

Breathing life into the Constitution: The transformative role of courts to give a unique identity to a constitution

the recognition of native title, the justiciability of directive principles, and giving effect to the implied terms of *Bundestreue* and *Ubuntu*

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Abstract

This paper reflects on the transformative role of courts to direct and change the pathway of the countries in which they serve. The paper commences with a brief discussion of what is meant by transformative constitutionalism. It takes issue with the proposition that newly created courts under post 1990-constitutions are more prone to constitutional transformation than courts under older constitutions. It shows how throughout the history of courts, there have been examples where courts have transformed their societies. It also points out that courts must, regardless of their transformative role, demonstrate respect for the separation of powers since all organs of government must work together to effectively transform society. The paper then focuses on 4 case studies where courts have radically transformed their society, namely Germany through the use of *Bundestreue* to give content to the federal system; India where directive principles of state policy are used to give content to human rights; Australia where Aboriginal native title had been recognised after 200 years of denial; and South Africa where *Ubuntu* is used as a life-giving word to effect social justice.

Keywords

transformative constitutionalism; directive principles of state policy; *bundestreue*; *ubuntu*; native title; *Mabo*; socio-economic rights

I. Introduction

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The judiciary can be an essential agent in the transformative process of a country. This is because the judiciary can breathe life into the dry text of a constitution. The judiciary can make a rainbow of the black print. The judiciary can let the silent words of the constitution speak out by resolving disputes based on findings of fact, the application of relevant law, and the exercise of discretion. It can fill in gaps in policies. Handing down a judgement is not a computer-generated exercise. This is because the judiciary is responsible, based on the facts and submissions before it, to declare the law of the land for which it is responsible. The judiciary cannot write a constitution, but it can enliven it. The life-giving ability of the judiciary applies to long established, young and emerging democracies.

Sometimes, as illustrated below by way of the 4 selected case studies the subject of this article, the judiciary can be *the* agent of transformation. It can be *the* rudder that changes the course of a country by the stroke of a pen. In the case of Australia, for example, the High Court shifted direction from a century-old dogma that the country was *terra nullius* (no persons land) at the time of settlement in 1788, to the recognition of native title in 1992 and thereby acknowledge extensive rights to land of Aboriginal people (Mabo (2) 1992). Two centuries of denial of Aboriginal customary property rights wiped away by a single judgement.

The dynamics that influence the outcome of reasoning of the judiciary are complex, diverse, and influenced by the social issues of the day. In the Marbury v Madison-judgement the Supreme Court of the United States introduced what is today known as constitutionalism (Marbury 1803). In Brown v the Education Board of Topeka, the Supreme Court of the United States in the briefest of judgements overturned the dogma of ‘separate but equal’ and set the USA (and consequently many other nations) on a course of civil rights and equality (Brown-case 1954). These judgements, arising from the oldest written constitution, are exemplary examples of transformative constitutionalism.

The factors that influence justices to make course adjustments are multiple, varied, and subtle, and can often only be the subject of speculation. Assumptions are often made about factors that influence judges, but those are rarely the subject of in-depth analysis to establish the accuracy of the proposition. Dugard, for example, has found that the popular assumption in South Africa was *incorrect*, namely that justices appointed pursuant to the post-democratic, newly created Constitutional Court of South Africa would hand down judgements in the socio-economic sphere that are more ‘transformative’ than the judgements of judges that had been appointed to the lower, pre-existing, *apartheid*-courts (Dugard 2016, 1154). She suggests that

the greatest factor that may have influenced more progressive or less progressive outcomes of judgements in the socio-economic sphere in South Africa may not have been the race of the judges; the time of their appointment; the age of the constitution; or the courts in which they served, but rather something as simple as whether justices sat in a single bench on their own, or collectively on the bench with other justices (Dugard 2016, 1155).

The judiciary can of course also be an instrument of oppression. A defender of the *status quo*. But defending the status quo may also sometimes provide a bullwork against tyranny. It all depends on circumstance. The apartheid-courts in South Africa for many decades used their legal reasoning to give effect to a system of oppression, but nevertheless many judges within those courts also attempted to hand down judgements that resisted the might of state power as much as it was legally possible (Baxter 1987).

The ‘independence’ of the judiciary therefore does not necessarily imply it being a life-giving institution. In central and eastern Europe, for example, the laudable constitutional provisions enacted post-1990 that relate to the rights of ethno-cultural minorities within those deeply divided societies ‘are seemingly well developed on paper [but] frequently not given the full legal effect by the courts as minorities may expect’ (Palermo and Constantin 2021, 212). Whilst in Latin America, where there has been extensive lip-service to indigenous rights and the importance of ‘free, prior and informed consent’ (FPIC) of indigenous people whenever their interests in land are affected, courts have been slow to adopt normative consultation standards of ‘consent’ with indigenous people. Consequently indigenous people ‘continue to face significant power imbalances’ (Tomaselli and Cittadino 2021, 175).

A judiciary, restricted to the black letter of the law-approach, or being an undue servant of the sovereignty of parliament, may lack the value of conscience or the ability to breathe life into a constitution. On the other hand, however, a judiciary that adopts a programmatic approach whereby it pursues a quasi-legislative and policy agenda and thereby undermines the separation of powers, may erode the legacy and credibility of the court. The Montesquieu-based dogma of separation of powers may not be an eternal truth, but it remains the most theoretically sound and pragmatic way to organise the powers of government.

The question the subject of this article is what the role is, if any, of the judiciary to breathe life into the constitutional text by giving it an identity that goes beyond the words of the constitution, but nevertheless reflects the values and aspirations of the nation? To answer the question, 4 case studies are used to demonstrate the nature and extent of the involvement

of the judiciary to breathe life into a constitutional text that reflects the values and aspirations of the people, albeit that those values were not explicitly stated in the constitution. In doing so, the courts became an agent of what is generally referred to as transformative constitutionalism.

In each of the 4 cases the justices utilised the circumstances of the nation to direct policy makers towards a more just and equitable society, but without usurping the powers and functions of parliament or the executive. The judiciary found a way to interpret, respectfully, what otherwise would be standard clauses of legal text, into a format that gives direction to the nation; that inspires it; that guides it; but most importantly for purposes of this paper, that transformed it. In each of these case studies the nation pre- and post-judgements were irrevocably changed.

The examples referred to are those of India where the Supreme Court through the use of the directive principles of state policy, set the scene for fundamental human rights to be interpreted in a manner that recognises the importance of socio-economic transformation and ultimately gave rise to the justiciability of social and economic rights; the Constitutional Court of Germany that has used the implied term of *Bundestreue* to lay down the contours of German federalism and intergovernmental relations in a manner that is nowadays referred to as ‘cooperative federalism’; the High Court of Australia that recognised after more than 2 centuries of denial, the existence of Aboriginal native title to land, which in turn has given rise to several other common law jurisdictions following suit; and finally the Constitutional Court of South Africa that read into the Constitution the implied term *Ubuntu* and thereby used that undefined term to initiate transformation in several areas of law, including the abolition of the death penalty and the pursuance of socio-economic rights and justice.

These cases highlight and celebrate the transformative power of the judiciary and the ability of justices to breathe life into a constitution.

II. Transformative ability of courts

Much has been written about the transformative ability of courts. This potential is often referred to as ‘transformative constitutionalism’, implying that the provisions of the constitution ought to be used by the courts to actively address the essential issues that cause inequality in a particular society, for example, through the recognition of socio-economic rights; minority and indigenous rights; or environmental rights. In Latin America the term *Ius Constitutionale Commune en America Latina (ICCAL)* has been coined to reflect what is seen as transformative

constitutionalism in that subcontinent (Von Bogdandy et al. 2017). ICCAL refers to the role of law in transforming societies (Von Bogdandy et al. 2016, 3). Couso observes that in Latin America ‘the notion that social transformation can be achieved through the judicial enforcement of social and economic rights, is now widespread...’ (Couso 2006, 74). A notable caution is, however, expressed by Ugarte when he says: ‘Let us not forget that their [social and economic rights] application depends not only on technical and institutional dynamics, but also on culturally imbedded political, social and judicial guarantees...The challenge lies in ensuring that the logic of rights prevails over the logic of power and privilege’ (Ugarte 2017, 82).

The concept of a transformative court has been explained as follows by the Supreme Court of Kenya, but in doing so the court has emphasised values that may as well also be associated with traditional liberalism (for example social justice, equality, devolution, human rights, rule of law and freedom and democracy):

Kenya’s Constitution of 2010 is a transformative charter. Unlike the conventional ‘liberal’ Constitutions of earlier decades which essentially sought the control and legitimation of public power, the avowed goal of today’s Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy... (Speaker-case 2013)

It is easier to *describe* transformative constitutionalism than to *define* it. Whilst what is exactly meant by transformative constitutionalism remains ambiguous, it has been suggested that the essential difference between transformative constitutionalism and traditional liberalism is that the latter pursues *formal* equality, whilst the former pursues *substantial* equality (Kibet and Fombad 2017, 353). This proposition is open to challenge. Bogdandy, for example, notes that the ideal of ‘social inclusion’ that is pursued by transformative constitutionalism, is an objective that can be shared by ‘conservative, liberal and socialist forces’ (Von Bogdandy et al. 2016, 5). Baxi acknowledges that transformative constitutionalism ‘presents a distorted lens’ (Baxi 2013, 23).

In the case of the constitutional transformation of South Africa from an *apartheid*-state to a state based on the rule of law and constitutionalism, Klare has sought to define constitutional transformation as being:

...a long-term project of constitutional enactment, interpretation, and enforcement committed...to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction...an enterprise of inducing large-scale social change... (Klare 1998, 150)

In each of the 4 examples discussed below, the justices had ventured onto a path that the respective parliaments and governments were unable to traverse. In doing so the respective courts walked a tightrope where they challenged the separation of powers; where they ran the risk of encroaching on legislative and executive functions; where they opened the door for public criticism and rejection; and where they adopted a vision hoping it would find resonance with the public.²

It is not surprising that transformative constitutionalism has ‘received a fair amount of criticism’ since it seeks greater involvement of the courts in policy priorities and even budgetary allocations (Kibet and Fombad 2017, 353). Pursuing an own agenda may bring the courts in conflict with other organs of government; whilst being enslaved to the text of the constitution may erode the public credibility and legitimacy of the courts. In each of the case studies below the highest court managed to retain the umbilical constitutional cord that links it to the nation; it upheld and respected the separation of powers; it adhered to the constitution under which it serves; and yet it managed to change the direction of the nation.

The proposition by some authors that contemporary-created courts may perhaps more suitable for transformative constitutionalism than older, liberal-based courts does not, in light of the experiences of these 4 case studies, hold water. Gargarella, for example, is of the view that ‘in countries with old constitutions, which are exclusively committed to negative liberties’ the transformational role of the court by way of social rights may be hard to achieve (Gargarella 2006, 25).³ This is not necessarily the case. A transformational court, regardless of the age of its constitution, must be alive to the social issues that are relevant to contemporary society. The scientific community may post-1990 have been drawn to the new concept of transformative constitutionalism due to international events, but courts have been transforming societies for a

² It is often suggested that liberal constitutions seek to protect basic freedoms in a negative manner by *preventing* state action, whilst transformative constitutionalism seeks to protect rights in a positive manner by *requiring* state involvement. This is not a defensible distinction of justiciable rights. The fact that giving effect to a judgement of a court may amount to some action or expenditure by the executive, does not constitute a breach of the separation of powers. Many judgements require some form of executive action or impact on the allocation of resources (Gargarella, Domingo, and Roux 2006, 260). The doctrine of separation of powers operates on the basis of proportion rather than absolutism. But, one must acknowledge that courts must be mindful of the remedies granted since those must be lawful, practical and achievable.

³ I agree with the observation of Gargarella and others that ‘the view that social rights are different in kind to civil and political rights has now been thoroughly discredited’ (Gargarella, Domingo, and Roux 2006, 257). However, if that is the case, then why would Gargarella draw a distinction between ‘negative liberties’ of ‘old constitutions’ and positive liberties of ‘new constitutions’? This contradiction highlights in my view the inconsistency to attribute transformative capacities principally to newly created courts. Few contemporary cases have had the impact on international constitutionalism and transformation as *Marbury* and *Mabo* respectively, and yet both were handed down pursuant to so called old constitutions.

long time. The endorsement in *Marbury v Madison* of the principle of constitutionalism, is arguably *the* most important example of transformative constitutionalism of all judicial outcomes. Notably, Dugard finds in her analysis of socio-economic type judgements in the 20 years post the new democratic constitution of South Africa, that the judgments by judges appointed under the pre-democracy, created High Court and the judges appointed pursuant to the post-democracy, created Constitutional Court displayed outcomes that were more consistent with one another than would perhaps have been anticipated. She observes that the High Court judgements in South Africa were not ‘as conservative’ as may have been expected, whilst the Constitutional Court judgements in South Africa ‘not as transformative’ as may have been expected (Dugard 2016, 1154).

The question is often raised in literature whether young and emerging democracies require a special form of judicial activism to nudge the nation towards social justice and equality? Kibet and Famobad, for example, suggest that the “traditional notion of constitutionalism is inadequate in meeting peculiar needs of transitional societies” (Kibet and Fombad 2017, 350). This is a proposition that is yet to be established by sound research. In fact, a court that exceeds its constitutional limitations, may harm a young democracy. The role of the courts as an independent source of powers has been transformative since the foundation of liberal democracies. Some of the oldest courts have handed down what could be regarded as transformative judgements, whilst there are many examples where some of the contemporary appointed justices in emerging post-1990 democracies have been careful not to offend those in political power. The proposition that courts created after a certain date, or subsequent to a specific democratisation or revolutionary event, are by nature more prone to being transformative, is at best romantic and at worst illusionary. Comparative law is filled with case studies of older courts being transformative and recently created courts being conservative.

In essence: The transformative role and ability of a court goes deeper and is more multi-layered than the age of the constitution under which the courts function. The transformative role of the judiciary may arise from a democratisation process; an end to civil war; eradication of socio-economic inequality; recognition of ethno-minority and indigenous rights; accommodation of societal plurality; ensuring equal treatment of all individuals; laying the contours of federal-state intergovernmental relations; upholding constitutional values such as the separation of powers, or acknowledging the importance of environmental issues.

Whilst transformative constitutionalism is often referred to in literature within the context of socio-economic rights, the true test for transformative constitutionalism is whether the courts address the issues that are relevant to a particular society *and* whether those judgements give rise to practical changes within the society. For example, in a similar way that the often quoted Grootboom-judgement (Grootboom-case 2000) reflected the socio-economic realities of South Africa, so the Mabo- case reflected the social realities of Australia.

It is not surprising that similar legal questions may be resolved in different ways in different countries. As is shown below, for example, the meaning given by the Supreme Court of India to directive principles of state policy, differ fundamentally from the meaning given by the courts of Ireland to the directive principles of state policy contained in the constitution of Ireland (De Villiers 1992c, 434). Whilst in India the directive principles shaped the thinking of the court about the content of fundamental rights, in Ireland the directive principles were ineffective and a mere *obiter* in their impact. Similarly, the values imbued in the term *Bundestreue* by the Constitutional Court of Germany, have been interpreted far more expansively than the effect of the same term in the constitutional traditions Switzerland and Belgium (De Villiers 1994a). Whilst in Germany *Bundestreue* is regarded as *the* implied term that permeates the federal system, the same status is not accorded to the term in Switzerland or Belgium. In similar vein, in South Africa the term *Ubuntu* has become widely used by the courts to effect societal change, while the same term, albeit widely used in a social context in southern Africa, has not had the same use or impact on courts in other African countries (Bennett 2011).

There is, of course, a fine balance to be struck between a judiciary giving life to a constitution that reflects the values and aspirations of the society it serves, and a judiciary that pursues its own social-policy agenda and, in the process, loses track of its core functions, its duty towards its people, its obligation to uphold the constitution, and in doing so exceeds its powers and encroaches on the separation of powers. Judiciaries often test the balance of societal and constitutional tolerance. Albie Sachs writes as follows:

In an open and democratic society, political compromise based on the principle of give-and-take rather than the idea of winner-takes-all, was to be applauded. Yet judges were unsuited to take decisions on houses, hospitals, schools, and electricity. They just did not have the know-how and the capacity to handle those questions. But judges did know about human dignity, about oppression and about things that reduced a human being to a status below that which a democratic society would regard as tolerable. (Sachs 2009, 170–71)

The notion of constitutionalism was transformative two centuries ago, whilst today given content to socio-economic rights, environmental rights, or balancing the rights of competing religious communities are regarded as transformative.

The ability of the courts to effect change and to be transformative is however limited by the constitution and the functions of other organs of government. It is particularly in emerging democracies where courts may become *the* forum where the competition for scarce resources is most intense. The courts may find themselves in what Klug calls 'lawfare'. But the courts cannot by themselves address all the inequality, incapacity, ineptitude and disharmonies of government (Klug 2016). The courts cannot create work, build houses, clean the environment, or bring peace to violent ethnic conflicts. The courts are part of a team, with the other elements of the team being the executive and legislature, and in addition, an active civil society. The 'interests of the disadvantaged cannot only be advanced through successful litigation...we would argue that courts need the cooperation of both the legislature and the executive in order to ensure respect for their decision' (Gargarella, Domingo, and Roux 2006, 273). Change is best effected if all parts of the team work in unison. In the absence of strong institutions and an active civil society, the demanding role placed on the judiciary to effect change is often undermined by a 'bottleneck' of weak policy implementation (Von Bogdandy et al. 2016, 9). Ultimately, the 'judiciary cannot substitute policy making through political institutions' (Von Bogdandy et al. 2016, 11) The transformative role of the courts therefore does not end with a laudable, transformative judgement. The impact is ultimately assessed about the practical change it brings to a society.

The proposition by Kibet and Fombad that transformative constitutionalism in itself 'offers hope for better prospects of constitutionalism and protection on fundamental rights in Africa', is untested by sound research (Kibet and Fombad 2017, 354). Judges are not necessarily immune to abuse of power; political influence; corruption; or undisclosed political or other agendas. Baxi correctly observes that 'despite the brilliance of erudite transformative constitutionalism discourse, socio-economic rights have not yet come into existence....' (Baxi 2013, 41) The most recent developments in the United States of America regarding judgements of the Supreme Court, most notably on the issues of abortion and firearm control, illustrate how the legal reasoning of justices can be influenced by societal factors, personal beliefs and values, effluxion of time, socio-economic events, international law, and political persuasion and pressure.

Justices are understandably often frustrated that the values and ideals aspired to in a constitution may not be open to judicial enforcement; or promises made in the constitution may not be suitable to justiciable and enforceable remedies. Regardless of the lofty promises that are made in constitutions – especially many post-1990 constitutions - about equality, fairness, social and economic rights, and equal treatment, all societies, but notably those of young and emerging democracies, suffer inequality and encroachments and denials of human rights at a scale that often ridicules the constitutional guarantees. For example, South Africa, which is lauded by many as an example of transformative constitutionalism (Von Bogdandy et al. 2016, 6), continues to suffer some of the greatest socio-economic inequality in the world (Gini Index 2022) and unbridled corruption and state-capture (Zondo 2022).

The inability of the judiciary to give effect to constitutional promises, can affect not only the legitimacy of the courts, but could lead to the erosion of trust in the entire system of government and in constitutionalism itself. Justices in particularly emerging democracies find themselves inhibited by the limited remedies available to give effect to laudable constitutional rights. Geoff Budlender, a senior legal practitioner in South Africa, observes as follows about the inequity between constitutional *ideal* and practical *reality*:

The really difficult question is what role the courts can play to address systematic failures. This is the question that requires creativity and energy. Currently all of us, including the courts, are passive observers of a systemic and wholesale breach of the rights of those who are most vulnerable, and whose rights are most important to our ability to succeed as a nation...Many rights problems are not solved overnight. You cannot wish for a court order that will solve the school system like a magic wand. But a proper interaction between government, civil society and the courts can go a very long way in taking us away from systemic breakdowns, towards systematic enforcement and realisation of the rights in the Constitution (Budlender 2007, 9).

In summary, the courts can play a transformative role in a society; the nature and extent of the transformative role is not necessarily dependent on the age of the constitution or when it was enacted; the transformative role of a court depends on the issues that are relevant to a particular society, for example socio-economic inequality; recognition of cultural and indigenous diversity; environmental concerns and land rights; and the justices, even within a transformative milieu, must be respectful of the limited powers of the judiciary, their allegiance to the constitution, and the importance of the separation of powers.

III. Four case studies of transformative justice

The 4 case studies the subject of the next part highlight a common theme concerning the value of an implied term in the constitution that may be used to influence and determine the outcome of adjudication of disputes. In each of the case studies the highest court decided, soon after the enactment of the constitution, to recognise and rely on implied constitutional values to guide the court in its resolution of disputes and to give effect to the constitutional in a transformative manner. Each of the judgements discussed were transformative, sometimes not only to the nation to which it applied, but also at the level of international jurisprudence. Each judgement succeeded to set the nation on a new course that at the time may not have been reflective of the political will of the legislature.

The approach adopted by the Supreme Court of India regarding the directive principles of state policy has had a marked impact on the way human rights in that country are interpreted and in the development of the justiciability of socio-economic rights internationally. The approach adopted by the Constitutional Court of Germany in recognition of *Bundestreue* (translated as federal comity or federal trust), as an implied term in the Basic Law, not only set the scene for the conduct of German federalism, but provided a basis for the notion of cooperative federalism in literature and newly drafted constitutions such as those of South Africa. In Australia the recognition of native title by the High Court sent reverberations through the nation, but after the dust had settled the case of *Mabo* became a much-cited judgement in other common law jurisdictions. Finally, the Constitutional Court of South Africa has to great effect used the implied term *Ubuntu* not only to transform society, but it has also given to jurisprudence a unique fingerprint to which South Africans can relate.

These implied values exhibited by the respective case studies and recognised by the respective courts can be described as reflecting the ‘soul’ of the respective constitutions and primary examples of transformative constitutionalism (De Villiers 2022a)

3.1. India: transforming society by way of directive principles

The inclusion into the Constitution of India of a chapter called Directive Principles of State Policy, reflected the history of India whereby individuals were not only the bearers of fundamental rights and freedoms, the Rulers in turn also had a duty of care towards the poor, the infirm and the needy. The Directive Principles are found in Part IV of the Constitutions (aa 36-51). The Principles sets out essential obligations of government towards the society. The traditional *Raja Dharma*, which reflects on the duties of the Rulers, were in effect codified by including those general obligations into the Constitution with clear objectives and ideals for

the state to pursue (Ready 1980, 403). The Directive Principles are, for purposes of this article, treated by the courts as the soul of the Constitution whereby the aspirations of the people and the duties of government to address those aspirations, are bound together into a chapter (Markandan 1987, 92).

The principle underlying the Directive Principles is that they would constitutionally recognise the obligations of the state towards the people, particularly the extremely poor and vulnerable, without converting those moral claims into justiciable rights (De Villiers 1992a, 30). The Principles had to ensure that a socially just, ‘economic democracy’ is achieved *in addition* to an elected democracy (Jain 1978, 549). The Directive Principles differ from the terms *Bundestreue* and *Ubuntu* discussed below in the sense that those terms were not included in the respective constitutions of Germany and South Africa, but the courts implied it. In the case of India, substantial thought and debate took place about the proper wording and legal status of the Directive Principles and although not justiciable, those Principles were in due course given a broadened meaning.

The constitutional debates in India became the precursor to debates in international law about the limitations that are suffered by traditional liberty-rights, and the need to ensure that the duty of the state towards socio-economic transformation is recognised in the constitution. Social justice was seen in India as an objective of equal importance to the protection of fundamental rights (Sharma 1984, 176). The Constitution was in this respect ahead of its time since it anticipated that to transform the socio-economic reality of India, the state would have to play an active role, even if it meant that in some respects limitations had to be placed on the scope of fundamental individual rights. The reality of poverty within the context of justiciable rights was summarised as follows:

For those who suffer from want and hunger, the so-called fundamental rights would be meaningless and remain only paper rights (Minerva Hills-case 1980).

The founders of the Constitution of India therefore agreed to include into the Constitution a *justiciable* charter on fundamental rights, and a *non-justiciable* chapter on directive principles of state policy. The former included fundamental rights that could be enforced against the state, whilst the latter included objectives of the state, albeit not justiciable as rights. But since both chapters are accorded constitutional status, both must be given effect by the courts and interpreted harmoniously. The Constituent Assembly regarded the directive principles as follows:

The principles of state policy set forth in this chapter are intended for guidance of the State. While these principles shall not be cognizable by any court, they are nevertheless fundamental in the governance of the country and their application in the making of law shall be the duty of the State (Constitutional Assembly 1947, 406).

Although there were some who argued that the directive principles should not be part of the Constitution due to their programmatic, non-enforceable nature, the majority of the Assembly felt that the Principles expressed the ‘salient features of the new social and economic order’ and hence those objectives ought to be elevated to constitutional objectives (Chaundri 1955, 221). Chaundri summarised the rationale for the directive principles as follows:

The political, social and economic ideology expressed in the directive principles imparts continuity to the nation’s policy and makes it comparatively free from the vicissitudes of the ideology of political parties that might come into force from time to time (Chaundri 1955, 223).

The directive principles can be grouped together into 5 main categories, namely, socialist principles; Gandhian principles; general welfare principles; international principles; and environmental principles (De Villiers 1992a, 35–36). Although the Principles cannot be a basis to initiate litigation for purpose of enforcement, the courts have developed the Principles into a legal framework to understand the intention of the legislature and to explain why a certain meaning ought to be given to fundamental rights. In essence, there is an implied presumption that laws ought to be interpreted to ensure their consistency with the objectives of the Directive Principles, and if there is an inconsistency, the effect that closest resembles the intent of the Directive Principles must be given (Balsara-case 1959). Importantly though is that whilst the Directive Principles may be constructed to limit the scope of a fundamental right, they cannot abrogate or abolish a fundamental right. It is therefore a question of degree as to when a limitation on a fundamental right is ‘reasonable’ in light of the Directive Principles (Tamil Nadu-case 1984).

The Supreme Court endorsed a general presumption that all legislation and executive actions are aimed at implementing the Directive Principles, and that the Principles could be used to resolve statutory ambiguities (Tripathi 2016, 209). The Supreme Court has further ruled that the Directive Principles could be used to ascertain the ambit of legislation and to restrict the scope of fundamental rights since public objectives had to be fulfilled. In this respect restrictions have been allowed in fundamental rights involving property (State of Bombay-case 1951); freedom of contract (Public Works-case 1959); fair labour practices (Eveready-case 1962); and legal aid (Hoskot-case 1978).

The transformative role of the Directive Principles did not commence immediately after the enactment of the Constitution. In the initial years the courts followed an approach that the fundamental rights were sacrosanct and could not be limited by legislation that sought to promote the Directive Principles (Madras-case 1951). In later years however the courts sought to achieve greater harmony between the Directive Principles and fundamental rights. In the Chandra Bhawan-case the court stated emphatically as follows:

While rights conferred under Part 3 [Fundamental Rights] are fundamental, the directives given under Part 4 [Directive Principles] are fundamental to the governance of the country. We see no conflict between the provisions contained in part 3 and Part 4. They are complementary and supplementary to each other. (Chandra Bhawan-case 1970)

The Supreme Court has over time actively used the directive principles to inform its jurisprudence in a manner that may not have been anticipated by the founders of the Constitution. The Indian approach is by far more adventurous than the approach of the Irish courts where directive principles were also available to assist the court, but not much came from it (De Villiers 1994b, 615–18).⁴

The application of the Directive Principles has not been without controversy, for example the use of the Principles to restrict the scope of fundamental rights was frowned upon by the earlier courts. In the social sphere, India continues to be challenged by some of the most stark inequality in the world. The Directive Principles were no panacea to the socio-economic inequality suffered by Indians, but they were designed to give direction, not to provide immediate solutions. The Directive Principles influenced state policies and when so measured, they had success. The purpose of this discussion of the Directive Principles is however not in a defence of their operation, but rather in illustration of how the courts have used the non-enforceable Principles to give guidance to legislative and executive organs; to allow restrictions on fundamental rights that otherwise may not have been possible; and to give a unique identity to judgements with reference to the Principles. The contrast between Ireland and India in the use of the Directive Principles is stark: In Ireland there is for all practical purposes no reliance or reference on the Directive Principles, whilst in India the courts have used the Directive Principles creatively and actively. The Directive Principles of India reflect the soul and spirit

⁴ Compared to India, there has only be scant reference by courts in Ireland on the Directive Principles (De Villiers 1992b, 430). The case of Rogers was one of the first judgements where the court concluded that it was 'entitled' to investigate the aims of the directive principles in order to ascertain the nature and extent of the right to freedom of contract (Rodgers-case 1978).

of the Constitution; they serve as a socio-economic chart of the nation; although not enforceable, they give lights and content to fundamental rights; and they consistently remind all organs of government of their obligations under the Constitution (De Villiers 1992a, 38–39).

3.2. Germany: laying the basis of cooperative federalism through *Bundestreue*

The German federal system, which is known for its ‘cooperative’ intergovernmental relations, relies on the little known, and undefined principle of *Bundestreue* to guide the conduct of the federal affairs of the country (De Villiers 1995). The federal constitutional court, in a series of judgements after enactment of the Basic Law, read the implied term *Bundestreue* into the Constitution and thereby used it to direct German federalism into the future (BVerfGE 1 56; BVerfGE 1, 117; BVerfGE 1 299). The Constitutional Court thereby cemented the term to a legal standard, obliging both the Federation and the Laender to conduct their affairs in a ‘federal friendly relationship’ (*bundesfreundliches Verhalten*) (BVerfGE 1 299, 315). In one of its first judgements (21 May 1952) the Constitutional Court described the essence of *Bundestreue* as follows:

The federal spirit brings about a constitutional obligation that the member states of the Federation must act in good faith and trust towards one another as well as towards the Bund. The constitutional obligation in the federal state places the Bund and the member states under a justiciable duty to friendly relations. (own translation) (BVerfGE 1 299, 315)

The effect of *Bundestreue* in contemporary Germany is varied, ranging from a term to supplement constitutional provisions in the Basic Law; to the protection of the rights of individual Laender; and to regulate the relationship horizontally between Laender, and vertically between federal government and Laender (De Villiers 1994a).

The term *Bundestreue* does not have a direct translation into English, but it implies federal trust, comity, or partnership. The term, which does not appear in the Basic Law, requires cooperation, consultation, coordination, and respect between the respective levels of government for the interests of each other. All governments are expected to exercise their powers and functions responsibly and in respect of *Bundestreue*. The powers must be discharged in a cooperative, non-litigious manner rather than by way of competition and litigation (De Villiers 2019).

It is notable that the term *Bundestreue* is not found in the Basic Law or in any other act of parliament. In fact, the term was not even mentioned during the drafting-process of the Basic

Law. But the court nevertheless recognises the importance of *Bundestreue* as a fundamental constitutional principle. This is because *Bundestreue* represents a value system, a tradition, a complex history, and an ideal. Its origins can be traced to the German confederal system of 1871 where the ‘trust’ that had to be displayed between the constituted parts of Germany was seen as the glue that gave rise to modern Germany (Smend 1916, 39).

The contemporary understanding of cooperative federalism in literature is closely associated with the development of the theory and practice of intergovernmental relations and cooperative federalism in Germany (Burgess 2006). The Constitutional Court of Germany has been *the* ‘driving force’ in the evolution of German federalism through the use of *Bundestreue*, giving rise to its cooperative rather than competitive nature (Benz 2010, 76).

The principle of *Bundestreue* is applied vertically between the levels of government as well as horizontally between the *Laender* (De Villiers 1994a). Importantly, *Bundestreue* refers not only to the substance of intergovernmental relationships, but also to the style and manner in which relationships are managed. The Constitutional Court effectively transformed the German federal system through the use of *Bundestreue*. The drafters of the 1996 constitutions of South Africa were so impressed with the practical application of *Bundestreue*, that they attempted in chapter 3 of the 1996 Constitution of South Africa to codify the essential principles of *Bundestreue* of relevance to the new federation (De Villiers and Sindane 2011). In its practical application *Bundestreue* has been reflected in the voting arrangements between states; the importance of consensus when decisions are made that affect all states; recognition of mutual interests; limitations on the way in which states exercise their powers; and the obligation on federal and state governments to refrain from litigating against each other (De Villiers 2022a, 184–90).

In light of the theme of this paper, the use of the term *Bundestreue* by the Constitutional Court of Germany has been transformative, creative and innovative. Through constitutionalism a legal standard had been adopted to guide the federal arrangements in Germany. The use of a historic constitutional convention that pre-dates modern Germany was creatively intertwined with the contemporary provisions of the Basic Law in a manner that the term not only represents an umbilical cord to the past, but it also established the contours of German federalism into the future.

3.3. Australia: recognition of a title to land long denied

Arguably the most important transformative judgement handed down by the High Court of Australia, was that of *Mabo* in which the native title that Aboriginal people held over their land since time immemorial, became recognised for the first time in common law in 1992 (*Mabo* (2) 1992). This judgement not only corrected an historical wrong, but it also directed Australia towards revisiting its relationship with Aboriginal people and their rights to land. The judgement has become one of the most often cited judgements in disputes about traditional ownership of land in other parts of common law-traditions, particularly so in southern African countries such as South Africa, Botswana and Namibia (Barrie 2021).

When Australia was settled in 1788, the historic status of status of Aboriginal people at law was determined by the legal dogma that applied at the time (Blackstone 1765, 104). At that stage the Aboriginal people of Australia were seem as incapable of negotiating or entering into a treaty since they purportedly lacked a cohesive social, cultural and legal organisation that was required for treaty-type negotiations. The entirety of Australia was therefore regarded at law as *terra nullius* (no person's land) under common law and the laws of the settler nation therefore took effect for the entire territory (Anaya 2004). It was only some 200 years later, that it was recognised in the *Milirrpum*-judgement of 1971 that Aboriginal people at the time of settlement had 'elaborate' systems of social rules and customs that gave rise to a stable order of society (*Milirrpum* 1971). The Court found as follows:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me (*Milirrpum* 1971, para. 267).

The court in *Milirrpum* ended short, however, of recognising native title rights and interests. It was in the *Mabo*-judgement of 1992 that the High Court declared that native title continued to exist and that to the extent that native title had not been extinguished, it recognised by common law (*Mabo* (2) 1992). In doing so the court overturned 200 years of legal dogma and subsequent policies. The effect of the judgement was that the Australian legal system acknowledged that Aboriginal people had at the time of settlement and continue to have sophisticated systems of traditional laws and customary rules that regulated ownership, use, access and control of their traditional lands. These traditional rights, called native title, continue to exist unless otherwise extinguished by way a clear intent of the settler nation (Wik 1996, para. 84).

The court described the unique complexity of native title and the relationship to country as follows:

The range of current estimates for the whole continent [at time of settlement] is between three hundred thousand and a million or even more. Under the laws or customs of the relevant locality, particular tribes or clans were, either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names. Their laws or customs were elaborate and obligatory. The boundaries of their traditional lands were likely to be long-standing and defined. The special relationship between a particular tribe or clan and its land was recognized by other tribes or groups within the relevant local native system and was reflected in differences in dialect over relatively short distances. In different ways and to varying degrees of intensity, they used their homelands for all the purposes of their lives: social, ritual, economic. They identified with them in a way which transcended common law notions of property or possession. (Mabo (2) 1992, para. 37)

For purposes of this paper the Mabo-judgement sits high in the international examples of transformative judgements. It was akin to a legal revolution in the sense that it upset and overturned the 200-year old status quo and the legal theory, history and traditions that supported it. The court ventured a path that no parliament in Australia would have been able to traverse. As a result of the judgement the Native Title Act, 1993 had been enacted and hundreds of native title land claims have since been recognised and thousands of native title agreements have been concluded (Bartlett 2020, 24). The recognition of native title has in turn opened opportunities for Aboriginal to self-determination of their affairs at a local level (De Villiers 2022b).

The Mabo-judgement highlights how a court can radically change the direction of a nation; how the legislature and executive must respond with respect to such a transformative event; and how, over time, all organs of government and civil society can work together to give effect to the transformation in a manner that brings greater social justice.

3.4. South Africa: transforming society through Ubuntu

In the first judgment handed down by the newly appointed Constitutional Court of South Africa under the new democratic order, the death penalty was abolished, and with it arose the principle of Ubuntu as a guiding set of values to the court (Makwanyane-case 1995).⁵ Madala J described Ubuntu as a term that ‘permeates’ the Constitution. (Makwanyane-case 1995, para.

⁵ It must be noted that the Makwanyane--judgement was handed down pursuant to the Interim Constitution of 1993 in which mention was made of Ubuntu. The subsequent 1996 Constitution contains *no* reference to Ubuntu, but the Constitutional Court has nevertheless declared that Ubuntu is an implied term of the Constitution and that it can be relied upon to resolve disputes.

237) Mokgoro J relied on Ubuntu as an instrument by which the Constitution should be interpreted because it reflects the underlying values of South African society. Mohamed J speaking to the meaning of Ubuntu, adding namely that it is -

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

are served by (Makwanyane-case 1995, para. 262).

Although the word Ubuntu does not appear in the 1996 Constitution, the Constitutional Court has found that the word and what it represents is implied in the Constitution as a fundamental norm to regulate relationships in society and to serve as an instrument to interpret the Constitution (De Villiers 2022a, 196). Although the word ubuntu is known in several languages in southern Africa, in South Africa Ubuntu is associated particularly with the Xhosa and Zulu languages and it reflects and combines essential human virtues, compassion and humanity (Ubuntu Lexico 2020). Some of the inherent values that are imbedded in Ubuntu are humanness; gentleness; hospitality; empathy; deep kindness; friendliness; generosity and vulnerability (Mangena 2020). Some would compare it to the Biblical concept of love-thy-neighbour.

The term Ubuntu does not give rise to distinct rights under the Constitution, but it has been used as an implied term to give content to constitutional rights; to interpret the Constitution; and to legitimise the Constitution and jurisprudence arising from it (Sachs 2009). In contrast to *Bundestreue*, which applies only within the intergovernmental, public law context in Germany, Ubuntu has also found its way into the jurisprudence of several non-constitutional disputes, for example criminal (Metz 2019), contractual (Manolios 2018), and immigration law (Mangu 2019).

Ubuntu is an open-ended customary term which applies to all aspects of society and is used as a cornerstone to facilitate the transformation of South African society from *apartheid* to a free and democratic society based on social justice. There is a risk of course that the vagueness of the term may give rise to inconsistent interpretation and application. Justices of various courts have relied on and applied Ubuntu in divergent contexts, albeit principally to interpret rights and duties and to balance competing interests. Ubuntu has creatively been used to encapsulate a home-grown African jurisprudence in a world where western jurisprudence is

prevalent and dominant (English 1996). It is particularly in regard to South Africa's Constitution, which has been described as not merely a black letter text but rather a breathing document with a soul that seeks to transform society, where Ubuntu has provided a practical and philosophical basis to interpret the Constitution and transform society (Klare 1998).

The use of the word ubuntu has played an essential role to ground the philosophical approach of the Constitutional Court towards transformative constitutionalism. There is, of course, a risk that such an undefined, non-legal term can give rise to romanticism and unlimited jurisprudential discretion not grounded in the Constitution. It is therefore incumbent on the courts to ensure whilst they may refer to Ubuntu in their judgements, that the merit of disputes is determined on the basis of the facts, and the remedies ordered are consistent with the Constitution.

IV. Conclusion

This paper has explored the transformative role of the courts and how that role has translated into specific examples where courts have changed the direction of their countries. Courts ordinarily exercise a judicial function whereby disputes are resolved. But sometimes, not often and not in the case of every country, a court can change the direction of a country through a life-giving judgement. To transform a country through transformative constitutionalism. To address an issue in such an original manner that the country changes course. These case studies share a communality, namely that the respective courts have relied on an implied term of the constitution to give life, content and direction to the constitution and policies arising from the constitution. Each of these courts met the description of what nowadays in literature is referred to as transformative constitutionalism. It is proposed that, although in literature the topic of transformative constitutionalism has received a lot of attention during the past 2-3 decades, the transformative role of judiciaries is as old as the concept of rule of law and constitutionalism itself. The proposition sometimes expressed in literature that transformative constitutionalism is more prevalent under recently drafted constitutions than in older constitutions, is challenged. It is pointed out that some of the most radical, transformative judgements by courts have arisen from pre-1990 constitutions. The proposition I put is that the transformative ability of a constitution and the judiciary serving under that constitution is not determined by the age of the constitution, but by an ability of its justices to determine disputes on the facts, in accordance with the law, and in reflection of the realities of the society in which they reside. The fault lines

of society often rapture in litigation, and that is when and where judges may direct a nation into a new direction.

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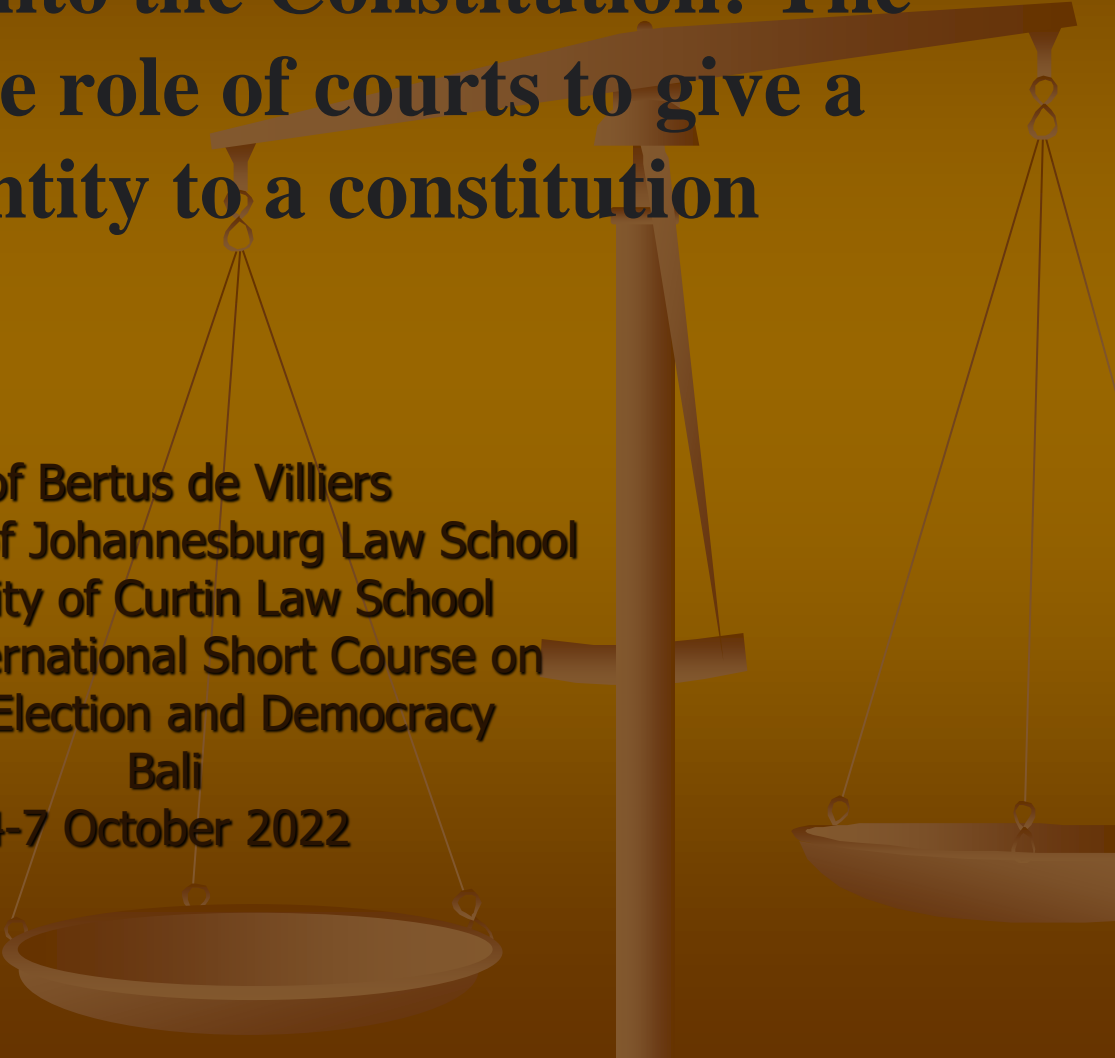
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Breathing life into the Constitution: The transformative role of courts to give a unique identity to a constitution



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Framework for presentation

1. **Meaning of transformative constitutionalism**
2. **Examples of courts that transformed their nation**
3. **India – use of directive principles to give content to fundamental rights**
4. **Germany – use of Bundestreue to develop cooperative federalism**
5. **Australia – recognition of native title to settle a 200-year wrong**
6. **South Africa – use of Ubuntu to transform society**
7. **Conclusion**

Meaning of transformative constitutionalism

- Role of the court to use the constitution to bring greater social justice, equality, dignity – BUT separation of powers must be respected
- Judgements according to facts, law, discretion and circumstances with the achieve constitutional objectives
- Court limited in power, but part of team – transform a country
- Rely on text, but also implied values
- Transformative judgements in different fields, eg socio economic, ethno-cultural; indigenous, federal
- Historic transformative judgements:
 - Marbury v Madison
 - Brown v Education Board

Examples of courts that transformed their nation

- India: use of Directive Principles to interpret legislation; to restrict fundamental rights; and give direction to executive and legislature (Chandra Bhawan Boarding and Lodging Bangalore v The State of Mysore 1970 SCR 600)
- Germany: use of Bundestreue to lay contours of federalism; encourage cooperation; prevent litigation; cooperative federalism (BVerfGE 1 56; BVerfGE 1, 299)
- Australia: recognition of native title; court brings social justice and compliance with international law; recognise rights that had been denied for 2 centuries (Mabo v Queensland (No 2) [1992] HCA 23, (1992) 175 CLR 1)
- South Africa: implied Ubuntu to make findings; explain reasons; interpret provisions (S v Makwanyane 1995 3 SA 391 (CC))

Conclusion

1. Transformative constitutionalism since earliest time – Marbury v Madison beginning of constitutionalism
2. Court part of team, but also separate: parts as a whole more effective than individual parts
3. Courts can imply and interpret with objective to address social issues through the constitution
4. Societal issues not only economic, but also environmental, minority and indigenous rights, religious rights, fundamental freedoms
5. 'And far from the law constituting a barricade of injustice that had to be stormed and torn down for freedom to be achieved, *it became the primary instrument accomplishing a peaceful revolution.*' Albie Sachs (2009) *The strange alchemy of life and law*, 2-3.