SEPTEMBER 2025 (№35)
Volume 11; Issue 3; Page No. 18-31
ISSN: 2346-7916 (Print)
ISSN: 2587-5043 (Online)

INTERNATIONAL JOURNAL OF LAW: "LAW AND WORLD" www.lawandworld.ge

https://doi.org/10.36475/11.3.2

The Global Implications of South Africa's Transformative Constitutionalism on Private Law Systems

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ARTICLE INFO

Article History:

Received 14.06.2025
Accepted 21.07.2025
Published 30.09.2025

Keywords:

Transformative constitutionalism, Private law, South Africa, Constitutionalisation, comparative law, Substantive justice

ABSTRACT

This paper examines the global impact of South Africa's model of transformative constitutionalism on private law systems. It explores how the South African Constitution's mandate for systemic social change has reshaped the structure, function, and underlying assumptions of private law, both domestically and transnationally. Using a critical-comparative approach, the study analyses South African case law alongside developments in Germany, Colombia, and Canada. The central argument is that South Africa's experience challenges the classical liberal view of private law as autonomous from public law values, revealing a constitutionalised private sphere in which rights, duties, and remedies are interpreted through the lens of substantive justice. The paper also cautions against naïve universalism: the transplantation of transformative constitutionalism is neither linear nor frictionless, as it interacts with diverse legal cultures, political economies, and institutional capacities. South Africa's experience thus serves both as a template and a provocation—encouraging private law systems worldwide to rethink their normative commitments, while highlighting the complexities and contestations inherent in juridical transformation.

INTRODUCTION

The constitutional transition that South Africa underwent in 1994 is often hailed as one of the most ambitious legal and social projects of the modern era. At its core was not merely the replacement of one political regime with another, but a profound reimagination of the role of law itself as an instrument of societal transformation. Emerging from a history of systemic oppression, the South African Constitution of 1996 enshrines values such as dignity, equality, and freedom, not as abstract ideals but as actionable mandates to reconstruct the social and economic fabric of society. Central to this project is the concept of transformative constitutionalism, first articulated by Karl Klare, who described it as a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming political and social institutions in a democratic, participatory, and egalitarian direction.[1]

Key to this philosophy is a purposive and value-laden approach to legal interpretation, which insists that the Constitution is a dynamic instrument designed to guide society towards substantive justice. As Chief Justice Pius Langa explained, transformative constitutionalism requires a judiciary that is sensitive to context, history, and the material conditions of society, and willing to engage creatively with legal principles to achieve the Constitution's normative goals.[2] The Constitution's Bill of Rights (Chapter 2) extends horizontally, binding not only the state but also, where appropriate, private actors. This signals a decisive break with the classical liberal model of private law, where autonomy and formal equality were assumed to operate in isolation from constitutional values.

While much scholarship has focused on the transformative impact of the Constitution on public law domains – such as administrative law, criminal justice, and human rights – the implications for private law systems are no less revolutionary. South African courts have progressively recognised that concepts such as good faith, fairness, and public policy must be interpreted in light of constitutional rights.[3] In doing so, private law is no longer a neutral sphere insulated from constitutional scrutiny, but an arena through which values of equality, dignity, and justice are actively realised.

This paper investigates the global reverberations of South Africa's transformative constitutionalism on private law systems. It critically examines how South Africa's experience challenges the entrenched liberal distinction between public and private law and catalyses new debates about the constitutionalisation of private relations across jurisdictions. Landmark South African cases such as *Barkhuizen v Napier* and *Daniels v Scribante* are analysed against the backdrop of broader international debates. The central argument is that while South Africa's model cannot be mechanically transplanted into foreign jurisdictions, it nevertheless provides a compelling normative vision for reimagining private law as an active participant in the pursuit of social justice. In a world grappling with rising inequality and systemic injustice, the South African experience compels a reconsideration of private law's role in fostering democratic, inclusive societies.

METHODOLOGY

This study adopts a critical-comparative methodology, combining doctrinal analysis of South African case law with theoretical insights from global constitutionalism and private law theory. The doctrinal component focuses on landmark Constitutional Court decisions, including *Barkhuizen v Napier*, *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*, and *Daniels v Scribante*, which collectively il-

1 Klare, K. E. (1998). Legal culture and transformative constitutionalism. *South African Journal on Human Rights*, 14(1).

2 Langa, P. (2006). Transformative constitutionalism. *Stellenbosch Law Review*, 17(3).

3 See *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Daniels v Scribante* 2017 (4) SA 341 (CC).

lustrate the constitutionalisation of private law doctrines relating to contract, good faith, and property.[4] These cases are examined to demonstrate how constitutional imperatives such as dignity, equality, and fairness "radiate" into private relationships and reshape foundational legal concepts.

The comparative dimension juxtaposes South Africa's jurisprudential innovations with developments in jurisdictions grappling with the horizontal application of constitutional rights, notably Germany, Canada, and Colombia. Germany's doctrine of *Drittwirkung* illustrates how constitutional rights influence private law through interpretive principles; Canada's "Charter values" approach reflects a more cautious infusion of constitutional principles into private disputes; while Colombia demonstrates a transformative judicial role in reconfiguring private legal relations in the pursuit of social justice.[5] This comparative framework highlights both convergences and divergences, enabling a critical assessment of the global transposability of South Africa's transformative model.

Finally, the methodology is informed by critical legal theory, which challenges the supposed neutrality of private law and exposes its role in entrenching systemic inequalities.[6] By integrating doctrinal, comparative, and critical approaches, the study situates South Africa's transformative constitutionalism within broader debates on global constitutionalism and the future of private law.

1. CONCEPTUAL FOUNDATIONS OF TRANSFORMATIVE CONSTITUTIONALISM

The concept of transformative constitutionalism emerged as a central jurisprudential philosophy in South Africa's post-apartheid era. First articulated by Karl Klare,[7] transformative constitutionalism is defined as a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions, and its relations of power and hierarchy, in a democratic, participatory, and egalitarian direction. It moves beyond traditional understandings of constitutional supremacy as merely a framework for limiting state power; instead, it demands the active restructuring of society itself to redress historical injustices and entrenched inequalities.[8]

Key features of transformative constitutionalism include the promotion of substantive – rather than merely formal – equality, the protection and realisation of socio-economic rights, and a purposive, value-laden approach to legal interpretation.[9] It insists that the Constitution is not a static text but a dynamic instrument intended to guide social evolution towards greater justice. As Chief Justice Pius Langa[10] explained, transformative constitutionalism requires a judiciary that is sensitive to context, history, and the material conditions of society, and willing to engage creatively with legal principles to achieve the Constitution's normative goals.

Central to South Africa's transformative vision is the constitutional mandate to restructure both the public and private spheres. The Constitution, particularly through its Bill of

4 *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2011 (3) SA 1 (CC); *Daniels v Scribante* 2017 (4) SA 341 (CC).

5 See *Lüth* BVerfGE 7, 198 (1958); *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd* [1986] 2 S.C.R. 573; Colombian Constitutional Court decisions *T-406/92* and *T-881/02*.

6 Kennedy, D. (1976). Form and substance in private law adjudication. *Harvard Law Review*, 89; Klare, K. E. (1998). *Legal culture and transformative constitutionalism*.

7 Klare, K. E. (1998). Legal culture and transformative constitutionalism. South African Journal on Human Rights, 14(1), pp. 146–188.

8 Ibid; Langa, P. (2006). Transformative constitutionalism. Stellenbosch Law Review, 17(3), pp. 351–360.

9 Ibid.

10 Constitution of the Republic of South Africa. (1996). (Hereafter referred as the Constitution).

Rights (Chapter 2), binds not only the state but also, where appropriate, private persons.[11] This horizontal application signals a fundamental shift: private law domains such as contract, property, and delicts must now be interpreted and developed in line with constitutional values. The historic insulation of the private sphere – where relationships between individuals were governed solely by classical doctrines of autonomy and formal equality – was thus deliberately dismantled to allow constitutional imperatives like dignity, freedom, and substantive equality to infuse private relations.[12]

This reorientation of private law challenges the classical liberal model that has historically dominated Western legal thought. Under the liberal tradition, private law was conceived as a neutral framework within which free and rational individuals could autonomously pursue their interests, largely free from state interference.[13] Rights and duties were framed in formalist terms, prioritising certainty, predictability, and individualism. However, transformative constitutionalism exposes the myth of neutrality in private law, revealing how supposedly neutral doctrines often mask and perpetuate systemic power imbalances.[14] By compelling courts to interrogate the substantive fairness of private relations and to align private law rules with constitutional values, South Africa's constitutional project disrupts long-standing assumptions about the autonomy of private law and its insulation from broader societal concerns.

In sum, transformative constitutionalism represents both a theoretical and practical shift in how law is understood and deployed: it transforms private law from a mechanism of private ordering into a normative tool for achieving collective justice. This foundational shift forms the bedrock for South Africa's influence on global debates about the constitutionalisation of private law, as explored in subsequent sections.

2. TRANSFORMATIVE CONSTITUTIONALISM IN SOUTH AFRICAN PRIVATE LAW

The influence of transformative constitutionalism is perhaps most vividly seen in the reshaping of South African private law. Through landmark decisions, South African courts have demonstrated that constitutional values are not confined to public law but must actively inform and restructure private legal relationships. This section examines three pivotal cases – *Barkhuizen v Napier*,[15] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,[16] and *Daniels v Scribante*[17] – which collectively illustrate the courts' evolving approach to contractual freedom, good faith, and property rights within a transformative constitutional framework.

3. BARKHUIZEN V NAPIER: BALANCING CONTRACTUAL FREEDOM WITH CONSTITUTIONAL FAIRNESS

In *Barkhuizen v Napier*[18], the Constitutional Court addressed the enforceability of a time-limitation clause in an insurance contract. The Court recognised the importance of contractual freedom as a fundamental principle underpinning private law, rooted in individual autonomy and the right to self-determination.[19] However, it also insisted that this freedom is not absolute; all contractual terms must conform to public policy, which is now determined

11 Ibid., Section 8(2).

12 Currie, I., De Waal, J. (2013). The Bill of Rights handbook (6th ed.), Juta.

13 Pistor, K. (2019). The code of capital: How the law creates wealth and inequality. Princeton University Press.

14 Klare, K. E. (1998). Legal culture and transformative constitutionalism. South African Journal on Human Rights, 14(1), pp. 146–188; Langa, P. (2006). Transformative constitutionalism. Stellenbosch Law Review, 17(3), pp. 351–360; Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.

15 Barkhuizen v Napier. (2007). (5) SA 323 (CC).

16 Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd (2011).

17 Daniels v Scribante. (2017). (4) SA 341 (CC)

18 Ibid.

19 Barkhuizen. (2007), para. 57.

with reference to constitutional values, including fairness, reasonableness, and equality.[20]

The Court introduced a two-stage inquiry: first, whether the clause itself is contrary to public policy; and second, whether enforcement of the clause in the particular circumstances would be unreasonable or unfair.[21] This nuanced balancing act demonstrates how transformative constitutionalism reshapes private law – contractual autonomy is respected but not at the expense of substantive justice.[22]

4. GOOD FAITH AND CONSTITUTIONAL VALUES IN CONTRACT LAW

The Constitutional Court further advanced transformative constitutionalism in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[23] at issue was whether the court should enforce an obligation to negotiate the renewal of a lease agreement in good faith. Although the majority refrained from definitively constitutionalising the doctrine of good faith, the judgment suggested that common law doctrines must be developed in line with constitutional values, particularly the commitment to fairness, dignity, and Ubuntu.[24]

Justice Yacoob's judgment emphasised that private law should not operate in a constitutional vacuum and that the duty to develop common law principles in line with Section 39(2) of the Constitution is both a power and an obligation.[25] The Court thus opened the door for a more robust incorporation of good faith as a constitutional value capable of reshaping contractual relationships.[26]

This case signals a doctrinal shift away from rigid, formalistic interpretations of contracts towards a relational, justice-oriented approach, where the spirit of cooperation and fairness guides contractual enforcement.[27]

5. DANIELS V SCRIBANTE: PROPERTY RIGHTS REINTERPRETED TO ACHIEVE DIGNITY AND EQUALITY

In Daniels v Scribante,[28] the Constitutional Court confronted the tension between private property rights and the rights of occupiers to live with dignity. The applicant, a farmworker, sought to make improvements to her dwelling without the consent of the landowner, arguing that her constitutional right to adequate housing entitled her to do so.

The Court held that the Extension of Security of Tenure Act (ESTA) must be interpreted in light of the Constitution's commitment to dignity, equality, and housing rights.[29] The judgment recognised that the traditional understanding of property as an exclusive, dominion-based right had to yield to a more relational, socially embedded conception aligned with constitutional norms.[30]

Chief Justice Mogoeng, writing for the majority, declared that property rights must be exercised consistently with the values of dignity and equality, and that ownership can no longer be conceived as an absolute entitlement divorced from social obligations.[31] This decision represents a profound constitutionalisation of property law, where historical hierarchies embedded in ownership structures are actively

20 Ibid., para. 29.
21 Ibid., para. 56.
22 Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.
23 Everfresh (2011), para. 71.
24 Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd (2011).
25 Ibid., para. 23; Constitution. (1996), s 39(2).
26 Bilchitz, D. (2011). Constitutionalism, the rule of law and the adjudication of private disputes: A view from South Africa. International Journal of Constitutional Law, 9(1), pp. 153–179.
27 Ibid.
28 Daniels v Scribante. (2017). (4) SA 341 (CC). (Daniels (2017), para. 37).
29 Ibid., Daniels. (2017), para. 37.
30 Fagan, A. (2010). Dignity and unfair discrimination: A value misplaced and a right misunderstood. South African Journal on Human Rights, 26(2), pp. 220–247.
31 Daniels. (2017), para. 47.

dismantled through purposive interpretation.

These landmark decisions not only illustrate the judiciary's commitment to infusing private law with constitutional values but also reflect a deeper normative shift toward relational conceptions of rights and duties. Central to this shift is the constitutional recognition of Ubuntu – a distinctly African philosophy of justice – which increasingly informs the development of private legal doctrines. A fuller engagement with Ubuntu reveals how it challenges liberal individualism and redefines private law's foundational assumptions in line with South Africa's transformative constitutional vision.

6. UBUNTU AND THE CONSTITUTIONAL TRANSFORMATION OF PRIVATE LAW

As South Africa's transformative constitutionalism reconfigures the foundations of private law, Ubuntu emerges as a critical normative resource that offers an alternative to liberal individualism.

By emphasizing relationality, human dignity, and communal responsibility, Ubuntu provides a uniquely African jurisprudential framework for interpreting and developing private legal doctrines in ways that advance the Constitution's transformative aims.

As South Africa's transformative constitutionalism reconfigures the foundations of private law, Ubuntu emerges as a critical normative resource that offers an alternative to liberal individualism.

7. KEY DOCTRINAL SHIFTS: PUBLIC POLICY, UBUNTU, AND CONSTITUTIONAL VALUES

Collectively, these cases illustrate transformative constitutionalism's radical impact on the doctrinal landscape of private law. First, the meaning of public policy has been constitutionalised: it now demands compliance with the Bill of Rights and broader constitutional values rather than merely reflecting prevailing social norms.[32] African philosophical notions emphasising interconnectedness, respect, and communal solidarity have been increasingly recognised as a normative guide within private law.[33]

Ubuntu informs not only the duties of fairness and good faith in contractual relations but also challenges the adversarial individualism historically embedded in private legal doctrines.

Third, the horizontal application of constitutional rights has cemented the idea that constitutional norms permeate all areas of law, requiring courts to develop and interpret private law in ways that advance the Constitution's transformative project.[34]

Thus, South African private law is no longer a neutral domain insulated from constitutional scrutiny; it is an active site for achieving societal transformation, embodying the values of equality, dignity, and social justice in everyday legal relations.

8. COMPARATIVE ANALYSIS: GLOBAL RESONANCES AND DIVERGENCES

South Africa's model of transformative constitutionalism has inspired and provoked comparative reflection in various jurisdictions. While its constitutionalisation of private law is distinctive in origin and scope, there are noteworthy resonances in other systems, particularly those that recognise the horizontal application of constitutional rights. This section undertakes a comparative analysis of three

32 Barkhuizen. (2007), para. 29; Everfresh. (2011), para. 23. Second, the principle of *Ubuntu* – a distinctly.

33 Metz, T. (2011). Ubuntu as a moral theory and human rights in South Africa. African Human Rights Law Journal, 11(2), pp. 532–559.

34 Constitution. (1996), s 8(2); Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.

such jurisdictions – Germany, Canada, and Colombia, highlighting points of convergence with South Africa, while also critically engaging with the contextual factors that enable or inhibit the transformative use of constitutional norms in private law.

8.1 Germany: Horizontal effect (Drittwirkung) of fundamental rights

Germany presents a compelling example of how constitutional rights can influence private law through the doctrine of *Drittwirkung* (third-party effect). Under German constitutional jurisprudence, the Basic Law (*Grundgesetz*) primarily binds state actors. However, the Federal Constitutional Court has developed both *mittelbare Drittwirkung* (indirect horizontal effect) and *unmittelbare Drittwirkung* (direct horizontal effect), enabling constitutional rights to shape private legal relationships.[35]

In Lüth,[36] the Court famously held that all branches of the law – including civil law – must be interpreted in light of the values enshrined in the Basic Law, especially the dignity clause in Article 1. This interpretive principle mirrors South Africa's Section 39(2) of the Constitution, which requires that "every court... must promote the spirit, purport and objects of the Bill of Rights" when developing the common law.[37]

However, while German courts remain more restrained in directly invalidating private contracts or altering substantive private law norms, their indirect influence on legal interpretation closely resembles South Africa's purposive approach to adjudication[38]

The German model demonstrates how constitutional rights can seep into private relations through a systemic interpretive mandate, yet it remains more cautious in challenging the structural norms of private law than South Africa's explicitly transformative project.

8.2 Canada: Charter values and private law – Dolphin Delivery and beyond

Canada provides another instructive comparative example, albeit with a more limited horizontal application of constitutional rights. In Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd,[39] the Supreme Court of Canada held that the Canadian Charter of Rights and Freedoms does not apply directly to private litigation between non-state actors. However, it affirmed that Charter values – such as freedom of expression, equality, and dignity – may influence the development of the common law in disputes involving private parties.[40]

Subsequent cases, including Hill v Church of Scientology of Toronto,[41] confirmed that courts must interpret private law in a manner consistent with the "values and principles" underlying the Charter, even if the Charter itself does not directly bind the parties.[42] This value-based influence is conceptually akin to the South African court's use of constitutional values to shape doctrines of contract, delicts, and property law.[43] However, the Canadian model stops short of the transformative ambition characterising the South African Constitution. There is a continued reluctance in Canadian courts to

35 Currie, I. (2008). Balancing constitutional rights: The German and South African experience. Law, Democracy and Development, 12(2), pp. 1–22; Alexy, R. (2002). A theory of constitutional rights (Rivers, J., Trans.). Oxford University Press.

36 Lüth BVerfGE 7, 198, 1958.

37 The Constitution.

38 Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.

39 In Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd. (1986). 2 S.C.R. 573.

40 Dolphin Delivery. (1986).

41 Hill v Church of Scientology of Toronto. (1995). 2 S.C.R. 1130.

42 Roach, K. (2001). The Supreme Court on trial: Judicial activism or democratic dialogue. Irwin Law.

43 Bilchitz, D. (2011). Constitutionalism, the rule of law and the adjudication of private disputes: A view from South Africa. International Journal of Constitutional Law, 9(1), pp. 153–179.

fully reconfigure private law rules in pursuit of social justice, revealing a more restrained, incrementalist tradition.[44]

8.3 Colombia: Transformative constitutionalism and private relations

Colombia offers perhaps the most striking example, outside South Africa, of the judicial application of transformative constitutionalism in private law. Following the adoption of the Colombian Constitution of 1991, which declared Colombia a "social state under the rule of law", the Constitutional Court began using constitutional values to directly influence private legal relationships.[45]

In decisions such as Sentencia T-406/92 and T-881/02,[46] the Colombian Constitutional Court recognised that private actors, particularly in asymmetrical relationships such as employment or tenancy, may be constitutionally obligated to respect the dignity and fundamental rights of weaker parties.[47] The Court has explicitly acknowledged the need to reinterpret private law in light of constitutional principles, particularly in socio-economic contexts where the formal equality of contracting parties is fictional.

Colombia's socio-political context – marked by extreme inequality, historical violence, and weak state capacity – has necessitated a robust judicial role in promoting social justice. Much like in South Africa, the Colombian judiciary sees itself as an active participant in societal transformation, empowered to reshape legal norms where the legislature or executive may be ineffective.[48]

9. CRITICAL COMPARISON: CONTEXTUAL ENABLERS AND INHIBITORS

The global diffusion of constitutional norms into private law is neither uniform nor universally accepted. The divergences among Germany, Canada, and Colombia – despite shared constitutional commitments – illustrate the importance of contextual factors in shaping the trajectory of constitutional private law.

Institutional design, legal tradition, political history, and judicial philosophy all influence how transformative constitutionalism is implemented.[49] For instance, Germany's civil law tradition and strong private law formalism temper the direct influence of constitutional norms, while Canada's common law heritage fosters doctrinal flexibility but retains a cautious posture due to the Charter's limited horizontal reach. In contrast, South Africa and Colombia, both emerging from deeply unequal and violent pasts, have embraced a more interventionist judiciary capable of using constitutional values to reconfigure private legal relations.

Yet, such a transformation is not without critique. Scholars warn that the over-judicialisation of social reform may strain judicial legitimacy or usurp legislative authority.[50] Others point out that, absent real changes in economic and institutional structures, judicial interventions in private law may yield symbolic rather than substantive transformation.[51]

Nonetheless, South Africa's transformative constitutionalism offers a bold, normatively compelling model for jurisdictions grappling with structural inequality and systemic exclusion. Its influence abroad – while adapted to

44 Gardbaum, S. (2003). The new commonwealth model of constitutionalism: Theory and practice. Cambridge University Press.

45 Uprimny, R. (2006). The enforcement of social rights by the Colombian Constitutional Court: Cases and debates.

46 Sentencia T-406/92 and T-881/02.

47 Uprimny, R. (2006). The enforcement of social rights by the Colombian Constitutional Court: Cases and debates.

48 In Gargarella, R., Domingo, P., Roux, T. (Eds.). Courts and social transformation in new democracies. Routledge, pp. 127–151.

49 Klare, K. E. (1998). Legal culture and transformative constitutionalism. South African Journal on Human Rights, 14(1), pp. 146–188.

50 Gardbaum, 2003; Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.

51 Pistor, K. (2019). The code of capital: How the law creates wealth and inequality. Princeton University Press.

local contexts – signals a growing recognition that private law cannot remain a bastion of formalism if constitutional democracies are to be truly inclusive and just.

10. CHALLENGES AND LIMITS OF GLOBAL INFLUENCE

While South Africa's model of transformative constitutionalism has inspired significant global interest, its influence on private law systems across different jurisdictions is neither automatic nor unproblematic. Efforts to constitutionalise private legal relationships face several critical challenges, particularly concerning judicial legitimacy, the difficulties of legal transplantation, and tensions inherent between the demands for legal certainty and the imperatives of social transformation.

10.1 Risks of judicial overreach and democratic legitimacy concerns

A persistent concern surrounding transformative constitutionalism is the risk of judicial overreach. When courts actively reconfigure private law in pursuit of constitutional goals, they may encroach upon domains traditionally reserved for democratic legislatures. This concern is particularly acute in pluralistic societies where competing conceptions of justice must be negotiated through inclusive political processes rather than imposed through judicial fiat.[52]

Critics argue that expansive judicial interpretations may undermine democratic legitimacy by concentrating transformative decision-making power in unelected bodies.[53] In the South African context, while the judiciary's role has been largely celebrated for advancing rights and correcting systemic injustices, scholars caution that the courts must remain attentive to the limits of their institutional competence and defer, where appropriate, to legislative processes better equipped to manage complex socio-economic reforms.[54] The legitimacy of transformative constitutionalism thus depends on maintaining a delicate balance between the courts' duty to enforce constitutional rights and the need to respect democratic self-government.

10.2 The problem of legal transplantation: Socio-political and institutional contingencies

The global appeal of South Africa's transformative model also encounters the problem of legal transplantation – the challenges of transplanting legal doctrines or practices from one socio-political context to another. As Watson[55] famously argued, legal transplants are rarely straightforward because legal rules are deeply embedded in specific historical, cultural, and institutional settings. Attempting to impose South African-style constitutionalisation of private law onto other jurisdictions without accounting for local conditions risks superficial adoption without meaningful integration.

For instance, while Germany's constitutional jurisprudence reflects sophisticated mechanisms for integrating human rights into private law, its formalistic legal tradition and entrenched legal culture of Rechtsstaatlichkeit (the rule of law) impose inherent limits on transformative ambitions.[56] Similarly, Canadian courts, grounded in a tradition of judicial restraint and respect for parliamentary sovereignty, have been cautious in allowing Charter values to disrupt private law doctrines significantly.[57]

52 Gardbaum, S. (2003). The New Commonwealth Model of Constitutionalism: Theory and Practice. Cambridge University Press, Cambridge.

53 Tushnet, M. (1999). Taking the Constitution away from the courts. Princeton University Press.

54 Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.

55 Watson, A. (1974). Legal transplants: An approach to comparative law. Scottish Academic Press.

56 Currie. (2008).

57 Uprimny, R. (2006). The enforcement of social rights

Thus, transformative constitutionalism cannot be mechanically replicated across jurisdictions. Success depends on the institutional capacity of the judiciary, the political culture, the level of rights consciousness, and the historical context of inequality and exclusion that the legal system seeks to address.[58] Without these enabling conditions, efforts to constitutionalise private law risk ineffectiveness or unintended counterproductive consequences.

10.3 Tensions between legal certainty and transformative demands

Finally, transformative constitutionalism inevitably generates tensions between the values of legal certainty and the demands of social transformation. Private law traditionally values predictability, consistency, and stability – features essential for enabling individuals and businesses to plan their affairs with confidence.[59] The introduction of broad constitutional values such as fairness, dignity, and Ubuntu into private law adjudication can introduce elements of indeterminacy and uncertainty, as courts may re-evaluate established doctrines in light of evolving social norms.[60]

For instance, in Barkhuizen v Napier,[61] the Constitutional Court's approach to assessing contractual clauses against constitutional values introduced a more flexible but less predictable standard based on fairness and public policy considerations. While such flexibility promotes substantive justice, it may also erode the clarity and reliability traditionally associated with private agreements.[62]

This tension is not easily resolved. Striking an appropriate balance requires courts to develop nuanced, context-sensitive standards that remain faithful to constitutional values without sacrificing the coherence and internal logic of private law.[63] Failure to manage this balance risks alienating key sectors of society, undermining economic development, or fostering perceptions of judicial arbitrariness.

11. EXPANDING THE COMPARATIVE DIMENSION: RESISTANCE AND CHALLENGES TO CONSTITUTIONALISATION

While South Africa's transformative constitutionalism has found resonance in jurisdictions such as Germany, Canada, and Colombia, other legal systems have demonstrated significant resistance to the constitutionalisation of private law. For example, in the United States, despite a robust constitutional culture, private law remains largely insulated from constitutional norms. The entrenched commitment to classical liberalism and the sanctity of contract doctrine reinforces a formalist approach, where private law is treated as a separate domain governed primarily by market logic rather than constitutional values.[64] Courts have been reluctant to permit constitutional rights to intrude upon private relationships, maintaining a sharp distinction between state action and private conduct.

Similarly, efforts within Europe to integrate human rights into private law through instruments like the Draft Common Frame of Reference (DCFR) reveal both promise and difficulty.

by the Colombian Constitutional Court: Cases and debates. In Gargarella, R., Domingo, P., Roux, T. (Eds.), Courts and social transformation in new democracies, Routledge, pp. 127–151.

58 Ibid.

59 Luhmann, N. (2004). Law as a social system (Ziegert, K., Trans.). Oxford University Press.

60 Klare. (1998).

61 Barkhuizen. (2007). (5) SA 323 (CC).

62 Ibid., para. 57.

63 Bilchitz, D. (2011). Constitutionalism, the rule of law and the adjudication of private disputes: A view from South Africa. International Journal of Constitutional Law, 9(1), pp. 153–179.

64 Horwitz, M. J. (1977). The transformation of American law, 1780–1860. Harvard University Press, Cambridge, MA; Kennedy, D. (1976). Form and substance in private law adjudication. Harvard Law Review, 89, pp. 1685–1778.

While the DCFR explicitly acknowledges fundamental rights and aims to promote values such as human dignity and non-discrimination within European contract and property law, it struggles to reconcile these commitments with the internal demands of market integration, legal certainty, and doctrinal autonomy.[65] The tension between harmonizing private law for economic purposes and embedding substantive social values mirrors broader global challenges in reimagining private law as a vehicle for constitutional transformation.

These examples highlight that the constitutionalisation of private law is neither inevitable nor uncontested. Instead, it depends on a complex interplay of historical, cultural, and institutional factors that shape each jurisdiction's willingness and ability to infuse private legal relationships with public law values.

12. UBUNTU AS A DISTINCTIVE JURISPRUDENTIAL RESOURCE IN TRANSFORMATIVE PRIVATE LAW

Ubuntu offers a distinctively African normative foundation that challenges the classical liberal assumptions underlying traditional private law. Centering relationality, community, and solidarity, Ubuntu reimagines justice not as the protection of atomistic individuals but as the promotion of harmonious social relationships.[66]

In South African constitutional jurisprudence, Ubuntu has moved beyond cultural rhetoric to serve as a substantive constitutional value capable of reshaping private legal relations. Justice Mokgoro emphasizes Ubuntu's role in advancing human dignity, equality, and restorative justice,[67] while Metz frames it as a coherent moral theory that prioritizes communal flourishing over adversarial individualism.[68]

Judicial decisions increasingly reflect Ubuntu's influence. In Everfresh Market Virginia (Pty) Ltd,[69] the Constitutional Court underscored that principles of good faith and fairness, deeply resonant with Ubuntu, must inform contract law development.[70] Likewise, in Daniels v Scribante,[71] the Court reinterpreted property rights to prioritize dignity and equality over exclusionary ownership models, aligning property law with Ubuntu's relational ethic.[72]

Thus, Ubuntu grounds a transformative reorientation of South African private law, embedding constitutional values into everyday legal relations and offering a jurisprudential model that foregrounds communal responsibility, social justice, and substantive equality.

As South Africa's transformative constitutionalism reconfigures the foundations of private law, Ubuntu emerges as a critical normative resource that offers an alternative to liberal individualism. By emphasising relationality, human dignity, and communal responsibility, Ubuntu provides a uniquely African jurisprudential framework for interpreting and developing private legal doctrines in ways that advance the Constitution's transformative aims.

13. EMPIRICAL AND POLICY RECOMMENDATIONS

While this paper has primarily offered a theoretical and comparative analysis, the practical success of transformative constitutionalism in private law also depends on targeted policy interventions and empirical engagement with the realities of legal practice. Several concrete recommendations emerge.

65 Micklitz, H. W. (2011). Social justice and access justice in private law (EUI Working Paper Law No. 2011/02). European University Institute.

66 Mokgoro, Y. (1998). Ubuntu and the Law in South Africa. Buffalo Human Rights Law Review 4: 15–23.

67 Ibid.

68 Metz, T. (2011). Ubuntu as a Moral Theory and Human Rights in South Africa. African Human Rights Law Journal 11 (2): 532–559.

69 In Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd. (2011).

70 Ibid., para. 71.

71 Daniels v Scribante. (2017). (4) SA 341 (CC).

72 Ibid., para. 47.

First, there is a pressing need for legislative reform to consolidate and clarify the constitutional principles that have begun to reshape South African private law. In particular, the Common Law of Contract remains heavily rooted in classical liberal assumptions about freedom of contract and autonomy, despite judicial efforts to infuse it with constitutional values. Parliament, in collaboration with the South African Law Reform Commission, should consider initiating a comprehensive review of contract law to explicitly incorporate principles of fairness, good faith, and substantive equality. Codifying these constitutional commitments would provide greater clarity and consistency, particularly for lower courts and litigants lacking access to sophisticated legal resources.

Second, empirical research is needed to assess how constitutional values are being applied in lower courts, particularly in Magistrates' Courts, where most ordinary South Africans experience the legal system. Existing jurisprudence from the Constitutional Court and the Supreme Court of Appeal offers guidance at a high doctrinal level, but little is known about how, or whether, lower court judges interpret and apply constitutional norms in everyday private disputes involving tenancy, employment, small contracts, or property use. Empirical studies – including court file reviews, judicial interviews, and analysis of reported decisions could reveal whether transformative constitutionalism is genuinely penetrating the grassroots of the legal system or whether it remains largely aspirational.

Third, legal education and judicial training programmes must be recalibrated to support the deepening of constitutional culture within private law. Universities and professional bodies should prioritize curricula that integrate constitutional analysis across all private law subjects, while judicial education programmes should equip magistrates and other judicial officers with the tools to engage meaningfully with constitutional values in their adjudication of private disputes.

Ultimately, for transformative constitutionalism to realize its full potential within the domain of private law, reform efforts must move beyond high-level jurisprudence toward systemic changes in legislation, legal practice, education, and empirical understanding. Without such efforts, the constitutional promise risks remaining an elite project, distant from the everyday legal experiences of the majority of South Africans.

CONCLUSION

This paper has argued that South Africa's transformative constitutionalism profoundly reshapes the relationship between constitutional rights and private law, offering both a catalyst for innovation and a cautionary template for global legal reform. Through a deliberate constitutional mandate, South African courts have sought not merely to protect individual rights in public law, but to infuse private legal relations with substantive values of dignity, equality, and freedom.[73] In doing so, South Africa challenges the classical liberal model that insulated private law from constitutional scrutiny, advancing a jurisprudential model where justice permeates all spheres of social life.

Comparative analysis reveals that while South Africa's approach resonates with developments in Germany's doctrine of Drittwirkung, Canada's infusion of Charter values into common law, and Colombia's socio-economic rights adjudication, each jurisdiction's experience reflects distinct institutional, cultural, and political contingencies.[74] The South African example thus acts as both inspiration and caution: it demonstrates the emancipatory potential of constitutionalising private law while simultaneously exposing risks of judicial overreach, legitimacy deficits, and tensions between transformation and legal certainty.[75]

73 Klare, K. E. (1998). Legal culture and transformative constitutionalism. South African Journal on Human Rights, 14(1), pp. 146–188.

74 Currie (2008); Roach (2001); Uprimny (2006).

75 Gardbaum (2003); Watson (1974).

The broader implications of this study are profound. In an era where rising inequality, global constitutionalism, and demands for social justice increasingly challenge the traditional neutrality of private law, South Africa's experience compels a rethinking of foundational assumptions. Private law systems worldwide must confront whether adherence to formalistic traditions can remain viable in the face of constitutional commitments to human dignity, equality, and social transformation.[76] However, successful adaptation requires sensitive attention to local contexts, institutional capacities, and the preservation of democratic legitimacy.[77]

Ultimately, South Africa's transformative constitutionalism invites jurists, scholars, and policymakers to envision private law not as a static repository of rules but as a dynamic tool for realising constitutional ideals. Its lessons caution against naïve transplantation, yet they affirm that in reimagining private legal relations, law can become an instrument of genuine, inclusive transformation – fulfilling the constitutional promise of a more just and humane society.

76 Bilchitz, D. (2011). Constitutionalism, the rule of law and the adjudication of private disputes: A view from South Africa. International Journal of Constitutional Law, 9(1), pp. 153–179.

77 Woolman, S. (2007). The amazing, vanishing bill of rights. South African Journal on Human Rights, 23(1), pp. 762–794.

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