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LEGAL REALISM, TRANSFORMATION AND THE LEGACY OF DUGARD

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ABSTRACT

John Dugard's courageous inaugural lecture drew on American realism, modern natural law and South Africa's liberal tradition to argue that judges might better serve the ends of justice if they recognised their creative role, and replaced their subconscious prejudices and preferences with liberal values of the common law. This turn to legal realism to understand South Africa law was a significant intellectual development. However, its implications remain undeveloped within the theory and practice of law in South Africa. (Critical)legal realism raises significant questions about the nature of law and its role in sustaining public and private power. The lessons of legal realism in relation to the dominant legal method (formalism) and the nature of private law were not really taken up by lawyers and legal academics under apartheid. This meant that South African lawyers were ill-prepared for the challenges of transformation in the legal system, especially in relation to legal method, the form and content of private law and the development of law under ss 8 and 39(2) of the Constitution. Moreover, while progressive lawyers have always recognised the political nature of law – especially under apartheid – this has not always translated into a deeper understanding of how the form and content of our democratic Constitution is contested, and how law and politics seep into one another.

I Introduction

In 1971, John Dugard delivered his inaugural address at the University of the Witwatersrand.[1] South Africa had began to experience, from the 1960s, one of the most brutal periods of apartheid authoritarianism in which the 90-day detention morphed into indefinite detention without trial, political opposition was largely criminalised and political resistance had been driven underground. Attempts to challenge the 90- and 180-day detention laws in court were met by 'executive-minded' judges, who deferred to the will of Parliament expressed in and through these laws.

For Dugard, the problem was two-fold. It lay firstly in the judiciary's narrow approach to its interpretive function, and a limited positivist notion of law as 'the command of the sovereign' in which the duty of courts was to 'interpret the will of parliament law "but not to reason why"'. Secondly, it was located in a 'rigid distinction between law and morality' and a consequent 'rejection of legal values' as important in the judicial process.[2]

In seeking a coherent means by which to challenge the dominant judicial approach, he wrote:

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1 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *SALJ* 181.

2 Ibid 187.

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> I would suggest the following two antidotes. First, a frank recognition on the part of the judiciary that their role is not purely mechanical, that while interpreting a statute they may create new law by filling in gaps in the statute; and that in dispute between individual and State subconscious personal preferences are an ever-present hazard. Secondly, what is needed is a conscious determination by judges to be guided by accepted traditional legal values in the exercise of their limited legislative function.[3]

Drawing on American realism, modern natural law and a long, if fragile, liberal legal tradition in South Africa, Dugard argued that the judiciary might better serve the ends of justice if judges recognised their creative role, and replaced their subconscious prejudices and preferences ('inarticulate premises') with 'accepted traditional legal values' designed to 'foster … the well-being and free development of the individual'.[4] In Dugard's view such 'enlightened legal values' were part of our Roman-Dutch legal tradition,[5] were drawn on in statutory interpretation and had always informed the development of the common law. In his later book, *Human Rights and the South African Legal Order*,[6] a devastating evaluation of South Africa's apartheid laws against human rights standards, Dugard expressed the wish that such a 'realist-cum-value-oriented approach' might also revive an interest in the Bill of Rights in South Africa – thus shifting our legal system from reliance on an increasingly impoverished notion of the rule of law to a clear reliance on substantive standards of justice.[7]

For Dugard, this 'plea for a new approach to law' was irretrievably tied to the future legitimacy of the legal system:

> If faith is to be restored in the South African legal system while there is yet time sweeping changes will need to be made to the entire edifice of our law. A new Constitution with a Bill of Rights to provide legal safeguards for individual liberty, anti-discrimination laws to educate an unenlightened and prejudiced people, and a concerned and courageous legal profession committed to the enforcement of human rights are the very minimum requirements.[8]

Dugard's realist emphasis on the judicial role, his liberal insistence on the place of the higher values of natural law in our legal system and his call for a Bill of Rights were insightful and particularly courageous at that bleak time.[9]

3 Ibid 195.
4 Ibid 197.
5 In *Human Rights and the SA Legal Order* (1978) 30, he listed them as 'freedom from arbitrary arrest and detention without trial, freedom from cruel and unusual punishment; the right to legal representation when the individual's liberty is at stake; the right to be heard in one's own defence before one's liberty is curtailed; equality before the law; freedom or speech and literary expression; freedom of the press, freedom of assembly and freedom'.
6 Ibid.
7 Ibid chapter 12.
8 Ibid 402.
9 Ironically in the same volume of the *SALJ* which published Dugard 's lecture, Ellison Kahn wrote a tribute to the retiring Chief Justice, LC Steyn (1971) 88 *SALJ* 1 which concluded 'the premature retirement of Mr Justice Steyn has been greatly regretted in all legal circles … may I say that academics join their ranks and at the same time voice an appreciation of the invaluable and ineffaceable contribution of the retired Chief Justice to the understanding and development of our law and the preservation of its underlying principle' (7-8). It was Steyn who, in stark contrast to Dugard, said: 'It would be an evil day for the administration of justice if our courts should deviate from the well-recognised tradition of giving politics as wide a berth as their work permits. It is one thing, and a very proper one, for a judge to point out defects in a statute or to draw attention to results, in

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Drawing on the work and ideas of Dugard, and other progressive lawyers, this article examines their resonance under apartheid and their relevance today.

We suggest that Dugard correctly identified the fundamental nature of law and the implications for adjudication, that law is neither neutral nor value free and that judges have considerable law-making power. These insights were as important under apartheid as they are today, raising significant questions about the nature of law and its role in sustaining public and private power. Taking Dugard's attention to realism as a starting point, we briefly set out, in part II, the main tenets and implications of critical legal realism for understanding law in South Africa. We then examine, in part III, how the lessons of legal realism in relation to the dominant legal method (formalism) and the nature of private law were never really taken up by progressive lawyers in South Africa under apartheid, although there was often a clear understanding of the contested and political nature of law. In part IV we explore how the failure to appreciate legal realism left us ill-prepared for the challenges of transformation in the legal system, especially in relation to legal method, the form and content of private law and the development of law under ss 8 and 39(2) of the Constitution of the Republic of South African, 1996.[10] We also examine how the ascendancy of a liberal democratic Constitution has enabled important democratic protections and transformative judgments. However, both the form and content of democracy remains contested.

In part V we conclude that the ongoing failure to examine and address the implications of critical legal realism has limited our ability to engage in the transformation of the legal system under constitutional democracy.

II (Critical) Legal Realism

Legal realism, and its later manifestation as critical legal realism, encompasses two overlapping critiques of law. An 'internal' critique considers legal doctrine and attempts to expose the contradictions inherent within (liberal) legal thought. Here the focus is on legal method/adjudication, as well as on the false distinctions between public and private law. The 'external' critique considers the place of law in politics and society, linked to a wider political project of societal transformation.[11]

Legal realism was predominantly a challenge to formalism, to the idea that the legal process involves the mechanical application of rules, that judges

all probability not anticipated or appreciated, which work hardship or injustice, ie. to matters which Parliament might presumably want to rectify. It is a very different thing, and in my view a very improper one, for a judge to rush into a political storm or into the wake of it, in a strongly contested matter in which Parliament has, by way of firm deliberate policy, knowing what it is about and in the valid exercise of its legislative powers, laid down what is to be done. In such a matter, it is not our function to write an indignant codicil to the will of Parliament' (ibid 7).

10 Although we do not discuss this in our article, the development of customary law would also be subject to value-based development.

11 On this distinction, see WB le Roux & K van Marle 'Critical Legal Studies' in C Roederer & D Moellendorf *Jurisprudence* (2004) chapter 10.

decide cases 'on the basis of distinctly legal rules and reasons that justify a unique result',[12] and that law and rights are discovered, not made.

The realist challenge to the formalist faith in the objective existence of 'rights' was based upon an examination of key legal categories in order to reveal their inherent incoherence. Realism also targeted the idea of a clear division in law between the public and private sphere. Thus, realists argued that rights are not a pre-existing fact of nature to be found 'out there', but are a function of the decision-making process itself. For a realist, what a court cites as the justification for the decision, being the existence of a right, only serves to describe the result of the case. Rights are then seen as an artificial function of the very decision-making process itself as opposed to a reflection of an objective reality. As such, rights are inherently political, regardless of their source in legislation or judgments, and express a particular set of preferences and interests. As Elizabeth Mensch writes:

> Realism had effectively undermined the fundamental premises of legal liberalism, particularly the crucial distinction between legislation (subjective exercise of will) and adjudication (objective exercise of reason). Inescapably, it had also suggested that the whole liberal world view of (private) rights and (public) sovereignty mediated by the rule of law was only a mirage, a pretty fantasy that masked the reality of economic and political power.[13]

This is particularly well illustrated by the realist critique of private law. Robert Hale, for example, argued that state enforcement of a contract represented, in a similar fashion to property, a delegation of a sovereign power of the state. Coercion was central 'to every freely' chosen exchange, in that it was a coercive power that was inherent in each person's legally protected threat to withhold what is owned; the right to withhold created the right to force submission to one's own terms. On this line of argument, there was no inner core of a free, autonomous bargaining process to be protected from extraneous state action. The coercion of the state was inextricably linked to the nature of the contractual relationship;[14] in that the latter depended upon the former. Realists also launched a sustained attack on the legitimacy of the market, emphasising that the market, and the law which underpinned it, was neither natural nor neutral but rather a social construct which could only be judged in terms of its social consequences. Morton Horwitz writes thus:

> A picture of a decentralised, comprehensive and self regulating market lay at the core of efforts to define the public–private distinction. Just as the analogist division between public and private law presupposed that voluntary relations of market exchange would usually make coercive regulatory interventions unnecessary, the more general separation of activities into public and private spheres was also driven by a conception of a neutral, a political and above all self regulating economic realm.[15]

12 S Hoctor 'Legal Realism' in Roederer & Moellendorff ibid 158, 158. See also E Mensch 'The History of Mainstream Legal Thought' in D Kairys (ed) *The Politics of Law; a Progressive Critique* 3 ed (1998).

13 Mensch ibid 35.

14 See R Hale 'Bargaining Duress and Economic Liberty' (1943) 43 *Columbia LR* 603.

15 M Horwitz *The Transformation of American Law 1870 – 1960* (1992) 206.

In reviewing the importance of the realist school of jurisprudence, Horwitz claims that '[t]he most important legacy of Realism was its challenge to the orthodox claim that legal thought was separate and autonomous from moral and political discourse'.[16]

Critical realists, drawing on a range of left thinking from Marx to Marcuse, built upon realist foundations. Examining legal doctrine in a number of legal fields, sourced both in public and private law, they exposed the liberal myth of the neutrality of law, illustrating how the underlying norms and values of legal system are inherently contested, requiring those who seek to change the law to engage the form, content and application of these values.[17] Critical realists thus reject the idea of universal values, or principles that are immanent within law, as well as any notion of legal neutrality. It is here that the divide between critical realists and Dugard becomes apparent for Dugard placed more faith in liberal values and in the possibility of neutrality of legal principle which comported with a universal narrative of the intrinsic nature and quality of law.

In general, the insistence on law as imbued with power meant that it could never be viewed as neutral because it always sustained particular interests. As an internal critique of law, critical realism mandates a close engagement with all legal doctrine and forms of adjudication to reveal the norms and interests that lie hidden beneath, especially in relation to private power. As an external critique, critical legal realism reminds us of the relationship between law and politics, and that law is often (to use Rick Abel's phrase) 'politics by other means'. Critical realism suggests that law does not stand outside of society or politics and that law and politics are always inter-related. While courts provide a forum for claiming rights and resolving disputes, and in some instances are effective in securing rights for the powerless – they are neither free nor immune from politics. This raises important questions about the nature and place of law in society, the extent to which it can be used to resolve political, economic or social disputes, and the way and extent to which law – or the rule of law – acts as a constraint on politics/political struggles.

For progressive lawyers who seek to use the law in challenging the status quo, critical realism suggests that a strategic engagement with law requires (1) recognition of the politics of law within both public and private spheres; and (2) the need to engage both rules and the underlying values/norms/assumptions (which might be hidden or visible) to change/subvert/dislodge the rule. As discussed above, this has particular implications for how we understand the 'transformation' of the legal system in post-apartheid South Africa.

Below, we explore the extent to which the implications of critical legal realism were taken up under apartheid and democracy.

16 Horwitz ibid 199–200.

17 This is comprehensively set out in*The Politics of Law*, edited by Kairys (note 12 above), which ran into three editions and covered a range of law, from family law to contract, delict, labour law, property law and most components of what was traditionally classified as public law.

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III Law Under Apartheid

For Dugard, realism exposed the creative nature of judicial law-making in the public sphere, revealing the executive bias of judges drawn from a small white elite and conservative in their loyalty to the status quo.[18]

External critiques of law as reflective of a dominant political ideology followed upon the work of Dugard. The assumption that judges operated in conditions which were relatively free of restrictions placed upon them in their performance of their role as an arm of state and that, as an 'independent institution' they did not represent an important legitimating mechanism for the values of the ruling elite, was subjected to vigorous examination by a number of commentators.[19] But beyond Dugard's work in demonstrating a judicial bias in favour of apartheid laws, which his use of realism enabled, an internal critique of law that exposed the political nature of all law, both public and private, was generally absent. The only major contribution that interrogated the way the judiciary mounted a political project to shape private law, in particular, was the magisterial analysis by Edwin Cameron of the role of Chief Justice LC Steyn, although even here there was no apparent recourse to realist theory.[20]

Notwithstanding its far reaching implications for a progressive jurisprudence in the public and private domains, realism scarcely made an impact within the legal academy[21] and even less was its effect within the practising profession. The dearth of academic and strategic practical thinking about the implications of Dugard's insights on legal formalism meant that academics and litigators tended to work within the parameters of formalism, rather than seeking to challenge and subvert it. In turn, this was shaped by the nature of law and politics at the time, which offered limited opportunities for legal manoeuvre.

Dugard's use of natural law, however, was adopted by scholars who followed upon him in the academy. Most eminent were Ettienne Mureinik and David Dyzenhaus who, following the work of Ronald Dworkin, argued that law, properly so called, contains certain universal features. Thus, for example, Dyzenhaus argued, that in contrast to legal positivists, even Parliament was 'a judicial body which controls the political sovereign's will by seeing to it that his commands are in accordance with the law, which is assumed, to be the overarching natural law expressive of a Divine Will'.[22] Thus, by following the

18 Dugard (note 5 above) 380.

19 See, for example, E Cameron 'Legal Chauvinism, Executive-Mindedness and Justice – LC Steyn's Contribution Impact on South African Law' (1982) 99 *SALJ* 38; H Corder & D Davis 'Law and Social Practice: An Introduction' in H Corder (ed) *Essays in Law and Social Practice* (1998) chapter 1; R Suttner 'The Ideological Role of the Judiciary in South Africa' (1984) 13 *Philosophical Papers* 28.

20 Cameron ibid.

21 On the other hand, Dugard's criticism of positivism generated a heated academic debate. See C Forsyth & J Schiller 'The Judicial Process, Positivism and Civil Liberty II' (1981) 98 *SALJ* 218; J Dugard 'Some Realism about the Judicial Process and Positivism – A Reply' (1981) 98 *SALJ* 372; D Dyzenhaus 'Positivism and Validity' (1983) 100 *SALJ* 454; DM Davis 'Positivism and the Judicial Function' (1985) 102 *SALJ* 103.

22 D Dyzenhaus *Hard Cases In Wicked Legal Systems; South African Law In Perspective Of Legal Philosophy* (1991) 263. See also E Mureinik 'Dworkin and Apartheid' in Corder (note 19 above).

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principles of the common law – fairness, reasonableness and equality – the legislature would be promoting the immanent qualities of law as would judges when they sought to interpret legislation in accordance with these principles.

In his book, *Hard Cases in Wicked Legal Systems*, Dyzenhaus classified South African judges into plain fact and common law adjudicators. The majority of the judiciary throughout the apartheid period were plain fact judges who were committed to the primacy of the sovereign. In this the South African plain fact judge drew his intellectual justification from positivism for as Dyzenhaus observed:

> [i]f the positivists aim to persuade judges who adopt a distinction between law as it is and law as it ought to be not to 'focus' on the 'facts' on which plain fact approach fastens, they owe such judges a doctrine of judicial responsibility which will show that other considerations are legally compelling. But positivists are especially disabled from offering such a doctrine since the conception of law which they share with plain fact judges is supported by the Hobbesian ideal which squeezes out any space for discretion.[23]

Thus, following Dugard, Dyzenhaus located the almost slavish deference of the majority of the judiciary to the authoritarian and racist legislature in the pervasive influence of legal positivism. A minority of judges followed a common law approach thereby understanding that the common law was not merely a set of rules but of 'controlling principles that both explain and justify the explicit law and that make up the context in which judges must try to interpret the data relevant to the question raised by the case'.[24]

This body of work played an important, if implicit, role in legal struggles particularly during the 1980s. In the absence of justiciable rights and substantive powers of review, legal struggles against apartheid tended to focus on statutory interpretation and administrative review. The dominant strategies adopted in courts were designed to lay claim to those core legal values, which Dugard had suggested were immanent within the South African legal system. In this way, a reluctant judiciary could be persuaded that, in the case of ambiguity of legislation, recourse to liberal legal values could be applied to mitigate the draconian effects of apartheid legislation.

That strategy depended ultimately on the claim that law was neutral, that these values were not of a political nature, but lay at the heart of the South African legal system, shaped as it was by liberal principles of the Roman-Dutch common law. It further depended on the idea that judges performed a neutral, adjudicative activity when they applied these principles. This strategic approach was far removed from the realist imperative of deconstruction of neutral legal rules as outlined in this article.

Of course, legal struggles against apartheid largely focused on the interpretation of apartheid legislation within the wider political struggle for democracy. In such an intensely political context, the progressive legal strategy was carefully calibrated. Whether by accident or design, a call to values under a neutral system was an effective strategy. The dominant South

23 Dyzenhaus ibid 246–7.
24 Dyzenhaus ibid 62.

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African legal culture based upon formalism provided opportunities for litigators to win legal victories against the state. By way of recourse to a formalist legal model and a literal approach to legal materials, anti-apartheid lawyers sought to persuade the judiciary toward results, which would have the effect of 'delaying and perhaps frustrating an executive bent upon change'. The lawyers understood that a strategy of interpretation, which was more sensitive to giving effect to the purpose of policy of legislation ultimately 'was one that facilitated executive ambitions'.[25]

When anti-apartheid lawyers failed to persuade the courts of the weight of these arguments, judges freed themselves of the grip of literalism and engaged with increasing generosity towards the intentions of the legislature. The results were then represented by an enthusiastic embrace of racist legislation as well as legislation designed to promote the security concerns of the state.[26] Holmes JA's disgraceful dictum in *Lockhart* is perniciously illustrative:

> The Group Areas Act; represent a colossal social experiment and a long term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities. Whether all this will ultimately prove to be for the common weal of all the inhabitants, is not for the Court to decide. But in that connection reference might perhaps be made to the Group Areas Development Act, 69 of 1955, sec. 12 of which empowers the Board to develop group areas and to assist persons to acquire or hire immovable property in such areas. The question before this Court is the purely legal one whether this piece of legislation impliedly authorises, towards the attainment of its goal, the more immediate and foreseeable discriminatory results complained of in this case. In my view, for the reason which I have given, it manifestly does.[27]

By contrast, where lawyers were able to persuade the court towards a literal interpretation buttressed, on occasion, by recourse to so-called 'neutral values' which were embedded in the legal system, surprising results ensued which helped to curb the excesses of the apartheid regime. This was luminously evident, for example in the two key challenges against the pass laws, the cases of *Komani* and *Rikhoto*.[28] These cases did not sweep away the efforts of imposed segregation, poverty, unemployment, lack of education and housing, but two central pillars of influx control policy were demolished: wives could now stay in urban areas with their husbands who enjoyed rights of residence and workers who, were in substance, employed in urban areas could now win rights of

25 M Chanock *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (2001) 518.

26 See in this connection *Minister of Interior v Lockhart* 1961 (2) SA 587 (A); *Rossouw v Sachs* 1964 (2) SA 551 (A). See also *Omar v Min of Law and Order* 1987 (3) SA 859 (A); *Staatspresident v UDF* 1988 (4) SA 830 (A); *Staatspresident v Release Mandela Campaign* 1988 (4) SA 903 (A). For a discussion of these emergency cases, see N Haysom & C Plaskett 'The War against Law: Judicial Activism and the Appellate Division' (1988) 4 *SAJHR* 303.

27 Ibid 602 D-G.

28 *Komani No v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A); *Oos Randse Administrasie Raad v Rokhoto* 1983 (3) SA 595 (A). Both of these cases are carefully analysed in Richard Abel's magisterial text *Politics by Other Means: Law in the Struggle against Apartheid 1980–1994* (1995) chapter 3.

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permanent residence. However, such cases were few and increasingly limited to minority judgments.[29]

If progressive lawyers deliberately sought to keep politics out of law (thus preserving its neutrality), they did not keep politics out of the legal arena. On the contrary, criminal trials, for example, often provide a site of ideological struggle in which the use of politics was carefully strategised. While the trial itself was usually fought on issues of proof, evidence and credibility, the alternative version of facts presented to the court might speak an alternative political truth – the liberation of South Africa from apartheid. If and when the stage of sentencing was reached, more evidence of the liberation struggle etc was introduced, both for political ends (to educate the public and supporters) and for legal ends (in the hope that a sympathetic judge would accept this in mitigation of sentence).[30]

There were thus manifest strategic reasons to treat the law as neutral within the public sphere. Recourse to the political implications of critical realism was hardly conducive to persuading a recalcitrant judiciary to gainsay repressive legislation; Dworkin was a far more strategically useful litigation ally then Llewellyn or even Duncan Kennedy!

But it would be wrong to view the approaches of progressive litigators purely in terms of a pragmatic recourse to liberal legal theory. As noted, an external critique of law which operated in parallel to the liberal critique of apartheid law was generated by academics and legal activists schooled in Marxism and more radical studies. For these progressive lawyers and academics, the ideas of British historian, EP Thompson, and his image of standing on 'a very narrow ledge'[31] between liberalism and Marxism had particular resonance. Thompson's research on the rule of law in 18th century England led him to conclude that law was, on the one hand, class-bound and served to reproduce, both instrumentally and ideologically, particular class interests and power, but in doing so it imposed inhibitions on the actions of the rulers and even resulted in government defeats in court. For Thompson, 'the regulation and the reconciliation of conflict through the rule of law [wa]s a cultural achievement of universal significance'.[32] In South Africa, although law under apartheid manifestly served the race and class based interest of the rulers, the possibility that the rule of law, however weak the adherence thereto in South Africa, could impose effective inhibitions upon power and hence bolster the defence of the citizen from arbitrary power afforded some protection particularly to the powerless.[33]

29 Arguably the most important minority judgment was that of Friedman J (as he then was) in *Minister of Law and Order v Omar* 1986 (3) SA 306 (C). See also Van Heerden JA in *Staatspresident v United Democratic Front* (note 26 above).

30 One outstanding exception to this is the case of the 'Delmas Four' portrayed in Peter Harris' book *In A Different Time* (2008). See also C Albertyn 'A Critical Analysis of Political Trials in South Africa: 1948–1988' unpublished PhD thesis, Cambridge University (1992).

31 EP Thompson *Whigs and Hunters* (1975) 260.

32 Ibid 265.

33 Ibid 266.

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It was, inter alia, the belief – from both a liberal and more radical perspective – that law, to a greater or lesser extent, enabled challenges to power, coupled with the emergence of public interest centres such as the Centre for Applied Legal Studies and the Legal Resources Centre, that enabled the 'explosion' of legal struggles in the 1980s. Dugard's role in this was pivotal in that his leadership allowed lawyers who embraced the position best encapsulated by the work of EP Thompson, such as Halton Cheadle and Nicholas Haysom, to flourish and develop a range of strategic legal challenges to the apartheid regime. These were particularly successful in the area of labour law,[34] and in holding the state to account over assaults in detention.[35]

Under apartheid, law continued to offer a range of spaces for challenging the state and for advancing the struggle for democracy, Often defensive, rather than proactive – and sometimes ideological rather than real – these legal struggles also kept alive an idea so central to Dugard's thinking – that law could serve justice. The success of the strategy is summarised by Abel in his review of the legal struggles of the 1980s:

> The legal battles described in this book did not win the war by themselves. But they empowered the masses while offering some protection from state retaliation. They strengthened the commitment of the anti-apartheid movement to legality – and also, perhaps that of the post-apartheid policy.[36]

The same strategic considerations did not inevitably apply to private law which was not subjected to the same searching external critique as public law. Private law continued to illustrate the endemic nature of formalism within the legal system. Legal formalism sought to separate the legal from the political, both institutionally and in terms of a justification for legal adjudication. As Zimmerman and Visser noted, lawyers in South Africa 'tend to create law primarily with reference to the intellectual concerns raised in statutory documents, authoritative court decisions and learned treatises'.[37] The classic remark of Kessler was hardly likely to produce a positive judicial reaction among judges manning the apartheid ramparts:

> [A]pparently the realization of deep going antinomies in the structure of our system of contracts is too painful an experience to be permitted to rise to the full level of our consciousness.[38]

Family law is illustrative of this approach, particularly the extent of discrimination and stereotyping which saturated the common law. Thus, it was only

34 For an analysis of labour litigation during the 1980s, see C Thompson 'Trade Unions using the Law' in Corder (note 19 above).

35 For example, the application brought by Wendy Orr against the state to prevent the torture of detainees in the Eastern Cape. See Abel (note 28 above) and D Davis & M le Roux *Precedent & Possibility: the (ab)use of Law in South Africa* (2009) for discussions of this case. See also the creative use of the Anton Pillar order to search and seize instruments of torture at a police station discussed in C Plasket 'Anton Pillar Orders and Police Stations (*Ex Parte Mashini* EPD 19 December 1985 Case No 2000/85, unreported)' (1986) 2 *SAJHR* 67.

36 Abel (note 28 above) 549.

37 R Zimmerman & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 6. See also K Klare 'Legal Culture and Transformative Constitution' (1998) 14 *SAJHR* 168.

38 F Kessler 'Contracts of Adhesion – Some Thoughts about Freedom of Contract' 1943 (4) *Columbia LR* 629, 633.

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in 1993 that legislation repealed the common law rule that gave the husband marital power 'over the person and property of his wife' and abolished any marital power that a husband may have had immediately prior to the coming into operation of the Act which repealed the common law provision.[39] Similarly, it took until 1993 for legislation to abolish the marital rape exemption, which provided that a husband could not be convicted of the rape of his wife.

In summary, progressive legal strategies during the late 70s and 80s extracted some victories from a brutal regime, but the strategies employed were hardly conducive to theoretical developments of law along the lines of the internal realist critique, the absence of which, we argue, has negatively affected the development of law. Whereas the theoretical debates developed during the apartheid years had created a sophisticated external critique of law, the use of a liberal legal discourse to claw legal victories from a recalcitrant state simultaneously had reinforced legal formalism. Consequently there was a marked absence of engagement with the conceptual or ideological underpinnings of legal doctrine at the very moment that the Constitution demanded the transformation of the entire legal system.

To anticipate the argument, the challenge to transform the legal system after 1994 required a sustained internal critique of all existing rules within the South African legal system in order to commence the further work of development of the existing system in the image of the principles contained within the Constitution. It is to this issue that we now turn.

IV The Dawn of Democracy

Political negotiations in the Convention for a Democratic South Africa (Codesa) and the Multi-Party Talks, and later the Constitutional Assembly, saw the emergence of a democratic South African Constitution[40] in which the familiar features of liberal democracy existed alongside a more substantive commitment to socio-economic rights and social justice. Of this Constitution, Chanock notes wryly that:

> [a] form of liberalism, which has failed over the whole period of the South African state to attract significant support from any segment of the population, found its political philosophy entrenched in the heart of a new Constitution.[41]

The Constitution's foundational principles of human dignity, equality and freedom,[42] its justiable Bill of Rights and its strong commitment to an independent judiciary and the rule of law constituted important antidotes to an

39 The General Law Fourth Amendment Act 132 of 1993. See J Sinclair *The Law of Marriage* (1996) 129.

40 Act 200 of 1993 (the interim Constitution) Act 108 of 1996.

41 M Chanock 'A Post-Calvinist Catechism or a Post-Communist Manifesto? Intersecting Narratives in the South African Bill of Rights Debate' in P Alston (ed) *Promoting Human Rights Through Bill of Rights Comparative Perspectives* (1999) chapter 10, 392–3.

42 Dignity was not afforded a prominent textual position in the interim Constitution (note 1 above), which spoke of 'equality, freedom … ', but was fully recognised in its jurisprudence (*S v Makwanyane* 1995 (3) SA 391 (CC)). It was included in the trio of foundational values in the final Constitution.

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unjust past in which law had been abused for the power and interests of a white minority. Dugard had realised this in 1977 when he noted that a Bill of Rights would enable a post-apartheid government to restore respect for the law and legal institutions in circumstances where these had been used as instruments of oppression.[43] In the 1990s, many human rights lawyers and academics welcomed the liberal values of the new Constitution, some seeing these as part of a universal narrative and the institutionalisation of individual liberties and values that, as Dugard had argued, had always been immanent in our legal system.[44] By contrast, realism – for which Dugard had advocated so strongly in the 1970s – suggests a more contingent and contested approach to the Constitution, its liberal democratic form and its substantive content. It is an approach that has remained undeveloped in South African jurisprudence and academia. We argue that it remains a significant legacy of Dugard's work in the post-apartheid era and explore some of its implications below.

In this section, we focus on two areas of critical legal realism: legal method and adjudication, and the political and contested nature of law. Firstly, we briefly consider the importance of critical legal realism to constitutional adjudication, especially in relation to private law. Secondly, we consider the Constitution as a contested document, with a number of competing interpretations of its provisions, and thus of its reach and its impact on our democracy and society. We explore the uncertain nature of its transformative potential in relation to these contested interpretations and explore the 'answers' that might be suggested by a critical legal realist approach.

(a) Critical realism, contestation and transformation

The establishment of constitutional democracy placed the Bill of Rights at the centre of legal and political power in South Africa. According to s 7(1) of the Constitution, it is the 'cornerstone of democracy' in South Africa, enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom. As the supreme law and the grundnorm against which all law and conduct would be measured,[45] the Constitution represented a political and legal sea change from the past. Its provisions enjoined the legal community to transform the very core of the apartheid legal system. Both public and private power – statutory, common and customary law – were subject to its provisions. Thus s 8 states that the Constitution binds all public actors, applies to all law and binds private actors under certain circumstances. Section 39(1)(a) requires a court, tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom when interpreting the Bill of Rights, and s 39(2) provides further that every court, tribunal or forum must promote the spirit, purport and objects of

43 Dugard (note 5 above).
44 Mureinik (note 22 above); D Meyerson *Rights Unlimited* (1997).
45 Section 2 of the Constitution.

the Bill of Rights when interpreting any legislation, and when developing the common law or customary law.

Early in the creation of its constitutional jurisprudence, the Constitutional Court recognised the transformative challenge posed by the Constitution. Mohamed DP (as he then was) proclaimed in the Court's first case, *S v Makwanyane*:[46]

> The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist authoritarian, insular repressive and a vigorous identification of a commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution … What the Constitution expressly aspires to do is to provide a transition from those grossly unacceptable features of the past to a conspicuously contrasting 'future founded on a recognition of human rights; democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'.

The Constitutional Court has consistently endorsed the Constitution's place within a broader transformative project:

> Both the Constitutional Court and other courts view the Constitution as transformative. The previous Chief Justice has written that a 'commitment … to transform our society … lies at the heart of the new constitutional order'. It is clear that the notion of transformation has played and will play a vital role in interpreting the Constitution.[47]

Yet, as has become clear over the past 15 years, the nature and scope of this transformation is by no means uncontested. While there might be a rhetorical consensus on the idea of transformation, its constitutional meaning, content and effects have been contested in the Court's jurisprudence, within academia and more broadly within politics. This contestation is particularly visible where the text seems to nudge the Constitution beyond the traditional boundaries of liberal democracy. It includes the extent to which the Constitution governs private power and the common law;[48] the interpretation and application of socio-economic rights;[49] the role and capacity of courts in addressing the structural inequalities of our society, including economic redistribution;[50]

46 1995 (3) SA 391 (CC) para 262.

47 P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Univ LR* 351.

48 For differing views see for example, D Bhana 'The Law of Contract and the Constitution: *Napier v Barkhuizen*' (2007) 124 *SALJ* 269; D Bhana & M Pieterse 'Towards A Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited' (2005) 122 *SALJ* 865; A Fagan 'The Confusion of K' (2009) 126 *SALJ* 156.

49 D Bilchitz *Poverty and Fundamental Rights* (2007); K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009); S Liebenberg *Socio Economic Rights under a Transformative Constitution* (2010).

50 C Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR* 253; E Bonthuys 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' (2008) 20 *Canadian J of Women and the Law* 1; B Goldblatt & S Liebenberg 'Achieving Substantive Equality in South Africa: The Relationship between Equality and Socio-Economic Rights' (2007) 23 *SAJHR* 335; H Botha 'Equality, Plurality and Structural Power' (2009) 25 *SAJHR* 1.

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and the proper relationship between courts and other state institutions in adjudicating rights (remedial and separation of powers issues).[51]

This contestation partly emerges (directly or indirectly) from different understandings of the role and content of the Constitution's underlying normative system. It thus relates to different legal methods (largely represented by formalism or realism) and different interpretations of constitutional values.

As stated by the Constitutional Court in *Carmichele v Minister for Safety and Security*:[52] 'Our constitution is not merely a formal document regulating public power. It also embodies, like the German constitution an objective, normative value system'.[53] While we can all agree that the Constitution was designed to enable and support a democratic society, we might disagree on the content and prioritisation of its values thus giving rise to different ideas about the nature of our democracy and the change that is required to attain a more just society. For example, an egalitarian approach might emphasise a society committed to social justice and self realisation, entailing profound socio-economic redistribution and change, while a more liberty-based approach might be more concerned with protecting individual freedoms against state incursion, placing brakes on the state's capacity for remedial action.[54] This also entails different views of the reach of the Constitution. While a more egalitarian perspective would support greater constitutional scrutiny of private power, a stronger reliance on liberty would draw a bright line between the private sphere and public scrutiny.

Of course, one could argue that this contestation is misplaced – that the Constitution's normative value system speaks to a set of universal values that prescribe limited answers. These are also the values that, in Dugard's critique of the apartheid legal order, were immanent in our legal heritage and common law. Following a Dworkinian approach, implicit in Dugard's work, and explicit in the work of writers such as Dyzenhaus and Mureinik, contemporary liberal academics suggest that the constitutional value system contains universal liberal principles that shape a 'correct' answer to a legal problem.[55] While pragmatic concerns might influence a judicial decision, a single, principled, reasoned decision based on the Constitution's liberal value system is possible and desirable. An eloquent example of this approach is to be found in a critique of the critical realist approach by Theunis Roux.[56] In criticising Klare's adoption of the critical method to the South African Constitution, Roux contends that by contrast to implementing a transformative constitutional project, Dworkin's Hercules would find the best interpretation of the Bill of Rights

51 McLean (note 48 above); K Hofmeyr 'A Central Case Analysis of Constitutional Remedial Power' (2008) 125 *SALJ* 521.

52 2001 (4) SA 938 (CC).

53 Ibid para 54.

54 We discuss some of these approaches in more detail below. See text accompanying footnotes 90-103.

55 Mureinik (note 22 above); Dyzenhaus (note 22 above); Meyerson (note 44 above).

56 T Roux 'Transformative Constitutionalism and the best Interpretation of the South African Constitution: Distinction without a Difference' (2009) 20 *Stellenbosch Univ LR* 258.

by devising, a progressive political theory along Rawlsian lines to support this 'best based' interpretation. The distinction between Roux's indigenous Hercules and Klare's critical judge does not rest on the classification of the interpretative task, but on an acceptance or denial that adjudication based on a text depends on divining a universal narrative, which claim to 'truth' trumps all other interpretative offerings, no matter the political, social, economical or ideological context in which the adjudication takes place.

A critical realist approach, steeped in the close relationship between law and politics and a more contingent approach to law and values, admits to a more uncertain outcome. Although the text places some constraints on interpretation, the values and principles of the Constitution, viewed through a judge's particular political preferences, can give rise to divergent responses. Constitutional adjudication thus requires a legal method that enables judges to define the particular vision enshrined in the Constitution's normative value system, and to interpret its provisions through an explicit engagement with its values. In so far as there are competing interpretations, the act of choosing one over another is a political one that has implications for how we understand the transformation of legal system – and thus of society.

The Constitution's transformative purpose, as well as the centrality of its values demonstrated in ss 7(1), 39(1) and 39(2), constitute an invitation for a realist critique and realist methods to be introduced into the adjudicative process. The starting point for this is to identify the Constitution's normative vision. In our view, the best interpretation of the Constitution and its transformative impulse is an egalitarian one. This requires, inter alia, the achievement of socio-economic equality and individual well-being through the dismantling of structures of exclusion and oppression and the development of a caring and inclusive society.[57] Legal transformation should thus be directed at the eradication, inter alia, of past racist and sexist practices that were deemed to be in conflict with this new normative conception of justice, together with the development of principles which would in turn serve as a guide to[58] the atonement of the egalitarian society prefigured in the Constitution.[59]

This requires legal interpreters to engage in a process of deconstruction of the values which were embedded in the legal system inherited from apartheid. The challenge is to understand that the previous legal system, even when purged of apartheid, racism and sexism, may not have constituted a sufficient basis on which to ground a transformed society because the value-laden qualities of those laws remained in conflict with a new conception of justice. It also requires a substantive engagement with values in the process of legal reasoning.

57 See Klare (note 37 above).

58 See T Roux 'Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution of South African Law' (2004) 121 *SALJ* 466, 467.

59 See Klare (note 37 above) 151–6.

Embracing the methods of critical legal realism[60] is a challenge within a legal community steeped in formalism. As other writers have pointed out, the courts' ability to overcome the limits of legal formalism, to develop a more detailed and conscious understanding of constitutional principles and values in interpreting the Constitution, and to engage in 'substantive legal reasoning' has been limited.[61] We illustrate this briefly in relation to the ambivalent approach to the common law.

In his 1971 article, John Dugard proclaimed the liberal roots of the common law sourced in the Roman-Dutch tradition. It is important to note that Dugard was not concerned with private law, based on the common law but rather to divine 'obvious guiding principles' from Roman-Dutch law, principles such as freedom from arbitrary arrest, prohibition against cruel and inhuman punishment, equality before the law, freedom of assembly and movement, all of which principles were eroded by legislation passed by the apartheid government.[62] Within the constitutional context, we are concerned with something different: Common law as it anchors private law.

(b) Transformation and jurisprudence in private law

As discussed in part II above, realism was particularly concerned with the way in which political and economic power was sustained in and through private law. A deep legacy of colonialism, segregation and apartheid in South Africa meant that, although political power shifted to the former national liberation movement, the African National Congress (ANC), social and economic power remained predominantly in white hands. Hence there was a strong political impetus to ensure that the Constitution could address social and economic inequalities in the private sphere. The Court had interpreted the interim Constitution to limit it application to the private sphere (and to exclude the possibility of direct horizontal application).[63] As a result, the provisions of the 1996 Constitution were explicit on its application to private parties and the common law.[64]

However, judges and legal scholars have remained ambivalent about the Constitution's reach in respect of the common law. This is illustrated by Anton Fagan's recent critique[65] of the Constitutional Court's decision in *K v Minister of Safety and Security*,[66] and by the courts' approach to the law of contract.

60 We do not have the space to set these out in detail, nor is this the purpose of this article. For a detailed exposition of the application of the methods of legal realism in South Africa, see D Davis & K Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *SAJHR* forthcoming.

61 See, for example, A Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1; Roux (note 56 above); S Woolman 'The Amazing Vanishing Bill of Rights' (2007) 124 *SALJ* 762.

62 Dugard (note 1 above) 197.

63 *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).

64 Section 8(3) explicitly states that the Constitution is applicable to private persons, thus overturning the decision of *Du Plessis* ibid.

65 Fagan (note 48 above).

66 2005 (6) SA 419 (CC).

The crisp question for decision in *K* was whether the Minister of Safety and Security was vicariously liable for rapes which had been committed upon Ms K by three policemen who were on duty at the time. Whereas the Supreme Court of Appeal decided that there was no vicarious liability, the, Constitution Court differed. In essence, the Court found that even if an employee's intention in committing a *delict* was to promote his own interest, if the act was sufficiently closely connected to his employment, it could be held that the employee had acted in the course and scope of employment which would justify the finding of the imposition of liability on the employer.[67]

Fagan's disagreement with the substance of a decision on vicarious liability is not the direct concern of this article, save for his examination of the scope of s 39(2) of the Constitution and its application to the development of common law. Fagan attacks the approach of the Constitutional Court to s 39(2), namely that the provision obliges a court to develop an applicable rule of common law insofar as it does not accord with the values of the Constitution. Adopting a literal interpretation to s 39(2), Fagan contends that the section does not impose such an obligation on a court. The wording of the section insofar as it is relevant, is as follows: 'when developing the common law … every court …. must promote the spirit, purport and objects of the Bill of Rights'. Fagan argues:

> it should be clear that what s 39(2) explicitly does is to impose on all courts a conditional obligation to promote the values of the Bill of Rights – the condition being that the court is developing the common law. What the Constitutional Court in *K* took s 39(2) to imply, however, is that every court is under a conditional obligation to develop the common law – the condition being that doing so would promote the values of Constitution.[68]

This criticism amounts to the following: the Court has inverted the wording of s 39(2) which imposes on obligation to promote the values of the Bill of Rights when the court arrives at a decision to develop the common law. The section was not intended to impose an obligation on courts, in every encounter with the common law, to interrogate an applicable rule of common law through the lens of the Bills of Rights and thereafter make a decision to develop the applicable rule of common law.

It should, however, be apparent from the exposition of realism developed in this article that an engagement with the literal wording of s 39(2) as the sole basis for its analysis ignores the nature of the adjudicative process undertaken in a case involving the common law. The critical question for determination is the existence of the trigger which propels a court to develop the common law. Section 39(2) employs the words 'when a court develops the common law' but the wording does not answer the question as to the condition which precipitates a decision to develop the common law. In the pre-constitutional era, a court would claim that the common law required development because in its present form it was incongruent with the legal convictions of the com-

67 Ibid 436 B–E; 441 G–H; 442 B–C.
68 Fagan (note 48 above) 183.

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munity, hardly a precise term. Indeed the term is no more than a rhetorical tool to enable a court to justify its decision-making process.[69]

Once the Constitution was introduced, the normative underpinnings of the legal system, or to employ the older terminology, the legal convictions of the community, are to be found in the Constitution. How then is a court to determine whether a principle of common law is congruent with the legal convictions of the community as mediated through the values of the Constitution? The indicated adjudicative process would appear to run as follows: A court, faced with a set of facts together with an argument that a rule of common law must be applied to these facts, engages with the application of the prevailing law to the facts. It finds that the result thereof is incongruent with the legal convictions of the community, because the applicable rule promotes a value system which is no longer in accordance with these legal convictions. This exercise depends upon an initial enquiry that is the very kind of interrogation of the underlying assumptions of the common law rule as was advocated by the realist school of jurisprudence. However, in the constitutional era it is buttressed by s 39(2) of the Constitution. Moseneke DCJ expressed this approach as follows:

> It seems to me that the need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the 'objective normative value system' found in the Constitution.[70]

In other words, a realist approach to the application of s 39(2) would require an initial process of deconstruction of the values underpinning the applicable existing rule of common law as essential before a decision can be taken as to the necessity of a development of the relevant rule to render it congruent with the spirit, purport and objects of the Bill of Rights. Expressed differently, a court, confronted with a common law rule the application of which could be decisive of a case, if developed, would first consider whether the existing rule is congruent with the spirit, purport and objects of the common law by analysing the values promoted by the accepted formulation of the rule. If it finds that these values are incompatible with the principles promoted by the Bill of Rights, it may then decide to develop the common law in terms of these principles.

69 See, for example, Marais JA in *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) para 15: 'There are many areas of the law in which Courts have to make policy choices or choices which entail identifying prevailing societal values and applying them. But Courts are expected to be able to recognise the difference between a personal and possibly idiosyncratic preference as to what the community's conviction ought to be and the actually prevailing conviction of the community. Provided that Courts conscientiously bear the distinction in mind, little, if any, harm is likely to result'.

70 *S v Thebus* 2003 (6) SA 505 (CC) para 78.

The inability to engage in this process is revealed in a recent contribution to the debate about fairness in the South African law of contract.[71] Mr Justice Brand refers to a *dictum* of Cameron JA in *Brisley v Drotsky*[72] in which Judge Cameron found support for the principle of pacta sunt servanda in the constitutional values of dignity and freedom: 'Contractual autonomy is part of freedom … (and) shorn of its obscene excesses, contractual autonomy also informs the constitutional value of dignity'.[73] Judge Cameron thus held that an ability to contract can enhance self-respect and dignity.

Amazingly, although he concurred with Judge Cameron in *Brisley*, Judge Brand now appears to reject this approach, suggesting that as the values of dignity and freedom display 'a perplexing capacity to pull in several directions at the same time, they may accordingly fulfil very different roles'.[74] Thus constitutional values are not needed to underpin 'every rule of contract law'. We have employed the word 'amazing' deliberately, in that Brand's sweeping rejection of the normative framework of the Constitution in shaping of the values which underpin the law of contract in a constitutional democracy, as defined by the constitutional text, is a breathtaking insistence upon the universality and absolute truth of the pre-constitutional common law. To an extent, this approach is predicted on the idea of a 'brooding neutral omnipresence of common law' which does not require interference from alien influences as the Constitution. Brand concedes that it is not irrelevant whether a contractual provision is regarded as unreasonable, whether it be a negotiated term or forms part of a standard form contract nor can an unequal bargaining position between the parties be of no concern to a court.[75] But, instead of an interrogation of the underlying values of the law of contract and the development of the law so that it is congruent with constitutional values, Brand produces what he considers to be a more precise resolution of these concerns: recourse to public policy. As he writes:

> I do believe … that these and numerous other considerations can be accommodated under the rubric of public policy which has by now become firmly established as a mechanism of judicial control over contractual enforcement.[76]

He is forced to concede that 'the concept of public policy needs development and fine-tuning' but, for him, the advantages of the use of public policy is that it will allow a court 'to provide for the changing needs and values of the society by incremental change without creating wholesale, legal and commercial uncertainty'.[77]

We finally arrive at the crux of the problem. The law of contract and other parts of private law are to be immunised from constitutional scrutiny: legal

71 FDJ Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 *SALJ* 71.
72 2002 (4) SA 1 (SCA).
73 Ibid paras 93–4.
74 *Brisley* (note 72 above) 86.
75 Brand (note 71 above) 87.
76 Ibid.
77 Ibid 87–8.

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transformation stops at the door of the state. Our Constitution promotes nothing more than 'a night-watchmen' vision of the state in which private power is left to its own devices and the state enters this private realm at the peril of the economy. But the Constitution is a transformative instrument. It requires an examination of the past in order to move forward into a constitutional future. All law requires development in accordance with this value system. Practically, this would not involve a change to each and every rule of private law but, where the law requires development, so it must be developed. Thereafter a measure of certainty through precedent will continue to operate. To contend that, only by ignoring the values of the Constitution, can judges be left incrementally to change the law reveals two fundamental flaws, as viewed through the prism of realism. Firstly, the law as it presently exists is not neutral nor is it certain. The application of a rule to a new set of facts creates, at least in part, a new rule; a point made eloquently by Justice O'Regan in *K*.[78] Secondly, in a society committed to transformation judges are required to ensure that change takes place, albeit within an incremental paradigm. By its nature the adjudicative process will continue as in the past, through incremental change, on a case-by-case basis but within the imperative that the law complies with an articulated normative vision of the legal convictions of a constitutional community.

In 1971 Dugard advocated for a realist approach to adjudication, especially in adopting a conscious approach to the form and content of the values – the 'inarticulate premise' – that underpinned judicial decisions. His insight remains valid today. The fact of a value-based, supreme Constitution requires us to employ critical legal realism to interrogate the existing body of law and then to ensure that such law is congruent with the underlying values and principles of the legal system, now found in the Bill of Rights.[79] There are, of course, important examples of this approach in some decisions of the Constitutional Court and the Supreme Court of Appeal, especially in cases concerning the development of the common law of delict to enhance the obligation of the state to protect its citizens from violence.[80] Yet the approach that is explicit in the writing of Fagan and Brand, and that seeks to immunise at least part of the common law from constitutional scrutiny, remains prevalent.

A critical realist approach, however, takes us one step further than Dugard's 1971 work. Rather than point us in the direction of 'universal' liberal values

78 *K* (note 66 above) para 16.

79 We are aware of only two articles that have explicitly addressed the role of Critical Legal Studies for private law. See JW van Doren 'Critical Legal Studies and South Africa' (1989) 106 *SALJ* 648 (arguing for the use of CLS to subvert the Roman-Dutch private law bias and formalism in SA law) and A van Blerk 'Critical Legal Studies in South Africa' (1996) 113 *SALJ* 86 (RDL can stifle transformation as it presents existing social inequalities as natural and necessary). But see Davis & Klare (note 60 above).

80 *Carmichele* (note 51 above); *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v Min of Safety & Security* 2003 (1) SA 389 (SCA); *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC).

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(as Dugard does in his call to 'accepted traditional legal values'),[81] it requires us to recognise that values are contested and that different outcomes are possible. Thus even where courts recognise the importance of values, they need to engage with them fully, and to be explicit about this process and the justifications for value choices. All too often, courts avoid this task.

In *Barkhuizen v Napier*,[82] the Constitutional Court was required to determine whether a time limitation clause in a short-term insurance policy was constitutional. The Court concluded that this was a matter of public policy,[83] but that:

> [w]hat public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights.[84]

Despite that recognition, however, the Court failed to engage fully with the application of constitutional values, choosing to affirm contractual autonomy as a matter of freedom and dignity, and avoiding questions of equality and fairness in contractual bargaining.[85] This reluctance suggests a concern with 'interfering' with private commercial arrangements that is explicitly articulated by Brand, but is strongly rejected by critical legal realists who find the law to be present and active in the so-called private sphere. It also represents an indirect value choice of autonomy over equality or equity, whereas a critical realist approach mandates a more conscious engagement with this choice and its implications, and would push the court in a more egalitarian direction.

To take Dugard's call to realism seriously in the contemporary constitutional era requires, firstly, a revisioning of the classic public/private divide to ensure that we subject our entire legal system to constitutional scrutiny. Secondly, that we understand and engage the contested content of values in line with a clear vision of the Constitution's transformative purpose.

(c) Critical legal realism, law and politics

Critical legal realism rejects the notion that values constitute a predetermined universal narrative, thus pointing to their strongly contested nature in law and in politics. For critical scholars, law itself is not a closed, neutral set of rules and principles, but is deeply political. While it is capable of regulating and constraining state power – especially in its liberal democratic form – it is also irretrievably political, imbued with unequal power relations and sectional

81 Dugard's adoption of a universal liberal narrative in his critique of the apartheid legal order, was endorsed by many of apartheid's liberal critics. Mureinik (note 22 above); Dyzanhaus (note 22 above).

82 2007 (5) SA 323 (CC).

83 In doing so the Court rejected the idea that the Bill of Rights applied directly to the dispute. See Woolman (note 61 above).

84 Ibid para 29.

85 There is a wide literature on the failure of courts to engage constitutional values in contractual cases. See, for example, AJ Barnard 'A Different Way of Saying. On Stories, Text, the Critical Legal Argument for Contractual Justice and the Ethical Element of Contract in South Africa' (2005) 21 *SAJHR* 278; Bhana (note 48 above); Bhana & Pieterse (note 48 above); Woolman (note 61 above).

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interests, and often seeks to legitimise the unequal distribution of power, goods and resources.

The political nature of law has become more explicit over the past 20 years, with the expansion of a rule of law standard and human rights in the wake of neo-liberalism and globalisation. As a result, law and courts have increasingly become sites of struggle over access to power, goods and resources. John and Jean Comaroff write compellingly of this growing 'use of legal means for political and economic ends':[86]

> More and more are differences of **all** kinds being dealt with by means of law, whether they involve private freedoms or public resources, access to medical treatment or title to territory, cultural knowledge or civic authority, the physical and fiscal entitlements of rulers or the property, liberty and wellbeing of heir subjects, religious tolerance or ethnic aspiration … What once happened primarily in parliaments, street protests, and other political theatres now finds a new – or to be precise, a parallel, expanding – terrain of contestation.[87]

An understanding of the political nature of law reminds us that the achievement of a liberal democratic Constitution, with an independent judiciary, a justiciable Bill of Rights and commitment to the rule of law in South Africa was a contextual victory of liberalism and human rights at a particular historic moment. It emerged from a global context in which ideas of democratic liberalism and human rights were dominant,[88] and a national political context in which a commitment to rights and the rule of law came to serve the interests of competing parties and groups.[89] Born out of struggle and compromise, the Constitution has always carried the burden of competing political and legal ideas about 'the new South Africa'. Hence, the manner in which it is given texture and meaning, not only by the Constitutional Court, but also by other state institutions and by the people themselves, is important to shaping South Africa's future and its ability to forge a new and inclusive society – one that breaks down, rather than re-enacts, the divisions of the past.

In this section we consider some of the wider implications of critical legal realism for the nature of our constitutional democracy. We note some of the recurring and emergent tensions within constitutional jurisprudence that represent contesting legal and political interpretations of the Constitution and its transformative purpose. We also discuss the extent to which these limit, extend or challenge the Constitution's basic commitment to liberal democracy. Alert to the realist claim that law is both uncertain and irretrievably connected to politics, we question the extent to which the 'liberal consensus' of the early 1990s is challenged, as well as the extent to which the Constitution is able to frame and nurture transformation. We conclude that transformation needs to be shaped by the values that were agreed upon more than a decade ago, but that this does not constitute an inevitable liberal narrative imposed

86 *Ethnicity, Inc.* (2009) 55.

87 Ibid 55.

88 H Klug *Constituting Democracy. Law, Globalism and South Africa's Political Reconstruction* (2000).

89 Chanock (note 41 above); D Davis 'Deconstructing and Reconstructing the Argument for a Bill of Rights' in P Andrews & S Ellmann *The Post Apartheid Constitutions* (2001); Klug ibid.

from above. Rather, guided by explicit judgments of the Constitutional Court, these values need to form the basis of deliberative discussion within society and the state, in order to give shape and meaning to a new, open-ended and shared narrative.

(i) A contested Constitution

We have already noted the possibility of competing views of the Constitution and its transformational purpose. As critical realists would have us understand, the abstract values and principles of the Constitution ground contesting and contradictory legal arguments and world-views. Constitutional interpretations are not merely legal interpretations, but constitute different views of justice, of power and politics, of the nature, scope and pace of social and economic change and of the role of the courts in this. We suggest that a number of interpretations or perspectives have been visible within academic writing and constitutional jurisprudence. These do not necessarily form discreet 'models' and tend either to a more egalitarian or a more libertarian view of society, or to a liberal democratic centre that seeks to balance the two.

We – and others[90] – have argued for an egalitarian vision of the constitutional project, one that is concerned with social and material inequalities in our society, with redress and redistribution, and our capacity to overcome the deep divisions of our past. Former Chief Justice, Arthur Chaskalson, describes these as follows:

> In 1996 when the Constitutional Assembly adopted a Constitution for South Africa we were one of the most unequal societies in the world. We had recently emerged, almost miraculously, from a repressive and undemocratic legal order, and had embraced democracy. The past hung over us and profoundly affected the environment in which we were living. The great majority of our people had been the victims of a vicious system of racial discrimination and repression which had affected them deeply in almost all aspects of their lives. This was seen most obviously in the disparities of wealth and skills between those who had benefited from colonial rule and apartheid and those who had not. In the contrast between those with land, and the millions of landless people; between those with homes and the millions without access to adequate housing; between those living in comfort and the millions without access to adequate health facilities, clean water and electricity, between those with secure occupations and the millions who were unemployed or had limited employment opportunities.[91]

This social-democratic or egalitarian approach seeks to expand and push against the boundaries of the liberal democratic framework of the Constitution. Accepting the fundamental importance of a substantive notion of the rule of law, separation of powers, an independent judiciary and justiciable rights; egalitarians argue strongly for an interpretation and application of socio-

90 See for example, Klare (note 37 above); C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248; D Davis 'Adjudicating the Socio-economic Rights in the South African Constitution: Towards **'**deference lite**'**? (2006) 22 *SAJHR* 301; P de Vos '*Grootboom,* The Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR* 258; S Liebenberg (note 49 above).

91 'Equality as a Founding Value of the South African Constitution' Oliver Schreiner lecture, University of the Witwatersrand (February 2001).

economic rights and the equality right that enables meaningful standards for government accountability and effective remedies,[92] the application of the Constitution to private power relations, deepening ideas of participatory rather than representative democracy, and promoting alternative meanings for the Constitution's founding values that advance these ideas. The Court is enjoined to give values a specific meaning that enables effective socio-economic transformation, rather than a more abstract content that allows judges to avoid difficult cases.[93]

A commitment to this egalitarian vision is present in many of the Court's cases, especially those concerning equality and socio-economic rights and that emphasise the values of substantive equality, positive freedom and material notions of dignity.[94] The Court has generally endorsed the importance of overcoming the material inequalities of the past:

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.[95]

However, the Court's jurisprudence is not consistent in pursuing this egalitarian idea, and it has been limited by more libertarian and socially conservative elements in the Court's jurisprudence. This is present in a 'negative' sense in its equality jurisprudence in cases that prioritise libertarian notions of autonomy and choice,[96] and in cases that express a strong reluctance towards constitutional encroachment of a 'private sphere'.[97] However, it is also present in a positive sense in cases that affirm individual liberties against the state.

It is, however, a liberal narrative that resonates particularly strongly within the Court's jurisprudence – seeking to balance the polar tendencies of equality and liberty. It is present in cases that emphasise individual liberties (against the state), that reject status-based discrimination (and emphasise equal dignity) and that affirm judicial independence and the rule of law. Important here is the abolition of the death penalty,[98] the affirmation of the rights of accused persons

92 Bilchitz (note 49 above); Davis (note 90 above); Liebenberg (note 49 above).
93 De Vos (note 90 above); Albertyn & Goldblatt (note 90 above) (dignity and equality); Bilchitz (note 49 above) (reasonableness).
94 *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC); *Khosa v Minister for Social Development* 2004 (6) BCLR 569 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR (CC) paras 72–7. On socio-economic rights, see *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).
95 *Soobramoney v Minister of Health KwaZulu-Natal* 1998 (1) at 765 (CC) para 8.
96 *S v Jordan* 2002 (6) SA 642 (CC); *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).
97 See in particular Ackermann J and Kentridge AJ in *Du Plessis v De Klerk* (note 63 above).
98 *Makwanyane* (note 46 above).

and prisoners, and equality cases that acknowledge the equal status of outsider groups (gay and lesbians, non-citizens).[99]

There is little space to explore these issues in detail. That must remain another project. The simple point we wish to make is that the Constitution does not produce a universal narrative, but gives rise to contestation and difference. It is correct that the South African Constitution has signified a shift to individual liberties and liberal values in the public sphere (equality, non-racialism, individual freedoms and liberties, rule of law), and has also been defined by the Constitutional Court to signify a strong social democratic concern with addressing poverty and inequality as manifestation of dignity and equality. At the same time, it is increasingly clear that the hegemony of these interpretations is challenged within and beyond the judiciary. The 'middle-ground' of liberal democracy is, and remains, a contested political and legal form in South Africa – both in terms of the social values it challenges through the groups it protects, as well as its core values of the rule of law and separation of powers.

Calls for the amendment of the Constitution, especially around issues of the death penalty, abortion and same sex marriage are being increasingly aired as socially conservative, religious communities find themselves closer to the centre for power.[100] Equally worrying for liberal and social democrats are the rumblings about the nature of the Constitutional Court's jurisprudence as 'Eurocentric' or 'Western'. Although little legal substance is given to these claims; its is clear that they represent a consensus against the more liberal judgements of the court (death penalty, individual liberties, same sex marriage) and the courts' remedial role in socio-economic rights cases. In some instances, the issue of race or identity has been directly or indirectly raised, as well as the Constitution's failure to resonate with 'Africanism'. These forms of opposition are often expressed in terms of alternative values, or as unarticulated values of 'the people'. Judge President, Bernard Ngoepe, expresses this succinctly:

> Again, there are perceptions out there that, in the interpretation of the constitution, the courts have in some respects gone overboard. In fact, there is a saying: if anything is allowed anywhere in the world, it will probably be allowed in South Africa; if it is allowed in South Africa, it is not necessarily allowed anywhere else.

99 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) BCLR 39 (CC); *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (3) BCLR 355 (CC); *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC); *Khosa v Minister for Social Development* 2004 (6) BCLR 569 (CC).

100 The National Interfaith Leaders Council, headed by Pastor Ray McCauley of the conservative and pentecostal Rhema Church, is an indication of the growing influence of more conservative religious views. The NILC, established in July 2009, consists of over 20 senior leaders from various religious groups, but appears to exclude important religious forums – such as the South African Council of Churches (SACC), the Muslim Judicial Council (MJC) or the Jewish Board of Deputies. According to media reports, the Council is to lead the moral regeneration debate in South Africa. L Peyper 'McCauley, ANC links to morality debate' (25 February 2010) <http://www.news24.com/SouthAfrica/Politics/McCauley-ANC-links-to-morality-debate-20100225>.

> Again, no one is calling for a populist interpretation of the constitution, but should judges force things down the throat of the people in the name of the constitution, thereby running the risk of alienating it from the people?
>
> Could it be that we have, in some instances, failed to properly interpret the constitution so as to bring some harmony between it and the general populace?
>
> A natural question from the previous point is: whose values do we use as a benchmark? Should we go to Washington, Canada or London, and ignore as points of reference the values as perceived by, say, tribesmen and women in the rural areas?
>
> Have we or have we not given judgments which certain sections of our communities (male or female, black or white) have found irreconcilable with their values?[101]

This suggests value conflicts in the social domain, and fundamental differences amongst judges and within communities over the place and meaning of constitutional values. As such, it demonstrates the fact of contestation and the need for greater public engagement over the meaning and place of the transformative constitutional project, a point we return to later in the article.

Equally troubling are direct and indirect challenges to the Constitution's liberal democratic form, including its commitment to the rule of law, the separation of powers and to accountable, responsive and open government. A raft of actual and potential abuses of state power are testimony to this: the use of state institutions for political ends[102] and the failure to address corruption and hold state and political figures to account under the Constitution.[103] Although we find liberalism to be theoretically and politically ill-equipped for addressing the relationship between law and politics, and the contestation and opposition that we find in law; the liberal democratic form of the Constitution and its commitment to the rule of law is an indispensable constraint on the abuse of power and the manner in which struggles over resources and power are fought out.[104] Defending core liberal values and the rule of law is fundamental to our ability to engage each other over the meaning of values and the trajectory of the Constitution. However, it is not enough.

(ii) Law, politics and transformation

Liberalism is not South Africa's universal narrative, but rather the contested product of a particular set of historical circumstances, one that is vulnerable to political and legal opposition, and that requires defence and vigilance. Most telling here is the warning of Chanock:

101 *Sunday Times* (30 August 2009).

102 For example, the apparent use of executive power to interfere with, secure or prevent prosecutions. See the concerns that former president, Thabo Mbeki, was implicated in bringing corruption changes against President Zuma, resulting in his removal from office, as well as the calls on Mbeki to explain why he 'protected' former Commissioner of Police Jackie Selebi from corruption charges ('Mbeki must explain himself on Selebi' 4 August 2010, <http://www.iol.co.za/news/politics/mbeki-must-explain-himself-on-selebi-1.671978>).

103 For example, the controversial dropping of corruption charges against President Zuma in April 2009 by the newly appointed Director of Public Prosecution, Mokotedi Mpshe.

104 In this sense, we agree with EP Thompsons's important insight that 'the rule of law is a cultural achievement of universal significance' (note 31 above).

> It may be that the hypothesis of rights discourses, that law can be placed beyond politics, will be cruelly exposed in South Africa in the coming years. But it is also likely that the alignment of South African law with … rights … will have significant effects on legal practice within the country. What is not clear is which vision of the future will benefit most from this.
>
> Despite the final constitutional exhortation about reconciliation, **politics** seems likely to reproduce the narratives of the years prior to reconciliation. There will be an increasing demand to tell more of the socialist story, and the recently submerged narratives of race and ethnicity will continue to be a part, officially or unofficially, of a highly racialised and ethnically conscious society … However the Constitutional Court interprets the Bill of Rights, its liberal framework may not fit easily into what has so far been an a-liberal polity.[105]

Fifteen years into democracy, Chanock's words have a prophetic ring. As critical legal realists suggest, contestation and politics are inevitable in law. Judges and the legal community are part of this. How we understand the nature and process of the Constitution's transformative project, and how this works in practice, become crucial to our ability to transform away from the fractured and unequal society of the past, and towards one that is more just and equal. Such a process of transformation needs, inter alia, to factor in the racial, and other deep divisions of the past and present, and to build solidarity across a (positively) diverse society. As Ruti Teitel suggests, transitional jurisprudence must be both backward- and forward-looking, situated between the past and the future.[106] This does not mean that it is a linear process, but is both uncertain and contradictory, involving the complexities, interruptions and continuities of the past and present injustice.[107]

It is perhaps in discussions about the process of transformation that critical legal realism/studies has had the most traction amongst South African academics. This is present in some of the critiques of the Court's failure to engage values,[108] as well as in writing about the nature of transformation.[109] Our reading of critical legal realism in South Africa, and its connections to an egalitarian political project, would lead us to disagree with the postmodern concern with indeterminacy and uncertainty that characterises some of this work,[110] arguing rather for an acknowledgement of the politics of transformation and the very real way in which, because different conceptions of social and constitutional values regulate power, status and access to resources, legal struggles materially affect distribution within our society.

Advancing the Constitution's transformative project thus requires legal and political work. In general, this should take place within a process that is open

105 Chanock (note 41 above) 428.

106 R Teitel 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale LJ* 2009. Teitel writes of public law; of course, for legal realists, this is equally true of private law.

107 The 'bridge' metaphor in South Africa was strongly criticised by P de Vos 'A Bridge too Far? History as Context in the Interpretation of the South African Constitution' (2001) 17 *SAJHR* 1; A J van der Walt 'Dancing with Codes – Protecting, Developing and Reconstructing Property Rights in a Constitutional State' (2001) 118 *SALJ* 258; W le Roux 'Bridges, Clearings and Labyrinths: The Architectural Framing of Post-Apartheid Constitutionalism' (2004) 19 *SA Public Law* 629.

108 Cockrell (note 61 above); Woolman (note 61 above).

109 H Botha 'Freedom and Constraint in Constitutional Adjudication' (2004) 20 *SAJHR* 249.

110 See, for example, K van Marle 'The spectacle of post-apartheid constitutionalism' (2007) 16 *Griffiths Law Review* 411; 'Transformative constitutionalism as/ & critique' (2009) 20 *Stellenbosch Law Review* and the early writings of J van der Walt in *Law & Sacrifice* (2005).

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and deliberative, enabling ongoing engagement over the meaning and place of the rights and values of the Constitution. If this project is to continue in a manner that values the principles of liberal democracy, whilst pursuing a more egalitarian goal in relation to the deep poverty and inequality of our society, then we suggest the following is inspired by the insights of critical legal realism.

Firstly, there is a continuing need to assert the genesis of the Constitution, as a product of local struggle and a consensus on shared values that would govern the new democracy. Secondly, these values must be developed, not as universal principles imposed from above, but as values that have meaning and relevance to different communities. This should be achieved through deliberative mechanisms that encourage participation and debate. Courts are expected to articulate clear meanings and reasoned justifications that enable public debate. Thirdly, courts should be prepared to interrogate the entire legal system in line with constitutional values. All power, both public and private, is subject to new norms. Finally, courts must ensure that the Constitution is given meaning through effective remedies. This requires a robust approach to the remedial function, one that avoids undue deference to the doctrine of separation of powers.

Courts have been reluctant, for example, to include a structural interdict in an order on the grounds that this form of remedy may infringe the separation of powers doctrine, as a supervising court will then usurp the functions of executive authorities. However, if the doctrine of separation of powers is reconfigured in terms of constitutional democracy in which courts are in a dialogic partnership to the legislature and the executive, this form of remedy should be embraced rather then eschewed by the courts.

However, the courts remain only part of the wider picture. Law does not exist outside of politics. Just as jurisprudence is based on contested norms and values, so too will struggles that take place in the courtroom always need to be resolved politically. Socio-economic rights provide a particularly good example of this.[111] The law and courts remain important places to defend values, but this also needs to be taken into political domain.

V Conclusion

In 1971, Dugard turned to legal realism to better understand the nature of the apartheid legal system. Nearly 40 years later, we argue that (critical) realism provides crucial insights for understanding the democratic legal order, its constitutional jurisprudence, the limits of its transformational impetus and the challenges facing our fledgling democracy.

111 See M Heywood 'Preventing Mother to Child HIV Transmission in SA: Background, Strategies and Outcomes of the TAC case against the Minister of Health (2003) 19 *SAJHR* 278; 'Shaping, Breaking and making the Law in a Campaign for a National HIV/AIDS Treatment Plan' in P Jones & K Stokke (eds) *Democratising Development: the Politics of Socio-Economic Rights in South Africa* (2005).

In particular, we have argued that critical realism enables a legal method that enhances the transformative potential of the Constitution, as well as a way of understanding the legally and politically contested nature of the Constitution. Adopting a critical realist approach to law and adjudication will, we suggest, nudge the democratic project in positive directions.

At the same time, we are ill-equipped to do so. Despite Dugard's insights many years ago, South African lawyers and academics have not taken up realist concerns seriously. Even progressive lawyers have only recently begun to embrace the methodological implications of critical legal realism.[112] As a result, few lawyers and scholars are trained to engage constitutional values in legal argument and to deconstruct the law – especially private law – to reveal the power relations underneath. We are thus left with a fragile and incoherent jurisprudence, especially in private law. Not only are we unclear on the role and content of values, but we have generated little debate about how the inherited private law reinforces power relations in society.

While there might have been strategic reasons for refraining from a realist critique of private law in the 1980s, the post-apartheid, democratic Constitution demands such as approach. Had we followed Dugard's call to realism 40 years ago, and embraced its implications both for legal education and for legal practice, we might have found ourselves better able to meet the challenges of transformation today.

112 Liebenberg (note 49 above).