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Legitimacy: The Social Turn and Constitutional Review: What political liberalism suggests: A Reply to Frank I. Michelman[1]

The authority enjoyed by a constitution is not self-generating. It rests on political conditions which cannot be guaranteed by the constitutional text itself.[2] For this reason contemporary constitutionally structured government requires a legitimacy which is not attained through some transcendent metaphysical claim but by means of the performance of its regulatory functions designed to improve the life and health of the citizenry. Expressed differently, when the output of this regulation closes the societal gap between a prevailing reality and the vision prefigured in the constitutional text, the constitutional enterprise may only then attain a viable form of political power. For Martin Loughlin, this role of government underlies a certain utopian idea, particularly when informed by a positive form of constitutionalism which holds the potential for an escape from the limits of nature and history, as it prefigures a new framework for society. Hence, the key question is whether this type of governmental regime can continue to maintain the power of constitutional imagination which sustains a collective political association that the individual within the association will tend to accept over the long run.[3]

Frank Michelman rises to this challenge on behalf of political liberalism by seeking to explore whether members of a society can sustain amongst themselves a sense of assurance of the 'deservingness' of the political regime to enjoy general and regular support through a legitimate constitutional framework, referred to by *Michelman* as legitimation by constitution (LBC). In exploring this possibility, *Michelman* examines LBC through the prism of social and economic rights, the constitutionalization of which has grown significantly over the past three decades. This recognition of social and economic rights allows *Michelman* to argue that the liberal principle of legitimacy does not only depend on the negative blockade against oppressive political majorities but also provides positive support for an on-going process of public opinion formation in the interests of securing the moral legitimacy of the State. In order to justify the inclusion of social and economic rights in a liberal constitution, he raises four questions which require positive answers in order to justify the constitutionalization of these components of the social wage.

The questions which *Michelman* poses are the following: to what extent does the guarantee of social and economic rights form part of the basic attributes required of any political regime which seeks justice in modern pluralistic conditions; does this guarantee constitute a condition for a minimal moral legitimacy; whether this inclusion would necessarily provide a reason to write the recognition of these rights into a constitution;

1 See Frank I Michelman, *Legitimacy, The Social Turn and Constitutional Review: What Political Liberalism Suggests*, this volume, 183-205.

2 Martin Loughlin, *The Concept of Constituent Power: A Critical Analysis, at 9-13* – paper presented at a law workshop at the University of Toronto, 15 January 2013.

3 Martin Loughlin, *The Constitutional Imagination*, 77 MOD. L. REV. 1, 20 (2014).

and finally whether the country's courts should be involved in the vindication of this field of social provisioning.

I find no difficulty with the argument, whether one accepts a Rawlsian principle of a guaranteed social minimum or what I would prefer to call a commitment to substantive egalitarianism, that a bedrock for a society which seeks to promote a coherent principle of justice is the establishment of a fair distribution of basic resources that, at the very least, minimally assures everyone living in that society the basic living conditions necessary to experience self-determination.[4] Neither do I have a difficulty with *Michelman's* answer to the third question relating to constitutionalisation. As *Michelman* contends, if the country's constitution is adequately democratic in design and if its content guarantees the provision of certain core rights, it is possible to have a constitution which holds a powerful call upon the members of that society, given that the text, read as a whole, may reflect the people's vision for a just society.

However, my concession to *Michelman's* reasoning with regard to this third question is qualified. It is dependent on an agreement on the answer to the second question relating to legitimacy. My reluctance to embrace *Michelman's* proposed answer can be encapsulated in the following question: Is it possible to conceive of an overlapping consensus as envisaged by Rawls? Working within this tradition, *Michelman* embraces the idea that a State would significantly weaken any claim it might have to compliance with its laws by all who live within its borders when it had 'within its grasp the means to do so at no more than a moderate cost to any ones enjoyment of the system's goods and without a violation of anyone's basic liberties, (but) failed in its commitment to eliminate the traps of soul defeating, structural poverty that it seems must otherwise arise and persist within a liberal market-based economy.'[5] But is this enough to extract the necessary compliance to stimulate the required constitutional imagination of the population in order to secure LBC?

I propose to deal with this question, a positive answer to which is required in order to answer positively the question of constitutionalization of socio-economic rights, through the prism of a developing country; in this case South Africa. There can be no doubt that post-apartheid South Africa embraced a normative constitutional project with the aim of achieving justice through reconciliation, equality through economic restitution, democracy through the transformation of the entire legal system, with particular emphasis upon the right to a dignified life. The constitution sought to establish a new relationship between law and society, between law and life while equating democracy and the political with the ethical and the just. The core underlying principle is that of ubuntu, a recognition of human mutuality. The very idea of the constitution constituted a promise of transcending the old politics of racial and gender difference by way of an affirmation of a shared humanity. Inevitably, this project involved a thicker constitution, a more ambitious project, than the thin model which flows from the embrace of the Rawlsian overlapping consensus which is implicit in *Michelman's* analysis.

4 See Karl Klare, *Critical Perspectives on Social and Economic Rights, Democracy and Separation of Powers* – in SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE, Helena Alviar Garcia, Karl Klare and Lucy Williams (eds) at 15 (2015).

5 Michelman, this volume, 191.

As *Achille Mbembe* has written:

'How to govern the poor has therefore become one of the biggest moral questions facing the nascent democracy. Behind policy debates and "welfare" and "service delivery" loom fundamental ethical choices that will determine the nature of the South African experiment in democracy – questions of how to write historical wrongs; what is the relationship between personal collective injury and larger problems of equality, justice and the law; hunger and morality; owning and sharing, or even truth, hope and reconciliation. The urgency of the new moral dilemmas is such that, for the democratic project to have any future at all, it should necessarily take the form of a conscious attempt to retrieve life and "the human" from the history of waste.'[6]

Mbembe's acute observation which must lead to a thicker constitution as a necessary requirement for legitimacy within the South African context finds support in the work of *Martin Chanock* who warned that the dream of liberal democracy in Africa was a western one not shared by the post-colonial elites. As *Chanock* writes:

'The rule of law cannot be built from the top down but some attachment to it must adhere in the society itself. A starting point to write in a meaningful way about democracy in an African constitutionalist tradition may be an awareness of the issue surrounding the languages and translation strategies in which this can be expressed.'[7]

The view from this part of the South cautions against the possibility of fashioning a constitutional enterprise where the legitimacy bar may well be set too low in order to obtain a sufficient consensus, or expressed in the terms being employed here, congruence with society's constitutional imagination. But, is it possible to think through this difficulty and to contend, as I suspect advocates of this form of LBC will do, that the social minimum as advocated within the Rawlsian perspective must suffice to gain acceptance even from those of to whom redistribution is demanded? I have my doubts that we can develop a universal claim here for the reasons already advanced. But if we think past the specific challenges posed by developing countries, the burden of argument must then shift to the final question, namely that of the judicialisation of social and economic rights in particular and, flowing therefrom, the central role of the judiciary in the constitutional project in general.

There is a traditional concern with an increasing judicialization of what previously were seen as political issues. [8] As *Michelman* notes, liberals have accepted without much qualm that, when government fails to safeguard, or worse, impedes upon the liberties of an individual with regard to conscience, thought, expression, association or privacy, a "court like authority" can satisfactorily decide disagreements with regard to these questions. By contrast, conformity with social provisioning, even at a basic level, is not unanimously seen as being located in the province of a "court like authority". The problems of compliance are regarded as falling outside the framework of justiciability. Polycentric problems are posed which are best resolved by political rather than legal

6 See Achille Mbembe, *Democracy as a Community Life* – in The Johannesburg Salon, 2011, Vol. 4, available at http://jwtc.org.za/volume_4/achille_mbembe.htm.

7 Martin Chanock, *Constitutionalism, Democracy and Africa: Constitutionalism Upside Down* – in FOR MARTIN CHANOCK: ESSAYS IN LAW AND SOCIAL PRACTICE, Stephen Ellman, Heinz Klug and Penelope Andrews (eds) 126 at 141 (2012).

8 See in general Ran Hirschl, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2007).

means.[9] In response, modern liberal constitutional scholars have turned to various forms of what is conveniently referred to as a weak form of review.[10] According to *Tushnet*:

'The basic idea behind weak-form review is simple: weak-form judicial review provides mechanisms for the people to respond to decisions that they reasonably believe mistaken that can be deployed more rapidly than the constitutional amendment or judicial appointment processes.'[11]

The weak form of review that *Michelman* has in mind is where the court acts initially as an instigator of as well as a forum for overseeing engagements amongst the various stakeholders to promote the continuing process of interpretation of what a constitutional right to, say access to health care services, consists, both in substance and what steps are required to vindicate this right. From this dialogical process may emerge a best practice consensus. At this point, the court can begin to demand substantial compliance with this newly agreed standard in order to ensure that the constitutional right to access to health care services is implemented by the State.

Michelman is correct to embrace the nuanced technologies of judicial review that explore a more dialogical role for the judiciary than was the case with the standard conceptions of judicial review. For the challenges posed to courts by the inclusion of social and economic rights, these various conceptions of weak-form review may well serve to provide the best promise for reconciling social democratic political impulses with the legitimation of a constitutional enterprise.

However to return to the South, the court's appropriate role could depend on a more complex range of factors and considerations. As *Loughlin* has noted:

'Neither the technical brilliance of its design nor its efficacy as law offers much guidance, on a constitution's integrative capacity. That quality rests not on a constitutions status as law but on its symbolic power. Its integrative capacity is a product of political culture.'[12]

In developing countries, the weight of the challenge posed, in particular, by transitional societies with new constitutions, to achieve a viable form of social and political integration of society, through being constituted by way of a legal text, may be too onerous for the minimalist conception of a consensus advocated by *Michelman*. The utopian vision of this kind of developing society as prefigured in the constitution appears to require a thicker form of consensus. In turn, this means that there may be powerful pressures upon courts to balance the counter majoritarian impulse against the need for this reconciliation with the utopian idea contained in the Constitution. *Michelman's* argument does not appear to make any provision or allowance for courts to respond to the tension between counter majoritarian concerns and utopian constitutional aspirations in this way.

In this context, weak-form review may not be sufficiently sturdy to bear the weight of the burdens imposed on courts, if LBC is to have any success in these societies, emerging as they are from decades of political turbulence, social division and economic decline. In turn, this means that the process of judicialization itself, especially in the

9 See Lon L Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

10 See in particular Mark Tushnet, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE IN COMPARATIVE CONSTITUTIONAL LAW (2008).

11 Id. at 23.

12 Loughlin, *supra* note 3, at 15.

construction of conditions which are required for an egalitarian form of democracy, may well need to move beyond the minimalistic overlapping consensus which is central to *Michelman's* argument.