

Spring 2014

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Drew F. Cohen

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### Recommended Citation

Drew F. Cohen, *A Constitution at a Crossroads: A Conversation with the Chief Justice of the Constitutional Court of South Africa*, 12 Nw. J. INT'L HUM. RTS. 132 ().  
<http://scholarlycommons.law.northwestern.edu/njihr/vol12/iss2/1>

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# A Constitution at a Crossroads: A Conversation with the Chief Justice of the Constitutional Court of South Africa

Drew F. Cohen\*

“It doesn’t matter how progressive the Constitution is. It cannot, just because it is operative, touch me, in my house to the point where I automatically begin to understand how my white brothers and sisters think and what I need to do to relate to them better. Some practical steps must be taken and we, as a nation, must also be encouraged to take them so that . . . [t]he ‘ubuntu’ or that spirit of sharing of humanity, of oneness, that the 1993 constitution provided for . . . [can] permeate across society.”

-Chief Justice of the Republic of South Africa, Mogoeng Mogoeng, September 4, 2013.<sup>1</sup>

## I. INTRODUCTION

¶1 Shortly before the first chapter of South Africa’s grand constitutional democratic experiment was to draw to a close with the passing of the country’s first black president and revered humanitarian, Nelson Mandela,<sup>2</sup> the Chief Justice of the Constitutional Court of South Africa graciously granted the author an informal interview to discuss some of the most pressing challenges facing both the court and the country as it embarks on the next phase of its transformative endeavor. To that end, this article provides insight into the court’s and country’s current controversies, including institutional accountability, social transformation and affirmative action, and judicial selection, as well as the responsibilities of leading the judiciary of a progressive constitutional democracy in the South African regional community.

¶2 On October 11, 1996, two-and-a-half years after a remarkably peaceful and abrupt transition from its authoritative past, South Africans enacted a final Constitution designed

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\* Drew F. Cohen, J.D., The George Washington University Law School, 2012. In writing this article, I was fortunate to draw upon my experiences as a 2013 foreign law clerk to Chief Justice Mogoeng Mogoeng of the South African Constitutional Court. I acknowledge the institutional support of Professor Scheherazade Rehman of the George Washington University and the European Union Research Center. Finally, I appreciate the diligence of Northwestern Law’s Journal of International Human Rights editors, in particular the Managing Articles Editor, Katherine G. Klein, in preparing this Article for publication.

<sup>1</sup> Interview with Mogoeng Mogoeng, Chief Justice, CC of S. Afr., Johannesburg, S. Afr. (Sept. 4, 2013).

<sup>2</sup> Nelson Mandela, “the father of the nation,” died on December 5, 2013, three months after the interview with the Chief Justice was conducted. *Nelson Mandela Dies*, MAIL & GUARDIAN (Dec. 5, 2013), <http://mg.co.za/article/2013-12-05-nelson-mandela-dies>.

to redress the country's past injustices.<sup>3</sup> In order to secure the new democratic initiative, the framers enshrined the Constitution with a bill of twenty-seven modern rights. Unlike almost any other people on earth,<sup>4</sup> South Africans have a constitutional right to privacy, housing, healthcare, and education.<sup>5</sup> The government cannot discriminate against them on the basis of “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”<sup>6</sup> South African children have their own set of specific rights. The new supreme law provided that every child has the right to “basic nutrition, shelter, basic health care services and social services” and “to be protected from maltreatment, neglect, abuse or degradation.”<sup>7</sup> Commentators have characterized the text as among the most progressive ever constructed. Justice Ruth Bader Ginsburg suggested that the Egyptians, when drafting their post-Arab Spring Constitution in 2012, model it based on the South African Constitution rather than the United States' founding document. The Constitution of South Africa, she said, “was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights, had an independent judiciary . . . It really is, I think, a great piece of work that was done.”<sup>8</sup>

¶3 As if to press a “reset button” from an era of “parliamentary sovereignty” under apartheid,<sup>9</sup> the autochthonous text installed a new apex court—the Constitutional

<sup>3</sup> S. AFR. CONST., 1996 pmbll., reprinted in OXFORD CONSTITUTIONS OF THE WORLD (Gisbert H. Flanz ed., 1997) [hereinafter S. AFR. CONST. 1996] (proclaiming that South Africans “[r]ecognise the injustices of [their] past” and therefore adopt a Constitution to, *inter alia*, “[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights . . .”). See also S. AFR. (INTERIM) CONST., 1993, Epilogue (envisaging national unity and reconciliation); *Azanian Peoples Org. (AZAPO) v. President of the Republic of S. Afr.* 1996 (8) BCLR 1015 (CC) (S. Afr.) (interpreting the epilogue). This and all South African Constitutional Court cases are available online at the Court's official website: <http://www.constitutionalcourt.org.za>.

<sup>4</sup> See, e.g., Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 323 (2007) (“Although some other countries' constitutions enumerate socio-economic rights, few countries' courts have found such rights to be fully and directly justiciable, and even fewer have multiple, affirmative social rights opinions. No other country has developed their case law sufficiently to outline a comprehensive jurisprudence.”); Henry J. Richardson III, *Patrolling the Resource Transfer Frontier: Economic Rights and the South African Constitutional Court's Contributions to International Justice*, 9 AFR. STUD. Q. 81, 81 (2007), <http://www.africa.ufl.edu/asq/v9/v9i4a6.pdf> (describing South Africa's 1996 Constitution as the “the most rights-protective in the world.”).

<sup>5</sup> S. AFR. CONST. 1996 §§ 14, 26, 27, 29.

<sup>6</sup> *Id.* at § 9(3).

<sup>7</sup> *Id.* at § 28(1)(c)-(d).

<sup>8</sup> Real Clear Politics, *Ruth Bader Ginsburg to Egypt: Don't Use US Constitution As A Model* (Feb. 3, 2012), [http://www.realclearpolitics.com/video/2012/02/03/ruth\\_bader\\_ginsburg\\_to\\_egypt\\_dont\\_use\\_us\\_constituti\\_on\\_as\\_a\\_model.html](http://www.realclearpolitics.com/video/2012/02/03/ruth_bader_ginsburg_to_egypt_dont_use_us_constituti_on_as_a_model.html). See also Adam Liptak, ‘We the People’ Loses Appeal with People Around the World, N.Y. TIMES (Feb. 6, 2012), <http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html> (quoting Justice Ginsburg).

<sup>9</sup> See, e.g., *Sachs v. Minister of Justice*; *Diamond v. Minister of Justice* 1934 AD 11 (A) at 37 (S. Afr.) (upholding “the plain principle that Parliament may make any encroachments it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of courts of law to enforce its will.”).

Court<sup>10</sup>—with the power to invalidate any “law or conduct” inconsistent with the Constitution.<sup>11</sup> The eleven justices,<sup>12</sup> who, in theory,<sup>13</sup> broadly reflect “the racial and gender composition of South Africa”<sup>14</sup> are appointed to a non-renewable, twelve-year term or serve until he or she reaches the mandatory retirement age of seventy.<sup>15</sup> Although the Chief Justice and his or her Deputy Chief Justice are the titular leaders of the Court, members of the bench consider and carry themselves as equals. Caseloads are divided evenly amongst the justices and consents and disagreements carry equal weight in the conference as well as in judgment. In an outward, public display that symbolizes this parity, justices sit on the same plane during hearings—with no one justice elevated above his or her peers—and, aside from the Chief Justice and Deputy Chief Justice who sit in the center, associate justices are randomly assigned different seats before each hearing.

¶4 The early Constitutional Court<sup>16</sup> quickly set about to actualize the post-conflict constitutional principles and handed down a series of celebrated cases<sup>17</sup> that addressed structural injustices brought about by decades of gross poverty, disease, and inequality. In one of its first judgments, it outlawed the death penalty,<sup>18</sup> and soon thereafter, in perhaps the first bench’s most significant social rights decision, forced the government to provide impoverished citizens expeditious access to “adequate housing.”<sup>19</sup> In another early landmark social rights case, *The Treatment Action Campaign (TAC)*,<sup>20</sup> the Court ordered the government to provide antiretroviral medicines to prevent the transmission of HIV from infected mothers to their infants at birth. Pursuant to the fundamental constitutional principles of equality and dignity, the Court also invalidated the common

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<sup>10</sup> The Constitutional Court was established by the interim Constitution in 1993, but President Nelson Mandela only formally opened the Court on February 14, 1995, the day before it heard its first case (*S v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.) (invalidating the death penalty)).

<sup>11</sup> S. AFR. CONST. 1996 § 2. *See also id.* at § 167(5) (announcing that the Constitutional Court is the “final” arbiter for determining the constitutional validity of an act of Parliament and conduct of the President).

<sup>12</sup> *Id.* at § 167(1) (stipulating that the Court will be composed of a Chief Justice, Deputy Chief Justice and nine other associate justices).

<sup>13</sup> The Court’s current, permanent composition includes six black males, three white males and two black females. Justice Kate O’Regan, who served from 1994 until her term expired in 2009, is the only white female to have served on the bench. For a list of the current justices and their biographies, *see Current Judges*, THE CONST. COURT OF S. AFR., <http://www.constitutionalcourt.org.za/site/judges/currentjudges.htm>.

<sup>14</sup> S. AFR. CONST. 1996 § 174(2).

<sup>15</sup> *Id.* at § 176(1).

<sup>16</sup> The “early Constitutional Court” or “first bench” refers to the period from the establishment of the Court under the interim Constitution to the retirement of its first chief justice, Arthur Chaskalson, on May 31, 2005.

<sup>17</sup> *See, e.g.*, Howard W. French, *South Africa’s Supreme Court Abolishes Death Penalty*, N.Y. TIMES (June 7, 1995), <http://www.nytimes.com/1995/06/07/world/south-africa-s-supreme-court-abolishes-death-penalty.html> (reporting on the Constitutional Court’s first major ruling that banned the death penalty); *South Africa to have gay weddings*, BBC NEWS (Dec. 1, 2005), <http://news.bbc.co.uk/2/hi/4487756.stm>.

<sup>18</sup> *S v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

<sup>19</sup> *Gov’t of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

<sup>20</sup> *Minister of Health v. Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (S. Afr.).

law definition of marriage inasmuch as it did not include same-sex couples<sup>21</sup> and, on similar grounds, banned the common law offense of sodomy.<sup>22</sup>

¶5 Almost two decades since its inception, however, the perception of the Court and the Constitution as irreproachable agents of social transformation<sup>23</sup> has flagged. Perhaps, given the deep socioeconomic inequalities the Court confronted, a perceivable decline is only natural. One of the challenges in adopting an aspirational constitution is squaring its progressive rights with socioeconomic realities.<sup>24</sup> The institutional legitimacy of the judiciary is only as strong as the capacity of the government to effectively and efficiently implement its rulings and the will of the people to follow them.<sup>25</sup> When social progress stagnates or fails to keep pace with expectations, the legitimacy of the institutions that hold themselves out as the champions of transformation are questioned.

¶6 The void between what the Court and the Constitution guarantee and the realities in the townships on the outskirts of cities, remains vast. Irene Grootboom, of the landmark socio-economic rights case that forced government to provide adequate housing, died homeless, still waiting for state accommodations eight years after the ruling.<sup>26</sup> Although the TAC case required the government to supply free antiretroviral drugs, 10% of the population, more than any other country, and over a quarter of all South African schoolgirls, is HIV positive.<sup>27</sup> The Court has sought to protect and provide pupils meaningful access to schools<sup>28</sup> and the Constitution explicitly guarantees every child's

<sup>21</sup> *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

<sup>22</sup> *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC) (S. Afr.).

<sup>23</sup> See, e.g., *S v. Makwanyane* 1995 (3) SA 391 (CC) at 152 para. 262 (S. Afr.) ("What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting . . . future . . ."); *Du Plessis and Others v. De Klerk and Another* 1996 (3) SA 850 (CC) at 108 para. 157 (S. Afr.) (describing the Constitution as "a document that seeks to transform the *status quo ante* into a new order . . .").

<sup>24</sup> For a discussion on the feasibility of legally enforcing socio-economic rights, see generally Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35 (2006).

<sup>25</sup> In late 2012, the *Economist* tartly observed that "[s]ince Mr[.] Mandela retired in 1999, the country has been woefully led." Under Jacob Zuma, South Africa's current leader, the ruling party "has sought to undermine the independence of the courts, the police, the prosecuting authorities and the press." *Sad South Africa: Cry, the Beloved Country*, *ECONOMIST* (Oct. 20, 2012), <http://www.economist.com/news/leaders/21564846-south-africa-sliding-downhill-while-much-rest-continent-clawing-its-way-up>. See also Xolani Mbanjwa, *Thuli Madonsela: How Ministers Obstructed Nkandla Probe*, *CITY PRESS* (Nov. 13, 2013), <http://www.citypress.co.za/politics/thuli-madonsela-ministers-obstructed-nkandla-probe/> (reporting that Ministers in President Zuma's cabinet attempted to "obstruct" the Public Protector's investigation into corruption allegations regarding R206 million upgrades to the President's private residence).

<sup>26</sup> Pearlie Joubert, *Grootboom Dies Homeless and Penniless*, *MAIL & GUARDIAN* (Aug. 8, 2008), <http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless> (remarking that "Grootboom's death 'and the fact that she died homeless shows how the legal system and civil society failed her.'").

<sup>27</sup> *South Africa: 'Over 25% of Schoolgirls HIV Positive'*, *BBC NEWS* (Mar. 14, 2013), <http://www.bbc.co.uk/news/world-africa-21783076> (reporting 28% of South African female students are HIV positive, according to the South African Health Minister); Barry Bearak, *South Africa Fears Millions More H.I.V. Infections*, *N.Y. TIMES* (Nov. 19 2010), <http://www.nytimes.com/2010/11/20/world/africa/20safrica.html>. For additional health statistics for South Africa see *South Africa*, *WORLD HEALTH ORG.*, <http://www.who.int/countries/zaf/en/>.

<sup>28</sup> See, e.g., *Head of Department, Department of Education, Free State Province v. Welkom High School and Another*; *Head of Department, Department of Education, Free State Province v. Harmony High School*

right to an education, yet a recent report found that South Africa's Basic Education Department "allocated only about half the money needed in 2013/14 to supply all pupils with textbooks in each subject that they study."<sup>29</sup> Shortly after the Court struck down the common law definition of marriage, Parliament legalized same-sex marriage in November 2006—making South Africa the first and only country on the continent to do so<sup>30</sup>—and the country celebrated its first open traditional Zulu gay wedding in April 2013,<sup>31</sup> but instances of violent assaults, including "corrective rapes,"<sup>32</sup> against homosexuals persist with alarming frequency. The country has one of the highest rates of violent crimes in the world and instances of rape and sexual assault have increased in recent years.<sup>33</sup>

¶7 Under these sobering societal and political conditions, sixteen years after the ink on the parchment had dried, the current chief justice, Mogoeng Mogoeng, assumed stewardship of the Constitutional Court. Mogoeng was first appointed in 2009 as an associate justice along with three others to fill the vacancies of four departing judicial stalwarts from the first bench whose terms were expiring.<sup>34</sup> He began his legal career as a High Court prosecutor in Mafikeng from 1986 until 1990, after obtaining a Juris B degree from the University of Zululand and an LLB at the University of Natal. Mogoeng rose through the judiciary, first serving as a member of the now-defunct Industrial Court, then as a judge of the North West High Court, and as its Judge President in 2002. After serving less than two years as an associate justice, President Zuma announced Mogoeng as his choice for the Constitutional Court's fourth chief justice, which was confirmed on September 8, 2011.<sup>35</sup>

¶8 In September 2013, during the midst of the Court's third term, Chief Justice Mogoeng Mogoeng discussed his thoughts on leading one of the most dynamic and

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*and Another* [2013] ZACC 25; 2013 (9) BCLR 989 (CC) (S. Afr.) (invalidating a school policy that expelled pregnant learners).

<sup>29</sup> Bongani Nkosi, *South Africa's Hidden Textbook Crisis*, MAIL & GUARDIAN, Aug. 23, 2013, <http://mg.co.za/article/2013-08-23-00-south-africas-hidden-textbook-crisis>.

<sup>30</sup> *Gay Marriage Around the World*, PEW RESEARCH (July 16, 2013), <http://www.pewforum.org/2013/07/16/gay-marriage-around-the-world-2013/> (finding that South Africa is one of only sixteen countries in the world that grant legal recognition to same-sex marriages).

<sup>31</sup> Mandy De Waal, *My Big Fat Gay Zulu Wedding*, DAILY MAVERICK (Apr. 9, 2013), <http://www.dailymaverick.co.za/article/2013-04-09-my-big-fat-gay-zulu-wedding>.

<sup>32</sup> Lee Middelton, 'Corrective Rape': *Fighting a South African Scourge*, TIME (Mar. 8, 2011), <http://content.time.com/time/world/article/0,8599,2057744,00.html> ("South Africa should be a beacon of tolerance. Its constitution was the first in the world to outlaw discrimination based on sexual orientation . . . But in the townships on the city's outskirts, another reality reigns. The rate of violence against women in South Africa is among the highest in the world.").

<sup>33</sup> Mark Rosenberg, *Countries at the Crossroads: South Africa*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/countries-crossroads/2012/south-africa-0>. For the most recent official crime statistics for South Africa, see *Crime Statistics April 2011—March 2012*, S. AFRICAN POLICE SERV. (SAPS), [http://www.saps.gov.za/statistics/reports/crimestats/2012/downloads/crime\\_statistics\\_presentation.pdf](http://www.saps.gov.za/statistics/reports/crimestats/2012/downloads/crime_statistics_presentation.pdf).

<sup>34</sup> In addition to Mogoeng, Johan Froneman, Christopher Jafta and Sisi Khampepe were appointed to replace then Chief Justice Pius Langa, and Justices Yvonne Mokgoro, Kate O'Regan and Albie Sachs. For an account of this transition, see Chris Oxtoby, *New Appointments to the Constitutional Court 2009-2012*, 130 S. AFR. L. J. 219 (2013).

<sup>35</sup> *President Zuma Appoints Justice Mogoeng as Chief Justice of the Republic*, THE PRESIDENCY, REPUBLIC OF S. AFR. (Sept. 8, 2011), <http://www.thepresidency.gov.za/pebble.asp?reid=4821>.

innovative constitutional democracies. The interview as presented in this paper is broken into two main sections: the first (Subsections A and B of Part II) discusses transformative constitutionalism and the second (Subsections C and D of Part II) probes recent developments in South African jurisprudence. To that end, Subsection A considers the pace of judicial transformation from a bench that was predominately composed of white males to one that broadly reflects the makeup of society. As chair of the body that nominates judicial candidates to the President for appointment, Mogoeng provides particular insight into the recent difficulties the Judicial Selection Committee has had in attempting to balance the constitutional dictate to transform and diversify the bench with the need to promote merit. The Chief Justice also considers the impact the Constitution has had on race relations and to what extent judicial activism plays in creating a more egalitarian society. Subsection B explores recent measures taken to improve the institutional legitimacy of the judiciary. The most significant include improving relations between the judiciary and the press and restructuring the magistrate's courts.

¶9 Subsection C examines how the Constitutional Court canvasses foreign legal doctrines and incorporates specific elements to create “distinctly South African” jurisprudence. Finally, Subsection D reflects on the evolving relationship between the common law and the Constitution and what responsibilities the Chief Justice has in promoting the South African constitutional democracy to the region. It also assesses the disconnect between the sweeping constitutional guarantees and stark inequalities in the country and predicts in which area the next social rights legal battle will occur. What follows has been edited and condensed by the author.<sup>36</sup> As mentioned above, the interview has been split into four thematic subparts. Each subpart begins with a few brief paragraphs introducing the subject matter of the interview questions; the questions and responses are then provided in italics and paragraphs below.

## II. THE CHIEF JUSTICE'S JUDICIAL CADENZA<sup>37</sup>

### A. *Race, Transformation and the South African Judiciary: “We Cannot Afford to be the Type of Umpires Chief Justice Roberts had in Mind.”*

¶10 The South African Constitution makes explicit provisions for the appointment of judicial officers.<sup>38</sup> The appointment criteria, however, is vague: any “appropriate qualified” person who is “fit and proper” may serve as a judge.<sup>39</sup> The only caveat is when appointing judicial officers, consideration must be had for the “need for the

<sup>36</sup> Interview with Mogoeng Mogoeng, Chief Justice, CC of S. Afr., Johannesburg, S. Afr. (Sept. 4, 2013). The interview that forms the basis of this Article was conducted over the course of two, one-and-a-half-hour informal question and answer sessions (one in the morning and the other in the afternoon) in the Chief Justice's judicial chambers at the Constitutional Court of South Africa. Passages have been lightly edited for grammar; other syntactic changes appear in brackets. The thematic subparts of the interview do not appear in the order that they were conducted but have been arranged by the author for the benefit of the reader.

<sup>37</sup> See Niren Tolsi, *Applause for Mogoeng's Judicial Cadenza*, MAIL & GUARDIAN (Oct. 18, 2013), <http://mg.co.za/article/2013-10-17-applause-for-mogoengs-judicial-cadenza/> (“Two years in, Mogoeng is adding strings to his bow and, contrary to the fears at the time of his appointment, he isn't conducting judicial manoeuvres in the dark.”).

<sup>38</sup> See generally S. AFR. CONST. 1996 §174.

<sup>39</sup> *Id.* at §174(1).

judiciary to reflect broadly the racial and gender composition of South Africa.”<sup>40</sup> The President appoints judges “on the advice of” the Judicial Service Commission (JSC)—a body established by the Constitution composed of politicians, academics, attorneys, advocates, judges and chaired by the Chief Justice.<sup>41</sup>

¶11

The need for the JSC to balance merit with diversity and transformation when selecting judicial candidates is a polarizing debate in South Africa. In April 2013, a white male JSC member resigned after his internal discussion paper on transformation, concluding that there is “a very real perception in certain quarters that the JSC is, in general, set against the appointment of white male candidates except in exceptional circumstances,” was leaked to the press.<sup>42</sup> On July 6, 2013, the Chief Justice delivered a response at the “Advocates for Transformation” annual dinner where he questioned the pace and commitment to the appointment of black and female judicial candidates:

Of concern to me is, knowing that the apartheid system did, by design, empower white male lawyers and disadvantage black and women legal practitioners, do these bodies and their individual members have a plan and the willpower to transform the professions, not cosmetically but radically. And by transformation I mean, among other things, destroying whatever hurdles might still be standing in the way of many women and black lawyers joining these professions, by consistently reminding government departments, state-funded institutions and big business of the need to create equal opportunities for all South African lawyers with a favourable disposition towards women and black male practitioners . . .

I have come to challenge you . . . to resist all efforts . . . [to equate] the appointment of black and women practitioners to the institutionalization of mediocrity. The apparent discomfort with the progress we are making in transforming the Judiciary, as if we are about to encroach into the no[-]go area of privileged interests, and the concomitant boldly declared struggle for “white male” appointment, even if it would result in the perpetuation of their historic over-representation, must be dealt with decisively.<sup>43</sup>

¶12

After the speech, some members of the legal community demanded the Chief Justice be impeached for imperiling the impartiality of the JSC.<sup>44</sup> Others remarked that as

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<sup>40</sup> *Id.* at §174(2).

<sup>41</sup> *Id.* at §178(1).

<sup>42</sup> Niren Tolsi, *JSC’s Izak Smuts Resigns After Transformation Row*, MAIL & GUARDIAN, April 12, 2013, <http://mg.co.za/article/2013-04-12-izak-smuts-resigns-after-transformation-row>.

<sup>43</sup> Chief Justice Mogoeng Mogoeng, *The Duty to Transform, Advocates for Transformation Annual General Meeting Dinner*, THE INSTITUTE FOR ACCOUNTABILITY IN S. AFR. (July 6, 2013), [http://www.ifaisa.org/current\\_affairs/Advocates\\_for\\_Transformation\\_AGM\\_Dinner.pdf](http://www.ifaisa.org/current_affairs/Advocates_for_Transformation_AGM_Dinner.pdf).

<sup>44</sup> Ernest Mabuza, *Hoffman Launched Bid to Impeach Mogoeng*, BUS. DAY (Aug. 7, 2013), <http://www.bdlive.co.za/national/law/2013/08/07/hoffman-launches-bid-to-impeach-mogoeng> (“By publicly making and disseminating the speech, the chief justice brought the judiciary of South Africa . . . into disrepute in that he descended into the arena of contestation and controversy in respect of issues which are pending in the high court and . . . are likely to require final determination in the Constitutional Court.”);

head of the judiciary he was right to speak out in favor of transformation, as it is his responsibility to oversee a recalibration of a judiciary, which, in its current composition, does not adequately represent the demographics in South African society.<sup>45</sup> In remarks at a women judges conference in August 2013, law professor Managay Reddi, for instance, was dismayed at the legal community’s reticence to discuss the transformation of the judiciary: “[the] inherent conservatism and refusal by some culprits of apartheid in the legal profession, to share in the responsibility of transformation . . . undeniably accounts for the slow pace of transformation in our society, especially in the legal profession and the judiciary.”<sup>46</sup> The debate over judicial transformation and the JSC will only intensify as the Deputy Chief Justice and two associate justices’ terms expire in the next two years.<sup>47</sup>

¶13 What follows is a discussion about the Chief Justice’s approach to transforming the judiciary and his broader philosophy on race relations in South African society.

¶14 *Are you concerned that the pace of the country’s transition from apartheid has stagnated?*

¶15 It is a long process; it is a very difficult process that attracts criticism from both sides. The previously disadvantaged believe that we are not transforming as fast as we should. The previously advantaged think that we are being irrational in the way we go about our business—we are almost victimizing some of our white compatriots. But that is understandable because it is a very difficult process. It is also very healthy. South Africans must talk about transformation more and do so openly. They must articulate their feelings in public because we all know that there are issues that must be addressed, that there is information that must be disseminated so that the misconceptions people might have can be dispelled.

¶16 *Does the South African Constitution adequately address race relations?*

¶17 I think it does.

¶18 It doesn’t matter how progressive the Constitution is. It cannot, just because it is operative, touch me, in my house to the point where I automatically begin to understand how my white brothers and sisters think and what I need to do to relate to them better. Some practical steps must be taken and we, as a nation, must also be encouraged to take them so that the nation-building and national reconciliation that the 1993 Constitution made provisions for can become a reality. The ubuntu or that spirit of sharing of

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Paul Hoffman, *Mogoeng: A Most Unsuitable Chief Justice*, SUNDAY TIMES (July 28, 2013), [http://www.ifaisa.org/current\\_affairs/Mogoeng\\_a\\_most\\_unsuitable\\_chief\\_justice-Sunday\\_Times.pdf](http://www.ifaisa.org/current_affairs/Mogoeng_a_most_unsuitable_chief_justice-Sunday_Times.pdf) (“Considering the race and gender of judicial officers in the constitution is a mechanism for sifting candidates of equal worth; it should not be abused.”).

<sup>45</sup> See, e.g., Charl du Plessis, *Rights Groups Come Out in Support of Mogoeng*, CITY PRESS (Aug. 13, 2013), <http://www.citypress.co.za/news/rights-groups-come-out-in-support-of-mogoeng/> (reporting that nine of “most prominent rights organizations” in South Africa issued a press release supporting the Chief Justice’s position on transformation); see also *Media Release: A Response to the Reactionary Letters by Adv. Paul Hoffman SC*, HIGHER EDUC. TRANSFORMATION NETWORK (July 30, 2013), [http://www.hetn.org.za/documents/Press\\_Release\\_76\\_Reactionary\\_Letters\\_Against\\_JSC.pdf](http://www.hetn.org.za/documents/Press_Release_76_Reactionary_Letters_Against_JSC.pdf) (“Merit and transformation are two sides of the same coin.”).

<sup>46</sup> Managay Reddi, Professor of Law, University of KwaZulu-Natal School of Law, Address to the International Association of Women Judges Conference (Aug. 2013) (transcript on file with the author).

<sup>47</sup> Justice Thembile Skweyiya’s term expires in 2014, followed by Deputy Chief Justice Dikgang Moseneke and Justice Johann Van der Westhuizen in 2016.

humanity, of oneness, that the 1993 Constitution provided for would then be able to permeate across society.

¶19 Programs must exist at the kindergarten level, the primary school level, the high school level and, possibly, even at the university level, as well as at workplaces, to ensure our children begin to see one another as nothing but fellow human beings, fellow South Africans, who should support one another and make sure that this country prospers. It must never be seen as a white country; it must never been seen as a black country. It must be seen as a country of South Africans.

¶20 What is missing, though, are specific measures that could help facilitate a better understanding of our different racial groups. Let me clarify a bit. Given just how deeply divided black and white South Africans were in the past, I think we would have been better off had either a national department or a state-funded organization been established with the primary responsibility of looking for ways through which the different racial groups in South Africa could better understand one another, be more sensitive in their relations with one another, and ultimately help reconcile with one another.

¶21 There seems to be a late-hour awakening by our government . . . led by the Department of Arts and Culture. It has embarked on a social cohesion program that I believe is designed to make sure that all South Africans, irrespective of their color and gender, focus on what is of mutual benefit, rather than sectarian interests. So, I think we need to accelerate that; we need to make sure there is proper networking among the different racial groups. We need to make sure whatever propaganda the different racial groups might have been fed, which causes them to be resistant towards embracing one another, is dealt with and dealt with properly. I think that way you would find South Africans blending together much faster than what otherwise would have been the case.

¶22 *During your JSC hearing for Chief Justice, you likened yourself to Chief Justice John Roberts. Do you agree with his assessment that, “Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ballgame to see an umpire.”*<sup>48</sup> *In other words, is judicial activism inappropriate in a constitutional democracy?*

¶23 Former Chief Justice Pius Langa delivered a very moving, very important lecture at the University of Stellenbosch a few years ago on “transformative constitutionalism.”<sup>49</sup>

<sup>48</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.); see also Bruce Webber, *Umpires v. Judges*, NY TIMES (July 11, 2009), <http://www.nytimes.com/2009/07/12/weekinreview/12weber.html> (arguing that since the Roberts confirmation proceeding, judges are viewed by the public as “merely arbiters” who are not permitted to “set aside precedent and create law but to decide cases on the basis of established law”); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENTARY 701 (2007) (exploring the virtues and vulnerabilities of the umpire analogy).

<sup>49</sup> “[T]here is no single stable understanding of transformative constitutionalism. There must, however, be agreement at any rate on some basis for an understanding of transformative constitutionalism. I would suggest that the Epilogue . . . to the interim Constitution provides that basis. The Epilogue describes the Constitution as providing:

a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and

Given our background and our Constitution, judges do not have the luxury to sit back and pretend that we do not have serious challenges, which can be addressed through a passive justice system.<sup>50</sup> I do not think we can afford to be the type of umpires Chief Justice Roberts had in mind.

¶24 Whatever we, as judges, do must facilitate nation-building so far as the case makes it possible by actively addressing the socioeconomic challenges that still confront certain sectors of the community as well as addressing the position of women in every sector of our society. Whereas that may not be feasible for judges in the U.S., it must [be the case] in South Africa. We have a different set of challenges that require judges to be somewhat proactive in the manner in which they approach their judicial responsibilities.

¶25 *And perhaps that's the way the Constitution was formulated—in terms of being a transformative constitution that judges have to take a more active role in order to ensure that transformation. Is that something most judges believe in at the Constitutional Court?*

¶26 Absolutely. Judges across the board—from the high court level to the specialist courts—believe that and act in [that manner].

¶27 *During their confirmation hearings before the U.S. Senate, Justices Elana Kagan<sup>51</sup> and Sonia Sotomayor<sup>52</sup> spoke of the need for judges to exhibit humility and empathy,*

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development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

This is a magnificent goal for a Constitution: to heal the wounds of the past and guide us to a better future. For me, this is the core idea of transformative constitutionalism: that we must change.” Pius Langa, former Chief Justice of the Republic of South Africa, Transformative Constitutionalism, Address at Stellenbosch University (Oct. 9, 2006) (transcript available at <http://www.msu.ac.zw/elearning/material/12571709391238154663Pius%20Langa%20Speech.pdf>); *see also* Karl E. Klare, *Legal, Cultural and Transformative Constitutionalism* 14 S. AFR. J. ON HUM. RTS. 146, 150 (1998):

*By transformative constitutionalism* I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation of course, but in a historical contest of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.

<sup>50</sup> “It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative constitution judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.” Pius Langa, former Chief Justice of the Republic of South Africa, Transformative Constitutionalism, Address Delivered at Stellenbosch University (Oct. 9, 2006) (transcript available at <http://www.msu.ac.zw/elearning/material/12571709391238154663Pius%20Langa%20Speech.pdf>).

<sup>51</sup> *The Nomination of Elana Kagan to be an Associate Justice of the Supreme Court of the United States Before the Comm. on the Judiciary*, 111<sup>th</sup> Cong. 2 (2010) (statement of Elana Kagan, Nominee to be an Associate Justice of the Supreme Court of the United States), <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/html/CHRG-111shrg67622.htm>.

<sup>52</sup> *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States Before the Comm. on the Judiciary*, 111<sup>th</sup> Cong. 1 (2009) (statement of Sonia Sotomayor, Nominee to be an Associate Justice of the Supreme Court of the United States), <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg56940/html/CHRG-111shrg56940.htm>.

respectively. Given South Africa's recent apartheid past, what role does humility and empathy play in judicial-making and how do you reconcile those qualities with the need for judges to break from some of the courts' challenging past precedent?

¶28 I was criticized for raising humility as an important component of the qualities that we require of potential judges. It is critical in South Africa that judges exhibit humility and empathy because when you look at some of the judgments delivered during the apartheid era, a good number of judges treated litigants and some practitioners with utter disrespect. The conduct really bordered on unadulterated arrogance. Most of the time, black South Africans were on the receiving end of this kind of judicial conduct.

¶29 As soon as the 1993 Constitution came into effect, the remarks made by some judges that we needed to be courteous to accused persons, that we need to be courteous to litigants, that we need to be more helpful to unrepresented people, began to gain prominence. If you look at our judgments since 1994, you will realize that humility, articulated or unarticulated, is the model of the day.

¶30 You simply cannot have a situation where judges speak in a manner that intimidates witnesses because then they will not be able to give evidence as freely as they ought to. Some witnesses are not educated. Some do not hold high positions in society. A court, by its very nature, is intimidating. Now, you can imagine in what state witnesses are to be left if judges are to harass them and talk down to them in a manner that is intimidating. In South Africa, humility is a critical component for a judge suitable for appointment. You want a friendly atmosphere to prevail.

¶31 *Are there any other traits that you value in a judge?*

¶32 What predominates of course, is that you must be a fit and proper person and that goes to merit. You cannot be appointed to any court unless you have shown that you are a competent judicial officer. All other qualities that apply in to judicial candidates in other respected democracies, apply with equal force in South Africa.

*B. The Institutional Legitimacy of South African Court: "The Vast Majority of the Public Said, 'But These are Not Our Courts. These are White Peoples' Courts.'"<sup>53</sup>*

¶33 A 2012 survey conducted by the Human Science Research Council to "establish the extent and nature of levels of trust and legitimacy, cooperation and compliance in the criminal justice system in South Africa" found that only half of all South Africans expressed trust in the courts, down from 57% in 2009.<sup>54</sup> Upholding the rule of law rests largely on the public's opinion of the judiciary, shaped, in part, by the press. The media no longer contends with a repressive state apparatus shrouded in secrecy, but court reporting challenges persist. Journalists experience difficulties accessing papers in high court proceedings.<sup>55</sup> Facts, parties, procedural issues and judgments are mischaracterized

<sup>53</sup> In 1990, there were 829 magistrate judges in South Africa. Of these, 811 were white, eleven were Asian, five were of mixed racial descent and two were "African." Charles J. Ogletree, Jr., *From Mandela to Mthwana: Providing Counsel to the Unrepresented Accused in South Africa*, 75 B.U. L. REV. 1, 17 (1995).

<sup>54</sup> *In the Court of Public Opinion: Attitudes towards the Criminal Courts*, HUM. SCIENCES RESEARCH COUNCIL, <http://www.hsrc.ac.za/en/review/hsrc-review-may-2013/in-the-court-of-public-opinion-attitudes-towards-the-criminal-courts>.

<sup>55</sup> Interview with Franny Rabkin, Court Reporter and Legal Commentator, *Business Day*, in Johannesburg, S. Afr. (Sept. 9, 2013). Before becoming a reporter, Mrs. Rabkin practiced corporate law and served as a law clerk at the Constitutional Court of South Africa.

as some journalists lack the requisite experience and training in court reporting.<sup>56</sup> Moreover, although South Africa has eleven official languages,<sup>57</sup> all Constitutional Court proceedings and papers are in English (with an occasional filing in Afrikaans).

¶34 To this end, the Constitutional Court has taken a series of steps to promote transparency, openness and access to the extent that this does not impinge on the dignity of litigants or their right to a fair hearing. At present, the Court interacts with the media in a number of ways: permitting media access to its hearings and judgments; allowing video cameras in hearings; issuing summaries and notices to the media; responding to individual requests from the media; and meeting with the media.

¶35 In what follows, the Chief Justice discusses his effort to improve the institutional legitimacy of the judiciary. The most significant measures include improving relations between the judiciary and the press and restructuring the magistrate's courts.

¶36 *The U.S. Supreme Court banned video cameras during hearings. Does it strengthen the judiciary's legitimacy to allow recordings and media access to Court proceedings?*

¶37 We do not bar cameras. We need to be as transparent as possible. South Africans need to know how their courts operate. Those with a direct interest in matters before the court may not be able to come to court. We believe that it is necessary that the media come to court so that they can report on what actually happens so when the judgment is actually delivered people can relate to the outcome based on how they were able to follow the daily reporting of the developments.

¶38 *What measures can the Constitutional Court take to improve the institutional legitimacy of the judiciary?*

¶39 You have to remember where the judiciary is coming from. One of the major challenges about legitimacy during the apartheid era was judicial officers at the superior court level were almost exclusively male and white. And the magistracy was no exception, except in the Homelands of course where you had a number of black faces there. So the vast majority of the public said, "But these are not our courts. These are white peoples' courts. Why are they run almost exclusively by white people?" Illegitimacy hinged, fundamentally, on the fact that people could not relate to them. They found these courts foreign because people like them were not appointed to positions on those courts. There were remarks of course that judicial officers would sometimes make about black people that led them to believe that these are really apartheid courts. Why would a judge say about black people that they just stab others with knives whenever they feel like it? They have a lust for stabbing other people with knives.<sup>58</sup> How some of the judicial officers would address black people as Bantus and so on.<sup>59</sup> Those are some of the things that denuded these courts legitimacy. Although, there were some excellent judicial officers who were really impartial even during the apartheid era.

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<sup>56</sup> *Id.*

<sup>57</sup> S. AFR. CONST. 1996 § 6(1). The eleven official languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

<sup>58</sup> "Commentators have reported judges noting differences in race between victim and defendant, judges using tribal custom against blacks, and judges taking judicial notice of the 'fact' that blacks have 'stab lust,' that black women submit to rape without protest, and that blacks who provide alibis are liars." Ogletree, *supra* note 53, at 18.

<sup>59</sup> The apartheid government formally referred to black South African derisively as "Bantus" or "natives."

¶40 That said, we still have some challenges with the lower courts. They enjoy a measure of legitimacy but there are still issues to grapple with in relation to their legitimacy because they were part and parcel of the Department of Justice before 1994. The process of detaching them completely from the Department of Justice is proving to be a bit too slow. There are some responsibilities that the Minister of Justice and Constitutional Development still has over the magistracy which tend to make or render its legitimacy somewhat questionable.

¶41 *But don't you think there is a challenge because most people only encounter those lower courts?*

¶42 Certainly, that is a problem. Most of the complaints that we hear and read about are from the magistrates' courts.<sup>60</sup> It was one of the biggest problems when I took over as Chief Justice and remains one of the most difficult issues I still need to contend with. It affects the image of the judiciary. When people say, "courts do not work," most of the time it is a result of the problems they have experienced with the magistrate courts. Remember, most of the courts in this country are magistrates' courts. Many people hardly ever go beyond a magistrate's court. So, the only perception they have of the judiciary is based on their experience at the magistrates' court level. To some extent, it impacts their perception of the Constitutional Court because a "court" is a "court" to many people. Remember, even those South Africans who are "educated" do not know much about the court system. So it does affect the public's perception of all other courts, including the Constitutional Court.

1. The Application of International Norms and Standards in South African Jurisprudence: "We Still Need to Have Regard to the Latest Developments in Comparable Jurisdictions."

¶43 Unlike in the United States,<sup>61</sup> international law plays a pivotal role in South African jurisprudence. The South African Constitution provides a provision that expressly authorizes the courts to "consider foreign law" when interpreting the Bill of Rights.<sup>62</sup> Then Justice Kate O'Regan suggested that, so long as it exercised proper precautions, the

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<sup>60</sup> See, e.g., Botho Molosankwe, *Top Magistrate 'Abused Her Position'*, THE STAR (Aug. 6, 2013), <http://www.iol.co.za/news/crime-courts/top-magistrate-abused-her-position-1.1558498#.UjsftWTFT49> (alleging that a chief magistrate required a contract magistrate to "do her hair" and provide transportation to a casino); Kamini Padayachee, *Clerk Sues Sex Pest Magistrate*, THE MERCURY (Aug. 5, 2013), <http://www.iol.co.za/news/crime-courts/clerk-sues-sex-pest-magistrate-1.1557483#.UjsgamTFT48> (following up on a retired magistrate who was sentenced to five year imprisonment for sexually assaulting a court clerk in his chambers); SAPA, *Magistrate's Rape Remark Probed*, IOL NEWS (July 18, 2013), <http://www.iol.co.za/news/crime-courts/magistrate-s-rape-remark-probed-1.1549127#.UjsiS2TFT49> (investigating a magistrate's "shocking" comment about rape in prisons); Zelda Venter, *Suspects Freed Due to Magistrate's Threats*, PRETORIA NEWS (March 18, 2013), <http://www.iol.co.za/news/crime-courts/suspects-freed-due-to-magistrate-s-threats-1.1488142#.Ujsio2TFT48> (overturning the conviction of two accused thieves after a magistrate concluded they were guilty before the two testified); Sharika Regchand, *Ex-Magistrate Wants Theft Conviction Overturned*, THE MERCURY (June 22, 2012), <http://www.iol.co.za/news/crime-courts/ex-magistrate-wants-theft-conviction-overturned-1.1325518#.UjsjuGTFT48>.

<sup>61</sup> *Roper v. Simmons*, 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting) (rejecting the relevance of international law when interpreting the U.S. Constitution).

<sup>62</sup> S. AFR. CONST., 1996 § 39, cl. 1 (specifying that, "[w]hen interpreting the Bill of Rights," courts "must consider international law" and "may consider foreign law").

Constitutional Court should rely on the law of foreign jurisdiction as an interpretive aid to develop its own jurisprudence:

It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions. Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done.<sup>63</sup>

¶44 A recent study found that foreign law is cited in roughly half of the Court's most recent cases.<sup>64</sup> This represents a marked decline from the Court's first three years, from 1995 until 1997, when it cited foreign law in seventy-three percent of its judgments.<sup>65</sup> Nonetheless, the Court's "continued use of foreign authority, after over a decade of detailed domestic decisions and far ranging jurisprudence, casts doubt on the theory that necessity is the sole reason the Constitutional Court cites foreign law."<sup>66</sup>

¶45 The discussion below examines how the Constitutional Court canvasses foreign legal doctrines and incorporates specific elements to create "distinctly South African" jurisprudence.

¶46 *What role does international law play in South African jurisprudence?*

¶47 If you examine the judgments of this Court over the years, you will realize that we have borrowed quite extensively from jurisdictions such as Canada, Germany and the United States as well as from other countries<sup>67</sup> that have constitutions that are fairly comparable to ours.

¶48 *As South Africa's constitutional democracy matures and develops its own jurisprudence, do you foresee this Court relying less on international law?*

¶49 Yes, there is no doubt about this. Once our jurisprudence gets settled, once it gets to the point that everyone can say that it is fairly well developed, there will be very little reason to rely as much as we used to on the jurisprudence of other countries. With that said, obviously, we will still need to have some regard to the latest developments in comparable jurisdictions. This is particularly true with regards to the area of socioeconomic rights and property law.

¶50 *The Constitutional Court developed a separation of powers doctrine based, in part, on American and French model, but that is often described as "distinctively South*

<sup>63</sup> *K v. Minister of Safety & Sec.* 2005 (9) BCLR 835 (CC) at para. 35 (S. Afr.).

<sup>64</sup> Jacob Foster, *The Use of Foreign Law in Constitutional Interpretation: Lessons from South Africa*, 45 U.S.F. L. REV. 79, 90 (2010).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 91.

<sup>67</sup> See, e.g., *Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others* 1996 (1) SA 984 (CC) (S. Afr.) (discussing Canadian, German, American and Australian law, at length).

*African.*”<sup>68</sup> *When developing judicial doctrines for South Africa, how do you choose which elements of comparable foreign doctrines to retain and incorporate into your own model?*

¶51 The guiding principle will always be what our Constitution requires. If we come to the realization that another branch of government overstepped its bounds, or that there is a conflict between a policy made by the Executive or Legislature with our Constitution, then we intervene. We then examine other jurisdictions and ask ourselves how did they deal with a similar situation, if ever there is any comparable jurisdiction that has dealt with a similar situation. You may well find that no court has ever dealt with that particular situation and that’s when we have to be innovative; we have to be creative and fend for ourselves.

¶52 *Building off of that, the U.S. Supreme Court developed what has been termed a “political question doctrine” whereby a federal court will decline to entertain a matter that raises a political issue. Do you ever foresee the Constitutional Court of South Africa developing a similar doctrine?*

¶53 I doubt we will ever get there. Let me cite an example that will illustrate the extent of our co-operational procedures. We have just delivered the Lindiwe Mazibuko judgment,<sup>69</sup> which is about whether, in developing its procedures, our National Assembly made provisions to regulate processes related to a motion of no confidence in a manner that accords with a section of the Constitution.<sup>70</sup> Now, in the U.S., it may have been a challenge for a court to deal with this matter. That is not the case in South Africa because the Constitution confers on the Constitutional Court powers with such far-reaching implications that there are very few areas that the Court would be forbidden from entering into. What we cannot do is actually write laws or rules for the National Assembly, although we always have the power to say this law, this rule, and this conduct of the National Assembly is not consistent with the Constitution and therefore is constitutionally invalid.

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<sup>68</sup> “I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.” *De Lange v. Smuts NO and Others* 1998 (3) SA 785 (CC) at para. 60 (S. Afr.).

<sup>69</sup> *Mazibuko v. Sisulu and Another* 2013 (6) SA 249 (CC) (S. Afr.).

<sup>70</sup> Deputy Chief Justice Dikgang Moseneke, writing for the majority, identified four core constitutional issues in the case: “(a) whether the Speaker had the power to schedule a motion of no confidence on his own authority; (b) whether the Rules are inconsistent with the Constitution to the extent that they do not provide for motions of no confidence in the President, as envisaged in section 102(2); (c) whether Parliament has failed to fulfill a constitutional obligation, in terms of section 167(4)[(e)] of the Constitution, by failing to schedule a motion of no confidence in the President for debate and vote in the Assembly within a reasonable time; and (d) whether, in the light of the fact that the National Assembly Rules Committee (Rules Committee) is currently reviewing the Rules to provide, *inter alia*, specifically for motions of no confidence brought under section 102, it is necessary for this Court to pronounce on the dispute at this stage.” *Id.* at para. 3. Further, section 102(2) of the South African Constitution provides: “If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign” and section 167(4)(e) states, “Only the Constitutional Court may decide that Parliament or the President has failed to fulfill a constitutional obligation . . .” S. AFR. CONST. 1996 §§ 102(2), 167(4)(e).

¶54 *On the U.S. Supreme Court there is a well-known divide between the liberal justices and the conservative justices. Do you ever worry that the South African Constitutional Court will have these ideological divides?*

¶55 It is a fear that I have because, speaking for South Africa, I don't think we should ever get to the point where you can predict in advance who is likely to decide how in any particular matter. It definitely undermines the judiciary that certain judges should deal with issues as if they owe allegiance to anybody or any political party. In our system, unlike in the U.S., however, we do not have justices of the Constitutional Court who were sort of sponsored by a particular President, with the support of a particular political party. Unlike Congress in the U.S., the South African Parliament does not decide who becomes a judge. Our system involves advocates, attorneys and the academia [in selecting judges]. It is not a perfect system, but we think it is structured in such a way as to eliminate what informs the challenges behind the predictable ideological split in the U.S. Supreme Court.

¶56 I would very much like to emulate the German Constitutional Court in this respect. Almost always, their decisions are unanimous. They take time to debate the issues until whatever differences might have existed are ironed out. Although judges are sponsored by political parties in the sense that judicial appointments, especially at that level, are done exclusively by the German Parliament, which then makes recommendations to the appointment authority to appoint, [the judges] have somehow managed to forget about the political support they have received [once appointed].

2. Challenges and Responsibilities of Applying a Modernist Constitution Predicated on Colonial Roman-Dutch Common Law in a Nation with Intractable Socioeconomic Inequalities: "I Am Not Sure That We Have The Best Constitution, But I Think We Have Something to Offer."

¶57 The drafters of the South African Constitution recognized the disconnect between the document's progressive founding principles of egalitarianism and a legal culture shrouded in common law and Roman-Dutch tradition, shaped by decades of apartheid and centuries of subjugation. To counterbalance these concerns, the drafters incorporated two clauses to empower and obligate judges to "develop" the common law in a spirit consistent with the Constitution. The relevant language of section 39(2) provides that "when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights."<sup>71</sup> Without a continual reexamination, the common law will neuter the transformative capacity of the Bill of Rights thereby perpetuating the status quo. As noted by Justice Froneman, "[T]he judge who fails to examine the existing law with a view to ensuring the effective realization of constitutional rights and values . . . is not, as is often presumed by proponents of this course, merely neutrally and objectively applying the law . . . More often than not such a supine approach will effectively result in a choice for the retention of an unequal and unjust status quo."<sup>72</sup> The second development clause, located in section 8(3) requires that when giving effect to a right contained in the Bill of Rights a court "must apply, or if

<sup>71</sup> S. AFR. CONST. 1996 § 39(2).

<sup>72</sup> *Kate v. MEC for the Dep't of Welfare, Eastern Cape* 2005 (1) SA 745 (SE) at para. 16 (S. Afr.).

necessary develop, the common law to the extent that legislation does not give effect to the right.”<sup>73</sup>

¶58 Relying on both sections 39(2) and 8(3), the Constitutional Court, in June 2013, developed the common law to empower South African domestic courts to register, recognize and enforce decisions of regional tribunals where the country had an international obligation.<sup>74</sup> The matter concerned the expropriation of farmers’ land by the government of Zimbabwe pursuant to its land-reform policy.<sup>75</sup> The policy, which came into force in 2005 through a constitutional amendment, provided for compulsory acquisition of identified agricultural land without compensation, save for improvements done on the land as well as ousted the jurisdiction of Zimbabwean courts to challenge any such confiscations.<sup>76</sup> The farmers approached the Southern African Development Community Tribunal—the adjudicatory body of a regional economic bloc of fifteen southern African member states bound by a treaty to act in accordance with the principle of “human rights, democracy and the rule of law”—for relief.<sup>77</sup> The Tribunal ruled in favor of the farmers.<sup>78</sup> When Zimbabwe failed to comply with the Tribunal’s decision, the farmers approached a trial court in South Africa for relief.<sup>79</sup>

¶59 vThe case was appealed to the Constitutional Court where Chief Justice Mogoeng, writing for the majority, noted that South African common law not did provide for the enforcement of international tribunal decisions in South African domestic courts:

[T]he enforcement provided for in our common law relates only to judgments or orders made by a domestic court of a particular foreign country. If international courts like the Tribunal were within the contemplation of our courts when they developed the common law and laid down these foreign judgment-enforcement requirements, the condition[s] . . . would have been differently or more appropriately and inclusively crafted.<sup>80</sup>

¶60 In explaining the need to develop the common law to align it with the spirit of the constitutional right of “access to courts” so as to give effect to the Tribunal’s holding, the Chief Justice wrote:

The rule of law is a foundational value of our constitution . . . And it is settled law that the rule of law embraces the fundamental right of access to courts in section 34 of the Constitution which provides: ‘Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’ The right to an

<sup>73</sup> S. AFR. CONST. 1996 § 8(3).

<sup>74</sup> *The Gov’t of the Republic of Zim. v. Fick and Others* 2013 (CCT 101/12) ZACC 22 (S. Afr.).

<sup>75</sup> *Id.* at para. 2.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at paras. 5-6.

<sup>78</sup> *Id.* at para. 14.

<sup>79</sup> *Id.* at para. 15.

<sup>80</sup> *Id.* at para. 52.

effective remedy or execution of a court order is recognised as a crucial component of the right of access to courts.<sup>81</sup>

¶61 Below, the Chief Justice discusses the evolving relationship between the common law and the Constitution and what responsibilities he has in promoting the South African constitutional experience to the region. He also reflects on the disconnect between the constitutional guarantees and startling inequalities in the country and predicts in which area the next socioeconomic legal battle could likely occur.

¶62 *As a jurist, how do you reconcile a progressive Constitution with a Roman-Dutch common law that is rooted in the country's colonial past?*

¶63 The Constitution enjoins us to have regard to our common law. In fact, much of the law we have in South Africa is derived directly from the common law. At the end of the day, however, we must make sure that whatever common law we adopt is aligned with the principles embodied in the Constitution. Remember, the Constitution is the supreme law. Customary law as well the common law must be developed in such a way that it is consistent with our Constitution.

¶64 The challenge is, however, that some of the principles in our common law are simply irreconcilable with our Constitution and our Bill of Rights. When South Africa became a constitutional democracy, for instance, the death penalty was still applicable. Our Roman-Dutch common law is structured in such a way as to accommodate the death penalty, corporal punishment and even the recognition of an offense such as sodomy. Our Constitution's design, however, is such that it is impossible to reconcile it to accommodate those common law offenses and therefore we had to abolish them.

¶65 *Does the development of the common law need to be gradual?*

¶66 It depends on the cases before us. We can only deal with a case depending on how it is pleaded, depending on the issues that surface. That said, there might be a large development of the common law depending on the issues.

¶67 *Are you ever concerned that developing the common law too rapidly will threaten the values of jurisprudential stability, predictability and administrability?*

¶68 No.

¶69 *Judges, academics and legal practitioners have remarked that South Africa possesses one of the most progressive constitutions in the world. What responsibilities, if any, do you have, as head of the judiciary, to promote the South African paradigm abroad?*

¶70 Our responsibilities are to scan the environment in Africa and identify those countries that are still battling to establish themselves as true constitutional democracies. In a very modest and non-confrontational manner, we must look for ways to influence those countries, to move in the direction to establish a Constitution similar to ours.

¶71 I am not sure that we have the best constitution, but I think we have something to offer. We cannot rest on our laurels because if we do not play an active role in promoting constitutional democracies in the region, we are then allowing a situation to exist that is conducive to coup d'états and dictatorships. If, however, we help create a human rights culture in other African countries backed by constitutional democracies, stability will set in, investors will want to go to those countries and people will find employment and stay home to develop their own countries.

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<sup>81</sup> *Id.* at paras. 60-61.

¶72 *The South African Constitution is sometimes characterized as “aspirational.” How can the Court close the gap between the constitutional guarantees and the realities on the streets?*

¶73 It takes all of the different government role players to close that gap. What the Court can do, however, is interpret the Constitution in a manner so as to ensure that every official who has a constitutional responsibility to close that gap—such as cabinet or Parliament members—are held accountable.

¶74 I think that the Court, however, has done fairly well in its efforts to close that gap. Look at our judgments dealing with socioeconomic rights. Look at our judgments on health issues. The typical example is when many people in South Africa needed antiretroviral drugs and the government was a bit slack in making sure they were accessible to the broader public, the judgment of this Court was such as to require government to supply those antiretroviral drugs.<sup>82</sup> In the area of housing, for those who would have been completely homeless had this Court not intervened and ordered the city to provide temporary housing, look at the *Blue Moonlight*.<sup>83</sup> In terms of natural resources, look the *Agri SA* judgment,<sup>84</sup> which made sure that the mining industry is opened up to all South Africans and that legislative measures are in place to facilitate that process are properly understood by government so that there is no excuse for not doing what it ought to do to close the gap between the poor and the rich.

¶75 *If you had to pinpoint an area where the gap is the greatest, where would it be?*

¶76 The next major court battles will involve the agricultural sector. If you look at the agricultural sector then you will realize that a very large percentage of [the present] commercial farmers are still those from the previously advantaged grouping and those from the previously disadvantaged background are still subsistence farmers. For the few who have received land through the government’s redistribution processes, it does not look like enough was done to empower them to be able to use the land productively. So, I think a lot needs to be done in the area of land redistribution but this must occur in a very, very slow and careful process.

### III. CONCLUSION

¶77 The first Constitutional Court bench deftly maneuvered the political environment to assert its authority and ensure its judicial independence. Its early opinions actualized many of the Constitution’s promises for millions of citizens as well as demystified a legal world that had been a black hole under the apartheid regime. Today, South African constitutional institutions are no longer fragile or new. The Court—led for at least the next decade by Chief Justice Mogoeng—must navigate impediments as seemingly Sisyphean as the first bench encountered but without the type of groundswell political and public backing that erupted from the euphoric days of the mid-1990s. The challenges, discussed above, are manifold: a growing ideological divide on the Court; slipping faith in the institutional legitimacy of the judiciary; resistance towards

<sup>82</sup> As discussed in the Introduction. *Minister of Health v. Treatment Action Campaign (No 2)*, *supra* note 20, at 721.

<sup>83</sup> *City of Johannesburg Metro. Municipality v. Blue Moonlight Props. 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) (S. Afr.).

<sup>84</sup> *Agri S. Afr. v. Minister for Minerals and Energy* 2013 (4) SA 1 (CC) (S. Afr.).

transforming the bench; and convincing a majority of the country that, they too, are entitled to guarantees in their Constitution. Government will continue to question the Court's reach. At Mogoeng's swearing in, President Jacob Zuma, advocated for a more restrained judiciary: "[t]he powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote."<sup>85</sup>

¶78 As Mogoeng indicated, the Court cannot carry out the transformative project on its own, but it does need to dispel any notion that liberal constitutionalism is an impediment to social betterment. To do so, it must continue to boldly develop the common law to align it with the foundational principles of freedom, equality and dignity, it must encourage access to hearings for members of the press and public, and it must neither become subsumed in the racialization and politicization of judicial transformation nor shy away from holding political actors accountable to their constitutional responsibilities.

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<sup>85</sup> Jacob Zuma, President of the Republic of S. Afr., Judiciary Must Respect Separation of Powers, Address Before the National Assembly, Cape Town, S. Afr. (Nov. 1, 2011), (transcript available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=264525&sn=Detail&pid=71616>).