially when it concerns the social change phenomenon. First conceived by Amartya Sen, the CA 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.

Martha Nussbaum later expanded the CA, becoming its renown proponent, further describing it 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 fundmental freedoms. The CA theoretical underpinnings provide coherent methods in terms of which to assess social change.

When closely considered, the CA carries with it, an intuitive moral reasoning, which in accordance with Dworkin's interpretation theory, requires a particular approach to the reading of the Constitution. I venture to say such an approach must conform and resonate moral values that safeguards humanity. Epistemologically speaking, it means departing from reading and teaching the Constitution as though it is the only avenue to seek refuge when confronted with challenges, especially those that can be resolved through dialogue or other methods that invokes and sees moral reasoning as a transcending yet complementary approach.

5. The Constitution, 1996: A Political or Social Constitution?

Alberts has argued that democratic constitutions are aimed at regulating the exercise of political power according to democratic norms, and that they also ought to establish institutions to reflect these norms (2009, p. 127). The essence of this establishment is to ensure that the constitutional rules established under constitutionalism make democracy work by enhancing the systems' legitimacy and efficacy. But unlike other constitutions of the world, South Africa's Constitution developed under extremely unique circumstances. As a result, it inherited an inherent obligation to transform society across all landscapes, moving beyond mere regulation. This entailed that the Constitution would also be expected to provide both normative and moral guidance in the process of resolving past and resultant social, political and economic challenges. That is, the Constitution was expected to assist in altering relations between the state and citizens, legal institutions and politics, social and economic development, and various other interactions. So, all these aspects necessitate the question whether South Africa's Constitution is a political or social one, or is it both? These questions, regardless how they are answered, are similarly critical because they enable us to understand the essence of the *best constitution* narrative.

Gee and Webber (2010, p. 173) describes a political constitution as one that is associated with holding politicians in government to account through political processes and in political institutions. I posit that a political Constitution is that which focuses on establishing normative instruments and institutions that are primarily concerned with regulating the exercise of political power, and managing international relations by giving a posture that seeks to say all is well. A political constitution also enshrines appealing human rights norms but says nothing about seriously altering past injustices. Its central appeal is to satisfy the international community that there is conformity to established international norms and standards, even if this occurs at the expense of justice and the motive forces of struggles against oppression. On the other hand, a social Constitution would be premised on guaranteeing fundamental freedoms, safeguarding human wellbeing by meaningfully empowering the state to serve and protect its citizens and does accommodate and promote diversity. Thus, a combination of both social and political, which I call socio-political constitution, would encompass both, but go further to advocate that as it guides healing the country from its awful past, justice must transcend peace and reconciliation, especially in view of the human rights violations that preceded democracy. Further, it would ensure that the state holds

strategic economic centers in order to ensure that state capacity in terms of its fiscus is augmented.

Within the above context, one is eager to exposit the nature of South Africa's Constitution, especially in the context of its ability to advance a morally grounded and pragmatic social change. This is also helpful in understanding how and why the *best constitution* found its way to dominate most constitutional law discourses within and outside the country. To achieve this, I venture to rely on examining the concept of state capacity versus the Constitution sentimentalized enshrinement of human rights.

6. Rights Realization and State Capacity

Can rights realization and social change be dissociated from the concept of availability of resources? This question demonstrates the importance of appreciating the synthesis between the realization of rights and the state capacity, especially in the context of South Africa where the post-apartheid dispensation tasked the state with the central role of developing human capabilities among others. This is particularly important given that the prescripts of constitutional law enjoins state to assume specific obligations towards citizens, which derives from a long-held traditional view associated with liberal constitutions that states ought to protect human rights and account for them. In accordance with a welfarists' perspective, Nussbaum too stresses that the state should devise strategies to ensure minimal provision of services needed to attain human well-being (West, 2001, p. 1902).

As stated, I have struggled to fathom why the Constitution, 1996 has been elevated to the status of being the best in the world. Often I hear repeated proselytization which simply speaks to two aspects. Firstly, this Constitution is the best because it entrenched appealing legal norms and established greater institutions. But such institutions and human rights norms (courts, separation of powers, tribunals, parliament, etc) being referred to are also found in many other jurisdictions. Second, and in the main, that it entrenched socio-economic rights, and made them justiciable to the effect that citizens could claim them from the state through courts. Such socio-economic rights are also found in various countries. In fact, the Netherlands does provide a much better and comprehensive social assistance to its citizens as compared to South Africa. Therefore, upon closer scrutiny, I struggled to understand how these aspects would render the Constitution to be labelled best in the world. This is simply because I consider these aspects to be ordinary tenets needed for any

democratic state to function effectively. To make matter worse, although socio-economic rights were entrenched, arguably as part of advancing socio-economic transformation, a regard was not had on the need to capacitate the economic capacity of the state, which Nussbaum stressed is a precondition were the state to be able to fulfill its constitutional obligations regarding improving people's socio-economic entitlements and advancing human development.

7. Conclusion

The object of this article was to critique the narrative that South Africa has the best Constitution in the world, in an attempt to develop a new constitutional law thought especially within the context of teaching and dissemination of the knowledge of constitutional law. I had sought to achieve this by focusing on leadership and post-liberation change, social transformation in a constitutional setting, and the realization of rights and human wellbeing in particular. Through the extrapolation of Fanon's crucial elements on leadership and change, I have demonstrated that leaders who are intellectually constricted can easily be swallowed by the system of their former oppressor, to an extent that they forget the motive forces of the struggle against oppression, and begin to see themselves featuring (as unconscious intermediaries) in the capitalist system that perpetuates exploitation and underdevelopment of the mass proletariat. It has demonstrated that the struggle against apartheid was not about producing the best constitution in the world. Instead, it was mainly about fighting for the restoration of human worth, equality and social justice among others. Subsequently, I conclude that the best constitution narrative was merely a political ploy, engineered through external influence, to convince the proletariat that all is well. As a result, the process produced a Constitution which to a large extent protected social and economic arrangements established under apartheid and before. Therefore, Nussbaum's approach on human capabilities necessitates the capacitation of the state in order that the state will be able to intervene towards improving people's living conditions through provisioning of adequate human entitlements, which should have been a fundamental priority. It is asserted that for the Constitution to be meaningfully transformative, strict legal norms ought to be indispensably harmonized with clear moral doctrines that are inherently intuitive in humanity. The theoretical implications of Klare's social change, Fanon on leadership and change and Nussbaum on human capabilities and wellbeing suggest that South Africa's social and economic transformation ideals require a solid normative moral enterprise in the first place, which may be complemented by the existing legal normative

establishment.

8. References

Alberts, S. (2009). How Constitutions Constrain. *Comparative Politics,* Vol. 41. No. 2, pp. 127-143.

Celebrant, B. (2014). Native Life in South Africa by Sol Plaatjie. *American Journal of Sociology,* Vol. 120, No. 2, pp. 626-632.

Corder, H. (1994). Towards a South African Constitution. *Modern Law Review,* Vol. 57, No. 4, pp. 491-533.

Currie, Ian & de Waal, Johan (2013). *The Bill of Rights Handbook.* 6th Ed. Cape Town: Juta & Co.

Dworkin, R. (2001) *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge, London: Harvard University Press.

Gee, G. & Webber, G. C. N. (2010). What is a Political Constitution? *Oxford Journal of Legal Studies*, Vol. 30, No. 2, pp. 273-299.

Goldstone, R.J. (1997). The South African Bill of Rights. *Texas International Law Journal,* Vol. 32, 451-470.

Fanon, F. (1961). The Trials and Tribulations of National Consciousness. *New Agenda,* No. 66, pp. 36-40.

Fanon, F. (1963). *The Wretched of the Earth.* New York: Grove Weidenfeld, Grove Press, Inc.

Fanon, F. (1963). The Pitfalls of National Consciousness. In Fanon, F., *The Wretched of the Earth.* New York: Grove Weidenfeld, Grove Press, Inc.

Klare, K. (1998). Legal Culture and Transformative Constitutionalism. *South African Journal on Human Rights*. Vol. 14, No. 1, pp. 146-188.

Klotz, A. (1995). Norms reconstructing interests: global racial equality and U.S. sanctions against South Africa. *International Organization,* Vol. 49, No. 3, pp. 451-478.

Landsberg, C. & Mackay, S. (2006). South Africa 1994-2004. In Rembe, Nasila (ed.). *Reflections on Democracy and Human Rights: A Decade of the South African Constitution*, pp. 1-14. Johannesburg: South African Human Rights Commission.

Langa, P. (2006). Transformative Constitutionalism. *Stellenbosch Law Review,* Vol. 17, No. 3, pp. 351-360.

Moseneke, D. (2010). The role of comparative and public international law in domestic legal systems: A South African perspective. *Advocate,* Vol. 23, No. 3, pp. 63-66.

Nussbaum, M.C. (1992). Human Functioning and Social Justice: in defense of Aristotelian essentialism. *Political Theory,* Vol. 20, No. 2, pp. 202-246.

Nussbaum, M.C. (1997/8). Capabilities and Human Rights. *Fordham Law Review,* Vol. 66, No. 2, pp. 273-300.

Nussbaum, M.C. (2006). Poverty and Human Functioning: Capabilities as Fundamental Entitlements. In Grusky, D. & Kanbur, R. (eds.), *Poverty and Inequality (Studies in Social Inequality).* pp. 47-75. Stanford, California: Stanford University Press.

Nussbaum, M.C. (2007). Human Rights and Human Capabilities. *Harvard Human Rights Journal,* Vol. 20, pp. 21-24.

Nussbaum, M.C. (2007). Foreword: Constitutions and Capabilities - "Perception" Against Lofty Formalism. *Harvard Law Review,* Vol. 121, No. 1, pp. 4-97.

Nussbaum, M.C. (2009). Capabilities and Constitutional Law: Perception against Lofty Formalism. *Journal of Human Development and Capabilities,* Vol. 10, No. 3, pp. 341-357.

Nussbaum, M.C. (2011). Capabilities, Entitlements, Rights: Supplementation and Critique. *Journal of Human Development and Capabilities,* Vol. 12, No. 1, pp. 23-37.

Plaatjie, S.T. (1916) (Ed.). *Native Life in South Africa, Before and Since the European War and The Boer Rebellion.* Johannesburg: Ravan Press (1982) & Ohio University Press: USA.

Rapatsa, M.T. (2015). The Right to Equality under South Africa's Transformative Constitutionalism: A Myth or Reality? *Acta Universitatis Danubius.Juridica,* Vol. 11, No. 2, pp. 18-35.

Rapatsa, M.T. (2017). Re-thinking the Constitution's Rights-based Approaches and Klare's Social Change Phenomenon A View Towards Securing Human Well-being and Societal Stability. *Acta Universitatis Danubius.Juridica,* Vol. 13, No. 3, pp. 65-79.

Sarkin, J. (1999). The Drafting of South Africa's Final Constitution From a Human Rights Perspective. *The American Journal of Comparative Law,* Vol. 47, No. 1, pp. 67-87.

Van Marle, K. (2009). *Transformative Constitutionalism as/and Critique. Stellenbosch Law Review* Vol. 20, No. 2, pp. 286-301.

Villa-Vicencio, C. (1991). Whither South Africa: Constitutionalism and Law-Making. *Emory Law Journal,* Vol. 40, pp. 141-162.

West, R. (2001). Rights, Capabilities and The Good Society. *Fordham Law Rev.* Vol. 69, pp. 1901-1932.