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The foundations of transformative private law in South Africa

Abstract

This article problematises a shallow understanding of "transformative private law" as being a simple merger of constitutional rights and private law. Instead, feeding into international discourse on transformative private law, it is argued that a South African iteration of the concept ought to be rooted in "transformative constitutionalism". Exploring the jurisprudential foundations of transformative constitutionalism, it becomes clear that we are not dealing with classical liberal constitutionalism. Instead, we are dealing with a type of constitutionalism committed to the legal traditions of natural law and critical legal studies that envisages an egalitarian politicisation of law. Against that backdrop, it is argued that "private law" as an area traditionally thought of as being apolitical is ripe for transformative analysis and critique. However, the complicated effect of the coming together of transformative constitutionalism and private law is that the "private" in private law is weathered away. Is transformative private law then capable of existing? And if so, how?

Keywords: transformative constitutionalism, private law, natural law, critical legal studies.

Introduction

I recently had the privilege to spend nearly a year at the Amsterdam Centre for Transformative Private Law (popularly known as "the ACT") where I quickly realised that my colleagues and I spoke a similar language – not only because of the Afrikaans/Dutch connection, but also because of their research agenda that similarly uses the language of "transformation" to reimagine private law in ways that might address the social, political and economic problems of our time (Bartl 2023: 414-415). In the last five years, Europe has seen a boom in transformative private law discourse in the form of research projects (e.g. Bartl 2020; Mak 2020; Hesselink 2020), special editions of journals (e.g. Beckers et al. 2022), and blogs (e.g. Van den Berg 2020). Even though our concerns are largely the same, the South African discourse on transformative private law has a distinct local flavour, spiced by our legal history. In 1998, US scholar Karl Klare wrote a now-famous article entitled "Legal culture and transformative constitutionalism" shortly after the introduction of constitutional democracy in South Africa. His branding of the South African Constitution of the Republic of South Africa, 1996 as "transformative" in its social, political and economic aims has laid the foundations for what "transformative private law" might mean in the South African discourse. Our iteration of transformative private law is worth sharing to strengthen the growing global discourse on this topic and to offer a unique perspective from the Global South. This is the first source of inspiration for this article.

The second source of inspiration comes from the University of the Free State's recent conference on "Transformative constitutionalism and private law" (5-6 June 2025). South African legal scholars seem to know intuitively that the term "transformative private law" somehow relates to the interaction between constitutional rights and private law, as shown by the call for papers for the conference (UFS Private Law 2025). But, as any private lawyer would enthusiastically tell you, terminology matters. Because terminology matters, transformative private law cannot mean whatever we want it to mean and a vague allusion to the Constitution's impact on private law cannot properly capture the rich intellectual history/histories attached to the concept. I problematise this type of shallow understanding of transformative private law that, from my attendance and observations, also seemed to animate a large number of papers presented at the conference. In this regard, I join the call of Brickhill and Van Leeve (2015: 142) to resist turning transformative

constitutionalism (and by extension, transformative private law) into an "empty slogan" that means everything and nothing.

Against this backdrop, I am interested in addressing two interrelated questions. First, what are the jurisprudential foundations of transformative constitutionalism? Secondly, what does transformative constitutionalism mean for private law, or phrased in line with the European discourse, what does transformative private law entail?

In the next part of this article, I will explore what is meant by "transformative constitutionalism". My aim is not to provide the most thorough account of what transformative constitutionalism means for the South African context. A whole book would probably be needed to do that type of exercise. Instead, my aim is to reflect on the definition of transformative constitutionalism and to trace, in broad strokes, its intellectual history/histories. I have decided to write this description of transformative constitutionalism with as many annotations and descriptions of jurisprudential jargon as possible, so that it might be accessible to even a black-letter private law scholar who, from time to time, still has nightmares about an undergraduate course in legal philosophy.

Thereafter, I will provide some critical thoughts on how transformative constitutionalism and private law might come together and pull apart at the same time. In that discussion it will be argued that a tension exists between the concepts of "transformative constitutionalism" and "private law", making one wonder whether something like private law exists under a transformative constitution, and consequently, whether "transformative private law" can exist. The reasons for this tension between transformative constitutionalism and private law will become clearer as my argument unfolds, but the gist of my thinking is that transformative constitutionalism involves a commitment to a politicised reimagination of law (traditionally thought to be something reserved for the realm of public law) while private law is traditionally thought of as a depoliticised area of law. Bringing these two concepts together would then lead to making private law more public, and so some may read "transformative private law" as a fundamentally contradictory concept. In spite of that tension, my argument will be that transformative private law exists and is worthy of pursuit.

In the end, I intend to provide a very short, minimum account of what transformative private law means, or at least should mean, in South Africa.

The hope is that from there, further studies can be done to investigate to what extent transformative approaches to private law are being pursued in South Africa today, what their strengths and weaknesses are, how the South African version of transformative private law might interact with its global family, and what the future for transformative private law might hold.

Transformative constitutionalism

Definition

Constitutionalism might be elementarily defined as "the idea that we are governed ultimately by a constitution in which all public power finds its origin" (Brickhill et al. 2024: 1). Let us call this the definition of *basic* constitutionalism. The big rationale underlying this is, of course, to prevent the abuse of state power. After reading sections 1 and 2 of the South African Constitution, it would be difficult for anyone to deny that our constitution sets up constitutionalism in this elementary sense. But what do we mean by *transformative* constitutionalism – assuming that the word *transformative* adds something new?

The first reference to the idea of transformative constitutionalism in the South African literature comes from Karl Klare (1998). The catchy definition of transformative constitutionalism that Klare (1998: 150) provides is this:

> By *transformative constitutionalism* I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere.'

Holistically read, in this definition, Klare is using the term transformation consistent with its dictionary definition, describing a complete change in the character and appearance of something(s). The things in need of change are politics, society and power relationships. The way in which these three things need to change are animated by at least four shifts: from inequality to egalitarianism, indifference to care, segregation to multiculturalism, and oppression to participatory democracy. For these shifts to occur, it will require various people committed to working with the Constitution in various ways to make its goals tangible realities.

The overlap of *transformative* constitutionalism with *basic* constitutionalism is clear: State power must be grounded in the country's foundational law. But the extensions of transformative constitutionalism are equally clear: Even non-state power must be subject to the Constitution and the concern here is with society not only the atomistic individual. As Brickhill and Van Leeve (2015: 142-143) argue, "transformative constitutionalism must include, at the very least, the entitlement to the material conditions necessary for a dignified life, as represented in the Bill of Rights." For politics, society and power relations to change, we cannot solely rely on the government to do its constitutional job, and we cannot rely solely on the protection of individual rights to change society in a substantially new direction.

This definition of transformative constitutionalism can be read descriptively and/or prescriptively. Klare uses the term to capture both of these dimensions.

The descriptive account: what the Constitution says

On the one hand, we might read this definition of transformative constitutionalism as a descriptive account about what makes the South African Constitution different in its aims and aspirations when compared to a *classically liberal* constitution (Klare 1998: 151).

In *classically liberal* constitutionalism, the individual and his rights are centred rather than the interests of society; formal equality, freedom from state interference, and individualism are dearly held values in classical liberal constitutionalism (Heywood 2013: 32). The South African Constitution clearly regards individuals and their human rights as important (Molaba 2025: 201). However, the South African Constitution signals a move beyond classical liberalism in a way that intends to change the heart of society.

Klare (1998: 153-155) highlights our constitutional provisions on socio-economic rights, substantive equality, positive duties placed on the state, the horizontal effect of fundamental rights, a commitment to participatory democracy, the promotion of multiculturalism and historical consciousness as the key indicators of a "post-liberal" philosophy (simply meaning a move beyond classical liberalism), geared towards transformative constitutionalism. Marius Pieterse (2005: 155-156) makes the much bolder claim that these aspects of the South African Constitution are transformative because they set up a social democratic system. To paraphrase Pieterse: the South African Constitution contains a Leftist politics and that is where its transformative impact lies. (More on the link between transformation and Leftist politics later.)

Theunis Roux (2009: 261-262) is surely right when he says that we would be hard pressed to read the South African Constitution as being classically liberal and so it is surely transformative in this sense. That is not to say that everyone would be comfortable with the fact that our Constitution is transformative as just described. Those who are strongly committed to individual freedom and strong property rights, for example, would probably not applaud the post-liberalism of the South African Constitution (Van Staden 2021).

Be that as it may, it would be an entirely different and more controversial reading of transformative constitutionalism to say that it demands a radically new type of legal reasoning because of the Constitution's substantive content. But that is exactly what Klare argues.

Prescriptive account: what lawyers ought to do in response to the Constitution's substance

In addition to the descriptive account of transformative constitutionalism, we might also read Klare's definition as a prescriptive account about what lawyers (attorneys, advocates, judges, academics, and so forth) ought to strive towards in their lawyering. The prescriptive dimension of transformative constitutionalism is admittedly a more controversial proposition (Klare 1998: 150). He argues that, for the descriptive account of transformative constitutionalism to become a reality, lawyers must take up the challenge that the Constitution poses (Klare 1998: 156):

> The Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. By implication, new conceptions of judicial

> role and responsibility are contemplated [...] Accordingly, the drafters cannot have intended dramatically to alter substantive constitutional foundations and assumptions, yet to have left these new rights and duties to be interpreted through the lens of classical legalist methods. They cannot have assumed that the document's lofty ambitions would be interpreted according to, and therefore constrained by, the intellectual instincts and habits of mind of the traditional common or Roman-Dutch lawyer trained and professionally socialized during the apartheid era. On my reading, the Constitution suggests not only the desirability, but the legal necessity, of a transformative conception of adjudicative process and method.

Klare (1998: 168) continues:

> Un-self-conscious and unreflective reliance on the culturally available intellectual tools and instincts handed down from earlier times may exercise a drag on constitutional interpretation, weighing it down and limiting its ambition and achievements in democratic transformation.

To unpack Klare's thinking on the prescriptive dimension of transformative constitutionalism, a good starting point would be to figure out what he means by "classical legalist methods" and the "intellectual instincts and habits of mind" that might impede transformative outcomes. Only once that is settled can we really move on to understand the new legal imagination that might be required to achieve the transformative goals of the Constitution.

Klare's view is that classical legalist methods are situated within a particular "legal culture". By legal culture he basically means the types of argumentative strategies that we use to convince one another as lawyers at a particular point in time; these mental reflexes are things we take for granted as "normal" even though argumentative strategies are hardly God-given and eternal (Klare 1998: 166-167). As we know, cultures can and do change. The problem is that culture can also be stagnant and resistant to change and transformation and this is particularly true for legal culture. This problem of a stagnant legal culture is what Klare (1998: 168) feared about South African law under the then-new Constitution. He worried that the "highly structured, technicist, literal and rule-bound" approach to law in South Africa, would make the realisation of transformative constitutionalism difficult (Klare 1998: 168). There are conceptual links here to the jurisprudential schools of thought of legal formalism (that Klare mentions explicitly at various points in his article) and positivism (that does not

get any explicit mention in his work). These legal philosophies mostly delineate how to adjudicate disputes properly, but they also necessarily imply how lawyers ought to argue about the law more generally.

Legal formalism is a potentially tricky philosophy to pin down because few (if any) people actively identify as formalists and it can mean very different things to different people (Stone 2004: 167-172). The version that Klare probably has in mind is similar to what Leiter (2010: 111) would call "vulgar formalism". The essence of this type of formalism involves a total failure to consider the social context of rules in legal reasoning. In this type of formalism, doctrines are given neat-and-tidy plug-and-play formulas where decision makers simply insert a set of facts into an algorithm that produces perfectly determinable answers. The clarity of rules is naturally important. The structuring or categorisation of rules is fundamental to making the formulas perfectly workable. The purpose of a rule does not play any role in its strictly literal interpretation. Where different doctrines come into contact with one another, highly technical differences are highlighted to ensure coherence and clarity on which rules ought to prevail in certain circumstances. It becomes easy to see how the law/society interface is comfortably ignored in formalist legal reasoning.

Some of the core concerns of legal positivism, or at least the brand that Klare implicitly takes issue with, include the claims that law and morality are not necessarily connected to one another; that the question of "what is the rule?" can be kept separate from "what is the origin and sociology of the rule?"; and that "correct legal rules can be deduced by logical means from predetermined rules without reference to social aims, policies, [and] moral standards" (Davies and Holdcroft 1991: 3). In other words, under legal positivism we can ask the question "what is the law?" in complete isolation from "what should the law be?". This popular belief about the separation of law and justice as distinct issues/questions is also apparent in how some modern textbooks on jurisprudence are structured both in South Africa (see e.g. Bilchitz et al 2017) and abroad (see e.g. Meyerson 2013). There is a clear law/politics divide in that a positivist judge's main job is to apply the law, not to create it like a politician (Klare 1998: 157). Popular positivist legal reasoning is based on whether a given set of facts falls within the ambit of an existing rule or precedent. When the rules run out, judges may have discretion to develop the law, but judicial legal development is the exception and not the rule. By and large, the law/society interface may (and for some, must) be ignored in the process of legal reasoning.

There is thus some overlap between formalism and positivism in the sense described here and the two can work in tandem with one another.

John Dugard's (1971: 183) famous diagnosis of the South African legal system is that apartheid was allowed to thrive, at least in part, because of the positivist belief that oppressive laws did not need testing against any higher norms. Dugard (1971: 199-200) bravely encouraged judges to draw on two alternative legal philosophies. First, Dugard encouraged a return to the natural-law approach (that is, roughly, the belief that all law is subject to testing against higher norms) embedded in the Roman-Dutch legal tradition. Secondly, Dugard believed that the natural-law approach should work in tandem with the American Legal Realist insight that adjudication cannot be as mechanical as vulgar formalism suggests, because judging inevitably requires discretion and choice. If natural law and realism joined forces, according to Dugard, human rights could have been introduced stealthily to undo the apartheid legal order. This makes some sense because the Roman-Dutch law's humanistic natural-law spirit was deeply concerned with the protection of rights – laying the foundation for the conceptualisation of human rights as we know them today (Van Zyl 1979: 191-193; Le Roux 2004: 40-41).

Even though Klare makes no reference to Dugard, as I am about to show, it is clear that he is working in the same legal tradition, essentially developing Dugard's apartheid-resistance ideas for what was then the "new" South Africa. Klare's new proposed legal imagination is also inspired by natural law and critical legal realist insights.

The current pinnacle of the natural law tradition in South African law is the justiciable Bill of Rights in the Constitution against which all laws and conduct must be tested (Zitzke 2015: 261-263). In this sense, the Constitution now embeds a new demand for natural-law style reasoning in the South African legal system. Through the supremacy clause (section 2) and the development clauses (sections 8, 39(2), and 173) the Constitution makes it clear that all valid law must be able to withstand constitutional testing, failing which, those laws will either be struck down or interpreted/developed in constitutionally compliant ways (Davis and Klare 2010: 409-410). Referring to this testing and developing right of the courts, Deputy Chief Justice Dikgang Moseneke (2002: 318) once said: "This is an epoch making opportunity." This is part of the new legally imaginative invitation that the Constitution extends to us that Klare takes very seriously.

Simultaneously, Klare (1998: 160-161) proposes a critical realist approach to specifically constitutional adjudication, although his ideas can easily be extended to adjudication more generally. The critical realist approach is animated by two realities involved in adjudication. On the one hand, Klare recognises that text constrains us. Judges are not free to ignore relevant statutory provisions or precedents that they do not like. Also, a text cannot mean whatever we want it to mean. (Just like transformative constitutionalism as a concept cannot mean whatever we want it to mean.) On the other hand, Klare sees that judges are also given extensive freedoms to interpret and develop laws in new directions, especially under the South African Constitution. Adjudicators are thus required to grapple with the tension between "freedom and constraint".

In this regard, Henk Botha (2004: 256, 260) suggests resisting a conceptualisation of the tension between freedom and constraint as a binary choice where judges arbitrarily choose between being either strictly bound to follow a rule (read: formalism and positivism) or have wild freedom to legislate (read: unbridled natural law), demonstrating that adjudication is a totally illegitimate exercise beyond repair and beyond hope. Instead, the encouragement is to think about adjudication as a field in which freedom and constraint co-exist (Botha 2004: 265). Judges are always navigating their way around in this field. Each case presents adjudicators with a variety of decisions including, for example, whether the case fits comfortably in the ambit of an existing rule (or an exception), whether the rule (or its exception) ought to be developed or interpreted in a new creative way, or even whether the rule (or its exception) is unconstitutional and must go. Klare (1998: 161) argues that texts do not interpret themselves and every interpreter of texts makes a series of choices about what to consider, what not to consider, and in what order of importance certain aspects must be considered in coming to the meaning of a relevant text. Judges can sometimes write judgments that make it seem like the particular law that was chosen, the particular way in which that law was utilised, and the particular outcome, were all so obvious that even a robot could have done it and come to the same conclusion. But Klare and Botha's point is that even a seemingly obvious, clear and simple judgment involves much more than a plug-and-play formula.

For Klare and Botha, in contrast to vulgar formalism, human decision makers are not simply calculators that receive an input, automatically process it, and churn out results. When faced with an uncertainty, ambiguity, or gap in the

law, a conflict between competing rules or principles, or when faced with a conflict between one's own views and the law as it stands, an opportunity arises for re-imaginative interpretation. Uncertainties, ambiguities, gaps, conflicts and tensions were especially prevalent in the early years of constitutional adjudication in South Africa. When grappling with uncertainties, ambiguities, gaps and tensions, judges might have to consider things like the purpose behind a rule, its social impact and usefulness, and whether it promotes justice at all. In the case of vague constitutional provisions, say, "everyone has the right to privacy" (section 14), judges would be providing substantive content to what privacy means. In this regard, sources of positive law might not be the only sources that could inform judges' thinking. Even though the common law contained some privacy protections, it would not be necessary to force the constitutional idea of privacy into the common law framework. Instead, for example, philosophical debates about the nature and content of privacy could strengthen judges' arguments. Indeed, this is what some judges did in the early years of democracy (Klare 1998: 177).

Even beyond constitutional adjudication in the early years of our democracy, uncertainties, gaps and tensions appear today more often than the strict positivists and formalists would like to believe, primarily because the Constitution's supremacy and development clauses invite an "audit and reinvention" of existing rules along constitutional lines (Davis and Klare 2010: 426). When judges engage uncertainties and embark on the reimagination of the law, the barrier separating law and politics is perhaps more porous than we think (Klare 1998: 157-159).

I should clarify that when legal theorists (like Klare) speak about politics they usually do not mean "party politics" in the sense that you must choose whether you are VF+ lawyer or an MK one and that by committing to transformative constitutionalism you are necessarily pledging allegiance to a specific political party. What they mean (and what I think Klare means) by politics is one or more of the following conceptualisations of the term. Simply, by suggesting that adjudication is political, Klare could mean that judges make law with the same force as the legislature when they interpret the vague provisions of the Constitution, give meaning to legislation, or develop common and/or customary law. In a richer sense, by suggesting that adjudication is political, Klare could mean that judges are engaged in "an ethical activity concerned with creating a 'just society'" and pursuing the common good ("politics as public affairs"), conciliating competing interests ("politics as compromise and consensus"), as

well as interrogating "the production, distribution and use of resources in the course of social existence'' and the struggle for the same ("politics as power") (Heywood 2013: 5-10). On my reading of Klare, he means all these things. When lawyers adjudicate, argue, draft, think, write and teach, we exert material influence over public affairs, consensus building, and power, as just described. And, in that process, they may end up interpreting legislation or developing the common or customary law in new directions that seem to create law. This is especially so when the supreme law of the state contains strong testing and developing rights given to courts in relation to subordinate sources of law.

For the sake of greater transparency, and to optimise the process of auditing and reconstructing law in South Africa under a transformative Constitution, Klare calls judges (and by extension, all lawyers) to be more candid about the moral implications of the work that we do and the choices we make when we work with the law. More specifically, he invites us to be more "policy-orientated and consequentialist" (roughly: thinking about the ethical knock-on effects of a particular decision) through substantive legal reasoning (roughly: figuring out the purpose and values that inform a given legal provision and arguing the rule's application, its deletion, or development on that basis) (Klare 1998: 168-169).

By employing these new forms of reasoning, the law/society interface is brought to the fore and we cannot ignore law's relationship with social problems. Klare (1998: 158, 163) makes much of the fact that judges' personal morality will necessarily infiltrate their reasoning processes, whether explicitly articulated or not. Instead of a pure reliance on personal morality, I would suggest that this is where the provocation arises that law could be weighed and measured against extra-legal sources of wisdom: philosophy, political theory, economics, sociology, and so forth. To restate the obvious, this is not a call to look at any philosophy, any politics, etc. It is a call to consider those philosophies, economic theories, etc. that could usefully be employed to work towards the transformative, egalitarian "scaffolding" that the Constitution sets up (Woolman 2015-2016). Explicitly grappling with the law/society interface could ensure that we do not block necessary "constitutional innovation" (Klare 1998: 171).

In tune with Klare, Johan Froneman (2005: 4), former Constitutional Court justice, wrote:

> [...] formal reasoning relies primarily on the authoritative origin of a legal rule (legislation properly passed, or proper judicial precedent), whilst substantive legal reasoning also concerns itself

> with the underlying justification for the rule (is it just? does it serve a good goal for society?) [...] the Constitution necessitates an engagement with substantive as opposed to formal reasoning [...]

We should not think that substantive and consequentialist reasoning is somehow more political than "applying" existing rules (Davis and Klare 2010: 431). Following Botha (2004: 251), existing rules have invariably been shaped by certain visions of the good life (i.e. politics). For example, strong rights to ownership in property, a strict upholding of contractual terms, and minimal duties imposed on others to look out for other people's interests resonate with classical liberal or libertarian politics. Applying those rules unthinkingly endorses that politics and thus is just as much of a political act as judgments that might push the law towards weighing the classical liberal concerns against considerations like access to housing, contractual fairness, and a more robust philosophy surrounding duties.

Klare is not perfectly clear on whether traditional legal reasoning ought to be totally displaced by substantive/purposive and policy-based reasoning, or whether the more technical, structured, and rule-bound analysis ought to be complemented with robust new layers of analysis. I think Froneman (2005: 8-11) captures it well in suggesting that all legal systems could do with a good mix of formal and substantive reasoning.

I fall in the camp that believes that some of the more traditional forms of legal reasoning can be valuable tools to help our process of substantive reasoning. Tracing the history of a rule can help us discover its purpose and underlying policy basis, which then makes substantive legal reasoning easier. Comparing a South African rule with foreign jurisdictions could assist in opening our imaginative realm of possibility, coming to realise that there is no single way to respond to a social issue through law. Creating coherent doctrine is not a terrible or un-transformative exercise per se, as long as we hold loosely on to the hope that the doctrine would and should remain stagnant forever. I would even go as far as to say that pure outcomes-based reasoning, effectively ignoring existing doctrine, is not necessarily transformative. In agreement with Zitzke (2015) and more recently Boonzaier (2024), there surely must be scope to find a midway between constitutional avoidance (where the constitution is ignored) and constitutional overexcitement (where existing doctrine is ignored).

So, the traditional methods of legal reasoning do not have to be thrown out completely. Yet, to be used in a transformative way, the traditional methods of legal reasoning should not be used in an antiquarian fashion to pull

contemporary society backwards, to mindlessly pull the Global South closer towards the Global North, or to attempt to freeze the law of the current moment for future generations. Even if more traditional modes of legal reasoning are used, additional layers to the enquiry must necessarily be, for example, asking the questions: What is the purpose of this rule/doctrine? What values do we want to promote in the process of working with and developing this rule, having due regard for the current social context? Asking the deeper normative questions about the law's "goodness or badness" (to put it very bluntly for those on whom the philosophical jargon could get lost) is the invitation that the Constitution extends to us, with a very clear vision about where the distinction between good and bad lies.

If all of this is a bit much for the traditional lawyer to stomach, we ought to be reminded that being a transformative constitutionalist does not involve throwing the rule of law out with the bathwater. Recall that Klare grounds the shift in South Africa's politics and legal reasoning in what the Constitution itself requires. This is why Brickhill et al. (2024: 13) list "transformative constitutionalism" as a cornerstone principle of the South African idea of the rule of law. Their definition of this principle is (Brickhill et al. 2024: 25):

> a recognition that the present fails to meet the Constitution's aspirations, and a commitment to changing society through law to better reflect the Constitution, understanding that the task is never complete.

Does this mean that if we simply merge the South African Constitution's provisions with existing law, or summarise Constitutional Court judgments that have done the same, we can describe ourselves as being "transformative constitutionalists"? It is possible that doing this type of exercise can have transformative effects, but this is not inevitable. As Klare (1998: 172-188) argued, even the early Constitutional Court sometimes failed to measure up to the transformative aspirations of the Constitution. Sometimes the Court explicitly used classical liberal philosophy to support its interpretation of the Constitution, other times the Court totally ignored the societal or politics-as-public-affairs dimensions of cases, and other times still the Court did not consider the historical baggage of power relationships adequately in its reasoning. So, to be very clear, a bland synthesis of existing law and what may vaguely be described as "the Constitution" does not necessarily equal a transformative constitutional approach to law.

To summarise: invoking the Constitution as a manifestation of natural law is only one of the ingredients. I argue that a *transformative* constitutional approach to the study of law must further, necessarily, delve into the substantive, normative issues at stake in a way that is at the very least sympathetic to critical realist insights about legal reasoning. To take us back to Klare's catchy definition of transformative constitutionalism, a transformative constitutional approach to law must relate to the change of character and appearance of the state and its interactions with others, non-state relations, and/or society at large. The changes we are concerned about are specifically the shifts from inequality to egalitarianism, indifference to care, segregation to multiculturalism, and oppression to participatory democracy. If we integrate constitutional rights with existing law but our reasoning is formal and non-substantive, and/or if our concern is not to realise substantive equality (especially for the vulnerable), care for those in need, to heal a still-divided society, or see a flourishing democracy, what on earth could be transformative about it?

My description of what a transformative constitutional approach to law involves has become controversial, especially since the mainstreaming of the concept in the Council on Higher Education's (2018: 18-20, 65) recommendations for the South African Bachelor of Laws (LLB) programme. Since the publication thereof, in the neo-liberal spirit of box-ticking, law schools around the country have endeavoured to incorporate transformative soundbites into an otherwise untransformed curriculum (a much kinder evaluation of the problem is provided by Van Marle 2019: 213-215). The tragedy is that everyone thinks they have become a transformative constitutionalist (or even worse, that "we are now fully transformed"), no matter how vaguely or specifically the term has been internalised.

Detractors might ask why my rather narrow description should be the one that trumps others. It may seem rather authoritarian of me to insist on this particular description of transformative constitutionalism as orthodox. In a lot of my other work, I seem to support a plurality of voices in a diverse world. The short answer is simply that words matter. Or, to re-emphasise a recurring theme: terminology cannot mean whatever we want it to mean. The word *transformative* that Klare uses adjectivally to describe a specific brand of constitutionalism comes from a rich intellectual tradition and did not simply fall from the sky.

Why "transformative" cannot mean whatever we want it to mean

I have already alluded to the fact that Klare's understanding of transformative constitutionalism relies on critical realist insights on adjudication. The truth is that Klare's notion of transformation is deeply rooted in the tradition of critical theory more generally. A typical encyclopaedic description of critical theory would reference the concept of transformation. For example, Celikates and Flynn (2023) write:

> 'Critical theory' refers to a family of theories that aim at a critique and transformation of society by integrating normative perspectives with empirically informed analysis of society's conflicts, contradictions, and tendencies.

In the 1930s, the Frankfurt School of interdisciplinary research combined "philosophy and social science with the practical aim of furthering emancipation" (Celikates and Flynn 2023). Early thinkers in this School were concerned about the political economy (roughly: domination in power and resources) and they were deeply concerned about phenomena like authoritarianism and exploitative capitalism. They critiqued the status quo and wanted people to experience true freedom. The influence of Marxism here is obvious and it should come as no surprise that this school of thought is situated on the Left of the political economic spectrum. At the same time, it should be equally apparent that these theorists were not calling for a type of Leninist domination. Core themes in their work included grappling with the tensions in society (for example, between rich and poor), challenging the acceptance of this as being normal (for example, positive descriptive accounts of the status quo), and reimagining a different, emancipated world where no one is enslaved to anyone or anything.

By the 1970s, these core themes of critical theory were brought into direct relationship with legal studies in the United States. The Critical Legal Studies movement was born as a Leftist legal project (Le Roux and Van Marle 2004: 246). Crits were concerned about apparent contradictions in law – for example, the tension between freedom and constraint in legal interpretation, the tension between rules and standards, the tension between individualism and altruism and so forth, that all made law seem unpredictable (indeterminate) and illegitimate (Le Roux and Van Marle 2004: 251-259). Crits were certainly not interested in maintaining the status quo at all costs (Van Blerk 1996: 94). They were actively interested in rejecting the ideas that everything in a given culture is normal and unchangeable (a rejection of so-called "false consciousness").

And they were, in varying degrees and in varying ways, committed to seeing the emancipation of the poor through a democratic politics on the Left (Le Roux and Van Marle 2004: 260-262). These basic themes were easily transplantable to different types of inequalities that extended beyond the rich/poor dialectic. Critiques of gender, race, sexual orientation and other categories of vulnerability eventually became the theoretical offspring of the Critical Legal Studies movement and, by extension, critical theory more broadly (Tushnet 1991: 1517-1518)

But how does all of this link to Klare's idea of transformative constitutionalism? As a point of departure, we must note that the concept of transformation is not a neutral one and comes from the intellectual tradition of critique. Klare (1998: 150) himself says that "transformative constitutionalism is not a neutral concept but is frankly intended to carry a positive valence, to connote a social good. That is, I am assuming that large-scale, egalitarian social transformation is desirable in South Africa [...]"

Klare's concern with changing the character of South African politics from authoritarianism to participatory democracy aligns, at least in a very basic sense, with the concerns of the original thinkers of critical theory. Klare's call to change society and all power relations in a more egalitarian direction resonates strongly with critical theory's emancipatory concerns. His continuous grounding of his thinking in history and social context makes it abundantly clear that he is not using the term transformation carelessly or thoughtlessly. Karin van Marle (2009: 288) has further shown how Klare's engagements with "the tension between freedom and constraint", his critique of the current dominant "legal culture" as normal, and his Left-leaning interpretation of the politics that underlies the Constitution very comfortably overlap with the main themes prevalent in the Critical Legal Studies movement. Moreover, even in the growing European discourse on transformative private law, the Left-leaning critique of neo-liberalism and exploitative capitalism takes centre stage. For example, in Marija Bartl's (2023) pioneering work, we see the call to reimagine private law to respond more boldly to the overlapping global problems of climate change, inequality, the undoing of democracy, and technological disruption. Even in the European context, transformative private law takes on a clear political stance.

The conclusion that I draw from all of this is that transformative constitutionalism is not a buzz word that we can detach from critical theory. If I say that I am employing a transformative constitutional approach, I am, at least inadvertently, committing myself to the basic tenets of critique. I should

be committed to some type of Left-leaning politics where my commitment to bringing freedom to the oppressed and care to the vulnerable are at the heart of what I do. (This does not necessarily mean that you have to be a Marxist. I think there is considerable scope for complexity, nuance and temporal fluctuations in (broadly) Left-leaning politics to resist strict labels.) I should also realise that critique can only properly be implemented through substantive, normative legal reasoning. All of this, of course, is rooted in the current constitutional democracy. Saying I am a transformative constitutionalist does not make me "illegal" or in any significant sense more "non-legal" than the next person who brings their conscious and subconscious personal baggage with them to the legal reasoning table. Saying that I am a transformative constitutionalist might make me have a complicated view about what I regard as "legal", but legality is an important concern of the transformative constitutionalist. However, to be very clear, simply saying that one acknowledges the supremacy of the Constitution does not marvellously turn one's approach into a transformative constitutional one. It might make one a constitutionalist. But hardly a *transformative* one.

As a final note on transformative constitutionalism, I do not think that any sensible crit would pledge blind allegiance to any man-made paradigm. Transformative constitutionalism cannot claim to be perfect. Since its early stages, it has faced numerous practical impediments and theoretical challenges (Langa 2006: 354-360; Sibanda 2011). It may very well be that better versions of constitutionalism exist in a hypothetical future and those are certainly worth exploring. Critiques of the current constitutional (dis-)order are certainly valuable and must be considered seriously. In the meantime, while we wait for a robustly debated and thoughtfully articulated alternative, transformative constitutionalism is a powerful legally sanctioned critical approach to the study of law and, perhaps, private law in particular.

Private law

What does the preceding discussion about transformative constitutionalism mean for private law in particular? Private law departments around the country teach courses like family, persons, succession, contract, delict, property, and unjustified enrichment. These sub-divisions of private law are grouped together as such because of a reliance on one or more classificatory theory. Three dominant ones in the South African discourse include the actor theory (private

law does not involve the state), the interests theory (private law protects the interests of individuals as opposed to the greater good), and the power theory (private law deals with people who interact with one another on equal footing) (Zitzke 2023: 2). The watertight distinction between private and public law faced critique in South Africa even before the advent of democracy from the pen of Alfred Cockrell (1993). Transformative constitutionalism, as I have described it above, casts further serious doubt on whether any of these theories can provide a convincing justification for the existence of private law.

Regarding the power theory, we know that one of the key features of transformative constitutionalism is that it seeks to hold both public and private power to account, clearly operating from the assumption that not all non-state actors operate from positions of equality (Davis and Klare 2010: 433). The horizontal effect of human rights in South Africa, Johan van der Walt (2000; 2003) taught us, exists in part to prevent privatised apartheid and neo-colonialism where multinational companies and other non-state actors in the political economy can abuse their power vis-à-vis the vulnerable in contract, property, delict and so forth. The public/private divide might then seem less important to the transformative constitutionalist compared to the traditionalist.

Regarding the interests theory, transformative constitutionalism envisions an entire legal system that is geared towards the greater good and a changed society along more egalitarian lines. Practically, this would mean that the law/society interface cannot and should not be ignored, even in subject matter that has historically been labelled as protecting "private" interests. What this requires, is a zooming out to see not only the individual's interests in a given matter, but also the interests of society. In the property-law context, as one example, we cannot simply look at a right to private ownership as the beginning and end of property law. We must surely also be conscious of the interests of the vulnerable and people's need for access to adequate housing in the face of the social issues of historic deprivation and dispossession – I am thinking here of course of the type of argument that André van der Walt (2009) made in *Property in the Margins*. When this invitation to consider a wider range of interests is taken up, the public/private divide becomes blurry.

The actor theory is treated with similar scepticism. If both state and non-state actors can abuse their power, what is the utility of differentiating between state and non-state actors more generally? Both state and non-state actors are ultimately bound to law that is adjudicated and enforced (and sometimes made)

by the state. In various ways, the state also concludes contracts, commits delicts, interferes with people's property, and plays a fundamental role in administrating family law, the status of persons, and estates. The Constitution is the ultimate regulator of it all and politicises all of it. Zooming out away from the non-state actor as the archetypical private-law subject, we see that private law sub-divisions often involve the state. Again, the public/private divide is difficult to defend.

To the extent that transformative constitutionalism poses challenges to the traditional theories supporting the existence of something like private law, we might say that the two concepts pull in opposite directions. Perhaps then it is more meaningful to speak about "transformative law" rather than "transformative private law". However, as I am about to show, we ought to think about "transformative law" (in other words the eroding of the barrier separating private and public law) as the end goal and "transformative private law" as the interim endeavour required to reach that goal. I would suggest that it can be quite useful to give special attention to placing traditional private law disciplines under the transformative microscope for thoroughgoing critique. This is so because private law, in comparison to public law, has traditionally been seen as an apolitical, neutral space, ignoring the fact that, as I have mentioned earlier, all laws have some type of political ideology (a vision for the good life) that underlies them. Exposing the traditional lie that private law is apolitical and neutral and doing systematic work to reimagine these disciplines along transformative constitutional lines would then be a valuable task (Davis and Klare 2010: 452). When I use the term "private law" in the context of "transformative private law", I use it as a grouping of disciplines that need special, transformative attention because of their resistance to change.

When private law is studied through the lens of transformative constitutionalism, possibilities are opened for interrogation, renovation, and reimagination of the political economy that it supports (Davis and Klare 2010: 409-410). I recall Klare's definition of transformative constitutionalism as involving something more than reform yet something less than revolution.

Towards transformative private law?

To conclude, transformative private law in South Africa means the application of transformative constitutionalism in the disciplines traditionally associated with the label private law. Transformative constitutionalism involves both a

descriptive account of the Leftist (read: post-liberal and/or social democratic) politics embedded in the South African Constitution and a prescriptive account of a new type of substantive reasoning that is required in legal disputes. For historical and legal philosophical reasons, an application of the descriptive and prescriptive dimensions of transformative constitutionalism necessarily involves applications of a mixture of natural law and critical legal theory. Transformative constitutionalism practically chips away at the intellectual wall that has traditionally separated public and private law. Be that as it may, private-law disciplines in South Africa (and it seems, globally) have traditionally not been regarded as areas ripe for political debate or reimagination. Transformative constitutionalism gives us the invitation to do so. It is in the simultaneous coming together and pulling apart of "transformative constitutionalism" and "private law" where a transformative private law for South Africa might be found. What exactly that looks like, and whether this is practiced at all in South Africa today, are questions for another day.

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