

Chapter 1

A Baedeker to *Constitutional Law of South Africa*

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- 1.1 Introduction
- 1.2 On the methodology of *Constitutional Law of South Africa*
- 1.3 On the relationship between *Constitutional Law of South Africa* and the Final Constitution

OS 06-08, ch1-p1

Do I contradict myself? Very well, then I contradict myself.

I am large, I contain multitudes.

Walt Whitman *Leaves of Grass*

Constitutional choices must be made; to all of us belong the challenges of making them wisely. We make them at many levels in many ways. Judges must make them whenever choosing among alternative interpretations of the Constitution . . . Legislators must make such choices . . . in voting for or against measures challenged as constitutionally infirm . . . As lawyers and scholars, all of us must make constitutional choices in the cases or causes we argue, in the constitutional viewpoints and principles we espouse or reject. . . . *I write in part out of a conviction that constitutional choices, whatever else their character, must be made as fundamental choices of principle, not as instrumental calculations of utility, or as pseudo-scientific calibrations of social cost against social benefit . . . in which the 'costs' . . . are supposedly 'balanced' against the 'benefits' . . . My reply to this grim metamorphosis of constitutional argument . . . is not to propose an alternative method. . . My reply is to question all formulas as concealing the constitutional choices that we must make — and that we cannot responsibly pretend to derive by any neutral technique.*

Laurence Tribe *Constitutional Choices*

1.1 Introduction

Writing an introduction to this four-volume, 76 chapter treatise — *Constitutional Law of South Africa* — is akin to writing a Baedeker for the city of Venice. Coherent as the four volumes may appear on a bookshelf, the contents of this work — like the many twisting streets, hidden canals, cul de sacs and charms of that isle — cannot be captured in the short space we have allotted ourselves. We have, therefore, set ourselves two limited tasks. The first is to explain the method behind this work and what it hopes to achieve. The second is to say something about how *Constitutional Law of South Africa* connects to the text of the Final Constitution, the jurisprudence of our courts, and the basic principles that animate our constitutional democracy.

1.2 On the methodology of *Constitutional Law of South Africa*

No single account of South African constitutional law could explain either the content of our Constitution, the legislation promulgated by Parliament or the jurisprudence of our courts. *Constitutional Law of South Africa* certainly never set itself such a Herculean task. But let's say it had. The rapid speed at which South African

constitutional law has developed — from the coming into force of the Interim Constitution in 1994, the advent of the Final Constitution in 1997, and the subsequent jurisprudence that has flowed from both these documents — would have defied such an effort.

While this work follows — self-consciously — a maximalist approach to constitutional law, the fact that *Constitutional Law of South Africa* is a multi-authored work means that any attempt to fit all 76 chapters within a single analytic rubric

OS 06-08, ch1-p2

would likewise have proved impossible.¹ That said, the maximalism and the anti-reductive approach associated with Tribe's *American Constitutional Law* has determined what we — as the editors — have asked of all our authors.

The first thing that we ask of them is that they take the text of the Final Constitution, the reasoning of cases, the political institutions that govern us, the fellow academics who contribute to their understanding, and a whole range of other quotidian academic considerations — like logic and research — seriously.² Within these parameters, we have been able to give the best South African and international legal academics the freedom to write about the area (or areas) of constitutional law doctrine that most interests them. What we may have lost through this approach in overarching coherence, we hope to have made up in discrete,

¹See William Brennan 'Reason, Passion and "The Progress of the Law"' (1988) 10 *Cardozo Law Review* 3. In speaking about 19th century treatises, Brennan wrote: 'The goal of the treatise — to classify reported cases into objective and determinative categories of legal principle — appealed to the positivist minds of the late-nineteenth century . . . Through classification of subjects, it sought to show that law proceeds not from will but from reason. Through its "black letter" presentation of supposed "general principles" of law it sought to suppress all controversy over policy which promoting the comforting ideal of a logical, symmetrical and, most importantly, inexorable system of law.' Conspicuously absent from the treatises was any narrative voice. The earliest treatises contain no commentary whatsoever, and even in later editions authors eschewed personal commentary on the cases and principles. The absence of commentary was consistent with, and no doubt helped to reinforce, the nineteenth-century conception of law as something that judges discovered but did not help define.' *Ibid.* It should be obvious that a treatise with over 50 authors defies the earlier efforts of treatises to systematize the law. Indeed, Brennan and the editors share, amongst other things, the belief that law's progress is contingent upon a happy marriage of reason, passion and multiple perspectives. See also Albie Sachs 'A Gentle Provocation: A Reply to Stu Woolman' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 37, 39.

²We know, for example, that the correct reading of a founding provision may turn on the placement of a comma — and that a bad outcome may flow from an errant reading of a preposition. On the importance of a comma for understanding the meaning of 'democracy' in our Constitution, see Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10. On the importance of a misinterpretation of a proposition — 'of' in *Kaunda* — for the extraterritorial application of the Bill of Rights, see Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

detailed, theoretically sophisticated chapters that provide some insight into the problems thrown up by South Africa's basic law.

A second goal that we set for all of our authors is that they write chapters that succeed in making greater sense of the system of constitutional law within which we operate. In the best of all possible worlds, the authors would — after engaging the text of the Final Constitution, the reasoning of cases, and the contributions of fellow academics in the field — produce a full blown 'theory' about the subject matter of their chapter. Again, such an expectation is subject to three strong limitations. The first limitation is that some subjects — for a variety of reasons — do not lend themselves to detailed accounts of the black letter law (for there may be none), good faith reconstructions of the black letter law (because such a good faith reconstruction is defeated by the black letter law) and preferred readings of the Final Constitution (because there are few, if any, grounds for dispute

OS 06-08, ch1-p3

over the basic law's meaning).³ The second limitation flows from the fact that many authors may not be inclined to offer a 'deep' account of their subject matter. The third limitation is that quite a number of chapters offer accounts of technical or procedural aspects of constitutional law that neither admit nor warrant a grand theory: a statement of the law as it stands is more than service enough to our readers.⁴ As editors, we have imposed a baseline 'standard' for the chapters without dictating a template that all the chapters must follow.

That said, our push for maximalism — and our openness to giving each author a platform to say what she or he wishes — has led many of our authors to adopt the desired approach. As a result, over a third of the chapters are of monograph length and quality. Another third of the chapters offer rich accounts of their subject matter — detailed coverage of the black letter law and a good faith reconstruction of the law as it currently stands — while eschewing the academic predisposition to offer a 'grand' theory. The final third, we hope, say exactly what needs to be said, though they may appear 'thin' by comparison to the more ambitious chapters.

We would like to suggest that the richness of this book lies precisely in its democracy and pluralism — the multi-faceted picture of South African constitutional law that the work as a whole constructs. Step back, and much like one of Seurat's pointillist paintings, all of a sudden discrete dabs of paint begin to cohere and a fuller picture of South African constitutional law starts to emerge.

But perhaps the demand for even that level of coherence cannot be sustained by the many chapters in this work. Indeed, there are many instances where chapters overlap in subject matter and offer distinctly different pictures of their subjects. That sets up the strong democratic Whitmanian or cubist view of *Constitutional Law of*

³See, eg, Stu Woolman & Julie Soweto-Aullo 'The Commission for the Promotion and the Protection of the Rights of Cultural, Religious, and Linguistic Communities' (supra) at Chapter 24F (Authors opted for a sociological analysis of this Chapter Nine Institution because it had produced no decisions of note and because the fragility of the institution seemed to be its most compelling feature.)

⁴See, eg, Adrian Friedman 'Costs' (supra) at Chapter 6 (Advocate Friedman's chapter is the only one of its kind — as far as we know — and an invaluable guide to practitioners (and academics) who wish to understand how the awarding of costs works in constitutional matters.)

South Africa. We consider that a virtue of this work. For, by setting our authors free to write as they like over the past seven years, we have had no expectation that they would agree with us or other authors in the book. For example, 'The Rule of Law, Legality and the Supremacy of the Constitution' (Michelman) covers terrain explored in some detail in 'Jurisdiction' (Seedorf). Read both. The conclusions that they draw from the text, the case law and secondary sources are not entirely at odds. However, they do engage in deep, well-articulated, and respectful rational disagreement. Or take the more subject

OS 06-08, ch1-p4

specific chapters on the 'President and the National Executive' (Murray & Stacey), the 'National Legislative Authority' (Budlender), 'Provincial Executive Authority' (Murray & Ampofo-Anti), 'Provincial Legislative Authority' (Madlingozi & Woolman), 'Local Government' (Steytler & De Visser), 'Legislative Competence' (Bronstein), 'Conflicts' (Bronstein), 'Co-operative Government' (Woolman, Roux & Bekink), 'Democracy' (Roux) and 'Public Finance' (Kriel & Monadjem). While there may be little disagreement on how the case law ought to be read, there are more than marginal differences between the authors about how the powers of our democratic institutions ought to be understood and whether various provisions regarding the allocation of political power in the Final Constitution require a progressive, liberal or conservative reading. Similar kinds of disagreements (between Albertyn, Bishop, Klaaren, Schutte, Soweto-Aullo, White and Woolman) take place in the chapters on the Chapter Nine Institutions

As one might expect, the chapters on the Bill of Rights create even more opportunity for 'dust-ups' — though they are never pitched in that manner. The chapters on Freedom of Association, Dignity, Education and Community Rights (Woolman), and their reliance upon a pretty thick understanding of involuntary associations and the need to protect sources of social capital stand in tension with the unremittingly egalitarian line taken in the chapter on 'Equality' (Albertyn & Goldblatt). The chapters on Socio-Economic Rights are penned by some of the best South African legal academics writing today. Here you'll find a commitment to a thick reasonableness test grounded in dignity (Liebenberg) set off against another chapter's strong philosophical arguments in favour of a minimum core (Bilchitz). Moreover, we benefit equally from the 'Food' chapter's discussion (Brand) on how the State's FC s 7(2) duty to protect, to promote and to fulfil fundamental rights influences our understanding of FC ss 26 and 27, and the 'Housing' chapter's account of the dynamic relationship between constitutional housing law and government housing policy during the past ten years (McLean).

Even the most 'mechanical' sections produce important disagreements. Monograph length chapters on 'Application' (Woolman) and 'Limitations' (Woolman & Botha) bracket an equally lengthy treatment of 'Interpretation' (Du Plessis). However, the normative (and structural) framework of shared constitutional interpretation and experimental constitutionalism that underlies both 'Application' and 'Limitations' sits somewhat uneasily with the predisposition towards subsidiarity in 'Interpretation'.

Who is right? As far as we are concerned, no one author in *Constitutional Law of South Africa* has written a single chapter that lies beyond the most basic strictures of coherence or plausibility. *Constitutional Law of South Africa* is large; it contains multitudes; and it may — on occasion — contradict itself. But like a cubist painting, the subject depicted will be all the more interesting for the alternative perspectives that different authors offer our readers.

1.3 On the relationship between *Constitutional Law of South Africa* and the Final Constitution

As we have already noted, many chapters in this work, and some of the best articles in South African constitutional law jurisprudence, aspire to be maximalist. What we mean by that term should not be misunderstood. The maximalist chapters are not designed to exhaust the entire interpretative space that a constitutional provision or norm creates. Rather our understanding of maximalism is that, where possible, and where the author is so inclined, the chapters ought to provide fairly full-blown accounts of the case law as it stands, a good faith reconstruction of the law, a critique where the good faith reconstruction itself lacks coherence and a preferred reading where the critique calls for one.⁵

The 'call' for maximalism — for substantive reasoning, but no specific form of substantive reasoning itself — is hardly new. Various authors have pressed for various forms of maximalism since the Interim Constitution came into being. Etienne Mureinik's 'A Bridge to Where' continues to remind us that the mere authoritative pronouncements of the courts, or Parliament or the President, are not good enough.⁶ We are always entitled to good, compelling reasons for government action: and it is, in fact, a constitutional obligation of government to persuade us of the rectitude of

5A good faith reconstruction can mean a number of things. First, it can be as simple as pulling together a diverse set of cases that fall within the scope of a particular constitutional provision and demonstrating how — in the absence of any express 'theory' provided by the courts — the author's reconstruction holds that body of law together. That is, in fact, a task undertaken by most academics and practitioners as a matter of course. (In a treatise, one might expect more explanation as to how a brace of cases are held together than one would find in heads of argument.) Second, it may mean something more: in the face of thinly reasoned judgments, academics may be required to 'fill in the gaps' in order to provide an account of what a particular constitutional provision is designed to do. This exercise, to be meaningful, must begin with the premise that the Court is (generally) right about its findings. It falls then, to the honest interpreter to 'struggle' with the texts in order to make them meaningful (in its truest sense) to ordinary readers. See Frank Michelman 'On the Uses of Interpretive Charity: Some Notes From Abroad on Application, Avoidance, Equality, and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1 ('Charity'). Professor Michelman's influence on the writing of many chapters in this work can be traced to his instructions regarding what a good faith reconstruction is, and how the principle of interpretive charity forces a particular kind of discipline on the interpreter. Between the good faith reconstruction and a preferred reading, our authors hope to do more than provide aesthetically pleasing designs of how law ought to appear. These thought projects are intended to stand some test of time.

6Etienne Mureinik 'A Bridge to Where?' (1994) 10 *SAJHR* 31, 32 ('If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification — a culture in which every exercise of public power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defense of its decisions, not the fear inspired by the force at its command.')

its responses to various social needs and problems.⁷ Indeed, the demand for reasons — good reasons — explains why we

OS 06-08, ch1-p6

have a just administrative action clause — as well as the Promotion of Access to Justice Act (PAJA)⁸— and why we have justiciable socio-economic rights.⁹

Karl Klare's 'Legal Culture and Transformative Constitutionalism' picks up where Mureinik left off.¹⁰ In particular, Klare focuses on alternative institutional arrangements that 'can be used to include the interests of people who find it difficult

⁷See FC s 7(2); Mureinik (supra) at 32. This vision has been endorsed by the Constitutional Court on a number of occasions. See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 156; *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25; *Pharmaceutical Manufacturers Association of SA & Another: in re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 85.

⁸Act 1 of 2000.

⁹See Etienne Mureinik 'Beyond a Charter of Luxuries: Socio-Economic Rights in the Constitution' (1992) 8 *SAJHR* 464. Between the Act and FC s 33, one exhausts many, if not quite all, of the public law disputes brought to court. See Jonathan Klaaren & Glenn Pennfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008); Cora Hoexter *Administrative Law in South Africa* (2007) Chapter 63. However, Professor Mureinik's most significant contribution to the creation of a government of law, and not a government of men, was his staunch defence of the common-law principle of legality. See Etienne Mureinik 'Reconsidering Review: Participation and Accountability' in Hugh Corder (ed) *Administrative Law Reform* (1993) 35, 38-39. For Professor Mureinik, legality — and the kind of robust review he advocated — is desirable because it makes government more responsive to the people, and because it 'fosters the justification of decisions' which, in turn, 'can be used to include the interests of people who find it difficult to make use of the participatory process.' *Ibid* at 42. Legality or the rule of law doctrine is now one of the most important features of South African constitutional law. The best articulation of the legality principle or the rule of law doctrine occurs in *Pharmaceutical Manufacturers*: 'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.' See *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('*Pharmaceutical Manufacturers*') at para 44. See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('*Fedsure*'); Frank Michelman 'The Rule of Law Doctrine, the Legality Principle and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11, 11-38. See also Frank Michelman 'Constitutional Supremacy and Appellate Jurisdiction in South Africa' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 33; Justice Kate O'Regan 'On the Reach of the Constitution and the Nature of Constitutional Jurisdiction: A Reply to Frank Michelman' in S Woolman & M Bishop (eds) *Constitutional Conversations*

to make use of the participatory [or political] process'.¹¹ This new institutionalism lies at the heart of his post-liberal order. In a new South African social democratic state, Klare's judiciary would advance the 'progressive agenda' made manifest in our Final Constitution through greater transparency and thicker justifications for the reasoning that underlies the courts' decisions'.¹² However, it is one thing to 'call for substantive reasoning' in constitutional adjudication. It is

OS 06-08, ch1-p7

quite another to provide a 'theory' that would require our courts to offer substantive arguments grounded in first principles.¹³ Klare offers no such theory.¹⁴

Alfred Cockrell's 'Rainbow Jurisprudence' captures the critical difference between 'a call' for transformative adjudication and the actual delivery of substantive reasons for decisions.¹⁵ Unlike the anti-positivists or anti-formalists who preceded him,¹⁶ Cockrell speaks the language of rules and does not for a moment deny their efficacy. What he wants, however, is greater space for the substantive reasoning that justifies the decision in a case and any rule that might be applied to (or arise from) the case. (And that, for starters, is what *Constitutional Law of South Africa* does — or attempts to do — when our courts do not.)

But what have these views to do with the decision-making process of the Constitutional Court? The commitment to rules had been thought to obscure from view the ugly, inhumane substantive reasons that served to uphold the racist apartheid regime. (That rather outré belief reflects a rather odd reification of law — in the South African legal academy — in light of the palpable facts on the ground during life under apartheid.) If one could get behind the rules, so the anti-formalists argued, then one might have a better chance at securing the kinds of substantive reasoning that would vouchsafe the humane treatment of the majority of South Africa's citizens in its courts.

(2008) 51.

10 (1998) 14 *SAJHR* 148.

11 In reading some of the initial judgments of the Constitutional Court, Klare saw some reason for concern. As evidence for such concern, he begins with a quote from *S v Makwanyane*: 'Our function is to interpret the text of the Constitution as it stands. Accordingly, whatever our personal views on this fraught subject might be, our response must be a purely legal one.' 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 349.

12 *Ibid* at 152. It is fair to say that the vast majority of South African constitutional scholars shared (and still share) this vision, and that quite a few had already put that conception into words. See, eg, Stu Woolman & Dennis Davis 'The Last Laugh: Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions' (1996) 12 *SAJHR* 361.

13 See Theunis Roux 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?' Paper presented at *Conference on Transformative Constitutionalism after 10 Years* Stellenbosch University (8 August 2008).

14 In fairness to Professor Klare, he had been asked by the *South African Journal on Human Rights* to author a tribute to the late Professor Mureinik. That tribute takes the form of a serious attempt to honour his friend and extend his work. Professor Klare can hardly be faulted for not offering a full blown theory: it was simply not his brief.

Thus, when the Constitutional Court first alighted upon the plethora of 'values' to be found in the Bill of Rights and the Interim Constitution as a whole, it saw an opportunity to liberate itself from the formalism that marked apartheid and to

engage in the substantive reasoning that had long been blocked in our judiciary. Cockrell expected such a response. However, the results bore out only half his expectations. The Interim Constitution, and its interpretation by the Court, led to a 'paradigm shift with profound implications'. That is, the Court eschewed unjustified rule-making and the formalism associated with it. Still, the cup was but half-full. 'The most striking feature of the record of the first year of the Constitutional Court', writes Cockrell, '. . . has been the absence of a rigorous jurisprudence of substantive reasoning.'¹⁷ What we were given instead, he continues, is a quasi-theory so lacking in substance that he proposed to call it 'rainbow jurisprudence':

We have as much chance of finding genuine instruction about substantive reasoning in the wishy-washy pronouncements as we have in touching a rainbow. Second: it is a feature of these statements . . . that they seem intent on denying deep conflict in the realm of substantive reasons. My point is that substantive reasons are difficult reasons; they require hard choices to be made between moral or political values which are inherently contestable and over which rational people will disagree.¹⁸

Cockrell then goes on to note that it would be one thing if the language of rainbow jurisprudence were a 'decoy', 'a cover for some theory that is actually doing the work'.¹⁹ That there is no deep theory, Cockrell contends, emerges from a statement of Sachs J where he acknowledged that 'we will frequently be unable to escape making difficult value judgments, where . . . logic and precedent are of limited assistance.'²⁰ Cockrell dissects this statement with characteristic aplomb: since logic and precedent are of limited assistance and rainbow jurisprudence is no decoy for

15 Alfred Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1. Cockrell's offering retains its freshness more than 13 years on, because Cockrell, with his usual perspicacity, saw in the 1995 term's jurisprudence troubling ways of approaching both the constitutional text, and the resolution of disputes before the Court, that remain quite evident in the Court's rulings today. Professor Cockrell begins his piece by traversing several themes: (1) the Court's aversion to rules; (2) The sub-optimality of rules; (3) the Court's preference to speak in values. Cockrell is not entirely averse to rule-making. He rues the formalists' beholdenness to rules, in the first instance, because rules will almost always be over-inclusive and under-inclusive. *Ibid* at 5-6 citing Frederick Schauer *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991) 102. But he then notes that such is the purpose of rules. They convey (often desirable) substantive reasoning and preclude decision-makers from taking matters into their own hands. Or: they take certain considerations off the table because previous decision makers have decided that such considerations should not be the subject of debate or play a role in the outcome of disputes. He concurs, therefore, with Frederick Schauer that rules often preclude a decision-maker from getting to the substantive reasons behind the rules. By blocking the use of substantive-reasoning to arrive at better, more appropriate outcomes with respect to the dispute before a court, rules sometimes promote suboptimal outcomes. Cockrell (*supra*) at 6 citing PS Atiyah & Robert Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions* (1987) 21.

16 See John Dugard 'The Judicial Process, Positivism and Civil Liberty (1971) 88 *SALJ* 181.

17 Cockrell (*supra*) at 10.

18 *Ibid* at 11.

19 *Ibid* at 12.

some underlying deeper normative theory, what we are witnessing is a Court averse — in a sizeable number of cases — to the kind of substantive reasoning that would give the Constitution meaningful content.²¹

Twelve years down the road, Cockrell's words still resonate profoundly.²² What is now clear from the Court's intervening jurisprudence is that it will employ a term of art designed to offer the illusion of substantive reasoning, but fail to make the necessary effort to give that term of art substantive content. We are talking here about the Court's regular invocation of the German Federal Constitutional Court's notion of an 'objective, normative value system'. Unlike the German Federal Constitutional Court, however, the Constitutional Court of South Africa has done little to delineate its extension.²³ Even prior to the use of the phrase in

OS 06-08, ch1-p9

Carmichele v Minister of Safety and Security,²⁴ the Constitutional Court had demonstrated little interest in giving the kind of content to statements about

20 *Coetzee v Government of the RSA* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) at para 46.

21 Cockrell acknowledges such exceptions. See, eg, *Ferreira v Levin NO* 1996 (1) SA 984 (CC), 1996 (4) BCLR 1 (CC).

22 See Stu Woolman 'The Amazing, Vanishing Bill Rights' (2007) 124 *SALJ* 762.

23 The Constitutional Court recognizes that there are any number of notionally different approaches one could take when constitutionally pruning the bramble bush that is the South African legal system. However, there is, the Court says, only one true way: '[I]t is within the matrix of . . . [the Final Constitution's] objective normative value system that the common law must be developed.' See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at para 54. See also *S v Thebus* 2003 (6) SA 505 (CC), 2003 (2) SACR 319 (CC), 2003 (10) BCLR 1100 (CC) at para 27. See also *Phumelela Gaming and Leisure Ltd v Gründlingh & Others* 2006 (8) BCLR 883 (CC) at paras 25-29. What this term of art means in South Africa remains unclear. For the clearest exposition of the phrase's meaning, and one entirely ignored by the courts and most academics, see Andre Van Der Walt 'Transformative Constitutionalism and the Development of South African Property Law: Parts 1 & 2' (2005) *TSAR* 655 and (2006) *TSAR* 1. But see *Geldenhuys v Minister of Safety and Security* 2002 (4) SA 719 (C), 728. Davis J's analysis suggests that the South African usage reflects a modernist response to post-modern anxiety about how memory and power turn law into hotly contested politics. The appeal to universally shared values ostensibly blunts the force of assertions that the Court actually plays politics or that its judgments reflect controversial ethical positions. That said, the phrase currently adds nothing to constitutional analysis. In *Transnet Ltd T/A Metrorail v Rail Commuters Action Group*, the High Court, the Supreme Court of Appeal, and the Constitutional Court all differed over the content of the civic morality — the objective normative value system — enshrined in the Final Constitution. In *Rail Commuter Action Group v Transnet Ltd T/A Metrorail*, the High Court had found that the Final Constitution imposed a legal duty on Transnet to ensure that all railway commuters — regardless of race or class — enjoyed a certain level of physical safety, 2003 (5) SA 518 (C), 573, 2003 (3) BCLR 288 (C). While recognizing the 'objective' moral content of our basic law, the Supreme Court of Appeal rejected the proposition that our constitutionally mandated morality demanded that a legal duty of care be imposed on Transnet in order to remedy the endemic violence visited upon commuters from historically disadvantaged communities, 2003 (6) SA 349 (SCA), 2003 (12) BCLR 1363 (SCA). When called upon to give the content to the 'objective, normative value system' that would dispose of this matter, the Constitutional Court reversed the Supreme Court of Appeal's decision. *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC). The three decisions offer three obviously different understandings of how the phrase 'objective, normative, value system' determines the meaning of 'freedom and security of the person' and the outcome of a case.

24 *Carmichele* (supra) at para 54 citing 39 *BVerfGE* 1, 41.

'values' that might help us better understand the Final Constitution.²⁵ In *Makwanyane*, for example, the Court appears to use the 'values' enshrined in the Interim Constitution to do away with capital punishment.²⁶ However, upon a closer reading of the 11 judgments in this case, one notes that no judgment really takes up the Constitution's invitation to engage in substantive moral, legal or political reasoning. Instead, as Roux notes:

the common themes running through the eleven judgments are: (1) reference to foreign law as a substitute for the consideration of moral values; (2) rejection of the relevance of public

OS 06-08, ch1-p10

opinion to the case as a way of defining the Court's institutional function in the new constitutional order; and (3) the use of the indigenous value of *ubuntu* to forge a link between the constitutional value system and social values.²⁷

The Constitutional Court's reticence regarding the meaning of 'an objective normative value system' — or its outright refusal to offer more than thin justifications in a significant number of its decisions — is particularly difficult to reconcile with recent extra-curial remarks of Chief Justice Pius Langa:

This approach to adjudication requires an acceptance of the politics of law. There is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked. At the same time, transformative adjudication requires judges to acknowledge the effect of what has been referred to elsewhere as the 'personal, intellectual, moral or intellectual preconceptions' on their decision-making. We all enter any decision with our own baggage, both on technical legal issues and on broader social issues. While the policy under apartheid legal culture was to deny these influences on decision-making, our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions. This is vital if respect for court decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given.²⁸

25 See Theunis Roux 'Morality, Law and Society: The Constitutional Value System and Social Values in South Africa' Paper presented at the 16th Annual Conference on 'The Individual vs the State' Panel on Constitutional Axiology, or is There Anything Behind/Above the Constitution? Central European University, Budapest, Hungary (June 7-8, 2008)('Values')(Manuscript on file with authors). However, as Roux notes, that does not mean that values have failed to feature, quite significantly, as background norms in a range of cases that have drawn upon various sections of FC s 1. He offers the following examples: the prisoners' right to vote, *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC), 2004 (5) BCLR (CC) at para 21, the allocation of fishing rights, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 73, the state's duty to provide an effective system for the protection of property rights, *President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) paras 48 and 51, and the requirements for registration in municipal elections, *African Christian Democratic Party v Electoral Commission & Others* 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC). See also Theunis Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* — (forthcoming).

26 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).

27 Roux 'Values' (supra) at 23.

28 (2006) 17 *Stellenbosch LR* 351.

It is hard to square the Chief Justice's acknowledgement of the politics of law, and the need to provide substantive reasons for a decision, with the Court's preference for couching outcomes in terms of vague reference to the values found in the Final Constitution or to the objective normative value system said to animate the basic law. And thus, 13 years of jurisprudence later, we return to the problem first identified by Cockrell.

What, then, should one make of the Court's lack of interest in making fine distinctions between the right and the good when it regularly relies upon a phrase that requires such distinctions? Perhaps what animates this rhetorical move is no more than a jurisdictional question: namely, how does a specialized constitutional court ensure that the basic law transforms the manner in which courts with plenary jurisdiction dispose of ordinary disputes?²⁹ Or perhaps this flight from substance 'is necessary to the Court's overall objective of winning public support for its role in the South African political system'.³⁰ Whatever the reason, a discernible gap clearly exists between what the Court understands its constitutional mandate to be — to model rational discourse and engage in substantive reasoning — and what it actually does.

OS 06-08, ch1-p11

In our view, *Constitutional Law of South Africa* steps in and fills that gap. It answers Mureinik, Klare, Cockrell and Langa's call for substantive reasoning by, at least momentarily, filling in the 'aporia' in the basic law. Let us be clear: we do not mean to overstate the contribution of *Constitutional Law of South Africa*. Its 76 chapters and 4 800 or so pages remain a commentary about what the courts, the legislatures, the executive and other institutional actors have already said about our basic law. Our authors engage that work: They do not seek to supplant it. However, where substantive reasoning is missing from the case law, from legislation or executive rule-making, then it falls to the many authors of this work to provide good faith reconstructions — doctrines full of substantive reasons — that 'fill the gap'.

Again, there will be differences amongst the authors about how to fill the gap. The initial surface inclination of some would appear to be toward critique;³¹ while others seem more inclined towards charity.³² But those distinctions reflect no more than the play of surfaces. What does bind the authors of *Constitutional Law of South Africa* together is that we claim no 'neutral method' of constitutional interpretation that

29 See *S v Thebus* 2003 (6) SA 505 (CC), 2003 (2) SACR 319 (CC), 2003 (10) BCLR 1100 (CC). An 'objective normative value system' grounded in the 'objectives' of FC s 39(2) has the potential to expand dramatically the jurisdiction of the Constitutional Court. Despite the *Thebus* Court's admission that FC s 39(2) 'does not specify what triggers the need to develop the common law or in which circumstances the development of the common law is justified', the failure of any court to adhere to FC s 39(2)'s obligation to develop the common law in light of the 'notional' demands of the Final Constitution's 'objective normative value system' risks reversal by our highest constitutional tribunal. See Woolman 'Application' (supra) at Chapter 31, § 31.4(e)(ii)(b); Seedorf 'Jurisdiction' (supra) at Chapter 4, § 4.3(d) and 4.3(h)(i)(aa); Michelman 'Rule of Law' (supra) at Chapter 11, § 11.2.

30 See Roux 'Values' (supra) at 1.

31 See Stu Woolman 'The Amazing, Vanishing Bill Rights' (2007) 124 *SALJ* 762.

32 See Frank Michelman 'On the Uses of Interpretive Charity: Some Notes From Abroad on Application, Avoidance, Equality, and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1.

makes hard choices for us. The eschewal of neutral methods — or a single reductive theory of interpretation — further ensures that there is no 'flight from substance' in *Constitutional Law of South Africa*. As Frank Michelman suggests, the provision of greater heft to a body of case law that is sometimes thinly justified and often under-theorized lies at the heart of the legal theorist's calling. In reflecting upon Tribe's refusal to offer a single theory of interpretation or a neutral method of judicial review that ends all quests for the justification of a constitutional order, Michelman writes: 'When . . . Tribe speaks . . . of the futility of the search for . . . legitimacy, he cannot mean that the question is one we may ever permit ourselves to stop asking.'³³ Such a never-ending quest for the substantive reasons, the full-blown doctrines and 'the fundamental principles' that undergird our basic law is the leitmotif for *Constitutional Law of South Africa* and its orchestra of authors.³⁴

33 Frank Michelman 'The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory' (2008) 42 *Tulsa Law Review* 797. See also Wil Waluchow 'Constitutions as Living Trees: An Idiot Defends' (2005) 18 *Canadian Journal of Law and Jurisprudence* 204, 208 (Waluchow suggests that we view Constitutions, Bill of Rights, and Charters as 'representing a mixture of only very modest precommitment[s] combined with a considerable measure of humility. . . Far from being based on the (unwarranted) assumption that we have the right answers to the controversial issues of political morality arising . . . [as constitutional] challenges, the alternative conception stems from the exact opposite: from a recognition that we do *not* have all the answers, and that we are better off designing our political and legal institutions in ways which are sensitive to this feature of our predicament.')

34 It is a never-ending quest at a very practical level. Having taken six years to write *Constitutional Law of South Africa 2nd Edition* (2002–2008), we have been forced to begin its revision immediately upon completion in order to keep pace with the changes in the law and our own points of view.