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CONCLUDING REFLECTIONS: LEGAL ACTIVISM AFTER POVERTY HAS BEEN DECLARED UNCONSTITUTIONAL

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1 Introduction

I had the honour – and daunting task – of offering concluding reflections at the Law and Poverty Colloquium with an eye toward drawing together some major threads of the discussion. I repeat here the gratitude I then expressed for the energy and imagination of the many people who made the Colloquium a great success.¹ In the brief compass of these remarks, I cannot possibly survey the rich array of research and analysis we shared, and I have precious little insight to add. I particularly regret short-changing the challenging papers on policy questions.

Preliminarily, I want to highlight Professor Liebenberg’s remark that the Colloquium was blessed to have so many distinguished jurists in attendance, including some heroes of the liberation struggle. I doubt that South African academics appreciate just how extraordinary it is that judges of the Constitutional Court and other courts would attend a gathering like this, sit with us, take our enterprise seriously, engage with our arguments and concerns, and contribute to the dialogue. We were particularly fortunate to hear former Chief Justice Pius Langa’s moving dinner address.² Nothing like this ever occurs in the United States. I suspect that there are very few, if any, other places in the world where it does. In this respect, South African lawyers and academics are indeed very privileged.

2 Poverty-eradication as a constitutional imperative

A tacit premise of the Colloquium that merits explicit statement is that poverty-eradication is not only a desirable policy-direction for South Africa, it is a *constitutional imperative*. This observation may be trite in South Africa, but it is decidedly novel almost everywhere else in the world. In their scholarship

* This is a lightly revised and annotated version of informal remarks delivered at the conclusion of the Law and Poverty Colloquium, Stellenbosch Institute for Advanced Study (STIAS), University of Stellenbosch, 29-05-2011 – 31-05-2011. The editors of the *Stellenbosch Law Review* generously offered to include it here as a non-peer-reviewed article.

¹ Special thanks in particular to Professor Sandra Liebenberg, Academic Director of the Colloquium; Project Manger Gustav Muller; Dean Gerhard Lubbe and the Faculty of Law, Stellenbosch University; the STIAS community; and the many students and others who facilitated the program.

² Reprinted here as P Langa “The Role of the Constitution in the Struggle Against Poverty” (2011) 22 *Stell LR* 446.

and activism, Colloquium participants fight to eradicate poverty both because poverty is wrong and because it is *prima facie* illegal. The continued existence of widespread poverty in South Africa is plainly inconsistent with the vision of freedom and democracy embraced by the Constitution.³ As former Chief Justice Langa put it, complacency in the face of continuing poverty “contradicts the Constitution”.⁴ The Constitutional Court has held that “[t]he State is *obliged* to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing”.⁵

The success of South Africa’s constitutional project will be judged in large part by the effectiveness of the measures taken by government and civil society under the command of the Constitution to eradicate poverty. As former Chief Justice Langa argued, the elimination of poverty “is critical to democracy, development and the stability of our constitutional state”.⁶ No one is so naïve as to think that, by themselves, the stated aspirations of the Constitution can deliver clean water, food, medical care, education, social security or housing. Still, it is a remarkable development in legal history for a jurisdiction to affirm that its constitution requires the abolition of poverty.

3 The multi-dimensional nature of poverty

A salient theme of the Colloquium was attention to the variegated and multidimensional nature of poverty. Sandra Fredman showed why merely defining “poverty” is a complicated and contested task.⁷ Lucy Williams’ paper developed the important analytical observation that poverty cannot be defined or understood independent of the ways in which legal practices and discourses characterise or “construct” it.⁸ The distinct dimensions of poverty are inextricably intertwined, yet each has unique aspects that cannot be reduced to or neatly mapped onto the others. Similar cross-cutting complexities arise in plotting the relationship between poverty and inequality or the inter-relationships between material deprivation, social and cultural life, and political life.⁹ Nancy Fraser raised a further complication: intersecting with each of the multiple dimensions of poverty are three different scales or levels of the injustice of poverty, namely national, transnational, and global.¹⁰

³ The Constitution of the Republic of South Africa, 1996 (“the Constitution”).

⁴ Langa (2011) *Stell LR* 446, referencing the Preamble of the Constitution.

⁵ Langa (2011) *Stell LR* 449, quoting *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 23-24 (emphasis added).

⁶ Langa (2011) *Stell LR* 446. Langa further states that “[p]overty ... may bring with it complex and interrelated challenges that threaten to interfere with our society’s commitment to the rule of law, which is a foundational concept and element of our constitutional existence”.

⁷ S Fredman “The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty” (2011) 22 *Stell LR* 566 567-574.

⁸ L Williams “The Legal Construction of Poverty: Gender, ‘Work’ & the ‘Social Contract’” (2011) 22 *Stell LR* 463.

⁹ In his discussion of the dichotomy Hannah Arendt draws between the social and the political, Emiliios Christodoulidis rightly argued that human freedom is at stake both socially and politically and that “social questions” are necessarily sites of political contestation over the meaning of freedom. See E Christodoulidis “De-politicising Poverty: Arendt in South Africa” (2011) 22 *Stell LR* 501.

¹⁰ N Fraser “Social Exclusion, Global Poverty & Scales of (In)justice: Rethinking Law and Poverty in a Globalizing World” (2011) 22 *Stell LR* 452.

The problem here is not simply to get the taxonomy right for academic purposes. Poverty-eradication strategies must be sensitive to the different ways in which poverty and deprivation are experienced. Well-intended anti-poverty measures designed to “raise all ships” simultaneously may differentially impact on particular social groups or on particular types of injury. “One-size-fits-all” thinking insensitive to the complexity and “thickness” of social context may wind up entrenching status-inequalities and relative economic deprivation.¹¹

One axis along which presenters arrayed the social context and experience of poverty is the dimension of social and cultural status. Cathi Albertyn argued, for example, that “the need to address the distinctive forms of poverty and inequality experienced by women” is central to fulfilling the Constitution’s commitment to equality, improved quality of life, and the freeing of human potential “although [this is] often not recognised as such”.¹² Lucy Williams argued that as decision makers in both the US and South Africa “translated the supposedly universal values of ‘dignity’, ‘self-sufficiency’ and ‘independence’ into policies, institutions, and legal rules, they consistently filled them with gendered content that ultimately reinforces the social and economic subordination of women”.¹³ Several speakers noted that even progressive anti-poverty advocates sometimes need to be reminded of the distinctly racial and gender dimensions of poverty.¹⁴

A distinct dimension of poverty is the range of harms it causes. Material deprivation is only one aspect (and there is dispute within the anti-poverty community about whether material deprivation should or can be defined in absolute or in relative terms). The poor are also denied agency and self-determination in daily life and in their life-course. Poverty is associated with stigma and shame. The poor, particularly poor women, are disproportionately vulnerable to violence. Some speakers invoked the notion of “social exclusion”,¹⁵ although in response, Lucy Williams argued the concept of social exclusion, now particularly salient in the European discussion, is problematical in that that it may valorise “inclusion” into or conformity with the going system.¹⁶ Nancy Fraser’s keynote address theorised the types of harms poverty causes

¹¹ See, for example, Fredman (2011) *Stell LR* 574-576 stating that policy responses focused only on poverty without considering issues of inequality among the poor risk entrenching inequality. See also S Mnisi Weeks & A Claassens “Tensions Between Vernacular Values that Prioritise Basic Needs and State Versions of Customary Law that Contradict Them: ‘We Love these Fields that Feed Us, but Not at the Expense of a Person’” (2011) 22 *Stell LR* 823, asserting that law and policies that ignore dense local contexts may increase rather than eradicate poverty.

¹² See C Albertyn “Gendered Transformation in South Africa Jurisprudence: Poor Women and the Constitutional Court” (2011) 22 *Stell LR* 591-591. Albertyn also states that the need to address gendered poverty and inequality is central to South Africa’s constitutional project (591). Albertyn’s approach is not a matter of “adding on” concerns about gender inequality to concerns about economic deprivation. Rather, the need is to address *intersectional* claims, for example, to appreciate the unique experience and needs of poor women (592-594).

¹³ Williams (2011) *Stell LR* 463.

¹⁴ It was altogether fitting that a session of the Law and Poverty Colloquium celebrated the launch of B Goldblatt & K McLean (eds) *Women’s Social & Economic Rights: Developments in South Africa* (2011).

¹⁵ See, for example, Fraser (2011) *Stell LR* 452.

¹⁶ Fredman (2011) *Stell LR* 567 deploys the concept of social exclusion, but also states that policy “should not exact conformity as a price of equality” (577).

or of which it consists, which in her formulation include material deprivation, denial of recognition, and denial of voice.¹⁷ Sandra Fredman offered a four-dimensional analytic framework for understanding questions of poverty in relationship to substantive equality.¹⁸

Once again, sorting out these complexities is not a matter of simply academic concern. The point is that virtually all of the critical concepts upon which progressive, anti-poverty thinking is grounded – such as “deprivation,” “equality,” “dignity,” and “poverty” itself – point us in a general direction but are indeterminate as to their concrete meaning(s). What these terms mean in people’s lived experience is something about which the poor and their advocates can and from time-to-time should disagree. These concepts and values are not self-defining. Except as evocative rhetoric, they become useful to us only if we fill them with ever-more fine-grained, substantive content. The indeterminacy of our fundamental values does not mean we cannot make rational decisions about the way forward or that anyone’s idea of “equality” or “dignity” is as good as anyone else’s. What it does mean is that we cannot *derive* policy approaches from the foundational values without making intermediate and contestable ethical and political judgments that are not prescribed by the abstract values. Moreover, we need to bring a great deal of local knowledge to bear on the effort in order to do a satisfactory job of translating the values into effective policies, always bearing in mind that all knowledge about society is at least partially shaped by the preoccupations and world-view of the actor or investigator. Conscious or unconscious moral and political sensibilities come into play whenever we address a question like “what is the scope and what are the characteristics of poverty among single-parent households in rural KwaZulu-Natal?” All of this is elementary to social scientists, policy analysts, and activists on the ground. As will be seen, however, special difficulties arise when *lawyers* attempt to give substantive content to abstract legal concepts like equality or dignity.

4 Poverty and democracy

Another thread of the conversation concerned the interpretive frame in which we should understand democracy. Henk Botha and Danie Brand argued that the Constitution embraces a new conception of democracy that assumes but is not exhausted by free elections and representative government.¹⁹ We thought aloud about the shape and contours of this new understanding of democracy and whether it might open political space for the poor to challenge their continued subordination and exclusion. Danie Brand argued that the constitutional vision of democracy embraces the idea that poverty-eradication

¹⁷ Fraser (2011) *Stell LR* 452. This corresponds to her three-axis conception of justice, comprising distributive justice, equal recognition, and democratic representation (455).

¹⁸ Fredman (2011) *Stell LR* 577 (redistribution, recognition, transformation, and participation as distinct dimensions of substantive equality in relationship to poverty).

¹⁹ H Botha “Representing the Poor: Law, Poverty & Democracy” (2011) 22 *Stell LR* 521–522. D Brand “Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa” (2011) 22 *Stell LR* 614–621–624. For an excellent overview, see T Roux “Democracy” in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 1 2009) 10-1–10-77.

is not a technical problem for solution by experts and elites but fundamentally a political problem. The implication is that the poor must be actively engaged in the design and implementation of measures to eliminate poverty. Frank Michelman spoke of a “social-liberal constitution” concerned to eliminate poverty,²⁰ but acknowledged that there is a “space of doubt” about whether the divide between liberal constitutionalism and socially progressive goals can be straddled.²¹ Sanele Sibanda feared that an interpretation of South Africa’s transformative constitution anchored within a liberal paradigm – even a modernised and “socially conscious” version – would narrow and stunt the transformative project and the promise of eradicating poverty.²² This outcome might eventuate, he argues, because of the general conservatism of the local legal culture.

Colloquium participants used an array of emblems to evoke this richer conception of democracy toward which the Constitution points including “advanced democracy”, “radical democracy”, “social democracy”, “social-liberal democracy”,²³ “participatory democracy”,²⁴ “thick democracy”,²⁵ “substantive democracy”,²⁶ and “post-liberal democracy”.²⁷ The conversation did, however, make two things clear. First, that the eradication of poverty will go hand-in-hand with the invention of a richer vision of democracy. Second, specifying the content of this advanced conception of democracy is every bit as complicated and difficult as concretising the meanings of poverty, deprivation, inequality, and social recognition. It will be the work of a generation.

In general conception, democracy is a set of political, institutional, social, and material arrangements and conditions that enable and allow all people to be self-determining in their individual choices, in their life-course, and in their collective existence. The Constitutional Court has provided a few, encouraging glimmers of authority for this broader vision.²⁸ But at this stage we are for the most part still groping in the dark in our efforts to fill the abstract idea with more precise content. Various speakers in various ways suggested

²⁰ FI Michelman “Liberal Constitutionalism, Property Rights and the Assault on Poverty” (2011) 22 *Stell LR* 706 716-717.

²¹ Cathi Albertyn insightfully addresses a parallel if also ambiguous debate within equality theory between a “liberal-egalitarian” and more “critical” or redistributive conceptions of substantive equality. See Albertyn (2011) *Stell LR* 605-609.

²² S Sibanda “Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism & the Struggle to Eradicate Poverty” (2011) 22 *Stell LR* 482 486. See also 492, where Sibanda expresses doubt that transformative constitutionalism “conceived within a liberal democratic paradigm” has the potential to empower the poor as true political agents or to provide the legal framework for eradicating poverty.

²³ See Michelman (2011) *Stell LR* 716-718.

²⁴ See Botha (2011) *Stell LR* 521.

²⁵ See Brand (2011) *Stell LR* 622.

²⁶ 623.

²⁷ See K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146 151-156.

²⁸ Among other cases, Botha (2011) *Stell LR* 523-529 refers us to *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC); *Matatiele Municipality v President of the RSA* 2007 6 SA 477 (CC); *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC); *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC); *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 3 SA 208 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

at least the following components of advanced democracy (in addition to free and fair elections and representative government):

- on-going and robust popular engagement and political participation down to grass-roots level;²⁹
- more complex conceptions of procedural fairness;³⁰
- transformative conceptions of separation-of-powers;³¹ and
- reorganisation of the background social and economic conditions so that all people live in circumstances affording them the capacity authentically to experience self-determination and the meaningful pursuit of personal and political choices.

The last point gives rise to a suggestion and a wholly tangential observation. The suggestion is that future colloquia of this kind devote greater attention to questions of private law to complement our discussions of constitutional law and public policy. South Africans cannot create a just society by superimposing a transformative Constitution suffused with the spirit of *ubuntu*³² onto a largely untransformed legal infrastructure.³³ As Lucy Williams reminded us, all of the hidden and obscure background rules that partially constitute social and economic life must be brought into the foreground, interrogated, and renovated with an eye toward transformation.³⁴ Not enough of this has occurred so far in the new South Africa,³⁵ with the notable exception of the field of residential property and evictions.

The tangent concerns an irony in our evolving understanding of the rule of law. Curiously, some of the most important and progressive stepping stones in poverty-eradication have involved disruption and transgression of law. One thinks of *Modderklip*³⁶ and *Olivia Road*, for example, as cases in which *illegal* occupation of land provoked noble advances in legal understanding and law enforcement. “Rights and remedies of illegal occupiers of land” is a bona fide field of legal scholarship in South Africa. I can assure you that this is not the case in the US. So primitive are the legal entitlements of occupiers in the US that it is an exaggeration to call them “rights”. I am not sure where this point goes exactly, but I sense it warrants study, particularly in light of the current rash of service-delivery protests (to which the police response has sometimes been quite harsh).

²⁹ Botha (2011) *Stell LR* 522.

³⁰ Symbolised, for example, by the concept of meaningful engagement launched in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC).

³¹ Brand (2011) *Stell LR* 621-637.

³² See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37 (Sachs J).

³³ See, generally, DM Davis & K Klare “Transformative Constitutionalism and the Common and Customary Law” (2010) 26 *SAJHR* 403 403-509.

³⁴ Williams (2011) *Stell LR* 468-470.

³⁵ See DM Davis “Developing the Common Law of Contract in the Light of Poverty and Illiteracy: The Challenge of the Constitution” (2011) 22 *Stell LR* 845 846-847, 850-857.

³⁶ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

5 Technologies of Judicial Review

The Colloquium grappled with a particular institutional aspect of “advanced democracy”, namely, how we should conceive judicial review of legislative or executive action affecting or giving effect to social and economic rights. Manifestly, a significant challenge facing progressive South African lawyers and activists is the task of inventing new legal approaches to (or what I call “technologies of”) judicial review that reflect a richer, more nuanced conception of separation of powers and relative institutional competence.

Numerous papers worked on aspects of this problem. Danie Brand argued that the Constitutional Court’s conception of separation of powers and judicial deference is at odds with the theory of democracy embedded in the Constitution.³⁷ He called for a revised theory of judicial review that would replace the current binary and exclusively institutional conception of separation of powers (the judicial deference question seen as concerning relationship between (i) courts and (ii) legislatures and executives) with a triangular understanding inspired by the substantive aspirations of the Constitution (judicial deference now understood as involving (i) courts, (ii) legislatures and executives, and (iii) engaged, popular sovereignty outside the normal representative institutions). Jackie Dugard and Stuart Wilson proposed a substantively oriented (as distinct from purely procedural and institutional) framework for judicial review in which the test for reasonableness is whether the government’s policy or omission in a socio-economic rights case adequately responds to the lived, situational context of the case with respect to the interests meant to be protected by the right.³⁸

Geo Quinot and Sandra Liebenberg strove valiantly to bring some coherence to South Africa’s existing jurisprudence of “reasonableness review”.³⁹ Building on this effort, they offered a refined, hi-tech proposal as to what reasonableness review should become. The core of their idea is that legislative and executive decision making (or omissions) affecting or giving effect to socio-economic rights must fall within a constitutionally permissible “band” of options, but that the range or “band-width” of legislative or executive discretion varies from case to case. They argued further that *prior* to any balancing or proportionality exercise, the band-width, and consequently the level of judicial scrutiny must be determined and justified based on a substantive analysis of the normative content and goals of the right. By analogy to a zoom-lens camera, the first stage of inquiry is equivalent to composing the picture by moving the lens in or out to determine focal length; the balancing or proportionality phase of the inquiry, equivalent to rotating the lens to put the image in focus, is secondary.

Filling out the meaning of transformative conceptions of judicial review and separation of powers will be, too, the work of a generation. But the idea is not

³⁷ Brand (2011) *Stell LR* 624-630.

³⁸ S Wilson & J Dugard “Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights” (2011) 22 *Stell LR* 664 672-673.

³⁹ G Quinot & S Liebenberg “Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa” (2011) 22 *Stell LR* 639 642-661.

to come up with neat and tidy doctrinal solution. Discussion at the colloquium generally reflected a “chastened” or “anti-formalistic” view of the constraining power of legal doctrine. No one suggested that if we can only come up with the correctly formulated test for judicial review in socio-economic rights cases we would have the “magic bullet” that will secure the right outcomes. Indeed, few participants exhibited a great deal of faith in the notion that legal rules and standards tightly confine and channel judicial action. At the end of the day, the words and concepts of the doctrinal formulation matter much less than how they are applied in practice, as Lucy Williams develops in a very helpful recent paper.⁴⁰

On the other hand, no one argued that legal reasoning is content-less or infinitely plastic and therefore that it can be assimilated to political or ethical argument. Scepticism about the constraining power of legal rules leads not to an instrumental or nihilistic approach but to an appeal to decision makers to be more self-conscious and transparent about their reasoning processes. Several speakers urged greater self-understanding by and candour from the courts about what they are doing when they make legal decisions.

6 The challenge of the ‘law/politics’ relationship in legal advocacy

These threads of conversation brought the Colloquium back to a familiar topic, the distinction between law and politics. But there was a new twist. Our project confronts a dilemma growing out of a critical understanding of the law/politics distinction.

As *advocates* we wish to invoke the cachet of legal necessity; we want to be able to say that our proposals for transformation and poverty-eradication are legally, indeed constitutionally required. This interpretative leaning is not simply a reflection of our personal political commitments. Our claim is that transformative, equality-seeking approaches are congruent with what is legally the best reading of the Constitution. In truth, the reason why we are so keen on transformative constitutionalism and social and economic rights is precisely because they make our fondest hopes and dreams appear to be legally necessary.

However, our work as *analysts and critics* demonstrates that the broad values and transformative aspirations embraced by the Constitution are indeterminate with respect to their legal and institutional implications. They can only be given concrete application on the basis of a myriad of intermediate judgments and choices that reflect moral and political perspectives and sensibilities. Central themes of the Colloquium were that the meaning of a constitution is not given or self-defined by its text,⁴¹ and that the progressive values we champion in the name of transformation are indeterminate, evolving, contestable, and sometimes internally contradictory. The proper understanding of these values

⁴⁰ See generally L. Williams “The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study” (2009) 3 *CCR* 141-199.

⁴¹ Sibanda (2011) *Stell LR* 492-494 makes this point with particular force.

is contested within the anti-poverty community, let alone within the general political culture.

At least on the surface, what we say to each other in gatherings such as this Colloquium seems different from what it is prudent to say in a courtroom. We urgently need to develop a language in which to address courts and other decision makers that is faithful to our analytical insights, yet persuasive as advocacy. We need to develop the capacity to reassure adjudicators that recourse to ethical and political judgment is inevitable in the adjudication process, and can be legitimate provided it is done transparently, self-critically, and faithfully to the broad vision of the Constitution. At the same time, we must avoid falling into the trap of being heard to approve of “politicising” adjudication in the primitive and corrupt sense of that phrase, i.e., that responsible adjudicators may pursue the self-serving agendas of individuals and interest groups whom they are beholden.

It was common cause among Colloquium participants that legal reasoning based on a duty of interpretive fidelity to legal authorities is a distinct discourse from “purely” political or ethical argument. Some argument-types that are perfectly acceptable in a philosophical treatise are inappropriate or unpersuasive in legal argument as lawyers know it. The project of deepening transformative constitutionalism in which we are engaged is a *constitutional* project, never “simply” an ideological project or an expression of personal inclination. On the other hand, all agreed that the boundaries between law and politics and between legal argument and political or philosophical argument are indistinct, blurred, and porous. In making the intermediate judgments and choices essential to translating legal norms into concrete applications, adjudicators have resort—and, since there is no other way the requisite intellectual operations can be performed—*must* have resort, consciously or unconsciously, to ideological considerations.⁴² Indeed, adjudicators’ understanding of the very authorities to which they owe interpretive fidelity is partly constructed by their interpretive activity which, consciously or unconsciously, filters through their ethical and moral preoccupations and sensibilities.

Moving forward, we must continually debate among ourselves as well as with broader publics about what the transformative values are and what they should mean in concrete application. We must debate the real-world content that should be poured into social and economic rights. We must be aware that these debates will never and should never reach closure, and that any conclusions we reach are always provisional. We must also acknowledge that transformation involves trade-offs that will rest in part on judgments of an ethical and political nature. An elderly, traditional councillor vividly illuminated this point. As reported by Sindiso Mnisi Weeks and Aninka Claassens, she spoke movingly about the love she and her community have

⁴² See H Botha “Rights, Limitations and the (Im)possibility of Self-government” in H Botha, A van der Walt & JWG van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13 13 n 4:

“[A] judge cannot simply invoke the authority of the Constitution, as if the Constitution speaks to us directly, unmediated by the interpretations of relevant social actors and legal decision-makers.”

for the fields that sustain them, but then said, without hesitation, that the community would provide a family in need with a parcel of land taken from others. This would be both for the benefit of the family in need and for the sustainability of the entire community.⁴³

But therein lays a danger. Candidly engaging in these debates, as we must, risks de-legitimizing our reading of the Constitution by revealing it to be in some way morally and politically grounded after all, not textually required (at least in any simple sense). Getting the law/politics relationship right is going to be hard work. It brings to mind Sisyphus rolling the rock up the hill. But that is what we do. It is a worthy task, and we should continue to work at it. I do not mean even slightly to suggest that resolving this jurisprudential conundrum is a priority on a par with delivering water, electricity, food, shelter, housing, medical care, and social security to the poor. My point is narrower. It is that these questions and paradoxes are pertinent and potentially significant to legal work to eradicate poverty. As Cathi Albertyn said, lawyers are partly responsible for the development of the law.⁴⁴ The substantive content of law is influenced by how we conceive and frame our cases, what theories we choose to advance, and what understanding of the legal process and the scope of judicial review we offer to courts.⁴⁵ Working on these questions is at best a modest contribution to establishing a just society. But it is *our* contribution, and if this work is exemplified by the learning, insight, imagination, and intellectual daring on display at this Colloquium, we can feel good about it.

⁴³ Mnisi Weeks & Claassens (2011) *Stell LR* 823.

⁴⁴ Dennis Davis, Cathi Albertyn, and other participants commented during the discussion that the way in which advocates and courts frame legal arguments, and therefore the conscious or unconscious political and ethical sensibilities advocates and judges bring to their work, play a large role in determining what the rights mean.

⁴⁵ See also Albertyn (2011) *Stell LR* 613.