

# MAKING THE ROAD BY WALKING

THE EVOLUTION OF THE  
SOUTH AFRICAN CONSTITUTION

Edited by  
Narnia Bohler-Muller, Michael Cossar & Gary Pienaar

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**For Nelson Rolihlala Mandela, who walked long with us  
and whose walk has not yet ended**





# TABLE OF CONTENTS

<b>Foreword</b>	ix
<b>Contributors</b>	xi
<b>1 Introduction</b>	
1 Introduction	1
1.1 Making the road by walking	1
1.2 The composition of the first Bench	3
1.3 The evolution of the South African Constitution	6
1.4 Social justice	8
1.5 Constitutional interpretation and amendment	11
1.6 The limits of constitutional transformation	14
1.7 Do we really need the Constitution?	16
2 Structure of the book	18
2.1 Lourens Ackermann	19
2.2 Richard Goldstone	20
2.3 Johann Kriegler	20
2.4 Yvonne Mokgoro	21
2.5 Kate O'Regan	22
2.6 Albie Sachs	23
2.7 Thembile Skweyiya	23
2.8 Zak Yacoob	24
3 Contributors to this volume	25
Bibliography	26
<b>2 The constitutionalist concept of Justice L Ackermann: Evolution by revolution</b>	
1 Introduction	27
2 The human rights rEvolution	29
3 The substantive legal rEvolution	35
4 The comparative rEvolution	37
5 Conclusion	40
Bibliography	42
<b>3 A <i>mensch</i> on the Bench: The place of the sacred in the secular jurisprudence of Justice Richard Goldstone</b>	
1 Introduction	44
2 Richard Goldstone: A selective biography	45
3 Justice Goldstone in the eyes of the world	47
3.1 <i>Apartheid</i> -era judge	47
3.2 International judge	52
3.3 Constitutional Court judge	57
4 Justice Goldstone's view of his life and work	60
4.1 <i>Apartheid</i> -era judge	61
4.2 International judge	63
4.3 Constitutional Court judge	65
5 Social justice and Judaism	67
6 Conclusion	69
Bibliography	70

<b>4</b>	<b>The advocate, peacemaker, judge and activist: A chronicle on the contributions of Justice Johann Kriegler to South African constitutional jurisprudence</b>	
1	Introduction	71
2	The advocate, peacemaker, judge and activist: A select biography	73
3	What others have said about Justice Kriegler	74
4	In Justice Kriegler's own words	76
5	Select themes	78
5.1	The Constitution as a transformative document	78
5.2	Role of the courts in the transformation process	79
5.3	Demographic transformation and the judiciary	81
5.4	Separation of powers	84
5.5	Independence and accountability of the judiciary	87
5.6	Equality and dignity	88
5.7	Horizontal application of the Bill of Rights	92
5.8	Reconciliation of criminal procedure with the Bill of Rights	94
5.9	Use of comparative international and regional norms, jurisprudence and practice	96
6	Reflections on Kriegler's interpretive approach and contribution to our understanding of the Constitution	99
7	Conclusion	100
	Bibliography	101

<b>5</b>	<b>Breaking the chains of discrimination and forging new bonds: The extraordinary journey of Justice Yvonne Mokgoro</b>	
1	Introduction	102
2	Yvonne Mokgoro's background and context: From childhood to judge	103
2.1	Activism	105
2.2	Impact of <i>apartheid</i> on Justice Mokgoro's life	106
2.3	Customary law and gender	107
3	<i>Ubuntu</i> on the Bench	107
3.1	<i>Makwanyane</i> : Not in my name	109
3.2	Beyond <i>Makwanyane</i> : A narrative about reconciling care and justice	112
3.3	Some critical and cautionary notes	116
3.4	A legacy in the making: Mind the gap	119
4	Life after the Bench	120
4.1	A public voice in defence of the Constitution and its values	122
5	Concluding observations about the dignity of <i>ubuntu</i>	123
	Bibliography	125

<b>6</b>	<b>Justice O'Regan: Finding the aristotelian golden 'middle way'</b>	
1	Introduction	126
2	A select biography	128
3	The 3Rs of the Constitution	129
3.1	Respect, responsibility and rights	129
3.2	Capacity and capabilities	132
3.3	Responsibility, reasonableness and deference	134
3.4	Responsibility and pragmatism	135
4	A 'progressive jurisprudence' of SERs and their 'progressive realisation'	136
4.1	Deprivation disables democracy	136
4.2	Principle, prudence, patience and pragmatism	138
4.3	Power and principles	140
5	Text and context	140
6	Separation of powers	141
6.1	The first constraint: Legality and the rule of law	144
6.2	The second constraint: Rationality or the 'some rhyme or reason' rule	145
6.3	The third constraint: The Bill of Rights	146
7	Conclusion	151
	Bibliography	154
<b>7</b>	<b>Infusing the Constitution with 'an ethic of care': The humane jurisprudence of Justice Albie Sachs</b>	
1	Introduction	155
2	Background: The stories of Justice Albie Sachs	158
3	Understanding Sachs's contribution to the evolution of the Constitution	162
3.1	In the beginning: Humanity and incertitude	162
3.2	The value of an individual life	165
3.3	Irene Grootboom and her struggle for shelter	167
4	Discussion and themes	171
4.1	Storytelling, <i>ubuntu</i> and care	171
4.2	Reconciliation and the restoration of balance	174
5	Persistent love of the Constitution	177
6	Conclusion	180
	Bibliography	182
<b>8</b>	<b>The functional constitutionalism of Justice Thembile Skweyiya</b>	
1	Introduction	184
2	Who was Justice Thembile Skweyiya?	186
3	Skweyiya's jurisprudence and its thematic considerations	190
3.1	Child-related judgments illustrating Skweyiya's constitutional commitment	194
4	The influence of African law on Skweyiya's legal sensibilities	198
5	Conclusion	203
	Bibliography	205

<b>9</b>	<b>Transformation as constitutional imperative: Justice Zak Yacoob and the making of a civil practice</b>	
1	Introduction	206
2	The biographical beginnings of Justice Zak Yacoob	209
3	The idea of the law and becoming constitutional	212
4	Views on the Constitution	215
5	Working in the Court and a humane approach	216
	5.1 Subjectivity	217
	5.2 Corruption, Nkandla and patriotic criticism	219
	5.3 Strengths and failures of the Constitutional Court	220
	5.4 Constitutional endings, civil society and retirement	220
6	Beyond a distributive paradigm: Yacoob's jurisprudence and the limits of social justice	221
7	Conclusions	224
	Bibliography	227



# FOREWORD

When Reason seemed the most to assert her rights,  
When most intent on making of herself  
A prime Enchantress – ...  
But in the very world, which is the world  
Of all of us, – the place where in the end  
We find our happiness, or not at all!

*William Wordsworth,  
'The French Revolution as it appeared to enthusiasts at its commencement'*

I evoke the memory of William Wordsworth, often characterised as a poet of romance and love and beauty and of nature, in this one of his most political of poems. It is a poem that is as much a meditation and a reflection on the French Revolution as it was a political statement. Wordsworth had become an ardent advocate of the French Revolution (1789), and, notably in a letter to the Bishop of Llandaff, he took issue with the attack on the French Revolution. He makes the point that 'Equality, without which liberty cannot exist, is to be met with in perfection in that state in which no distinctions are admitted but such as are evidently for their object the general good' (*Wordsworth's Political Writings*). Wordsworth's youthful enthusiasm for the French Revolution must have been alarming to the establishment that had become accustomed to the soft revolution of the Magna Carta and its 1689 Bill of Rights. For Wordsworth and other emerging democrats the lure of France was irresistible, and the call to change the human condition was to affect the quality of life in the British Isles.

In this timely study of our Constitution and its application, in law and through the stories of men and women whose minds form and shape its practical application, we have depicted for us just what Wordsworth referred to as the 'Prime Enchantress', one that gives confidence to South Africans, assures them about their rights, protects them against mis-governance and the arbitrary use of public power, and regulates relations between citizens. In 21 years since South Africa was established as a democratic constitutional state South Africans may be excused for having such a romantic relationship with their Constitution. That is so because to those to whom *apartheid* remains a living memory, the Constitution offered a lifetime of bliss, a relationship with the state characterized by checks and balances, and relations among citizens regulated by law and the Bill of Rights.

Twenty-one long years on, however, South Africans are waking up to the perceived limitations of their Constitution and the shortcomings of their democracy. It has been a rude awakening from complacency and dependence on the righteousness and goodwill of those to whom citizens have outsourced their rights. Failure to question and revolt has meant that the instrument of rights has become blunted. But there is another challenge that we face. For some reason we have come to understand a merely

transactional view of our Constitution. The Constitution is of value only if and to the extent that we get what we want from it, that it facilitates our demand for service delivery. It is about receiving rather than giving. What we have not interrogated enough is the inherent quality and value of the Constitution, namely its quality of enhancing the capacity to be fully and truly human, and thus to render quality to human relationships. The misappropriation of the Constitution has become possible because we have not been paying sufficient attention to the inherent values of the Constitution.

This study tells stories, stories of South Africans and their relationship to their Constitution. It tells the tale of how we apply and interpret the Constitution, and how we live its values day by day. It tells these stories in a manner that is understandable and within reach of the ordinary experience of people. Through them and their stories, the Constitution lives. It comes to life and need not be obscure. The constitutional and human rights architecture of the country should ordinarily ensure that the courts, independent constitutional bodies like the Public Protector, and the public service are imbued with the values set out in s.195 of the Constitution.

But that was not to be. In large measure that is because many assumptions have been made about people – those charged with the responsibility to discharge their functions dispassionately, fairly and in a manner that ensures that the purposes and objectives of policy are met. Ultimately it has to do with ethics and public morality. It means that society does not sufficiently interrogate the moral standing of its public representatives, that we have been enchanted for far too long with the lure of the rhetoric of liberation politics. Above all, as a nation and society, we are not inclined to make demands on our public representatives. We make allowances and accept excuses far too easily. And yet we complain as if we are not the holders of citizen power.

Finally, the title of the book, *Making the road by walking*, evokes a memorable dialogue by social activists and popular educators Myles Horton and Paulo Freire in their book *We make the road by walking*, in which they explore the elements necessary for social change, liberation and justice. Their emphasis throughout is popular participation and ownership by the people of all the elements of their own liberation. If this book achieves what Myles Horton and Paulo Freire did in radicalising popular conceptions of democracy, it would surely take our democracy a step closer to the vision of our Constitutional fathers (and mothers!). Likewise, we make the Constitution by living and experiencing it. The courts have said *ad nauseam* that the Constitution is a living document. We, the people, must own it and shape it. The stories in this book are sufficient evidence that the Constitution and its values are being shaped by the hammer and the anvil.

A book like this achieves that critical task of restoring confidence in the people. It should help citizens claim back their power. That is what the French Revolution did.

**N Barney Pitjana**

Pretoria, 9 September 2017

# CONTRIBUTORS

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*Michael Cosser, Narnia Bohler-Muller & Gary Pienaar*

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## 1 Introduction

### 1.1 Making the road by walking

The Constitution of the Republic of South Africa, the final draft of which was forged over a two-year period between 1994 and 1996, assumed a particular profile in the body politic in 2016. Following the release of the Public Protector's 2014 report on improvements to President Zuma's Nkandla residence,<sup>1</sup> the Constitutional Court in March 2016 declared binding her findings and recommendations about the need for the President to repay public monies spent on non-security upgrades to his residence.<sup>2</sup>

Such high-profile cases, however, can distract us from the importance of the Constitution in shaping the lives of ordinary people. In catapulting the Constitution into the limelight, the 'Nkandla judgement', as it is known colloquially, has created renewed interest in what meaning the Constitution has for South Africans in 2018 and beyond.

The initial impetus for this book came from a public address by former Chief Justice Sandile Ngcobo. Delivered on 30 June 2016 and entitled 'Why does the Constitution matter?', his address began with an almost throwaway comment: that he was 'privileged enough ... to participate in constructing our foundational jurisprudence on constitutional law.'<sup>3</sup> Ngcobo went on to say that the process of building a constitutional

1 Public Protector South Africa 'Secure in comfort' [http://www.pprotect.org/library/investigation\\_report/2013-14/Final\\_Report\\_19\\_March\\_2014.pdf](http://www.pprotect.org/library/investigation_report/2013-14/Final_Report_19_March_2014.pdf) (accessed 23 May 2017).

2 *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

3 S Ngcobo 'Why does the Constitution matter?' HSRC public address, Gallagher Estate, Midrand (30 June 2016) 2.

jurisprudence was a ‘work in progress’.<sup>4</sup> Lest there be any misunderstanding about the place of the Constitution as the ‘supreme law of the Republic’,<sup>5</sup> however, Ngcobo’s words betoken not the unfinished nature of the document that is the Constitution, but the incremental nature of its meanings as Justices of the Constitutional Court interpret its laws and precepts through the judgments they hand down in a society seeking transformation and social justice.

Ngcobo has stated that the role of judges must be circumscribed by the democratic principle of separation of powers, and thus by the powers of the other two branches of the state, namely the executive and legislature.<sup>6</sup> For the third and former Chief Justice, the Constitution is not merely a matter for the courts, or only for these three branches of state, but should be embedded in our hearts and, as such, guide the way in which we interact with our fellow human beings.<sup>7</sup> In this sense Ngcobo acknowledges the need for a normative order that is informed by the Constitution.

Further impetus for the book is provided by a couple of key phrases from the Western Cape High Court judgment in the Nkandla matter: ‘the contours of constitutional democracy’; and ‘this period of constitutional adolescence’.<sup>8</sup> It is clear that the High Court and Ngcobo alike perceive a constitutional democracy as a phenomenon whose shape is undulating and whose nature is maturing.

So while the Constitution (including the interim version) was a long time in the making and its acceptance into law on 4 December 1996 (with effect from 4 February 1997) might appear to have signalled the end of the process of formulating the supreme law of the Republic, the Constitution – as in the Spanish poet Antonio Machado’s depiction<sup>9</sup> – is a road made by walking:

Wanderer, your footsteps are  
the road, and nothing more;  
wanderer, there is no road,  
the road is made by walking.

4 As above.

5 ‘The Constitution of the Republic of South Africa, 1996’ (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005) sec 2.

6 Ngcobo (n 3 above) 19-21.

7 As above, 27. Ngcobo cites an excerpt from L Hand ‘The spirit of liberty’ [http://www.digitalhistory.uh.edu/disp\\_textbook.cfm?smtID=3&psid=1199](http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=1199) (accessed 14 July 2017): ‘Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.’

8 *Economic Freedom Fighters* (n 2 above) para 6. Cited in Ngcobo (n 3 above) 2.

9 A Machado *The Castilian camp* trans J Green (1982).

By walking one makes the road,  
 and upon glancing back  
 one sees the path  
 that must never be trod again.  
 Wanderer, there is no road –  
 Only wakes upon the sea.

South Africa charted a new path from 1994, leaving in its wake a reprehensible system of governance and the absence of true democracy – the ‘path/that must never be trod again.’

The language of the Constitution itself, in its use of the terms ‘progressive’, ‘develop’ and ‘advance’ or their variations, reflects the sense of movement embodied in Machado’s poem. The Constitution allows for the ‘*progressive* realisation’ of the rights to housing; to healthcare, food, water and social security; and to education.<sup>10</sup> Every court, tribunal or forum, ‘[w]hen *developing* the common law or customary law ... must *promote* the spirit, purport and objects of the Bill of Rights,’<sup>11</sup> courts possessing the inherent power ‘to *develop* the common [and customary] law, taking into account the interests of justice.’<sup>12</sup> The ‘*advancement* of human rights and freedoms’ is a founding value of the Republic of South Africa.<sup>13</sup>

Kate O’Regan’s claim that Constitutional Court judges were ‘[setting] out on *the journey* to develop a *progressive* jurisprudence of social and economic rights’<sup>14</sup> epitomises the task the Justices set for themselves. Making the road by walking, we can hardly forget, finds its ultimate correlative in Nelson Mandela’s ‘long walk to freedom’.<sup>15</sup>

## 1.2 The composition of the first Bench

If the South African Constitution is a road made by walking, there are certain architects, engineers and artists who have played a larger role than most in designing and developing it. A total of 79 persons – 49 full members and 30 alternates – under the chairpersonship of Cyril Ramaphosa were appointed to a Constitutional Assembly tasked with drafting the final Constitution.<sup>16</sup> The judges, both former and current, appointed to the Constitutional Court have in turn played a major role in shaping the Constitution through their judgments.

10 ‘The Constitution’ (n 5 above) (emphasis added).

11 As above, sec 39(2) (emphasis added).

12 As above, sec 173 (emphasis added).

13 As above, sec 1(a) (emphasis added).

14 K McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009) viii (emphasis added).

15 N Mandela *Long Walk to Freedom* (1994).

16 South African History Online (SAHO) ‘A history of the South African Constitution 1910-1996’ <http://www.sahistory.org.za/article/drafting-and-acceptance-constitution> (accessed 18 May 2017).



Source: <http://ccac.org.za/>

The Justices appointed to the Constitutional Court in 1994 were Arthur Chaskalson (Chief Justice), Lourens (Laurie) Ackermann, Richard Goldstone, Tholie Madala, Ismail Mohamed, Johann Kriegler, John Didcott, Pius Langa, Kate O'Regan, Yvonne Mokgoro, and Albie Sachs. Chaskalson, senior counsel and the then national director of the Legal Resources Centre (LRC), was the first to be appointed: President Nelson Mandela, in consultation with the Cabinet and the Chief Justice of the Supreme Court at the time, Judge Michael Corbett, appointed Chaskalson as President of the Constitutional Court in June 1994. The process of appointing the other ten members, set out in the interim Constitution,<sup>17</sup> required the President, in consultation with the Cabinet and the Chief Justice, to appoint four judges from the ranks of the then Supreme Court.

17 South African Government 'Constitution of the Republic of South Africa Act 200 of 1993' <http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993> (accessed 14 July 2017) sec 19.

These were Ackermann, Goldstone, Madala, and Mohamed. Thereafter the President, after consultation, selected the remaining six judges from a shortlist of ten sent to him by the Judicial Service Commission (JSC), which had trimmed an initial list of 100 down to 25. These 25 candidates were interviewed by the JSC over a period of four days in October 1994. The list was finally reduced to ten candidates – Kriegler, Didcott, Langa, O'Regan, Mokgoro, Sachs, Dugard, Dlamini, Ngoepe, and Skweyiya<sup>18</sup> – of whom six (Kriegler, Didcott, Langa, O'Regan, Mokgoro, and Sachs) were appointed to the Court. The judges were each to serve a non-renewable term of seven years – subsequently extended to a period of between 12 and 15 years, depending on the age of the judge on first appointment.<sup>19</sup>

The composition of the first Bench reflected, to the extent that it could,<sup>20</sup> the diversity of the legal landscape of the time. The *nature* of the diversity present in that composition was evocatively captured by Albie Sachs in his interview for the Human Sciences Research Council's (HSRC's) Constitutional Justice Project:<sup>21</sup>

And then certainly all the judges on the Constitutional Court recognised the need for major transformations in society, not only the ugliness and unfairness and injustice of *apartheid* and dreadfulness, but the fact that it had left quite deeply entrenched patterns of inequality and disparity. So that was never an issue on our Court, and we came from very different personal backgrounds. It's quite astonishing, and again, a very South African phenomenon, that you would have somebody like Yvonne Mokgoro ... growing up in, what was that called, a location, who studied law and then going on to be assistant nurse and then a part-time prosecutor and then prosecutor and so on, and then someone like Laurie Ackermann, who collected wine labels, and a very cultivated person and totally different social background, and yet Laurie and Yvonne could speak to each other truly as equals on that Court in conceptual constitutional terms; and in that sense we're all in heart, soul and mind ... in favour of acknowledging that the role of our Constitution was not simply to consolidate gains that have been made through decades of struggles in terms of advancing human rights. It was to bring about major transformation; and the extent to which we did it, that raised the question of how much depends on the Courts, and how much depends upon the elected bodies ... but the notion of transformation was certainly very strong and it was unanimous.

18 Skweyiya chose not to accept this appointment, as reflected in the chapter addressing his jurisprudential contributions to the evolution of the Constitution.

19 South African History Online (SAHO) 'Historical background of the Constitutional Court. The appointment of judges' <http://www.sahistory.org.za/article/appointment-judges> (accessed 14 July 2017).

20 Given that almost the entire judiciary was white and male during the *apartheid* era, achieving the kind of representivity enjoined in sec 174 of the Constitution was never going to be possible at the outset.

21 N Bohler-Muller 'HSRC Constitutional Justice Project: Interview with Justice Albie Sachs' (2014) 24.

The transformation of society for which Sachs argues here began, appropriately enough, with the breaking down of race, gender and class barriers *within the Court itself* as, in Sachs's example (whether hypothetical or not), a formerly disenfranchised black woman engaged on an equal footing with a privileged white Afrikaner male, their worlds brought together by a Constitution forged from bodies of legal precept (the Canadian Charter of Rights and Freedoms,<sup>22</sup> the National Party proposals regarding Constitutional Principle II [fundamental rights and freedoms],<sup>23</sup> a Charter for Social Justice,<sup>24</sup> and the Freedom Charter)<sup>25</sup> representing the diverse aspirations of those across the political spectrum. The Constitutional Court's racial profile has evolved over time, but its gender composition remains a challenge to this day.<sup>26</sup>

### 1.3 The evolution of the South African Constitution

The jurisprudence of the first Bench of the Constitutional Court constituted the first steps along the new path charted by South Africa from 1994. Johann Kriegler speaks of its having been 'very exciting indeed to start with a complete blank slate in virtually every respect. We had no rules, we had no principles, we had no background, there was no South African body of constitutional precedent in the context of a predominant Constitution with a Bill of Rights and a testing power for the courts.'<sup>27</sup> Albie Sachs speaks of the tensions involved in being 'a fairly new Court ... feeling our way, the government's feeling its way and ... so we don't want to pick up the reins of government and take over and be too pushy.'<sup>28</sup>

As these extra-curial reflections suggest, Constitutional jurisprudence has been shaped not by court judgments alone but by the pronouncements

- 22 Justice Laws Website, Government of Canada 'Constitution Act, 1982: Part 1: Canadian Charter of Rights and Freedoms' <http://laws-lois.justice.gc.ca/eng/Const/page-15.html> (accessed 14 July 2017).
- 23 ConstitutionNet 'Proposals of the National Party on the fundamental rights and freedoms' <http://www.constitutionnet.org/vl/item/proposals-national-party-fundamental-rights-and-freedoms> (accessed 14 July 2017).
- 24 H Corder *et al A charter for social justice: A contribution to the South African Bill of Rights debate* (1992).
- 25 African National Congress 'The freedom charter' <http://www.anc.org.za/content/freedom-charter> (accessed 14 July 2017).
- 26 Of the 227 judges appointed to the Constitutional Court, the Supreme Court of Appeal and the 13 High Courts, only 82 (or 36 per cent) were female as at 29 March 2017 – see Judges Matter 'The make-up of South Africa's judiciary' 29 March 2017 <http://www.judgesmatter.co.za/opinions/south-africa-judges/> (accessed 26 November 2017). This figure represents a 6 percentage point increase on the 2013 figure reported by the Commission for Gender Equality in *Lack of gender transformation in the judiciary. Investigative report 2016* (2016) 30.
- 27 University of the Witwatersrand 'Constitutional Court Oral History Project: Interview with Justice Kriegler' [http://www.historicalpapers.wits.ac.za/inventories/inv\\_pdfo/AG3368/AG3368-K40-001-jpeg.pdf](http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-K40-001-jpeg.pdf) (accessed 24 May 2017) 5.
- 28 Bohler-Muller (n 21 above) 5.

of Constitutional Court judges *between* judgments – curial and extra-curial words together rendering the Constitution a living entity.

The idea of a living Constitution is hardly foreign to theorists and practitioners of jurisprudence in South Africa. Stu Woolman's notion of 'experimental constitutionalism', for example, implies a dynamic Constitution.<sup>29</sup> The judiciary, he suggests, should resolve intractable rights disputes by 'mov[ing] away from traditional models of adjudication and adopt[ing] such experimentalist, problem-solving modalities as meaningful engagement orders, structural injunctions and remedial equilibration' and by initiating 'debates between shareholders that are often essential for information gathering, information pooling, information sharing, collective action and collective norm setting.'<sup>30</sup>

*Engagement, information sharing, and collective norm setting* involve taking collective responsibility for the making and application of the law. But wherever the collective is concerned there will be contestation that needs to be resolved through negotiation. Deploying the same road metaphor used in the title of the present book, Langa writes:

*The way, however, is not always certain. The provisions of our Bill of Rights are expressed in a manner that calls explicitly for **judicial application of open-textured political values** such as dignity, equality and freedom. They call implicitly for judicial choice from amongst a variety of possible solutions to various deep problems of governance and social interaction. It thus falls ultimately to judges to decide finally *where we must place our feet as we walk our path.*<sup>31</sup>*

The two kinds of emphasis in this excerpt draw attention to two related, though paradoxical, ideas. The first (expressed through the italicised words) is that the onus is on judges, 'ultimately' and 'finally', to chart the path to be followed by the body politic. The second idea (expressed through the words in bold typeface) is that such a charting cannot happen without judges applying '*open-textured political values*' (emphasis added) – implying not only transparency and a measure of latitude in interpretation, but also consultation.

Indeed, the need for far-reaching consultation is expressed in the early Constitutional Court judgment in *S v Mhlungu*,<sup>32</sup> part of which argued that constitutional interpretation should take the form of 'a principled judicial dialogue, in the first place between members of this Court, then between

29 S Woolman *The selfless constitution: Experimentalism and flourishing as foundations of South Africa's basic law* (2013).

30 As above, 425.

31 P Langa 'Foreword' in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) (italics and bold text emphasis added) x.

32 *S v Mhlungu* 1995 (3) SA 867 (CC) para 129.

our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large'.<sup>33</sup>

The title of the book from which the foregoing quotation is taken – *Constitutional conversations* – is apt: the book comprises essays on a number of topics by prominent legal academics, each followed by a 'reply' by the judges. The book is structured, then, as a set of conversations. Three of the replies are by former Constitutional Court judges – Justices Albie Sachs, Kate O'Regan, and Laurie Ackermann. Albie Sachs replies to criticism of his comment that the academic role in forging the Constitution ended with the finalisation of the Constitution, while Kate O'Regan engages with a legal academic on the remit of the Constitutional Court's jurisdiction. Laurie Ackermann takes issue with his interlocutor's definition of dignity, arguing for an inner, spiritual interpretation rather than an external, secular interpretation of the term. The dialogue thus created through the book's structure provides a useful prequel to the present book, which seeks to extend the dialogue through examining the ways in which the words of prominent former Justices of the Court have not merely informed the legal interpretations of sections of the Constitution but have also begun to shape a jurisprudence of social justice – an interpretation of the Bill of Rights forged through, and in the interstices between, curial judgments and extra-curial pronouncements.

#### 1.4 Social justice

While *social justice* is a slippery term that eludes simple definition,<sup>34</sup> one denotation that seems to have found salience in the South African context is the following:

a state of affairs [...] in which a) benefits and burdens in society are dispensed in accordance with some allocative principle (or set of principles); b) procedures, norms and rules that govern political and other forms of decision making preserve the basic rights, liberties and entitlements of individuals and groups; and c) human beings (and perhaps other species) are treated with dignity and respect not only by authorities but also by other relevant social actors, including other citizens.<sup>35</sup>

These aspects of the definition correspond, claim Chipkin and Meny-Gibert,<sup>36</sup> to what Jost and Kay call redistributive justice, procedural

33 Cited in S Woolman & M Bishop 'Introduction: Law's autonomy' in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 7.

34 D Miller 'Recent theories of social justice' (1991) 21(3) *British Journal of Political Science* 373.

35 JT Jost & AC Kay *Social justice: History, theory and research* (2010), 1122. Cited in I Chipkin & S Meny-Gibert 'Understanding the social justice sector in South Africa: A report to the RAITH Foundation and Atlantic Philanthropies' 5 <http://www.raith.org.za/docs/Report-Social-justice-Sector-7Feb2013-FINAL-10022013.pdf> (accessed 14 July 2017).

36 Chipkin & Meny-Gibert (n 35 above) 5.



justice, and interactional justice – which in South Africa are more commonly known as economic justice, public participation, and social cohesion.

It might seem anomalous that, if *social justice* is indeed quite so important, it is mentioned just once in the Constitution – part of the Preamble to which reads:

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.<sup>37</sup>

But while a simple definition of the term may be elusive, *social justice* undergirds the Constitution and what it represents in terms of both redress – ‘[recognising] the injustices of [the] past’ and ‘[healing] the divisions of the past’<sup>38</sup> – and progress –

[Laying] the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; [and]

[Improving] the quality of life of all citizens and [freeing] the potential of each person.<sup>39</sup>

The Preamble in this regard constitutes the prelude to a manifesto for social justice which is elaborated in the Bill of Rights. Stewart has argued that the other constitutional values of ‘human dignity, equality, freedom, accountability, responsiveness and openness’ should be used side-by-side, or even interactively, to achieve the goal of social transformation,<sup>40</sup> which we understand to mean social justice. ‘In terms of this reasoning,’ claim the authors of the final report on the HSRC’s Constitutional Justice Project, ‘progress towards the attainment of social justice can be used as a yardstick to measure the impact of the judgments of the [Constitutional Court] and [Supreme Court of Appeal], which of course depends upon implementation by all [three] spheres of government.’<sup>41</sup>

For the first Bench of the Constitutional Court, the issue of redistributive justice proved to be a major challenge. In the face of the requirement that ‘States should use all the available resources, including

37 ‘The Constitution’ (n 5 above) Preamble.

38 As above.

39 As above.

40 L Stewart ‘Adjudicating socio-economic rights under a transformative constitution’ (2010) 28(3) *Penn State International Law Review* 487. Cited in Human Sciences Research Council & Nelson R Mandela School of Law ‘Constitutional justice project: Final report’ (2015) 38.

41 Human Sciences Research Council & Nelson R Mandela School of Law (as above) 38.

international assistance, to make sure that every individual in their territory enjoys a bare minimum of [economic, social and cultural rights],<sup>42</sup> – especially ‘[p]rotection from starvation, primary education, emergency healthcare, and basic housing’ – the Constitutional Court had constantly to find a balance between meeting these core needs and the state’s ability to afford the rights to them.

Justice Richard Goldstone’s view was that ‘It’s pointless having a minimum core ... where government simply cannot, where there’s not enough money’,<sup>43</sup> while the judgment in *Minister of Health and Others v Treatment Action Campaign and Others* read:

Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation [by the courts]. Such determinations of reasonableness *may in fact have budgetary implications*, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.<sup>44</sup>

This judgment acknowledges that the courts do have a role to play in achieving the constitutional objective of social justice, but emphasises that the primary responsibility for such achievement lies with the executive.

Notwithstanding the perceived deference of the Court in *Treatment Action Campaign*, the most remarkable aspect of the jurisprudence of the first Bench was the justiciability of socio-economic rights, South Africa’s Constitution being globally remarkable in this sense.<sup>45</sup> This aspect of the foundational jurisprudence of the Constitutional Court, addressed in each of the chapters in this book, highlights the unique ways in which the individual judges understood socio-economic rights and their relationship with the complexities of transformation and social justice.

42 ESCR-Net ‘Minimum core obligations’ <https://www.escr-net.org/resources/minimum-core-obligations> (accessed 2 May 2017).

43 G Pienaar ‘HSRC Constitutional Justice Project: Interview with Justice Richard Goldstone’ (2014) 27 (emphasis added).

44 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) para 38 (emphasis added).

45 Etienne Mureinik argued for the inclusion of socio-economic rights as justiciable rights in the Bill of Rights of a new South African Constitution, the role of the courts being confined to judicial review of the extent to which relevant policy and legislation were justifiable. See E Mureinik ‘Beyond a charter of luxuries: Economic rights in the Constitution’ (1992) 8(4) *South African Journal on Human Rights* 471-474.

## 1.5 Constitutional interpretation and amendment

In his public address ‘Why does the Constitution matter?’ Sandile Ngcobo asked: ‘How can we tell the difference between a court interpreting the Constitution and a court amending the Constitution?’<sup>46</sup> Technically, amendment of the Constitution requires the introduction and passing of a bill supported by either three-quarters or two-thirds of the legislature (depending on which aspects of the Constitution are to be amended) – which at face value renders Ngcobo’s question somewhat puzzling. But in the context of recent calls for amendments to the South African Constitution – regarding land and property rights<sup>47</sup> – and given the relative youth of the Constitution, the line between amendment and interpretation may have become blurred. Ngcobo’s question therefore provides a useful entry point to a consideration of the issue of constitutional amendment.

De Vos points out that the South African Constitution was amended on 17 occasions between 1996 and 2014 but that most of the amendments were of a technical nature.<sup>48</sup> By contrast, the US Constitution was amended only 27 times between 1787 (when it was adopted) and 2014 – a time span of 225 years<sup>49</sup> – despite over 10,000 amendments having been proposed by members of Congress. Jeff Jacoby argues that amendment of the US Constitution *is* possible,

but only with time, persistence, and public support that is both wide and deep. The process was designed to be difficult. For all the talk about a ‘living Constitution,’ it is the nation’s legal bedrock; it isn’t supposed to change except under extraordinary circumstances, and only after following the deliberately convoluted, hurdle-filled course set out in Article V... But a fundamental altering of the Constitution’s meaning — a tectonic shift in the bedrock — should come not from judges but from the people, through the affirmative democratic act of amending the Framers’ text.<sup>50</sup>

Notwithstanding the conservatism of the US Constitution in its resistance to amendment, Jacoby’s point that it is not the judiciary but ‘the people’ who should drive amendment is a critically important one – though arguably not only in cases involving ‘a tectonic shift in the bedrock’.

46 Ngcobo (n 3 above) 21.

47 Pierre de Vos discusses this and other areas of contention in ‘Changing the Constitution: Much ado about nothing’ *Daily Maverick* 12 January 2014 <https://www.dailymaverick.co.za/opinionista/2014-01-12-changing-the-constitution-much-ado-about-nothing/#.WfnGMmiCw2w> (accessed 1 November 2017).

48 As above.

49 ‘The way to alter the Constitution is by amendment, not interpretation’ *The Boston Globe* 16 July 2014 <https://www.bostonglobe.com/opinion/2014/07/16/the-way-to-alter-constitution-amendment-not-interpretation/Iq4HyjuKPUUMGGEj7WicDM/story.html> (accessed 4 August 2017). The Framers are the people who wrote the US Constitution.

50 As above.

Recent attacks on the South African Constitution are wont to engender concerns about its sustainability. In their exhaustive study of the endurance of the world's constitutions, Elkins, Ginsburg and Melton found that three features are crucial for facilitating constitutional endurance: flexibility; inclusion; and specificity. They define these features as follows:

*Flexibility* represents the constitution's ability to adjust to changing circumstances, and is captured in the empirical analysis by the ease of formal and informal amendment. Constitutions can be changed through both formal processes **as well as interpretative changes that update the understanding of the text among relevant actors.** *Inclusion* captures the degree to which the constitution includes relevant social and political actors, both at the time of drafting and thereafter. Inclusion facilitates both enforcement of the constitution as well as investment in its endurance. *Specificity* refers to the breadth of coverage and level of detail of constitutional provisions.<sup>51</sup>

Flexibility of amendment was found by Elkins *et al* to be associated with constitutional endurance, constitutions that are highly changeable and highly rigid both being subject to early demise (in which regard India's constitution appears to have forged an optimal path between malleability and rigidity). Inclusion of actors was similarly found to be associated with endurance, continual participation by individuals and institutions in constitutional processes maximising constitutional longevity. Finally these authors found that, counterintuitively, the more detailed the constitution, the more likely it was to endure.

The bold text emphasis in the excerpt from Elkins *et al* brings us back to Ngcobo's question about the difference between amendment and interpretation, suggesting that the question is not so perplexing after all. 'Interpretative changes that update the understanding of the text among relevant actors' is a key focus of the present volume: how the Constitution is interpreted by those entrusted with its care finds it metaphorical correlative in that journey along the road that is made by walking.

What makes interpretation of a constitution possible, however, is not merely the participation of all the actors in constitutional processes (in South Africa, 'all stakeholders' would constitute a key part of 'all the actors') but the extent to which the Constitution serves as a framework within which interpretation may occur. We may construe from the description in Jacoby's article<sup>52</sup> of the drafters of the US Constitution as *framers* that in drafting the Constitution they were in fact providing a *frame*: 'an *open structure* that gives support to something'.<sup>53</sup> The operative words

51 Z Elkins *et al* *The endurance of national constitutions* (2009) 8 (italics emphasis original, bold emphasis added).

52 *The Boston Globe* (n 49 above).

53 *American Heritage Dictionary of the English Language Fifth Edition* (Houghton Mifflin Harcourt Publishing Company: Boston MA. 2016) (emphasis added).

here are ‘open structure’ – a paradox suggesting that though the framework that is the visible text of the Constitution is there, this does not imply that the Constitution is fixed. There is, therefore, room for interpretation of and within the Constitution. The *frame* it provides enables those entrusted with its protection and application – in the first instance the judiciary, but also the legislature, the executive, and by extension the population as a whole – to interpret it without the need for automatic recourse to its amendment. As Yacoob has said, ‘The Constitution creates a framework, a launching pad if you like, for the achievement of the society described in the Bill of Rights. It places an undeniable obligation on all the people of our country including everyone present here to leave no stone unturned in the process of achieving this result.’<sup>54</sup>

A good example of the power of interpretation versus the need for amendment was recently provided by Justice Albie Sachs’s reflections on property and land reform. Sachs argued that:

any deficiencies with land reform thus far have stemmed from failure either to use at all or to exercise effectively the full powers given under the Constitution. The Constitution as it stands provides powerful instruments to bring about comprehensive land reform. The problem so far has been one of implementation rather than of impediments created by the Constitution. Before seeking to amend the Constitution, it would be wise to utilise its redistributory powers properly *and to rely on the fact that the Constitution is a living tree capable of responding creatively and with vigour to new problems.*<sup>55</sup>

As a ‘living tree’ the Constitution allows the three branches of government ‘considerable latitude’ – as Sachs says earlier in the same piece – to interpret the law progressively, purposively and transformatively, as required by section 39 of the Constitution.<sup>56</sup>

The import of Sachs’s pronouncements about ‘deficiencies with land reform’ is that it is incumbent upon the legislature and the executive to use the Constitution as a framework within which to make laws and to

54 Z Yacoob (2012) ‘A dynamic constitution. Opening address by Justice Yacoob, Judge of the Constitutional Court of South Africa (Acting Deputy Chief Justice of South Africa) presented at Constitution Week on Monday 12 March 2012 at the University of Cape Town, South Africa’ <http://constitutionallyspeaking.co.za/justice-zac-yacoob-on-the-dynamic-constitution/> (accessed 2 August 2017) n.p.

55 A Sachs, ‘Oliver Tambo Centenary Series, Part 2: Does the Constitution stand in the way of radical land reform?’ *Daily Maverick* 5 May 2017 <https://www.daily-maverick.co.za/article/2017-05-05-oliver-tambo-centenary-series-part-3-does-the-constitution-stand-in-the-way-of-radical-land-reform/#.WYhQgYh942x> (accessed 7 August 2017; emphasis added).

56 The image of the Constitution as a tree is used fruitfully by O’Regan also. For her, the Constitution is a fruit tree requiring ongoing cultivation; but though ‘bold and generous in spirit ... its vision is still far from the daily experience of most South Africans. As the Constitution takes root and grows, the challenge is to bring its bold and generous vision to fruition in our daily lives.’ See K O’Regan ‘Cultivating a constitution: Challenges facing the Constitutional Court in South Africa’ (2000) 2 *Dublin University Law Journal* 18.

implement the policies that follow from this – in effect, to interpret and apply the Constitution.

The notion of the Constitution as a frame or a framework should not, however, be interpreted to suggest that no amendment is possible. As the glossing of *frame* as an ‘open structure’ implies, the borders are porous – and so where amendment is necessary, calls for this must be entertained. Not only is the Constitution, within limits, open-ended; it is also ‘open-sourced’ in the sense that it has drawn and continues to draw on a wide range of influences and experiences, nationally and internationally. In terms of section 39(1) of the Constitution, any court, tribunal or forum, when interpreting the Bill of Rights,

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

Nor was the Constitution altogether the ‘clean slate’ Ngcobo described it as being, as there was continuity from the Freedom Charter and from many other influences in its drafting.

## 1.6 The limits of constitutional transformation

Justice Sandile Ngcobo has reflected thus on the role of the Constitution in social transformation:

A constitution is a document we look to for answers to some of the intractable societal problems that confront us whether they are social, economic or political. But the text of the Constitution does not always provide a straightforward answer to the problems confronting us. In such a case we are compelled to look outside of and beyond the text of the Constitution ‘to various possible historical accounts, political and moral philosophy, theories of meaning and language, to practical and pragmatic considerations [and] to a host of matters beyond the Constitution that we can all see and read.’<sup>57</sup>

Compare this with Justice Johann Kriegler’s account of the role of the Constitution in social transformation:

I had a habit of saying to young colleagues who used to come to the old greybeard and ask for advice, I’d say, go and look at your certificate of appointment. You were appointed a judge, not God. There’s only so much you can do. The limitations of the law ... we got starry-eyed because we came from where we came from and we came to where we are, in a constitutional democracy with a Bill of Rights, and independent and competent judiciary to enforce it and the public opinion in favour of it, and we all got a little starry-

57 Ngcobo (n 3 above) 5-6.

eyed. I don't think you can change societal structures and its essentials solely through court cases. Absent the political will, you really can do very little. You know, the breakthrough that the TAC made with AIDS was a combination of public opinion, advocacy, public demonstrations, media exposure – *and* litigation – *and* the law: working hand-in-hand ... You've got to use the law and public awareness at the same time.<sup>58</sup>

The Constitution, both Ngcobo and Kriegler suggest, can go only so far in transforming society. The democratically elected government bears the primary responsibility for leading us along the constitutional path, but it is unable to meet that responsibility without first empowering the country's citizens to accept their own responsibility for making the path. Ultimately the Constitution remains a framework within which different forces act to effect change: historical accounts, political and moral philosophy, and theories of meaning and language; and such practical and pragmatic considerations as public opinion, advocacy, public demonstrations, media exposure, and litigation – all 'working hand-in-hand'. This is both the Constitution's weakness and its strength.

But its weakness *is* its strength. Consider Ngcobo's distinction between the visible and invisible Constitution:

The task of discovering the *invisible Constitution* belongs to the judiciary, which it conducts through the process of constitutional adjudication. The constitutional rules and principles that are formulated in the course of adjudication do not appear from the text of the Constitution but they are regarded as part of the Constitution because they illuminate the text of the *visible* Constitution. They constitute what has been described as an unwritten constitution or an invisible constitution. In this sense the 'Constitution that we can all see and read' is a shadow cast by the invisible constitution.<sup>59</sup>

Compare this with the excerpt from Kriegler's separate judgment in *Fose*:<sup>60</sup> 'When courts give relief they attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of [the supremacy clause of Constitution]'

The image of an ideal construct recalls the relationship between the real and the ideal explored by Plato in his 'Allegory of the cave' in *Republic*.<sup>61</sup> Ngcobo's notion – borrowed from Tribe<sup>62</sup> – of the text of the Constitution being a shadow cast by the invisible constitution is consonant with this image. The meaning of the Constitution is created through adjudication that mediates between the visible and invisible texts of the Constitution. This renders the Constitution an archetype – 'something

58 N Bohler-Muller 'HSRC Constitutional Justice Project: Interview with Justice Johann Kriegler' (2014) 22-23.

59 Ngcobo (n 3 above) 6.

60 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94.

61 Plato: *The republic* trans RE Allen (Yale University Press: New Haven, CT. 2006).

62 LH Tribe *The invisible constitution* (2008) 211.

moulded first as a model' (Greek *arkhetupon*)<sup>63</sup> – the ideal towards whose image judicial adjudication seeks to conform. If the text of the Constitution were fixed it would be a weak Constitution indeed: it needs the interpretation of the judiciary – and as we have seen earlier, of the legislature and the executive also – to bring it to life and to give it substantive meaning.

## 1.7 Do we really need the Constitution?

A variation of Sandile Ngcobo's question 'Why does the Constitution matter?'<sup>64</sup> is: Do we really need the Constitution? Commentator Barney Mthombothi in a March 2017 opinion piece on the effectiveness of Chapter 9 institutions reflected wryly: 'World's best constitution, you say? Pity people can't eat it ...'.<sup>65</sup> In responding to this sentiment, Richard Calland, another respected commentator, wrote in a piece entitled 'Why South Africa's Constitution is under attack'.<sup>66</sup>

... the Constitution is an unavoidable victim of the political zeitgeist. It's therefore potentially collateral damage to vicious power struggles currently consuming both the ANC and the government.

However, this analysis is not to deny that the Constitution is, and should be, a site of authentic contestation. 'Did we talk enough about land?' Moseneke asked law students at the University of Cape Town last week. 'No. But we reached a starting point compromise in section 25. We can't have millions of South Africans as unlawful occupiers of the land of their birth.'

A constitution should have a dynamic quality; it is not a tablet of stone .... Of course you can't eat a constitution. But, as time and again South Africa's Constitution has proved – not least this week with the SASSA [South African Social Security Agency] judgment – *it can help ensure that the poorest citizens can eat*. Moreover, and perhaps even more importantly, it can ensure that their government does not lose sight of their everyday needs and its responsibility to serve them.

The point that Calland is making, indicated in italics, is that the Constitutional Court should, and usually does, interpret the Constitution in such a way that realises its promises. To illustrate this point, he refers to the judgment of *Black Sash Trust v Minister of Social Development and Others*,<sup>67</sup> wherein Froneman J, for the majority, held that SASSA was under a

63 Oxford English Dictionary <https://en.oxforddictionaries.com/definition/archetype> (accessed 10 August 2017).

64 Ngcobo (n 3 above).

65 'World's best constitution you say? Pity people can't eat it' *Sunday Times* 12 March 2017 <https://www.pressreader.com/south-africa/sunday-times/20170312/282046211900618> (accessed 11 August 2017).

66 'Why South Africa's constitution is under attack' *The Conversation* 17 March 2017 <http://theconversation.com/why-south-africas-constitution-is-under-attack-74763> (accessed 11 August 2017) (emphasis added).

67 2017 (3) SA 335 (CC).



constitutional obligation to pay social grants to beneficiaries in terms of section 27(1)(c) of the Constitution. In this case the Court held that payment should be made to vulnerable beneficiaries despite the fact that the Court had declared the contract concluded with the distributors of the social grants, Cash Paymaster Services (CPS), invalid in 2013.

The Court held that CPS and SASSA would be closely monitored through a supervisory interdict and independent and technical advisors during the 12 months within which a new entity was to be appointed. In paragraph 8 of the judgment, Froneman J expressed the frustrations of the Court:

This Court and the country as a whole are now confronted with a situation where the executive arm of government admits that it is not able to fulfil its constitutional and statutory obligations to provide for the social assistance of its people. And, in the deepest and most shaming of ironies, it now seeks to rely on a private corporate entity, with no discernible commitment to transformative empowerment in its own management structures to get it out of this predicament.

Put simply, the Court had to bend over backwards to ensure that social grant beneficiaries did not suffer after 1 April 2017 as a result of the negligent (or worse) conduct of the Department and the Minister. Thus the Constitution and the Court ensured that poor South Africans could eat.

The Constitutional Court in this most extreme of examples referenced the Constitution to rescue social grant recipients from the weakness of the executive. Without the Constitution, millions would quite literally have gone hungry.

Such an extreme example of executive weakness may be an outlier – and in any case exemplifies a deficit approach towards understanding the value of the Constitution. More pertinently, then, in what ways is the Constitution a force for positive change? The answer seems to lie not in other people’s interpretations of the Constitution but in one’s own. In his famous exchange with Myles Horton about education and social change, Paulo Freire reflected:

The question for me is how is it possible for us, in the process of making the road, to be clear and to clarify *our own making* of the road ....

Let’s look at [how one acquires legitimate authority] in a very practical way. First of all, let us take a situation at home, in the relationship between the father and the mother and the kids. I am very sure, absolutely sure, that if the father, because he loves his kids, lets them do what they want to do and never shows the kids that there are limits within which we live, create, grow up, then the father does not assume vis-à-vis the kids the responsibility he has to guide and to lead. And what is beautiful, I think, philosophically is to see how, apparently starting from outside influence, at some point this discipline begins

to start from inside of the kid. *That is, this is the road in which we walk, something that comes from outside into autonomy, something that comes from inside.*<sup>68</sup>

In the same way, appropriating for oneself the values of the Constitution signals the first step along the constitution-building road that instantiates the collective journey of a nation, in the vanguard of which are the Justices of the Constitutional Court.

## 2 Structure of the book

In 2013 the Democracy, Governance & Service Delivery research programme of the Human Sciences Research Council (HSRC) was contracted by the Department of Justice and Constitutional Development (DoJ&CD) to conduct research into a developmental jurisprudence of the rights enshrined in the South African Constitution.<sup>69</sup> The Constitutional Justice Project (CJP), as it was known, sought to locate South Africa's jurisprudence within the developmental state as outlined in the National Development Plan (NDP), focusing on the need for progressive jurisprudence that would advance the objects of the Bill of Rights and, in particular, socio-economic rights. Further objectives of the project were to assess the capacity of the state (at national, provincial and local levels) to implement courts' decisions and to advance the transformation of the administration of justice with regard to access to justice, the development of common- and customary law, and the cost of litigation.<sup>70</sup>

The interviews with Justices that formed part of the CJP yielded a rich source of data which has not been adequately mined. Having learned first-hand from the judges interviewed for the CJP something about their lives and roles, we seek to celebrate them through charting their journeys, which ended for some in the Constitutional Court but for others has extended beyond that Court.

The selection of judges for inclusion in the book is based on the 'Chaskalson court' – more specifically, all the Justices who had served under Chief Justice Chaskalson who were still alive at the commencement of the CJP in 2013 and who were not sitting judges at the time. The Chaskalson court comprised Arthur Chaskalson, Laurie Ackermann, Richard Goldstone, Tholie Madala (deceased), Ismail Mohamed

68 M Horton & P Freire *We make the road by walking. Conversations on education and social change* (1990) 6-7, 187 (emphasis added).

69 The project was conducted by the HSRC in partnership with the University of Fort Hare between 2013 and 2015. For more information about the project, see Department of Justice & Constitutional Development 'Constitutional Justice Project: Presentation to the Justice Portfolio Committee, 5 September 2014' [https://pmg.org.za/files/140905constitutional\\_justice\\_project.ppt](https://pmg.org.za/files/140905constitutional_justice_project.ppt) (accessed 17 July 2017).

70 The Minister of Justice, Mr Mike Masutha, launched the report on 3 November 2017. For a full statement, see [http://www.justice.gov.za/m\\_speeches/2017/20171103-CJPreport.html](http://www.justice.gov.za/m_speeches/2017/20171103-CJPreport.html) (accessed 6 November 2017).

(deceased), Johan Kriegler, John Didcott (deceased), Pius Langa (deceased), Kate O'Regan, Yvonne Mokgoro, and Albie Sachs. The composition of the Court has changed somewhat since its inauguration in 1994, but those on the Bench included: Justice Pius Langa (deceased), Justice Tholie Madala (deceased), Justice Yvonne Mokgoro, Justice Dikgang Moseneke (sitting Deputy Chief Justice at the time of the project), Justice Sandile Ngcobo, Justice Bess Nkabinde (sitting judge at the time of the project), Justice Kate O'Regan, Justice Albie Sachs, Justice Thembile Skweyiya, Justice Johann van der Westhuizen (sitting judge at the time of the project); and Justice Zak Yacoob.

The book accordingly pays tribute to eight Justices: Ackermann, Goldstone, Kriegler, Mokgoro, O'Regan, Sachs, Skweyiya, and Yacoob. Chapter outlines – the chapters are ordered alphabetically by last name – are provided below.

## 2.1 Lourens Ackermann

Protestant Christianity – perhaps little different from the Calvinism to which Kriegler was exposed in his youth – also shaped Ackermann's conceptualisation of human rights. Jonathan Klaaren, the author of this chapter, locates Ackermann (by the judge's own admission) within a Christian legal tradition traceable to a Dutch jurist, but argues that 'In his forthright acknowledgement of these beliefs, Ackermann is ever the careful lawyer, indeed as careful with his religion as he is with his law ... disavow[ing] any attempt to subvert a secular Constitution.'<sup>71</sup> There are parallels here with Goldstone, both men careful not to foreground their religion but rather to recognise, in Ackermann's words in his book *Human dignity: Lodestar for equality in South Africa*, 'the theological and secular philosophic background, and indeed grounding, of the legal concepts of human worth and equality.'<sup>72</sup>

The Christian undercurrent in Ackermann's life and work is not, however, the main thrust of the chapter, which is 'the Constitution's continuity and discontinuity with the legal order that preceded it as well as its equally constitutive relationship with other national and global legal orders.' In this regard, the author identifies three strands of (r)evolution that characterised Ackermann's contribution to the South African Constitution: the human rights (r)evolution, epitomised by Ackermann's resignation from the *apartheid* Bench to take up the Harry Oppenheimer Chair in Human Rights Law at the University of Stellenbosch; the substantive legal (r)evolution, which in Ackermann's words '[turned] the

71 This could also be said about Goldstone and Kriegler, whose religious influences did not override their obligations under a secular Constitution that demands religious freedom.

72 L Ackermann *Human dignity: Lodestar for equality in South Africa* (2012) 18.

whole structure of the state and state organs ... upside down';<sup>73</sup> and the comparative (r)evolution, marked by Ackermann's fondness for and consequent use of (western) comparative law.

## 2.2 Richard Goldstone

Justice Richard Goldstone was brought up in a secular home by parents of Jewish origin. While his references to his Jewishness are understated, a function perhaps of his characteristic diffidence, there is a religious undercurrent that runs beneath his life and work. Michael Cosser argues that, while there are no demonstrable influences of Judaism upon the Constitution, the centrality of justice and dignity in Judaic law and prophecy, the representation of Jews in the liberation struggle for freedom, the generosity of spirit of a Jewish law firm, and the commitment of Jewish lawyers to social justice in South Africa coalesce in the person of Richard Goldstone, who succeeds in achieving a 'rare balance' between promoting a secular Constitution and upholding the right to religious freedom of expression. This sense of balance, Cosser shows, is the hallmark of Goldstone's life and work, his jurisprudence being modelled, in his court judgments, on the notion of finding compromise in cases involving seemingly irreconcilable opposites in a way that seeks a just outcome for both parties, and the quest for fairness for all permeating the reports arising from his judicial inquiries (both national and international) and his extrajudicial pronouncements in articles, addresses, and books.

## 2.3 Johann Kriegler

Justice Johann Kriegler, Khulekani Moyo observes, came to the Constitutional Court as a 'human-rights lawyer, with a fairly strong religious background',<sup>74</sup> his Calvinist upbringing having engendered in him a sense of 'an immortal spark that every human being possesses as of right, by the very fact that you are a human being, that you're entitled to dignity, to respect, to a say in the affairs of the community in which you live, to express your views, to have your opinions, to have your right to privacy.'<sup>75</sup> In an account that spans a prodigious range of topics reflecting Kriegler's engagement with different facets of the law, Moyo argues that Kriegler's understanding of and commitment to equality is in fact the bedrock of his jurisprudence. 'Rather than viewing the constitutionally guaranteed rights contained in the Bill of Rights as a check on democracy,' maintains Moyo, 'Kriegler's jurisprudential approach shows his

73 University of the Witwatersrand 'Constitutional Court Oral History Project: Interview with Lourens Ackermann' (6 December 2011) [http://www.historicalpapers.wits.ac.za/index.php?inventory\\_enhanced/U/Collections&c=213564/R/AG3368-A1](http://www.historicalpapers.wits.ac.za/index.php?inventory_enhanced/U/Collections&c=213564/R/AG3368-A1) (accessed 23 May 2017).

74 University of the Witwatersrand (n 27 above) 1.

75 Bohler-Muller (n 58 above) 15.

appreciation of the significance of the Bill of Rights as a vehicle for enabling broad substantive transformative social change in South Africa.’ The articulation of this approach reaches its peak in Kriegler’s dissenting judgment in the *Hugo* case,<sup>76</sup> in which he held that ‘[t]he South African Constitution is primarily and emphatically an egalitarian constitution.’<sup>77</sup> For Kriegler, Moyo shows, equality entails ‘the full and equal enjoyment of all rights and freedoms as defined in section 9(2) of the Constitution’ and therefore requires an ‘[emphatic] rejection of the deployment of stereotypes’ – exemplified in the *Hugo* case as the caricature of women as caregivers and mothers.

## 2.4 Yvonne Mokgoro

Justice Yvonne Mokgoro was the first Black South African woman to grace the Bench, the youngest amongst her peers. She was one of only two women at the outset, the other being Kate O’Regan. Coming from humble beginnings in the Northern Cape, Mokgoro rose through the ranks of academia swiftly. Even before her stint on the Bench she had built a solid scholarship related to the role of *ubuntu*<sup>78</sup> in the constitutional jurisprudence of the new South Africa. Despite not having ‘practised’ law in the narrow sense of the word, Mokgoro’s intellect and invaluable contribution to jurisprudence as a scholar rendered her suitable for appointment. She brought with her a fresh approach to values and argued strongly throughout her time on the Bench that the African value of *ubuntu* be operationalised in legal judgments and discourse.

Although she was not the only judge to rely on *ubuntu* in her judgments, the way Mokgoro approached this value was in a deeper and more Africanist way. Rather than focusing on the universality of the concept of *ubuntu* as Sachs tended to do, Mokgoro embedded her understanding of this value in her heritage and her identity as an African woman. Notably she also emphasised the inter-relationship between *ubuntu* and reconciliation in law, arguing for a less punitive and more restorative justice system. Her pronouncements on *ubuntu* in the *Makwanyane*, *Khosa* and *Dikoko* cases in particular<sup>79</sup> continue to resonate as legal discourse that reflects the kind of care required by the Constitution. Since retiring from the Court, Mokgoro has continued with her work on developing *ubuntu* conceptually and practically as a value unique to South African jurisprudence, and has simultaneously focussed on matters related to social cohesion.

76 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

77 As above, para 74.

78 In using the term ‘*ubuntu*’ here and throughout the book, we take its non-Nguni correlative ‘*botho*’ as understood.

79 *S v Makwanyane and Another* 1995 (3) SA 391 (CC); *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC); *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

## 2.5 Kate O'Regan

In his chapter on Justice Kate O'Regan, Gary Pienaar notes that her interpretation of the doctrine of separation of powers has led to her having faced considerable criticism for her position on judicial deference (or 'modesty' and 'restraint') in the realm of public law and its impact on socioeconomic rights. In this, she resembles Ngcobo and Skweyiya, who, though perhaps for different reasons, have been similarly absorbed with the (somewhat strict) maintenance of the separation of powers. But O'Regan's judicial record, Pienaar argues, reveals that she is hardly averse to a degree of judicial activism in pursuit of the constitutional value of equality. Recognising the dangers of both activism and restraint, her UCT colleague Professor Pierre de Vos has suggested that there is an imperative for judges to find a morally justifiable path 'between judicial activism and judicial restraint'.<sup>80</sup> The 'restraint' of which O'Regan has been accused is consistent with her view of the role of the Constitutional Court as a forum for 'public reasoning'.<sup>81</sup>

As Pienaar sets out to demonstrate, the rudder of reason and rationality can be identified as a strong guiding principle in her body of work, along with the principle of legality. On the other hand, she is quoted as saying that the Constitution's transformation project requires all of us to engage with empathy as we try to imagine life from the perspective of the other<sup>82</sup> – attributable perhaps to the fact that she was one of two women on the Bench at that time, the other being Justice Yvonne Mokgoro, who is well known for her views on *ubuntu* and rights.<sup>83</sup> The possibility of establishing from Justice O'Regan's judicial, academic and public record whether she has succeeded in navigating a justifiable middle way through the tensions arising between the imperatives of legality and experimentation, between rationality and imagination, and between deference and empathy is the central question Pienaar attempts to address in his chapter.

80 P de Vos 'Between judicial activism and judicial restraint' *Constitutionally speaking* (20 January 2009) <http://constitutionallyspeaking.co.za/between-judicial-activism-and-judicial-restraint/> (accessed 18 December 2013).

81 K O'Regan 'A Forum for reason: Reflections on the role and work of the Constitutional Court' Helen Suzman Memorial Lecture, Johannesburg (22 November 2011) <http://hsf.org.za/resource-centre/lectures/hsf-memorial-lecture-2011/view> (accessed 3 August 2017).

82 'Have empathy, that's what you can do for constitutional democracy – Kate O'Regan' *City Press* 8 September 2015.

83 See, for example, her decision in *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC); 2004 6 BCLR 569 (CC) (4 March 2004).

## 2.6 Albie Sachs

In their chapter on Justice Albie Sachs, Narnia Bohler-Muller and Thobekile Zikhali maintain that it is apposite, in 2018, to listen carefully to the Justice's voice to understand the difference between his activism before and after 1994. Bohler-Muller had formerly been critical of Sachs: while recognising the remarkable contributions he had made to building an understanding of the South African Constitution and its values, she 'accused' him, in 2010,<sup>84</sup> of having left his activism behind when he reached the Bench. With hindsight, Bohler-Muller and Zikhali claim, Sachs's activism is, ironically, perhaps the most important contribution he has made in 'walking the path' to a post-*apartheid* democratic South Africa. For activism, they go on to argue, takes different forms; and at times the Constitutional Court needs to defer to the other two branches of government to ensure that it is not seen to be 'over-reaching' or being counter-majoritarian (or, even worse, according to the ANC's former Secretary-General, Gwede Mantashe, counter-revolutionary).<sup>85</sup>

Prior to 1994 Sachs fought bravely against the oppression of *apartheid*; he paid a high price, losing limb and almost life, for his courage. After 1994 he entered into a new phase of 'activism' more suitable to South Africa's democratic dispensation. As a member of the first Bench of the Court he continued to fight, in new more nuanced ways, to protect the Constitution and to ensure that its interpretation reflected an ethic of care and *ubuntu*. Through a unique combination of story-telling, *ubuntu*, reconciliation and the restoration of balance, the authors maintain, Sachs's life and words have shown him to be a deeply caring man often torn between his empathy for the plight of the poor and dispossessed and the pragmatic realities of limited state resources. This care extends to the present as he draws the attention of a polarised public to a more balanced reading of the land reform provisions in the Constitution.

## 2.7 Thembile Skweyiya

Justice Thembile Skweyiya was known for his efforts in making the Constitution a lived reality for communities and not simply a charter of rights – his interpretation of the Constitution, Ndlovu and Omino argue, having been heavily influenced by his dedication to social justice. His judgments often encapsulated his pragmatic interest in the manner in which the law affected people and communities at large beyond individual cases. Skweyiya was particularly known for his critical contributions to the interpretation of children's rights contained in section 28 of the Constitution (on 'Children'), his court contributions to judgments or his

84 N Bohler-Muller 'The strange alchemy of the judge and the blue dress' (2010) 25(1) *Southern African Public Law* 152.

85 'Counter-revolutionary coalition emerging' *Cape Argus* 23 September 2014.

own majority author judgments epitomising the notion that ‘A child’s best interests are of paramount importance in every matter concerning the child.’<sup>86</sup>

But while Skweyiya, perhaps more than any other judge on the Constitutional Court Bench, was able to identify with the downtrodden by virtue of an empathy born of his familiarity with the conditions in which they lived, his primary jurisprudence, argue Ndlovu and Omino, centred around attempts to infuse the South African Constitution with elements of African jurisprudence and the continental resonances of *ubuntu* it embodied. ‘Ultimately my message’, he said in an HSRC colloquium in 2015, ‘is that we ought to be not only more attentive and receptive to the African voice when we conduct our comparative constitutional interpretation but also more conscious of our responsibility to strengthen that voice in our judgments from which the rest of the continent and even the world may find assistance.’<sup>87</sup>

## 2.8 Zak Yacoob

For Vasu Reddy and Sarah Chiumbu, identity is a function of ‘processes that constitute and continuously reform the subject who has to act and speak in the social and cultural world.’<sup>88</sup> The authors take an approach in their chapter on Justice Zak Yacoob that sees as inseparable the making of the man and his contribution to constitutional jurisprudence. More specifically, their central argument is that Yacoob’s location in the world is inseparable from ‘his commitment to fairness and equality’, which is born of his own life experiences in ‘overcoming personal, political and social obstacles ... and his ability to render probing and difficult questions on all matters that concern inequalities when the values of the Constitution are transgressed.’ For Yacoob, equality resides in ‘just practice’, the law finding true meaning only in ‘efforts to understand people’s life circumstances and how these interact with their ability to live in the world.’

Yacoob himself claims that ‘the inclusion of social and economic rights in our Constitution militates against the idea of *mere liberal democracy* ... I would say that we should develop ourselves to be a people’s democracy ... that is truly interested in people’ (emphasis added)<sup>89</sup> – which leads Reddy and Chiumbu to posit that Yacoob in fact believed in ‘inclusive neoliberalism’<sup>90</sup> with its ‘explicit focus on the poor and

86 As above, sec 28(2).

87 TL Skweyiya ‘Presentation at the HSRC colloquium for the Constitutional Justice Project’ (26 November 2014) 9.

88 S Hall ‘Fantasy, identity, politics’ in E Carter, J Donald & J Squires (eds) *Cultural remix: Theories of politics and the popular* (1995) 95.

89 Z Yacoob ‘The Constitution: A liberal democracy and patriotic criticism’ Helen Suzman memorial lecture 2013 <http://hsf.org.za/resource-centre/lectures/hsf-memorial-lecture-2013/view> (accessed 3 August 2017) 21.



recognition of the role of the state in ameliorating the plight of the poor.’ Epitomising the core argument of the present volume, Yacoob maintains that ‘a dynamic Constitution also implies a living instrument, a facilitator that has a life of its own and which breathes life and positive energy into the people of the country.’<sup>91</sup> Through his words and actions, and yearning for inclusiveness, Yacoob is the living embodiment of the first three words of the Preamble to the Constitution: ‘We, the people’.<sup>92</sup>

### 3 Contributors to this volume

This book is unique among books published by legal publishing houses for the diversity of its contributors: the editors and authors are drawn not only from the legal profession or legal academia but include scholars and researchers from different disciplines. A quick perusal of the authors’ biographies shows that there is a mix of disciplines, ranging from law to sociology to development theory to education. The chapters themselves, moreover, are written in a multi-, inter- and cross-disciplinary style, building a mosaic that seeks to enrich future conversations about the evolution of the Constitution – which after all is not the sole preserve of the law and lawyers.

Some of the chapters in this volume are voluminous; others are rather shorter. This discrepancy is due in some instances to the amount of available material on the judges – a function of the extent of the documentation of their backgrounds, the nature and extent of their legal careers, and their personal dispositions. But it is due also to the different writing styles of the authors – a function in turn of their disciplinary bents. As such, the authors have worked with the materials at their disposal and within the confines of their personality types and writing styles. The process, much like the making of the Constitution, is uneven, yet oriented towards the building of the mosaic that is the Constitutional narrative.

90 O Eggen ‘Making and shaping poor Malawians: Citizenship below the poverty line’ (2013) 31(6) *Development Policy Review* 697.

91 Z Yacoob ‘A dynamic Constitution’ Opening address by Justice Yacoob, Judge of the Constitutional Court of South Africa (Acting Deputy Chief Justice of South Africa) presented at Constitution Week on Monday 12 March 2012 at the University of Cape Town, South Africa <http://constitutionallyspeaking.co.za/justice-zac-yacoob-on-the-dynamic-constitution/> (accessed 3 August 2017) n.p.

92 ‘The Constitution’ (n 5 above) Preamble.

## Bibliography

- Ackermann, L *Human dignity: Lodestar for equality in South Africa* (Juta & Company Ltd.: Cape Town 2012).
- Bohler-Muller, N 'The strange alchemy of the judge and the blue dress' (2010) 25(1) *Southern African Public Law* 152.
- Carter, E, Donald, J & Squires, J (eds) *Cultural remix: Theories of politics and the popular* (Lawrence & Wishart: London 1995).
- Corder H; Kahanovitz, S; Murray C; Sarkin-Hughes, J & Steytler, NC *A Charter for social justice: A contribution to the South African Bill of Rights debate* (Department of Public Law, University of Cape Town: Cape Town 1992).
- Eggen, O 'Making and shaping poor Malawians: Citizenship below the poverty line' (2013) 31(6) *Development Policy Review* 697.
- Elkins, Z; Ginsburg, T & Melton, J *The endurance of national constitutions* (Cambridge University Press: Cambridge, UK 2009).
- Hall, S 'Fantasy, identity, politics' in Carter, E, Donald, J & Squires, J (eds) *Cultural remix: Theories of politics and the popular* (Lawrence & Wishart: London 1995).
- Horton, M & Freire, P *We make the road by walking. Conversations on education and social change* (Temple University Press: Philadelphia 1990).
- Jost, JT & Kay, AC *Social justice: History, theory and research* (Wiley: Online Library 2010).
- Langa, P (2008). 'Foreword' in Woolman, S & Bishop, M (eds.) *Constitutional conversations* (Pretoria University Law Press (PULP): Pretoria 2008).
- Machado, A *The Castilian camp* trans J Green (Aquila: Portree, Isle of Skye 1982).
- Miller, D 'Recent theories of social justice' (1991) 21(3) *British Journal of Political Science* 371.
- Mureinik, E 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 8(4) *South African Journal on Human Rights* 464.
- Reid, T *Essays on the intellectual powers of man* (Jonathan Bennett, Early Modern Texts: 2017).
- Woolman, S & Bishop, M (eds.) *Constitutional conversations* (Pretoria University Law Press (PULP): Pretoria 2008).
- Woolman, S & Bishop, M 'Introduction: Law's autonomy' in Woolman, S & Bishop, M (eds.) *Constitutional conversations* (Pretoria University Law Press (PULP): Pretoria 2008).
- Woolman, S (2013) *The selfless constitution: Experimentalism and flourishing as foundations of South Africa's basic law* (Juta & Co Ltd.: Cape Town 2013).

# CHAPTER 2

## THE CONSTITUTIONALIST CONCEPT OF JUSTICE L ACKERMANN: EVOLUTION BY REVOLUTION

*Jonathan Klaaren*

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Source: <http://www.constitutionalcourt.org.za/site/judges/justicelwhackermann/index1.html>

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### 1 Introduction

Justice LWH Ackermann was arguably one of the most systematic expositors of the South African Constitution. The task of identifying his words and thoughts in order to illuminate the evolution of the South African Constitution is thus greatly assisted by the character of his writings, both in his judgments while serving on the Constitutional Court and by his extra-curial writings before and after his Court service. His judgments most prominently include those delivered from the Constitutional Court though he also served on the High Court both in the Transvaal during *apartheid* and later in the Cape.

In these writings, much of Justice Ackermann's focus has been on dignity and its relationship to equality. Ackermann's writings after leaving the Bench include his monograph, *Human Dignity: Lodestar for Equality in*

*South Africa*.<sup>93</sup> He wryly observed: ‘During my forensic life I had written numerous opinions, heads of argument and judgments, but these had not – I found – prepared me properly for writing a book. I am not sure why.’<sup>94</sup>

This monograph gave Ackermann the opportunity to articulate both the Court’s and his own views on dignity and equality. As his close colleague Justice O’Regan points out in her foreword to this book: ‘From early on, the Constitutional Court asserted that human dignity was key to the interpretation of the equality clause. This approach has been criticised in some quarters, and supported in others. This book is a sustained argument for the proposition that the concept of human dignity is integral to the interpretation of the equality clause, as the Court has asserted.’<sup>95</sup> Indeed, Ackermann’s statement of one of the principal arguments of his book goes further than O’Regan’s identification of the Court’s assertion of dignity as ‘integral to the interpretation’ of equality. For Ackermann, ‘for legal purposes, the answer to the question “equality of what” ... is/should be human worth (dignity).’<sup>96</sup>

One can see three distinct imagined revolutions in Ackermann’s constitutionalist thought: that of human rights; that of the South African Bill of Rights; and that of comparative constitutionalism. Each of these is more a revolution from above than from below. But they are revolutions nonetheless. This chapter’s use of the term ‘revolution’ differs somewhat from that of Roger Berkowitz – who has argued that Ackermann’s judgments were ‘an example of the double revolutionary activity of founding and creating.’<sup>97</sup> It is more in line with Ackermann’s own understanding of a revolution as a significant change in structure or practice, as explained below. But we should agree wholeheartedly with the identification of the spirit that Berkowitz has found in Ackermann’s ‘revolutionary’ judgments – ‘the joy in debating, the love of contest, and the exhilaration of the act of founding that erupts from his prose.’<sup>98</sup>

Each of the three revolutions discussed below points to the distinct features Ackermann brought to the constitutional pathway he co-created with his colleagues: the Constitution’s continuity and discontinuity with the legal order that preceded it as well as its equally constitutive relationship with other global legal orders. This chapter will use these three revolutions to trace the Constitution’s evolutionary path by exploring a number of Ackermann’s court judgements, his out-of-court writings in

93 L Ackermann *Human dignity: Lodestar for equality in South Africa* (2012).

94 As above, vii.

95 As above, x.

96 As above, 17.

97 R Berkowitz ‘Revolutionary constitutionalism: Some thoughts on Laurie Ackermann’s jurisprudence’ in AJ Barnard-Naudé *et al Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (2008) 217.

98 As above.

journal articles, book chapters, and books, as well as speeches he made and interviews conducted with him.

## 2 The human rights rEvolution

The first revolution is the human rights revolution. It is perhaps here where Ackermann's words are the sparsest and his deeds the most fulsome. It is primarily in his action in stepping down from the then-*apartheid* Bench that Ackermann engaged in his most revolutionary action. This action directly contributed to evolutionary change in South African constitutionalism.

Justice Ackermann may easily be identified with the South African constitutionalist culture existing prior to 1994. One might pull out three strands to this culture that Ackermann embodied: its attention to legal expertise; its relative inclusivism; and its values-based character. In many countries, legal expertise is cultivated within universities, such as in many of the civil law jurisdictions of Europe. In addition to having displayed excellence as a student, Ackermann transitioned from the *apartheid* Supreme Court Bench in the Transvaal to the Constitutional Court Bench through the Faculty of Law at Stellenbosch. At the height of South Africa's intellectual human rights revolution, he thus spent some key formative years as a law professor. He was possibly the first of South Africa's top-judges-in-waiting to do so. The more usual judicial career of South Africa's top judges, certainly at the Appellate Division, had been decidedly different throughout *apartheid*.<sup>99</sup> Ackermann's, by contrast, shows a fusion of the bar, the Bench, and the academy in the Cape. These are all places professing expertise and can be seen in sum as a distinct legal culture with a decided scholarly bent.<sup>100</sup>

After his studies at Stellenbosch and as a Cape Rhodes Scholar at Oxford, Ackermann worked as an advocate at the Pretoria Bar. He took acting appointments to the Bench from as early as 1976 and was permanently appointed to the Transvaal Provincial Division of the Supreme Court in 1980, serving until 1987. His appointment occurred immediately after then-Chief Justice Michael Corbett's celebrated speech supporting human rights in 1979, although it is unclear to what extent, if any, that speech was a factor in Ackermann's acceptance of this appointment. Nevertheless, in September 1987 Ackermann resigned to inaugurate the newly established Harry Oppenheimer Chair in Human Rights Law at the University of Stellenbosch, holding that position until the end of 1992. During his academic appointment, he served on the highest courts of two of South Africa's neighbouring states: on the Lesotho

99 H Corder *Judges at work: The role and attitudes of the South African appellate judiciary, 1910-1950* (1984).

100 H Corder *A charter for social justice: A contribution to the South African Bill of Rights debate* (1992); DV Cowen & S Cowen *Cowen on law: Selected essays* (2008).

Court of Appeal from 1988 to 1992; and on the Namibian Supreme Court as an acting judge of appeal from 1991 to 1992. He was briefly reappointed to the High Court in the Cape in 1993 and from there was appointed to the Constitutional Court.

Pre-1994 constitutionalist culture might also be identified as relatively inclusive: racially segregationist (undoubtedly) yet distinctly neither English nor Afrikaans, but South African. This relatively inclusive elite culture mirrored, and derived to some extent from, the development of a South African identity built initially through a defective and incomplete notion of equality between English-speaking South Africans and Afrikaners, an equality of course encompassing only whites.<sup>101</sup> This culture of cautious openness comes through in Ackermann's own life narrative: 'Both my parents were Afrikaners but they believed in being South Africans first, and Afrikaners second. And from the cradle I was brought up bilingually and bi-culturally in the sense that I spoke both the European languages, English and Afrikaans, and imbibed a dual culture from childhood.'<sup>102</sup> As this quotation demonstrates, Ackermann appears comfortable in recognizing his cultural identity as an Afrikaner. He thus occupied a space within a legal polity which has been influenced primarily by British legal cultural scripts more than any others, as aptly described by Martin Chanock.<sup>103</sup> One may trace some of Ackermann's facility with the interplay of revolution and evolution to this distinctive Cape fusion of English and Afrikaans legal traditions, betokening as they do the civil law and common law long beloved as topics of discussion by pre-Constitutionalist legal historians.<sup>104</sup> Married to Denise Ackermann, the prominent feminist theologian based at the University of the Western Cape (a university often identified with the coloured community in the Cape),<sup>105</sup> Ackermann was at home in a supportive and rich environment that was decidedly not narrow.

Finally, its values-based character was also a significant part of the pre-1994 South African constitutionalist culture which Ackermann epitomised. While for many whites protestant Christianity bolstered the defence of *apartheid*, in the practice of some (such as the Ackermanns) it manifested itself as an attachment to human rights.<sup>106</sup> Writing of Denise Ackermann's set of autobiographical essays, Desmond Tutu observed: 'it

101 J Lambert 'An identity threatened: White English-speaking South Africans, Britishness and dominion South Africanism, 1934-1939' (2005) 37(1) *Kleio* 50.

102 University of the Witwatersrand 'Constitutional Court Oral History Project: Interview with Lourens Ackermann' (6 December 2011) [http://www.historicalpapers.wits.ac.za/index.php?inventory\\_enhanced/U/Collections&c=213564/R/AG3368-A1](http://www.historicalpapers.wits.ac.za/index.php?inventory_enhanced/U/Collections&c=213564/R/AG3368-A1) (accessed 23 May 2017).

103 M Chanock 'Writing South African legal history: A prospectus' (1989) 30(2) *The Journal of African History* 265.

104 R Zimmermann & D Visser *Southern cross: Civil law and common law in South Africa* (1996); HR Hahlo & E Kahn *The South African legal system and its background* (1968).

105 D Ackermann *After the locusts: Letters from a landscape of faith* (2003).

106 S Dubow *South Africa's struggle for human rights* (2012).

is a deeply moving account of a very special person, remarkably courageous: she and her lawyer husband, now a Judge in our Constitutional Court, have paid heavily for holding to their beliefs and principles which put them at odds with the majority of their community.<sup>107</sup> As we shall see, this values-based character had a Christian manifestation in Ackermann's own thought.

The values-based strand to this culture is evident in Ackermann's writings on dignity. One of Justice Ackermann's most quoted passages about the meaning of dignity in the South African Constitution is in *Ferreira v Levin*:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally.<sup>108</sup>

Dignity was one of the rights at issue when Ackermann, together with Goldstone J, identified 'the objective value system embodied in the Constitution.'<sup>109</sup> On behalf of the Court, they held that, in addressing the positive obligations on members of the police force found in the Constitution and the relevant legislation 'in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence.'<sup>110</sup>

In one of his sole-authored judgments, Ackermann even approached the value of dignity from a critical perspective. The case concerned the sentence of life imprisonment. For Ackermann, 'to attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.'<sup>111</sup>

107 Ackermann (n 105 above).

108 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).

109 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

110 As above, para 62.

111 *S v Dodo* 2001 (3) SA 382 (CC).

Drucilla Cornell has drawn precisely from this passage in developing from Ackermann's jurisprudence what she terms 'the critical edge of dignity as moral ideal'.<sup>112</sup> In Cornell's analysis, the Constitution is both law (what is) and an ethical aspiration (what we want to become); it is both journey and destination; it is a magnificent bridge over a yawning chasm between where we come from and where we want to be. Cornell quotes Ackermann as describing the ultimate fate of our 'transforming' Constitution – 'a bridge with a very long span' – as reliant not only on the jurisprudence of its courts, but also on 'everyone, in government as well as in civil society at all levels,' embracing and living out 'its values and its demands.'

However, it is in Ackermann's extra-curial writings that he delves most deeply into the sources of his personal beliefs regarding the value of dignity. Ackermann supported the 1994 Constitution's move to articulate the basis of the South African order as a secular state rather than one based on Christian nationalism.<sup>113</sup> But his support for a secular state and for the dominant global norm of judges not justifying their decisions through reference to their religious beliefs does not mean that Ackermann did not firmly hold and defend those religious beliefs and depend on them in his choices.

Indeed, for Ackermann, it seems clear: Christianity supports Kant. In 2004, Ackermann wrote: 'As essentially a court lawyer, with no formal training in philosophy, I dare to take my stand on Kant because his imperatives encapsulate for me, by way of contrast and in the most rationally compelling manner that I have been able to discover, what was so obscene about *apartheid*. It serves as a constant reminder of our very ugly recent past. As a reforming Constitution, it is right that human dignity should be so highly valued.'<sup>114</sup> Ackermann in this passage seems to imply that his use of Kant is instrumental and discretionary, impelled by twin senses of the wrongness of *apartheid* – its obscenity (a clearly value-laden term) as well as the attractiveness of a rational conception of order.

Indeed, Ackermann has explicitly stated his hermeneutical method: '[i]t is permissible and indeed necessary to look at the ills of the past which [the Constitution] seeks to rectify and in this way try to establish what equality and dignity mean.'<sup>115</sup> Elsewhere, he also writes that 'Kant, to my mind, musters the most powerful and convincing *secular* arguments in support of human dignity being a worth beyond price, and hence equal in

112 D Cornell 'Bridging the span toward justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence' in AJ Barnard-Naude *et al* *Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (2008) 30-34.

113 A Leatt 'Faithfully secular: Secularism and South African political life' (2007) 20(2) *Journal for the Study of Religion* 29-44.

114 LWH Ackermann 'The legal nature of the South African constitutional revolution' (2004) 2004 *New Zealand Law Review* 633.

115 As above.



and for all persons' (emphasis added).<sup>116</sup> For Ackermann, Kant gives the best secular justification and explanation of what the values of dignity and equality should mean.

The text quoted directly above is part of a constitutional conversation between Ackermann and Prof Stu Woolman. Here, Ackermann brings to the table extensive quotations and material from Christianity. He quotes from the first chapter of the first book of the Bible, Genesis 1:27: 'So God created humankind in his image, in the image of God he created them; male and female he created them.'<sup>117</sup> Ackermann carefully points to the Christian belief system of other expositors (and indeed sources) of the South African legal order, in particular Grotius, the Dutch jurist whom Ackermann notes was additionally a theologian and a Christian believer.<sup>118</sup> Ackermann also embraces the expanding contemporary literature on Christianity and human rights, while simultaneously citing the Muslim writer Abdulahi An-Na'im. In his forthright acknowledgement of these beliefs, Ackermann is ever the careful lawyer, indeed as careful to be inclusive with his religion as he is with his law. He does not ground himself in Christianity only but instead, as the use of An-Na'im manifests, in the Abrahamic religions more broadly and further disavows any attempt to subvert a secular Constitution.<sup>119</sup>

The fine balance between his approach to his faith and his judicial responsibilities emerges in Ackermann's defining moment in respect of the pre-1994 South African constitutional culture: his resignation from the then-Supreme Court Bench. For Ackermann, his resignation as a judge was consistent with his judicial philosophy:

I don't like the word judicial activism, because in certain connotations it means acting outside the Law. I resigned from the Bench because I regarded [that] my Oath of Office [w]as not something that could be fiddled with. I took an oath to uphold the Law, it's the Law *inter alia* passed by the government. I couldn't pretend that my Oath of Office was to uphold some supernatural law. I might have been wrong, but that's my approach and I resigned because I didn't feel that one could do any more in terms of the Oath of Office ... [that one took]. Now, I don't regard my action as activist, and I don't like the word activist.<sup>120</sup>

Of course his action emphasised some aspects of constitutionalism more than others.

116 LWH Ackermann 'The soul of dignity: A reply to Stu Woolman' in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 218.

117 As above, 219.

118 As above, 219–20.

119 As above, 220.

120 N Bohler-Muller & G Pienaar 'HSRC Constitutional Justice Project: Interview with Justice LWH Ackermann' (2014).

In this refashioning of a Christian perspective on the values-laden character of South African constitutionalist culture, Ackermann is on unassailable legal academic ground. He quotes one of the most respected current legal scholars, Jeremy Waldron, to the effect that: '[w]e might reasonably expect to find further clues to a rich and adequate conception of persons, equality, justice, and rights in what is currently made of the Christian-centered tradition by those who remain centred in Christ.'<sup>121</sup> Ackermann's theoretical chapter in *Human Dignity: Lodestar for Equality in South Africa* similarly rounds off with an exploration of 'crucial aspects of the theological and secular philosophic background, and indeed grounding, of the legal concepts of human worth and equality.' Ackermann 'seeks to justify this theological and philosophical use in the process of giving meaning to these concepts in constitutional law.'<sup>122</sup> There is an interesting parallel here to the purpose of this volume. While the present volume links the curial with the extra-curial through the words of the Justices, this inner focus of Ackermann's links, through the words of those in the intellectual traditions out of which the Constitution emerges, the worlds of religious belief and secular constitutionalism. This is evidenced by Ackermann's place as a comparativist in the Court's own body of doctrine on law and religion.<sup>123</sup>

There was a further comparative element to this career choice. As Ackermann explains:

[T]he person who made the single biggest impact on me was in fact Professor Louis Henkin of Columbia University, whom I met in 1983. He was one of the truest and most open-minded people I ever met in my life, and a world authority on human rights and a human rights activist in the United States. And I think his very clear way of thinking probably played the biggest role in my total rejection of *apartheid*. So much so that in 1986 I felt that it was not much good having a Westminster type Constitution where Parliament was sovereign. I felt that there was very little the judges could still do to ameliorate the impact of *apartheid*, and I was consequently instrumental in founding the Human Rights Chair at Stellenbosch. It really came as quite a surprise to me when both the donor and the university approached me to become the first professor. I eventually decided to accept the offer. The State President (PW Botha at the time) wouldn't give me permission to retire from the bench, so I had to resign, which involved the loss of my pension.<sup>124</sup>

121 As above, 222.

122 Ackermann (n 93 above) 18.

123 C Rautenbach 'The South African Constitutional Court's use of foreign precedent in matters of religion: Without fear or favour?' (2015) 18(5) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1545-1570.

124 University of the Witwatersrand (n 102 above).

### 3 The substantive legal rEvolution

Justice Ackermann was at the centre of the substantive legal revolution that resulted from the change from *apartheid* to constitutional democracy. His former colleague Kate O'Regan has argued that Ackermann's principled exploration of the values of dignity, freedom, and equality is 'an exercise in a form of judicial decision-making that marks a radical break from the traditional forms of legal reasoning in our legal system; and it is a form of reasoning entirely appropriate to our new constitutional order.'<sup>125</sup> Ackermann himself consistently describes the Constitution as a substantive but not a procedural revolution.<sup>126</sup> He has thus identified a paradoxical framing between the revolutionary and the evolutionary nature of the Constitution.

Ackermann's question was whether a constitutional revolution was not a contradiction in terms. His answer was that the South African transition from *apartheid* to post-*apartheid* was indeed a constitutional revolution that was not contradictory.<sup>127</sup> More particularly, Ackermann argued that 'the constitutional changes described constitute, in substance, a constitutional revolution, in the sense that the previous constitutional disposition was turned on its head, and that the content of the new constitutional dispensation differed radically from the previous one.'<sup>128</sup>

As a good legal philosopher, Ackermann did not leave the matter resting upon only this clever framing – revolution as turning on its head, and the procedure / substance distinction.<sup>129</sup> Instead, he proceeded to face the substantive question: What did it mean to have a legal revolution? Ackermann's answer is revealing – both of his philosophy and of South Africa's current post-Ackermann constitutional moment (a matter largely beyond the scope of this chapter).

In a passage worth quoting at some length, Ackermann links a set of legal facts regarding the transition to democracy to the philosophy of the legal positivist Hans Kelsen. Ackermann writes:

Yet this radical constitutional change would not, in my view, qualify as a revolution procedurally. In his work, *General Theory of Law and State*, Hans Kelsen formulates a definition of a coup d'état or revolution that has gained wide recognition. The crux of the definition is that a revolution takes place 'whenever the legal order of a community is nullified and replaced by a new

125 K O'Regan 'From form to substance: The constitutional jurisprudence of Laurie Ackermann' in AJ Barnard-Naude *et al* *Dignity, Freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (2008) 16.

126 Ackermann (n 114 above).

127 As above, 633-646.

128 As above, 646.

129 A Cockrell 'The South African Bill of Rights and the duck / rabbit' (1997) 60 *Modern Law Review* 513-537.

order in an illegitimate way, that is in a way not prescribed by the first legal order itself', or 'the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated.' That did not occur in South Africa. There was no discontinuous legal fracture with the old legal order. The revolution was commenced by a parliamentary statute of that old order (namely, the Interim Constitution) and controlled by it, and the Constitutional Court was created by it.<sup>130</sup>

One sense in which Ackermann understands a procedural revolution is contained in the potential for a branch of the government to unilaterally change the procedures of the Constitution. This would be a violation of the separation of powers doctrine and not a good thing, as he makes clear in a post-constitutional context:

If an executive resolutely refuses [to comply with a court order] under all circumstances and no matter what opportunity had been given to him, no matter how reasonable and structured the interdict may be, refuses to do so, you've got to have a stage for revolution. When one branch of [government] refuses to honour its constitution ... what else is that but a procedural revolution? And the Courts have the immensely difficult task of deciding when it would be appropriate to teach the Executive a lesson by calling for the Minister involved or the Director-General involved ... and bring him to Court and say I'll give you a month's opportunity to explain why you haven't carried it out. And if there's not a reasonable explanation for why you can't do it, I'm going to commit you to jail for contempt of court.<sup>131</sup>

Significantly, Ackermann gives a prominent role, in the transition, to the Constitutional Principles. Many indeed saw these Principles as very significant at the time of transition. Yet they have faded both in substantive significance for the ongoing constitutional project (where the Bill of Rights has largely supplanted any force the Principles had) and also in the recollections of the transition. But ever the careful lawyer, Ackermann does not forget them. He points to their procedural and evolutionary nature. He does this by referring to them as the second of three components that secured the transition – a two-staged constitutional drafting and promulgating process, the Principles, and an arbiter (the Constitutional Court). The Principles are given further significance, in Ackermann's analysis, by the Court's role in deciding on their meaning and application to the result of the first stage of the constitution-making process.<sup>132</sup>

In his insistence on the lack of a procedural revolution and his focus on the substantive nature of the transitional change, Ackermann distinguishes himself sharply from the superficially similar but actually

130 Ackermann (n 114 above) 646.

131 Bohler-Muller & Pienaar (n 120 above).

132 H Klug 'Towards a sociology of constitutional transformation: Understanding South Africa's post-apartheid constitutional order' (8 February 2016) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2729460](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2729460) (accessed 20 November 2017); H Klug *Constituting democracy: Law, globalism and South Africa's political reconstruction* (2000).

quite different vision of the American critical legal studies scholar Karl Klare. Ackermann is the polar opposite to the standard understanding of the Klare vision of transformative constitutionalism. For Ackermann to call the legal change at the end of *apartheid* a substantive revolution is to characterise it as something less than a procedural revolution. For him,

[O]f course, when we started, this was part of what I'd call a substantive legal revolution. It wasn't in Kelsen's terms a formal one because there was no revolution, which made a total break with the structure. We had the *apartheid* Parliament, which passed the Interim Constitution, set up the negotiating structures, which negotiated and formulated the final Constitution. So while there was very peaceful and a legal handover of power substantively, the whole structure of the state and state organs were turned upside down.<sup>133</sup>

In Ackermann's view, the substantive legal revolution of the transition was nonetheless a step short of revolution in the sense of a 'total break with the structure.'

#### 4 The comparative rEvolution

Ackermann's third revolution was one of adjudicative approach. He was unabashed in his use of and appreciation for comparative law. Recall his appreciation for an American human rights and constitutional law professor, Louis Henkin – the single most influential person in Ackermann's jurisprudential development.

Ackermann's appreciation for comparative law was demonstrated early on in the evolution of constitutional jurisprudence in one of the first signs of a genuine difference of opinion within the Braamfontein Court. In *Fose*, O'Regan J and Kriegler J each gently but firmly distanced themselves from Ackermann's use of comparative law.<sup>134</sup> As academic commentators have remarked, Ackermann probably had the greatest faith in the use of comparative law and was willing to risk the danger of misinterpretation.<sup>135</sup> The counterpoint is provided by Justice Kriegler who, in discussing the risks of attempting to understand cases written in German, stated:

It's not an easy language, and it's certainly not technically an easy language. And there are writing styles, techniques, [and] mannerisms in legal writing in German, quite apart from always putting the verb in the wrong place. And people blindly concurred with Laurie's [Ackermann's] judgments. I couldn't do that; if I can't get to the guts of what it's about, if I don't understand what they are really saying, what is built on that, I can't go along with it.<sup>136</sup>

133 University of the Witwatersrand (n 102 above).

134 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (5 June 1997).

135 U Bentele 'Mining for gold: The Constitutional Court of South Africa's experience with comparative constitutional law' (2009) 37 *Georgia Journal of International & Comparative Law* 242.

136 As above, 243.

On the whole, the use of German precedents in the Constitutional Court was significant, but must be seen within the context of the Court's extensive use of foreign precedents in general and a long South African tradition of knowledge of German legal scholarship, albeit mostly in private law.<sup>137</sup>

The two touchstones of Ackermann's use of comparative law are legitimacy and the rule of law – perhaps best expressed as a commitment to the application of neutral principles. They came together when he was discussing whether the 'Chaskalson court' he was part of should be described as cautious:

I think we were cautious in the sense of being modest about working with the most sophisticated Constitution in the world and we had no previous experience with doing that. My attempt to overcome this was to look at comparative jurisprudence, because I was aware if you look at the first Constitutional Court and its composition it was heavily white. If you give a controversial judgement the legitimacy is so much greater if you can say these are the themes which have been agreed upon by other longstanding courts of democracy.<sup>138</sup>

Ackermann's passion for comparative law may have led him into his institutional role in supporting the library of the Constitutional Court. As he puts it:

Obviously if one is going to adopt a comparative approach to constitutional law, this has great implications for the building up of the library as a research facility. And there are book lovers and book collectors who collect not just for the love of it, but because they have the feeling that if a book is referred to fruitfully once in its lifetime in a library, its purchase is justified. So it's very difficult to know where to draw the line, but it has become, I believe, a centre of research for a number of institutions. And I think the holdings, particularly the German holdings, are magnificent. One of my previous German clerks who has a good knowledge of our Constitutional Court library, said that it was really good enough for a German student to write his or her first German doctorate, which I took to be a great compliment.<sup>139</sup>

Ackermann's penchant for the comparative method was in full view in his writings on dignity and equality. One may argue that his exercise of comparative law has guided his understanding of dignity in a fundamental manner. Ackermann himself argues that there is a disjuncture between his understanding of dignity while on the Court Bench and in his writings afterwards. As he puts it: '[I]n my book in a footnote I plead guilty to not [having] understood [at] the time when I wrote my judgements ... the

137 C Rautenbach & L du Plessis 'In the name of comparative constitutional jurisprudence: The consideration of German precedents by South African Constitutional Court judges' (2013) 14 *German Law Journal* 1539.

138 Bohler-Muller & Pienaar (n 120 above).

139 University of the Witwatersrand (n 102 above).

understanding of dignity and its all-encompassing [reference] that I have today.<sup>140</sup> Ackermann goes on to recognize that this was largely so in one respect: ‘particularly the fundamental question, [equality] of what?’<sup>141</sup> This self-aware observation clearly places Ackermann as the herald of those calling for substantive equality. For him, the substance could be identified in large part through comparative law.

For Ackermann, dignity was not only in its essence but also in its praxis – part and parcel of the rule of law understood in a transnational sense. This is seen in his linkage of neutral principles to the adjudication of equality and dignity. As he has written: ‘May I suggest that dignity, and its relationship to equality, is one of these common values and that it is an indispensable constituent in neutrally principled and correct adjudication on issues of unfair discrimination.’<sup>142</sup> As Theunis Roux has argued, there is a direct connection between Ackermann’s interest in human dignity and his commitment to comparative constitutional law. The purpose of comparative constitutional law was to discover the core content of domestic human rights regimes by ‘stripping away the superficial differences to get at the common essence beneath.’<sup>143</sup>

The conceptual architecture in the Court’s use of dignity has been well described by Susannah Cowen.<sup>144</sup> As early as 2001, she asked the pertinent question whether the Court’s dignity jurisprudence could guide its search for equality. Her answer perhaps lies more towards the centre than Ackermann’s, yet it overlaps with his argument and does so in an eminently defensible space. She defends the use of dignity as a contested value, admitting the legal realist point that it is not determinate, but holding to the notion that it is a conceptual platform for justification and one shared by most South Africans. Conceived in this manner as a platform for justification, the concept of dignity fits well with Ackermann’s appetite for the use of comparative law. Cowen appropriately marks Ackermann and Chaskalson as the Justices most identified with the initial exposition of the concept of human dignity, while Justice Yvonne Mokgoro subsequently developed and elaborated the concept within the Court’s jurisprudence.

The relevance of the comparative law method to Ackermann’s continuing movement towards substantive questions even after his service on the Court Bench is revealed in an interchange with an interviewer.

140 Bohler-Muller & Pienaar (n 120 above).

141 As above.

142 L Ackermann, ‘Bram Fischer lecture: Equality and the South African Constitution: The role of dignity’ [http://www.zaoerv.de/60\\_2000/60\\_2000\\_1\\_a\\_537\\_556.pdf](http://www.zaoerv.de/60_2000/60_2000_1_a_537_556.pdf) (accessed 20 November 2017).

143 T Roux ‘The dignity of comparative constitutional law’ in AJ Barnard-Naude *et al* *Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (2008) 202.

144 S Cowen ‘Can “dignity” guide South Africa’s equality jurisprudence?’ (2001) 17(1) *South African Journal on Human Rights* 34-58.

Interviewer: You've referred in your book ... [to the proposition] that dignity is a super-constitutional value. So it's not something that our Constitution creates, but rather that it's something that it recognises.

Ackermann: Ja. That would appear from the wording of Section 10. ... What is the thing that we are concerned with to protect by the Law? What is it?<sup>145</sup>

## 5 Conclusion

This chapter has identified and discussed three distinct revolutions in Ackermann's constitutionalist thought: first, the revolution of human rights (with attention to some aspects of the South African legal order shown by Ackermann's career – its emphasis on legal expertise, its relative inclusivism, and its basis in values); second, that of the substantive character of the South African transition; and third, that of Ackermann's comparative constitutionalist adjudicative approach. These thematic revolutions of course overlap: they are identified in and drawn from Ackermann's own words; but they overlap with the themes in the words of other judges and other interpreters of the Constitution.

These overlaps – of meaning and of interlocutors – pose challenges to the concept of revolution. As one might expect from a judge-scholar, the revolutions he has been part of are ones that depend more on concepts and texts than on guns and barricades. As such, one might question whether revolutionary terminology is apt. The meaning of revolution for Ackermann appears, however, to be that there is no revolutionary moment that may be captured within a single act of expression. For him, every use of the term 'revolution' in the key text on the point is either prefaced by the adjective 'constitutional' or occurs within a sentence that points to the Constitutional Court or the other legal institutions surrounding the transition process.<sup>146</sup> For Ackermann, a text without an interpreter or interpreting institution is not revolutionary. Ackermann thus distances himself from accepting an act of expression alone as revolutionary. Yet this distancing fits with his deep reverence for the texts of the interim and the final Constitutions. He is left at the end with continuing substantive content questions rather than ones he sees as being of politics and institutional conflict, of revolutions and regime changes.

As this chapter has shown, Ackermann's movement through the legal system and the world of human rights has been more deliberative than expressive. His trajectory has been a journey. Cornell invokes similar imagery when she casts the ongoing 'journey' over dignity jurisprudence as '[a]rchitectonic'.<sup>147</sup> Her words acknowledge Ackermann's 'bravery'

145 Bohler-Muller & Pienaar (n 120 above).

146 Ackermann (n 114 above).

147 Cornell (n 112 above) 18.



and seem to characterise it as at once both a work of careful creativity and a process that summons the dreadful power of immense shifts in the foundations of the historical present. It is a testament to Ackermann's knowledge, imagination, skill, determination, and art that his words have occupied and still occupy a central place in the debates among judicial interpreters of the Constitution over the meaning, significance and evolving implications of equality and dignity in the law and practice of post-*apartheid* South Africa.

## Bibliography

- Ackermann, D *After the locusts: Letters from a landscape of faith* (WB Eerdmans: Grand Rapids, MI. 2003).
- Ackermann, LWH *Human dignity: Lodestar for equality in South Africa* (Juta & Co Ltd: Johannesburg 2012).
- Ackermann, LWH 'The legal nature of the South African constitutional revolution' (2004) *New Zealand Law Review* 633.
- Ackermann, LWH 'The soul of dignity: A reply to Stu Woolman' in Woolman, S & Bishop, M (eds) *Constitutional conversations* (Pretoria University Law Press (PULP): Pretoria 2008).
- Bentele, U 'Mining for gold: The Constitutional Court of South Africa's experience with comparative constitutional law' (2009) 37 *Georgia Journal of International & Comparative Law* 219.
- Berkowitz, R 'Revolutionary constitutionalism: Some thoughts on Laurie Ackermann's jurisprudence' in Barnard-Naudé, AJ, Cornell, D & Du Bois, F (eds) *Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (Juta & Co Ltd: Johannesburg 2008).
- Cachalia, F 'Judicial review of parliamentary rulemaking: A provisional case for restraint' (2015/16) 60(2) *New York Law School Law Review* 379.
- Cachalia, F 'Separation of powers, active liberty and the allocation of public resources: The e-tolling case' (2015) 132(2) *South African Law Journal* 285.
- Chanock, M 'Writing South African legal history: A prospectus.' (1989) *The Journal of African History* 30(2): 265.
- Cockrell, A 'South African Bill of Rights and the duck / rabbit, The' (1997) 60 *Modern Law Review* 513.
- Corder, H *A Charter for social justice: A contribution to the South African Bill of Rights debate* (Department of Public Law, University of Cape Town: Cape Town 1992).
- Corder, H *Judges at work: The role and attitudes of the South African appellate judiciary, 1910-1950* (Juta & Co Ltd: Cape Town 1984).
- Cornell, D 'Bridging the span toward justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence' in Barnard-Naudé, AJ, Cornell, D & Du Bois, F (eds) *Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (Juta & Co Ltd: Cape Town 2008).
- Cowen, DV & Cowen, S *Cowen on law: Selected essays* (Juta & Co Ltd: Cape Town 2008).
- Cowen, S 'Can "dignity" guide South Africa's equality jurisprudence?' (2001) 17(1) *South African Journal on Human Rights* 34.
- Dubow, S *South Africa's struggle for human rights* (Ohio University Press: Athens, OH 2012).
- Fowkes, J *Building the constitution* (Cambridge University Press: Cambridge 2016).
- Hahlo, HR and Kahn, E *The South African legal system and its background* (Juta & Co Ltd: Cape Town 1968).
- Klaaren, J 'A delicate dialogue: Courts, the executive and social policy in South Africa' in Plaatjies, D (ed) *Future inheritance: Building state capacity in democratic South Africa* (Jacana Media: Auckland Park, Johannesburg 2011).
- Klug, H *Constituting democracy: Law, globalism and South Africa's political reconstruction* (Cambridge University Press: Cambridge 2000).
- Lambert, J 'An identity threatened: White English-speaking South Africans, Britishness and dominion South Africanism, 1934-1939' (2005) 37(1) *Kleio* 50.

- Leatt, A 'Faithfully secular: Secularism and South African political life' (2007) 20(2) *Journal for the Study of Religion* 29.
- O'Regan, K 'From form to substance: The constitutional jurisprudence of Laurie Ackermann' in Barnard-Naudé, AJ, Cornell, D & Du Bois, F (eds) *Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (Juta & Co Ltd: Cape Town 2008).
- Rautenbach, C 'The South African Constitutional Court's use of foreign precedent in matters of religion: Without fear or favour?' (2015) 18(5) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1545.
- Rautenbach, C & Du Plessis, L 'In the name of comparative constitutional jurisprudence: The consideration of German precedents by South African Constitutional Court judges' (2013) 14 *German Law Journal* 1539.
- Roux, T 'The dignity of comparative constitutional law' in Barnard-Naudé, AJ, Cornell, D & Du Bois, F (eds) *Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (Juta & Co Ltd: Cape Town 2008).
- Roux, T *The politics of principle: The first South African Constitutional Court, 1995-2005* (Cambridge University Press: Cambridge 2013).
- Zimmermann, R & Visser, D *Southern cross: Civil law and common law in South Africa* (Juta & Co Ltd: Cape Town 1996).

# CHAPTER 3

## A MENSCH ON THE BENCH: THE PLACE OF THE SACRED IN THE SECULAR JURISPRUDENCE OF JUSTICE RICHARD GOLDSTONE

*Michael Cosser*

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*Source: <http://www.constitutionalcourt.org.za/site/judges/justicerichardgoldstone/index1.html>*

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### 1 Introduction

Justice Richard Goldstone was one of four Supreme Court of Appeal judges (along with Lourens Ackermann, Tholie Madala and Ismail Mohamed) appointed to the first Bench of the Constitutional Court. The appointment was made by President Mandela, in consultation with the cabinet and the then Chief Justice, Judge Michael Corbett, after the appointment of Arthur Chaskalson, senior counsel and the national director of the Legal Resources Centre, as President of the Constitutional Court had been made.<sup>148</sup> Justice Goldstone served as a judge of the Court from his appointment in 1994 to his retirement in 2003 – a period of ten years.

148 Constitutional Court of South Africa 'ABOUT THE COURT | History of the court' <http://www.constitutionalcourt.org.za/site/thecourt/history.htm#judges> (accessed 13 February 2017).

Goldstone's service on the Bench of the Constitutional Court forms part of a long and illustrious career as a corporate lawyer, as a Supreme and Appellate Court judge, and as the head of various inquiries, both South African and international, into issues of local and international importance. The focus of this chapter, while it charts key moments in his career, is on his contribution to our understanding of the South African Constitution – an understanding forged both through what others have said about him and what he has said about himself in relation to the law and specifically about the Constitution, through the judgements he has handed down from the Benches of all the courts on which he has served, and through his extra-curial pronouncements, whether in interviews, speeches, reports, articles, or books. The contribution of Richard Goldstone to the Constitution, as this suggests, signifies the coalescence of a number of factors that helped shape him – amongst which, this chapter will show, is the religion into which he was born.

## 2 Richard Goldstone: A selective biography

The biography of Justice Goldstone provided by the Constitutional Court website<sup>149</sup> is parsimonious about his personal life and education (he was born on 26 October 1938, is married and has two daughters and four grandsons, and graduated from the University of the Witwatersrand with a BA LLB cum laude in 1962), more forthcoming about his career, and effusive about his 'Other activities' – largely, one suspects, because of their number, range, and impact. My intention here is not provide an exhaustive biography of the man; the Constitutional Court website,<sup>150</sup> Wikipedia,<sup>151</sup> and other sources do this. Rather, I shall mention some of the key moments in his career that have attracted comment from others and from himself and which form the basis of the analysis in subsequent sections of this chapter.

Goldstone began his professional career practising as an advocate at the Johannesburg Bar. In 1976 he was appointed senior counsel and in 1980 was made a judge of the Transvaal Supreme Court. In 1989 he was appointed to the Appellate Division. From 1991 to 1994 he served as the chairperson of the Commission of Inquiry Regarding Public Violence and Intimidation, which came to be known as the Goldstone Commission.

From 15 August 1994 to September 1996 Goldstone served as the Chief Prosecutor of the United Nations' International Criminal Tribunals

149 Constitutional Court of South Africa 'JUDGES | Justice Richard Goldstone' <http://www.constitutionalcourt.org.za/site/judges/justicerichardgoldstone/index1.html> (accessed 13 February 2017).

150 As above.

151 Wikipedia 'Richard Goldstone' [https://en.wikipedia.org/wiki/Richard\\_Goldstone](https://en.wikipedia.org/wiki/Richard_Goldstone) (accessed 1 February 2017).

for the former Yugoslavia and Rwanda. In 2009, he was appointed Chair of a UN Human Rights Council inquiry into the Gaza conflict.

On his return to South Africa, Goldstone took up his place on the Bench of the Constitutional Court, in which capacity he handed down judgments that have come to shape our understanding of aspects of constitutional law. These judgments are considered later in this chapter.

One of the influences on Goldstone's life has been his religion – though not his faith, as he describes himself as having grown up in a secular family. Goldstone's maternal grandfather, who had a seminal influence on his early life and career choice, was part of 'A Jewish family who'd been expelled centuries before from Spain.'<sup>152</sup> Goldstone first became aware of racial disparities and separate development on the cusp of the change of government in 1948 from United Party to National Party rule: 'coming from a Jewish background, the National Party had a background of anti-Semitism and still in those days its constitution banned Jews from being members of the National Party.'<sup>153</sup> And while none of his relatives died in the Holocaust, he reportedly considered the Nuremberg trials of Nazi war criminals "an inspiration", maintaining that "being Jewish, part of a community that has been persecuted throughout history, shaped [my] ethical views from an early age."<sup>154</sup> Goldstone was all too aware, then, of latent and patent prejudice against Jews.

Goldstone reportedly spoke 'with emotion of "this religious tradition to which I was exposed ... although I have never been a particularly religious person .... Either you have religion or you do not. I sometimes wish I was religious but I am not. Religion is a bit like a musical gift – you have it or you don't."<sup>155</sup> Despite not being gifted with religion, Goldstone became a bar mitzvah when he came of age. And throughout, Goldstone and his family have kept the Sabbath (on a Friday night and Jewish holy days) "out of respect for our roots and cultural identity"<sup>156</sup>.

152 University of the Witwatersrand, Johannesburg 'Historical papers research archive' Constitutional Court Trust oral history project: Interview with Richard Goldstone (15 December 2011) [http://www.historicalpapers.wits.ac.za/index.php?inventory\\_enhanced/U/Collections&c=213591/R/AG3368-G29](http://www.historicalpapers.wits.ac.za/index.php?inventory_enhanced/U/Collections&c=213591/R/AG3368-G29) (accessed 7 May 2017) 1.

153 As above, 2.

154 'World Report Profile: Richard J. Goldstone: A South African jurist takes on Balkan and Rwanda conflicts, seeking to punish war criminals' *Los Angeles Times* 14 March 1995.

155 C Villa-Vicencio & M Soko *Conversations in transition: Leading South African voices* (2012) 191.

156 As above, 182.

### 3 Justice Goldstone in the eyes of the world

Goldstone's life and work naturally fall into three parts: *apartheid*-era judge; international judge; and Constitutional Court judge. What others have said about him in relation to these three roles is considered below.

#### 3.1 *Apartheid*-era judge

Richard Goldstone had practised corporate and intellectual property law for 17 years before he was appointed to serve on the Bench of the Transvaal Supreme Court. The link between his commercial law career and his time on the Bench is characterised thus by Shimoni: '[Goldstone was] an outstanding commercial lawyer who had shrewdly and inventively applied the law to secure justice in politically controversial and human rights cases.'<sup>157</sup> Zimmermann hailed Goldstone as 'one of the leading "liberal" judges who never showed any propensity towards the then prevailing executive-mindedness'<sup>158</sup> while Davis and Le Roux characterised such liberal judges as Goldstone as persons who interpreted *apartheid* legislation 'as narrowly as possible to give effect to the values of the common law.'<sup>159</sup>

What emerges from these ascriptions is Goldstone's capacity to work against the *apartheid* system from within the system, using ingenuity and guile to outwit his *apartheid* detractors within the country's legal framework.

One of Goldstone's major successes was his judgment in *S v Govender*.<sup>160</sup> He ruled in favour of a Mrs Govender, who had been accused of living unlawfully with her children and grandchildren in rented accommodation in a residential area reserved for whites. Goldstone exploited the Group Areas Act provision that a court convicting a person for living in such an area 'may ... make an order for the ejection' of such a person – placing the onus on the prosecutor to place material before the court to justify the court's exercising its discretion to order the ejection. He argued also that a person could not be evicted from a designated area unless alternative accommodation could be provided. Villa-Vicencio and Soko believe that this judgment 'effectively ended the enforcement of the Group Areas Act and it heralded the end of residential segregation'<sup>161</sup> – echoing the observation made by the first Chief Justice of the

157 G Shimoni 'The Jewish response to *apartheid*: The record and its consequences' in E Mendelsohn (ed) *Jews and the state: Dangerous alliances and the perils of privilege* (2004) 38.

158 R Zimmermann 'The contribution of Jewish lawyers to the administration of justice in South Africa' (1995) 29 (1-2) *Israel Law Review* 250.

159 D Davis & M Le Roux *Precedent and possibility: The (ab)use of law in South Africa* (2009) 5.

160 1986 (3) SA 969 (T).

161 Villa-Vicencio & Soko (n 155 above) 180.

Constitutional Court, Arthur Chaskalson, and George Bizos SC.<sup>162</sup> The judgment represented a landmark achievement opening the door to freedom of movement in South Africa.

As if in deference to this judgment, Section 26(3) of the Constitution reads:

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.<sup>163</sup>

Seminal judgments handed down by Goldstone – *inter alia*, his declaring (in 1985) the dismissal of 1,700 striking black staff at Baragwanath Hospital illegal; his freeing (in 1986) a political prisoner detained under the recently imposed State of Emergency; his releasing a detainee because of the police's failure to inform him of his right to legal assistance<sup>164</sup> – earned him a reputation for social justice (a commitment to justice for ordinary people) in the midst of political and legalised injustice. So much so that the state placed its confidence in him, the Judge President of the Transvaal Supreme Court appointing him to investigate the conditions under which prisoners languished in *apartheid* prisons. The government wished to quash reports of prisoners being tortured and abused but simultaneously, claimed Goldstone, to signal to prison warders and the police that assault and torturing of detainees was unacceptable.<sup>165</sup> Such was the fine line an increasingly under-pressure *apartheid* state was forced to tread.

Though Goldstone imposed the death penalty on two occasions<sup>166</sup> – and not the 28-plus occasions the Israeli newspaper Ynet news claimed<sup>167</sup> – he was clearly opposed to the death penalty; as Judge David Curlewis observed, “A person who deserves to hang was more likely to get the death sentence from me or my ilk than Goldstone or other liberal judges who are at heart abolitionists for one reason or another ... Obviously, and for that reason, they cannot be sound on the imposition of the death penalty.”<sup>168</sup>

162 A Chaskalson & G Bizos 'In support of Justice Goldstone' (2010) 23(2) *Advocate* 44.

163 'The Constitution of the Republic of South Africa, 1996' (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005) sec 26(3).

164 Villa-Vicencio & Soko (n 155 above) 182.

165 As above, 182-183.

166 As above, 183.

167 This claim was made by the Israeli online newspaper *Ynetnews.com* in the wake of Goldstone's report on the Gaza conflict in which he apportioned blame for targeting civilians to both Israel and Hamas (Human Rights Council 'Human rights in Palestine and other occupied Arab territories' 2009) <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> (accessed 10 April 2017) – 'Judge Goldstone's dark past' *Ynetnews.com* 6 May 2010 <http://www.ynetnews.com/articles/0,7340,L-3885999,00.html> (accessed 10 April 2017).

168 P Parker & J Mokhesi-Parker *In the shadow of Sharpeville: Apartheid and criminal justice* (1998) 171.



In 1990, just four years before the transition to democracy, Goldstone was appointed by President FW de Klerk to investigate the death by hanging of an uMkhonthe weSizwe (MK) soldier, Clayton Sizwe Sithole, in John Vorster Square Police Station in Johannesburg. The controversy surrounding the death of Sithole and others under similar circumstances is evocatively depicted in Chris van Wyk's poem 'In detention':<sup>169</sup>

He fell from the ninth floor  
 He hanged himself  
 He slipped on a piece of soap while washing  
 He hanged himself  
 He slipped on a piece of soap while washing  
 He fell from the ninth floor  
 He hanged himself while washing  
 He slipped from the ninth floor  
 He hung from the ninth floor  
 He slipped on the ninth floor while washing  
 He fell from a piece of soap while slipping  
 He hung from the ninth floor  
 He washed from the ninth floor while slipping  
 He hung from a piece of soap while washing

The slippage, literal and metaphorical, in this poem epitomises the incredulity with which the South African Police's official version of events surrounding Sithole's death was met. Villa-Vicencio and Soko argue<sup>170</sup> that De Klerk appointed Goldstone to investigate the matter because the population at large was more likely to accept Goldstone's report, given his reputation for judgments often characterised by finely balanced reasoning, than that of any other sitting judge.

Goldstone's next high-profile case involved an investigation into the so-called 'Sebokeng massacre' in 1990, in which the police were found to have acted unlawfully by firing on a crowd with live ammunition. This incident followed escalating violence across the country, characterised by African National Congress (ANC)-Inkatha Freedom Party (IFP) contestation amidst claims of 'third force' destabilisation. The Los Angeles Times described Goldstone's finding as 'one of the strongest indictments of South Africa's police ever made by a government-appointed investigator.'<sup>171</sup>

Following the Sebokeng inquiry, Goldstone was appointed chair of the Standing Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation tasked with investigating the ongoing violence in the country – the 'Goldstone Commission'. The inquiry found that there

169 C van Wyk *It is Time to Go Home* (1979) 45.

170 Villa-Vicencio & Soko (n 155 above) 184.

171 'S. Africa police blamed in fatal shootings of black protesters last March' *Los Angeles Times*, 2 September 1990.

was indeed ‘third force’ involvement in the violence, in the form of a Mozambique national-headed front company that passed information on to the South African Military Intelligence’s Directorate for Covert Collection.<sup>172</sup> Following the release of this information at a press conference, De Klerk appointed General Pierre Steyn to investigate South African Defence Force (SADF) activities – the report on which led to the dismissal of 23 generals and other senior SADF officials.

The Goldstone Commission’s investigation into the notorious Vlakplaas Unit of the security police that followed the Steyn inquiry led to the dismissal of three generals and the sentencing of Eugene de Kock and other Vlakplaas operatives for murder and other crimes. De Kock, sentenced to serve a prison sentence of 212 years, was released from prison in September 2016.<sup>173</sup> Villa-Vicencio and Soko claim that ‘The Goldstone Commission arguably did more than any other inquiry or investigation to uncover the illegal activities of the South African security forces in the period overlapping the transition to democratic rule in South Africa.’<sup>174</sup>

The ANC’s assessment of the contribution of the Goldstone Commission to ending the violence is summed up in its Secretary General’s Report to ANC 49th National Conference, held in Bloemfontein (now Mangaung) from 17 to 22 December 1994. In that report, Ramaphosa wrote:

The recommendations of the United Nations secretary-general to the UN Security Council helped to place extra international pressure on the De Klerk regime. That, and the findings of the Goldstone Commission, vindicated the demands of our Campaign for Peace and Democracy [which had been launched following the suspension of negotiations with the *apartheid* government in the wake of the Boipatong massacre of 39 people].<sup>175</sup>

That the ANC credited the work of the UN and the Goldstone Commission as having reopened the way to the Convention for a Democratic South Africa (CODESA) negotiations – at which, appropriately, Ramaphosa was the ANC’s chief negotiator – is testimony to Goldstone’s impact on the transition to democracy. Goldstone, at the time of this transition, was described by fellow Justice Albie Sachs as “an honest and dignified judge who was sensitive to the fundamental human rights of all human beings and who, even in the most dire circumstances, could find space for concepts of legality and respect for human dignity.”<sup>176</sup>

172 Villa-Vicencio & Soko (n 155 above) 185.

173 ‘Eugene de Kock allowed to go home’ *News24* 6 September 2016.

174 Villa-Vicencio & Soko (n 155 above) 186.

175 African National Congress ‘ANC Secretary General’s Report to ANC 49th Annual Conference’ (1994) <http://www.anc.org.za/content/49th-national-conference-secretary-generals-report> (accessed 19 April 2017).

176 ‘SAF/GOLDSTONE (L-O)’ *Voice of America* 2 October 2003.

The impact of Judge Richard Goldstone on the political fortunes of a country and the individual fortunes of ordinary people is manifest in this selective account of his achievements. Collectively, his judgments and inquiries during the *apartheid* era influenced the course of events in relation to: freedom of movement; unfair labour practice; release of political prisoners; the imposition of the death penalty; the actions of the security forces; and politically-motivated violence.

Significantly, Goldstone's key judgments as *apartheid*-era judge anticipated the inclusion of certain rights in the Bill of Rights in the South African Constitution. His releasing a detainee because of the police's failure to inform him of his right to legal assistance anticipated section 35 of the Constitution: 'Everyone who is detained, including every sentenced prisoner ... has the right ... to choose, and to consult with, a legal practitioner, and to be informed of this right promptly'.<sup>177</sup> His declaring the eviction of Mrs Govender and her family from a house in a 'white' area (*S v Govender*) anticipated sections 21 and 26 of the Constitution: 'Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic .... No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions'.<sup>178</sup> His declaring the dismissal of 1,700 striking black staff at Baragwanath Hospital illegal anticipated section 23 of the Constitution: 'Every worker has the right ... to strike'.<sup>179</sup> His appointment by the Judge President of the Transvaal Supreme Court to investigate the conditions under which prisoners languished in *apartheid* prisons and Goldstone's ensuing report on the investigation anticipated section 12 of the Constitution: 'Everyone has the right to freedom and security of the person, which includes the right ... not to be tortured in any way; and ... not to be treated or punished in a cruel, inhuman or degrading way'.<sup>180</sup> His appointment by President FW de Klerk to investigate the death by hanging of Sizwe Sithole in John Vorster Square Police Station anticipated sections 12 and 35 of the Constitution: 'Everyone has the right to freedom and security of the person, which includes the right ... not to be detained without trial'; 'Everyone who is detained, including every sentenced prisoner, has the right ... to conditions of detention that are consistent with human dignity'.<sup>181</sup> And finally, Goldstone's investigation into the Sebokeng massacre anticipated section 12 of the Constitution: 'Everyone has the right to freedom and security of the person, which includes the right ... to be free from all forms of violence from either public or private sources'.<sup>182</sup>

177 'The Constitution' (n 163 above) sec 35(2)(b).

178 As above, secs 21(3) and 26(3).

179 As above, sec 23(2)(c).

180 As above, sec 12(1)(d) & (e).

181 As above, secs 12(1)(b) and 35(2)(e).

182 As above, secs 12(1)(c) and 16(1) & 16(2)(b) & (c).

This account should by no means be construed to suggest that these rights are in the Constitution because of Goldstone. Rather, the judgments with which they resonate constitute *apartheid*-era exemplars of the kind of rights-based approach adopted by Goldstone – a dispensation in which, in fulfilment of a Constitution not yet drafted, he ‘promote[d] the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’.<sup>183</sup>

### 3.2 International judge

It was the very reputation for impartiality and forthrightness manifested in Goldstone’s *apartheid* judicial career that influenced his appointments to the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1994 and later the same year the International Criminal Tribunal for Rwanda (ICTR). Success breeding success, this appointment led to several more. As Chief Prosecutor of the ICTY and ICTR, as Chairperson of the International Independent Inquiry on Kosovo (1999-2001), as Co-chairperson of the International Task Force on Terrorism (2001), as a member of the independent committee to investigate the Iraqi oil-for-food programme (the Volcker Committee; 2004), and as Chair of the Advisory Committee on the Archiving of the Documents and Records of the ICTY and ICTR (2007), Goldstone had established a reputation for fairness at the highest international levels – a reputation that preceded his appointment to head the United Nations Fact Finding Mission on the Gaza Conflict.

#### 3.2.1 Chief Prosecutor of the ICTY and ICTR: ‘A troubled judge in the international arena’<sup>184</sup>

The combination of Goldstone’s religion, his stand against *apartheid*, and his international exposure made him the perfect candidate for Chief Prosecutor of the ICTY and ICTR, the first of a number of international appointments. As Pierre Hazan said of Goldstone’s appointment as Chief Prosecutor of the ICTY: ‘Goldstone’s nomination satisfies the French .... The British and the Americans are also reassured. Goldstone is neither too hot-headed for London, nor too weak for Washington. The image of a white South African who directly opposed *apartheid* also suits the Russians and the Chinese.’<sup>185</sup> This perceived neutrality stemmed ironically from his religion – ironically, on two counts: first, a Jewish prosecutor, according to Antonio Cassese, Italian jurist and the first President of the Tribunal, would be ideal precisely because as a Jew Goldstone was an ‘outsider’;<sup>186</sup>

183 As above, sec 9(2).

184 Villa-Vicencio & Soko (n 155 above) 180.

185 P Hazan *Justice in a time of war: The true story behind the International Criminal Tribunal for the Former Yugoslavia* (2004) 55-56.

and second, though born of Jewish parents, Goldstone grew up in a non-practising family and was not himself religious.<sup>187</sup>

Goldstone's term as ICTY Chief Prosecutor was marked by his characteristic fearlessness in the face of international community tardiness in addressing the issue of war crimes in the former Yugoslavia – in particular, its perceived reluctance to pursue those indicted for war crimes. Only seven of the 74 persons indicted had been arrested by the end of his term of office. But he did ensure that there was no amnesty for those apprehended.<sup>188</sup> Goldstone also made sure that rape and sexual assault were recognised in the ICTY prosecution policy as crimes against humanity and as war crimes. As Chief Prosecutor for the ICTR, Goldstone angered the Rwandan government by excluding capital punishment for those found guilty of genocide,<sup>189</sup> thereby setting an important precedent for subsequent genocide cases.

### 3.2.2 *Eyeless in Gaza?*

On 3 April 2009, the President of the Human Rights Council of the United Nations established the United Nations Fact Finding Mission on the Gaza Conflict, with the mandate 'to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after.'<sup>190</sup> Judge Richard Goldstone was appointed to head the Mission.

At the press conference at which Goldstone's appointment was announced, he was asked how he, as a Jew, felt personally about heading a UN investigation into a conflict involving Israel, a Jewish State. His response was:

Well it certainly came to me as quite a shock as a Jew to be invited by the President to head this mission. *It is obviously an additional dimension.* I've taken a deep interest in Israel in what happens in Israel and I have been associated with organizations that have worked in Israel. But having said that, I believe I can approach the daunting task that I have accepted in an even-handed and impartial manner and give it the same attention I have to situations in my own country where, perhaps, similar considerations may have been taken into account.<sup>191</sup>

186 HV Stuart & M Simons *The prosecutor and the judge: Benjamin Ferencz and Antonio Cassese – Interviews and writings* (2009) <http://press.uchicago.edu/Misc/Chicago/9789085550235.html> (accessed 9 March 2017).

187 'World ORT president: Israel, S. Africa face similar problems' *The Jerusalem Post* 7 June 2000.

188 Villa-Vicencio & Soko (n 155 above) 187.

189 As above.

190 Human Rights Council *Human rights in Palestine and other Occupied Arab Territories. Report of the United Nations fact-finding mission on the Gaza conflict* (2009) 13.

Goldstone's response to an invidious question that in any other context might have been deemed insensitive characteristically understates his Jewish roots – a cue for the Human Rights Council President's follow-up comment 'In my consideration, *there are no Jews or gentiles*. We are all working for the same purpose of human rights.'<sup>192</sup>

The Gaza conflict enquiry 'interpreted [its] mandate as requiring it to place the civilian population of the region at the centre of its concerns regarding the violations of international law.'<sup>193</sup> While the Mission had the full support of the Palestinian Authority, it was not given any support by the Israeli government, despite repeated attempts by Goldstone himself to obtain such support. In fact Annex II of the Goldstone Report devotes 17 pages to the voluminous correspondence 'between the United Nations Fact Finding Mission on the Gaza Conflict and the Government of Israel regarding Access and Cooperation'.<sup>194</sup>

Israel's response to the publication of the Goldstone Report was predictably antagonistic, degenerating at times into *ad hominem* attack. *Ynetnews.com* ran a story entitled 'Judge Goldstone's dark past' in which it reported that an investigation had allegedly 'revealed Goldstone's dark past as a cruel judge in South Africa under the *Apartheid* regime' and in which he was likened to the German SS Officer Joseph Mengele, who claimed in his defence that "we just followed the law"<sup>195</sup> The cynical comparison of Goldstone with a Nazi war criminal was no doubt calculated to inflict maximum harm in the face of Goldstone's war-crime investigations as Chief Prosecutor of the ICTY and ICTF.

Goldstone's former colleague on the Constitutional Court Bench, Judge Albie Sachs, asked: "Why should any Jew who speaks out with an independent voice, especially with regard to the conduct of the State of Israel, be regarded as a self-hating Jew [of which Israeli Prime Minister Benjamin Netanyahu had accused Goldstone after the release of the Goldstone Report] ... Why should someone be made to choose between being a Jew and having a conscience?"<sup>196</sup> Opposition to Goldstone's report was registered in South Africa too, certain high-profile Jew-hating Jews threatening to demonstrate outside the Sandton Synagogue if Goldstone were to attend his grandson's Bar Mitzvah.<sup>197</sup>

191 'Near verbatim transcript of press conference by the President of the Human Rights Council, Martin Ihoeghian Uhomobhi (Nigeria) and Justice Richard J. Goldstone on the announcement of the Human Rights Council fact-finding mission on the conflict in the Gaza Strip' (emphasis added). [www.ohchr.org/Documents/HRBodies/.../TranscriptPressBriefing03042009.doc](http://www.ohchr.org/Documents/HRBodies/.../TranscriptPressBriefing03042009.doc) (accessed 7 May 2017) n.p.

192 As above (emphasis added).

193 Human Rights Council (n 190 above) 13.

194 As above, 434.

195 'Judge Goldstone's dark past' *Ynetnews.com* 6 May 2010.

196 Cited in Villa-Vicencio & Soko (n 155 above) 188.

197 As above.

In 'An open letter to Richard Goldstone', a New York City lawyer, Trevor Norwitz, challenged the very foundation of the Mission and its subsequent report:

You may disagree with Israel's decision to ignore your Mission, but when that becomes the fundamental linchpin on which you reach your conclusions, that is not fact-finding. It is politics. I myself was unsure of the Israeli government's decision not to cooperate with your investigation, but it becomes hard to argue with those who say that your Report validates the view that the deck was so stacked against Israel that it was not worth playing the game .... [Y]our Report as written is an abominable travesty of justice. The damage that you and your Report have already done – to Israel, to the Jewish people, and to truth itself – can never be undone. But it can be mitigated if you are willing to admit the flaws in your Report loudly and clearly.<sup>198</sup>

Ironically, while the UN resolution to which the Israeli Ambassador had referred in his correspondence with Goldstone blamed Israel only, the Goldstone Report apportioned blame for civilian-targeted activities to Israel and Hamas. Little wonder then that both Israel and Hamas rejected the report.<sup>199</sup> Notwithstanding this finding, Goldstone later expressed regret about the report having implicated Israel in civilian-targeted deaths, famously declaring in an article in *The Washington Post*:

We know a lot more today about what happened in the Gaza war of 2008-09 than we did when I chaired the fact-finding mission appointed by the U.N. Human Rights Council that produced what has come to be known as the Goldstone Report. If I had known then what I know now, the Goldstone Report would have been a different document.<sup>200</sup>

More significant than this retraction, however, was the reaction of Prime Minister Benjamin Netanyahu to it:

Netanyahu told his cabinet at its weekly meeting that Goldstone's retraction of his conclusion accusing Israel of war crimes was rare and deserving of further action .... 'There are very few incidents in which false accusations are taken back, and this is the case with the Goldstone report,' Netanyahu told ministers.<sup>201</sup>

Why did Goldstone retract? Was he influenced by Norwitz's 'Open letter to Richard Goldstone', which accused him of having relied too heavily on the testimony of Hamas? This is the view propounded by Raphael Israeli, who says that Goldstone 'repeatedly repented on his

198 Commentary Magazine 'An open letter to Richard Goldstone' 19 October 2009 <https://www.commentarymagazine.com/articles/an-open-letter-to-richard-goldstone/> (accessed 3 May 2017).

199 Villa-Vicencio & Soko (n 155 above) 189.

200 'Reconsidering the Goldstone Report on Israel and war crimes' *The Washington Post* 1 April 2011.

201 'Israel to launch campaign urging UN to retract Goldstone Report' *Haaretz* 3 April 2011.

inflated condemnation of Israel, since he discovered the mammoth errors he had made in relying too heavily on the Hamas narrative.’ Or is there another, evidence-supported, explanation? Whatever the reason for Goldstone’s withdrawal of ‘false accusations’, the mere fact of the retraction earned him praise *from the very quarter most offended by them* – partly substantiating Norwitz’s claim in his ‘Open letter to Richard Goldstone’ that ‘[the damage caused by the report] can be mitigated if you are willing to admit the flaws in your Report loudly and clearly.’

As to the veracity of the accusations, Goldstone was ultimately proved partially correct. An investigation by the Israel Defense Forces (IDF) into claims that it had targeted civilians in the Gaza conflict was launched in the wake of the Goldstone report:

Now the army has been forced to renege and open investigations it would not have conducted had it not been for the Goldstone report, human rights groups’ reports and coverage in the Israeli and international media .... Now, when it turns out the censure of Israel had plenty of truth in it, it is time to thank the critics for forcing the IDF to examine itself and amend its procedures. Even if not all of Richard Goldstone’s 32 charges were solid and valid, some of them certainly were.<sup>202</sup>

The about-turn on Israel’s vilification of Goldstone may have been cold comfort, but at least it vindicated him. This, together with his having gone out of his way to afford Israel the opportunity to participate in the Mission, had the effect of heaping burning coals on Israel’s head.<sup>203</sup>

Was Goldstone ‘eyeless in Gaza’<sup>204</sup> – blind, as Israel initially suggested, to what really happened in the Gaza conflict; or did he see despite not having the full picture which Israel’s cooperation in the Mission would have given him? Goldstone himself acknowledged that *with hindsight* – ‘If I had known then what I know now’<sup>205</sup> – he did not have the full picture; but the IDF finding from its own investigation that it had indeed targeted certain civilians went some way towards revealing that Goldstone saw from the beginning more than his detractors had given him credit for.

202 ‘Thanks to the critics’ *Haaretz* 27 July 2010.

203 Proverbs 25:21-22 reads ‘If someone who hates you is hungry, give him food to eat; and if he is thirsty, give him water to drink. For you will heap fiery coals [of shame] on his head, and ADONAI will reward you.’

204 A reference to Judges 16:21, which tells of Samson having his eyes cut out by the Philistines – ‘Judges 16:21 CJB’ <http://www.biblestudytools.com/cjb/judges/16-21.html> (accessed 21 April 2017); to Milton’s ‘Samson Agonistes’, which retells that story: ‘... Promise was that I/Should Israel from Philistian yoke deliver;/Ask for this great deliverer now, and find him/Eyeless in Gaza at the Mill with slaves ...’ – ‘The John Milton Reading Room: Samson Agonistes’ [https://www.dartmouth.edu/~milton/reading\\_room/samson/drama/text.shtml](https://www.dartmouth.edu/~milton/reading_room/samson/drama/text.shtml) (accessed 21 April 2017); and to the bestselling novel by Aldous Huxley – A Huxley *Eyeless in Gaza* (1936).

205 *Washington Post* (n 202 above).



### 3.3 Constitutional Court judge

Nelson Mandela appointed Goldstone to the first Bench of the Constitutional Court. Goldstone owed his appointment not to his religion (it was a Jewish law firm that took Mandela in as a law clerk) or to Mandela's patronage; rather, his exceptional service to the judiciary on the Benches of the Transvaal Supreme Court and later the Appellate Court that manifested itself in his impartiality and commitment to human rights – and especially in the key cases and commissions outlined above – will have commended him to Mandela.

While Goldstone's landmark judgments as judge of the Transvaal and Appellate Courts, his chairmanship of the Goldstone Commission, his Chief Prosecutorial role on the ICTY and ICTR, and his investigation of the Gaza conflict tend to overshadow his career as a Constitutional Court judge, his majority author judgments in that Court are testimony to the continuation of his commitment to balance and justice. Some of the key human rights-related cases in which Goldstone was the major author are sketched below.

In *President of the Republic of South Africa and Another v Hugo*<sup>206</sup> the President, who has the constitutional power to pardon offenders, had granted release to prisoners in certain categories. One such category was mothers in prison with minor children under twelve years of age. A single father of a child under twelve challenged the constitutionality of the pardon in court, claiming that it unfairly discriminated against him and his son on the grounds of sex or gender. The majority ruling was that, although the pardon may have denied men an opportunity it afforded women, it could not be said that *it fundamentally impaired their sense of dignity and equal worth*.<sup>207</sup> The pardon simply deprived them of an early release – though by virtue of such pardons being exclusively the prerogative of the president, they were hardly entitled to such pardons. Nor did the pardon prevent fathers from petitioning the President directly for remission of sentence. The pardon did not, therefore, discriminate unfairly against fathers.<sup>208</sup>

The judgment balanced the president's right to pardon offenders, the fundamental dignity and worth of men whose children were imprisoned, and the right of men to apply directly to the president for 'remission of sentence on an individual basis'.

In *Harksen v Lane NO and Others*,<sup>209</sup> the court was asked to rule on whether certain provisions of the Insolvency Act of 1936 violated the

206 *Hugo* 1997 (4) SA 1 (CC).

207 As above.

208 As above.

209 *Harksen* 1998 (1) SA 300 (CC).

equality clause in the Constitution. The sequestration of the estate of one of two spouses led to the property of the spouse whose estate had not been sequestered being vested in the master or trustee – which, it was argued, constituted unequal treatment of solvent spouses, discriminating unfairly against them. Goldstone’s ruling was that while the close relationship of solvent spouses to insolvent spouses *had the potential to diminish human dignity, solvent spouses were not a vulnerable group which had suffered discrimination in the past*. The inconvenience and potential prejudice that could result for the solvent spouses did not therefore compromise their fundamental dignity.<sup>210</sup>

Again, Goldstone as majority author characteristically balanced the potential of the close relationship of the solvent spouse with the insolvent spouse and the usual cohabitation of spouses to ‘demean persons in their human dignity’ against the notion that solvent spouses are not a ‘vulnerable group which has suffered discrimination in the past’ – as required by the equality clause (section 9) in the Constitution.

In *Democratic Party v Minister of Home Affairs and Another*<sup>211</sup> the Democratic Party (DP) challenged the Electoral Act requirement that voters in the upcoming election had to produce bar-coded identity documents (IDs) instead of alternative documents used during the *apartheid* era. The court found that the documentary requirements prescribed by the Electoral Act did not infringe the Constitution. Goldstone’s judgment indicated that the use of a single document, the bar-coded ID, facilitated speedy verification of the holder’s eligibility to vote, that electoral fraud would be prevented because there were records of fingerprints of bar-coded ID holders, and, most importantly from a human rights perspective, that other forms of ID had been issued *on a racial basis* and were therefore a legacy of racial discrimination during the *apartheid* era.

In *Minister for Welfare and Population Development v Fitzpatrick and Others*<sup>212</sup> the Minister sought clarity on a finding by the Cape High Court that the prohibition on the adoption of a South African-born child by non-South Africans was unconstitutional. As majority author and unanimously supported by the full Bench, Goldstone ruled that the rights of the child were paramount and, notwithstanding the threat of an increase in child trafficking in which the striking down of the prohibition legislation might issue, ruled that the prohibition should in fact be set aside. Goldstone’s judgment paved the way for non-South Africans to adopt South African-born children in cases where such adoption would be in the best interests of the child. In a not dissimilar case (*S v T and Another*),<sup>213</sup>

210 ‘Interpretation of equality clause in Bill of Rights’ (emphasis added) <http://sas-space.sas.ac.uk/3572/1/1576-1941-1-SM.pdf> (accessed 25 April 2017).

211 *Democratic Party* 1999 (3) SA 254 (CC).

212 *Fitzpatrick* 2000 (3) SA 422 (CC).

Goldstone – also in a unanimous decision – ruled that a child, Sofia, who was brought to South Africa from Canada by her mother and kept in South Africa in violation of an order of the Supreme Court of British Columbia and against the wishes of her father, be returned to British Columbia in terms of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction. Again, the best interests of the child were paramount for Goldstone, who nevertheless characteristically balanced the rights of the father and the child against those of the mother, ruling that mother and child would not be returned to Canada without a British Columbian authority guarantee that the mother would not be arrested for her actions upon her arrival in Canada.

In *Carmichele v Minister of Safety and Security*<sup>214</sup> the majority authors, Ackermann and Goldstone, handed down judgment in a case in which the applicant had sued the two Ministers for damages as a result of a brutal attack on her by a man awaiting trial for having tried to rape another woman. The police and prosecutor had recommended the man's release without bail notwithstanding his history of sexual violence. The applicant had not been given leave to appeal in lower courts; but Justices Ackermann and Goldstone, in another unanimous decision of the Constitutional Court, granted her leave to appeal.

In *Van der Walt v Metcash Trading Limited*,<sup>215</sup> the Supreme Court of Appeal (SCA) on two successive days had refused leave to appeal to one applicant and granted leave to appeal to another; the key facts and grounds for appeal in both applications were substantially identical. In his majority judgment, Goldstone maintained that although it was hardly desirable that contrary orders should be issued by the SCA in substantially identical cases, the constitutional right of the applicant who had been refused leave to appeal by the SCA had not been violated. Neither of the two SCA orders was arbitrary: the judicial panels had to decide whether the appeal granted would have any chance of success. In handing down this judgment, Goldstone balanced the rights of the applicant against the rights of the SCA to issue contrary orders – thereby seeking justice for the applicant in terms of the Constitution and for the judicial system.

All of these judgments reflect Goldstone's intent to balance the rights of opposing parties in ways that either did not infringe upon the human rights of either or that promoted the human rights of both. In *President of the Republic of South Africa and Another v Hugo* he sought to maintain the dignity and worth of men; in *Harksen v Lane NO and Others* he had regard to the vulnerability of persons who had not been discriminated against in the past; in *Democratic Party v Minister of Home Affairs and Another* he protected the right of persons who had been disenfranchised under *apartheid* to vote

213 *S v T* 2001 (1) SA 1171 (CC).

214 *Carmichele* 2001 (4) SA 938 (CC).

215 *Van der Walt* 2002 (4) SA 317 (CC).

on an equal playing field; in *Minister for Welfare and Population Development v Fitzpatrick and Others* and in *S v T and Another* he ruled in the best interests of the child, thereby protecting the child against the possible harm caused by one or both parents; in *Carmichele v Minister of Safety and Security* he upheld the right of a woman attacked by an alleged rapist to appeal the lower-court judgments; and in *Van der Walt v Metcash Trading Limited* he recognised the right of the judiciary to apply its legal mind differently in two substantially similar cases.

#### 4 Justice Goldstone's view of his life and work

The above account of Richard Goldstone's life and work in three capacities – as *apartheid*-era judge, as international judge, and as Constitutional Court judge – has viewed his contributions to human rights through the eyes of others. The focus shifts in this section of the chapter to his own view of his contributions in each of these capacities.

A good starting point is Goldstone's explication of the principles that have guided his life and work:

There are three priorities that form the basis of my private and professional life: *human rights values* as entrenched in international law, *rational thought* as a basis for *honest* and strategic decision-making, and an unreserved commitment to execute a task before me with *integrity* and *dedication*. I soon realised that if you do not achieve your aim in the first round, you need to persevere. If your principles are rationally sound and you are committed to seeing them being realised you need to persevere – to hang in. Even if you don't succeed at least you know you have tried your best.<sup>216</sup>

Four salient points emerge from this passage. First, there is in Goldstone's life no distinction between the public and the private persona: the principles by which he behaves in public are no different from those by which he lives at home. Second, there is a universality of human rights jurisprudence which should militate against nationalism. Third, rational thought, or reason, is the foundation for behaviour that is *honest*.<sup>217</sup> And fourth, *integrity* is coupled with *dedication* – perseverance in the face of initial failure to the point at which one has done one's best and can do no more.

A fifth priority, which Goldstone does not foreground here but which flows just beneath the surface of his life and work, is the 'influence of the

216 Villa-Vicencio & Soko (n 155 above) 192 (emphasis added).

217 The word *honest* collocates with *honour* (which suggests 'an active or anxious regard for the standards of one's profession, calling, or position'), *integrity* (which implies 'trustworthiness and incorruptibility to a degree that one is incapable of being false to a trust, responsibility, or pledge'), and *probity* (which connotes 'tried and proven honesty or integrity') – Definition of HONESTY' (Merriam-Webster Dictionary) <https://www.merriam-webster.com/dictionary/honesty> (accessed 3 May 2017).

liberal Jewish religious and cultural context within which he was raised in his young and formative years.<sup>218</sup> As he reflects in his interview with Villa-Vicencio and Soko, “‘Being part of a broader Jewish community that has been persecuted for 2000 years has, nevertheless, shaped my moral and legal convictions’”<sup>219</sup> – the nonchalance of *nevertheless* betraying a quiet confidence in his antecedents.

The ‘three priorities that form the basis of [his] private and professional life’ resonate strongly with the Bill of Rights in the South African Constitution. Three of them – human rights values, reference to international law, and reason – are directly reflected in the Constitution. First, the advancement of human rights is one of the founding provisions of the Constitution.<sup>220</sup> Second, regard to international law is reflected in the Bill of Rights,<sup>221</sup> where a court, tribunal or forum when interpreting the Bill of Rights ‘*must* consider international law,’<sup>222</sup> as well as in the General Provisions of the Constitution, which devotes an entire chapter to international law and stipulates that ‘when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’<sup>223</sup> And third, the Bill of Rights is replete with references to reason and reasonableness – in relation to the environment, property, housing, health care, food, water and social security, education, access to information, just administrative action, arrested, detained and accused persons, limitation of rights, and states of emergency.<sup>224</sup>

#### 4.1 *Apartheid-era judge*

Goldstone’s views on his tenure as judge on the Benches of the Transvaal Supreme Court and later the Appellate Court and on all matters legal and judicial are largely consistent with the ‘three priorities that form[ed] the basis of [his] private and professional life’.

In the 36<sup>th</sup> Alfred and Winifred Hoernle Memorial Lecture, which he delivered in Johannesburg on 10 February 1993, Goldstone spoke of his admiration for judges Searle (1925) and Didcott (1979) for speaking out during the colonial and *apartheid* years respectively, quoting a section from one of Didcott’s judgments:

218 Villa-Vicencio & Soko (n 155 above) 190.

219 As above, 191.

220 ‘The Constitution’ (n 163 above) sec 1(a).

221 As above, sec 37(4)(b)(i).

222 As above, sec 39(1)(b) (emphasis added).

223 As above, sec 233.

224 As above, secs 24(b), 25(5), 26(2), 27(2), 29(1)(b), 29(2), 32(2), 33(1), 35(1)(d), 35(1)(f), 35(3)(d), 36(1), 37(4)(b)(iii), and 37(6)(a), (c) & (d).

Parliament has the power to pass the statutes it likes, and there is nothing the courts can do about that. The result is law. But that is not always the same as justice. *The only way that Parliament can ever make legislation just is by making just legislation.*<sup>225</sup>

The notion that the *apartheid* Parliament was incapable of making laws that were just and that it arrogated to itself supreme powers highlighted the need for a constitution that would be the ‘supreme law of the Republic’<sup>226</sup> and a constitutional court that would be the ‘highest court on constitutional matters.’<sup>227</sup>

In *Do judges speak out?* Goldstone opines extensively about the role of a judge vis-à-vis the legislation he is supposed to uphold. He claims that no ‘South African judge speaking out against unjust or immoral laws whether in or out of Court, has made himself unfit to sit on the Bench. Indeed, as I have already indicated I believe that judges who did so tended to preserve the integrity of the South African Bench.’<sup>228</sup> The integrity he speaks of here not only resonates with his own priority discussed above but alludes to the use of the term in the Constitution, where ‘institutional integrity’ is enjoined upon all spheres of government and organs of state.<sup>229</sup> Before *integrity* meant ‘firm adherence to a code of especially moral or artistic values’ it meant ‘the quality or state of being complete or undivided’ (from the Latin *integer*, ‘entire’).<sup>230</sup> Speaking out against unjust or immoral laws therefore preserves the wholeness of the judicial process and the officers entrusted with it.

There are many instances, both on and off the Bench, in which Goldstone spoke out; his book *Do judges speak out?* mentions some of them. On the Bench, in *S v Govender* (discussed earlier), he reflected: ‘I do not believe that it was in any way improper or compromising of the integrity of the Bench to have spoken out in that way. I would like to believe that the opposite conclusion would be justified.’<sup>231</sup> Had he not spoken out, the Group Areas Act might still have been actively policed for the next three years, at least until the unbanning of the ANC in 1990, thereby impacting the negotiation process.

Off the Bench, reflecting on his approximately 3,000 visits to political prisoners to refute stories of prison torture and abuse, he observed:

225 R Goldstone *Do judges speak out?* (1993) 23 (emphasis added).

226 ‘The Constitution’ (n 163 above) sec 2.

227 Constitutional Court of South Africa ‘ABOUT THE COURT| Role of the Constitutional Court’ <http://www.constitutionalcourt.org.za/site/thecourt/role.htm> (accessed 3 May 2017).

228 Goldstone (n 225 above) 25.

229 ‘The Constitution’ (n 163 above) sec 41(1)(g).

230 Merriam-Webster Dictionary ‘Definition of INTEGRITY’ <https://www.merriam-webster.com/dictionary/integrity> (accessed 3 May 2017).

231 Goldstone (n 225 above) 22.

These opportunities enabled me to be more than a servile executioner of *apartheid* law. Often dealing with unsympathetic police and prison officials, I was able to contribute to ameliorating the lot of some detainees .... My sense of *moral ambiguity* was, however, always there. I was working within the context of the deeply immoral *apartheid* system.<sup>232</sup>

Unfortunate use of ‘executioner’ (in the context of *apartheid* death sentence practice) aside, ‘moral ambiguity’ (‘a lack of certainty about whether something is right or wrong’)<sup>233</sup> might in any other person have issued in Hamlet-like inaction in the face of dilemma. But in Goldstone it was more likely to manifest in decisiveness accompanied by reasoned discourse. In the prison context, this meant ‘engaging in attempts to assist in the rehabilitation of former prisoners.’<sup>234</sup>

## 4.2 International judge

The sub-heading of Villa-Vicencio and Soko’s chapter on Richard Goldstone in their book *Conversations in transition* is ‘Troubled judge in the international arena’<sup>235</sup> – a title on first reading seemingly inappropriate given his quiet confidence but seeking perhaps to capture the inner turmoil Goldstone experienced in:

- Accepting the appointment to head the enquiry into the Gaza conflict
- Managing the vitriolic *ad hominem* attacks on him from Israel in particular following the release of the Goldstone Report
- Subsequently retracting one of the key findings in the report (that Israel had deliberately targeted civilians in the conflict); and
- Processing the fall-out from the retraction – which included having to defend his withdrawal of the civilian-targeting claim.

When asked to head the Gaza inquiry, Goldstone confessed that:

It was not an easy decision to make, but I decided that I could execute the daunting task in an *even-handed and impartial* manner, giving it the same attention that I have given to situations in my own country .... I accepted the appointment because of my deep concern for peace in the Middle East and my concern for victims on all sides in the Israeli-Palestinian conflict.<sup>236</sup>

The *Los Angeles Times* article cited his claim, made in an interview captured on a video portal, that “‘What moves me is the effect that justice has on

232 Villa-Vicencio & Soko (n 155 above) 183 (emphasis added).

233 Merriam-Webster Dictionary ‘Definition of MORAL ambiguity’ <https://www.merriam-webster.com/dictionary/moral%20ambiguity> (accessed 3 May 2017)

234 Villa-Vicencio & Soko (n 155 above) 184.

235 As above, 180.

236 As above, 188-189. Reported also in *Los Angeles Times* ‘Judge named to lead Gaza inquiry is known for fairness’ <http://www.latimes.com/world/la-fg-goldstone8-2009apr08-story.html> (accessed 4 May 2017).

victims. It's really the victims who are the customers, or should be. They're often forgotten. And victims are craving for that public acknowledgment of their victimhood, what happened to them.'"<sup>237</sup> Goldstone said his team would investigate 'all violations of international humanitarian law' before, during and after the Israeli assault. 'It's in the interest of the victims,' he said. 'It brings acknowledgment of what happened to them. It can assist in the healing process.'" And almost as an afterthought: "'I would hope it's in the interests of all the political actors too.'"<sup>238</sup> His assertion that 'victims are craving for that public acknowledgement of their victimhood, what happened to them' arises surely from the very uncomfortable cases he would have to have dealt with in investigating war crimes while on the ICTY and ICTR.

Having accepted the appointment to head the Gaza Mission, Goldstone wrote immediately to the Israeli Ambassador to the United Nations to request Israel's support in cooperating with the Mission, including facilitating access to Israel, Gaza, and the West Bank. There followed an extraordinary exchange of letters between the two men – the extraordinariness lying chiefly in the one-sidedness of the exchange: Goldstone's five letters, four to the Israeli Ambassador, Aharon Leshno-Yaar, and one to the Israeli Prime Minister, elicited just two letters from the Ambassador.<sup>239</sup>

Goldstone's first letter to the Israeli Ambassador to the UN (dated 3 April 2009) contained three important statements. First, he assured the Ambassador that the Mission 'would be *given* unbiased and even-handed terms of reference' (emphasis added) – but then later in the letter claimed that 'As a completely independent body, the Mission will now be determining *its own* terms of reference.'<sup>240</sup> Fortunately the Ambassador did not react to (if he picked up) the contradiction. Second, Goldstone was at pains to emphasise that the Mission would '*in particular* ... investigate the effects on Israeli citizens of the rocket attacks that emanated from Gaza' (emphasis added). And third, he expressed a desire to 'meet with some of the victims of those attacks, to ascertain ... the effect that they had on an ongoing basis upon the civilian population in the effected [sic] areas of Israel'<sup>241</sup> – bearing out his ICTY / ICTR-derived assertion that 'victims are craving for that public acknowledgement of their victimhood'.

What stands out from this correspondence is Goldstone's tenacity in pursuing Israel's cooperation with the Mission – presciently, in order to guard against later recriminations of bias. This tenacity supports the last of his three priorities discussed earlier.<sup>242</sup>

237 *Los Angeles Times* (n 238 above).

238 As above.

239 Human Rights Council (n 190 above).

240 As above, 434 (emphasis added).

241 As above.

242 Villa-Vicencio & Soko (n 155 above) 192.



### 4.3 Constitutional Court judge

Some of Goldstone's words spoken as Justice of the Constitutional Court were considered earlier, in the presentation and discussion of the judgments in which he was the majority author. This sub-section of the chapter examines his reflections on some of those judgments and on the Constitution more broadly.

In his interview with the HSRC that formed part of the Constitutional Justice Project,<sup>243</sup> Goldstone was asked how best the Constitutional Court should deal with socio-economic rights – some commentators having accused the Court of having ‘overstepp[ed] the mark’,<sup>244</sup> others of its not having gone far enough. (Christiansen, for example, maintained that ‘What is revealed is a [South African Constitutional] Court that has been both less revolutionary and less irresponsible than commentators expected (and continue to allege).’)<sup>245</sup> Goldstone's response to the HSRC interview question was:

One of the problems which emerges, I mean, one doesn't have to be an expert to know that there are just too many millions of poor South Africans who haven't benefitted at all from socio-economic rights, notwithstanding 20 years of them. Having a *minimum core* I think would be calculated to ensure that there was at least a trickledown which potentially would affect all South Africans. That to me would ... be probably the major benefit of having a minimum core. I think that's as was pointed out in the decisions of the Constitutional Court and certainly during argument. You know, would you have one minimum core for the whole country or would you have different minimum cores for Gauteng and Mpumalanga? And what will the minimum core be? It's pointless having a minimum core ... where government simply cannot, where there's not enough money.<sup>246</sup>

Here Goldstone balances the government's obligation to provide a minimum core of socio-economic services that address basic rights of citizens against economic pragmatism: if the state cannot afford to implement a minimum core dispensation at national level, let alone in each of the nine provinces, what is the point of even considering it?

Yet the view of the ESCR-Net (International Network for Economic, Social and Cultural Rights) on the affordability question is that claims of unaffordability are no excuse:

243 G Pienaar 'HSRC Constitutional Justice Project: Interview with Justice RJ Goldstone' (2014).

244 As above, 3.

245 EC Christiansen 'Adjudicating non-justiciable rights: Socioeconomic rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321.

246 Pienaar (n 243 above) 27 (emphasis added).

Governments, no matter what level of resources are at their disposal, are obligated to make sure that people living under their jurisdiction enjoy at least essential levels of protection of each of their economic, social, and cultural rights. While the ICESCR [International Covenant on Economic, Social and Cultural Rights] recognizes the principle of progressive realization of ESCR [economic, social and cultural rights], this does not mean that states are free to postpone undertaking their duties vis-à-vis ESCR until a later date. Protection from starvation, primary education, emergency healthcare, and basic housing are among the minimum requirements to live a dignified life and it is the duty of governments to ensure these at all times. Even in cases of economic downturn or other emergency, these core requirements must be guaranteed to everyone. States should use all the available resources, including international assistance, to make sure that every individual in their territory enjoys a bare minimum of ESCR.<sup>247</sup>

This statement is unequivocal in its insistence on government responsibility with regard to all its citizens, however poor. Is Goldstone's sentiment about affordability a legitimate excuse? If it is, it is countered by his own unequivocation on the issue of government accountability:

I think government is inefficient and as much as it may not perform in certain areas I think the position in our country would be far worse than without socio-economic rights. I think government at all levels knows that there's an expectation and that they can be called to account. That's very important. The question of judicial oversight I think if anything, and I hope I'm not exaggerating, I think it's more important and even its most important benefit is the knowledge by civil servants that they may be called on to account.<sup>248</sup>

The second key issue raised by Goldstone in his HSRC interview was the importance of consensus – not as a constitutional principle per se (though consensus was enjoined by the Constitution as a means of reaching agreement in a Government of National Unity at president, cabinet, premier, and executive council levels)<sup>249</sup> – but as a Constitutional Court practice:

In the American Supreme Court the judges meet only once, the justices only meet once per case .... On the South African Constitutional Court very, very early on we adopted the very opposite. We meet in conference on every case and sometimes in a difficult case we may have 14 conferences on the same case. And we'll go on and on meeting until – I mean, obviously if there's unanimity then you have one meeting .... But in cases where there are differences of opinion or uncertainties we'll go on and on meeting until there's no point in further discussion. It's been exhausted.... And it's so valuable. I mean, you know, I can't tell you how many judges have changed their minds in the course of those discussions.<sup>250</sup>

247 ESCR-Net 'Minimum core obligations' <https://www.escr-net.org/resources/minimum-core-obligations> (accessed 2 May 2017).

248 Pienaar (n 243 above) 51.

249 'The Constitution' (n 163 above) Annexure B.

250 Pienaar (n 243 above) 35-36.

Judgment by fatigue (not only is the matter exhausted but the Justices must be too) is in a curious paradox touted as being ‘so valuable’, the fact of judges having changed their minds through an extensive face-to-face consensus-seeking process being proffered as evidence of the value it affords.

The practice Goldstone valorises mirrors the way in which the South African electoral system was negotiated:

Ideally, decisions would be reached through general consensus – and if this proved impossible the chairperson of the forum would have to decide whether there was at least ‘sufficient’ consensus. For most purposes, sufficient consensus was equated with agreement between the ANC and the National Party, a practice which encouraged the resolution of key issues in discreet ‘bilateral’ encounters between representatives of the two parties.<sup>251</sup>

The Constitutional Court consensus-seeking process must have aimed for full consensus but have had to settle, on many occasions, for sufficient consensus – hence the combination of majority and minority judgments emanating from the Court.

## 5 Social justice and Judaism

Nelson Mandela, whose career owed much to the early support of the Jewish law firm Witkin, Sidelsky and Eidelman,<sup>252</sup> was later to write: ‘I have found Jews to be more broad-minded than most whites on issues of race and politics, perhaps because they themselves have historically been victims of prejudice.’<sup>253</sup> Some eight years after the publication of Mandela’s *Long walk to freedom*, Kgalema Motlanthe, in his capacity as ANC Secretary General, said of the Jewish influence on the liberation movement:

That people of Jewish descent should be so prominent in the liberation movement says something fundamental about the compassion of Judaism. Many Jewish immigrants arrived in our shores in abject poverty, laying claim to little but their rich commitment to humanitarian and egalitarian ideals. These commitments were sometimes rooted in traditional Jewish teaching. They sometimes emerged from traditions of socialism .... Whatever the case, Jewish compassion is the fruit of empathy, rather than sympathy. It is the fruit of struggle over many millennia, against racism and persecution.<sup>254</sup>

251 T Lodge ‘How the South African electoral system was negotiated’ (2003) 2(1) *Journal of African Elections* 75.

252 N Mandela *Long Walk to Freedom* (1994).

253 As above, 54.

254 Jews for Justice for Palestine ‘Address to the South African Jewish Board of Deputies, 15 Oct 2002’ <http://jifjp.com/?p=73387> (accessed 7 May 2017).

While Mandela and Motlanthe collectively attribute Jewish broadmindedness, empathy and compassion to historical victimisation in the form of (racial) prejudice and persecution, another source of such compassion, maintains Sacks,<sup>255</sup> is Jewish protest. Countering Marx's oft-quoted claim that religion is 'the sigh of the oppressed creature, the heart of a heartless world, and the soul of soulless conditions. It is the opium of the people',<sup>256</sup> Sacks links justice and dignity to Jewish protest against the prevailing powers:

Opium of the people? Nothing was ever less an opiate than this religion [Judaism] of sacred discontent, of dissatisfaction with the status quo. It was Abraham, then Moses, Amos, and Isaiah, who fought on behalf of justice and human dignity – confronting priests and kings, even arguing with God Himself. That note, first sounded by Abraham, never died. It was given its most powerful expression in the book of Job, surely the most dissident book ever to be included in a canon of sacred scriptures. It echoes again and again in the rabbinic midrash, in the *kinot* (laments) of the Middle Ages, in Hassidic tales and the literature of the Holocaust. In Judaism, faith is not acceptance but protest, against the world that is, in the name of the world that is not yet but ought to be .... The Bible is not metaphysical opium but its opposite. Its aim is not to transport the believer to a private heaven. Instead, its impassioned, sustained desire is to bring heaven down to earth.<sup>257</sup>

The origins of South African law lie in Roman-Dutch civil law, English common law, and customary law;<sup>258</sup> and the Constitution borrowed heavily from American, Canadian and German constitutional law, in particular the Canadian Charter of Rights and Freedoms.<sup>259</sup> There are no demonstrable influences of Judaism upon the Constitution. Yet in a curious coincidence, the centrality of justice and dignity in Judaic law and prophecy, the representation of Jews in the liberation struggle for freedom, the generosity of spirit of a Jewish law firm, and the commitment of Jewish lawyers to social justice in South Africa coalesce in the person of Richard Goldstone, who, in interspersing a non-partisan commitment to social justice with muted references to the religion of his birth, achieves that rare balance between promoting a secular Constitution and upholding the right to religious freedom of expression. A fellow Jew, Arthur Chaskalson, held that 'Religion and ethnicity are irrelevant to the capacity to judging with

255 J Sacks *To heal a fractured world: The ethics of responsibility* (2005) 27.

256 K Marx 'Towards a critique of Hegel's philosophy of right: Introduction' (1844) [https://www.marxists.org/archive/marx/works/download/Marx\\_Critique\\_of\\_Hegels\\_Philosophy\\_of\\_Right.pdf](https://www.marxists.org/archive/marx/works/download/Marx_Critique_of_Hegels_Philosophy_of_Right.pdf) (accessed 7 May 2017).

257 Sacks (n 255 above) 27 (emphasis original).

258 J Dugard 'International law and the South African Constitution' (1997) 1 *European Journal of International Law* 79.

259 D Davis 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1(2) *International Journal of Constitutional Law* 186-187.

integrity'.<sup>260</sup> But Goldstone, through his essential Jewish-inspired humanity, has shown himself to be a *mensch* on the Bench.<sup>261</sup>

## 6 Conclusion

Justice Richard Goldstone has never denied his religious antecedents; nor has he foregrounded them. This much is perhaps to be expected from a man who, though raised in a secular home, embodied, without extolling, the proud Jewish tradition of social justice embraced by so many of his compatriots in the fight against *apartheid* – a fight that led Nelson Mandela to highlight the broad-mindedness of Jews on issues of race and politics and Kgalema Motlanthe to attribute Jewish compassion to empathy with those engaged in their own struggle.<sup>262</sup> For both Mandela and Motlanthe, such empathy was born of the prejudice suffered by Jews over millennia.

Yet the circumspection with which Goldstone carried his Jewishness in the post-*apartheid* era – pre-eminently as a Justice on the first Bench of the Constitutional Court – is a function also of the sanctity of the secular state to which the Constitution had committed South Africa and of Goldstone's allegiance to that precept. Raised in a secular home, he was at home in a secularised country in which, as a Jew, he was free nevertheless, should he have chosen to do so, to practise his religion with constitutional sanction.<sup>263</sup> As in all things, Goldstone was measured in walking the line between secularism and religion, preferring the expansiveness of outcomes that affirmed the humanity he had in common with those with whom he interacted to any narrowness an adherence to his own religion might have afforded.

260 Chaskalson & Bizos (n 162 above) 45.

261 'Yiddish *mentsh* human being, from Middle High German *mensch*, from Old High German *menisco*; akin to Old English *man* human being, man' *Merriam-Webster Dictionary* <https://www.merriam-webster.com/dictionary/mensch> (accessed 7 May 2017).

262 Mandela (n 252 above) 54; Jews for Justice for Palestine 'Address to the South African Jewish Board of Deputies, 15 Oct 2002' <http://jffp.com/?p=73387> (accessed 7 May 2017).

263 See 'The Constitution' (n 163 above) secs 9(3), 15, 16, and 31.

## Bibliography

- Chaskalson, A, & Bizos, G 'In support of Justice Goldstone' (2010) 23(2) *Advocate* 43-45.
- Christiansen, EC 'Adjudicating non-justiciable rights: Socioeconomic rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321.
- Davis, D 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1(2) *International Journal of Constitutional Law* 181.
- Davis, D, & Le Roux, M *Precedent & possibility: The (ab)use of law in South Africa* (Juta and Company Ltd.: Johannesburg 2009).
- Dugard, J 'International law and the South African Constitution' (1997) 1 *European Journal of International Law* 77.
- Goldstone, R *Do judges speak out?* (South African Institute of Race Relations: Johannesburg 1993).
- Hazan, P *Justice in a time of war: The true story behind the International Criminal Tribunal for the Former Yugoslavia* (Texas A&M University Press: College Station, TX. 2004).
- Human Rights Council *Human rights in Palestine and other Occupied Arab Territories. Report of the United Nations fact-finding mission on the Gaza conflict* (Office of the United Nations High Commissioner for Human Rights: Geneva 2009).
- Huxley, A *Eyeless in Gaza* (Chatto & Windus: London 1936).
- Lodge, T 'How the South African electoral system was negotiated' (2003) 2(1) *Journal of African Elections* 71.
- Mandela, N *Long walk to freedom* (Little Brown & Co: London 1994).
- Parker, P, & Mokhesi-Parker, J *In the shadow of Sharpeville: Apartheid and criminal justice* (New York University Press: New York 1998).
- Sacks, J *To heal a fractured world: The ethics of responsibility* (Schocken Books: New York 2005).
- Shimoni, G 'The Jewish response to *apartheid*: The record and its consequences' in Mendelsohn, E (ed) *Jews and the state: Dangerous alliances and the perils of privilege* (Oxford University Press: Oxford 2004).
- Van Wyk, C *It is time to go home* (Ad Donker: Johannesburg 1979).
- Villa-Vicencio, C, & Soko, M *Conversations in transition: Leading South African voices* (David Philip: Cape Town 2012).
- Zimmermann, R 'The contribution of Jewish lawyers to the administration of justice in South Africa' (1995) 29 (1-2) *Israel Law Review* 250.

THE ADVOCATE, PEACEMAKER, JUDGE  
AND ACTIVIST: A CHRONICLE ON THE  
CONTRIBUTIONS OF  
JUSTICE JOHANN KRIEGLER  
TO SOUTH AFRICAN  
CONSTITUTIONAL JURISPRUDENCE

*Khulekani Moyo*

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Source: <http://www.constitutionalcourt.org.za/site/judges/justicejohannkriegler/index1.html>

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## 1 Introduction

In 2003, the General Council of the Bar of South Africa presented Justice Johann Christiaan Kriegler with the *Sydney and Felicia Kentridge Award for Service to Law in Southern Africa*.<sup>264</sup> The award is made annually to persons or an institution adjudged to have made an outstanding contribution, worthy of public recognition, to law in Southern Africa. In his tribute to Kriegler, the former General Council of the Bar, Chairperson Willem van der Linde SC, had this to say regarding Kriegler's contribution to law:

I am confident that in time scholarly analysis will show that it was on the Constitutional Court that his full potential as a jurist came to the fore. There he was able to blend his energy, his love of the law, his intellect, and his

264 WHG van der Linde 'Tribute paid to Justice Johann Kriegler at the fourth Sidney and Felicia Kentridge award for service to law in Southern Africa' (2004) 21 *The South African Law Journal* 22.

ingenuity, and then to paste it all together with his remarkable use of language. It is in this respect that Justice Kriegler's contribution to the law was singular. Judges, young and old, quote from his judgments to lend richness to their own.<sup>265</sup>

During his interview for appointment to the Constitutional Court in 1994, on being asked by Justice Corbett why he thought he was a suitable candidate for appointment to that court, Kriegler politely declared that he did not think he was qualified for appointment, but was fascinated by the challenges likely to face the new institution and was excited to make whatever modest contribution to the Court.<sup>266</sup> Fast-forward 22 years later, Kriegler is regarded as one of the finest Justices to ever grace the hallowed corridors of that venerated institution in Braamfontein.<sup>267</sup>

Despite the many glowing accolades, Kriegler's humility shines throughout his judgments and public speeches. This is despite the general acknowledgement that his major contribution, well known to the South African body politic, is that of peacemaker: the dexterous and skilful way in which he shepherded South Africa through its painful and delicate transition as head of South Africa's electoral body between 1994 and 1999. In that regard, he was lauded for saving the country from the brink of a debilitating racial conflagration and rightfully earned the moniker 'Mr Fix-It'.<sup>268</sup> Less known and written about is Kriegler the legal maverick, with a legal career – as advocate, judge and activist – spanning over half a century.

This chapter, through analyses of various interviews conducted with Kriegler, literature and speeches about him by peers, colleagues and academics, his own personal pronouncements in his judgments – principally as a member of the Constitutional Court – public lectures and publications (both academic and non-academic), looks at the judicial path that Kriegler has traversed and the contribution he has made to South African constitutional jurisprudence.

The chapter is divided into three sections. The first section constitutes a non-exhaustive biography of Kriegler which seeks to highlight his career trajectory before and after his appointment to the Constitutional Court. The aim is to ascertain whether and to what extent his prior experience and career trajectory prepared him for the post-1994 Bench. The second section reviews the literature on Kriegler's contribution to our understanding of the Constitution. This section is divided into two parts. The first reviews

265 As above.

266 See 'Interview with Justice Johan [*sic*] Christiaan Kriegler, Judge of the Appellate Division, 5 October 1994' <http://www.constitutionalcourt.org.za/site/judges/transcripts/johannkriegler.html> (accessed 3 May 2017).

267 Van der Linde (n 264 above) 22.

268 See van der Linde (n 264 above). Senator Ngcuka, Advocate Gordon and Mr Ernstzen acknowledged the use of this moniker in reference to Kriegler during the award ceremony.



literature by third parties on Kriegler's contribution to constitutional jurisprudence and our understanding of the Constitution. The second reviews the literature authored by Kriegler himself in order to provide a more personal understanding of his views on and contribution to the evolution of South Africa's constitutional jurisprudence. The third section considers a number of themes selected from Kriegler's curial and extra-curial pronouncements: transformation in general; the constitution as a transformational document; transformation and the judiciary; the transition to democracy and the role of the Constitutional Court; separation of powers; the independence and accountability of the judiciary; the horizontal application of the Bill of Rights; equality and dignity; reconciliation of criminal procedure with the Bill of Rights; and the utilisation of international and comparative law as an interpretive guide in constitutional adjudication. This thematic focus provides a better and deeper understanding of Kriegler's interpretive approach as well as the extent to which his adjudicative approach advances our understanding of the Constitution. The chapter ends with an account of Kriegler's progressive jurisprudence and a Conclusion.

## **2 The advocate, peacemaker, judge and activist: A select biography**

Kriegler completed his Bachelor of Arts degree in 1954 at the University of Pretoria, after which he proceeded to study for a Bachelor of Laws degree at the University of South Africa. He joined the Johannesburg Bar in 1959, where he practised law for 25 years as an advocate. He took silk in 1973 and chaired the Johannesburg Bar Council in 1977 and 1980.<sup>269</sup> Kriegler built an extensive litigation practice at the bar, where he represented some leading societal and political figures. These included Breyten Breytenbach, Mangosuthu Buthelezi, the Church of Scientology, Lucas Mangope, Beyers Naude, Eschel Rhoodie, and Eugene Terreblanche. In 1994, Kriegler was appointed a founding Justice of the newly established Constitutional Court of the Republic of South Africa. He completed his term of office in 2002.

Between 1976 and 1983, Kriegler served intermittently as an acting judge and in 1984 was appointed to the Transvaal Provincial Division of the Supreme Court (TPD). At the TPD, he distinguished himself as a highly competent judge and is described as having 'left his indelible mark'.<sup>270</sup> Of particular note is that the incredible array of his judgments covered many different areas of the law. These include trademark law, criminal law and procedure, administration of estates, intellectual property law, electoral law, tax law, insurance law, company law, insolvency,

269 Van der Linde (n 264 above) 18.

270 As above, 20.

labour law, and procedural law.<sup>271</sup> Notably Kriegler is a leading authority on criminal procedure; in 1993, he authored the 5th edition of *Hiemstra's Suid-Afrikaanse strafproses*. Between 1990 and 1993, he acted in the Appellate Division, which at the time was the highest court in the country, and was permanently appointed to its Bench in 1993. As a Justice on the first Bench of the Constitutional Court, in a total of 29 cases in which Kriegler handed down opinions between 1995 and 2003, he wrote 15 unanimous judgments for the Court, wrote five concurring opinions, authored or co-authored a total of five majority judgments and handed down four dissenting opinions.

During the *apartheid* era, Kriegler was involved in establishing various human rights and public interest advocacy bodies. He provided advocacy training with the Black Lawyers' Association from the early 1980s, he was the founding chair of Lawyers for Human Rights (1981), and he was a founding trustee of the Legal Resources Centre (1978). The latter two are amongst the oldest public interest litigation organisations in the country. In December 1993, Kriegler was appointed Chairperson of the Independent Electoral Commission (IEC), whose major task was to manage South Africa's first democratic elections, and was instrumental in establishing the IEC, which he chaired until 1999.

Since retiring from the Bench in 2002, Kriegler has been chiefly engaged in judicial education and the training of public prosecutors and practising advocates. He has also been engaged in various countries across the world in executing mandates from the United Nations, the African Union, the Commonwealth, and various international non-governmental organisations such as the International Bar Association and the International Commission of Jurists. Kriegler has also participated in numerous national and international judicial missions; this has included delivering lectures on judicial and electoral matters in numerous countries throughout the world. He currently sits on the boards of Freedom under Law, which he chairs, and the Centre for Human Rights, and is an Extraordinary Professor in the Faculty of Law at the University of Pretoria. Kriegler is also a trustee of the Nelson Mandela Children's Fund, patron of Advocacy Training for the General Council of the Bar, and Chairperson of the Constitutional Court Trust.

### 3 What others have said about Justice Kriegler

Van der Linde SC has described Kriegler at the bar as a 'busy junior (when he started off)', indicating that the 'law reports reveal a large number of appearances in various courts throughout the country, and also the then appellate division.'<sup>272</sup> Judge Lewis Goldblatt has praised Kriegler's 'sharp

271 As above.

272 As above, 18.

intellect, analytical ability and great felicity of language'.<sup>273</sup> Goldblatt further described Kriegler as 'a man who believed, as he still does, in justice and fairness for every member of our society ... and saw the proper practice of the law as a contribution to this cardinal principle.'<sup>274</sup>

The poet Breyten Breytenbach, in his book *The true confessions of an albino terrorist*, depicts Kriegler as 'the rarest of all Afrikaners: a completely honest man profoundly inspired by humane principles.'<sup>275</sup> On trial for terrorism-related charges in the late 1970s, in which he was defended by Kriegler, Breytenbach declares that 'from the moment he agreed to defend me he never once went back on his ferocious commitment to my cause. I could not have asked for a better defender.'<sup>276</sup>

Retired President of the Supreme Court of Appeal Judge Craig Howie also noted Kriegler's intellectual and physical energy during his time at the Appellate Division, pointing out that 'at that time he was busy writing his book on criminal procedure.'<sup>277</sup> He variously describes Kriegler as a 'great contributor to the law'<sup>278</sup> and 'a great promoter for the respect of law.'<sup>279</sup> On Kriegler's contribution to constitutional jurisprudence, legal luminaries such as Sir Sidney Kentridge and Lady Felicia Kentridge have described Kriegler's contribution to South African constitutional jurisprudence 'as a monument to the combination of sensitivity and realism which has always marked his approach to law'.<sup>280</sup> Kriegler's contribution to South African constitutional jurisprudence will be fully canvassed in the third section of this chapter through an analysis of select themes.

Retired Deputy Chief Justice Dikgang Moseneke, who deputised for Kriegler at the IEC, described him as somebody who 'detested *apartheid* and unfairness'<sup>281</sup> and was 'unwaveringly committed to a transformed, inclusive and just society.'<sup>282</sup> Moseneke further applauded Kriegler for his 'incisive intellect, forthrightness, and deep sincerity' as well as the extraordinary brilliance of his judgments and legal writing.<sup>283</sup>

273 As above.

274 Van der Linde (n 264) 20.

275 B Breytenbach *The True Confessions of an Albino Terrorist* (1984); cited in van der Linde (n 264 above) 19-20.

276 As above.

277 Van der Linde (n 264 above) 21.

278 As above.

279 As above.

280 As above, 24.

281 As above, 22.

282 As above.

283 As above.

## 4 In Justice Kriegler's own words

Kriegler has described himself as a 'vehement opponent of socialism and certainly its extreme form of Marxism ... a human-rights lawyer, an anti-communist human-rights lawyer, with a fairly strong religious background to it, and an experienced judicial officer',<sup>284</sup> believing such experience adequately prepared him for the Constitutional Court.

Various interviews have also provided some insights into the formative years of Johann Kriegler which may have influenced his approach to constitutional adjudication. Kriegler has described himself as 'a journeyman lawyer who has done some fifty-five years in the courts of this land and the neighbouring territories, in just about every capacity'.<sup>285</sup> He explains that he 'battled with the Nationalist government from [his] student days at Pretoria University, trying to form a Young Communist League at Pretoria University before the Suppression of Communism Act'.<sup>286</sup> There is, however, no publicly available information to suggest that Kriegler ever became a communist. In addition to being a 'vehement opponent of socialism ... an anti-communist',<sup>287</sup> he has described himself as a 'free market enterprise maverick'.<sup>288</sup> It also appears that his belief in human dignity was one of his abiding principles from an early age; he noted in an interview for the Constitution Court Oral History Project (History Project) that:

I do believe and did believe in the immortal spark that every human being possesses as of right, by the very fact that you are a human being, that you're entitled to dignity, to respect, to a say in the affairs of the community in which you live, to express your views, to have your opinions, to have your right to privacy.<sup>289</sup>

One of the biggest challenges confronting the Constitutional Court in its early years was that it had to develop an interpretative approach suitable for the transformative ethos envisaged in both the 1993 interim and 1996 Constitutions despite the lack of experience in constitutional human rights adjudication of any of the Court's founding Justices. Describing his first experiences at the Court, Kriegler said:

284 University of the Witwatersrand 'Constitutional Court Oral History Project: Interview with Justice Kriegler' 24 November 2011 [http://www.historicalpapers.wits.ac.za/inventories/inv\\_pdfo/AG3368/AG3368-K40-001-jpeg.pdf](http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-K40-001-jpeg.pdf) (accessed 24 May 2017) 1.

285 J Kriegler 'Can judicial independence survive transformation? – A public lecture delivered by Judge Johann Kriegler at the Wits School of Law on 18 August 2009' <http://constitutionallyspeaking.co.za/can-judicial-independence-survive-transformation-a-public-lecture-delivered-by-judge-johann-kriegler-at-the-wits-school-of-law/> (accessed 25 May 2017).

286 University of the Witwatersrand (n 284 above) 1.

287 As above.

288 N Bohler-Muller 'HSRC Constitutional Justice Project: Interview with Justice Johann Kriegler' (2004) 15 (on file with the author).

289 As above.

I found it stimulating, and in fact it was the first time I really got excited about the possibility of actually serving on this Court. And it then proved to be very exciting indeed to start with a complete blank slate in virtually every respect. We had no rules, we had no principles, we had no background, there was no South African body of constitutional precedent in the context of a predominant Constitution with a Bill of Rights and a testing power for the courts.<sup>290</sup>

On whether his life trajectory might have prepared him for the Bench, Kriegler explained that he did not think he ‘was prepared for life on the Constitutional Court Bench. I think I grew a great deal in the years that I was privileged to serve on the Constitutional Court.’<sup>291</sup> He acknowledges, however, that his career as an advocate and a judge in the various courts was invaluable preparation for serving on the newly-minted Court.<sup>292</sup>

Regarding his contributions to the initial functioning of the Constitutional Court, Kriegler acknowledges the importance of his skills and experience as an advocate and a judge in different courts which he brought to bear in establishing and stabilising the new Court. He was able to generously impart skills in legal and judgment writing to some of his colleagues who had no prior judicial experience before being appointed to the Constitutional Court. For instance, Kriegler’s judicial experience was to be tapped by the Constitutional Court in one of its most famous decisions, the *Certification of the Constitution of the Republic of South Africa* case.<sup>293</sup> In an interview with the History Project, Kriegler explained that he:

assisted in the administration of the case, and then eventually in writing the judgment, which was a very difficult judgment, and a very lengthy and detailed judgment. I stitched it together. I saw to it that the seams between the various contributions were as invisible as possible, that the style remained the same, that it ran logically, that the sequences were right, that what we said in chapter one was not watered down in chapter three, or contradicted in chapter eight – that kind of managerial judicial skill. I also did a good deal, right at the beginning, in helping colleagues with limited judicial experience on the format of a judgment: how one goes about thinking it through, and how one then goes about putting on paper what you have thought through.<sup>294</sup>

The next section discusses and evaluates Kriegler’s contribution to our understanding of the Constitution by focusing on select themes as reflected most often in both his curial and extra-curial pronouncements.

290 University of the Witwatersrand (n 284 above) 5.

291 As above, 1.

292 As above.

293 See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (‘First Certification judgment’).

294 University of the Witwatersrand (n 284 above) 13.

## 5 Select themes

### 5.1 The Constitution as a transformative document

In an often-cited article published in 1998, Karl Klare described the South African Constitution as entailing a project of ‘transformative constitutionalism’.<sup>295</sup> The notion of transformative constitutionalism has found deep expression in the Constitutional Court’s jurisprudence and academic literature.<sup>296</sup> However, transformation is often a complex concept, which may mean different things to different people. What is not debatable, though, is that the Constitution was developed within a particular historical and social context. Because of the *apartheid* policies of the National Party government, the black majority had been subjected to systemic deprivation and discrimination in accessing basic services such as water, healthcare, housing, food, education and social security.<sup>297</sup> It was also a context of social exclusion, unequal power relations, and material dispossession.<sup>298</sup> As a result, the Constitution was designed to redress this legacy. In that regard, the Preamble to the Constitution declares that the purpose of the Constitution is to ‘establish a society based on democratic values, social justice and fundamental human rights’.<sup>299</sup> It further emphasises, as one of the aims of the Constitution, the need to ‘[i]mprove the quality of life of all citizens and free the potential of each person’.<sup>300</sup>

In the Constitutional Court’s first case on the interpretation of the socio-economic rights provisions in the Constitution, the case of *Soobramoney v Minister of Health, KwaZulu-Natal (Soobramoney)*,<sup>301</sup> the Constitutional Court affirmed that ‘a commitment ... to transform society ... lies at the heart of our new constitutional order’.

There is, however, vigorous debate as to the nature and pace of the changes to the legal, political and economic systems that must be engendered to give effect to the transformative goals of the Constitution.<sup>302</sup> What is particularly noteworthy is that beyond the aspirational ideals articulated in its Preamble, the Constitution neither provides a comprehensive model for a transformed society nor articulates

295 K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *SAJHR* 150.

296 See S Liebenberg *Socio-economic rights: Adjudication under a transformative Constitution* (2010) 25.

297 K Moyo ‘Water as a human right under international human rights law: Implications for the privatisation of water services’ unpublished LLD Thesis, Stellenbosch University, 2013 249.

298 D Moseneke ‘Transformative adjudication in post-*apartheid* South Africa – Taking stock after a decade’ in PC Osode & G Clover (eds) *Law and transformative justice in post-apartheid South Africa* (2010) 27.

299 ‘The Constitution of the Republic of South Africa, 1996’ (as set out in sec 1(1) of the Citation of constitutional Laws Act 5 of 2005) Preamble.

300 As above.

301 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 8.

302 Liebenberg (n 296 above) 28.

the detailed processes for achieving this.<sup>303</sup> What it does is provide 'a set of institutions, rights and values for guiding and constraining processes of social change.'<sup>304</sup>

Kriegler has also expressed a view on the transformative nature of the Constitution, noting that:

... the Constitution is indubitably a transformational document. It is ... a bridge. A bridge between the old and the new. It expressly, at the threshold, sets out that we are to heal the wounds of the past, to build a new society, to lay the foundations and to build on them. And that is inherently then transition .... We negotiated a revolution .... But to believe that by settling the conflict, we had erased the past would be self-delusory. Of course, the past is still with us and the Constitution tells us to heal those wounds and that is part of the transition in which we are engaged.<sup>305</sup>

However, Kriegler points out that the word *transformation* is itself an imprecise one and that often 'people give it the content they want to give it'.<sup>306</sup> For example, transformation 'means something very, very different to people depending upon whether they were oppressed or oppressors in the past'.<sup>307</sup> Nevertheless, Kriegler's view is that transformation as a concept must take its meaning from its context from time to time.<sup>308</sup>

## 5.2 Role of the courts in the transformation process

One of the most vexing questions in post-*apartheid* South Africa centres on a precise articulation of the proper role of courts and the judiciary in a new constitutional democracy, regard being had to the cardinal role courts play in interpreting the law. South Africa's constitutional dispensation provided for a constitutional system in which the Constitution and not Parliament is supreme.<sup>309</sup> The pertinent question relates to the role the judiciary should play in the transformation of society in general and the creation of a new order as envisaged in the Constitution.

During his interview for the Bench in 1994, Kriegler had no illusions about the unique role of the Constitutional Court beyond just interpreting black-letter law, noting that the interim Constitution provided the Court with a broader role to play.<sup>310</sup> This was because the Constitutional Court

303 As above, 29.

304 As above.

305 Kriegler (n 285 above).

306 Bohler-Muller (n 288 above) 5.

307 Kriegler (n 285 above).

308 Bohler-Muller (n 288 above) 5.

309 A Govindjee & M Olivier 'Finding the boundary – The role of the courts in giving effect to socio-economic rights in South Africa' in PC Osode & G Clover (eds) *Law and transformative justice in post-apartheid South Africa* (2010) 79.

310 Kriegler (n 266 above).

would have a final say on societal and political issues of national importance, with inevitable policy implications. These include land redistribution and affirmative action in order to rectify the inequities of the past.<sup>311</sup> Kriegler's view, which is illustrated in his jurisprudential approach as reflected below, was that the new Court's role was 'distinctly different from that of an interpreter of the law pure and simple'.<sup>312</sup> The role of the Court, as famously put by Kriegler in the case of *Fose v Minister of Safety and Security (Fose)*,<sup>313</sup> would be to 'attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of [the supremacy clause].' He believed that the Constitutional Court's internationally-lauded socio-economic rights jurisprudence in the area of health and housing had broken new ground in its clear articulation not only of the negative but also of the positive duties of a state in the realisation of such rights.<sup>314</sup>

In the case of *S v Mhlungu and Others (Mhlungu)*,<sup>315</sup> one of the earliest cases to be adjudicated by the Constitutional Court under the interim Constitution, Kriegler was quite emphatic about the transformation envisaged under that document, which he christened a 'metamorphosis'.<sup>316</sup> He pointed to the 'universal consensus that the Constitution ushered in the most fundamental change in the history of our country'.<sup>317</sup> He further emphasised the new framework in which 'the Constitution is the supreme law of the land and binds all legislative, executive and judicial organs of state'.<sup>318</sup> In *S v Dlamini and Others (Dlamini)*,<sup>319</sup> a decision handed down in March 1999, Kriegler further emphasised the transformative impact of the Bill of Rights on every aspect of South African law, noting that the advent of the Bill of Rights entailed a reappraisal of statutory and common law 'in the light of the new constitutional norms heralded by that transition'.<sup>320</sup>

311 As above.

312 University of the Witwatersrand (n 284 above) 25.

313 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94. In this case, the Constitutional Court had to determine the meaning of 'appropriate relief' as set out in section 7(4) of the interim Constitution as a result of the applicant's claim for 'constitutional damages' for infringement of the right not to be tortured. The Constitutional Court held that the award of monetary damages would be inappropriate relief in the particular circumstances of the case and the appeal was dismissed.

314 Bohler-Muller (n 288 above) 5, 15.

315 *S v Mhlungu and Others* 1995 (3) SA 867. The case involved the proper interpretation of section 241(8) of the interim Constitution, which dealt with criminal proceedings that had commenced before the enactment of the interim Constitution in 1993. The Constitutional Court had to determine the meaning of 'pending' and whether the effect of this provision rendered the Constitution inapplicable to the case in question.

316 As above, para 69.

317 As above.

318 As above.

319 *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC).

320 *Dlamini* (n 319 above) para 2.



These curial declarations by Kriegler display an acute awareness that it was no longer business as usual. The adoption of the new Constitution was analogous to a ‘negotiated revolution’, the Constitution being ‘indubitably a transformative document’.<sup>321</sup> This entailed a re-evaluation of all law, including common law, statutory law, court procedures, style and language in light of the new Constitution, and in particular the Bill of Rights.

One of the clearest signals that the Constitution sought a complete and definitive break with the past and ushered in significant changes in how we think about rights was the inclusion of an expansive set of justiciable socio-economic rights. Rather than viewing the constitutionally guaranteed rights contained in the Bill of Rights as a check on democracy, Kriegler’s jurisprudential approach showed his appreciation of the significance of the Bill of Rights as a vehicle for enabling broad substantive transformative social change in South Africa. He acknowledged, however, the limitations in effecting social change through law only, emphasising the importance of political will in any transformative endeavour, noting that one cannot change ‘societal structures and its essentials solely through court cases. Absent the political will, you really can do very little.’<sup>322</sup> He gave the example of the breakthrough by the Treatment Action Campaign in its access to health care as a ‘combination of public opinion, advocacy, public demonstrations, media exposure – and litigation – and the law: working hand-in-hand.’<sup>323</sup>

### 5.3 Demographic transformation and the judiciary

Linked to the transformation debate is how representative the judiciary is or should be, taking into account the national demographic makeup of a country like South Africa. Kriegler has expressed some views on the hotly contested issue of suitability for appointment to the judiciary, an issue that to date is the subject of considerable debate.<sup>324</sup> Section 174 (1) of the Constitution provides that ‘[a]ny appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer.’ Additionally, section 174(2) of the Constitution enjoins the Judicial Services Commission (JSC) to ensure that ‘[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa *must be considered* when judicial officers are appointed’ (emphasis added).

321 Kriegler (n 285 above).

322 Bohler-Muller (n 288 above) 22.

323 As above, 23 (emphasis added).

324 See J Klaaren ‘Transformation of the judicial system in South Africa, 2012–2013’ 2015 (47) *The George Washington International Law Review* 481; L Siyo and JC Mubangizi ‘The independence of South African judges: A constitutional and legislative perspective’ 2015 (18) *Potchefstroom Electronic Law Journal* 825; N Ntlama *The transformation of the South African judiciary: A measure to weaken its capacity?* <http://www.nyulawreview.com/wp-content/uploads/sites/16/2014/10/Ntlama.pdf> (accessed 15 May 2017); Kriegler (n 285 above).

During his interview for the Constitutional Court in 1994, and upon being probed on the necessity of judicial experience for aspiring Justices, Kriegler explained that he never thought it essential that all of the members of the Constitutional Court should necessarily have that kind of experience.<sup>325</sup> He pointed out that ultimately it was a 'question of cross-pollination and mutual enrichment on the bench' and that no one should be disqualified if s/he did not have judicial experience, stating that '[i]f you do have that kind of experience it can only be to the good, but I do not regard it as essential.'<sup>326</sup> Relatedly, his view was that the Constitutional Court should be as broad as possible in its composition. This would enable it 'to draw on the widest possible pool of knowledge.'<sup>327</sup> Kriegler did point out, however, that it was never the function of a court to be representative of all the interest groups in a country. Rather,

... the court should be so composed that its members are alert to, aware of sensitive to all of those diverse interests. I think it is, you are looking more at the quality of the person that you are nominating than at the selection or the mix of persons that you put together. I think that you can have in one outstanding judicial officer all of the qualities and all of the sensibilities and you could put together a body of 11 that would have none of them.<sup>328</sup>

In a 2009 interview with the *Mail and Guardian* newspaper, Kriegler acknowledged that for historical reasons, the legal profession in the country had traditionally favoured white citizens and that undoubtedly there was a need for radical change.<sup>329</sup> He cautioned, however, against knee-jerk reaction to the issue, emphasising the need to realise that one was dealing with a developmental problem and that 'quick fixes lead to quick problems'<sup>330</sup> and pointing out that the world over, the bar (which traditionally feeds the Bench) was drawn from the middle-class elite.<sup>331</sup> Consequently, if one wished to change the system, according to Kriegler, there was a need to positively promote the candidature to the profession from underrepresented groupings.<sup>332</sup>

At a public lecture at the University of the Witwatersrand delivered on 18 August 2009 (Wits lecture), Kriegler acknowledged that it was imprudent to have a judiciary that was 'manifestly unrepresentative of the society which it is supposed to serve',<sup>333</sup> but proceeded to state that:

The harsh conclusion to which I have come is that the Judicial Service Commission, in adhering too rigidly to its policy of preferring transformation

325 Kriegler (n 266 above).

326 As above.

327 As above.

328 As above.

329 'Kriegler saddles up for rough ride' *Mail & Guardian* 11 September 2009 6.

330 As above.

331 As above.

332 As above.

333 Kriegler (n 285 above).

over appropriate qualification, has not only misapplied its substantive selection power but has done so in a manner that is unacceptable in a society based on human dignity, equality and respect for human rights.<sup>334</sup>

He further bemoaned the practice of a 'Judicial Service Commission that is appointing more and more judges on purely political grounds in order to control the judiciary through party hacks and yes-men and deployed cadres.'<sup>335</sup>

Kriegler's interpretation of section 174(1) of the Constitution was that it instructs the JSC to appoint people who are appropriately qualified as a precondition, and such a criterion should take precedence over other considerations, such as demographic representation. Although the Constitution explicitly states that the transformational criterion of race and gender balance must be considered in judicial appointments, Kriegler argued that the primary and essential requirement was that appointees had to be appropriately qualified as the main criterion, ahead of the 'race and gender composition' criterion.<sup>336</sup> In his view, '[n]ow these two essential factors, the one absolute (appropriately qualified) and the other discretionary (race and gender composition), have been turned on their heads.'<sup>337</sup> Kriegler further argued that:

... by depriving the High Court Bench of the services of these people the JSC has impoverished the judiciary and the country. In adhering too rigidly to its policy of preferring transformation over appropriate qualification, the JSC has not only misapplied its substantive selection power but has done so in a manner that is unacceptable in a society based on human dignity, equality and respect for human rights. If the independence of the judiciary is to be preserved, this misguided transformation, this stalking horse for racial animosity, will have to be confronted.<sup>338</sup>

It is clear from this statement that the nub of Kriegler's interpretation is that the requirement for race and gender balance is a guide, and not a prerequisite for appointment.

The Constitution is clear that the need to ensure race and gender composition is an essential requirement for appointment to the Bench. Kriegler views the race and gender criterion as having opened a loophole for the JSC to appoint 'judges on purely political grounds in order to control the judiciary through party hacks and yes-men.'<sup>339</sup> Kriegler's concerns appear to be predicated on the need to appoint qualified, competent, fit and proper women and men to the courts. Race and gender

334 As above.

335 Bohler-Muller (n 288 above) 24.

336 Kriegler (n 285 above).

337 As above.

338 As above.

339 Bohler-Muller (n 288 above) 24.

balance should therefore not be abused through appointing candidates of questionable competence or ethics.

It is, however, important to note that the requirement to consider race and gender as a criterion in judicial appointments was included in the Constitution precisely to address the grotesque race and gender imbalances in the composition of the country's judiciary. Kriegler's interpretive approach, though understandable, was rightly questioned.<sup>340</sup> Since black people and women are previously disadvantaged, section 174(2) of the Constitution cannot be interpreted without due regard to the equality clause enshrined in section 9 of the Constitution as well as to employment equity legislation. The latter seeks to address, through the utilisation of affirmative action measures, the imbalances occasioned by the deliberate exclusion of black people and women in key endeavours of life. It is therefore important for the JSC to ensure that the candidates whom it recommends for appointment to the judiciary are 'appropriately qualified' (minimally, have a law degree) and 'fit and proper' (minimally, do not have a criminal record and are persons of demonstrable integrity) and that consideration is given to race and gender composition, *all criteria weighed equally*, for such an exercise of public power to pass constitutional muster.<sup>341</sup>

#### 5.4 Separation of powers

Schedule 4 of South Africa's 1993 interim Constitution contained thirty-four Constitutional Principles (CPs) with which the text of the final Constitution was required to comply. As a result, and as part of the constitution-making process, the first Bench of the Constitutional Court had to certify that the resultant Constitution adhered to the CPs. CP IV is the key provision that provided for the separation of powers. It stipulated that '[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.' In the *First Certification Judgment*,<sup>342</sup> the Constitutional Court held that CP IV required a separation of powers between the legislature, the executive and judiciary though it did not prescribe what form that separation should take, and in that regard 'the CPs must not be interpreted with technical rigidity.' Practically, this entails that the legislative branch is responsible for enacting legislation, the executive branch for developing and implementing policy and legislation, and the judiciary for interpreting the law. Importantly, mutual control and accountability is established through

340 Siyo & Mubangizi (n 324 above) 825.

341 See section 174(1) and (2) of the Constitution on the criteria for appointment to the judiciary.

342 *First Certification judgment* (n 293 above).

a system of checks and balances, of which judicial review of legislative or executive action is an important component.<sup>343</sup>

Given South Africa's tortu(r)ous history and social circumstances, courts are often called upon to adjudicate on highly contentious matters, with significant political and policy implications. An important issue in constitutional adjudication is normally the question of correct interpretation and application of the doctrine of separation of powers, particularly in cases that have significant political and policy implications. The adjudication of socio-economic rights is a case in point, where a variety of polycentric concerns tends to arise.<sup>344</sup> The orthodox argument was that judicial adjudication of socio-economic rights would compel the judiciary 'to encroach upon the proper terrain of the legislature and executive', particularly by 'dictating to the government how the budget should be allocated'.<sup>345</sup>

In the South African context, Kriegler has acknowledged that the 'the interaction between executive and legislature and judiciary has been an acute issue for the Constitutional Court from day one, particularly as we did not have a justiciable bill of rights in the past'.<sup>346</sup> He has called for a cautious approach, arguing that it is not the function of the judiciary to descend into detail on issues.<sup>347</sup> In his view, the Constitutional Court's function is to ensure that legislative and executive conduct is consistent with constitutional prescripts.<sup>348</sup> He further adds that the Constitutional Court is probably more conservative than many of the high courts in other jurisdictions.<sup>349</sup> This is reflected in its reluctance to get involved in areas of policy 'that are not the judiciary's job'.<sup>350</sup> Kriegler's view is that it should never be part of the remit of a court of law, in particular an apex court, 'to be seen or to aspire to being seen to be activist'.<sup>351</sup> Commenting on the competence of courts to determine the quantity of water as part of interpreting the right of access to water in the Constitution as adjudicated in the *Mazibuko and Others v City of Johannesburg*<sup>352</sup> case, for example, Kriegler argued that it was not part of the Constitutional Court's mandate 'to get down into that kind of nittygritty detail'.<sup>353</sup>

343 Liebenberg (n 296 above) 66.

344 See *Soobramoney* (n 301 above) & *Mazibuko and Others v City of Johannesburg and Others* 2010 4 SA 1 (CC).

345 *First certification* judgment (n 293 above).

346 Bohler-Muller (n 288 above) 5-6.

347 As above, 1.

348 As above, 1-2.

349 As above.

350 As above, 5-6.

351 As above.

352 *Mazibuko and Others v City of Johannesburg and Others* 2010 4 SA 1 (CC). The *Mazibuko* case was very significant in that it was the first South African case in the Constitutional Court in which litigants explicitly sought enforcement of their constitutional right of access to sufficient water in terms of section 27(1)(b) of the Constitution.

353 Bohler-Muller (n 288 above) 7.

Kriegler is, however, clear in his view that the practical application of the doctrine should not result in judicial timidity. Ultimately, the standard should be the Constitution. This is because a judicial officer within the South African context derives her or his power from the Constitution. In that regard, the judge's job in terms of the Constitution is to interpret and apply the Constitution. If that brings a judge into confrontation with other branches of the state, 'that is the essence of the separation of powers recognised in our Constitution',<sup>354</sup> as he asserts, 'a proper judicial correction prevents the executive or the legislature from making mistakes.'<sup>355</sup>

On the frequent tension between the different branches of government, in particular the executive and the judiciary, Kriegler has argued that such tension is normal in a constitutional state recognising the separation of powers.<sup>356</sup> In his view, such tension is an essential characteristic of separation of powers functioning properly. Nevertheless, '[t]here has to be a give and take, a respect, a deference, a judicial restraint and a protection and respect for the judiciary's independence.'<sup>357</sup>

In section 7, the Constitution clearly enjoins the state to 'respect, protect, promote and fulfil all the rights in the Bill of Rights.' Additionally, section 3 makes it crystal clear that the Constitution is the supreme law of the Republic; it follows that any law or conduct inconsistent with the Constitution is invalid. The doctrine of constitutional supremacy thus enjoins South African courts to apply the Constitution and the law 'impartially and without fear, favour or prejudice.'<sup>358</sup>

In *Fose*, as indicated above, Kriegler described the role of courts in crafting remedies for constitutional violations as an 'attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of [the supremacy clause]'.<sup>359</sup> The implications are that, in its adjudicative approach, a court is obliged to consider whether the state has complied with its constitutional obligations. This clearly calls into question any interpretation of the separation of powers doctrine predicated on inflexible functional demarcations between the three branches of government. As noted above, the Constitutional Court made it abundantly clear in the *First Certification* judgment that the Constitution does not envisage bright-line boundaries between the three branches of government.<sup>360</sup> The standard is therefore the Constitution, under and from which a judge derives her or his power.

354 University of the Witwatersrand (n 284 above) 24.

355 As above.

356 Kriegler (n 285 above).

357 As above.

358 Section 165(2) of the Constitution.

359 *Fose* (n 313 above) para 94.

360 *First Certification* judgment (n 293 above) para 111.

## 5.5 Independence and accountability of the judiciary

Section 165 of the Constitution vests judicial authority in the courts, rendering them ‘independent and subject only to the Constitution and the law’. Interference with the functioning of the courts by other organs of state is expressly prohibited. In *Bernstein v Bester (Bernstein)*,<sup>361</sup> the Constitutional Court identified the independent authority of the judiciary to enforce the Constitution as a key ingredient of a constitutional state.

The independence of the judiciary is one of the themes about which Kriegler has publicly expressed his views, both in and outside the Court. In the case of *S v Mamabolo (Mamabolo)*,<sup>362</sup> Kriegler deliberated on the position of the judiciary in relation to other branches of government. The case involved the issuing of a press release by the Department of Correctional Services in which it publicly stated its disquiet regarding the granting of bail in a case involving the late Eugene Terreblanche. The judge who granted bail then sought an explanation in this regard and convicted and sentenced the applicant for the crime of scandalising the court.<sup>363</sup> Writing for the majority, Kriegler held that while the common law crime of scandalising the court limits freedom of expression, the limitation was justifiable provided that the crime was appropriately and narrowly defined with the aim of preserving confidence in the administration of justice. The Court concluded that the conviction and sentence had violated the accused’s rights.<sup>364</sup>

Related to the independence of the judiciary is the concern about the accountability of judges, a natural corollary of the fact that judges are not subjected to democratic processes such as elections but are appointed. In that regard, Kriegler has forcefully argued for the need for balance between the independence of the judiciary, on one hand, and the imperative for judges to be accountable, on the other, pointing out that:

[Judicial] independence does not mean unaccountability. Without doubt judges, who are paid from the public purse to serve their country and its people, are not free agents, privateers at liberty to do as they wish without being answerable for their actions (or, more often, lack thereof).<sup>365</sup>

361 *Bernstein v Bester* 1996 (2) SA 751 (CC) para 51. In this case, the Constitutional Court had to determine whether sections 417 and 418 of the then Companies Act 61 of 1973, which provided for the examination of persons and the disclosure of documents as to the affairs of a company, was consistent with sections 8 (right to equality), 11 (right to freedom and security), 13 (right to privacy) and 24 (right to fair administrative action) of the interim Constitution.

362 *S v Mamabolo* 2001 (3) SA 409 (CC).

363 As above.

364 As above, para 16.

365 J Kriegler ‘The rule of law in post-colonial Africa: A British legacy? Second international rule of law lecture’ *Bar of England and Wales, Gray’s Inn Hall* (3 December 2008).

In the process of delivering the majority opinion, Kriegler emphasised the importance of judicial independence, pointing out that the judiciary was ‘the arbiter in disputes between organs of state’,<sup>366</sup> and a ‘watchdog over the Constitution and its Bill of Rights.’<sup>367</sup> Significantly, he emphasised that ‘[i]n our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially.’<sup>368</sup> Kriegler further declared that ‘[u]nder the doctrine of separation of powers it [the judiciary] stands on an equal footing with the executive and the legislative pillars of state.’<sup>369</sup>

Kriegler’s view is clearly that judicial independence is fundamental to democracy and to a constitutional state such as South Africa. It hardly bears repeating that in the fulfilment of their judicial functions, judges should be in a position to execute their mandate impartially and independently, without undue influence.<sup>370</sup> It should be noted that the independence of the judiciary is intertwined with the doctrine of separation of powers, which is an important ingredient of any polity aspiring to the status of a constitutional democracy. The judiciary plays a cardinal role in ensuring that other branches of government fulfil their constitutional and legislative obligations, a role which demands that the courts be immunised from undue influence and interference from the executive, the legislature and powerful private interests.

## 5.6 Equality and dignity

### 5.6.1 Equality

Inequality is often cited as the biggest challenge facing development and transformation in post-*apartheid* South Africa.<sup>371</sup> Poverty and income inequality in South Africa have strong racial, gender and spatial dimensions. In the light of South Africa’s history of systematic discrimination, the importance of the principle of equality in South Africa is reflected in the very first section of the Constitution.<sup>372</sup> Additionally, the Constitution provides for a justiciable Bill of Rights. Section 7(1) of the Constitution affirms that the Bill of Rights is ‘a cornerstone of democracy in South Africa and affirms the democratic values of human dignity, equality and freedom’. Furthermore, section 39 of the Constitution

366 As above.

367 As above.

368 As above.

369 As above.

370 Sec 165(3) of the Constitution.

371 Section 1 of the Constitution cites the achievement of equality as one of the founding values of the South African state.

372 As above.



expressly requires the courts to promote the constitutional values of human dignity, equality and freedom when interpreting the Bill of Rights.

Kriegler has referred to human dignity, equality and freedom as 'conjoined, reciprocal and covalent values' which are 'foundational' to South Africa.<sup>373</sup> He has also freely expressed his views on equality, which is both a right and a value animating and underpinning all the rights protected under the Constitution. In the case of *President of the Republic of South Africa v Hugo (Hugo)*,<sup>374</sup> Kriegler explained that the Constitution 'is primarily and emphatically an egalitarian document'<sup>375</sup> and that:

... in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred.<sup>376</sup>

In *Du Plessis v De Klerk (Du Plessis)*,<sup>377</sup> Kriegler observed that '[o]ur constitution aims at establishing freedom and equality in a grossly disparate society'.<sup>378</sup> On the relationship between equality and the limitations clause in section 36, Kriegler elaborated in *Hugo* that 'section 36 explicitly requires proportionality. Therefore, the law should impair the right to equality no more than is necessary to accomplish the desired

373 *Mamabolo* (n 362 above) para 41.

374 *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708. In this case, the Constitutional Court had to decide the constitutionality of a presidential pardon in which a number of prisoners were released in terms of the decree, including mothers of minor children under the age of 12. Hugo, a single father of a son below the age of 12, challenged the pardon on the grounds that it unfairly discriminated on the basis of sex and gender. A key issue that the Constitutional Court canvassed was whether a short-term benefit afforded to a historically disadvantaged group – the remission of imprisoned mothers with children under 12 years of age – outweighed the perpetuation of a gender stereotype – that mothers bear more responsibility for child-rearing than fathers in South African society. Although the majority of the Constitutional Court was of the view that such a generalization was one of the chief causes of women's inequality in South African society, it nevertheless found the challenged decree to be justified on the basis that it was aimed at benefiting vulnerable groups which historically had borne the brunt of unfair discrimination. In a dissenting opinion, Kriegler's view was that alleviating the historical burden of a small group of women benefiting from the pardon could not outweigh concerns regarding the long-term effects of judicially endorsing an unjustifiable gender stereotype against all women in the country. Kriegler held that regardless of the veracity of the stereotype, by releasing mothers of minor children based on such a generalisation, the decree was nevertheless perpetuating an unfortunate stereotype which was at the core of women's inequality in society. Kriegler held that the benefits accorded to a few women were outweighed by the serious disadvantage of perpetuating a stereotype to society as a whole and held the presidential pardon to constitute unfair discrimination.

375 As above, para 74.

376 As above.

377 *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC). The case involved a defamation suit against a newspaper's journalists and publishers. One of the key issues the Constitutional Court had to decide concerned the applicability of the Bill of Rights between private parties.

378 As above, para 147.

objective.<sup>379</sup> In his view, if there are other, less restrictive measures possible to achieve the same objective, section 36 does not save the violation of the equality clause.<sup>380</sup>

Kriegler's dissent in the *Hugo* case is worth noting. Like the majority, he held that the President had violated the equality provisions of the Constitution by distinguishing between classes of parents on the basis of their gender.<sup>381</sup> However, contrary to the majority ruling, he concluded that the presumption of unfairness in 'attaching that distinction has not been rebutted.'<sup>382</sup> On considering women as the primary care givers of young children, Kriegler argued that:

[this phenomenon] is a root cause of women's inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so vehemently condemns .... One of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choices they make about their own identities. Reliance on the generalisation that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely.<sup>383</sup>

In his view, 'there is also more diffuse disadvantage when society imposes roles on men and women, not by virtue of their individual characteristics, qualities or choices, but on the basis of predetermined, albeit time-honoured, gender scripts.'<sup>384</sup>

Kriegler's dissent in *Hugo* is noteworthy for its emphasis on equality – almost feminist in its tone – as entailing the full and equal enjoyment of all rights and freedoms as defined in section 9(2) of the Constitution. He emphatically rejected the deployment of stereotypes which caricature women as caregivers and mothers, which clearly was an affront to the egalitarian ethos of the Constitution. The intersection between equality and gender is particularly important in the context of transforming the 'patterns of gendered disadvantage and inequality which are deeply inscribed [in] South African society.'<sup>385</sup> In particular, the disadvantaged position of women often arises from the perpetuation of certain gendered social roles, as highlighted in Kriegler's dissenting judgment in *Hugo*.

379 *Hugo* (n 374 above) para 74.

380 As above, para 77.

381 As above, para 32.

382 As above.

383 As above, para 80.

384 As above, para 83.

385 Liebenberg (n 296 above) 208.

### 5.6.2 Dignity

Section 39(1)(a) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum ‘must promote the values that underlie an open and democratic society based on human dignity, equality and freedom’. The Constitutional Court, however, has shied away from constructing a hierarchy of values. Nevertheless, there is no doubt that human dignity more often than not serves as a point of reference. Thus, for example in the case of *S v Makwanyane*,<sup>386</sup> the Constitutional Court declared that ‘[r]espect for life and dignity ... are values of the highest order under our Constitution.’<sup>387</sup>

In the case of *Mamabolo* discussed above, Kriegler further emphasised the importance of the right to dignity as a cardinal right, pointing out that:

The Constitution, in its opening statement and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity.<sup>388</sup>

In *Ex parte Minister of Safety and Security and Others: in Re S v Walters and Another (Walters)*,<sup>389</sup> Kriegler held, for a unanimous court, ‘that the right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution.’<sup>390</sup> He further added that ‘[c]ompromise them and the society to which we aspire becomes illusory. It therefore follows that any significant limitation of any of these rights, would for its justification demand a very compelling countervailing public interest.’<sup>391</sup>

Kriegler’s interpretive approach outlined above underscores the important role that he attaches to the South African society’s founding values of equality and dignity as reflected in the Constitution. His dissent in *Hugo*, in particular, emphasises a substantive, as opposed to a formal, approach to both the right and value of equality, an approach in line with the transformative ethos of the Constitution. Giving meaning and

386 *S v Makwanyane* 1995 (3) SA 391 (CC). In this case, the Constitutional Court was called upon to decide on the constitutionality of the death penalty. The Constitutional Court declared section 277 (1)(a), (c), (d), (e) and (f) of the Criminal Procedure Act 51 of 1977 and all corresponding provisions of other legislation permitting the application of capital punishment as a form of punishment as being inconsistent with the interim Constitution.

387 As above, para 111.

388 *Mamabolo* (n 362 above) para 41.

389 *Ex parte Minister of Safety and Security and Others: in Re S v Walters and Another* 2002 (4) SA 613 (CC).

390 As above, para 28.

391 As above.

substance to the foundational values of equality, freedom and dignity is important if we are to realise the transformative ethos of the Constitution.

## 5.7 Horizontal application of the Bill of Rights

The horizontal application of human rights is a metaphor used to describe the application of human rights between private individuals *inter se*. The Constitution expressly provides for the horizontal application of the Bill of Rights.<sup>392</sup> Section 8(1) provides that the Bill of Rights applies to all law and binds all organs of the state.<sup>393</sup> Section 8(1) further provides a specific description of the circumstances in which the Bill of Rights binds a private party.<sup>394</sup> Section 8(2) of the Constitution provides that a provision in the Bill of Rights 'binds a natural and juristic person if, and to the extent that, it is applicable taking into account the nature of the right and the nature of any duty imposed by the right.' However, to date, the courts have not been consistent in interpreting, nor has a clear methodology emerged to guide, the horizontal application of the rights in the Bill of Rights.<sup>395</sup>

During his interview for the Court in 1994, Kriegler foresaw some of the critical issues with which the future Constitutional Court would engage.<sup>396</sup> He anticipated that one of the most vexed issues in constitutional interpretation, the horizontal application of the new Bill of Rights, was one such issue. He explained at the time that:

The one issue that I saw at the time when I studied it as being a potential problem, was whether the Bill of Rights is vertical only or horizontal in my terminology, whether it applies only as between State and citizen or whether it applies as between citizens and private bodies and citizens *inter se*.<sup>397</sup>

The majority decision in *Du Plessis*<sup>398</sup> held that the Bill of Rights contained in the interim Constitution was not intended to have a general direct horizontal application. The majority held that the Bill of Rights was only indirectly horizontally applicable. Only Kriegler, with whom Didcott J concurred, held in a dissenting judgment that the Bill of Rights was indeed capable of direct horizontal application.<sup>399</sup>

392 Liebenberg has defined 'horizontal application of the Bill of Rights' as referring to the applicability of the Bill of Rights in relations between private parties. See Liebenberg, 'Adjudicating socio-economic rights under a transformative constitution' in M Langford (ed) *Socio-economic rights: Emerging trends in international and comparative law* (2009) 78.

393 See D Bilchitz 'Corporate law and the constitution: Towards binding human rights responsibilities for corporations' (2008) 124 *South African Law Journal* 773-783.

394 Liebenberg (n 296 above) 322.

395 Liebenberg (n 296 above) 321.

396 Kriegler (n 266 above).

397 As above.

398 *Du Plessis* (n 377 above).

399 As above.

Kriegler prefaced his dissent by pointing out that '[o]ur past is not merely one of repressive use of state power. It is one of persistent, institutionalized subjugation and exploitation of a voiceless and largely defenceless majority by a determined and privileged minority'.<sup>400</sup> In that regard, 'when the Preamble speaks of "citizenship in a sovereign democratic constitutional state" the emphasis immediately falls on racial equality.'<sup>401</sup>

According to Kriegler, 'the Constitution is elevated to supremacy over all law, and then all organs of state are enjoined to honour and enforce that supremacy'.<sup>402</sup> Furthermore,

[t]he Constitution promises an 'open and democratic society based on freedom and equality', a radical break with the 'untold suffering and injustice' of the past .... No one familiar with the stark reality of South Africa and the power relationships in its society can believe that protection of the individual only against the state can possibly bring those benefits.<sup>403</sup>

Kriegler proceeded to hold that the true debate was not one of verticality versus horizontality.<sup>404</sup> Rather, the focus should be on the manner of the horizontal application of the Bill of Rights. Hence it did not matter whether such application was direct or indirect.<sup>405</sup> Relying on the interpretation of section 35(3) of the interim Constitution, he argued that all the courts were enjoined, in interpreting statutory law as well as in applying and developing common law and customary law, to advance the purpose of the Constitution.<sup>406</sup>

It is particularly noteworthy that before the issue was clarified in the 1996 Constitution, Kriegler argued in his dissenting judgment in *Du Plessis* that the Bill of Rights in the interim Constitution was directly applicable to private relationships. It should be noted that liberalisation and privatisation have resulted in the increased provision and management of goods and services such as water, healthcare, social security and assistance, and education by private entities. This has resulted in the concomitant prevalence of private actors in human rights-sensitive goods and services.<sup>407</sup> The express provision made in the Constitution for the horizontal application of the Bill of Rights, as noted by Liebenberg, no doubt poses a challenge to the public/private divide in South Africa's legal tradition.<sup>408</sup> The possibility of the horizontal application of rights enshrined in the Bill of Rights 'invites a critical re-examination of the

400 As above, para 125.

401 As above.

402 As above, para 128.

403 As above.

404 As above, para 119.

405 As above.

406 As above, para 147.

407 Moyo (n 297 above) 288.

408 Liebenberg (n 299 above) 61.

network of private law rules and doctrines',<sup>409</sup> thereby supporting the egalitarian and transformative ethos of the Constitution so eloquently – as correctly articulated by Kriegler in his dissenting judgment in *Du Plessis*.

## 5.8 Reconciliation of criminal procedure with the Bill of Rights

One of Kriegler's key contributions to our understanding of the Constitution is in the field of criminal procedure, which was one of his areas of expertise even before his appointment to the Bench. He also expressed passionate views on the importance of reconciling criminal procedure with the Bill of Rights, arguing that 'the quality of a society is in the criminal courts where the people are at their most exposed and the vast majority of our citizenry are without the benefit of legal representation.'<sup>410</sup> As a result, 'the fibre, the spirit, the philosophy of the criminal procedure system is of the utmost importance' to any society.<sup>411</sup> This reflects the humanistic nature of Kriegler's judgments.

In the case of *Key v Attorney-General, Cape Provincial Division and Another*,<sup>412</sup> Kriegler highlighted the potential tension between the criminal justice system and the Bill of Rights, pointing out that:

In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale.<sup>413</sup>

In his constitutional interpretive approach, Kriegler has emphasised the imperative need to humanise a criminal justice system that had been dehumanised in large measure by virtue of the country's legacy. South Africa's *apartheid* history clearly demonstrates that 'the criminal justice system can be used to impose extra-curial punishments.'<sup>414</sup> These included 'vague statutory crimes which gave the state sweeping scope to investigate, charge and prosecute opponents of the governing party'.<sup>415</sup> The other arsenal used by the *apartheid* state to criminalise people's lives included legislative enactments that allowed attorney-generals to refuse bail as well as to impose invasive bail conditions in cases where bail was granted.<sup>416</sup>

409 As above.

410 Kriegler (n 266 above).

411 As above.

412 *Key v Attorney-General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC).

413 As above, para 13.

414 *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 23.

415 As above.

416 As above.

In *Sanderson v Attorney-General, Eastern Cape (Sanderson)*,<sup>417</sup> Kriegler emphasised three protected interests: liberty; security; and trial-related interests. In his view, the right to a trial within a reasonable time sought to render the criminal justice system fair by reconciling the tension between the presumption of innocence and the publicity of trials.<sup>418</sup> The Constitutional Court acknowledged that although a criminally accused person is presumed innocent, s/he is nevertheless punished before conviction, and in some cases, such as during pre-trial incarceration, the 'punishment' is severe.<sup>419</sup> The constitutional imperative is that a trial must be held within a reasonable time. According to Kriegler, it makes sense that a substantively fair trial would include a provision that minimises non-trial related prejudice suffered by an accused.<sup>420</sup>

In *Wild v Hoffert (Wild)*<sup>421</sup> Kriegler held that the state is at all times and in all cases obligated to ensure that accused persons are not exposed to unreasonable delays in the prosecution of the case against them.<sup>422</sup> This, in turn, means that both state prosecutors and presiding officers must pay particular regard to their constitutional duty to foreclose any infringement of the right to a speedy trial.<sup>423</sup>

The 'fibre, the spirit, the philosophy of the criminal procedure system is of the utmost importance' to any society<sup>424</sup> as it is in the criminal courts where the less privileged and more vulnerable members of society are likely to experience the workings of the legal system.

The above jurisprudential analysis clearly shows that Kriegler's adjudicative approach is a practical exhibition that the human rights of dignity, equality, and liberty are designed to protect accused persons against being emasculated of their rights. The transformative ethos ushered in by the core constitutional values of democracy, human dignity, equality, advancement of human rights and freedoms necessitates that such values must animate and undergird trial and non-trial related aspects of criminal trials.

417 As above. This case involved an appeal against the rejection of a contention that the applicant, an accused in criminal proceedings, had not been brought to trial within a reasonable time after having been charged as provided for in terms of section 25(3)(a) of the Interim Constitution.

418 As above, para 24.

419 As above.

420 As above.

421 *Wild and Another v Hoffert NO and Others 1998 (3) SA 695 (CC)*. This case involved an appeal against a judgment of the High Court in which the applicants were refused constitutional relief for unreasonable delay in criminal proceedings. For a unanimous court, Kriegler dismissed the appeal on the basis that the relief prayed for (permanent stay of prosecution) was inappropriate because there was no trial-related prejudice or other extraordinary circumstances present in the case.

422 As above, para 26.

423 As above, para 11.

424 Kriegler (n 266 above).

## 5.9 Use of comparative international and regional norms, jurisprudence and practice

Section 39(1)(b) of the Constitution requires that, when interpreting the Bill of Rights, a court ‘must consider international law’. This provision doubtlessly signals the Constitution’s openness to the norms and values of the international community as enshrined in international treaties and customary international law. Furthermore, section 39(1)(c) of the Constitution permits the courts to consider foreign law when interpreting the Bill of Rights. The difficulties of drawing on comparative constitutional law in the interpretation of a national constitution are well known and Kriegler has been at pains to emphasise such dangers in a number of cases.

On whether the Constitutional Court has adequately utilised international and comparative sources in its interpretive approach, Kriegler has pointed out that ‘the Court is much more aware ... and taken more note of foreign jurisprudence.’<sup>425</sup> Kriegler is, however, sceptical about the spectre of lower courts immersing themselves in comparative law in their adjudication, arguing that the ‘heady stuff’ should be left to the senior courts.<sup>426</sup>

In *Du Plessis*,<sup>427</sup> Kriegler warned against the uncritical resort to, and transplantation of, foreign law in constitutional interpretation. He counselled that although it is always instructive to see how other countries have arranged their constitutional affairs, nevertheless such an exercise should be conducted with extreme caution.<sup>428</sup> Consequently, any survey of comparative law should be ‘conducted from the point of vantage afforded by the South African Constitution, constructed on unique foundations, built according to a unique design and intended for unique purposes.’<sup>429</sup> It necessarily follows that regard to applicable public international law and comparable law is not a license ‘to a wholesale importation of doctrines from foreign jurisdictions.’<sup>430</sup>

In an earlier case, *Bernstein*,<sup>431</sup> although careful not to direct his misgivings against fellow Justices, Kriegler, in a minority judgment, railed against what he perceived as the extensive and uncritical use of comparative law made by counsel in argument.<sup>432</sup> He pleaded for a more nuanced use of comparative law.<sup>433</sup> Kriegler’s view was that ‘the subtleties

425 Bohler-Muller (n 288 above) 6-7.

426 As above.

427 *Du Plessis* (n 377 above) para 127.

428 As above.

429 As above.

430 As above, para 144.

431 *Bernstein* (n 361 above) para 133.

432 As above.

433 As above, para 132.



of foreign jurisdictions, their practices and terminology require more intensive study'<sup>434</sup> and this rendered 'analogies dangerous without a thorough understanding of the foreign systems.'<sup>435</sup> Kriegler's concession to the use of foreign jurisprudence was:

[in cases where] a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision .... But that is a far cry from blithe adoption of alien concepts or inapposite precedents.<sup>436</sup>

In *Fose*,<sup>437</sup> the Constitutional Court Justices disagreed about the appropriateness of referring to foreign law. In that case, the plaintiffs, claiming police abuse, had brought an action seeking constitutional damages for infringement of their rights to dignity, freedom and security of the person, privacy, and criminal process. The Constitutional Court, noting that the plaintiffs placed considerable reliance on foreign law, considered how other jurisdictions had adjudicated on similar issues. Justice Ackermann provided lengthy descriptions of the law in the United States, Canada, and the United Kingdom, among others.<sup>438</sup> While agreeing with the outcome, Kriegler made known his disquiet with the main judgment's extensive references to foreign law. In his concurring opinion, Kriegler expressed the view that Justice Ackermann had ranged too broadly, declaring that 'I decline to engage in a debate about the merits or otherwise of remedies devised by jurisdictions whose common law relating to remedies for civil wrongs bears no resemblance to ours and whose constitutional provisions have but passing similarity to our [relevant section].'<sup>439</sup>

In a case (*Dlamini*) relating to the granting of bail, Kriegler again pointed out that in considering statutory provisions in other jurisdictions, courts must do so cautiously.<sup>440</sup> This is because each system of criminal justice will vary and the application of legal rules will depend on procedures and practices peculiar to each system.<sup>441</sup> Nevertheless, Kriegler proceeded in that case to consider rules governing bail in the United States, the United Kingdom, Canada and Australia before concluding that bail is not an absolute right in any jurisdiction, and that limitations on the right to bail vary considerably.<sup>442</sup>

434 As above.

435 As above.

436 As above, para 133.

437 *Fose* (n 313 above).

438 As above, paras 24-37.

439 As above, para 90.

440 *Dlamini* (n 319 above) para 69.

441 As above.

442 As above, paras 70-73.

In *Sanderson*, discussed above, Kriegler repeated his warning regarding the uncritical resort to comparative law, noting that foreign precedent 'requires circumspection and acknowledgment that transplants require careful management.'<sup>443</sup> He further added that comparative law is generally valuable when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies.<sup>444</sup> In *Mamabolo*, Kriegler emphasised the need for a judicious approach to the use of comparative law, counselling that:

before one could subscribe to such a wholesale importation of a foreign product, one needs to be persuaded, not only that it is significantly preferable in principle, but also that its perceived promise is likely to be substantiated in practice in our legal system and in the society it has been developed to serve.<sup>445</sup>

*Metcash Trading Limited v Commissioner for the South African Revenue Service and Another*,<sup>446</sup> a case which concerned the constitutional validity of the 'pay now, argue later' tax principle, provided Kriegler with an opportunity to deliberate upon comparative law. In that case, he resorted to comparative law to support his finding about the constitutional validity of the 'pay now, argue later' tax principle, pointing out that 'the principle ... is one which is adopted in many open and democratic societies.'<sup>447</sup> He proceeded to declare that given the principle's 'prevalence in many other jurisdictions, it suggests that the principle is one which is accepted as reasonable in open and democratic societies based on freedom, dignity and equality as required by section 36.'<sup>448</sup>

Kriegler's cautious approach to the use of comparative sources as an interpretative guide might have been based on the limited access to these materials on the part of counsel. He saw a greater risk in such sources being misunderstood, misconstrued or interpreted out of context. Mistakes might be made inadvertently through the citation of foreign authorities whose reliability might be questionable. Such concerns appear to be based, in part, on the fear that even well-intentioned judges and lawyers may misunderstand foreign authorities.<sup>449</sup> Kriegler's reticence regarding comparative law also appears to have been informed partly by an acknowledgment that constitutional provisions acquire a distinctive meaning through their operation in particular contexts, including history. Consequently, it becomes a herculean challenge to acquire a

443 *Sanderson* (n 414 above) para 26.

444 As above, para 26.

445 *Mamabolo* (n 362 above) para 36.

446 *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* 2001 (1) SA 1109 (CC).

447 As above, para 63.

448 As above.

449 U Bentele 'Mining for gold: The Constitutional Court of South Africa's experience with comparative constitutional law' *Brooklyn Law School Legal Studies Research Papers Working Paper Series Research Paper No. 113* (1998) 14.

comprehensive understanding of the relevant implications of comparative laws without a proper comprehension of the relevant historical, political or social contexts.<sup>450</sup>

## 6 Reflections on Kriegler's interpretive approach and contribution to our understanding of the Constitution

Kriegler's interpretive approach appears to have been that the law should strive to ensure equality and should be applied in a humanistic fashion – a thread that permeates his jurisprudence and constitutes perhaps his greatest contribution in the endeavour to use law as a catalyst for social change. Rather than viewing the constitutionally guaranteed rights contained in the Bill of Rights as a check on democracy, as we have seen, Kriegler's jurisprudential approach shows his appreciation of the significance of the Bill of Rights as a vehicle for enabling broad substantive transformative social change in South Africa.

One of the stand-out attributes of Kriegler is that he established himself as a progressive jurist. His dissent in *Hugo* is remarkable for its emphasis on equality as entailing the full and equal enjoyment of human rights. By repudiating the deployment of stereotypes caricaturing women as caregivers and mothers, he inflicted grave damage on the gender stereotypes so prevalent in South African society.

Another illustration of Kriegler's progressive jurisprudence was his dissent in the *Du Plessis* case, where he presciently argued that the Bill of Rights was capable of direct horizontal application. In this, he went against the majority decision, which held that the Bill of Rights contained in the interim Constitution was not intended to have a general direct horizontal application. Today, the direct horizontal applicability of the Bill of Rights in appropriate cases is no longer in question, which shows that Kriegler's interpretive approach on the issue was clearly ahead of its time.

The progressive nature of his jurisprudence is illustrated also in his insistence on equality in the criminal justice system, manifested most perspicaciously in his declaration that 'the quality of a society is in the criminal courts where the people are at their most exposed and the vast majority of our citizenry are without the benefit of legal representation.'<sup>451</sup> Such an approach is an endorsement of the view that the many manifestations of inequality inherited from South Africa's troubled past mean that the constitutional commitment to equality cannot be simply understood as a commitment to a formalistic understanding of equality.

450 Liebenberg (n 299 above) 118.

451 Kriegler (n 266 above).

Rather, the constitutional imperative is to conceptualise equality substantively. This entails an examination of the institutions, norms and the lived social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to an egalitarian society is being advanced. To borrow from Goldblatt, there is no doubt that Kriegler is 'a man who believed, as he still does, in justice and fairness for every member of our society ... and saw the proper practice of the law as a contribution to this cardinal principle.'<sup>452</sup>

## 7 Conclusion

What emerges from the analysis of Kriegler's curial and extra-curial pronouncements in this chapter is an understanding of the sheer brilliance of his judicial approach and his indefatigable belief and passion in driving the transformation agenda envisaged under the Constitution, which he famously christened a 'metamorphosis'.<sup>453</sup> Consider his unequivocal assertion in *Du Plessis* that '[o]ur constitution aims at establishing freedom and equality in a grossly disparate society'.<sup>454</sup> Recall his famous declaration in *Dlamini*, where he emphasised the transformative impact of the Bill of Rights, noting that the advent of the Bill of Rights entailed a reappraisal of statutory and common law 'in the light of the new constitutional norms heralded by that transition'.<sup>455</sup> Or note his emphatic pronouncement in *Fose* that the role of courts in crafting remedies for constitutional violations is an 'attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of [the supremacy clause]'.<sup>456</sup>

Kriegler's sheer determination to humanise the law relating to criminal procedure as illustrated in a significant number of his judgements, most of which he wrote for a unanimous Constitutional Court, will stand as a monument for generations to come. Rather than viewing the constitutionally guaranteed rights contained in the Bill of Rights as a check on democracy, Kriegler's jurisprudential approach as evidenced in his curial and ex-curial pronouncements discussed under the various themes in this chapter shows his appreciation for the significance of the law as a vehicle for catalysing broad substantive transformative social change in South African society.

452 Van der Linde (n 264 above) 20.

453 *Mhlungu* (n 315 above) para 69.

454 *Du Plessis* (n 377 above) para 147.

455 *Dlamini* (n 319 above) para 2.

456 *Fose* (n 313 above) para 94.

## Bibliography

- Bilchitz, D 'Corporate law and the constitution: Towards binding human rights responsibilities for corporations' (2008) 124 *South African Law Journal* 773.
- Breytenbach, B *The true confessions of an albino terrorist* (Farrar, Straus & Giroux: New York 1984).
- Govindjee, A & Olivier, M 'Finding the boundary – The role of the courts in giving effect to socio-economic rights in South Africa' in Osode, PC & Clover, G (eds) *Law and transformative justice in post-apartheid South Africa* (Spekboom Publishers 2010).
- Klaaren, J 'Transformation of the judicial system in South Africa, 2012-2013' 2015 (47) *The George Washington International Law Review* 481.
- Klare, K 'Legal culture and transformative constitutionalism' 1998 (14) *South African Journal on Human Rights* 150.
- Liebenberg, S 'Adjudicating socio-economic rights under a transformative constitution' in Langford, M (ed) *Emerging trends in international and comparative law* (Cambridge University Press: Cambridge 2009).
- Liebenberg, S *Socio-economic rights: Adjudication under a transformative constitution* (Juta & Co Ltd: Cape Town 2010).
- Moseneke, D 'Transformative adjudication in post-apartheid South Africa – Taking stock after a decade', in Osode, PC & Clover, G (eds) *Law and transformative justice in post-apartheid South Africa* (Spekboom Publishers 2010).
- Siyo, L & Mubangizi, JC 'The independence of South African judges: A constitutional and legislative perspective' 2015 (18) *Potchefstroom Electronic Law Journal* 825.
- Van der Linde, WHG 'Tribute paid to Justice Johann Kriegler at the fourth Sidney and Felicia Kentridge award for service to law in Southern Africa' (2004) 21 *The South African Law Journal* 22.

# CHAPTER 5

## BREAKING THE CHAINS OF DISCRIMINATION AND FORGING NEW BONDS: THE EXTRAORDINARY JOURNEY OF JUSTICE YVONNE MOKGORO

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Source: <http://www.constitutionalcourt.org.za/site/judges/justiceyvonnemokgoro/index1.html>

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### 1 Introduction

In this chapter we make an attempt to highlight the main contributions of Justice Yvonne Mokgoro to South African constitutional jurisprudence. As the first black African woman appointed to the Bench in 1994, she brought with her fresh scars of the oppressive system of *apartheid* that alienated and marginalised her as a black person and as a woman. Her childhood and youth were marked by the struggle; her first encounter with Robert Sobukwe put her firmly on a path of resistance to injustice. As a member of the Constitutional Court Justice Mokgoro was active and engaged, with her most lasting contribution being her efforts to Africanise human rights through the dignification of the law and the operationalisation of *ubuntu* as a constitutional value.

The three cases discussed in this chapter are chosen to illustrate the powerful and unique impact of her judgments and philosophies. In

*Makwanyane* (the constitutionalism of the death penalty), *Khosa* (the right of foreign nationals to social grants) and *Dikoko* (determining the quantum of damages in defamation cases) Mokgoro brought to bear her life views and expressed them in ways that continue to shape the *ubuntu* jurisprudence of the Court. Even post-Bench she has continued to live out her convictions that the Constitution should reflect values that South Africans can accept as their own in order to ensure its legitimacy.

The first part of the chapter briefly looks at Justice Mokgoro's journey through childhood and young adulthood, with an emphasis on her activism, the effects that *apartheid* had on her life and her thinking, and her strong sense of gender justice. The second part outlines her unfolding story of *ubuntu* and how she expertly crafted this African philosophy to influence constitutional interpretation and adjudication in such a way as to recognise the humanity of 'others' and our duty to care for 'them'. In the last part we follow her journey post-Bench and discover that she continues to influence public discourse around justice, care and social cohesion.

## 2 Yvonne Mokgoro's background and context: From childhood to judge

I don't see my position as a judge, as a woman wielding power. I see my role as having great responsibility to my people, to justice in this country, to assist in providing people with what is necessary to improve the quality of their lives. Why I see it this way, when many see the position of a judge at the Constitutional Court as powerful, can be attributed to my mother's influence. We were so many kids, not wealthy, but my parents did the best they could. My father was very ambitious. Although he and my mother only went up to primary school ... they put into our education as much as they could, because they wanted us to have a quality of life better than theirs. They instilled in us the values that the only way to a better life was for us to get an education and escape the rut of *apartheid* and poverty.<sup>457</sup>

Appointed in 1994 as a judge of the Constitutional Court of the Republic of South Africa, Justice Yvonne Mokgoro was not only the first black woman to be appointed to the Constitutional Court Bench, but also one of only two women to be appointed, the other being Justice Kate O'Regan.<sup>458</sup> Mokgoro served for fifteen years as judge until the end of her term in 2009.<sup>459</sup> She has ascribed her valued contribution as Constitutional Court

457 Judge Mokgoro, on how her parents influenced her views on her role as judge in the Constitutional Court. In M Orford (ed) *Life and soul: Portraits of women who move South Africa* (2006) 58.

458 *Duke Law* 'The Honorable Yvonne Mokgoro, Justice of the South African Constitutional Court' 15 April 2009 <https://law.duke.edu/news/honorable-yvonne-mokgoro-justice-south-african-constitutional-court/> (accessed 1 November 2017).

459 South African History Online 'Yvonne Mokgoro' <http://www.sahistory.org.za/people/yvonne-mokgoro> (accessed 1 November 2017).

judge to her 'special background', which is a claim worth exploring further.<sup>460</sup>

Mokgoro, the second child of working class parents, was born in Galeshewe, a township on the outskirts of Kimberley in the Northern Cape. After matriculating in 1970 at St Boniface High School, a local Catholic Mission School, she enrolled for an education degree to become a teacher, as she had 'always known' that she would like 'to work with people'.<sup>461</sup> However, during that time she met Robert Sobukwe, founder of the Pan Africanist Congress (PAC), who instilled in her a passion for law. Having served time on Robben Island, Sobukwe was one of the few African lawyers in Kimberley at the time. After her arrest for protesting against the ill-treatment of a man by the police her family secured the services of Sobukwe to represent her in court. Mokgoro recounts that she expressed her frustration to Sobukwe about the small number of African lawyers and specifically about the lack of African male law students to represent black South Africans. Sobukwe, however, noted that although the legal profession was male dominated, it was not 'exclusively male' and that 'there [was] no law that preclude[d] women from studying law and becoming lawyers'. Mokgoro subsequently enrolled for a law degree and used the legal profession to live out her dream of working with people.<sup>462</sup>

Justice Mokgoro studied mostly part time from 1982 to 1987 at the erstwhile University of Bophuthatswana, where she obtained the B.luris, LLB and LLM degrees, and subsequently received a second LLM degree from the University of Pennsylvania in 1990.<sup>463</sup> She specialised in the field of human rights, customary law and the effect of the law on society, particularly on women and children.<sup>464</sup>

Entering the job market, Mokgoro worked as a nursing assistant and a salesperson before being appointed as clerk in the Department of Justice of Bophuthatswana. Upon obtaining her LLB degree she was employed as maintenance officer and public prosecutor in the former Mmabatho Magistrate's Court.<sup>465</sup> During the period 1984 to 1991 she worked at the University of Bophuthatswana's Department of Jurisprudence, first as lecturer and later as Associate Professor, whereafter she was appointed as

460 Orford (n 457 above) 58.

461 University of the Witwatersrand 'Constitutional Court Trust Oral History Project: Interview with Justice Yvonne Mokgoro 24 November 2011' [http://www.historicalpapers.wits.ac.za/inventories/inv\\_pdfo/AG3368/AG3368-M60-001-jpeg.pdf](http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-M60-001-jpeg.pdf) (accessed 1 November 2017) 1-2.

462 As above, 2.

463 Democracy & Governance Research Programme, HSRC *Women marching into the 21st century: Wathint'Abafazi, Wathint'Imbokodo* (2000) 260.

464 University of the Witwatersrand 'Citation: Yvonne Mokgoro' <https://www.wits.ac.za/media/wits-university/alumni/documents/Justice%20Yvonne%20Mokgoro.pdf> (accessed 2 November 2017).

465 Penn Law University of Pennsylvania Law School 'Yvonne Mokgoro, LLM'90' <https://www.law.upenn.edu/live/profiles/1124-yvonne-mokgoro/profiles/international-alumni-spotlight.php> (accessed 3 November 2017).



Associate Professor at the University of the Western Cape for the period 1992 to 1993. Mokgoro also worked at the Human Sciences Research Council (HSRC), specialising in human rights, and lectured part time at the University of Pretoria before being appointed as a judge of the Constitutional Court.<sup>466</sup> Hers was indeed a meteoric rise.

Justice Mokgoro spent most of her career as an academic prior to her appointment to the Constitutional Court. In fact, her limited practical experience in litigation was questioned during her interview with the Judicial Service Commission (JSC) for the position of Constitutional Court judge. She argued eloquently that her analytical skills as an academic would be greatly beneficial to the Court as it dealt with the analysis of both law and fact.<sup>467</sup>

In her life prior to the court Mokgoro was an anti-*apartheid* and gender activist, as illustrated briefly below.

## 2.1 Activism

Apart from teaching law to university students, Justice Mokgoro also utilised her knowledge of the law as an activist during the *apartheid* years. She was, for example, involved in the establishment of the Mafikeng Anti-Repression Forum (MAREF),<sup>468</sup> she was a member of the Northern Cape Executive Committee of the ANC (which included Mafikeng at that stage) and headed the Justice for Women portfolio<sup>469</sup> and she was also involved in Lawyers for Human Rights (LHR) in Mafikeng.<sup>470</sup> Through her involvement in these activist organisations Mokgoro used her legal knowledge to 'try to improve people's lives, try to improve the way communities see oppression and repression' while simultaneously endeavouring to protect the oppressed.<sup>471</sup> On being an activist Mokgoro noted that although people might have perceived her as a troublemaker, her aim was to 'try to change the system and ... to create awareness of what is right and what is wrong'.<sup>472</sup>

466 Democracy & Governance Research Programme (n 463 above) 260.

467 Constitutional Court 'Judicial Service Commission interview with Prof Yvonne Mokgoro 5 October 1994' [http://www.constitutionalcourt.org.za/site/judges/justice\\_yvonnemokgoro/index1.htm](http://www.constitutionalcourt.org.za/site/judges/justice_yvonnemokgoro/index1.htm) (accessed 3 November 2017).

468 MAREF, founded in 1990 in the erstwhile Bophuthatswana, was an organization working in the field of human rights and had, amongst other things, monitored human rights abuses in the former homeland and assisted victims of political repression to secure legal representation. See A Manson "'Punching above its weight": The Mafikeng Anti-Repression Forum (Maref) and the fall of Bophuthatswana' (2011) 43(2) *African Historical Review* 55.

469 Personal communication with Justice Mokgoro.

470 F Haffajee (ed) *The book of South African women* (nd) 135.

471 University of the Witwatersrand (n 461 above) 3.

472 As above, 4.

## 2.2 Impact of *apartheid* on Justice Mokgoro's life

When reminiscing on her experiences of Constitutional Court deliberations, Mokgoro highlighted the 'total equality and respect' for each other's diverse views as judges, despite any disagreement that may have existed about a particular issue. For a black woman who had spent a substantial part of her life under an *apartheid* dispensation it was 'the most wonderful experience'. Describing her background, she noted that:

you lived in a system which told you every day and reminded you that you are nothing. That you don't belong. That you don't have a brain. Because you have to do what the system wants you to do. That you can't think. That you have no right to think.<sup>473</sup>

She experienced her time with the Court as antithetical to her experiences under the oppressive system of *apartheid*. Perhaps her negative experiences and activism during *apartheid* contributed in some way to her support for the concept of *ubuntu* within the legal system, *ubuntu* being an inclusive worldview and not a divisive one as *apartheid* had been.<sup>474</sup> During an interview in 2011 for the Constitutional Court Trust Oral History Project she commented as follows on the meaning of *ubuntu*.<sup>475</sup>

[i]t can mean so many different things, values ... It's just the basic value of life where human beings share a space and show respect for each other based on the fact that they are human ... you don't have to earn to be treated with *ubuntu*. You're treated with *ubuntu* because you are a human being. It's just respect that we have for human beings. All the other socio-economic issues come after that.<sup>476</sup>

Her background influenced her in dealing with socio-economic rights cases. Mokgoro has noted that thoughts about her upbringing and experiences during the *apartheid* years involuntarily came to mind, as did the related importance of these rights for the transformation of society and making a difference in peoples' lives as required by the Preamble of the Constitution.<sup>477</sup>

473 As above, 8.

474 For Mokgoro's views on *ubuntu* and the law, see JY Mokgoro 'Ubuntu and the law in South Africa' Paper delivered at the first Colloquium, Constitution and the Law, Potchefstroom (1997) [www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/.../98v1mokg.pdf](http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/.../98v1mokg.pdf) (accessed 6 November 2017).

475 Her influential thinking on *ubuntu* and the law in a number of Constitutional Court cases is addressed in more detail below.

476 University of the Witwatersrand (n 461 above) 21.

477 As above, 20.

### 2.3 Customary law and gender

At the time of Justice Mokgoro's appointment to the Constitutional Court she specialised in customary law and legal philosophy. As a result she was asked during her interview with the Judicial Service Commission (JSC) about possible tensions between customary law, the Constitution and common law. Mokgoro argued<sup>478</sup> that prior to the adoption of the new Constitution, customary law had enjoyed 'ordinary legislative status', but since it had been formally recognised in Chapter 11 of the Constitution it had attained constitutional status. This implied that future legislative reform of customary law must comply with the Constitution, making future reform more challenging. However, customary law 'ha[d] not developed ... sufficiently', since 'traditional social practice' was much more flexible than written laws.

To illustrate this, Justice Mokgoro discussed the situation of rural women who, in the absence of the men who migrated to cities to work, managed families and communities and had, for example, been greatly involved in the purchasing of property. But when ownership of such property was questioned, customary law was applied. Fortunately, the constitutional recognition of customary law is subjected to the Bill of Rights and in the case of women Section 8, the equality clause in the interim Constitution, 'seems to trump customary law.' Mokgoro concluded by stating that the equality clause should 'take precedence as opposed to the preservation of culture, because if culture for its sustenance depends on the unequal treatment of some members of the cultural group who descend particularly from the prevailing culture, then that aspect of culture has no place in our legal system.'<sup>479</sup>

## 3 *Ubuntu* on the Bench

The collective unity, group solidarity and conformity tendencies of *Ubuntu* can surely be harnessed to promote a *new patriotism* and *personal stewardship* so crucial (for a number of reasons) to the development of a young democracy.<sup>480</sup>

Yvonne Mokgoro was an active judge who contributed substantially to the formative jurisprudence of the Constitutional Court over a period of fifteen years. Although much is written about her and Justice Sachs sharing a strong belief in *ubuntu's* potential as an interpretational value along with dignity, equality and freedom, she was more likely to agree with Justices

478 Constitutional Court (n 467 above).

479 As above.

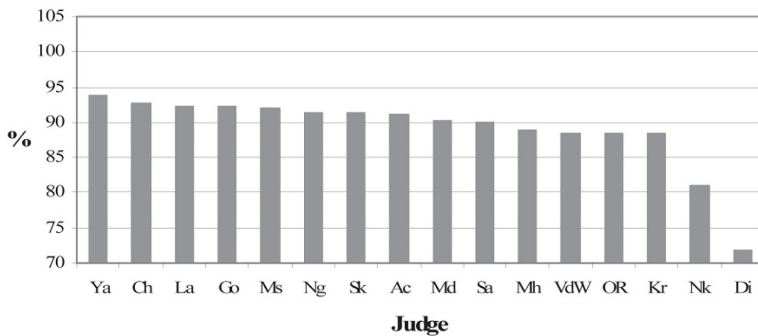
480 Mokgoro (n 474 above) emphasis added. The paper was published by the Konrad Adenauer-Stiftung in its Seminar Report of the Colloquium (1998). Paper in possession of the lead author of this chapter.

Yacoob and Chaskalson, as illustrated in Figure 1 below. In addition, she did not always agree with O'Regan, her fellow female judge, and had less disagreement than might have been expected with Justice Ackermann, an Afrikaner judge who tended to avoid debate on the Africanisation of the law.

The table below provides an overview of the judgment statistics of Justice Mokgoro's tenure on the Bench over the period 1994-2009. She participated in 305 judgments, which averaged just more than 20 cases per year. Justice Mokgoro wrote 19 leading (L) judgments, which comprised 6.2 per cent of the total judgments she participated in. Of note are the nine dissenting judgments, which comprised 3 per cent of the total number of judgments. Of these dissenting judgments *one third* were delivered from 2006 to 2009, her last three years on the Bench.

**Table 1: Judgments in which Justice Mokgoro participated**

Judge	Leading Judgments (L)	Concurring Judgments (C)	Concurring Votes (c)	Dissenting Judgments (D)	Dissenting Votes (d)	Total
Mokgoro	19 (6.2%)	16 (5.3%)	256 (83.9%)	9 (3%)	5 (1.6%)	305



**Figure 1: Extent of agreement of Yvonne Mokgoro with other judges, 1994-2006**

Key: Ya = Yacoob; Ch = Chaskalson; La = Langa; Ms = Moseneke; Ng = Ngcobo; Sk = Skweyiya; Ac = Ackermann; Md = Madala; Sa = Sachs; Mh = Mahomed; VdW = Van der Westhuizen; OR = O'Regan; Kr = Kriegler; Nk = Nkabinde; Di = Didcott

Source: Bishop et al, 2008<sup>481</sup>

481 M Bishop et al 'Twelve-year review of the work of the Constitutional Court: A statistical analysis: Current developments' (2008) 24(2) *South African Journal on Human Rights* 370.

An analysis of voting alignment of Justice Mokgoro with other judges for the period 1994-2006 is provided in Figure 1. Justice Mokgoro's highest voting alignment was with Yacoob (Ya) (93.8%) and Chaskalson (Ch) (92.6%) for this period. Of note is the relatively low alignment with Nkabinde (Nk) (81%) and Justice Didcott (Di) (71.9%). Possible reasons for this low alignment are the retirement of a number of judges during the period 2002 to 2004. In particular the retirement of the two Chief Justices, Chaskalson and Langa, is reported as the most likely explanation for this increasing trend of dissent.<sup>482</sup> During his relatively short tenure on the bench, Justice Didcott had some of the lowest levels of agreement of any judge, which highlights his independent voice.<sup>483</sup> The relatively short overlap of tenures of Justices Nkabinde and Mokgoro was marked for its high level of disagreement in comparison with other years and may explain the low alignment with them.

While Justice Mokgoro was an engaged member of the Bench and contributed to many areas of constitutional jurisprudence, she is best known for her remarkable contribution towards utilising and developing *ubuntu* as a constitutional value and interpretative tool that stemmed from her wish for the 'dignification' of South African post-apartheid law and jurisprudence and that led to far-reaching decisions and outcomes. The discussion of her judgments below is limited to the three cases in which she articulated most ardently her views in a way that influenced subsequent African-focused jurisprudence. Nor is this an extensive treatise on the advantages and disadvantages of linking *ubuntu* and the law. The contents of this chapter are limited to those aspects of her work, and some commentary on it, that is sure to receive continued attention by South African courts and scholars, especially within the context of restorative justice.

### 3.1 *Makwanyane*: Not in my name

In the second substantive case on human rights heard by the Constitutional Court, *S v Makwanyane*,<sup>484</sup> the Court in 1995 unanimously declared the death penalty unconstitutional. Justice Mokgoro brought to bear on this judgment her understanding of the African philosophy of *ubuntu* within the new South African constitutional context. As reflected in this seminal case, Mokgoro was convinced that *ubuntu* could serve as a basis from which interpretation of the Bill of Rights proceeds. She endorsed, along with Justices Madala and Sachs, the idea of *ubuntu* as an over-arching and basic constitutional value that could drive and assist the Court's future jurisprudence. The judges made it clear that the relevance of *ubuntu* for

482 As above, 361.

483 As above, 365.

484 1995 (3) SA 191 (CC).

South Africa's new order extended well beyond a narrow reading of the Post-amble of the interim Constitution:<sup>485</sup>

### **National Unity and Reconciliation**

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.

According to Mokgoro, Madala and Sachs this African value, based on a philosophy of life, is foundational and permeates the Constitution as a whole, not only within the context of the fear of vengeance but in the context of the restoration of dignity to the law and to the peoples of South Africa. *Makwanyane*, decided prior to 27 April 1996, marked the beginning of an *ubuntu* jurisprudence that has endured despite some scepticism.<sup>486</sup>

In her separate judgment in *Makwanyane* Mokgoro explained that although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines is *ubuntu*:

Generally, *ubuntu* translates as humanness. In its most fundamental sense it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.<sup>487</sup>

In her scholarly writing Yvonne Mokgoro placed her nuanced understanding of *ubuntu* alongside the concept of humanity. She was (and is) of the view that in order to transform South African law and along with it the lives of those who live under the law, constitutional jurisprudence should embrace *ubuntu* in all its Africanness along with the key values of human dignity, respect, inclusivity, compassion, concern for others, and honesty.<sup>488</sup> In her work, she mentions the following as examples of ways

485 Act 103 of 1994. It should be noted that *ubuntu* is not mentioned at all in the 1996 Constitution.

486 See C Himonga *et al* 'Reflections on judicial views of *ubuntu*' (2013) 16(5) *Potchefstroom Electronic Law Journal* 67 for an extensive analysis of the scope and content of *ubuntu* and the law.

487 *Makwanyane* (n 484 above) para 308.

488 Mokgoro refers to *ubuntu* as the 'one shared value that runs like a golden thread across cultural lines' (*Makwanyane*, paras 307-308) and equates this African concept with the English word 'humanity' and the Afrikaans word *menswaardigheid* (*Makwanyane*, para 308).

in which South African jurisprudence could be transformed in order to align itself with these values:<sup>489</sup>

- Law should be transformed to the extent that it is no longer conceived as a tool for personal defence
- Communalism should place more emphasis on group solidarity and interests
- The conciliatory character of the judicial process should be developed in order to restore peace and harmony between members, rather than placing overdue reliance on the adversarial approach, which emphasises retribution and seems repressive
- The importance of public ritual and ceremony should be given due recognition
- The idea that law, experienced by an individual within the group, is bound to individual duty as opposed to only individual rights or entitlement should be advanced; and
- The importance of sacrifice for every advantage or benefit which has significant implications for reciprocity and caring within the communal entity should also be advanced.

In radically re-thinking the law Mokgoro states:

Quite obviously, the complete dignification of South African law and jurisprudence would require considerable re-alignment of the present state of our value systems. We will thus have to be ingenious in finding or creating law reform programmes, methods, approaches and strategies that will enhance adaptation to such unprecedented change.<sup>490</sup>

In *Makwanyane* and her subsequent scholarship it is clear that Mokgoro does not want to limit *ubuntu* to a vague spirit, but wishes to use *ubuntu* as a concrete value made explicit in legal decisions. It is therefore surprising that she does not explicitly refer to *ubuntu* in the *Khosa* case.<sup>491</sup> Nowhere in this judgment does she give voice to her express wish to operationalise *ubuntu* as a constitutional value, although it does seem that her understanding of *ubuntu* implicitly informed her legal opinion in this case, which led to the extension of payment of social grants to permanent residents. However, in an interview conducted with the HSRC for the Constitutional Justice Project,<sup>492</sup> Mokgoro explained that:

And in *Khosa*, although I didn't particularly mention even once *ubuntu* ... but the inter-connectedness that is a central aspect of *ubuntu* I used when I said when people come into the country, foreign nationals come into the country,

489 Mokgoro (n 474 above).

490 As above, 6.

491 *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC).

492 G Pienaar 'HSRC Constitutional Justice Project: Interview with Justice Yvonne Mokgoro' (2014) 22.

they are accepted as permanent residents .... They've integrated with communities, they work here, they pay taxes, they contribute to the social welfare system, and when they are down and out [we] want to reject them and say they have no right to benefit from the social welfare system, when they're already so inter-connected with South Africans. There's just no way we can treat them like that. So I didn't mention *ubuntu* ... but I used the principles of *ubuntu* [- that] was a deliberate choice.

### 3.2 Beyond *Makwanyane*: A narrative about reconciling care and justice

#### 3.2.1 *Xhosa: Radically re-interpreting citizenship*

In *Xhosa* the Constitutional Court was faced with a challenge to the Social Assistance Act.<sup>493</sup> The applicants were Mozambiquan citizens who were permanent residents in South Africa. The first applicant, a mother of two children, applied for a child support grant and a care dependency grant for a child suffering from diabetes. The second applicant applied for an old age grant. Both applicants had been denied their grants as they were not citizens of South Africa. The applicants argued that sections 26, 27 and 28 of the final Constitution use the word 'everyone' in the first two sections and 'every child' in the third, and that it would be unconstitutional to limit access to social grants to citizens alone. In the Constitutional Court, Mokgoro upheld a decision of the High Court that it was the Court's responsibility to read the words 'permanent resident' into the challenged provisions of the Social Assistance Act.

Drucilla Cornell and Karin van Marle critically analyse this case and the underlying assumptions in Mokgoro's judgment. They argue that Mokgoro's reasoning reveals politics and ethics at play.<sup>494</sup> There is a deep sense that the humanity and dignity of these applicants should not be denied as the purposive nature of the South African Constitution is rooted in the promotion of a just community.<sup>495</sup> Although Mokgoro does not use the word *ubuntu* anywhere in this case, her insistence that everyone is responsible for ensuring the well-being of persons within their community reflects the essence of *ubuntu* in the way that she understands it. She is not only promoting a fair community but a *caring* one. In her view, there is a connection between a just and caring community:

493 Act 59 of 1992.

494 D Cornell & K van Marle 'Exploring *ubuntu*: Tentative reflections' (2005) 5(2) *African Human Rights Law Journal* 195. This politics and ethics seems to be telling us that no one – including the state – is allowed to say 'you do not interest me'.

495 During *apartheid*, legislation was interpreted in terms of what was considered to have been the intention of the legislators as Parliament was supreme in its law-making powers. After 1994 the Constitution became the supreme law and the interpretation of any law had to be purposive and reflect the underlying values of the Constitution. See also section 39 of the Constitution (1996).



Through careful immigration policies it can ensure that those admitted for the purpose of becoming permanent residents are persons who will profit, and not be a burden to, the state. If a mistake is made in this regard, and the permanent residents become a burden, that may be a cost we have to pay for the constitutional commitment to developing a caring society, and granting access to socio-economic rights to all who have homes here. Immigration can be controlled in ways other than allowing immigrants to make their permanent homes here, and then abandoning them to destitution if they fall upon hard times.<sup>496</sup>

In *Khosa*, Mokgoro further develops her vision as expressed in *Makwanyane*, namely that of caring within a communal context. In attempting to find a new constitutionalism along these lines, Kenneth Karst suggests that women's concern for a 'web of connection' might result in a more *inclusive* reading and interpretation of constitutional and human rights law.<sup>497</sup> He suggests that constitutions traditionally derive from a 'male' conception of freedom that is expressed in terms of (negative) freedom from the interference of others and separation from government. The emphasis is thus on individual liberties rather than on collective or group rights. Karst suggests that the voice of care and connection may lead to doctrinal changes in the state's duty to assist all members to fully participate in the community.<sup>498</sup>

In the *Khosa* case Mokgoro's reasoning is a concrete example of an attempt to protect the applicants from manifestations of technical, juristic violence and negative freedom. She encourages us to consider the stories of the applicants and the plight of children and the aged who would be left to suffer even more if not assisted. Our response to these stories defines who we are and our visions of the type of community and society we wish to live in. Our courts, now more than ever as institutions operating in a constitutional and transitional democracy, have an opportunity to open up spaces in which the vulnerable can be heard. Justice Mokgoro has drawn our attention to the responsibility of creating, within constitutional imperatives, a community both just and caring and a morality of social concern. She challenges us to view the imperatives of the Constitution as demanding of us to be responsible and caring towards all members of our community, including permanent residents.

Justice Mokgoro argues for a more conciliatory and communal *approach* to law and justice. A common thread is found in her insistence on more attention being paid to caring within the community. She argues convincingly that *ubuntu* is a philosophy of life which, in its most fundamental sense, represents personhood, humanity, humaneness, and morality. The fundamental belief is that *motho ke ba batho ba bangwe / ubuntu*

496 *Khosa* (n 491 above) para 65.

497 K Karst "'Women's' Constitution' (1984) *Duke Law Journal* 477.

498 As above, 487, 488.

*ngumuntu ngabantu*, which, literally translated, means that a person can only be a person through others.

As such our freedom and well-being is dependent upon our communal interactions and our attitudes towards, and relations with, others. This is a recognition of the constitutional importance of care, connectivity and the protection of vulnerable members of our society.

Echoing Mokgoro's concerns with the development of a caring society, Albie Sachs makes explicit reference to *ubuntu* in *Port Elizabeth Municipality v Various Occupiers*, an eviction case,<sup>499</sup> expanded upon in Chapter 7 in this volume. In justifying his refusal to uphold an eviction order which would result in the homelessness of a large number of squatters, he highlights the constitutional requirement that everyone must be treated with 'care and concern' within a society based on the values of human dignity, equality and freedom. He also reminds us that the Constitution places a demand upon us to decide cases not on generalities but in the light of their own particular circumstances:<sup>500</sup>

The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.<sup>501</sup>

Justices Mokgoro and Sachs thus argue strongly that *ubuntu* should become central to a new constitutional jurisprudence and to the revival of sustainable African values as part of the broader process of the African renaissance or re-birth.<sup>502</sup> They do so again in a case dealing with the civil law.

### 3.2.2 *Dikoko and the interrelationship between ubuntu and restorative justice*

Justices Mokgoro and Sachs were instrumental in bringing the restorative dimensions of *ubuntu* to bear in the case of *Dikoko v Mokhatla*,<sup>503</sup> which dealt with defamation and the assessment of a quantum of damages.

Without going into the detail of the facts, Mokgoro and Sachs invoked *ubuntu* in deciding that the order of damages imposed by the High Court

499 2005 (1) SA 217 (CC).

500 As above, para 31.

501 As above, para 37.

502 T Mbeki 'The African renaissance, South Africa and the world' Speech delivered at the United Nations University on 9 April 1998. For the full speech see <http://archive.unu.edu/unupress/mbeki.html> (accessed 15 November 2017).

503 *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

was too harsh and unreasonable. But their conclusions were different. Mokgoro argued that the amount in damages should be reduced from R110 000 with costs to R50 000 without costs, while Sachs preferred to have the payment of damages replaced with an order requiring an apology, arguing that 'the reparative value of retraction and apology' should be given a more prominent role:<sup>504</sup>

There is a further and deeper problem with damages awards in defamation cases. They measure something so intrinsic to human dignity as a person's reputation and honour as if these were market-place commodities. Unlike businesses, honour is not quoted on the Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur.

Mokgoro emphasised that the basic constitutional value of dignity has an interrelationship with *ubuntu*. Her focus was on the restoration and/or attainment of harmony as understood in indigenous law. Thus, when one considered cases of compensation for defamation the goal should not be to 'enlarge the hole in the defendant's pocket'.<sup>505</sup> She explained that compensatory damages were intended to restore the insulted dignity of the plaintiff rather than to punish the defendant. She further argued that this was better achieved through restorative than through retributive justice:<sup>506</sup>

The focus on monetary compensation diverts attention from two considerations that should be basic to defamation law. The first is that the reparation sought is essentially for injury to one's honour, dignity and reputation, and not to one's pocket. The second is that courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognize the human dignity of the plaintiff, thus acknowledging, in the true sense of *ubuntu*, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant.

In this case Mokgoro clearly articulates the interrelationship between dignity and *ubuntu*. This is addressed in an interesting way in an article entitled 'Where dignity ends and *uBuntu* begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts',<sup>507</sup> which she co-authored with Stu Woolman. Responding to Drucilla Cornell's '*Ubuntu* Project',<sup>508</sup> Mokgoro and Woolman acknowledge her attempts at defining *ubuntu* within the context of western notions of dignity

504 As above, para 109.

505 As above, para 68.

506 As above, para 69.

507 Y Mokgoro & S Woolman 'Where dignity ends and *uBuntu* begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts' (2010) 25 *South African Public Law* 402.

508 For details of Cornell's *Ubuntu* Project see <http://www.up.ac.za/en/jurisprudence/article/17597/ubuntu-project> (accessed 14 November 2017).

or communitarianism, but submit that ‘it provides a distinctly Southern African lens through which judges, advocates, attorneys and academics ought to determine the extension of the actual provisions of the basic law.’<sup>509</sup> Mokgoro and Woolman argue strongly that ‘[t]he presence of “*uBuntu*” as a guiding norm in the interpretation of our basic law is essential, in the minds of ordinary people, for the legitimation of our legal system. We ignore “*uBuntu*” at our own peril.’<sup>510</sup> This position is the same taken by Mokgoro in her 1997 paper (above), where she argues that the value of *ubuntu* could provide the Constitution with the necessary ‘*indigenous impetus*’<sup>511</sup> to prevent scepticism about its legitimacy as an African-focussed supreme law. Although Mokgoro linked *ubuntu* and dignity in her judgments, she also recognised, in 2010, that:

... a growing sense of disjunction between the ideals of the Constitution and the lived experience of most South Africans warrants a reappraisal of the place of *uBuntu* in South African law. It is this difference between dignity – as espoused by Kant and other Western philosophers – and *uBuntu* as practiced by the majority of South Africans .... The legitimation of the South African legal order depends upon our ability to synchronise these two closely related, but distinct terms.<sup>512</sup>

They conclude, simply, that ‘*uBuntu* and dignity do not map directly on to one another’ as Drucilla Cornell has tried to establish, ‘but they do rhyme’.<sup>513</sup>

### 3.3 Some critical and cautionary notes

Of course critical scholars have warned that it would be dangerous to merely embrace *ubuntu* as a universal value without reflection. Postmodern critics of essentialism, foundationalism and metanarratives have submitted that rendering concepts stable and static only leads to further oppression and exclusion as those who do not ‘fit in’ are once again silenced and excluded. In his critique of *ubuntu*, Patrick Lenta points out that the recognition of *ubuntu* as a constitutional value has been heralded in South Africa as an indication that we now share a substantive, inclusivist vision of the law and justice.<sup>514</sup> However, he cautions us against declaring this a victory as ‘... there is a danger that indulging in nostalgia about African colonial cultures will reinforce the myth that there is a single African culture and that the continent lacks diversity....’<sup>515</sup>

509 Mokgoro & Woolman (n 507 above) 402.

510 As above, 403.

511 Emphasis in the original.

512 Mokgoro & Woolman (n 507 above).

513 As above, 407.

514 P Lenta ‘Just gaming? The case for postmodernism in South African legal theory’ (2001) 17 *SAJHR* 189.

515 As above.

Adopting an even more critical stance towards the attempts by the Constitutional Court in *Makwanyane* to 'legalise' the value of *ubuntu*, Rosalind English expresses concern over the contradictory nature, meaning and implications of adopting *ubuntu* as a specific conception of human rights.<sup>516</sup> She states that: 'If *ubuntu* is a serious proposal ... it is a pity that the implications of the idea have not been explored more fully in cases where the interests of the individual conflict with those of society.'<sup>517</sup>

It is no doubt true that critical perspectives should be taken seriously; but we do not share the same concern about the collapse of the rights of individuals within community and the impression created that *ubuntu* thinking would *always* place societal interests over and above those of the individual. In fact, the opposite result was reached in *Makwanyane*, where every opinion poll in South Africa showed overwhelming support for the death penalty at the cost of individual lives. The Court decided differently, upholding the human rights of even the most heinous of criminals.

A possible answer to English's concern about individual rights may also be found in the sentiments expressed by Justice Edwin Cameron (a sitting judge) when deliberating on the equal right to sexual orientation.<sup>518</sup> Cameron supports an approach to substantive equality which is informed by *ubuntu*. In doing so he relies on former Chief Justice Langa's description of *ubuntu* as the recognition of another's status as a human being worthy of respect. This recognition has a converse in that '... the person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community.'<sup>519</sup> Rather than attacking or dismissing *ubuntu* as a patriarchal, exclusionary and conservative force, Cameron praises this African concept as one inclusive of humanity that encourages the extension of human rights protection to the socially vulnerable, including gays and lesbians. He states that *ubuntu* finds *practical value* by providing constitutional protection to those we deem to be different from ourselves and by allowing us to build our future on respect and tolerance and 'delight in our diversity'.<sup>520</sup> From the above, it is clear that Cameron, an HIV/AIDS activist and current Constitutional Court judge, is *not* of the view that adopting *ubuntu* as a constitutional value

516 R English 'Ubuntu: The quest for an indigenous jurisprudence' (1996) 12 *South African Journal of Human Rights* 641.

517 As above, 643. English states that the Court seems to be 'resurrecting indigenous values that have fallen into desuetude' (648). She submits that constitutional adjudication is about conflict and not harmony and that 'if *ubuntu* is to be a useful addition to constitutional discourse, we have to get rid of the idea that it is in some way a balm for the conflict at the heart of society' (648). She also warns that 'if you are delving in the archives for the fragmentary accounts of a legal system which has largely gone unrecorded, in search of practices that support your particular argument (whatever it is) you are bound to find exactly what you are looking for' (644).

518 In a speech delivered in Windhoek, Namibia during Human Rights Awareness Week 2001. See E Cameron 'Sexual orientation and "Ubuntu"' (2010) 10 *Sister Namibia*.

519 As above.

520 As above, 3. Cameron thus holds that the value of *ubuntu* encourages the unconditional acceptance of the gay and lesbian community.

would lead to the oppression and marginalisation of the gay and lesbian community. In fact, he expresses the opposite view: that *ubuntu* thinking encourages inclusivity, even of those deemed to be ‘different’.<sup>521</sup>

In *Justice: A Personal Account*,<sup>522</sup> Justice Cameron tells the story of a random act of kindness by a stranger which allowed him and his sister to buy a cake for his sister Jeanie’s birthday.<sup>523</sup> In recounting this poverty-riddled childhood story he recounts the generosity and ‘charity’ that led to his appointment as a judge. He writes about the ‘[d]istributive interventions’ that changed his life and concludes that ‘we all need the caring and generosity of others’,<sup>524</sup> and he maintains that the Constitution gives us this by obliging our government to care for us.

Marius Pieterse also encourages the use of *ubuntu* on condition that it is utilised as a multi-dimensional value within the sphere of legal interpretation.<sup>525</sup> Pieterse argues that it is precisely the treatment of *ubuntu* as a unidimensional concept that renders the ideal problematic.<sup>526</sup> He argues that the fact that *ubuntu* thinking does not fit comfortably into legal discourse does not mean that it has nothing to offer.<sup>527</sup> On the contrary, it is a rich philosophy that holds much promise in assisting us in developing a constitutional jurisprudence that is not merely a mirror of western law – thereby reflecting the views of Mokgoro. *Ubuntu* could be seen as a form of ‘groupcentered individualism’ in that it acknowledges the importance of individual interests, but always contextualises these interests by emphasising the effects of these interests on the group.<sup>528</sup>

Thus, when applauding *ubuntu* as a constitutional value, we need to keep in mind that it remains a ‘problematic concept’ as Lenta warns us, while simultaneously heeding the call of Mokgoro to reimagine *ubuntu* as a constitutional value that resonates with African ways of being. In paying close attention to Yvonne Mokgoro’s vision of a just and caring community, we could be adopting a radical position that serves in its own way to decolonise the law and contribute to the African renaissance. Consequently, in displacing and destabilising dominant conceptions of western liberalism and individualism, and by introducing new ways of

521 As above.

522 E Cameron *Justice: A Personal Account* (2014).

523 As above, 232-235.

524 As above, 236.

525 M Pieterse ‘“Traditional” African jurisprudence’ in CJ Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438.

526 As above, 442.

527 As above, 448.

528 As above, 460. He comes to this conclusion after analysing the provisions of the African Charter on Human and Peoples Rights which place emphasis on social justice and development. These ‘communitarian’ values are reflected in the African Charter articles 27-29, where reciprocal duties are stressed.

solving disputes, we would be empowered to move beyond the exclusionary tendencies of western discourses of law.<sup>529</sup>

However, despite all the value to be had, *ubuntu* is an open and malleable concept that could be used to justify a certain form of conservatism, which could be glimpsed in the AfriForum case against Julius Malema in the Equality Court. This case is interesting in that there was a need to balance two rights, that of freedom of expression versus the feelings of dignity of a minority Afrikaner community in South Africa.

### 3.4 A legacy in the making: Mind the gap

Mokgoro's *ubuntu* legacy was outlined in a very vivid and complex way by Justice Lamont in the Equality Court case of *Afri-Forum and Another v Julius Sello Malema and Others*,<sup>530</sup> wherein the singing of the song 'shoot the boer' was found to construe hate speech and thus serve as a limitation of the right to freedom of speech as encompassed in section 16 of the Constitution. In his judgment Lamont held that *ubuntu* was recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies that contributed towards more mutually acceptable remedies for the parties in such cases.<sup>531</sup> He described *ubuntu* broadly as a concept which.<sup>532</sup>

1. Is to be contrasted with vengeance
2. Dictates that a high value be placed on the life of a human being
3. Is inextricably linked to the values of, and which places a high premium on, dignity, compassion, humaneness and respect for the humanity of another
4. Dictates a shift from confrontation to mediation and conciliation
5. Dictates good attitudes and shared concern
6. Favours the re-establishment of harmony in the relationship between parties and that such harmony should restore the dignity of the plaintiff without ruining the defendant
7. Favours restorative rather than retributive justice

529 N Bohler-Muller 'Developing a new jurisprudence of gender equality in South Africa' unpublished LLD thesis, University of Pretoria, 2006.

530 2011 (6) SA 240 (EqC).

531 As above.

532 As above. Lamont references the following cases for informing his summary understanding, many of which were influenced by Mokgoro's thinking: *S v Makwanyane and Another* 1995 (3) SA 191 (CC) (paras 131, 225, 250, 307); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 517 (CC) para 37; *Dikoko v Mokgatla* 2006 (6) SA 235 (CC) paras 68-69, 112, 115-116; *Masethla v President of RSA* 2008 (1) SA 566 (CC) para 238. See also *Union of Refugee Women v Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 38; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 50; *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) paras 45, 163.

8. Operates in a direction favouring reconciliation rather than estrangement of disputants
9. Works towards sensitising a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and towards changing such conduct rather than merely punishing the disputant
10. Promotes mutual understanding rather than punishment
11. Favours face-to-face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful; and
12. Favours civility and civilised dialogue premised on mutual tolerance.

This use of *ubuntu* to ban the *apartheid* struggle song combines the sentiments in the Post-amble of the interim Constitution with elements of the jurisprudence of the Constitutional Court and provides a very broad understanding of the value and its use. The emphasis on reconciliation and the facilitation of differences are honourable, but freedom of expression activists may argue that this is indeed *not* a reconciliation of differences and recognition of diversity, as one party is held to a higher standard of 'civility' than the other. In a firm critique of this judgment, Pierre de Vos mentions three problematic aspects, one of which is of relevance here.<sup>533</sup> Judge Lamont invoked the notion of *ubuntu* '... to help justify the drastic limitation on the freedom of expression of all South Africans. For judge Lamont ... the protection of dignity and adherence to the values of *ubuntu* requires a radical limitation on the right to freedom of expression.'

It is a drastic limitation because Judge Lamont ordered that both Julius Malema and the ANC be interdicted and restrained from singing the song known as *Dubula Ibhunu* 'at any public or private meeting held by or conducted by them'. His 'essentialistic and simplistic division of South Africans' into different race groups could also be viewed as problematic as the Court relied on racial assumptions and stereotypes to justify its finding. This could be considered the antithesis of *ubuntu* as understood by Mokgoro.

## 4 Life after the Bench

Since her departure from the Bench Justice Mokgoro has continued to be active in the legal space by occupying several influential positions. She has taught a number of legal courses, which include Constitutional Law, Human Rights Law Jurisprudence, Criminal Law, History of Law, Customary Law, Comparative Law, and Private Law, at universities in the

533 P de Vos 'Malema judgment: A re-think on hate speech needed' 12 September 2011 <https://constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speech-needed/> (accessed 15 November 2016).



United States, Netherlands, the United Kingdom and South Africa.<sup>534</sup> As a skilled writer and speaker, she has written and presented papers and participated in a number of conferences, seminars and workshops both nationally and internationally, where she has focused mainly on themes pertaining to sociological jurisprudence, human rights, customary law, the impact of law on society in general, and on women and children in particular.<sup>535</sup> In recognition of her contributions to the judiciary and law the South African universities of North West, Western Cape, KwaZulu-Natal, Pretoria and Wits as well as the University of Toledo (Ohio) and the University of Pennsylvania have awarded her with the Doctor of Laws (*Honoris Causa*).<sup>536</sup>

Justice Mokgoro served as Chairperson of the South African Law (Reform) Commission for a period of 16 years until the end of her third term on the Bench in 2011. From 2011 until 2013, she served in the Office of the Chief Justice (OCJ). Work in this office required of her to exercise oversight over the administration of the OCJ. Her responsibilities also entailed the implementation of the mandate of the OCJ, which promotes the independence of the South African Judiciary as per Section 165 of the South African Constitution as well as other supporting laws.

Of note is the fact that Justice Mokgoro has made significant contributions as a resource person both in South Africa and internationally for non-governmental and community-based organisations.<sup>537</sup> She holds a number of memberships of prestigious institutions such as the International Women's Association (Washington DC), the International Federation of Women Lawyers, the International Association of Women Judges, and the South African Women Lawyers Association.

Justice Mokgoro was appointed as a Special Ambassador by the University of Venda in 2009, and in January 2012 she was appointed as Chairperson of the Independent Panel of Experts, with the brief to investigate the circumstances surrounding an incident at the University of Johannesburg (UJ) in which a stampede occurred during a student registration process, resulting in the death of a parent. In 2013 she was appointed to chair a tribunal to investigate the ethical conduct of the President of the Lesotho Court of Appeal. In her role as Chairperson of the Social Cohesion Reference group, Yvonne Mokgoro supported a forum that managed to diffuse tension around the 'Fees must fall' student protest in 2016. It is not widely publicised that this forum entered into highly sensitive talks with student leaders, university managements and government and played a vital role in dissolving the violence and tensions

534 South African History Online 'Yvonne Mokgoro' 16 August <http://www.sahistory.org.za/people/yvonne-mokgoro> (accessed 3 November 2017).

535 Penn Law (n 465 above).

536 Constitutional Court 'Judges: Yvonne Mokgoro' <http://www.constitutionalcourt.org.za/site/judges/justiceyvonnemokgoro/index1.htm> (accessed 3 November 2017).

537 As above.

on campuses across the country.<sup>538</sup> The Premier of Gauteng, David Makhura, called upon an Eminent Group of Social Cohesion Champions on Human Right's day in 2016 to deal with racism and xenophobia among various sections of the population in Gauteng. The group is chaired by Justice Mokgoro and has been tasked to work with both government and civil society to unravel and address the institutional, spatial, structural, psychosocial and socio-economic nature of racism and xenophobia in the province.

Currently, Justice Mokgoro serves on a number of boards and trusts. These include the Nelson Mandela Children's Fund, the Mandela-Rhodes Trust, the International Institute of Judicial Education, the South African Police Services (children's) Education Trust (of which she is Deputy Chairperson), and the African Centre for Justice Innovation (ACJI).<sup>539</sup>

#### 4.1 A public voice in defence of the Constitution and its values

Justice Mokgoro has been vocal on a number of matters in the media and public spaces since leaving the Constitutional Court. A golden thread of upholding the Constitution as the basis for a South African ethos on human rights, ethics, and the rule of law is notable whenever she speaks in civic forums. Speaking in Midrand, the former Constitutional Court Justice commented, when opening a two-day ethics conference, that the ethical situation in South Africa was dire. She also lamented the new ethos of corruption that was eroding the fabric of society and added that the Constitution must serve as the basic ethos of all South Africans and a guide for all their actions.<sup>540</sup>

During a women's networking and empowerment session in Kimberly recently, she encouraged women not to always wait for the judicial system to resolve all their problems but clarified that society had the power to resolve many psychological and social problems. She mentioned that everyone in society, including schools and youth organisations, had a mandate right from the beginning to deal with society and its well-being.<sup>541</sup>

Justice Mokgoro spoke about the Constitution during a media briefing in February 2015 on the funding of a joint 'Constitutionalism Fund',

538 'When reason leaves the building' *News24* 20 March 2017 <http://www.news24.com/Columnists/AletJvRensburg/when-reason-leaves-the-building-20170320> (accessed 3 November 2017).

539 South African History Online (n 534 above).

540 'Justice Yvonne Mokgoro: Ethical issues in SA have become dire' *EWN Eyewitness News* 2016 <http://Ewn.Co.Za/2016/09/15/Justice-Yvonne-Mokgoro-Ethical-Issues-In-Sa-Have-Become-Dire-1> (accessed 3 November 2017).

541 'Judge instils hope' 9 September 2015 <http://www.news24.com/SouthAfrica/Local/Express-News/Judge-instils-hope-20150908> (accessed 6 November 2017).

insisting on the substantiveness of the protection of human rights. She said that:

some people like to call it delivery of the mandate to those who have been tasked with making real the promise of the constitution. I think those people who like to call it – in relation to socio-economic rights, health care, education, access to food – they like to term those service delivery by government. Maybe we have got to bring it back to the constitution and base it on the substantiveness of the constitution.<sup>542</sup>

She added that the long-term stability of the country and the progressive realisation of the rights and values of the Constitution were dependent on the maintenance of key institutions and the promotion of the rule of law.<sup>543</sup>

In a speech delivered in 2015 entitled ‘The rule of law, judicial authority, and constitutional democracy in South Africa’<sup>544</sup> Mokgoro ended with a powerful statement about politics, the Constitution, the courts and integrity in South Africa:

The long and short of it is that whether state or the public at large, we all have an interest in the independence, integrity and legitimacy of our courts and must therefore protect them and desist from creating circumstances which weaken them and place their authority in jeopardy. If there is a point of social cohesion which has the greatest potential for institution-building with a view to nation-building, it is the respect we must show for our Constitution as the foundation of our constitutional democracy, where the role of our courts is central.

## 5 Concluding observations about the dignity of *ubuntu*

Yvonne Mokgoro has been an ardent supporter of *ubuntu*, which was reflected in her judgments in the *Makwanyane*, *Khosa* and *Dikoko* cases touched upon above. In her separate judgment in *S v Makwanyane*, she secured a place for *ubuntu* in South Africa’s jurisprudence, spearheading an Africanist approach to constitutional interpretation. In the *Khosa* case she insisted that everyone was responsible for ensuring that the well-being of persons within their community and society reflected such thinking. She

542 ‘Massive boost for SA civil society as \$25 million long-term fund to advance Constitution announced’ *Daily Maverick* 5 February 2015 <https://www.dailymaverick.co.za/article/2015-02-05-massive-boost-for-sa-civil-society-as-25-million-long-term-fund-to-advance-constitution-announced/#.WfsGj4-Cw2w> (accessed 6 November 2017).

543 As above.

544 Mokgoro’s tribute to Professor Asmal. See P de Vos ‘Justice Yvonne Mokgoro on rule of law, judicial authority and democracy’ 21 July 2015 <https://constitutionallyspeaking.co.za/justice-yvonne-mokgoro-on-rule-of-law-judicial-authority-and-democracy/> (accessed 14 November 2017).

has therefore shown herself to be in support not only of a fair community but also of a 'caring' one.<sup>545</sup> In her view, a just community and a caring community are one. During her career Justice Mokgoro has dedicated her scholarship to unpacking *ubuntu*,<sup>546</sup> including taking forward her thoughts on *ubuntu* and dignity, as expressed in the civil case of *Dikoko*.

The concept of *ubuntu* has been widely debated, with some authors arguing that it cannot be given expression satisfactorily using non-African vocabulary. In *Makwanyane*, Justice Mokgoro explained that: 'Although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines is the value of *uBuntu*.'<sup>547</sup> She also relies upon her own understanding of the African philosophy within the constitutional context by claiming that constitutional law reform can harness the spirit of *ubuntu*(ism), with its key values of human dignity, respect, inclusivity, compassion, concern for others, and honesty.<sup>548</sup> She maintains also that: '[q]uite obviously, the complete dignification of South African law and jurisprudence would require considerable re-alignment of the present state of our value systems. We will thus have to be ingenious in finding or creating law reform programmes'<sup>549</sup> within the context of the African renaissance. In the words of Mokgoro and Woolman:

We can ask of the *uBuntu* project, as Hillel did of his brethren over two millennia ago, 'If not now, when?'<sup>550</sup>

545 Bohler-Muller (n 529 above) 81.

546 Mokgoro (n 474 above).

547 *Makwanyane* (n 484 above).

548 Bohler-Muller (n 529 above).

549 Mokgoro (n 474 above) 10-11.

550 Mokgoro & Woolman (n 507 above) 407.

## Bibliography

- Bishop, M; Chamberlain, L & Kazee, S 'Twelve-year review of the work of the Constitutional Court: A statistical analysis: Current developments' (2008) 24(2) *South African Journal on Human Rights* 354.
- Cameron, E *Justice: A personal account* (Tafelberg Press: Cape Town 2014).
- Cornell, D & Van Marle, K 'Exploring *ubuntu*: Tentative reflections' (2005) 5(2) *African Human Rights Law Journal* 195.
- Democracy & Governance Research Programme, HSRC (Human Sciences Research Council) *Women marching into the 21st century: Wathint' Abafazi, Wathint' Imbokodo* (HSRC Press: Pretoria 2000).
- English, R 'Ubuntu: The quest for an indigenous jurisprudence' (1996) 12 *South African Journal of Human Rights* 641.
- Haffajee, F (ed) *The book of South African women* (M&G Media Ltd: Johannesburg nd).
- Himonga, C; Taylor, M & Pope, A 'Reflections on judicial views of *ubuntu*' (2013) 16(5) *Potchefstroom Electronic Law Journal* 67.
- Karst, K "'Women's' constitution' (1984) 3 *Duke Law Journal* 477.
- Lenta, P 'Just gaming? The case for postmodernism in South African legal theory' (2001) 17 *South African Journal of Human Rights* 173.
- Manson, A "'Punching above its weight". The Mafikeng Anti-Repression Forum (Maref) and the fall of Bophuthatswana' (2011) 43(2) *African Historical Review* 55.
- Mokgoro, Y & Woolman, S 'Where dignity ends and *uBuntu* begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts' (2010) 25 *South African Public Law* 400.
- Mokgoro, Y 'Ubuntu and the law in South Africa' (1998) 1(1) *Potchefstroom Electronic Law Journal* 1.
- Orford, M (ed) *Life and soul: Portraits of women who move South Africa* (Juta and Company Ltd: Cape Town 2006).
- Pieterse, M "'Traditional" African jurisprudence' in Roederer, CJ & Moellendorf, D (eds) *Jurisprudence* (Juta and Co Ltd: Lansdowne 2004).

# CHAPTER 6

## JUSTICE O'REGAN: FINDING THE ARISTOTELIAN GOLDEN 'MIDDLE WAY'

*Gary Pienaar*

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*Source: <http://www.constitutionalcourt.org.za/site/judges/justicekateoregan/index1.html>*

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### 1 Introduction

Arising from her interpretation of the South African Constitution's framework for the separation of powers, Justice Kate O'Regan has faced considerable criticism for her position on judicial deference (or 'modesty' and 'restraint') in the realm of public law and its impact on socioeconomic rights. In partial justification of this position, and in the early days of the Constitutional Court, she argued that the precedent-setting nature of the Court's decisions should serve as a constraint on undue judicial interference in 'the field of social and economic policy where governments [particularly the new South African democratic government] often need to act expeditiously and even experimentally to seek to identify solutions to the pressing problems faced by the country.'<sup>551</sup>

551 K O'Regan 'A forum for reason: Reflections on the role and work of the constitutional court', Helen Suzman Memorial Lecture, 22 November 2011 (2012) 28 *South African Journal on Human Rights* 133.

By contrast, her judicial record suggests that she is not averse to a degree of judicial activism in pursuit of the constitutional value of equality, for example. Recognising the dangers of both activism and restraint, her University of Cape Town (UCT) colleague Professor Pierre de Vos has suggested that there is an imperative for judges to find a morally justifiable path 'between judicial activism and judicial restraint'.<sup>552</sup> De Vos's injunction references the philosophical ideal posited perhaps most famously by Aristotle of equilibrium, balance and moderation – essentially, finding the perfect path by avoidance of equally unvirtuous, unhealthy, unwise or antisocial extremes of excess or inadequacy.<sup>553</sup> In the Aristotelian view, there is an ethically desirable middle way between two extremes, one of excess and the other of deficiency. For example, courage is a virtue, but if taken to excess would manifest as recklessness, while a deficiency of courage results in cowardice.

Justice O'Regan has described the role of the Constitutional Court as a forum for 'public reasoning'.<sup>554</sup> The rudder of reason and rationality can be identified as a strong guiding principle in her body of work, along with the principle of legality. Her commitment to 'cold-eyed' rationality might perhaps be contrasted with the rather warmer poetic nature of much of the writing by her colleagues Sachs and Yacoob. Elsewhere, however, she has also been quoted as saying that the Constitution's transformation project requires all of us to engage with empathy as we try to imagine life from the perspective of the other.<sup>555</sup> In her recognition of the judicial and human duty to understand and share the feelings of another, she shares a great deal with the adjudicative orientation of her colleagues on the Court – not only that of her sole female colleague, Justice Yvonne Mokgoro.

This chapter explores whether it is possible to establish from Justice O'Regan's judicial, academic and public record whether she has succeeded in navigating a justifiable middle way through the tensions arising between the imperatives of legality and experimentation, between rationality and imagination, and between deference and empathy.

552 P de Vos 'Between judicial activism and judicial restraint' *Constitutionally Speaking* 20 January 2009 <http://constitutionallyspeaking.co.za/between-judicial-activism-and-judicial-restraint/> (accessed 18 December 2013).

553 *Wikipedia* 'Golden mean (philosophy)' [https://en.wikipedia.org/wiki/Golden\\_mean\\_\(philosophy\)](https://en.wikipedia.org/wiki/Golden_mean_(philosophy)) (accessed 25 November 2017). See also *New World Encyclopedia* 'Golden mean (philosophy)' [http://www.newworldencyclopedia.org/entry/Golden\\_mean\\_\(philosophy\)](http://www.newworldencyclopedia.org/entry/Golden_mean_(philosophy)) (accessed 25 November 2017).

554 K O'Regan *The role of the Constitutional Court: Fostering a democracy based on public reason* Part II 'The Challenge of change: Thirteen years of constitutional democracy in South Africa' Unrevised text of John Foster and Miriam Rothschild Memorial Lecture, London, 23 October 2007 [http://www.constitutionalcourt.org.za/site/judges/justice\\_kateoregan/index1.html](http://www.constitutionalcourt.org.za/site/judges/justice_kateoregan/index1.html) (accessed 12 March 2017).

555 'Have empathy, that's what you can do for constitutional democracy – Kate O'Regan' *City Press* 8 September 2015 <http://www.news24.com/SouthAfrica/News/Have-empathy-thats-what-you-can-do-for-constitutional-democracy-Kate-ORegan-20150908> (accessed 12 March 2017).

## 2 A select biography<sup>556</sup>

O'Regan received a BA from the University of Cape Town (UCT) in 1978, an LLB (cum laude) from UCT in 1980, an LLM from the University of Sydney (first class honours) in 1981, and a PhD from the University of London (London School of Economics) in 1988. She practised as an attorney in Johannesburg during the 1980s, specialising in labour law and land rights law, representing a wide range of trade unions, anti-*apartheid* organisations, and communities facing evictions under *apartheid* land policy. On the academic front, she was a researcher in UCT's Labour Law Unit in 1988 and a senior lecturer in UCT's Faculty of Law in 1990.

Over the next five years, her anti-*apartheid* activism became prominent. She was: a founder member of UCT's Law, Race and Gender Research project and of UCT's Institute for Development Law; an advisor to the African National Congress on land claims legislation and to the National Manpower Commission on gender equality law; a trustee of the Legal Resources Trust; a co-editor (with Christina Murray) of a book on forced removals and the law – *No place to rest*<sup>557</sup> – as well as the Independent Mediation Services of South Africa (IMSSA) Arbitration Digest, a digest of labour arbitration decisions; and a contributor to *A charter for social justice: A contribution to the South African Bill of Rights debate*.<sup>558</sup>

O'Regan was a Justice of the Constitutional Court of South Africa from 1994 to 2009. Since the end of her fifteen-year term of office in 2009, she has served as an *ad hoc* judge of the Supreme Court of Namibia (since 2010), she chaired the 'Commission of inquiry into allegations of police inefficiency and a breakdown in relations between SAPS and the community in Khayelitsha' in 2012,<sup>559</sup> was an academic at UCT,<sup>560</sup> was a Director of the Bonavero Institute of Human Rights at Oxford University<sup>561</sup> and has served on the Board of Trustees of the Bingham

556 Constitutional Court of South Africa 'JUDGES | Judges: Justice Kate O'Regan: Personal details' <http://www.constitutionalcourt.org.za/site/judges/justicekateoregan/index1.html> (accessed 12 March 2017).

557 O'Regan, K (1990). *No place to rest: Forced removals and the law in South Africa*. Oxford University Press in association with the Labour Law Unit, University of Cape Town, 20 Dec 1990. See [https://books.google.co.za/books/about/No\\_place\\_to\\_rest.html?id=fOToAAAAIAAJ&redir\\_esc=y](https://books.google.co.za/books/about/No_place_to_rest.html?id=fOToAAAAIAAJ&redir_esc=y) (last accessed 27 November 2017).

558 Corder, H (ed) (X). *A charter for social justice: A contribution to the South African Bill of Rights debate*. Department of Public Law, University of Cape Town, 1992. See [https://books.google.co.za/books/about/A\\_Charter\\_for\\_Social\\_Justice.html?id=ZygvAAAAYAAJ&redir\\_esc=y](https://books.google.co.za/books/about/A_Charter_for_Social_Justice.html?id=ZygvAAAAYAAJ&redir_esc=y) (last accessed 27 November 2017).

559 See Khayelitsha Commission 'Kate O'Regan' <http://www.khayelitsha.commission.org.za/about/79-about/78-kate-o-regan.html> (accessed 12 March 2017).

560 See Who's Who Southern Africa 'Catherine O'Regan' <http://whoswho.co.za/catherine-oregan-4876> (accessed 12 March 2017).

561 See University of Oxford, Faculty of Law 'Kate O'Regan' <https://www.law.ox.ac.uk/people/kate-oregan> (accessed 12 March 2017).



Institute of International and Comparative Law.<sup>562</sup> She is an honorary member of the Advisory Council of the Council for the Advancement of the South African Constitution (CASAC),<sup>563</sup> a board member of Corruption Watch,<sup>564</sup> and was until August 2015 a board member of the Open Society Foundation for South Africa.<sup>565</sup>

### 3 The 3Rs of the Constitution

#### 3.1 Respect, responsibility and rights

Justice Catherine 'Kate' O'Regan is wary of viewing rights as a one-way street. Rights, too, must be weighed in the balance. She wrote her article on the 'three Rs of the Constitution'<sup>566</sup> in response to '[m]any commentators' who had criticised 'the South African Constitution and our emerging constitutional jurisprudence on the basis that they are all about rights, and not responsibility.' In her view, this criticism was 'misplaced' because 'respect, responsibility and rights' *together* 'are the building blocks of the Constitution'.<sup>567</sup> From her perspective, the '3Rs of our Constitution, the basic tools of our social ordering, are equal respect for human beings, a normative commitment to asserting and promoting the moral responsibility of human beings, and the entrenchment of fundamental rights to protect and enhance democracy, dignity, equality and freedom'.<sup>568</sup>

She has offered a proposition based on 'constitutional principle' that consists of two components. First, the Constitution 'asserts that human beings are morally responsible agents'; and second, this then 'imposes obligations upon the State to foster the conditions of moral agency'. This, she argued, is 'the starting point upon which the commitment to democracy and to the Bill of Rights is built' and 'goes to the very root of the Constitution'. It is precisely '[b]ecause the [constitutional] vision is of human beings who should have the capacity for moral responsibility, [that] we assert the value of human dignity – that human beings are worthy of equal respect and concern'. It is for this same reason – equal human dignity – that the Constitution 'assert[s] also the centrality of democracy to ensure

562 See Bingham Institute of International and Comparative Law, Governance, Board of Trustees <https://www.biicl.org/governance> (accessed 25 November 2017).

563 See CASAC 'Executive committee and advisory council' <http://www.casac.org.za/executive-and-advisory-council/> (accessed 12 March 2017).

564 See Corruption Watch 'Board members' <http://www.corruptionwatch.org.za/about-us/people/board-members/> (accessed 12 March 2017).

565 See Open Society for South Africa 'Board' <http://www.osf.org.za/the-osf-sa-board-1/> (accessed 12 March 2017).

566 C O'Regan 'The three Rs of the constitution: Responsibility, respect and rights' (2004) 86 *Acta Juridica* 86.

567 As above, 86.

568 As above, 95.

that the exercise of public power is open, accountable, responsive and based upon the will of the people’.

For O’Regan, the Constitution has two primary ‘related purposes: it establishes the institutions and procedures of democracy, on the one hand; and on the other, it entrenches fundamental human rights. Underlying both of these,’ she suggests, ‘lies the assertion of the moral agency of human beings and the important role the state can play in enhancing moral agency’.<sup>569</sup> This emphasis on personal responsibility, and the recognition of its necessary enabling factors, may reflect O’Regan’s particular sense of responsibility as a relatively privileged white woman on the Bench of the highest court in a country emerging from centuries of racism, sexism and patriarchy. Her academic and professional background in labour law and land rights, and the fact that she was a founder member of both the Law, Race and Gender Research project and of the Institute for Development Law at UCT, are indicative of her concern with the power imbalances prevalent in South African society under colonialism and *apartheid*.<sup>570</sup>

O’Regan clarifies that her proposition is ‘not based on the descriptive proposition that human behaviour is determined entirely by human choice and not [also] caused in some way by a range of factors beyond human choice’. Rather, hers is ‘a normative proposition that human beings can exercise choice in a morally responsible fashion and that the broader society should seek to enhance the ability to exercise such choices.’<sup>571</sup> She is therefore ‘not arguing for a strong view of free will’, as there ‘can be no doubt that both circumstance and structure impact on human agency. Who we are, where we have come from, and where we are now, including what we have – all affect our decisions and choices’.

She clarifies, further, that her proposition also ‘exclude[s] [the opposite extreme of] a hard determinist position, in terms of which all human conduct is determined by factors other than the exercise of genuine choice by individuals,’ as this interpretation would leave ‘no room for any meaningful moral responsibility’. While it may be possible to establish ‘a constitutional order’ on this extreme view, it would not be ‘the best understanding of our [particular] constitutional endeavour’. She concludes that if her proposition is correct that the Constitution ‘asserts moral agency ... then the Constitution should be interpreted in a way which empowers and enhances moral responsibility’.<sup>572</sup>

O’Regan finds her proposition on several constitutional provisions, including section 3, which asserts the obligations of citizens in the following terms:

569 As above, 88.

570 Constitutional Court of South Africa (n 556 above).

571 O’Regan (n 566 above) 88.

572 As above, 89.

- (2) All citizens are –
- (a) equally entitled to the rights, privileges and benefits of citizenship; and
  - (b) equally subject to the duties and responsibilities of citizenship.

It is clear from these provisions that the Constitution affords rights to citizens while also requiring of them that they fulfill their duties and responsibilities. O'Regan argues that it is 'implicit in the notions of duty and responsibility' that citizens have a choice, and that 'in exercising that choice citizens must act in a morally responsible' manner.<sup>573</sup>

Further, section 1 of the Constitution, containing the founding provisions, provides that:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) *Human dignity, the achievement of equality and the advancement of human rights and freedoms* (emphasis added).

It is worth noting that the values are mostly phrased as achievements to be pursued – 'achievement' and 'advancement'. They have not been achieved by the stroke of a pen and adoption of the Constitution. The Constitution is infused with these values of democracy, human dignity, equality, and freedom, which are repeatedly asserted. Thus, section 7(1) provides that the Bill of Rights 'is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.' Similarly, section 36 states that rights may be limited 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. Moreover, section 39 instructs courts, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

O'Regan asserts that these provisions make it absolutely clear that the Constitution 'is premised on a vision of an open and democratic society based on human dignity, equality and freedom'. As a result,

the emphasis on an accountable democratic government, human dignity, equality and freedom seem to [her] to be compatible only with a conception of human conduct that affirms the possibility and desirability of human agency and the important role of government in fostering such agency. [The Constitution's democratic vision is based on citizens' participation in elections and in governance, and] demands a form of government which is not only open, but accountable to the people, and responsive to their needs. [This] emphasis on the value of human dignity, on open and accountable

573 As above, 90.

democracy, and on freedom and equality [thereby] impose[s] obligations upon government to foster human agency.<sup>574</sup>

### 3.2 Capacity and capabilities

If one were to accept O'Regan's proposition, two questions then arise. Firstly, without placing complete responsibility on the shoulders of the individual, how does the state act in such a way as to empower and enhance personal moral responsibility? Secondly, how do the courts evaluate and adjudicate the conduct of the state and its efforts in this regard?

Her argument is based on more than the text of the Constitution. Thus, '[a]lthough text is important and in this case indicative of the proper interpretation of the Constitution,' she submits that 'the overall *context* of the Constitutional project as a whole also provides important interpretive guides' (emphasis added).<sup>575</sup> As we shall see, this has significance for her interpretation of rights, particularly socio-economic rights (SERs).

Significantly, O'Regan argues that the 'important role of government in fostering agency and the equal worth of all South Africans' is 'particularly evident' in the Constitution's 'recognition' of SERs. If civil and political rights alone were entrenched, despite the context of 'our deeply unequal society', that 'might well have suggested that government's role in fostering autonomy was a minimal or even negative one'. However, there can be no question of such a limited role for the state when the Constitution 'imposes positive obligations upon government' to take reasonable steps to achieve the progressive realisation of rights to housing, health care, food, water, social security, and education. She thus concludes that 'it is clear that the Constitution asserts the moral agency of human beings and imposes obligations upon the State to foster the conditions in which moral agency may flourish.'<sup>576</sup> O'Regan emphasises that '... our Constitution contains within it an express set of values about the ordering of human relations which is not neutral'. However, 'nor [is it] without competitors'. Clearly, despite their express nature and the active public obligations to which they give rise, these values and the rights that flow from them are contested. They need therefore to be protected and upheld by the judiciary. Thus, she concludes that 'the task of constitutional adjudication lies in *giving voice and effect* to those values' (emphasis added).<sup>577</sup>

This assertion then begs the question whether the current approach by the courts to the adjudication of SERs successfully gives adequate 'voice

574 As above, 91-92.

575 As above, 91.

576 As above, 92.

577 As above, 94-95.

and effect' to constitutional values. Do the courts in practice astutely ensure that government is 'diligently and promptly'<sup>578</sup> fulfilling its constitutional responsibilities to fulfil all rights, thereby fostering the necessary 'capacity for autonomy',<sup>579</sup> which in turn enables dignity, equality and freedom – and thereby democracy – to flourish?

The Constitution 'imposes obligations upon government to foster our capacity for autonomy' in order to enable us to meet our responsibilities as citizens. For, through the enhancement of 'citizens' ability to be morally responsible agents,' human dignity and freedom are enhanced. In performing the positive obligations imposed upon it, the government 'will seek to ensure that all South Africans have the equal capacity' to act morally and responsibly. 'Democracy will *then* be founded on the morally-responsible exercise of rights' (emphasis added).<sup>580</sup> In other words, the democratic government must be proactive, including by creating certain material conditions, before citizens will be able to exercise rights responsibly.

The similarities between O'Regan's philosophical approach and Amartya Sen's developmental theory based on a 'capabilities' approach are not coincidental. Among others, Sen acknowledges O'Regan's influence on his thinking on the role of law.<sup>581</sup>

In an interview with Justice O'Regan for the Constitutional Justice Project (CJP),<sup>582</sup> she provided an additional example of how the state should act proactively to empower and enable citizens to act morally and responsibly. She expressed strong endorsement of the idea of state financial support for civil society advocacy for SERs, including litigation where necessary. It should be recognised, she said, that everyone is fallible and that, even with the best will in the world, mistakes are made that have significantly undermined citizens' dignity, equality and freedom. The state is required to be responsive to people's needs, and this form of support would be a significant way to signal that it is willing to listen and to be responsive.

In this respect, O'Regan finds support from Jackie Dugard, who has argued vigorously for the right to legal representation at state expense in civil matters. Dugard has argued that the judiciary has failed the poor because of the Constitutional Court's 'weak socio-economic rights record', which has further diminished the capacity of the judiciary to act as an

578 'The Constitution of the Republic of South Africa, 1996' (as set out in sec 1(1) of the Citation of constitutional Laws Act 5 of 2005) sec 237.

579 O'Regan (n 566 above) 95.

580 As above.

581 A Sen *The idea of justice* (2011) xxv.

582 G Pienaar 'HSRC Constitutional Justice Project: Interview with Justice Kate O'Regan (2014) 22.

'institutional voice for the poor'.<sup>583</sup> In addition to critiquing the Constitutional Court's under-utilisation of the adjudication techniques and remedial instruments available to it, she suggests that state financial support for legal representation in these cases is one important way in which access to justice can be enhanced.

### 3.3 Responsibility, reasonableness and deference

Dugard's critique of the Court's record includes trenchant criticism of O'Regan's decision in the 2010 *Mazibuko*<sup>584</sup> matter, which for the first time required the Court to consider the right of access to water, and her separate concurring judgment in the 2010 *Joe Slovo*<sup>585</sup> matter, which dealt with the right to housing. In the wider context of ruling party politicians' criticism of the courts for undue and excessive interference in the policy-making responsibilities of the executive branch of the state, Wilson and Dugard decry the Court's undue deference to the executive and legislative branches.

In *Mazibuko*, where there was evidence suggesting a range of possibilities concerning the content of the right to 'sufficient water', O'Regan quoted with approval the following passage from the Court's decision in *Treatment Action Campaign No.2*:<sup>586</sup>

Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a *restrained* and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness *may in fact have budgetary implications, but are not in themselves directed at rearranging budgets*. In this way, the judicial, legislative and executive functions achieve *appropriate constitutional balance* (emphasis added).

In her separate concurring judgment in *Joe Slovo*, O'Regan cautioned that:

In considering this and similar cases, courts need *on the one hand* to be aware of the enormity of the task that government must perform in seeking to '(i) improve the quality of life of all citizens' and be astute not to impair government's ability to perform this task. *On the other hand*, courts must not

583 J Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *South African Journal on Human Rights* 214. See also J Dugard 'Judging the judges: Towards an appropriate role for the judiciary in South Africa's transformation' (2007) 20 *Leiden Journal of International Law* 965.

584 *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

585 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC).

586 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) para 38. See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 32, to similar effect.

permit government to treat citizens in a manner that is not consistent with *human dignity* while pursuing laudable programmes. The difficulty lies in seeking an *appropriate balance* between these two constitutional imperatives (emphasis added).<sup>587</sup>

While signaling the significance of dignity in the Court's jurisprudence, she continued to hold that the test of reasonableness 'does not require us to be satisfied that' government's rehousing plan for Joe Slovo residents 'is perfect, or that there is no better plan'; and that courts 'should be slow to interfere in the legitimate policy choices made by government in determining the plan'.<sup>588</sup>

### 3.4 Responsibility and pragmatism

Wilson and Dugard<sup>589</sup> argue that the Court, including in these two cases, has not achieved an appropriate balance. On the contrary, they believe that the Court is unduly deferential to its conceptualisation of the separation of powers doctrine, to the detriment of its responsibility to afford due weight to a contextual analysis of the lived experiences of structural poverty. In other words, the Court had failed to exercise the empathy that its members acknowledge is required of them.

Despite O'Regan's apparent firm adherence to a principled approach to the Court's interpretation of the separation of powers, in the CJP interview O'Regan identified a further example of her openness to pragmatic solutions to large-scale problems affecting the realisation and enjoyment of rights. She indicated support for the idea of administrative tribunals, using inquisitorial procedures, to provide individuals with accessible, cheap and speedy redress, for example, in instances of multiple social grant errors.<sup>590</sup>

O'Regan explained during the CJP interview that the Constitutional Court's 2004 decision in *Khosa*,<sup>591</sup> contrary to any perception that the Court had overreached and strayed into executive territory, should be attributed to appropriate weight being afforded to the fundamental constitutional right and value of equality. The decision did not signal an exception to the Court's approach to the progressive realisation of SERs. Although the Court's decision had budgetary implications – a matter ordinarily reserved for the legislative and executive branches of the state – the decision was basely largely on considerations of equality. This imperative allowed the Court to order the inclusion of an additional group

587 *Joe Slovo* (n 585 above) paras 265-266.

588 As above, para 295.

589 S Wilson & J Dugard 'Taking poverty seriously: The South African Constitutional Court and socio-economic rights' (2011) 3 *Stellenbosch Law Review* 664.

590 Pienaar (n 582 above) 24-25.

591 *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC).

of beneficiaries in the social security safety net provided for in terms of section 27 of the Bill of Rights.<sup>592</sup>

## 4 A ‘progressive jurisprudence’ of SERs and their ‘progressive realisation’

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. ‘Necessitous men are not free men.’

*Franklin D Roosevelt, State of the Union address 11 January 1941*

### 4.1 Deprivation disables democracy

Justice O’Regan opens her Foreword to McLean’s book *Constitutional deference, courts and socio-economic rights in South Africa*<sup>593</sup> with the above quotation, reiterating her moral responsibilities-capabilities approach to understanding rights. Rights are indivisible and mutually reinforcing; deprivation disables democracy. Nevertheless, fifteen years into the democratic era, thirteen years after adoption of the final Constitution, and near the end of her term on the Court, O’Regan appeared to remain awed by the novelty, scale and complexity of the challenge of developing an appropriate jurisprudence of SERs in South Africa.

She wrote perhaps just as the urgency of the need to realise SERs, to ensure widespread lived experience of enjoyment of SERs, began to dawn on South Africa’s elites. Realisation was just awakening of the necessity of taking bold steps to help define the substantive content of SERs within the framework of the Constitution’s promise of social justice. Against a background of growing dissatisfaction and discontent with democracy’s failure to deliver greater equality, President Jacob Zuma’s ANC was elected in 2009 on a platform promising more rapid socio-economic progress. Zuma was seen at the time as a candidate of ‘the left’, more open to collaboration with alliance partner the South African Communist Party, and offering tangible hope to workers, labourers and the poor more generally.<sup>594</sup>

O’Regan described the novelty of the task before the courts, including ‘her’ Court, in the following terms:

592 It is perhaps noteworthy that the judgment by Justice Yvonne Mokgoro, who authored the Court’s majority decision in *Khosa*, appeared – on one measure – to found her reasoning more on the constitutional value of dignity (mentioned 19 times) than of equality (mentioned 12 times).

593 K McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009).

594 R Calland *The Zuma Years* (2015) 170-173.



The South African Constitution is one of the first Commonwealth constitutions to entrench both civil and political rights and social and economic rights and to render both justiciable before the courts. The task of interpreting and applying the social and economic rights in the Constitution is arguably the most challenging task facing lawyers and courts in South Africa.<sup>595</sup>

Acknowledging the pertinence of South Africa's socio-economic context, she described the scale of the constitutional enterprise as follows:

That task is rendered all the more difficult by the deep inequality in South African society. In its Preamble, the Constitution states that the Constitution is adopted in order to build a society in which, to paraphrase, the quality of life of all South Africans is improved and the potential of each person is freed. Fifteen years into our new democratic order, we are still far from realising these goals.<sup>596</sup>

In her interview for the CJP, O'Regan expressed in plain terms the difficulty facing the state, and therefore the courts too, when adjudicating the positive obligation to progressively realise SERs. The area of positive obligations is 'so much tougher terrain for courts ... particularly ... for courts in a country which don't have enough money for everything'.<sup>597</sup> Prioritising state interventions is a delicate task. While recognising that rights are based on fundamental human needs, she felt the burden of the 'inescapable reality' that 'South Africa is a middle-income country with a high rate of unemployment and government is simply not able immediately to provide the basic necessities of life to all citizens'.<sup>598</sup> This sentiment echoes her position in *Mazibuko*, for example, where she held that:

[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the *first* place, for the *legislature and executive*, the institutions of government best placed to *investigate social conditions in the light of available budgets and to determine what targets are achievable* in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to *democratic popular choice* (emphasis added).<sup>599</sup>

595 K. O'Regan 'Foreword' in K. McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009) vii.

596 As above, vii.

597 Pienaar (n 582 above) 4.

598 O'Regan (n 566 above) vii.

599 *Mazibuko* (n 584 above) para 160.

## 4.2 Principle, prudence, patience and pragmatism

In the midst of this resource dilemma, she remained alive to the very practical task at hand, as well as to the pragmatic and principled constraints imposed by the need for judicial deference to the newly democratic legitimacy of the other branches of the state. Thus, there is a need to develop a jurisprudence ‘which gives concrete meaning and effect to social and economic rights. This jurisprudence must foster the constitutional values of human dignity, equality and freedom, on the one hand, *without unduly trammelling the executive and legislative arms of government*, on the other’ (emphasis added).<sup>600</sup>

O’Regan believed that patience was necessary, and was sustainable – the government and the courts were ‘[o]nly just over a decade in, [and] we should accept that we are only beginning the long process of establishing that jurisprudence.’<sup>601</sup> She believed that she was writing in what were still only the very early years of the Constitution’s life, and that time was needed, and available, to undertake a cautious, thoughtful and prudent journey, anticipating deep-rooted disagreement and disputation, which should be overcome by shared principles that would be ultimately identified:

*As we set out on the journey to develop a progressive jurisprudence of social and economic rights, it seems to me that we should accept that it is unlikely that we will achieve consensus on the proper role for courts in this field. Like other areas of constitutional adjudication, our understanding of the proper role of courts will depend on deep and contested questions of political and moral philosophy. The contestation that will inevitably persist, therefore, makes it all the more important that contributions to the debate are clear and principled* (emphasis added).<sup>602</sup>

She re-emphasised that she and her fellow lawyers were only beginning what she signalled would be an inevitably tumultuous and perilous journey – ‘As lawyers *who are embarking* on this journey, I would warn of two countervailing dangers’ (emphasis added).<sup>603</sup> While highlighting prudence, and recognising that each of us has a limited worldview, she therefore affirmed the value of principled and purposive imagination. The first danger ‘is that we stop challenging our preconceptions, and fail to let our jurisprudential imagination roam. By so doing, we may fail to give real content to the social and economic rights in our Constitution (emphasis added).’<sup>604</sup>

600 O’Regan (n 566 above) vii.

601 As above.

602 As above, viii.

603 As above.

604 As above.

Writers such as Wilson and Dugard as well as Liebenberg<sup>605</sup> suggest that caution has been excessive and that imagination (and empathy) has been lacking in the Court's approach to adjudicating SER matters thus far. As the crisis arising from persistent inequality grows, there is an urgent need to give substantive meaning and content to SERs, rather than a continued emphasis on a largely 'procedural' approach to determining reasonableness.<sup>606</sup> Wilson and Dugard in particular suggest that this task will require the judicial exercise of imagination, which entails an understanding of the realities of the structural context within which lived experiences of poverty rights claims arise.<sup>607</sup> Thus, the Court needs to 'develop a theory of these needs [of litigants] and [constitutional] purposes [and values], by listening more closely to what poor litigants say in their papers about how the social context of poverty affects their access to socio-economic goods.'

In her book, McLean notes pertinently that the principled approach to the doctrine of deference (in the context of the separation of powers) has been less evident and less clearly defined in SER matters:

[T]he post-1994 South African courts have quickly developed the beginnings of a jurisprudence on the doctrine of deference which mirrors that in Canada and the United Kingdom. Yet, this development is uneven: while the application of the doctrine is principled in the interpretation and enforcement of civil and political rights (such as in the *Pillay* decision),<sup>608</sup> this has yet to be mirrored in its application to socio-economic rights. It is this latter point which is developed in the remainder of this book.<sup>609</sup>

Indeed, recent litigation in the Constitutional Court involving the South African Social Security Agency's (SASSA's) administration of social grants payments<sup>610</sup> represents an example of why the patience of the most vulnerable is justifiably wearing thin. The Court's decision is a clear indication that, at least in this respect, the time has passed for the poor to be patient with a weak, careless or even culpably remiss public administration that should be energetically focused on the diligent performance of constitutional responsibilities.<sup>611</sup> Government must ensure service delivery in realisation of rights. The Court made it abundantly clear that '[t]he sole reason for the litigation leading to this judgment is the failure of SASSA and the Minister [of Social

605 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010). Wilson & Dugard (n 589 above) fn 7.

606 As above, 667ff.

607 As above, 665.

608 *MEC for Education, KwaZulu-Natal & Others v Pillay* 2008 (1) SA 474 (CC).

609 McLean (n 593 above) 87.

610 *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* (CCT48/17) [2017] ZACC 8; 2017 5 BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017).

611 Section 237 of the Constitution provides that 'All constitutional obligations must be performed diligently and without delay.'

Development] to keep their promise to this Court and the people of South Africa.<sup>612</sup>

### 4.3 Power and principles

The second danger O'Regan cautioned against arises from the temptations of power. She recognised that lawyers are among society's elites, and admonished that they should remind themselves that they are in service of but one branch of the state, and are not themselves above the law and the Constitution. Lawyers must therefore 'be cautious, given our own craft and the power that it affords us, not to seek a jurisprudence that will empower lawyers and clients but in the end undermine democracy and the democratic arms of government.'

O'Regan advocates use of a roadmap signposted by principles that help us avoid pitfalls and quagmires that might divert us from our national objective. Endorsing Kirsty McLean's book, O'Regan warranted that it 'is alive to both these dangers' and welcomed it as 'a principled basis for the development of our jurisprudence which will constitute a valuable and lasting contribution to the debate.'<sup>613</sup> However, as suggested elsewhere in this chapter, steering a route strictly in the middle of the sea passage between Scylla and Charybdis risks blunting the transformative impact of the Constitution, thus perpetuating and compounding the marginalisation of litigants and the multitudes who together with them suffer complex deprivations.

## 5 Text and context

Discussing the significance of the constitutional text and its contextual origins and continued realities, O'Regan draws a sharp distinction between South Africa's Constitution and older Constitutions 'whose original constitutional purpose may be less pertinent today than at the time of their inception' and which may be 'short on normative and purposive guidance'. Highlighting the necessity for the courts to give due attention to citizens' lived experiences, she notes 'the sense of immediacy and purpose [and] the detailed texture of the South African Constitution'. For these reasons, 'the trivialisation of text has no place in contemporary South African constitutional jurisprudence.'<sup>614</sup>

Having said this, however, O'Regan cautions that she is 'not suggesting that in every case, the constitutional text is determinative of the outcome' of that case. When there are cases where there is room for

612 *Black Sash* (n 610 above) para 14.

613 O'Regan (n 566 above) viii.

614 K O'Regan 'Text matters: Some reflections on the forging of a new constitutional jurisprudence in South Africa' (2012) 75 *The Modern Law Review* 11.

reasonable disagreement, 'the text *and context* of the Constitution still serve as significant constraints on the ambit and nature of that disagreement' (emphasis added). In terms redolent of progress and the creative task, she argues that while judges 'may well be giving shape and form to the bones of constitutional provisions ... the constitutional text is an important determinant of that shape and form.'<sup>615</sup>

Reflecting on the jurisprudence of the Constitution's first seventeen years, she argues that 'it is clear that the task of delineating the scope and content of the rights has been more complex than predicted.' For her,

the hardest part of constitutional judging is giving contours and content to these open-ended guarantees. From early on, the Court accepted that the interpretation of the rights should be both 'generous' and 'purposive' though the Court also acknowledged that, at times, a purposive analysis might require a narrower interpretation of a right.<sup>616</sup>

It might be suggested, however, that this complexity could be simplified should the Court call on litigants to provide evidence in support of the minimum core content of SERs.<sup>617</sup> Her discussion of the internal qualifiers in SERs clauses appears to give them a virtual right of veto, whereas it might be argued that those same internal qualifiers, i.e., 'reasonable' and 'available', also provide logical and essentially pragmatic exits from the 'internal definition of the content of the right'. This might be especially so because they do so precisely by making available a reference to history, experience and context. Reflection on lessons and inferences that could be drawn from our history and experience might suggest that if government does not have a transparent, rational objective (such as some generally agreed approximation of the minimum core that constitutes progress towards the constitutional vision of social justice) and a transparent, reasonable and well-administered plan to achieve it, the chances of attaining that objective are significantly, and unreasonably, reduced.

## 6 Separation of powers

In her Helen Suzman memorial address,<sup>618</sup> O'Regan again referenced the uniqueness of the South African Constitution and emphasised that the separation of powers doctrine does not have a single global definition. Instead,

615 As above, 11.

616 As above, 23.

617 Indeed, in *Mazibuko* (n 584 above), at para 54, while rejecting a minimum core approach, the Court quoted Yacoob J in *Treatment Action Campaign No 2* (para 34) as recognising that 'that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the State are reasonable'.

618 O'Regan (n 551 above) 118.

each constitutional framework has its own understanding of the relationship between the arms of government. The particular conception of the separation of powers in any particular constitutional democracy requires a careful analysis of its constitutional text as well as its constitutional practice. Moreover, the precise contours of the doctrine of the separation of powers are, arguably everywhere, somewhat uncertain.<sup>619</sup>

In regard to this contentious debate, O'Regan indicated during the CJP interview that the term *separation of powers* itself is 'unfortunate' in that it sends an incomplete and misleading message about the relationship that ought to characterise the complementary and collaborative working relationship between the three branches of the state. She therefore suggested the value of also taking note of the constitutional imperative of cooperative governance and its application in this context. 'Courts have a responsibility to respect what the other arms of government have done,' she said.

O'Regan's call to a necessarily careful and thorough analytical approach found inspiration in the diligence and preparation that characterised Helen Suzman MP's exemplary single-handed parliamentary opposition to the *apartheid* government over many years. Suzman was one of a very few women at the forefront of political life during *apartheid*, not entirely dissimilar to O'Regan's tenure on the Constitutional Court bench when her only female contemporary was Justice Yvonne Mokgoro.<sup>620</sup> O'Regan expressed particular admiration for Suzman's 'mastery of detail and attention to principle' and for her 'serious-minded and painstaking approach to the exercise of public power'.<sup>621</sup> For O'Regan as much as for Suzman, although in quite different political contexts, playing the game within the rules is an absolute requirement; principles are not mere options that can be taken from a shelf when convenient.

Wishful thinking and nice-to-haves are included neither in O'Regan's toolbox nor in Suzman's. Hence, when considering the appropriate extent and limits of the doctrine of separation of powers, the need to pay close attention to 'constitutional text as well as its constitutional practice'. In that context, O'Regan recognises that the relationship between the branches of the state in a democracy is ordinarily 'tense';<sup>622</sup> it is precisely the purpose of the separation of powers to enable restraint on the exercise of public power, which will inevitably give rise to a degree of frustration and irritation.

619 As above.

620 Mokgoro J served during the same 15-year term as O'Regan – 1994-2009. See Constitutional Court of South Africa 'JUDGES | Justice Yvonne Mokgoro: Narrative' <http://www.constitutionalcourt.org.za/site/judges/justiceyvonnemokgoro/index1.html> (accessed 12 March 2017).

621 O'Regan (n 551 above) 116-117.

622 As above, 118.

O'Regan cautions that in many instances, 'there is reasonable disagreement in our society as to what policies will best achieve the destruction of the *apartheid* legacy. Courts should take care not to limit unduly government's ability to make the decisions as to which policies it chooses. Given the great challenges we face, and the lack of clear and agreed answers as to how they should best be tackled, courts should not tie government's hands more than the Constitution requires.'<sup>623</sup> Courts must accordingly avoid what a respected Indian commentator has termed the 'jurisprudence of exasperation':<sup>624</sup> the tendency to reach decisions or make statements that are an expression of judges' exasperation with the state of affairs in the country, rather than on the basis of 'carefully thought out arguments based on the law's possibilities and limits.' She is concerned that, in South Africa, a jurisprudence of exasperation might result in the requirements of rationality being unduly tightened or in courts being too slow to accept that government's policies in achieving social and economic rights are reasonable, or in courts insisting that government adopt their views as to what is appropriate government policy.

O'Regan correctly identifies that the Constitution confers a particular role on the courts and that they have not illicitly assumed it themselves; that their role and responsibilities include reviewing 'policy'; and that citizens have the right 'to use the courts to protect the Constitution', rather than merely to protect rights. In addition to constitutional supremacy, the corollary of which is a 'strong power of review',<sup>625</sup> O'Regan describes the Bill of Rights in the global context as 'particularly broad'<sup>626</sup> because it includes not only civil and political rights, but also a 'wide range' of 'additional' rights, such as environmental rights, and rights to just administrative action and to access to information, as well as SERs. In addition, it binds the judiciary, as well as the executive and legislative branches, and also, to varying extents, private individuals and private corporations.

Emphasising the magnitude of the task entrusted to the courts, she enumerates in some detail the remainder of the Constitution which must be interpreted, applied and protected by the judiciary, and notes that the Constitutional Court is given the significant and invasive power to make an order of constitutional invalidity. Given these broad powers, O'Regan argues strongly that they should be exercised with deference, modesty and restraint. This chapter, however, endeavours to identify legitimate scope for nuance while respectful of a contextually appropriate understanding of separation of powers.

623 As above.

624 PB Mehta 'With due respect, Lordships' *Indian Express* 11 March 2007 <http://www.indianexpress.com/news/with-due-respect-lordships/25375/2> – cited in O'Regan (n 551 above) 133.

625 O'Regan (n 551 above) 121.

626 As above, 120.

In the Suzman memorial address, O'Regan responded to President Zuma's and the ruling party's expressed concern that opposition parties were using the courts to 'co-govern' and that, in so doing, the courts were curtailing the power of the executive and the legislature 'to make what is referred to as "policy"'.<sup>627</sup> These concerns arose from perceptions that the courts were disrespecting the constitutional separation of powers. O'Regan provided a detailed account of the Court's record, noting that, 'of the 90 declarations of legislative invalidity made by the Court, the largest number, 22, have been in the field of criminal law and procedure,'<sup>628</sup> while the 'second most common ground for declarations of constitutional invalidity has been inequality,' based on section 9 of the Constitution. By 2011, very few declarations of constitutional invalidity were controversial in the sense that they affected what President Zuma and the ruling party might call 'policy'. There had been seven challenges to the actions or conduct of the President, and four had involved President Nelson Mandela, two of which were not upheld by the Court. Two challenges concerned President Thabo Mbeki, again with a 50 per cent 'success' rate. The single challenge by that time involving President Zuma related to the purported extension of the term of Chief Justice Ngcobo, which was successful.<sup>629</sup>

'The principles that inform the determination of such challenges are relatively straightforward,' noted O'Regan: 'The President must act lawfully, rationally and consistently with the Bill of Rights.'<sup>630</sup> The first two principles are discussed briefly before the third is explored in greater detail.

## **6.1 The first constraint: Legality and the rule of law**

The first constraint on policy implementation is that all government conduct must have a legal foundation, whether in the Constitution or in legislation. In an early case, the Constitutional Court formulated this principle to mean that 'it is central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.'

This principle of legality is based on the rule of law, a founding principle in our constitutional order. The rule of law simply means that

627 As above, 118.

628 As above, 123.

629 There have been several more challenges subsequently, some of which involved 'policy', while others involved executive discretion (for example, appointments), and many have been successful.

630 O'Regan (n 551 above) 125.



power must be exercised in accordance with the Constitution and the law.<sup>631</sup>

## 6.2 The second constraint: Rationality or the 'some rhyme or reason' rule

O'Regan emphasised that this second requirement 'is not onerous, for it requires only that there be some nexus or link between the purpose sought to be achieved by the relevant action or legislation and the terms of the legislation or character of the conduct. It perhaps might be called the "some rhyme or reason" rule. As long there is some rhyme or reason to what the legislature or executive seeks to do, it will probably pass the rationality test.'<sup>632</sup>

The Court described the requirement of rationality as 'a minimum threshold requirement applicable to [the] exercise of all public power by members of the executive and other functionaries', but emphasised that the standard of rationality does not permit courts to substitute their opinions as to what would be appropriate for that of the government. Given the requirement that any link between the decision or legislation and the underlying purpose would suffice, the Court noted that '[a] decision that is objectively irrational is likely to be made only rarely.'

O'Regan emphasised that this 'no rhyme or reason' test 'does not significantly impair the ability of the government to perform its necessary tasks .... [T]he Court has on several occasions emphasised that it "should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively ... *As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly*" (emphasis added). She cautioned that '[s]etting a tighter test for rationality *might well constitute an unwarranted intrusion into the legitimate constitutional space accorded to the legislature and the executive*' (emphasis added).<sup>633</sup>

Compare these sentiments, however, with the words of an attorney working at a university law clinic interviewed for the CJP. He expressed the view of many when he pleaded for greater urgency from the Constitutional Court to 'map out our democracy, and clearly define rights without delay' without 'wasting' more time. Rather than give the executive and legislative branches of the state more space, his words indicate an increasingly widely shared view that government has failed to make adequate progress towards substantive equality, urging an appreciation

631 As above, 126.

632 As above, 127.

633 As above, 127-8.

that ‘we are no longer a young democracy’. For him, as for many others, empathy with the demands of dignity and equality, together with an appreciation of the requirements of reason and rationality, demand that the courts must step in where government policies are proving to be inadequate to the transformative task.

### 6.3 The third constraint: The Bill of Rights

No government policy, whether implemented through legislation, executive or presidential action or administrative law, may infringe the rights entrenched in the Bill of Rights. The legislature, executive and judiciary all bear obligations under the Bill of Rights to respect, protect, promote and fulfil those rights. In a very real sense, therefore, ‘it is the provisions of the Bill of Rights that most sharply constrain the conduct of government, including the making of policy.’<sup>634</sup>

Nevertheless, these rights ‘are not absolute constraints’ or ‘trump cards’ that always take precedence over other concerns. The Constitution ‘recognises that there will be times when one right in the Bill of Rights will be in tension with another, or where important public interests may require the limitation of rights and it accordingly permits the limitation of rights,’ provided this is supported by “‘special justifications for limitations that make them compatible with the general principles of individual autonomy and dignity’”.<sup>635</sup> Rights must be balanced against one another, rather than limited or ‘rationed’ based on limited available resources. Thus, when deciding whether an infringement is nevertheless justifiable, the Court ‘considers whether the reason given by the government for limiting the right is sufficiently important to outweigh the impact it causes in limiting the right. This is essentially a proportionality analysis.’<sup>636</sup>

‘The role of the Constitutional Court is thus not to thwart or frustrate the democratic arms of government,’ but is rather to call on them to account, that is, to explain and justify the manner in which they exercise public power. O’Regan cites Etienne Mureinik’s ‘celebrated formulation’ in which ‘our new constitutional order establishes a “culture of justification”’ and through which government leadership ‘rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command’ and builds a community based ‘on persuasion, not coercion.’<sup>637</sup>

634 As above, 128.

635 As above, 128 – citing Dieter Grimm. See D Grimm ‘Proportionality in Canadian and German constitutional jurisprudence’ (2007) 57 *University of Toronto LJ* 383, 391.

636 O’Regan (n 551 above) 129.

637 E Mureinik ‘A bridge to where? Introducing the interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 32.

In understanding the meaning of a right, the key question is the scope of the obligations imposed by that right, explains O'Regan. Thus, if an individual has a right of access to health care, against whom does she have that right and, most significantly, what must that person do in relation to her right? Again, O'Regan signals caution, describing the 'most difficult' jurisprudential aspect of social and economic rights as 'determining the extent of the positive obligation they impose upon government to act to achieve the realisation of the right.'<sup>638</sup>

Essentially, the approach of the Court has been to require government to explain why its policies in the field of social and economic rights are reasonable. Government must disclose to the Court 'what it has done to formulate the policy, its investigation and research, the alternatives considered and the reasons why the option underlying the policy was selected'. O'Regan is satisfied that this approach permits citizens to hold the democratic branches of government to account through litigation, but does not require government 'to be held to an impossible standard of perfection.'<sup>639</sup> The effect of this deferential approach and the reasonableness test, for O'Regan, is that the courts 'do not take over the task of making policy, but they do require government to account to citizens for its policy decisions in the field of social and economic rights. The process of accounting for decisions in the field should improve the quality of decision-making without improperly restricting the choices available to government.'<sup>640</sup>

### 6.3.1 *Deference, democracy, and just and equitable remedies*

A consideration of the leading cases in which the courts have sought to define the contours and the limits of the application of deference shows that O'Regan has by no means been alone in undertaking this enterprise, and neither has the Constitutional Court's or the Supreme Court of Appeal's approach lacked nuance.<sup>641</sup> In *Ferreira v Levin*<sup>642</sup> Ackermann J found that 'where a right is expressly and narrowly protected in the Constitution, the Court would be less deferent to the legislature than would be the case where the interest was protected generally or through a residual right.'<sup>643</sup> In the *National Coalition*<sup>644</sup> decision, the Constitutional Court 'again used the language of deference, finding that the deference

638 O'Regan (n 551 above) 130.

639 See *Mazibuko* (n 584 above) para 160.

640 O'Regan (n 551 above) 131.

641 Reference is made here to McLean's text as it neatly traces the development of the law regarding deference and the role that O'Regan, and many others, have played in that trajectory.

642 *Ferreira v Levin NO & Others; Vryenhoek and Others v Powell NO & Others* 1996 (1) SA 984 (CC).

643 McLean (n 593 above) 82.

644 *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC).

owed to the legislature in deciding what constitutes appropriate relief will depend on the individual circumstances of each case.<sup>645</sup> Here, it is important to note the significance of ‘... the Court’s awareness of the *context-sensitive* nature of the choice of remedies, and the role that deference to the legislature plays in that assessment’ (emphasis added).

In *Minister of Health v TAC*,<sup>646</sup> the Constitutional Court expressly considered the question of how deference and the doctrine of separation of powers relate to how it should adjudicate SERs, raising two concerns in this regard. The first concerned the deference the Court was to show the executive regarding policy formulation, while the second related to the appropriate remedy which the Court should provide. In deciding on the former, ‘the Court emphasised its institutional limitations as the most important consideration’, which it again emphasised in the decision in *Bel Porto School Governing Body*,<sup>647</sup> while also noting that ‘an appreciation of these limitations should not undermine the court’s role in interpreting and protecting rights.’ The Constitutional Court found that, while courts should, ‘as a general principle, be deferent to the “practical difficulties” faced by the administration, this does not mean that decision makers should not be held to account for infringement of constitutional rights: “It is the remedy that must adapt itself to the right, not the right to the remedy.”’

Reviewing administrative action which involved polycentric decision making, Cameron JA, in the Supreme Court of Appeal decision of *Logbro Properties*,<sup>648</sup> developed that court’s understanding of institutional competence, holding that a ‘measure of judicial deference’ is appropriate to the administration. The decision linked ‘institutional competence concerns with democratic competence issues.’ Deference is important, Cameron JA held, to maintain the distinction between review and appeal, to ensure that the judiciary ‘appreciate[s] the legitimate and constitutionally-ordained province of administrative agencies,’ recognising their expertise in such matters, and to ensure that they are ‘sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.’<sup>649</sup>

645 McLean (n 593 above) 83.

646 *Treatment Action Campaign* (n 586 above).

647 *Bel Porto School Governing Body & Others v Premier, Western Cape, & Another* 2002 (3) SA 265 (CC).

648 *Logbro Properties Constitutional Court v Bedderson NO & Others* 2003 (2) SA 460 (SCA) para 21.

649 McLean (n 593 above) 84.

*Logbro Properties* was then applied in the SCA's later decision in *Phambili Fisheries*,<sup>650</sup> where the Court held that deference in the judicial review of government economic policies was appropriate for the same institutional and democratic competence reasons.<sup>651</sup> The court stated that '[j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary.'

This is particularly important, the SCA held, 'where the subject matter under review is "very technical or of a kind in which a Court has no particular proficiency."' <sup>652</sup> Likewise in *Foodcorp*<sup>653</sup> the Cape High Court, 'following both *Logbro Properties* and *Phambili Fisheries*, acknowledged the importance of "due judicial deference" to "policy-laden and polycentric" administrative action which "entails a degree of specialist knowledge and expertise that very few, if any, judges may be expected to have."' <sup>654</sup>

In *Bato Star Fishing*<sup>655</sup> (the appeal to the Constitutional Court against the SCA decision in *Phambili Fisheries*), O'Regan J repeated the passages cited by the SCA on the deference to be adopted in the judicial review of administrative agencies. With reference to the *ProLife Alliance*<sup>656</sup> decision, she added that 'the need for courts to treat decision makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.'<sup>657</sup> By contrast, the High Court in *South African Jewish Board of Deputies*,<sup>658</sup> also referring to the SCA's judgment in *Phambili Fisheries*, held that where a judicial review matter was not one which was 'very technical or of a kind in which a court has no particular proficiency', judicial deference was not appropriate at all (emphasis added).<sup>659</sup>

The Constitutional Court's decision in *Bato Star* has since become possibly the leading decision on the topic, followed in many subsequent decisions. However, the decision in *Pillay*<sup>660</sup> is a significant refinement by the Constitutional Court. It concerned the right of a schoolgirl to wear a

650 *Minister of Environmental Affairs and Tourism & Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism & Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 SCA.

651 *Phambili* (as above) para 47.

652 As above, para 53.

653 *Foodcorp (Pty) Ltd v Deputy Directory-General, Department of Environmental Affairs and Tourism, Branch Marine and Coastal Management* 2004 (5) SA 91 (CC) para 68.

654 McLean (n 593 above) 84-85.

655 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC).

656 *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23 paras 75-76.

657 *Bato Star Fishing* (n 655 above) para 46.

658 *South African Jewish Board of Deputies v Sutherland NO & Others* 2004 (4) SA 368 (W).

659 McLean (n 593 above) at 85.

660 *Pillay* (n 608 above).

nose stud in school as part of her right not to be discriminated against on the basis of religious and cultural practices. The school authorities argued that the Court should show a measure of deference to school ‘governing bodies that are statutorily required to run schools and have the necessary expertise to do so.’ Consistent with O’Regan’s reference<sup>661</sup> to the constitutional value of equality as the distinguishing consideration in *Khosa*, the Court here held that, while judicial deference is appropriate in the review of administrative action where the decision-maker is ‘especially well qualified to decide a particular matter, no institutional deference is necessary or desirable where a court is to determine whether the right to equality has been infringed.’ More specifically, the Court held that:

The question before this Court ... is whether the fundamental right to equality has been violated, which in turn requires the Court to determine what obligations the school bears to accommodate diversity reasonably. Those are questions that courts are best qualified and constitutionally mandated to answer. This Court cannot abdicate its duty by deferring to the school’s view on the requirements of fairness. That approach is obviously incorrect for the further reason that it is for the school to show that the discrimination was fair. A court cannot defer to the view of a party concerning a contention that that same party is bound to prove.<sup>662</sup>

McLean notes further that in other judgments, the ‘courts have recognised the role of the legislature in the South African democracy, and held that deference is due to the legislature by the other branches of government, and that a court should only interfere where it is “*absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation*”’ (emphasis added).<sup>663</sup> With this caveat in mind, it is notable that O’Regan was party to the unanimous decision of the Constitutional Court in *TAC (No.2)*, in which the Court intervened in an unparalleled manner to instruct the executive to dispense a particular medication, with significant budgetary impact in the longer term.

In contrast to O’Regan’s apparent contentment with the doctrine as currently applied, it has been argued that, while the courts have quickly developed the ‘beginnings of a jurisprudence on the doctrine of deference which mirrors that in Canada and the United Kingdom,’ this development is ‘uneven’. Thus, while the application of the doctrine is ‘principled in the interpretation and enforcement of civil and political rights (such as in the

661 Pienaar (n 582 above).

662 Pillay (n 608 above) para 81.

663 *President of the Republic of South Africa & Others v United Democratic Movement (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amicus Curiae)* 2003 (1) SA 472 (CC) para 31. This passage was quoted with approval in *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs & Others* 2003 (5) SA 281 (CC) para 69.

*Pillay* decision), ... *this has yet to be mirrored in its application to socio-economic rights*' (emphasis added).<sup>664</sup>

Without doubt, there is no single correct model for deference or single appropriate deferential position; the courts' approach to deference will depend on a number of contextual factors, as well as pre-existing attitudes of the judges and judicial culture. This understanding is not inconsistent with 'a principled approach to deference within a particular context, or that normative claims cannot be made in this regard.' On the contrary, in terms supportive of Wilson and Dugard's emphasis on a contextual approach to understanding SERs adjudication, it is reasonable to argue that 'normative evaluations' *should* be made regarding an "'appropriate" level of deference *in our current context and circumstances*' (emphasis added).<sup>665</sup>

## 7 Conclusion

It is apparent from this analysis that it is necessary to encourage a continuation of the journey towards an appropriately contextualised understanding and application of the doctrine of deference. An appropriate understanding of the doctrine is essential in the context of increasing demands for the fundamental transformation of South Africa's unequal socioeconomic environment. O'Regan does not disagree, observing that we are making a path as we try 'to give real content to the social and economic rights in our Constitution', but reminding us of the need to be guided by clear principles lest we miss our mark.<sup>666</sup>

O'Regan expressed openness to the idea of some form of a purposeful 'constitutional dialogue' in keeping with the Constitution's transformative vision: 'The more we debate and consider the proper approach to social and economic rights in our Constitution, the more likely it will be that we will develop a progressive and democratic jurisprudence.'<sup>667</sup>

O'Regan believes that we are yet in the early days of our journey towards the transformed society envisioned by the Constitution. While she prizes principle and accordingly urges caution and patience, she is under no illusion that we have yet arrived at our destination. While prioritising 'balance' and respectful deference, she does not understand this to mean stubborn or self-satisfied rigidity. As such, the way is yet open to making a path that makes rights real, especially for those who have little else to cling to as a source of hope. An essential initial step along this path is the state's responsibility to enable citizens to develop the capacity to exercise moral

664 McLean (n 593 above) 87.

665 As above, 88.

666 O'Regan (n 566 above) viii.

667 As above, vii.

responsibility. In O'Regan's conceptualisation of the constitutional framework, rights and responsibilities adhere to everyone within the polity; they are interlocking and mutually reinforcing paving stones on the pathway to the goal of a just society. In her imagery, the South African Constitution is a fruit tree requiring ongoing cultivation. While it 'is bold and generous in spirit ... its vision is still far from the daily experience of most South Africans. As the Constitution takes root and grows, the challenge is to bring its bold and generous vision to fruition in our daily lives.'<sup>668</sup>

It is not beyond the realms of this framework and this vision – and it does not divert us from our road – to assert that the pressing needs of our current context and circumstances require us to identify other ways to bring to fruition the Constitution's 'bold and generous spirit' and to find a different equilibrium between the branches of the state. The courts recognise that deference has its limits, particularly as regards policy implementation, but also as regards policy formulation, with particular reference to context and circumstance. For O'Regan, everyone bears some responsibility for where we are and the progress we are making along our road. If, for instance, application of the reasonableness test indicates that maladministration and poor governance are substantially undermining the ability of some branches of the state to fulfil their responsibilities, it is within the parameters of this test for the courts to identify a different route to, or a different vehicle with which to reach, the transformed destination promised and required by our Constitution. Scope for this lies, for example, in the courts' powers to identify a 'just and equitable remedy' in terms of the provisions of section 172(1)(b) of the Constitution.<sup>669</sup>

In our current situation of profound disequilibrium, a different set of measures may be necessary in order to balance the scales, and a different delineation of the separation of powers may be required. As a first step, the courts are able to call upon litigating parties to provide more detailed evidence about the choices that inform policy and programmes, to more closely interrogate the sets of governance actions that underpin or undermine those programmes, and to inquire about their reasonableness in all the relevant circumstances. A second instrument could be the conscious factoring into the reasonableness test of considerations of urgency and

668 K O'Regan 'Cultivating a constitution: Challenges facing the Constitutional Court in South Africa' (2000) 2 *Dublin University Law Journal* 1-18, 18.

669 A case in point is the Constitutional Court's ongoing supervision of the various parties involved in finding an optimal alternative to current arrangements for the payment of social grants. Following the CC's decision in *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* (CCT48/17) [2017] ZACC 8; 2017 5 BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017), it continues to oversee the process of identifying an appropriate vehicle and associated institutional arrangements for grants payments. See, for example, 'Court wants details on mooted grant payment methods' *SA News* 30 November 2017 <https://www.sanews.gov.za/south-africa/court-wants-details-mooted-grant-payment-methods> (accessed 30 November 2017).



maladministration – under the mantle of the diligent performance of constitutional responsibilities. Mureinik's 'culture of justification' may provide the necessary counterweight to revisit the current parameters of the reasonableness test. Likewise, the constitutional rights of equality and dignity seem able to provide the necessary principled pillars to guide closer scrutiny of the policy implications of our current context and circumstances.

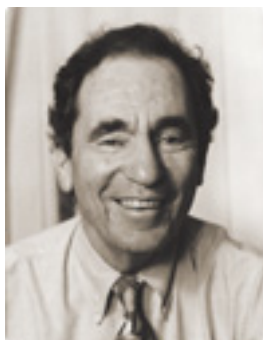
## Bibliography

- Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* (CCT48/17) [2017] ZACC 8; 2017 5 BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017).
- Calland, R. *The Zuma years: South Africa's changing face of power* (Zebra Press: Cape Town 2015).
- Dugard, J 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *South African Journal on Human Rights* 214.
- Dugard, J 'Judging the judges: Towards an appropriate role for the judiciary in South Africa's transformation' (2007) 20 *Leiden Journal of International Law* 965.
- Human Sciences Research Council 'Constitutional Justice Project: Interview with Justice K O'Regan' 7 October 2014.
- Human Sciences Research Council and University of Fort Hare 'Final report on the Constitutional Justice Project for the Department of Justice and Constitutional Development' (2015).
- McLean, K *Constitutional deference, courts and socio-economic rights in South Africa* (Pretoria University Law Press (PULP): Pretoria 2009).
- Mureinik, E 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.
- O'Regan, C 'Cultivating a constitution: Challenges facing the constitutional court in South Africa' (2000) 2 *Dublin University Law Journal* 1.
- O'Regan, C 'The three Rs of the constitution: Responsibility, respect and rights' (2004) 86 *Acta Juridica* 86.
- O'Regan, C 'Text matters: Some reflections on the forging of a new constitutional jurisprudence in South Africa' (2012) 75 *The Modern Law Review* 21.
- Sen, A *The idea of justice* (Harvard University Press: Cambridge 2011).
- Wilson, S & Dugard, J 'Taking poverty seriously: The South African constitutional court and socio-economic rights' (2011) 3 *Stellenbosch Law Review* 664.

## INFUSING THE CONSTITUTION WITH 'AN ETHIC OF CARE': THE HUMANE JURISPRUDENCE OF JUSTICE ALBIE SACHS

*Narnia Bohler-Muller & Thobekile Zikhali*

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Source: <http://www.constitutionalcourt.org.za/site/judges/justicealbiesachs/index1.html>

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### 1 Introduction

We wanted a Constitution that was smiling to the people – but it mustn't be a sneer smile, or an insincere mask of a smile. The smile must come from inside, that people may believe in it, because it's authentic. And the smile contains tears, and sadness, and a knowledge of imperfection.<sup>670</sup>

It is a complex task to write about the unique jurisprudence of retired Constitutional Court Justice Albie Sachs. In a sense, his own words tell the story better than anyone else could. Thus, in this chapter we refer extensively to Justice Sachs 'in his own words'. We also recognise that many knowledgeable persons have written about him and his role in the

670 'Soft Vengeance: Albie Sachs on loving your enemy into defeat' *Canadian Broadcasting Corporation* (CBC) 30 September 2016 <http://www.cbc.ca/radio/ideas/soft-vengeance-albie-sachs-on-loving-your-enemy-into-defeat-1.3785689> (accessed 20 June 2017).

transformation of South African law and society. However, a book such as this about the importance of the South African Constitution, its birth and evolution, could never be complete without once again re-visiting Justice Sachs's words and their meaning within the context of his life as a 'gentle' freedom fighter seeking 'soft' vengeance.<sup>671</sup>

The quotation by Sachs opening this chapter illustrates that for him the Constitution and the constitution-making process should be people-centred and focused on the humanity of the people it serves. For him, as for many others who craved freedom, the road had to be walked despite, or perhaps because of, the pain of the journey. Sachs's jurisprudence and life story more broadly have largely portrayed him as a sensitive and caring freedom fighter and a poetic judge – hence the title of this chapter. This approach, explained in more detail below, places emphasis on *context* in decision-making. To advance such an argument, we take a critical look at his contribution in building a free democratic South Africa. We trace his path, from growing up in a politicised Jewish family with a father who dreamt of him becoming a freedom fighter when he was merely six years old, to his participation in the struggle against *apartheid* and the Defiance Campaign, to his contributing to the Freedom Charter, to his experiences in jail and exile, and to the attack that almost cost him his life.

In 2009, one of the authors of this contribution, Narnia Bohler-Muller, wrote an article predominantly critical of the socio-economic jurisprudence of Justice Albie Sachs. In this article, 'The strange alchemy of the judge and the blue dress',<sup>672</sup> she recognised the remarkable contributions he had made in building an understanding of the South African Constitution and its values, but questioned whether he had not left his activism behind when he reached the first Bench of the Constitutional Court:

It should be noted from the outset that I write this critique of Sachs's socioeconomic jurisprudence within the context of my respect for the contributions he has made as a judge. My concern rests, however, with the fact that Sachs's pre-Bench political activism did not (fully) translate into judicial activism, but rather tended towards a utopian yet cautionary approach that failed to adequately interrogate the status quo.<sup>673</sup>

671 As above. See also A Sachs (n.d) 'From the soft vengeance of a freedom fighter' <http://anthropology.msu.edu/anp336-us13/files/2013/06/6.2-Schepper-Hughes-From-The-Vengeance-of-a-Freedom-Fi.pdf> (accessed 7 March 2017).

672 N Bohler-Muller 'The strange alchemy of the judge and the blue dress' (2010) 25(1) *South African Public Law* 152 (hereinafter referred to as 'Blue dress'). In this article Bohler-Muller takes exception to what she perceives as a lack of discomfort when faced with human suffering and Sachs' seeming ability to cling to the law to justify hard choices. This impression predominately relates to his socio-economic rights judgments, which appear more deferent than necessary. However, when not speaking 'as a judge' but as an 'activist', Sachs explains the internal tensions that may not have been an express part of his judicial discourse.

673 Bohler-Muller (n 672 above) 154.

The concerns expressed were that he had not done enough to assist in alleviating the suffering of the poor, by remaining cautious in his judgments and unwilling to openly and aggressively challenge the executive in a post-*apartheid* context when it came to fulfilling socio-economic rights in particular.<sup>674</sup> But, in hindsight, perhaps it is apposite to listen to his voice again, and to understand the differences in the nature of activism before and after 1994; in other words, activism under an oppressive regime versus activism in a democracy. Activism takes different forms, and at times the Constitutional Court has had to defer to the other two branches to ensure that the Court was not seen to be ‘over-stretching’ or counter-majoritarian (or, even worse, counter-revolutionary).<sup>675</sup> It could be argued that the dawn of democracy brought an end to the kind of activism needed before 1994. However, the persistence of poverty and inequality in South Africa has raised questions about whether enough has been done.

Justice Sachs has stretched our legal imagination(s), but he has also worked within strict constraints – the limits of the law – which have prevented him, to some extent, from being the kind of judicial activist he *could* have been within the context of transformative constitutionalism,<sup>676</sup> described by Van Marle as a ‘critical account of the notion [of law] itself’,<sup>677</sup> where judges read the Constitution as being both legal and political:

What I mean by transformative constitutionalism as critique, for the moment, is an approach to the Constitution and law in general that is committed to transforming political, social, socio-economic and legal practice in such a way that it will radically alter existing assumptions about law, politics, economics and society in general.<sup>678</sup>

Prior to 1994 Justice Sachs fought bravely against the oppression of *apartheid*, and he paid a high price for his courage. After 1994 Justice Sachs entered a new phase of ‘activism’ considered more suitable to South Africa’s new democratic dispensation. As a member of the first Bench of the Constitutional Court under the Presidency of former Chief Justice Chaskalson, he did continue to fight, in new ways, to protect the Constitution and to ensure that its interpretation reflected an ethic of care and *ubuntu*. This is truly a valuable contribution, one we wish to

674 The ‘suffering’ Bohler-Muller refers to in her critique is based on LE Wolcher *Law’s task: The tragic circle of law, justice and human suffering* (2008).

675 ‘Judges must not undermine the integrity of the courts’ (2008) 8(27) *ANC Today* 11-17 July <http://www.anc.org.za/docs/ancctoday/2008/at27.htm> (accessed 15 May 2017). The anonymous article denied that Mantashe had used the term ‘counter-revolutionary’.

676 Originally introduced into South African legal discourse by K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146.

677 K van Marle ‘Transformative constitutionalism as/and critique’ (2009) 20(2) *Stellenbosch Law Review* 293.

678 As above, 288.

acknowledge in the writing of this chapter, where we take a fresh look at the humane jurisprudence of Justice Albie Sachs.

The chapter draws on academic literature, the Constitution, various interview transcriptions, judgments, Justice Sachs's own writings, lectures and speeches as well as media articles or coverage of his contributions in the political and legal landscape of South Africa. It is divided into three main parts. The first sketches the background, where we provide an abbreviated 'biography' of the life of Albie Sachs as liberator, jurist and beyond. The second provides an overview of his contribution to the evolution of the Constitution and to a democratic society through a selection of his most ground-breaking judgments. The third part identifies the themes we find in his work (*ubuntu*, an ethic of care, storytelling, reconciliation and restoration) and describes his journey in the making (and continued protection) of the Constitution – one could say his perpetual love of the Constitution.

## 2 Background: The stories of Justice Albie Sachs

Born in 1935, Albie Sachs is known not only as a former Justice of the Constitutional Court; he is an activist, a writer, a teacher, a lecturer, and a well-known international personality. Sachs has often been described as a humane person who has a heart for forgiveness.<sup>679</sup> His background, rooted in radical politics, led him to join the struggle against the oppression of South Africa's black population. His background shaped his political ideas and ultimately his contribution to the Constitution and the jurisprudence of the Constitutional Court.

Sachs graduated and started practising law at the age of twenty-one. Most of his clients were black people who were facing oppression at the hands of the *apartheid* government. Although he worked within the law, his support for marginalised communities made him a target for the state's security forces. The *apartheid* government had a 'right' to imprison 'traitors' and 'terrorists' in solitary confinement for 90 days, later increased to 180 days, without laying charges.<sup>680</sup> In his words, 'when I had been in solitary confinement I had wondered why it had been so difficult to be brave.'<sup>681</sup> He wrote a narration of his ordeal in *The jail diary of Albie Sachs*,

679 P Trehwela (nd) 'The dilemma of Albie Sachs: ANC constitutionalism and the death of Thami Zulu' <http://www.sahistory.org.za/sites/default/files/sloct93.6.pdf> (accessed 15 May 2017).

680 The Internal Security Amendment Act of 1976 was promulgated following the uprisings of students in Soweto. This Act allowed for renewable 12-month periods of preventive detention and six-month detention of potential witnesses in solitary confinement. As mass protests grew in the 1980s, a new Internal Security Act was enacted in 1982, streamlining previous legislation. Section 29 of this Act allowed for detention until 'all questions are satisfactorily answered' or 'no useful purpose will be served by further detention.'

681 A Sachs *The strange alchemy of life and law* (2011) 140.

which was later turned into a play and produced by the Royal Shakespeare Company.<sup>682</sup>



*Twenty-one-year-old Albie Sachs (centre) at a meeting of The Congress of the People to adopt the Freedom Charter, Kliptown, 1955 (Source: Robben Island Museum Archives)*

In 1966, Sachs moved to England, where he and his first wife, Stephanie Kemp, had two sons. During this time he received a PhD scholarship to study at the University of Sussex. As a scholar he has written several books, including *Justice in South Africa*,<sup>683</sup> *The jail diary of Albie Sachs*,<sup>684</sup> *The free diary of Albie Sachs*<sup>685</sup> and *The strange alchemy of life and law*.<sup>686</sup> His latest book, *We the people: Insights of an activist judge*, was published in 2016.<sup>687</sup>

When Mozambique gained independence in 1975, Sachs moved from England to Mozambique, where he lived for eleven years. He worked at Eduardo Mondlane University in Maputo as a law professor and continued his activism against the *apartheid* regime. During that period of his life he met and befriended Oliver Tambo and together they drafted the

682 D Edgar *The jail diary of Albie Sachs* Royal Shakespeare Company.

683 A Sachs *Justice in South Africa* (1973).

684 A Sachs *The jail diary of Albie Sachs* (1990).

685 A Sachs with V September *The free diary of Albie Sachs* (2004).

686 Sachs (n 681 above).

687 A Sachs *We the people: Insights of an activist judge* (2016).

ANC's Code of Conduct and the laws guiding the organisation as a liberation movement.<sup>688</sup>

In 1988 Sachs faced a threat to his life when his car exploded in Mozambique. As a result of this attack he lost his right arm as well as the sight in one of his eyes. The bomb was orchestrated by agents working for South African Military Intelligence.<sup>689</sup> However, as testimony to his resilience, this tragedy did not deter him in his fight for freedom and democracy. In fact, Sachs preached forgiveness; his story about 'the soft vengeance of a freedom fighter' illustrates his steadfast belief in reconciliation. In an interview with Patrick Barkham of the *Guardian* newspaper, Sachs had this to say about the incident that almost cost him his life:

To wake up without an arm but to feel joyously alive, to learn to do everything – to sit up, to stand, to walk, to run, to write again. Every little detail became a moment of discovery and breakthrough. I had an absolute conviction that as I got better, my country got better.<sup>690</sup>

He had survived and triumphed over those who wanted to see him dead, as South Africa would triumph over the evils of *apartheid*. This marked a 'new journey of discovery' and portrayed his undying spirit. Describing the Constitution as an example of soft vengeance, Sachs notes that:

It totally smites the horror, the division, the hatreds, the separations of *apartheid* but it does so in a way that is benign and creative and humanising. It's a far more profound vengeance than doing to them what they did to us.<sup>691</sup>

Upon his return to South Africa after twenty-four years in exile, Sachs was appointed as a member of the Constitutional Committee that was responsible for developing a democratic constitution. Sachs proposed the inclusion of the Bill of Rights and an independent judiciary. He also successfully fought for justiciable socio-economic rights such as access to water, housing, a clean environment, and healthcare. With such a strong a commitment to the building of a constitutional democracy it was not surprising that former President Mandela appointed him as one of the eleven judges of the Constitutional Court's first Bench.

Some of the milestones marking Sachs's contributions to South Africa's road to transformation include the abolition of the death penalty,<sup>692</sup> arguing for the decriminalisation of homosexuality in the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice*

688 'Sachs tells how he crafted ANC's code of conduct' *Mail & Guardian* 9 November 2007.

689 C Steinberg 'Albie Sachs: Our Shakespearian fool' (1991) 35(1) *The Drama Review* 194-199.

690 I 'can't tell my son everything' *The Guardian* 8 October 2011.

691 As above.

692 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 262.



and Others case,<sup>693</sup> which led to the legalisation of same sex marriages in 2005,<sup>694</sup> and introducing the concept of ‘meaningful engagement’ in eviction cases.<sup>695</sup> His contribution to the development of socio-economic rights jurisprudence is discussed in more detail below.

Even after retiring as a judge in 2009, Sachs continues to play a significant role both in South Africa and internationally. He served as a member of a magistrates and judges vetting board in Kenya involved in assessing whether judicial officers were still suitable for their jobs following the adoption of the new Constitution, largely modelled on that of South Africa.<sup>696</sup> Recently, he was awarded the Tang Prize, which in Asia is equivalent to the Nobel Prize. The Tang Prize Foundation honoured Sachs for his contribution to human rights and justice, particularly in the realisation of the rule of law in a democratic South Africa.<sup>697</sup>

In his Oliver Tambo Centenary Lecture he asked the audience ‘what good thing came out of *apartheid*?’ To cheers he stated that *apartheid* created ‘anti-*apartheid*’. Although his remark sounds simplistic, such a statement is pregnant with meaning. *Apartheid* did indeed see the joining of forces by different peoples both within South Africa and outside. In South Africa, the fight against *apartheid* gave birth to the Defiance Campaign, which saw different liberation movements joining hands in the struggle.<sup>698</sup> On the global stage the principles of the Freedom Charter were visible in the policies of the Organisation of African Unity and in statements by the Front Line States that condemned the ideology and practice of racism. In 1979 the UN ‘Declaration of South Africa’ was adopted.<sup>699</sup>

However, despite celebrating the solidarity of the anti-*apartheid* movements locally, continentally and internationally, Sachs also acknowledges the challenges that South Africans face today and promotes the need to reclaim human rights.<sup>700</sup>

693 1999 (1) SA 6 (CC). See also the ground-breaking judgment of *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* – 2006 (1) SA 524 (CC), which recognised the right of gay and lesbian couples to marry.

694 Academy of Achievement ‘Albie Sachs’ <http://www.achievement.org/achiever/albie-sachs/> (accessed 23 February 2017).

695 Starting with *Port Elizabeth v Various Occupiers* 2005 (1) SA 217 (CC), where Sachs referred to the need for mediation between the land owners, the ‘squatters’ and the municipality. This later evolved into the concept of meaningful engagement.

696 ‘Transcript of the interview with Albie Sachs’ *International Centre for Transitional Justice (ICTJ)* 25 April 2011.

697 ENCA ‘Anti-*apartheid* hero Albie Sachs awarded Tang prize’ <http://www.enca.com/anti-apartheid-hero-awarded-tang-prize> (accessed 23 February 2017).

698 ‘Freedom charter our blueprint for human rights’ *Cape Times* 23 June 2016.

699 As above.

700 Centre for Human Rights ‘Oliver Tambo centenary lecture by Justice Albie Sachs’ 22 February 2017 <https://www.youtube.com/watch?v=U3g6LJyQCDE> (accessed 7 March 2017).

In the next section we explore Sachs's contributions to the evolution of a constitutional jurisprudence which places emphasis on the role of rights in alleviating suffering and advancing principles of social justice, something no doubt worth reclaiming.

### 3 Understanding Sachs's contribution to the evolution of the Constitution

Sachs is a strong believer in human rights and the need for government to respect and protect such rights.<sup>701</sup> With regard to the Constitution, Sachs notes that 'the issue is no longer whether to have democracy and equal rights, but how fully to achieve these principles and how to ensure that within the overall democratic scheme, the cultural diversity of the country is accommodated and the individual rights of citizens respected.'<sup>702</sup>

This section focuses on how Sachs himself understands constitutional justice in his own words and how this understanding is illustrated in the *Soobramoney* and *Grootboom* cases, which required of him to make hard choices in the face of human suffering and tragedy.

#### 3.1 In the beginning: Humanity and incertitude

In the beginning and the end is the word, at least as far as the life of a judge is concerned. We pronounce. We work with words, and become amongst the most influential story-tellers of our age. How we tell the story is often as important as what we say. The voice we use cannot be that of a depersonalised and divine oracle that declares solutions to the problems of human life through the enunciation of pure and detached wisdom. Nor dare we seek to imitate the artificial sound of a computer that has been programmed to produce inexorable outcomes. We speak with the living voices of real protagonists who are immersed in and affected by the very processes we deal with. If law is a machine we are the ghosts that inhabit it and give it life. We are animated by consciences that will have been shaped not only by our learning but by our varied engagements with life, with experiences both inside and outside the law.<sup>703</sup>

For Sachs, true transformation and reconciliation requires the recognition of the absence of legal certitudes and embracing the messiness and uncertainty of humanity. In the book *Albie Sachs and transformation in South Africa. From revolutionary activist to Constitutional Court judge*<sup>704</sup> there is extensive discussion about the centrality and importance of the recognition of humanity. According to Sachs the law should show compassion

701 A Sachs 'Towards a Bill of Rights for South Africa' (1991) 35 *Journal of African Law*.

702 As above, 21.

703 Bohler-Muller (n 672 above) 170.

704 D Cornell *et al Sachs and transformation in South Africa. From revolutionary activist to Constitutional Court judge* (2014).

towards the people it serves, unlike the role the law played in oppressing and attempting to de-humanise the majority of South Africans under the *apartheid* regime, during which time the legislature was supreme.

Narrating his involvement in the case of an HIV positive person who was unfairly discriminated against by South African Airways because of his HIV status, Sachs reveals his belief in humanity and humaneness<sup>705</sup> by admitting to shedding tears after some of the cases he presided over. For example, he confessed that 'the tears had come because of an overwhelming sense of pride at being a member of a court that protected fundamental values and secured dignity for all human beings.'<sup>706</sup> It should be noted here that the emotions that Sachs openly shares are those one could consider to be 'feminine'. In the sense that he describes himself as a feminist he is resisting stereotypes in his own life, another sign of the activist within.

Sachs's jurisprudence has received extensive attention from academics<sup>707</sup> and the media. In an article entitled 'Freedom, constraint and (the) judging of Albie Sachs'<sup>708</sup> Brand examines the extent to which Sachs's judgments reflect an interplay between freedom and constraint. The motivation of such an engagement comes from Sachs's claim, the central theme of his book *The strange alchemy of law and life*, that life and law are interconnected. The central argument is that a judge is constantly affected or constrained by the environment surrounding him / her when adjudicating various cases, thereby limiting his or her freedom to judge. *The strange alchemy* is a journey in and of itself as Sachs probes his own life as a judge. He admits that Cartesian rationality plays only a small part in decision-making, as it is also laced with elements of passion, creativity and intuition, some of which occur in interesting places such as a warm bath.<sup>709</sup> These bath-time revelations, according to Sachs, are some of the 'best-travelled' of all his opinions.<sup>710</sup>

Brand concludes that the best way to define Albie Sachs's constitutional work is 'one that would assume rhyme and reason, which

705 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

706 P Jones & K Stokke *Democratising development: The politics of socio-economic rights in South Africa* (2005) [https://www.researchgate.net/profile/Peris\\_Jones2/publication/248706970\\_Democratising\\_Development\\_The\\_Politics\\_of\\_SocioEconomic\\_Rights\\_in\\_South\\_Africa/links/56cbee4d08aee3cee5419712.pdf](https://www.researchgate.net/profile/Peris_Jones2/publication/248706970_Democratising_Development_The_Politics_of_SocioEconomic_Rights_in_South_Africa/links/56cbee4d08aee3cee5419712.pdf) (accessed 7 March 2017).

707 For example, P Lenta 'Revelation and legitimation in Albie Sachs's *The strange alchemy of life and law* (2013) 40(1) *English in Africa* 79-97; S Woolman & M Bishop (eds) *Constitutional conversations* (2008); D Cornell & K van Marle *Exploring ubuntu: Tentative reflections* (2005); T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Journal*; F Horne 'Can personal narratives heal trauma? A consideration of testimonies given at the South African Truth and Reconciliation Commission' (2013) 39(3) *Social Dynamics: A Journal of African Studies*.

708 D Brand 'Freedom, constraint and (the) judging (of) Albie Sachs' (2010) 25(1) *South African Public Law*, 25-38.

709 Bohler-Muller (n 672 above) 116.

710 As above, 117-119.

would assume the existence of a normative framework that guided his individual decisions about how to approach specific cases.<sup>711</sup> This implies that Sachs saw legal rules as flexible and not fixed and that he emphasised the importance of a normative environment and context.

Brand uses the example of *Port Elizabeth Municipality v Various Occupiers* 2004 to show the interplay of life and law in Sachs's judgements. This case was brought by the Port Elizabeth Municipality after land owners had complained about the illegal occupation of their private land by impoverished squatters. In dealing with this case, Sachs underscored the importance of moving away from the abuses that were common during the *apartheid* period, making reference to the Prevention of Illegal Squatting Act (PISA).<sup>712</sup> In contradistinction to PISA, Sachs chose to be guided by the Constitution's values of human dignity and equality as a path towards justice and equity.<sup>713</sup> Such considerations saw Sachs denying the eviction order, arguing that the Port Elizabeth Municipality should instead offer alternative accommodation to the squatters and not evict them as this would render them homeless and even more vulnerable. As he noted in his *free diary*, 'as long as we are judges and not computers, an element of ourselves must inevitably and properly go into our decisions.'<sup>714</sup>

In his contribution to the *National Coalition for Gay and Lesbian Equality v Minister of Justice* case on same sex unions, Sachs made it a point to illustrate the uniqueness of people. He explained that sexuality varies and that it is everyone's responsibility to create safe spaces that give people the freedom to become who they want to be. Similarly, in *S v Jordan* Sachs 'recognises that the lived experience of prostitutes is subject to the same constraints and the same demands we all face – survival, support of the family'<sup>715</sup> and therefore demands equal respect and concern.

Thus, part of Justice Albie Sachs's legacy to us is his insight into the process of judging, and his experience of being a judge.

He has expressed a degree of uncertainty about his role as a judge because his was quintessentially a journey in which he 'made the road by walking'. He begins his story with an account of his experiences as a freedom fighter. In the prologue to the *Strange Alchemy* (one of many, but probably the most remarkable of his books) Sachs describes his early life as dichotomous, of his being 'divided' between 'lawyer' and 'outlaw'. He did not see his relationship with the law as unproblematic in the light of his activism against *apartheid* law. He relates the story of a lecture he delivered at the University of Toronto, where he told students that '[e]very judgment

711 Brand (n 708 above) 38.

712 Act 52 of 1951.

713 Brand (n 708 above) 38.

714 Sachs with September (n 685 above).

715 Woolman S, "I am large": Sachs, Whitman and democracy' (2010) 25 *Southern African Public Law* 72

I write is a lie'.<sup>716</sup> This is not as a result of the *falsehood* of the content of the judgment, but rather refers to the internal struggle a judge goes through when thinking through difficult concepts and then articulating these concepts as clearly as possible.

Despite claims of radicalism and activism, Sachs's relatively cautious approach as an 'activist judge' is epitomised in his commentary on the enforceability of socio-economic rights in the *Soobramoney*<sup>717</sup> and *Grootboom*<sup>718</sup> cases, which reflect his 'compassion' on the one hand and his acceptance of the law's role in perpetuating 'necessary' suffering on the other.<sup>719</sup> These two judgments – and his own and others' views about them – are discussed in some detail below. The Constitutional Court's version of the *Soobramoney* and *Grootboom* stories is well known and has been written about extensively.<sup>720</sup> Here, we focus on Sachs's interpretation of the enforceability of socio-economic rights as a reflection of a general tendency to accept the notion that human suffering is necessary in order to ensure the greater good.

### 3.2 The value of an individual life

Thiagraj Soobramoney was a 41-year-old diabetic suffering from ischaemic heart disease, cerebrovascular disease and irreversible chronic renal failure. It was common knowledge that his life could be prolonged by regular renal dialysis. He did not have sufficient resources to continue renal dialysis in a private hospital and sought dialysis treatment from Addington State Hospital.<sup>721</sup> However, because of a shortage of resources, based on a set of guidelines to determine eligibility for the dialysis programme the hospital could only provide dialysis to a limited number of patients.

Soobramoney was adjudicated by the public hospital to be ineligible for the dialysis programme and was denied treatment. In July 1997 he made an urgent application to the Durban and Coast Local Division of the High Court for an order directing Addington Hospital to provide him with dialysis treatment.<sup>722</sup> His application was dismissed, and the matter was

716 As above, 7.

717 *Soobramoney v Minister of Health KwaZulu-Natal* 1998 (1) SA 765 (CC).

718 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

719 See Bohler-Muller (n 644 above).

720 See for example, A Sachs 'The judicial enforcement of socio-economic rights: The Grootboom case' (2005) 56(1) *Current Legal Problems* 579-601. See also JJ Williams *The Grootboom case and the constitutional right to housing: The politics of planning in post-apartheid South Africa* (2005). For the *Soobramoney* case see, E Kramer "'No one may be refused emergency medical treatment'" – Ethical dilemmas in South African emergency medicine' (2008) 1(2) *South African Journal of Bioethics and Law*; and K Lehmann 'In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006) 22(1) *American University International Law Review*.

721 *Soobramoney* (n 717 above) paras 1 and 5.

brought on appeal to the Constitutional Court in an attempt to enforce his right to emergency medical treatment and his right to life.<sup>723</sup> In short, Soobramoney wanted to enforce his right to be kept alive by a kidney dialysis machine for as long as possible, whilst the hospital in question claimed that it was not equipped to do so as it lacked resources and had to keep many other people alive – people who were more likely to survive.

The Court subsequently dismissed the claim based on these two rights, but then went further to discuss the possibilities for the success of the claim had it been brought on the basis of section 27(1)(a), the right to access to health care services.<sup>724</sup> The Court found that section 27(1)(a) was qualified by section 27(2), which determines that the state is only required to give effect to the section 27(1)(a) right ‘within its available resources’.<sup>725</sup>

The Court further found that the hospital had proved that it had limited resources available for the provision of kidney dialysis treatment. The hospital had also shown that it had developed a set of reasonable and fair criteria that enabled it to decide who would receive treatment and who would not and that those criteria had been applied in good faith in the instant case.<sup>726</sup> It was stated in the judgment that courts should be ‘slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.’<sup>727</sup> It was therefore held by the Court that Thiagraj Soobramoney was not entitled to the kidney dialysis treatment. He died shortly thereafter. In a commentary on his judgment in this case, Sachs stated:

This was a most painful case. Effectively, it was up to the eleven men and women on the Court to decide whether this man lived or died. *There was no precedent to guide us* – all we had was the text of the Constitution, a hospital with good but limited resources, and the pleas of a dying man.<sup>728</sup>

It felt wrong that a test for ‘reasonableness’ was used in response to the pleas of a dying man. It felt cold, even heartless. In essence, the hospital’s policy was found to be ‘eminently rational and non-discriminatory’ and Soobramoney’s pleas were dismissed. In fact, Sachs recalls remarking to counsel that if ‘resources were co-existent with compassion, the case would have been easy to decide.’<sup>729</sup> The sadness, according to Sachs, is that it had already been established that the enforceability of socio-economic rights is dependent on the availability of resources, and as

722 As above, para 5.

723 As above, paras 5 and 7.

724 This is highly unusual as the Court usually deals only with arguments before it, and is thus an indication of how much the judges were willing to grapple with the difficult issue of imminent life and death.

725 *Soobramoney* (n 717 above) para 22.

726 As above, para 29.

727 As above.

728 Bohler-Muller (n 672 above) 176 (emphasis added).

729 Bohler-Muller (n 672 above).

resources are limited, such rights must be ‘rationed’ through a system of ‘apportionment’.<sup>730</sup> Sachs concluded that the reach of health programmes should become progressively larger, and that each individual should be granted the right to be considered fairly and without discrimination for treatment within such programmes. But the moment of judgment itself constituted the subjugation of an individual, whose death was deemed to be necessary in order to save the lives of others.

The fact that the judges had ‘no precedent to guide them’ as stated by Sachs in the above quotation is again a reminder as to how uncertain the terrain was. The road did not exist and was being made by walking, an enormous responsibility as the precedents being set would influence the interpretation of the Constitution in the future.

### 3.3 Irene Grootboom and her struggle for shelter

This brings us to the story of Irene Grootboom, who initially lived in Wallacedene, an informal squatter settlement in the municipal area of Oostenberg. The residents of Wallacedene lived in severe poverty, without any access to water, sewage or refuse removal.<sup>731</sup> The area is partly waterlogged and lies dangerously close to a main thoroughfare. Many Wallacedene residents had placed their names on a waiting list for low-income housing.<sup>732</sup> As time passed, a group of about 900 people, including Irene Grootboom, began to move from Wallacedene onto adjacent, vacant, privately-owned land that had been ear-marked for low-cost housing. The landowner obtained an eviction order and the Sheriff was ordered to dismantle and remove any structures on the land.<sup>733</sup> The magistrate who granted the eviction order stated that the community and the municipality should negotiate in order to identify alternative land for the community to occupy on a temporary or permanent basis.<sup>734</sup> Since they had lost their former sites in Wallacedene, the community moved onto the Wallacedene sports field and erected temporary structures there.<sup>735</sup> With legal assistance, they notified the municipality of the situation and demanded that the municipality meet its constitutional obligation to provide adequate temporary accommodation.

After receiving an unsatisfactory response from the municipality, the community launched an urgent application in the Cape High Court.<sup>736</sup> The Grootboom community based their case on two constitutional

730 As above.

731 *Grootboom* (n 718 above) para 7.

732 As above, paras 7 & 8.

733 As above, para 9.

734 As above.

735 As above, para 11.

736 *Grootboom and Others v Oostenberg Municipality and Others* (6826/99) [1999] ZAWCHC 1 (17 December 1999).

provisions: section 26 of the (interim) Constitution,<sup>737</sup> which provides that everyone has a right of access to adequate housing, obliging the state to take reasonable measures, within its available resources, to make sure that this right is realised progressively; and section 28(1)(c), which provides that children have a right to shelter, without condition.

The Cape High Court rejected the first argument. It held that government's housing programme was reasonable and thus fulfilled the requirements of the Constitution.<sup>738</sup> In terms of the second argument, the court held that parents are primarily responsible to provide shelter for their children. If, however, they are unable to do this, section 28(1)(c) places an obligation on the state to do so.<sup>739</sup> Furthermore, the court found that parents should be able to live with their children as it was not in the best interests of children to be separated from their families.<sup>740</sup> This seemed to overcome some of the obstacles faced by the community.

Government took the decision of the High Court on appeal to the Constitutional Court. In the case of *Government of the Republic of South Africa v Grootboom*<sup>741</sup> the Court, as with *Soobramoney*, adopted a standard of review founded upon an assessment of reasonableness. At the centre of this approach lay its concern with an assessment of resource availability and the fact that the realisation of socio-economic rights is a function of resource allocation over time. In addition, the Court also carefully located its socio-economic rights adjudication function within its understanding of the fundamental principle of separation of powers as between the judiciary and the legislature as policy formulator and the executive as the driver of service delivery.<sup>742</sup> In his commentary on the judgment in the *Grootboom* case, Sachs warns that judges should avoid the pitfalls of being 'passive and uncaring' on the one hand and seeking 'headlines as champions of the poor' on the other.<sup>743</sup> So, how then did the Court respond to people sleeping with their heads in the dust under plastic sheeting?<sup>744</sup> It determined that the state had an obligation to take reasonable, progressive measures to provide adequate housing within its budget in order to respect the dignity of the poor. The result, as Sachs mentions much later in the epilogue of his book, was that Irene Grootboom died some years later 'without having moved from her shack to a brick house'.<sup>745</sup>

Within this context Sachs acknowledges the difficulty of enforcing socio-economic rights and states that '[t]he years on the Court have not

737 Act 103 of 1994, now section 27 of the 1996 Constitution.

738 *Grootboom* (n 718 above) para 14.

739 As above, para 15.

740 As above.

741 As above.

742 As above, paras 21-25.

743 Bohler-Müller (n 672 above) 177.

744 As above.

745 As above, 274.



always been free from moments of pain and discomfort'.<sup>746</sup> In response to the socio-economic jurisprudence of Sachs and his colleagues on the Bench, Dugard maintains that the judiciary remains institutionally 'unresponsive to the problems of the poor and fails to advance transformative justice.'<sup>747</sup> Dugard notes that the Constitutional Court has adopted a cautious style, which Iain Curry – following Cass Sunstein – has termed 'judicious avoidance'.<sup>748</sup>

Despite the existing potential for radical innovation in the interpretation of socio-economic rights through the adoption of a more flexible and creative judicial engagement with rights, the Court rather fixated on the 'availability of resources' as determined by the executive's budget. The judgment did, however, lead to a change in housing policy and thus could be interpreted ultimately as transformative and in the public good.<sup>749</sup>

In Sachs's interview with the HSRC as part of the Constitutional Justice Project,<sup>750</sup> he spoke extensively about the Grootboom case and its significance:

Sometimes I start with Mrs Grootboom, and I tell the story about the rains coming down and a thousand people trekking to get away from being submerged by water in the middle of the winter rains in the Cape .... I

746 As above.

747 J Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *SAJHR* 215.

748 See I Curry 'Judicious avoidance' (1999) 15 *SAJHR* 138, drawing on CR Sunstein *Legal reasoning and political conflict* (1996).

749 See for example, South African Government 'Social housing policy for South Africa' (2003) [http://www.gov.za/sites/www.gov.za/files/social%20housing%20policy\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/social%20housing%20policy_0.pdf) (accessed 15 May 2017); Department of Human Settlements 'National housing code, 2009' <http://www.dhs.gov.za/content/national-housing-code-2009> (accessed 15 May 2017); Socio-economic Rights Institute of South Africa, 'Upgrading of Informal Settlements Programme (UISP) Part 3, Volume 4 of the National Housing Code, 2009' [http://www.seri-sa.org/images/5\\_Volume\\_4\\_Upgrading\\_Informal\\_Settlement.pdf](http://www.seri-sa.org/images/5_Volume_4_Upgrading_Informal_Settlement.pdf) (accessed 15 May 2017); Socio-economic Rights Institute of South Africa 'Emergency Housing Programme (EHP) Part 3, Volume 4 of the National Housing Code (2009)' <http://www.seri-sa.org/images/2%20Volume%204%20Emergency%20Housing%20Programme.pdf> (accessed 15 May 2017).

750 The Human Sciences Research Council (HSRC), together with its partner the University of Fort Hare (UFH), was appointed by the Department of Justice and Constitutional Development (DOJCD) to assess the impact of the Constitutional Court (CC) and the Supreme Court of Appeal (SCA) on the lived experiences of all South Africans (the 'Constitutional Justice Project'), particularly in respect of the adjudication and implementation of socio-economic rights within the context of a capable and developmental state. Included in the scope of the research is an analysis of pertinent issues relating to access to justice – including direct access to the Constitutional Court – with a view to addressing inequality and the eradication of poverty. In this research project an in-depth legal analysis of the jurisprudence of the apex courts was complemented by a strong empirical component that sought to investigate the broader impact of these court decisions on South African society. A unique case study methodology was adopted to track the impact of landmark cases in all spheres of government and society, which involved interaction with various role players, from academics to litigants to members of the Bench, and public officials responsible for the implementation of court orders.

imagine her lying out at night, she's only got plastic to cover herself and she's looking up at the sky, she sees the clouds overhead, and thinks to herself why ... why am I sleeping out like this? All I want for my children is a decent home. I haven't done anything wrong and yet I'm in such a vulnerable situation ... why, why, why?

After sketching this vivid picture of the suffering of this individual and this community, Sachs explains his existential moment, the discomfort one would expect from an activist:

... the terrain was open at that stage .... The great constitutional [texts] like the American Constitution [do not] include socio-economic rights. Canada with a wonderful Charter of Rights doesn't include socio-economic rights. So there's lots of theorisation on liberty and more recently on equality, but on this theme if you like, of human solidarity, social solidarity, there was nothing ... it's not the ordinary job of judges to determine questions of housing and housing priorities. We know very little about it on purely technical terms, and our expertise and our thinking is not directed towards those questions. In a sense we work in another realm.

Sachs describes remembering 'so vividly the tensions in my own head that reflected the tensions of the Court ... we were also a fairly new Court and we were feeling our way, the government was feeling its way and ... so we don't want to pick up the reins of government and take over and be too pushy.' He explained the need for caution in the context of a new democracy, but he also acknowledged that on 'the other side there were a thousand people sleeping out on a bare field, the rains are coming, they've got plastic to protect themselves ... if we can't come up with something in this case, then what the hell are the Courts doing at all?' In this case, as with *Soobramoney*, life and law become entangled in a way that is difficult to reconcile. The Court chose avenues that it believed would have wider policy impact in the long term, whilst recognising the suffering of those trapped in the present.

Sachs has described the need for a cautious 'activism' by referring to the *Treatment Action Campaign*<sup>751</sup> case:

... to bring it back to separation of powers. In the *TAC* case we expressly dealt with the argument that [socio-economic rights were individual rights] presented by Wim Trengrove ... I remember it. It's one of my very special moments on the Bench, a dialogue between him and myself when he was arguing very persuasively, or very forcefully, about why rights should be individual and personal. And I said, well, does that mean that somebody living up in the high mountains far away from any dam or source of water complain[ing] that she must have a tap, when the same expenditure involved in getting that water up into the mountain could provide water for ten thousand people. He said that's an emotional argument. And I said the issues

751 *Minister of Health & Others v Treatment Action Campaign & Others* (No 2) 2002 (5) SA 721 (CC), para 106.

are emotional. It was a marvellous interchange, but we rejected his approach and I think appropriately so.

Having analysed the two Constitutional Court cases that had a substantive impact on Sachs' life and his understanding of the law as well as an impact on the lives of others, we now turn to the themes that can be distilled from these judgments and consequent decisions.

## 4 Discussion and themes

Sachs concludes his book *strange alchemy* with a simple answer as to what judges do: 'in a word', they 'judge'.<sup>752</sup> In this section we unpack, within the context of his understanding that life and law are intertwined, what 'judging' entails as illustrated above. These themes are tightly related, but have been 'categorised' in order to allow a focus on particular curial and extra-curial expressions of judging and judg(e)ment.

### 4.1 Storytelling, *ubuntu* and care

*S v Makwanyane*<sup>753</sup> was the first human rights case heard by the newly constituted Constitutional Court in which the concept of *ubuntu* was referred to as a means of voicing the marginalised other. In this case Sachs was instrumental, together with Mokgoro J, in introducing the concept of *ubuntu* into the common law and into contract law.<sup>754</sup>

If *ubuntu* is conceived as a philosophy of the individual-in-relationship, freedom constitutes an act of responsibility to the community. This disposition does not rely on uniformity or sameness within community, but plays out as a question of potential – in other words: who I am able to become through a sense of belonging. This is reflected in Sachs's jurisprudence and was based on his ability to care – about people and about the law.

The way in which Sachs expresses himself in his activism, both political and legal, is through the medium of stories and storytelling. Through this medium he contextualises his decision-making and provides a window into the mind of a judge. He makes clear in the telling of these stories that real lives, including his own, are 'messy, as we constantly travel between our own internal worlds and those of the outside. These world

752 Bohler-Muller (n 672 above).

753 *Makwanyane* (n 692 above) para 262.

754 At its root, the Nguni phrase *umuntu ngumuntu ngabantu* ('A person is a person through other persons', or 'I am what I am because you are'), or the Sotho-Tswana phrase *Motho ke motho ka batho babang*, communicates a basic respect, empathy and compassion for others and encourages a worldview that recognises not only the rights but also the responsibilities that inevitably arise when we live in community with others – even those who may not share our values, beliefs or backgrounds.

travels are metalinguistic and multivocal.<sup>755</sup> Storytelling and narratives can assist us in avoiding monovocalism. If we listen attentively, with care and compassion, to the stories of others – in a spirit of *ubuntu* – without making their stories our own, we hear voices previously silent to us. In his telling of stories, Sachs expresses the kind of care and compassion seldom expressed by one who judges. His ethic is one that correlates with Sevenhuijsen's (2001) understanding of the four interrelated values underlying the ethic of care, namely:

1. **Attentiveness** to the needs and particularities of individuals
2. A sense of **responsibility** in the fulfilment of needs
3. **Competence** in developing the capabilities of others and to improve their well being; and
4. **Responsiveness** to the voices of others and recognition of care as an everyday practice of life.<sup>756</sup>

These values emphasise that the particularity of the story and context are values evident in the life's work of Justice Sachs, who recognises care as an 'everyday practice of life' and who tried within the limits of the law<sup>757</sup> to introduce a caring jurisprudence.

Although Justice Mokgoro, a contemporary of Sachs and the first black female Constitutional Court judge, does not use the words '*ubuntu*' or '*botho*' in the groundbreaking *Khosa* case,<sup>758</sup> her insistence that everyone is responsible for ensuring the well-being of persons within their community and society reflects such thinking. She is therefore promoting not only a fair community but a *caring* one.<sup>759</sup> In her view, there is a connection between a just and a caring community. Later in her career Mokgoro dedicated her scholarship to unpacking *ubuntu*.<sup>760</sup>

The concept *ubuntu*, like many African concepts, is not easily definable. To define an African notion in a foreign language and from an abstract as opposed to a concrete approach is to defy the very essence of the African world-view and can also be particularly elusive .... Because the African world-view cannot be neatly categorised and defined, any definition would only be a simplification of a more expansive, flexible and philosophically accommodative idea.

755 N Bohler-Muller 'Really listening? Women's voices and the ethic of care in post-colonial Africa' (2002) 17(54) *Agenda* 89.

756 S Sevenhuijsen 'South African social policy and the ethic of care' (2001) unpublished paper delivered at the annual meeting of the American Political Science Association.

757 D Cornell *The philosophy of the limit* (1992) 154.

758 *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC).

759 Y Mokgoro 'Ubuntu and the law in South Africa' (1998) 1(1) *Potchefstroom Electronic Law Journal* 17.

760 As above, 2-3.

Echoing Mokgoro's concerns with the development of a caring society, Sachs makes explicit reference to *ubuntu* in the *Port Elizabeth Municipality v Various Occupiers* case.<sup>761</sup> In justifying his refusal to uphold an eviction order which would result in the homelessness of a large number of 'squatters', he highlights in his judgment the constitutional requirement that everyone must be treated with 'care and concern' within a society based on the values of human dignity, equality and freedom. He also reminds us that the Constitution places a demand upon us to decide cases not on the strength of generalities but in the light of their own particular circumstances:<sup>762</sup>

The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.<sup>763</sup>

Justices Mokgoro and Sachs thus argue, albeit in different ways, that *ubuntu* is central to a new constitutional jurisprudence and to the revival of sustainable African values as part of the broader process of the African renaissance.<sup>764</sup>

Ultimately, *ubuntu* as relied upon by Sachs amounts to the belief that life is dependent on interactions with others. In the words of Archbishop Emeritus Desmond Tutu, '[w]e think of ourselves far too frequently as just individuals, separated from one another, whereas you are connected and what you do affects the whole World. When you do well, it spreads out; it is for the whole of humanity.'<sup>765</sup>

However, it has been argued that it would be dangerous to merely embrace or operationalise *ubuntu* as a 'universal' value without some serious reflection. Postmodern critiques of essentialism, foundationalism and metanarratives have taught that rendering concepts stable and static

761 *Port Elizabeth Municipality* (n 695 above).

762 As above, para 31.

763 As above. See also See Sachs J in *S v Makwanyane* (n 668 above) 374, 516E.

764 *Ubuntu* was mentioned in the Post-amble to South Africa's first democratic Constitution (the 'interim' Constitution of 1993), where it was contrasted with the destructiveness of retribution, vengeance and victimisation. In this sense, *ubuntu* was used to craft a strong reliance on restorative justice within the local context, a positive value that would assist in constructing a better life for all in post-apartheid South Africa. See also Y Mokgoro (n 759 above).

765 See *Ubuntu Women Institute USA Inc 'UBUNTU: Brief Meaning of African Word "UBUNTU"'* <http://uwi-usa.blogspot.co.za/2012/01/ubuntu-brief-meaning-of-african-word.html> (accessed 22 June 2017).

only leads to further oppression and exclusion as those who do not ‘fit in’ are once again silenced and excluded.<sup>766</sup>

In the words of Douzinas, *ubuntu* could be understood as the ‘image of a prefigured beautiful future which, however, *will never come to be*’.<sup>767</sup> Cornell articulates this as follows:

Utopianism has always been tied to the imagination, to visions of what is truly new. A world in which we could all share in life’s glories would be one radically different .... At last it is up to us to turn yesterday’s utopia into a new sense of reality.<sup>768</sup>

In his interview for the Constitutional Justice Project, Sachs spoke extensively about *ubuntu*, referring specifically to Cornell’s *Ubuntu* Project and rejecting the need to ‘operationalise’ this value:

There’s a time when Drucilla Cornell was waving the banner of *Ubuntu* very strongly, and getting good discussions going, and she asked at some forum, she asked me would I think *Ubuntu* was a significant constitutional principle, and I said no. I said, it’s an important value, it informs other constitutional principles but it doesn’t have any operational force as such.

Related to the care and *ubuntu* themes addressed in this section are the themes of reconciliation and restoration.

## 4.2 Reconciliation and the restoration of balance

... the theme of reconciliation had lodged itself deeply into my legal consciousness, surfacing rather strongly in two of [my judgments]. One emphasized the role of apology as a restorative justice response to defamation (libel). The other stressed the role of mediation in reconciling the rights of poor landless people with those of wealthy landowners on whose vacant property they had erected shacks.<sup>769</sup>

Besides developing a jurisprudence of *ubuntu* Sachs and Mokgoro have also expressed similar views on reconciliation and restoration. In this regard, it would be useful to consider the ground-breaking reasoning in the cases of *Dikoko v Mokhatla*<sup>770</sup> and *PE Municipality*. In the former case the court had to decide on the ambit of the immunity from civil liability given to municipal councillors in respect of what they said when carrying out their functions as municipal councillors. Immunity from civil liability, which protects councillors from litigation based on allegations that their

766 N Bohler-Muller ‘Developing a new jurisprudence of gender equality in South Africa’ unpublished LLD thesis, University of Pretoria, 2006. <http://repository.up.ac.za/bitstream/handle/2263/25545/Complete.pdf?sequence=4> (accessed 8 May 2017).

767 C Douzinas *The end of human rights* (2000) 338 (emphasis added).

768 D Cornell *At the heart of freedom: Feminism, sex and equality* (1998) 186.

769 Lenta (n 707 above) 87.

770 *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

words have been defamatory, enables them to speak and express themselves freely and openly. This, in turn, advances democratic government. But the ambit of the immunity is not without limit, as a balance must be maintained between the need to speak freely and the dignity of the person being defamed.

On the facts of this case, Mr Mokhatla called on Mr Dikoko to appear before the North West Provincial Public Accounts Standing Committee to provide an explanation of certain debts he owed to the Council. Dikoko's statement in his defence, made while he was providing the explanation, was to the effect that his overdue indebtedness was because Mr Mokhatla had changed the accounting procedures of the Council.

Mr Dikoko entered a special plea of privilege against a civil claim for defamation based on section 28 of the Local Government: Municipal Structures Act,<sup>771</sup> arguing that this section afforded him privilege in that he was not liable to civil proceedings. However, the court held that section 28 was not applicable, and it was determined that a case for defamation had been made. The High Court, having found Mr Dikoko liable for defamation, awarded damages against him in the amount of R110,000. He appealed against the award, claiming that it was excessively disproportionate or grossly unreasonable and not commensurate with the limited publication of the statement as well as the slight injury to Mr Mokhatla's reputation, and contended for the Constitutional Court to substitute its own award of damages for that of the High Court. Now retired Justice Yvonne Mokgoro considered the rules of the *actio iniuriarum* as applied in South African law and held that an apology (*amende honorable*) was one way of restoring balance in a situation of defamation.

Mokgoro held that in a consideration of the purpose of compensation in defamation cases, the true value of a sincere and adequate apology, the publication of which should be as prominent as that of the defamatory statement, and / or a retraction as a compensatory measure restoring the integrity and human dignity of the plaintiff, could not be exaggerated.<sup>772</sup>

She adjudicated that the High Court order be set aside and replaced with an order for damages in the amount of R50,000. In a separate but concurring judgment Justice Sachs emphasised the importance of restoring relations between the parties. He expressed that it was virtually impossible to measure a person's dignity, reputation and honour 'as if these were market-place commodities. Unlike businesses, honour is not quoted on the Stock Exchange.'<sup>773</sup> Sachs reiterated Mokgoro's view that the quantum of damages was too high and that the value of *ubuntu*, which in his view overlapped with the *amende honorable*, would support the making of a

771 Act 117 of 1998.

772 *Dikoko* (n 770 above) para 67 (references excluded).

773 As above, para 109.

sincere apology rather than the imposition of a large sum in damages. Sachs argues that:

The placing of a monetary value on a reputation, to my mind, is actually a denial of the intrinsic quality of what your dignity as a human being is really worth. *Ubuntu* and the African mode of settling disputes by bringing the parties together and acknowledging that you're all going to live together in the same community afterwards can do more to restore dignity and heal the social rupture than a monetary penalty calculated to ensure continuing antagonism.<sup>774</sup>

As reflected above, adherence to the value of *ubuntu* as outlined here demands that we deal with people in the context of their historical and current disadvantage and that equality issues must address the actual conditions of human life, for example life as a 'non-citizen' or a 'squatter'.

Some years later, in the *Port Elizabeth Municipality* case, Sachs stated that *ubuntu* was central to the whole Bill of Rights project: 'Our Court had used *Ubuntu*, referred to it in the very first place in *Makwanyane* in relation to capital punishment. But in that case it wasn't an operational principle, it was a value that informed the operational principles.' In *Port Elizabeth Municipality*, he maintained, 'it just seemed to me that unless there was some notion of human interdependence being recognised, we couldn't get the right answer .... So, again I tell the story as a story ....'

Sachs describes this case as 'a serious crisis' for him because he had:

... taken an oath to uphold the law and the Constitution without fear, favour or prejudice, and people have come and put up their shackles on somebody else's land, and we have the Rule of Law in South Africa, and we have private property and, you just can't do it. They've got to move. But I, Albie, I can't ... I can't sign an order telling them to go. It goes against my whole life, my whole sense of justice and fairness, and if I can't reconcile Albie, the former activist, fighting for the socio-economic rights that's been put in the Constitution envisaging, and understanding the background of dispossession and true justice, and removals of people and homelessness and joblessness and landlessness, if I can't write that judgement upholding the law, then I must get off the Bench. And I seriously thought about it.

He then describes how he was able to 'convert a purely personal dilemma into an intellectual tension, and it's the tension between the property owners' rights not to be arbitrarily dispossessed for their property, and the right of people to have access to housing, which is in the Constitution, and how to reconcile the two.' It became clear to him that there was no 'right answer'. When writing up the judgment, faced with this dilemma, he realised that 'without that notion of *Ubuntu*, that somehow established a

774 A Sachs 'Liberty, equality, fraternity: Bringing human solidarity back into the rights equation' (2012) 4 *Journal of Human Rights Practice* 381.



connection between the white homeowners living in their beautiful homes ... and the homeless black people out there in shacks on the land belonging to the wealthy people ...' he would not have been able to resolve the issue. He was convinced that the solution lay in:

some sense of neighbourliness and some sense that the whole nation's involved in this, the courts and the government and everybody, that it's an affront not just for the dignity of the poor people that they're living in shacks like that with nowhere to lay their heads, it's an affront to each one of us in our society, and that's implicit in our Constitution ... and it's taking account of all relevant circumstances ....

He thus held that the municipality should offer alternative accommodation to those who would be evicted and that there should be 'meaningful engagement' around this issue. Sachs acknowledges that the words *meaningful engagement* are borrowed from Zac Yacoob, who came up with those words in dealing with 'jurisprudence on evictions'.<sup>775</sup> In his public lecture titled 'Liberty, equality, fraternity: Bringing human solidarity back into the rights equation', Sachs explains that:

[c]ases frequently are brought to the courts in South Africa by desperately poor people crowded into innercity buildings, where the lights have been cut off, the water's not there anymore, they've got nowhere else to go, and the buildings are needed for redevelopment. Instead of simply saying to the occupants 'you've got to get out' or 'you can stay', the courts now require 'meaningful engagement'... the dignity of all South Africans was assailed by the fact that millions of our fellow human beings were compelled to live as homeless wanderers in the country of their birth.<sup>776</sup>

Sachs's thinking in cases such as *Soobramoney*, *Grootboom*, *Dikoko* and *Port Elizabeth Municipality* has been described as 'radical', a position which values pluralism and solidarity as key ingredients of democracy over stark and self-serving individualism.<sup>777</sup>

## 5 Persistent love of the Constitution

Sachs's care for the Constitution – and by association people and the law – can be seen long after his stint on the Constitutional Court Bench. Amongst other activities he has been responding to new proposals that the Constitution needs to be amended to remove the requirement of paying just and equitable compensation for land expropriated. As one of the ANC negotiators at Kempton Park who worked directly on the question of property and land redistribution, Sachs has made it clear that this proposal of Constitutional amendment is based on others' false assumptions and an

775 As above.

776 As above, 380.

777 Woolman (n 715 above).

incorrect interpretation of section 25 of the Constitution.<sup>778</sup> He outlines the three strategic propositions on land that were adopted by the working group on land:

1. *Proposition One:* The Constitution as a whole should be a transformative document
2. *Proposition Two:* Victims of forced removals after 1913 should get their land back or alternative restitution; and
3. *Proposition Three:* Extensive programmes of land reform to deal with colonial dispossession before 1913 should be instituted.

Sachs clarifies that there was an extensive consultation process leading to the drafting of the controversial property clause and that one of the main aims was to prevent the fragmentation of South Africa or the continuation of the 'bantustans'. It was considered best to consider the dispossession of blacks holistically. He explains:

Far from being a barrier to radical land redistribution, the Constitution [on a correct reading of section 25] in fact requires and facilitates extensive and progressive programmes of land reform. It provides for constitutional and judicial control to ensure equitable access and prevent abuse. It contains no willing seller willing buyer principle, the application of which could make expropriation unaffordable.

As a protector of the Constitution, Sachs is of the opinion that

... deficiencies with land reform thus far have stemmed from failure either to use at all or to exercise effectively the full powers given under the Constitution. The Constitution as it stands provides powerful instruments to bring about comprehensive land reform. The problem so far has been one of *implementation* rather than of impediments created by the Constitution (emphasis added).

Sachs thus continues to argue that the Constitution remains relevant and resilient:<sup>779</sup>

The Constitution is not a housing act, it's not an education act, it's not a nourishment act. The Constitution deals with rights, mechanisms, procedures and what we did when we fought for this Constitution.<sup>780</sup>

778 See A Sachs 'Oliver Tambo Centenary Series, Part 3: Does the Constitution stand in the way of radical land reform?' (2017) [https://www.dailymaverick.co.za/article/2017-05-05-oliver-tambo-centenary-series-part-3-does-the-constitution-stand-in-the-way-of-radical-land-reform/#.WQ\\_k2tyZHmS](https://www.dailymaverick.co.za/article/2017-05-05-oliver-tambo-centenary-series-part-3-does-the-constitution-stand-in-the-way-of-radical-land-reform/#.WQ_k2tyZHmS) (accessed 8 May 2017).

779 'Violence undermines values students are fighting for – Albie Sachs' 702 25 October 2016 <http://www.702.co.za/articles/193817/violence-undermines-values-students-are-fighting-for-albie-sachs> (accessed 1 March 2017)

780 'Albie Sachs: Free housing, food and education were not promised in the constitution' *Mail & Guardian* 19 October 2016 <https://mg.co.za/article/2016-10-19-albie-sachs-free-housing-food-or-education-was-not-promised-in-the-constitution> (accessed 1 March 2017)

One of the most pressing challenges in South Africa in 2017 is the attempted de-legitimisation of the Constitution and the Bill of Rights.<sup>781</sup> Whilst it is self-evident that economic freedom is still to be achieved and that the poor are tired of waiting for their (economic) emancipation, the arguments against the Constitution and the courts are based on a false premise, and the blame for the failure of transformation is misplaced. During Sachs's OR Tambo centenary lecture 'The Constitution: The negotiation processes that led to South Africa's first great act of decolonisation' at the University of Western Cape in 2017, some students in the audience vehemently challenged his views,<sup>782</sup> with one student claiming that the Constitution 'is against us, especially when you are poor' and other students making reference to Franz Fanon's revolutionary principles.<sup>783</sup> The responses by Sachs to these provocations reflect his continued belief in the transformative power of the Constitution:

If government has not used its powers given by the Constitution, don't blame the Constitution. That's a matter for self-reflection by the government .... I'm not saying there's nothing to complain about. I'm saying nothing will be achieved by tearing up the Constitution. We will not advance if we refuse to acknowledge what has been achieved by democracy.

He emphasised that the Constitution was written by those consciously keeping in mind the need for transformation: '[W]e opened the door for transformation, for change. After that it is about (political) will, leadership, vision and the sensibility to work with others to bring about the change.' Ultimately, it is not for governments to determine the limits of well-being, but for human rights to be used as tools against oppression and deprivation.

Today we continue to see Sachs's legacy in some Constitutional Court rulings. Recently the Constitutional Court handed down a landmark judgment in *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet*.<sup>784</sup> In this case the Constitutional Court repealed the eviction order of 184 applicants from Berea. The ruling resonates with what Sachs fought, and continues to fight, for: protection of the rights of the poor. The Court referenced the *Port Elizabeth Municipality* case as precedent, where Sachs attempted to protect the poor from homelessness. As in *Port Elizabeth Municipality*, the need in *Occupiers of erven 87 & 88 Berea* to consider all

781 At an anti-corruption 'African Perspectives on Global Corruption' conference held in Pretoria on 22-23 February 2017 one of the Chairs, a member of the Black First Land First movement, proclaimed that the Constitution is 'racist', 'anti-Black' and 'illegitimate'. When one of the authors of this chapter (Bohler-Muller) questioned him, he admitted that the main concern was section 25, dealing with the right to property, and thus the issue of land. Many such statements are made at public events and the veracity thereof is questionable.

782 "'Constitution is against the poor" – students give Sachs a tough time' *City Press* 26 April 2017 <http://city-press.news24.com/News/constitution-is-against-the-poor-students-give-sachs-a-tough-time-20170426> (accessed 15 May 2017).

783 F Fanon *The wretched of the earth* (1963).

784 2017 8 BCLR 1015 (CC) (8 June 2017).

circumstances surrounding the case before reaching a fair and just decision was paramount. The clarification of what is meant by ‘meaningful engagement’ and reasonableness is evident; as stated by the Socio-Economic Rights Institute (SERI):

The Constitutional Court found that the residents were indeed unaware of their legal rights, and so unable to give true consent to the eviction. The Court emphasised ‘the fundamental importance that a person’s home has to the realisation of almost all human rights’. Even where it seems a person has agreed to be evicted, a Judge must not order that eviction unless he or she is made aware of all the relevant circumstances, including the residents’ needs and attitude to the proceedings, and is sure that no-one will be left homeless. The Constitutional Court accordingly set aside the eviction order against the Kiribilly residents, joined the City of Johannesburg to the proceedings, and directed the City to report to the High Court on the steps it would take to provide the residents with alternative accommodation.<sup>785</sup>

In this instance the Constitutional Court took steps to ensure that the 184 applicants were protected and that the Johannesburg Municipality prioritised finding alternative accommodation for victims of the eviction. The Court underscored the importance of informed consent, reasoning that the eviction order was erroneous as only four applicants were consulted while the other 180 were clearly not informed, and that all of the applicants were not fully aware of their rights to contest the eviction as they did not have proper legal representation.<sup>786</sup>

This case illustrates how the Constitution continues to evolve as a result of the impact of judges such as Albie Sachs.

## 6 Conclusion

This chapter is not meant to deify Albie Sachs’s contribution to the constitution-making process; rather, it uses his journey to tell a story about ‘making the road by walking’. Being human and loving humanity, Sachs made mistakes and has faced strong criticism from activists and scholars; yet his jurisprudence is instilled in our memories. His journey has taught us that soft vengeance is possible and that as a country we can move beyond the challenges we face. His activism has not ended; a new national dialogue has begun in South Africa that seeks to place the values of the Constitution at the centre of transformation.<sup>787</sup> Sachs is one actor in this

785 Socio-Economic Rights Institute of South Africa ‘Constitutional Court issues ground-breaking housing rights judgment’ *Press Statement*, 8 June 2017.

786 *Occupiers* (n 784 above) para 69.

787 See, for example, ‘Former presidents launch national dialogue to address threats to SA’s democracy’ 702 <http://www.702.co.za/articles/254974/former-presidents-launch-national-dialogue-to-address-threats-to-sa-s-democracy> (accessed 23 June 2017). See also ‘Why does South Africa need a national dialogue?’ *IFP* 25 May 2017 <http://www.ifp.org.za/newsroom/south-africa-need-national-dialogue/> (accessed 23 June 2017).

dialogue, having discovered a new spirit of post-Bench activism in the process.

The chapter has also shown Sachs's contribution to the birth, evolution and protection of the Constitution. The cases cited in this chapter illustrate the complexities of making judgments. We have learnt that 'judging' is indeed a continuous struggle with irreconcilable issues which requires hard decisions to be made in the face of uncertainty. Sachs openly acknowledges this as one of the severe challenges of being on the Bench. How does one define 'equity' and 'reasonableness'? What about the people involved and the inevitable consequences of judgment? The dilemma with which he was faced in the *Port Elizabeth Municipality* case *supra*, where he stated that he had contemplated resigning from the Bench, epitomises this inner wrestling. What worked for him in this context, however, was to tap into his intellectual and emotional capabilities, which led to an outcome infused with an ethic of care.

## Bibliography

- Bohler-Muller, N 'The strange alchemy of the judge and the blue dress' (2010) 25(1) *Southern African Public Law* 152.
- Bohler-Muller, N 'Really listening? Women's voices and the ethic of care in post-colonial Africa' (2002) *Agenda* 86.
- Botha H 'Albie Sachs and the politics of interpretation' (2010) 25 *Southern African Public Law* 39.
- Brand, D 'Freedom, constraint and (the) judging (of) Albie Sachs' (2010) 25(1) *Southern African Public Law* 25.
- Cornell, D *At the heart of freedom: Feminism, sex, and equality* (Princeton University Press: New Jersey 1998).
- Cornell, D & Van Marle, K 'Exploring *ubuntu*: Tentative reflections' (2005) 5 *African Human Rights Law Journal* 195.
- Cornell, D; Van Marle, K & Sachs, A *Albie Sachs and transformation in South Africa. From revolutionary activist to Constitutional Court judge* (Birkbeck Law Press: New York 2014).
- Currie, I 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138.
- Douzinas, C *Human rights and empire: The political philosophy of cosmopolitanism* (Routledge-Cavendish: Abingdon, Oxfordshire 2007).
- Dugard, J 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24(2) *South African Journal on Human Rights* 214.
- Edgar, D *The jail diary of Albie Sachs* (Royal Shakespeare Company: Stratford-Upon-Avon, Warwickshire 1978).
- English, R 'Ubuntu: The quest for an indigenous jurisprudence' (1996) 12 *South African Journal of Human Rights* 641.
- Fanon, F *The wretched of the earth* (Grove Press: New York 1963).
- Horne, F 'Can personal narratives heal trauma? A consideration of testimonies given at the South African Truth and Reconciliation Commission' (2013) 39(3) *Social Dynamics: A Journal of African Studies* 443.
- Klare, K 'Legal culture and transformative constitutionalism' (1998) 14 *South African Human Rights Journal* 146.
- Kramer, E 'No one may be refused emergency medical treatment' – Ethical dilemmas in South African emergency medicine (2008) 1(2) *South African Journal of Bioethics and Law* 53.
- Lehmann, K 'In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006) 22(1) *American University International Law Review* 163.
- Lenta, P 'Revelation and legitimation in Albie Sachs's *The strange alchemy of life and law*' (2013) 40(1) *English in Africa* 79.
- Metz, T 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11(2) *African Human Rights Journal* 532.
- Mokgoro, Y 'Ubuntu and the law in South Africa' (1998) 1(1) *Potchefstroom Electronic Law Journal* 17.
- Sachs, A *We the people: Insights of an activist judge* (Wits University Press: Johannesburg 2016)
- Sachs, A *The strange alchemy of life and law* (Oxford University Press: Oxford 2011)
- Sachs, A 'The judicial enforcement of socio-economic rights: The Grootboom case' (2005) 56(1) *Current Legal Problems* 579.

- Sachs, A with September, V *The free diary of Albie Sachs* (Random House: Johannesburg 2004).
- Sachs, A *The jail diary of Albie Sachs* (Harvill Press: London 1966).
- Sachs, A *Justice in South Africa* (University of California Press: Berkeley, CA. 1973).
- Sachs, A 'Towards a Bill of Rights for South Africa' (1991) 35 *Journal of African Law* 21.
- Sachs, A 'Liberty, equality, fraternity: Bringing human solidarity back into the rights equation' (2012) 4(3) *Journal of Human Rights Practice* 365.
- Sachs A *The soft vengeance of a freedom fighter* (Grafton Books: London 1990).
- Steinberg, C 'Albie Sachs: Our Shakespearian fool' (1991) 35(1) *The Drama Review* (1991) 194.
- Van Marle, K 'Transformative constitutionalism as / and critique' (2009) 20(2) *Stellenbosch Law Review = Stellenbosch Regstydskrif* 286
- Williams, JJ 'The Grootboom case and the constitutional right to housing: The politics of planning in post-apartheid South Africa' in Kabeer, N (ed) *Inclusive citizenship: Meanings and expressions* (Zed Books: London 2005).
- Woolman S & Bishop M (eds) *Constitutional conversations* (Pretoria University Law Press (PULP): Pretoria 2008).

# CHAPTER 8

## THE FUNCTIONAL CONSTITUTIONALISM OF JUSTICE THEMBILE SKWEYIYA

*Ntandokayise Ndlovu & Melissa Omino*

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*Source: <http://www.constitutionalcourt.org.za/site/judges/justicethembileskweyiya/index1.html>*

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### 1 Introduction

Justice Thembile Skweyiya was one of the ten legal practitioners shortlisted by the Judicial Services Commission (JSC) for the first Constitutional Court Bench in 1994. He had left the Bar with the intention of taking up an appointment on the Bench but later decided to pursue matters in the corporate field. As the Constitutional Court website explains, between October 1995 and January 2001 he acted as a High Court Judge in the Natal and Eastern Cape divisions ‘for various periods – two years in all.’<sup>788</sup> As such, Skweyiya could be described as a ‘reluctant’ member of the Bench.

788 Constitutional Court of South Africa ‘JUDGES | Justice Thembile Skweyiya’ <http://www.constitutionalcourt.org.za/site/judges/justicethembileskweyiya/index1.html> (accessed 10 June 2017).



Justice Skweyiya obtained an LLB from the University of KwaZulu-Natal whereafter he served his articles of clerkship in an attorney's office from 1968 to 1970. In 1989 he attained silk as the first Black African and was admitted to the Bar in various jurisdictions. Given his experience as a legal practitioner in civil and commercial matters and his role as a human rights activist, Skweyiya accepted his appointment to the Constitutional Court in 2003. Despite his initial reluctance, it was nevertheless no surprise that the current Chief Justice Mogoeng Mogoeng and other notable figures lauded Justice Skweyiya on the occasion of his death as having had a passion for promoting human rights<sup>789</sup> through a substantive and purposive interpretation of the Bill of Rights.

Skweyiya's background in public interest work before 1994 and especially in representing numerous activists in the political trials of the 1980s resonated with his later concern and passion for constitutionalised human rights and a functional constitutional democracy. For example, Justice Skweyiya acted as counsel in several trials involving political activists.<sup>790</sup> Given this public interest work, his interpretation of the Constitution was heavily influenced by his dedication to social justice. In *Joseph and Others v City of Johannesburg and Others*,<sup>791</sup> for example, he upheld the right of flat-dwellers to be afforded a 14-day notice period before the termination of electricity supply where electricity bills had not been paid. His judgment here encapsulated his pragmatic interest in the manner in which the law affects people and communities at large beyond individual cases and interests.

Notably, Justice Skweyiya has made critical contributions to the interpretation of children's rights, as contained in section 28 of the Constitution, particularly regarding the substantive content of the notion of the best interests of the child.<sup>792</sup> His judicial approach is illustrated in several cases where both his pragmatic and empathetic nature is observed in the reasoning of his judgments, some of which will be explored later in this chapter. His approach was based on his belief that the Constitution was progressive and fundamental to the transformation that was required in South Africa at the time of its promulgation, as well as the protection of the most vulnerable members of society.

While Skweyiya is known for his public interest work, his dedication to social justice, and his concern for how the law affected communities,

789 'Tributes pour in for Judge Skweyiya' *SA News* <http://www.sanews.gov.za/south-africa/tributes-pour-judge-skweyiya> (accessed 10 June 2017).

790 'Skweyiya rests his case' *Mail & Guardian* 25 August 2014 <https://mg.co.za/article/2014-08-25-skweyiya-rests-his-case/> (accessed 10 June 2017).

791 2010 (4) SA 55 (CC).

792 Section 28(2) of the Constitution specifies that a child's best interests are of paramount importance in every matter concerning the child. See 'The Constitution of the Republic of South Africa, 1996' (as set out in sec 1(1) of the Citation of constitutional Laws Act 5 of 2005).

however, his attempt at locating the South African Constitution within a broader African framework of social jurisprudence epitomised by concepts such as *ubuntu* and the quest for an African voice in the interpretation of the Constitution is less well known. 'Ultimately my message,' he proclaimed in a 2014 HSRC seminar,

is that we ought to be not only more attentive and receptive to the African voice when we conduct our comparative constitutional interpretation but also more conscious of our responsibility to strengthen that voice in our judgments from which the rest of the continent and even the world may find assistance.<sup>793</sup>

This is one of the facets of Justice Skweyiya's jurisprudence which this chapter will explore.

Besides the respect he generated from fellow colleagues on the Bench, Skweyiya is also known for his courageous work leading two controversial enquiries, the first one prior to his time as a Constitutional Court judge, where he was appointed by the African National Congress (ANC) to lead a Commission of Inquiry into the circumstances faced by detainees in ANC camps during the struggle and in particular in Quatro.<sup>794</sup> Shortly after his retirement from the Bench in 2014 he dealt with the circumstances of detainees – the treatment of inmates and conditions in correctional centres – in South African prisons.<sup>795</sup> In these roles he acted without fear or favour, submitting reports that were damning of the ANC's treatment of detainees in the notorious 'correctional' camps and of the state in their failure to protect the rights of prisoners post 1994.

Beyond the Introduction, this chapter is divided into three sections. The first section distils the voice of the late Justice Skweyiya, particularly through a treatment of his personal and professional background. The second briefly examines his jurisprudence and its thematic considerations, focusing on his child-related judgments. And the third considers his vision for an African-inspired constitutional dispensation for South Africa.

## 2 Who was Justice Thembile Skweyiya?

Justice Thembile Lewis Skweyiya was born on 17 June 1939 in Worcester, near Cape Town.<sup>796</sup> He attended primary school in Cape Town, and went on to matriculate at the Healdtown Institution near Fort Beaufort in the

793 TL Skweyiya 'Presentation at the HSRC colloquium for the Constitutional Justice Project' (26 November 2014) 9.

794 A copy of the Skweyiya report can be found at <http://www.anc.org.za/content/skweyiya-commission-report> (accessed on 12 December 2017).

795 His report can be found at <http://judicialinsp.dcs.gov.za/Annualreports/JUDICIAL%20INSPECTORATE%20FOR%20CORRECTIONAL%20SERVICES%20ANNUAL%20REPORT%20FINAL2014-2015.pdf> (accessed on 12 December 2017).

796 Much of this biography comes from the Constitutional Court website (n 788 above).

Eastern Cape in 1959.<sup>797</sup> Skweyiya earned a BSocSc degree from the University of Natal in 1963 and subsequently his law degree from the same institution in 1967. This combination of disciplines appeared to play a role in the way in which he understood and interpreted the law, with a strong emphasis on social justice. He was a family man, having been married to Sayo Nomakhosi Skweyiya, with whom he had four children. Skweyiya was appointed to the Constitutional Court in 2003 and retired in 2014. Soon after his retirement from the Bench, he served as Inspecting Judge of Prisons, a position he held until his untimely demise on 1 September 2015. As his successor, Justice Johann van der Westhuizen, said of him:

The Inspectorate was privileged to have Justice Skweyiya, a former Judge of the Constitutional Court of South Africa, assume duty from 1 May 2015 as the new Inspecting Judge. Under his leadership, the Inspectorate made tremendous progress towards achieving administrative independence for the Inspectorate .... Although he served for a few months as the Inspecting Judge, the team at the Inspectorate appreciate his passion for the protection of inmates' human rights; and remember his robust and enthusiastic approach to elevate the Inspectorate to a government component and attain full independence ....

Healthcare for inmates and health conditions in correctional centres was a focus area for the late Inspecting Judge Skweyiya.<sup>798</sup>

Skweyiya has been recognised as one of the great advocates for human rights and judicial independence,<sup>799</sup> as the following account bears out.

Justice Skweyiya's legal career spanned half a century, beginning with his admission to the Bar in Durban in 1967 and his attaining Senior Counsel status in 1989. Despite the personal achievement of being the first black South African silk, Skweyiya's humility was recognised by his peers in the General Bar Council (GBC).<sup>800</sup>

At the beginning of his career Skweyiya specialised in private law. In the 1980s, however, his work mainly involved human rights and civil liberties cases. He acted as counsel in trials involving political activists such as Oscar Mphetha, Griffiths Mxeke, and Sibusiso Zondo.<sup>801</sup> A consistent

797 According to General Council of the Bar of South Africa (GCB) chair Jeremy Muller SC, Healdtown is the same school attended by other famous South Africans, including Robert Sobukwe, Rivonia trialists Govan Mbeki and Raymond Mhlaba, and the late President Nelson Mandela. See 'Obituary: GCB marks the passing of Justice Thembile Skweyiya' <http://www.sabar.co.za/law-journals/2015/december/2015-december-vol028-no3-pp17.pdf> (accessed 25 July 2017).

798 The Judicial Inspectorate for Correctional Services 'Annual report for the period 01 April 2015 to 31 March 2016' 15, 115 [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/JICS\\_Annual\\_Report\\_2015-2016\\_as\\_at\\_30\\_September\\_2016\\_V5.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/JICS_Annual_Report_2015-2016_as_at_30_September_2016_V5.pdf) (accessed 1 August 2017).

799 'Former Concourt judge Skweyiya dies' *eNCA* 1 September 2015 <http://www.enca.com/south-africa/former-concourt-judge-skweyiya-dies> (accessed 19 June 2017).

800 *SA News* (n 789 above).

801 *Mail & Guardian* (n 790 above).

feature of his professional career, especially in the 1980s (well before the enactment of the Constitution),<sup>802</sup> was that he was not motivated by glamour or financial prosperity but by a passion and respect for human rights. In fact, it was Skweyiya's view that, while there are different career paths within the legal profession, every lawyer in South Africa has to be committed to the ideals underlying the Constitution. In a University of Fort Hare address Skweyiya suggested that:

... regardless of your chosen career path (be it in the corporate legal field or public interest law) each of us has an obligation to further the ideals of establishing a just, equitable society based on democratic values, social justice, and respect for fundamental human rights.<sup>803</sup>

As opposed to expanding his commercial and civil law practice after attaining silk, Skweyiya instead immersed himself in human rights, public interest work and later, on the Bench, in an endeavour to ensure that the Constitution practically transformed the lives of everyone, especially those worst off and most vulnerable in society.<sup>804</sup> As mentioned above, Advocate Thembile Skweyiya was appointed to lead an ANC Commission of Inquiry. The Skweyiya Commission Report was released in October 1992.<sup>805</sup> The Commission under his leadership found that the ANC was responsible for several human rights abuses in its camps – particularly in Quatro – and recommended that:

- The torturers and perpetrators be identified and held accountable for their actions; and
- The victims receive some sort of monetary compensation for the physical and psychological damage as well as the losses of property that they had suffered at the hands of their torturers in the camps.

The ANC at that time under President Nelson Mandela welcomed the Skweyiya Commission's report and announced that the organisation took full responsibility for the human rights abuses detailed in the Commission's report.<sup>806</sup> A separate report by Amnesty International was published at the same time as the Skweyiya Commission Report and confirmed the Commission's findings.<sup>807</sup> Subsequently the Douglas

802 Constitutional Court (n 788 above).

803 T Skweyiya 'University of Fort Hare Law Students Dinner: What it means to be a lawyer in South Africa today' <http://www.constitutionalcourt.org.za/site/judges/justicethembile-skweyiya/index1.html> (accessed 10 June 2017). Skweyiya believed that exceptional legal giants such as the late Former President Nelson R. Mandela, ZK Matthews, Braam Fischer, George Bizos and the late CJ P Langa were inspired by the quest to establish a just and equitable society based on human dignity, equality and social justice.

804 As above.

805 *Beeld*, 24 October 1992; *The Star*, 20 October 1992; *Sunday Times*, 18 October 1992.

806 *Business Day*, 20 October 1992; *The Star*, 20 October 1992; *Sunday Times*, 11 October 1992.

807 Amnesty International 'South Africa: State of fear: Appeals on behalf of victims of torture and political killings' <https://www.amnesty.org/en/documents/AFR53/011/1992/en/> (accessed 11 July 2017).

Commission revealed that Nelson Mandela had been handed a list of the names of ANC members whom the Skweyiya Commission had found to be responsible for torture in the camps, but that this list had not been made public.<sup>808</sup>

It is this background that culminated in former President Thabo Mbeki's appointing Skweyiya to the Constitutional Court in 2003. Indeed, in Justice Skweyiya's view, a 'background as an attorney [was] a useful starting tool' for any legal practitioner who wanted to join the Bench.<sup>809</sup>

Arguably, it is for this reason and because of Skweyiya's trail-blazing human rights work in general and children's rights jurisprudence in particular that Chief Justice Mogoeng Mogoeng referred to him as a 'peaceable' jurist with a 'passion for human rights, judicial independence, and a functional constitutional democracy.'<sup>810</sup> In the same vein, the analysis of Skweyiya by the General Council of the Bar was that his 'tenure on the Constitutional Court was characterised by wisdom, humility and an obvious passion for human rights, with a particular emphasis on the rights of children, and an unwavering commitment to judicial independence.'<sup>811</sup> Minister of Justice and Constitutional Development Advocate Michael Masutha dubbed Skweyiya 'a brilliant jurist, whose legal expertise helped in shaping the jurisprudential elements in the justice system.'<sup>812</sup> And in his eulogy on the occasion of Skweyiya's state funeral, Deputy President Cyril Ramaphosa was effusive in his praise for the gentle Justice, drawing attention to his 'legal acumen and prowess ... unflinching courage as he served our country with integrity and dignity ... strong sense of ... professional and moral responsibilities ... [defence of] the oppressed regardless of party affiliation .... [and] true embodiment of fairness, humility, integrity, dedication and professionalism.'<sup>813</sup> President Jacob Zuma emphasised the deep passion that Justice Skweyiya had for the protection and promotion of human rights even before the enactment of the Constitution. In his official eulogy the President said:

Justice Skweyiya was one of the distinguished members of our judiciary who served the nation at many levels of our justice system including as

808 Amnesty International, 'South Africa: Torture, Ill-Treatment and Executions in African National Congress Camps', AFR 53127/92, London, 2 December 1992; 'The Report of the Douglas Commission 1993', January 1993; and International Freedom Foundation, Johannesburg. 13. International Society for Human Rights, 'Human Rights and the African National Congress', Frankfurt, 1993.

809 Constitutional Court of South Africa (n 843 above).

810 'Former ConCourt judge Skweyiya dies' *IOL* 1 September 2015.

811 'Obituary: GCB marks the passing of Justice Thembile Skweyiya' <http://www.sabar.co.za/law-journals/2015/december/2015-december-vol028-no3-pp17.pdf> (accessed 25 June 2017).

812 'Judge Skweyiya's death sad – justice minister' *News24* 1 September 2015.

813 C Ramaphosa 'Eulogy by Deputy President Cyril Ramaphosa on the occasion of the funeral of Justice Thembisile Lewis Skweyiya, Ethekwini City Hall, 5 September 2015' <http://www.thepresidency.gov.za/speeches/eulogy-deputy-president-cyril-ramaphosa-occasion-funeral-justice-thembisile-lewis-skweyiya%2C> (accessed 11 July 2017).

Constitutional Court Judge and Inspector of Correctional Services. The nation has lost a dedicated leader in the development of the country's jurisprudence and a renowned human rights lawyer and activist during the height of *apartheid* repression in the 1980s.<sup>814</sup>

### 3 Skweyiya's jurisprudence and its thematic considerations

The passion for the protection and promotion of human rights in the jurisprudence and activism of Justice Skweyiya to which President Zuma referred is evident in Skweyiya's writing or co-writing of judgments in cases before the Constitutional Court and in his extra-curial commentary on other cases.

Skweyiya recognised that the Constitutional Court was pivotal to the development of law in South Africa. Following from this, South Africa as a constitutional state which abides by a supreme Constitution and the Constitutional Court as the guardian of the Constitution<sup>815</sup> had, together with the executive and legislature, to ensure that the values and fundamental rights enunciated in the supreme law were respected and realised. His comments on the landmark judgment in the *Treatment Action Campaign* case<sup>816</sup> and his stance on the realisation of socio-economic rights and the role of the Constitutional Court were that, while administrative decisions regarding resource allocation belonged to the executive, the Constitutional Court was constitutionally mandated to compel the executive to comply with its socio-economic rights obligations as interpreted by the courts.<sup>817</sup> This was further evident from the *locus classicus* of *Joseph and Others v City of Johannesburg and Others*, where Skweyiya J held that:

taken together, these provisions impose constitutional and statutory obligations on local government to provide basic municipal services, which include electricity. The applicants are entitled to receive these services. These rights and obligations have their basis in public law. Although, in contrast to water, there is no specific provision in respect of electricity in the Constitution, electricity is an important basic municipal service which local government is ordinarily obliged to provide. The respondents are certainly subject to the duty to provide it.<sup>818</sup>

814 The Presidency 'President Zuma conveys condolences on the passing of Justice Skweyiya' 1 September 2015 <http://www.thepresidency.gov.za/content/president-zuma-conveys-condolences-passing-justice-skweyiya> (accessed 18 June 2017).

815 'The Constitution' (n 792 above) sec 167.

816 O Mireku 'HSRC Constitutional Justice Project: Interview with Justice Thembile Skweyiya' (2014).

817 Constitutional Court (n 788 above).

818 2010 (4) SA 55 (CC) sec 40.

The *Joseph* case was an exciting development in South African jurisprudence because it broadened the scope of application of administrative law – in particular, the application of procedural fairness in decisions related to the public law duty of the state to provide basic services effectively, efficiently and fairly.<sup>819</sup> Skweyiya identified '[t]he real issue' as being 'whether the broader constitutional relationship that exists between a public service provider and the members of the local community gives rise to rights that require the application of section 3 of [the Promotion of Administrative Justice Act 2000 (PAJA)]'.<sup>820</sup> He explained that section 3(1) of PAJA requires procedural fairness not only in the event of a 'breach' of a right, but whenever administrative action 'materially and adversely affects' a right or legitimate expectation of any person.<sup>821</sup>

The *Joseph* case can therefore be held up as a prime example of the value of human dignity in judicial decision making, especially in the interpretation of the rights in the Bill of Rights. Through the Constitutional Court's substantive interpretation of constitutional provisions, employing the context of relevant legislation, the case also highlighted the concomitant public law right of people to receive public services. Accordingly, the dignity of citizens is ultimately respected only when there is access to amenities and services envisioned by the Constitution in section 27. In effect, as many South Africans were denied many basic amenities before the enactment of the Constitution, the *TAC* decision and subsequent comments by Justice Skweyiya during his Constitutional Court interview by the JSC – reproduced below – illustrate the transformative nature of the Constitution. Moreover, the *Joseph* case demonstrates the promotion of the practical realisation of rights by the Bench, while at the same time promoting functional constitutional democracy, where the Constitution is interpreted and applied for the benefit of the most vulnerable, who live in deplorable conditions.<sup>822</sup> In his own words during the JSC interview Skweyiya said:

I presume that we have in our Constitution, you know, socio-economic rights and I think there are difficulties also with the type of right which we had to consider in that case (*TAC* case) in a sense that we need resources for many things in the country and it is a question of where to employ resources and of course as a court we are obliged, you know, to compel the executive to comply with its obligations in terms of the Constitution and on the facts of that case there was no other conclusion to which the court could have come and I think we are alive to the difficulties surrounding the issues in that case.<sup>823</sup>

819 AN Munyai 'The contribution of the *Joseph* case to the development of procedural fairness in the Republic of South Africa' unpublished Master's dissertation, University of Pretoria, 2015.

820 *Joseph* (n 818 above) para 33.

821 As above, para 31.

822 It is noted, however, in the *Joseph* case that administrative efficiency is an important goal in a democracy and that the courts must remain vigilant not to impose unduly onerous administrative burdens on the state bureaucracy.

823 Constitutional Court of South Africa (n 843 above).

In similar vein, while addressing a law dinner at the Nelson R Mandela School of Law at the University of Fort Hare,<sup>824</sup> Skweyiya observed that the duty of transformation was not only for the Bench but for everyone in the legal profession, especially the duty to uphold the underlying values of the Constitution, namely, human dignity, equality, non-sexism, freedom, and the supremacy of the Constitution. In his speech he explained:

The possibilities are endless; just know that choosing a career away from public interest law does not mean that you have left your obligations behind. The work of transformation cannot be left only to the judiciary because well-considered and groundbreaking judgments are not enough. If judgments are not accompanied by a concomitant change in the living conditions of the poorest among us then we have failed in our respective duties as lawyers, as activists, as South African citizens.<sup>825</sup>

In his interview with Professor Obeng Mireku, the former Dean of the Nelson R Mandela School of Law, for the Constitutional Justice Project,<sup>826</sup> Skweyiya in his quest for a functional constitutional democracy asserts that, while matters of policy belong to the executive, where there is a need to align legislation and policies that impact on socio-economic rights of people under the Constitution, the courts influence such decisions in an endeavour to protect people's rights. Policies and courts therefore influence one another to ensure proper realisation and protection of the fundamental rights entrenched in the Constitution. Skweyiya was adamant that the courts in general and the Constitutional Court in particular could not remain aloof from the socio-economic needs of the people, especially the indigent.<sup>827</sup> This is so because, although the realisation of socio-economic rights in the Constitution is a complex task, cases of this kind present courts not only with legal issues but with the opportunity to help us understand the relevance of the Constitution for the practical realities of life. Consequently, courts must ensure that these rights are not mere abstract rights on paper, but are substantive rights that are enjoyed in practice. In his JSC interview for appointment as a Constitutional Court judge, Justice Skweyiya stated:

Well, you can have the nicest of Constitutions on paper. If it doesn't relate to reality, then there are difficulties. The Constitution requires of all of us to do certain things, to respect the dignity of South Africans and one can't speak of

824 Skweyiya (n 803 above).

825 As above, n.p.

826 Mireku (n 816 above). The Constitutional Justice Project (CJP) was undertaken for the Department of Justice and Constitutional Development. The CJP consisted of an assessment of the transformative impact on society of the socio-economic rights decisions by the apex courts (that is, Constitutional Court and Supreme Court of Appeal).

827 Skweyiya (n 803 above).



a person's dignity when that person is living in squalor and that person can't have access to facilities, medical facilities ....<sup>828</sup>

It is for this reason that Skweyiya consciously and deliberately interpreted and applied constitutional rights provisions to ensure the protection of the impoverished and vulnerable – as observed in the *Joseph* case, which judgment he penned. As we saw earlier, he has remarked that every legal practitioner, including judges, attorneys and advocates in South Africa, should be committed to the promises found in the Preamble and the Constitution itself.<sup>829</sup> This constitutional commitment is 'to heal the divisions of the past and to establish a just society founded on a democratic ethos, namely social justice, the rule of law, and respect for fundamental rights.'<sup>830</sup>

To this end, while respecting the realms of other branches of government as key to the doctrine of separation of powers, the underlying philosophy in Skweyiya's rights jurisprudence was that the courts should shy away from a highly structured legal-centric interpretation of rights. Instead, courts should understand their constitutional duty and ensure that constitutionally protected rights, especially socio-economic rights, become a reality through a generous and contextual interpretation that gives content and meaning to those rights. It can also be inferred from his judgments that courts should not resort to the shelter of legal formalism, instead actively developing the legal system to be more attuned to the urgent necessity of responding to poverty and social marginalisation, and to identify the substantive content of what it means to have respect for human dignity and fundamental rights. Thus, Skweyiya's jurisprudence in the enforcement of socio-economic rights is a powerful indication that the Constitution's vision goes beyond merely guaranteeing abstract equality; rather, courts must ensure that these rights become a reality.<sup>831</sup> In this regard, it is the vision of the Constitution to ensure democracy, transparency, accountability, good governance, and the rule of law.<sup>832</sup> Although the Constitution neither provides a comprehensive blueprint for a transformed society nor stipulates the precise processes for achieving such transformation, it provides for a set of institutions such as the Constitutional Court and Chapter 9 institutions<sup>833</sup> and outlines

828 Constitutional Court (n 788 above).

829 Skweyiya (n 803 above).

830 'The Constitution' (n 792 above) Preamble.

831 See, for example, Skweyiya's concurring judgments in *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* (2011 8 BCLR 761 (CC)) and *Minister of Health and Others v Treatment Action Campaign and Others* (2002 (5) SA 703 (CC)).

832 'The Constitution' (n 792 above) sec 1.

833 The Chapter 9 institutions are: the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Electoral Commission. See 'The Constitution' (n 792 above), sec 181(1).

fundamental values to guide processes of social change and transformation.

It becomes clear from the above analysis that Skweyiya's judicial stance with regard to the interpretation of socio-economic rights was heavily influenced by his personal background. Although he acknowledged that he was more privileged than most, he highlighted his disadvantaged background and the impact that it had on his judicial thinking, which though tempered by training placed him in an advantaged position in deciding on the practical, substantive meaning of those rights.<sup>834</sup> Consequently, Skweyiya's body of work may be described as having inspired a functional constitutional democracy by way of ensuring the practical and realistic interpretation of fundamental rights.

### 3.1 Child-related judgments illustrating Skweyiya's constitutional commitment

The area of human rights in which Justice Skweyiya made a particularly strong contribution to constitutional jurisprudence was children's rights. This sub-section briefly reviews the cases that exemplify that contribution.

The *locus classicus*<sup>835</sup> of *Le Roux and Others v Dey*<sup>836</sup> dealt with a civil matter of substantial relevance for children. The case concerned an action against school children who were involved in the creation and distribution of an allegedly offensive image – a 'manipulated photo of two naked gay bodybuilders sitting next to each other in a compromising position. The photo of the respondent (the vice principal of the school) was pasted on the face of the one bodybuilder and the face of the principal of the school onto the other.'<sup>837</sup> The principal and his deputy instituted claims for defamation and injury to their feelings.

The Supreme Court of Appeal (SCA) dismissed an appeal against an order of the North Gauteng High Court (Pretoria) finding in favour of the respondent in an action for defamation. In a dissenting judgment Skweyiya illustrated his empathetic and pragmatic nature in that, in his view, in any case (either civil or criminal) involving children, their best interests should come first.<sup>838</sup> In other words, any conduct by children, whether such conduct was believed to be right or wrong, had to be measured against the 'best interests' principle in section 28(2) of the

834 Constitutional Court (n 788 above).

835 That is, 'famous case'.

836 2011 (3) SA 274 (CC).

837 Supreme Court of Appeal 'Media summary – Judgment delivered in the Supreme Court of Appeal: *Le Roux and v Dey*' 1 <http://www.saflii.org/za/cases/ZASCA/2010/41media.pdf> (accessed 26 July 2017).

838 While conceding that the best interests of the child are not absolute, section 28(2) of the Constitution requires that 'A child's best interests are of paramount importance in every matter concerning the child.' 'The Constitution' (n 792 above).

Constitution. While conceding that the conduct of the school boys in pranking the school principal and his deputy was wrong in all respects and was injurious to their dignity, there were certain considerations that the best interests of the child required. First, greater emphasis had to be placed on the fact that the conduct was committed by children and in a school environment, where children should be permitted to make mistakes and learn from them. Second, the Constitutional order in its entirety, but more particularly the children's rights clause, mandated special protection to be afforded to children. Third, the demands of the best interests principle in the Children's Act (38 of 2005) read with section 28(2) of the Constitution formed the foundation upon which any matter involving children was to be considered.

In the same *Le Roux* judgement Skweyiya held that, although the conduct of the children was wrong and as such they should face punishment for their actions, such a measure had to be commensurate with the alleged offence. While measuring the best interests of the child against the alleged conduct of the school boys, Skweyiya held that the claim for defamation should fail in that the children in question had already faced formal disciplinary measures at school, had served community service as part of the criminal charges laid against them, and above all had showed willingness to apologise to the school authorities.

Again we see his empathy, pragmatism and promotion of child rights in the case of *C and Others v Department of Health and Social Development, Gauteng and Others (C v DPP)*.<sup>839</sup> The case involved the confirmation of a declaration of constitutional invalidity of sections 151 and 152 of the Children's Act (38 of 2005) to the extent that these sections provide for a child to be removed from family care by state officials and placed in temporary safe care without judicial oversight.<sup>840</sup> In essence, the case concerned the constitutionality of the normative framework for the removal of children by the state from their family environment and their placement in temporary safe care without the intervention of a court of law.<sup>841</sup>

Section 151(1) of the Children's Act empowers the Children's Court, after testimony has been placed before it, to order that a social worker investigate whether a child is in need of care and protection. Section 152(1) of the same Act empowers relevant authorities to remove a child and place the child in temporary safe care, without a court order, if it is reasonably believed that a child is in need of care and a delay in obtaining a court order may jeopardise the child's safety and wellbeing. Although it was apparent,

839 2012 (2) SA 208 (CC).

840 The High Court (HC) declared sections 151 and 152 to be unconstitutional in so far as the above reasons are concerned. Section 172(2) requires that an order for constitutional invalidity by a HC must be referred to the Constitutional Court for confirmation.

841 *C and Others* (n 839 above) paras 1, 9 and 10.

*prima facie*-speaking from the provisions of the Children's Act, that such removal of children was legitimate in order to secure their well-being and protect them from discrimination, exploitation and any other form of physical, emotional or moral abuse, Skweyiya J was of the view that, in any matter concerning a child, his / her best interests had to be the starting point. As such, due consideration had to be given to alternatives to any removal of a child from his / her family environment, since any coercive removal of children from their family environment was undoubtedly an extreme limitation of their right to family or parental care.<sup>842</sup> While holding that section 151 of the Children's Act was unconstitutional, Skweyiya maintained that, as a minimum, section 28(2) of the Constitution (the best interests of the child) would require the family concerned, and most importantly the child in question, to be given an opportunity to make representations in a court of law on whether removal was in the best interests of the child<sup>843</sup> and whether such action should be subject to automatic review by the court.<sup>844</sup> To ensure that the Constitution, particularly the Bill of Rights, was a living reality to many, Skweyiya held that the interests of children and their parents, particularly those who were indigent, should bear no risk of undue infringement.<sup>845</sup>

Another example illustrating Skweyiya's quest for the promotion and protection of rights, in particular those of vulnerable groups, is the case of *J v National Director of Public Prosecutions and Another*.<sup>846</sup> As in the *C and Others* case, the *J v National Director* matter concerned confirmation proceedings after a decision by the Western Cape High Court that declared section 50(2) of the Criminal Law Amendment Act 32 of 2007 unconstitutional. The Criminal Law Amendment Act stipulated that a court had to make an order to include in the National Register for Sexual Offenders the particulars of a person convicted of a sexual offence against a child or mentally disabled person. In *J v National Director*, the applicant was 14 years old at the time and was charged with the rape of a seven-year-old boy and two six-year-old boys in contravention of section 3 of the Sexual Offences Act.<sup>847</sup> The question before the Constitutional Court was whether the constitutional invalidity of section 50(2) of Act 32 of 2007

842 As above, para 24. He further stated that while section 28(1) of the Constitution referred to the right to alternative care when children were removed from family care, such alternative care was a secondary right.

843 As above, para 27. The impugned provisions in sections 151 and 152 do not provide for adequate consideration of the best interest of the child. Furthermore, the limitation of the right to family care or parental care and removal without automatic judicial review also infringes the right of access to courts under the Constitution.

844 His reasoning was that the statutory framework for the removal of children must expressly provide for an appropriate degree of judicial oversight because in this way a court of law would be able to consider whether it was in the best interests of the child to remove him / her. Hence if the provisions, despite their legitimate purpose, were too restrictive of the rights of the child and the family, they would be unconstitutional.

845 *C and Others* (n 839 above) para 49.

846 2014 (2) SACR 1 (CC).

847 The applicant was further charged with assault with the intent to do grievous bodily harm for stabbing a 12-year-old girl.

should be confirmed and whether section 50 of the Sexual Offences Act limited the rights of children and if so whether the limitation could be justified in terms of section 36 of the Constitution (the limitations clause). If the limitation could not be justified, the provision had to be declared unconstitutional and the Court had to determine a just and equitable remedy.

As in the *C and Others* case, the impugned provisions in the statutory provisions had a legitimate purpose: that of protecting children and persons with disabilities from coming into contact with sex offenders through relevant employers, licensing authorities and child care authorities being informed that a particular person was listed on the sex offenders register. Skweyiya sought a balance between the legitimate purpose of the provisions and the best interests of the child, on the one hand, and the adverse ramifications that flow from having one's particulars registered in the sex register, on the other.<sup>848</sup> The media summary of the judgment read:

In a unanimous judgment, Skweyiya ADCJ held that section 50(2)(a) of the Sexual Offences Act infringes on the right of child offenders to have their best interests considered of paramount importance in terms of section 28(2) of the Constitution. The Register fulfils a vital function in protecting children and persons with mental disabilities from sexual abuse. However, the limitation of the child offender's right is unjustifiable because a court has no discretion whether to make the order and because there is no related opportunity for child offenders to make representations. The Court limited its declaration of constitutional invalidity to child offenders. It held that the constitutionality of the provision in relation to adult offenders was not properly before the Court.... The Court suspended the declaration of invalidity for 15 months to give the Legislature an opportunity to correct the constitutional defect. The respondents were further directed to provide a report to the Court setting out the details of child offenders currently listed on the Register.<sup>849</sup>

Skweyiya's stance in ensuring that the Constitution fulfilled its transformative mandate is evident also in *Du Toit and Another v Minister for Welfare and Population Development and Others*.<sup>850</sup> This case concerned a challenge as to the constitutionality of certain provisions of the Child Care Act and the Guardianship Act<sup>851</sup> in that they violated the rights of same-sex couples in matters concerning joint adoption. The applicants (a same-sex couple) in the *Du Toit* case claimed that these two statutes discriminated against them on the basis of their sexual orientation and marital status, infringed the dignity of the first applicant, and undermined

848 See section 41(1) of the Sexual Offences Act. No employer is permitted to employ a person who is listed in the sex register.

849 Constitutional Court of South Africa '*J v National Director of Public Prosecutions and Another*. Media summary' <http://www.saflii.org/za/cases/ZACC/2014/13media.pdf> (accessed 31 July 2017).

850 2003 (2) SA 198 (CC).

851 Act 192 of 1993.

the constitutional principle that the best interests of the child were paramount in matters concerning children.

Declaring the two pieces of legislation unconstitutional, Skweyiya J held that the Constitution protected the right to equality, which had to be enjoyed by everyone, including same-sex couples, in such matters as the adoption of children. In this way, Skweyiya maintained, the constitutional rights to equality<sup>852</sup> and human dignity<sup>853</sup> of the same-sex couple and most importantly the best interests of the child (section 28(2) of the Constitution) would be upheld. This judgment is particularly illustrative of Justice Skweyiya's deep understanding of the meanings, objectives and implications of the Constitution and the need to consider context and circumstances when deciding on the fate of people.

#### **4 The influence of African law on Skweyiya's legal sensibilities**

What has been discussed hitherto is arguably the aspect of Skweyiya's jurisprudence that is relatively well known. Less well known is his desire to locate South African constitutional law within the framework of a larger African jurisprudence.

In his address at the 2015 HSRC colloquium alluded to in the Introduction, Skweyiya drew the attention of the audience to the pivotal role of key individuals in heralding and in actioning a constitutional dispensation not only for South Africa, but for the continent as a whole – what Skweyiya called 'the invigoration of the African voice in comparative constitutional interpretation.'<sup>854</sup> In his address to the HSRC Colloquium, Skweyiya avowed:

Ultimately my message is that we ought to be not only more attentive and receptive to the African voice when we conduct our comparative constitutional interpretation but also more conscious of our responsibility to strengthen that voice in our judgements from which the rest of the continent and even the world may find assistance.<sup>855</sup>

The herald of the African voice was Pixley Seme, founder of the African National Congress (ANC). After obtaining a Bachelor of Arts degree from Columbia in 1906 and a Bachelor of Civil Law degree from Oxford in 1909, in 1910 Seme became the first black South African to open a legal practice in South Africa.<sup>856</sup> Skweyiya cites an excerpt<sup>857</sup> from Seme's

852 'The Constitution' (n 792 above) sec 9.

853 As above, sec 10.

854 Skweyiya (n 793 above) 2.

855 As above, 9.

856 As above, 3.

857 As above, 4.

speech delivered at Columbia University in 1906 on 'The Regeneration of Africa' (which won him the university's highest oratorical honour, the George William Curtis medal)<sup>858</sup> in support of his (Skweyiya's) location of the South African Constitution within an African legal tradition:

*The brighter day is rising upon Africa.* Already I seem to see her chains dissolved, her desert plains red with harvest, her Abyssinia and her Zululand the seats of science and religion, reflecting *the glory of the rising sun* from the spires of their churches and universities. Her Congo and her Gambia whitened with commerce, her crowded cities sending forth the hum of business, and all her sons employed in advancing the victories of peace – greater and more abiding than the spoils of war.... The African people, although not a strictly homogeneous race, possess a common fundamental sentiment which is everywhere manifest, crystallizing itself into one common controlling idea. Conflicts and strife are rapidly disappearing before the fusing force of this enlightened perception of the true intertribal relation, which relation should subsist among a people with a common destiny. Agencies of a social, economic and religious advance tell of a new spirit which, acting as a leavening ferment, *shall raise the anxious and aspiring mass to the level of their ancient glory.* *The ancestral greatness*, the unimpaired genius, and the recuperative power of the race, its irrepressibility, which assures its permanence, constitute the African's greatest source of inspiration.<sup>859</sup>

While for Skweyiya the sentiment of which Seme spoke is explained 'by the African ethical concept of *Ubuntu*, [which is] unique and untranslatable ... speaks of human interdependence and its legal, social and moral implications',<sup>860</sup> there are other collocations in Seme's speech: *the brighter day ... rising upon Africa, the glory of the rising sun, the rais[ing] ... to the level of ancient glory, the ancestral greatness* – all images prefiguring the 'Africa rising' narrative that came to characterise Africa's economic ascendance during the global financial crisis of 2008.<sup>861</sup> But as Skweyiya is at pains to point out, Seme's 'vision of regeneration was not of material progress, but moral progress.'<sup>862</sup>

If the herald was Seme, the actioner was Mandela, whose statement at the Organisation of African Unity (OAU) meeting of Heads of State and government<sup>863</sup> in June 1994, shortly after his inauguration as President of South Africa, 'capture[s] the very essence', claimed Skweyiya, 'of what I aim to convey in this address':

858 South African History Online 'Pixley ka Isaka Seme' <http://www.sahistory.org.za/people/pixley-ka-isaka-seme> (accessed 6 July 2017).

859 As above (emphasis added); cited in Skweyiya (n 793 above) 4.

860 Skweyiya (n 793 above) 4-5.

861 See, for example, 'The sun shines bright' *The Economist* 3 December 2011; 'Africa rising' *Time* 3 December 2012; V Mahajan *Africa rising: How 900 million African consumers offer more than you think* (2009).

862 Skweyiya (n 793 above) 5.

863 SA History Online 'Statement of the President of the Republic of South Africa, Nelson Mandela, at the OAU meeting of Heads of State and government' <http://www.sahistory.org.za/article/statement-president-republic-south-africa-nelson-mandela-oau-meeting-heads-state-and-governm> (accessed 5 July 2017).

In the distant days of antiquity, a Roman sentenced this African city to death: 'Carthage must be destroyed (*Carthago delenda est*)'.

And Carthage was destroyed. Today we wander among its ruins, only our imagination and historical records enable us to experience its magnificence. Only our African being makes it possible for us to hear the piteous cries of the victims of the vengeance of the Roman Empire.

But the ancient pride of the peoples of our continent asserted itself and gave us hope ... [Mandela goes on to list a string of great African leaders ancient and modern].<sup>864</sup>

What Skweyiya does not articulate fully in his 2015 address, but which will have undergirded his construction of an African regeneration narrative, is the legacy of greatness bequeathed by the continent to the world as spelled out by Mandela in his speech to the African heads of state – delivered poignantly in Tunis, just south of the ancient city of Carthage:

The titanic effort that has brought liberation to South Africa, and ensured the total liberation of Africa, constitutes *an act of redemption for the black people of the world*. It is a gift of emancipation also to those who, because they were white, *imposed on themselves the heavy burden of assuming the mantle of rulers of all humanity*. It says to all who will listen and understand that, by ending the *apartheid* barbarity that was the offspring of European colonisation, Africa has, once more, contributed to the advance of human civilisation and further expanded the frontiers of liberty everywhere.<sup>865</sup>

Few orators could, as Mandela has done, in a masterful stroke simultaneously dub the effort that liberated South Africa *an act of redemption for the black people of the world* and extend this redemption to white people, who were freed from the *heavy burden of assuming the mantle of rulers of all humanity* by the efforts of South Africa's liberators. Few, that is, except that other great South African orator, Thabo Mbeki, who, though Skweyiya mentions him only tangentially in his HSRC colloquium address, continued this tradition through the delivery of his 'I am an African' speech on the occasion of the adoption by the Constitutional Assembly of The Republic of South Africa Constitution Bill 1996, on 8 May 1996.<sup>866</sup> Like Mandela and Seme before him, Mbeki alludes to Africa's affirmation that 'she is continuing her rise from the ashes' and that her people 'respond to the call to create for [them]selves a glorious future [mindful of] ... the Latin saying: *Gloria est consequenda* – Glory must be sought after!'<sup>867</sup>

864 As above. Cited in Skweyiya (n 793 above) 10.

865 SA History Online (n 861 above) n.p (emphasis added).

866 T Mbeki 'I am an African – Thabo Mbeki's speech at the adoption of The Republic of South Africa Constitution Bill' <http://www.anc.org.za/content/i-am-african-thabo-mbekis-speech-adoption-republic-south-africa-constitution-bill> (accessed 6 July 2017).

867 As above, n.p.



More pertinently, in the context of the South African Constitution, however, Mbeki spoke in his 'I am an African' speech of '[o]ur sense of elevation at this moment also deriv[ing] from the fact that this magnificent product [the Constitution] is the unique creation of African hands and African minds' – followed by the *coup de grace*: 'But it also constitutes a tribute to our loss of vanity that we could, *despite the temptation to treat ourselves as an exceptional fragment of humanity, draw on the accumulated experience and wisdom of all humankind*, to define for ourselves what we want to be.'<sup>868</sup>

African hands and minds might have created the Constitution; but on reflection, Mbeki seems to say, South Africa is not *an exceptional fragment of humanity*, the Constitution being a product ultimately of the *accumulated experience and wisdom of all mankind*. With this master stroke in the tradition of Seme and Mandela, Mbeki suggests that the universal giants upon whose shoulders the drafters of the South African Constitution have stood are responsible in the final analysis for the making of the South African Constitution.

Whether Skweyiya consciously had Mbeki's speech in mind or not, his summoning up of great African legal minds, emancipators, and orators reflects his attempt at positioning South African constitutional jurisprudence within a two-thousand-year-old-plus tradition dating back to an empire – the Carthaginian empire – that was the envy of the Roman republic in the third century BCE and a worthy adversary in three Punic wars.<sup>869</sup> While the direct origins of the South African Constitution may lie most demonstrably in the Canadian Charter of Rights and Freedoms,<sup>870</sup> then, African customary law<sup>871</sup> and the jurisprudence of many other African states (Skweyiya mentions resonances with Tanzanian, Ugandan, Lesotho and Nigerian law, as well as with the African Charter of Human Rights) have, he suggests, influenced not only the shaping of the text of the Constitution but the judgments that have been made on the basis of this text.

Noble as this attempt at locating South African constitutional law within an African legal tradition was, however, South African case law does not reflect in any major way such a tradition. As Skweyiya himself has said of his and his Justice colleagues' judgments, 'we were influenced by where we came from and [where we were] going, in our decisions. It was relevant to current situations and to the continent. *It's a pity that we*

868 As above (emphasis added).

869 See C Scarre, *The Penguin historical atlas of ancient Rome* (1995) 24-25.

870 D Davis 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1(2) *International Journal of Constitutional Law* 186-187.

871 For an account of the influence of customary law on the Constitution, see J Dugard 'International law and the South African Constitution' (1997) 1 *European Journal of International Law* 79.

couldn't get as much, you know, precedents from Africa.'<sup>872</sup> How Skweyiya believed such precedents might have influenced interpretations of the Constitution is not spelled out in his address.

Indeed, the intimations of African greatness to which Skweyiya alluded in his HSRC address were not the main topic of that address, but rather the backdrop to his central point. His speech focused on *ubuntu* – that 'unique and untranslatable' value system that is very much a part of African jurisprudence. Skweyiya shows how *State v Makwanyane*<sup>873</sup> 'borrowed from the jurisprudence of another African nation in giving legal content to the concept of *Ubuntu*'.<sup>874</sup> The Attorney General had argued in the case of the Tanzanian Court of Appeal in *Mbushuu and Another v The Republic*<sup>875</sup> that, while the death sentence amounted to cruel and degrading punishment, which was prohibited under the Tanzanian Constitution, the death sentence was not unconstitutional since it was up to the people, not the courts, to decide whether the death sentence was an appropriate form of punishment.<sup>876</sup> The South African Constitutional Court argued, however, that 'It is for the Court, and not society or Parliament, to decide whether the death sentence is justifiable under the provisions of section 33 of our Constitution.'<sup>877</sup>

Skweyiya went on to show how '*State v Makwanyane* and its legal expression of *ubuntu* was also invoked by the Ugandan constitutional court ... [which found the death sentence] to be cruel and inhuman punishment and therefore unconstitutional',<sup>878</sup> how the concept of *ubuntu* was cited by the High Court of Lesotho in the context of the law of succession,<sup>879</sup> and how the Nigerian Court of Appeal had applied the concept of *ubuntu* in a judgment involving discrimination against women.

While other Justices profiled in this book – notably Mokgoro and Sachs – have made extensive use of the concept of *ubuntu* in cases in which they have adjudicated, then, Skweyiya deliberately locates *ubuntu* within a broad continental context. Sentiments such as 'It is fitting therefore that *ubuntu* should occupy a prominent place in Africa's regeneration', 'jurisprudence of another African nation ... giving legal content to the concept of *ubuntu*', 'a growing continental jurisprudence' and 'African courts ... engaged in a continental dialogue to develop a jurisprudence' reflect this yearning for a pan-African jurisprudence characterised by, and uniting all in, its embracing of *ubuntu*.

872 Mireku (n 816 above) 7 (emphasis added).

873 *S v Makwanyane* 1995 (3) SA 391 (CC).

874 Skweyiya (n 793 above) 6.

875 Criminal Appeal No. 142 of 1994; 30 January 1995. Cited in *S v Makwanyane* (n 873 above) para 114.

876 *S v Makwanyane* (n 873 above) para 114.

877 As above, para 115.

878 Skweyiya (n 793 above) 6.

879 *Mokoena v Mokoena and Others* (CIV/APN/216/2005) <https://www.lesotholii.org/ls/judgment/high-court/2007/14> (accessed 1 August 2017).

Skweyiya's idea for a more African jurisprudence, when combined with his independent-mindedness, made an interesting combination. The second enquiry after his retirement from the Court in which he was involved was to investigate the state of correctional centres in South Africa. Once again Skweyiya showed independence, courage and respect for the rights of arguably the most vulnerable persons in our society besides children: prison detainees left to the mercy of the state in terms of their health and well-being, when the Constitution explicitly protects the rights of prisoners in section 35 of the Bill of Rights and foresees rehabilitation as the end goal of imprisonment. Overcrowding, disease and malnutrition as exposed by Skweyiya in correctional centres were clearly not serving that goal. His *ubuntu* philosophy did not stop at the doors of one of the most notorious prisons in South Africa, Pollsmoor. It had no bounds.

## 5 Conclusion

The examples of Skweyiya's ground-breaking jurisprudence cited in this chapter, together with his community engagement and his continued public service in the Judicial Inspectorate, his speeches, his JSC interview for Constitutional Court appointment, the views of his peers, and his commitment to a pan-African *ubuntu* illustrate how he 'walked the talk' in translating the human rights inscribed in the Constitution into practice in order to protect everyone in the country, especially the vulnerable, the needy, the weak, and the worst-off in society. It was Skweyiya's view that everyone in the legal profession should be committed to the underlying ethos of and values espoused by the Constitution. Without such a widely shared commitment to the democratic values and respect for fundamental rights, the transformative promises of the Constitution would not be achieved.

Skweyiya embodied the characteristics of judicial independence, a functional constitutional democracy, and humility. It is not surprising therefore that in his address at the University of Fort Hare, where he was Chancellor, he maintained that South Africans should be proud of the strength and independence of the judicial system, especially the utilisation of the underlying values to which every lawyer should be committed. He emphasised that the realisation of the transformative agenda introduced by the Constitution required not only the financial, technical and political muscle of the state but, most importantly, a strong judiciary committed to the ideals of democratic values, social justice and respect for fundamental rights. His parting words to the group of students were:

[To] be a lawyer in South Africa, you must act with integrity, and in doing so you will ensure that the judiciary remains independent and that the rule of law remains ... to be a lawyer in South Africa today means that you are committed to this ideal that you will play your part in creating a democratic

society where every person can realise and enjoy their rights protected in the Bill of Rights.<sup>880</sup>

With these forward-looking sentiments – ‘you will ensure that the judiciary *remains* independent’ – and characteristic embracing of human rights for all – ‘where *every person* can realise and enjoy their rights’ (emphases added) – Skweyiya sought to pass on to the next generation of legal practitioners a legacy of human rights-based, socially aware, and socially oriented jurisprudence, in the hope that they would become the custodians and promoters of the functional constitutional democracy to which he had dedicated his life’s work. In handing on the baton to his successors, he was urging, in the great African legal tradition of Seme and Mandela, that cultivation and practice of *ubuntu* of which he himself had been a beneficiary.

880 University of Fort Hare Law Students Dinner (n 844 above) n.p.

## Bibliography

- Davis D 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1(2) *International Journal of Constitutional Law* 186-187.
- Dugard, J 'International law and the South African Constitution' (1997) 8(1) *European Journal of International Law* 77.
- Mahajan, V *Africa rising: How 900 million African consumers offer more than you think* (Pearson Education, Inc.: Upper Saddle River, NJ 2009).
- Scarre, C *The Penguin historical atlas of ancient Rome* (Penguin Books: London 1995).

# CHAPTER 9

## TRANSFORMATION AS CONSTITUTIONAL IMPERATIVE: JUSTICE ZAK YACOOB AND THE MAKING OF A CIVIL PRACTICE

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Source: <http://www.constitutionalcourt.org.za/site/judges/justicezakYacoob/index1.html>

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### 1 Introduction

This chapter provides an empirical and analytical template that foregrounds the legal personality of Justice Zak Yacoob and his contributions in promoting the transformative objectives and vision of the Constitution. Our approach sees as inseparable the making of the man and his contribution to the Constitution. We propose therefore that Yacoob's engagement with matters constitutional has its origins in an ongoing project rooted in his social, historical and political shaping. His identity, physical blindness and Muslim upbringing have shaped his contribution to the Constitution in unique ways. Identity, following Stuart Hall,<sup>881</sup> is a

881 S Hall 'Fantasy, identity, politics' in E Carter *et al* (eds) *Cultural remix: Theories of politics and the popular* (1995).

function of 'processes that constitute and continuously reform the subject who has to act and speak in the social and cultural world.'<sup>882</sup>

The argument herein takes as a point of departure a central thread in the volume in which it appears, which is concerned, following Ngcobo's 2016 public address,<sup>883</sup> with the question as to *why* the Constitution matters in so far as it frames the character, role, and identity of Justice Zak Yacoob on the Constitutional Court Bench. Justice Yacoob surfaces in this sense as a signal torchbearer for the value of the Constitution and its transformative imperative. Our argument zeroes in on the character, nature and attributes of the meaning of the Constitution, and we deploy a reading that motivates that the developing identity of Yacoob is a central thread that gains currency over time, for it is difficult to separate the man from his understanding, interpretation and execution of the constitutional mandate.

The chapter provides in part a legal biography of Justice Zak Yacoob, drawing on a series of sources (namely interviews, vignettes, speeches, journal articles, insights from court judgements and media clippings) for an argument about Yacoob's contributions to and advancement of the South African Constitution in particular, and transformative constitutionalism more broadly. The chapter formulates an interpretation of Yacoob's vision and practice and its alignment to a transformative social justice – not purely in terms of demographical variables but rather in respect of 'how the court does its work'. The idea that the work of the court is fundamentally about incrementally building towards 'being pro-transformation, pro-poor, respectful of human beings' and that it enables the 'government gently to account' appears central to the kind of jurisprudence that Yacoob espouses.<sup>884</sup>

Conceptually, we read Yacoob's jurisprudence and civil practice through the lens of social justice. In his judgments and speeches, Yacoob has recognised injustices as expressed in inequalities as being born of the *apartheid* past. He therefore advocates for recognition of the poor as full citizens deserving of dignity. He clearly views the Constitution as one of

882 See, for example, RB Flemming *et al* *The craft of justice: Politics and work in political court communities* (1992); E Goffman *The presentation of self in everyday life* (1959); JT Ulmer *Social worlds of sentencing: Court communities under sentencing guidelines* (1997); P Wice, *Justice and lawyers: The human side of justice* (1991). These references provide a clarification in respect of how the social worlds of judges also shape their identities (Goffman; Wice), while Flemming *et al* and Ulmer provide a perspective in criminal law as to how judges are embedded into communities where communication and interaction define courtroom duties. See also JL Huck & DR Lee 'The creation of sentencing decisions: Judicial situated identities' (2014) 25(2) *Criminal Justice Policy Review* for a quantitative paper that responds to a gap in knowledge as to how the social worlds of the courtroom and judge relate to sentencing decisions.

883 S Ngcobo 'Why does the Constitution matter?' HSRC public address, Gallagher Estate, Midrand (30 June 2016).

884 N Bohler-Muller 'HSRC Constitutional Justice Project: Interview with Justice Zak Yacoob' (2015): 15.

the key tools to address the severe material, racial and class inequalities of the *apartheid* past, while at the same time creating a platform for the full realisation of constitutional citizenship. Yacoob views citizenship as therefore intractably linked to questions of redistributive justice and sees the courts as important players in this process.

We argue below that Yacoob's views of social justice align with Nancy Fraser's notion of social justice, where justice is viewed as a matter of fair distribution and reciprocal recognition.<sup>885</sup> From the distributive perspective, injustice appears in the guise of class inequalities, rooted in the economic structure of society. Injustice in this case is maldistribution, understood broadly to encompass not only income inequality but also deprivation and marginalisation.<sup>886</sup> The remedy is a more equitable (re)distribution of resources and goods. In contrast, from the recognition perspective, injustice appears in the guise of status subordination, rooted in institutionalised hierarchies of cultural value. The paradigm of injustice here is misrecognition, broadly understood to encompass non-recognition and disrespect. The remedy, therefore, is recognition of the cultural identities of groups that suffer experiences of social discrimination and exclusion.

While Fraser's ideas have a bearing on a narrow type of identity politics, there is a particular saliency in her insights for understanding Justice Zak Yacoob (the activist and Constitutional Court judge), who as a champion of the Constitution has shown that social justice as a primary value has overarching relevance to the idea of equality in just practice – also known as substantive equality – that requires efforts to understand people's life circumstances and how these interact with their ability to live in the world. We also introduce insights from critical social justice theory to critique Yacoob's vision of social justice.

At the core, we have assembled in this chapter sources that confirm Yacoob's vision that socioeconomic transformation is contingent on remedies for social injustices, requiring ongoing efforts to restructure and democratise in order to reorganise the procedures by which decisions are made. As indicated earlier, the constitutional imperative remains paramount in respect of the identity and practice of Yacoob's life mission and work. In this sense the chapter initiates a set of descriptive, empirical and analytical perspectives that show *how* insights from his life's work provide opportunities for meaning-making and, in particular, for understanding Yacoob's perspective on the transformative imperative of the South African Constitution.

885 N Fraser 'From redistribution to recognition? Dilemmas of justice in a "post-socialist" age' (1995) 212 *New Left Review*.

886 N Fraser 'Social justice in the knowledge society: Redistribution, recognition, and participation' (Beitrag zum Kongress "Gut zu Wissen", Heinrich-Böll-Stiftung, 5/2001).



The chapter comprises four interconnected sections. In the first part, we provide an abbreviated biography of Yacoob that articulates his formative beginnings. In the second part, we investigate Yacoob's conception and interpretation of the Constitution by tracing particular perspectives that help distil a set of identifying beliefs and practices that show how his engagement, information-sharing and collective norm setting articulate meanings for the application of the law, as well as his thoughts on current issues of national import. In the third part, we offer a critique of Yacoob's politics of redistributive justice through the lens of critical social justice. Finally, in the fourth part we tentatively delve into the scope of the foregoing description and analysis for possible deductions about Yacoob's ethic of social justice and its undergirding by a constitutional imperative.

## 2 The biographical beginnings of Justice Zak Yacoob

The intersection between private and public life is what in essence characterises the person who is Zak Yacoob. An array of social forces and codes, such as language, disability, race and gender, shape the attributes of, and mediate, his identity.

Born on 3 March 1948, Justice Zakeria 'Zak' Mohammed Yacoob became blind at 16 months of age following a bout of meningitis. He attended the Arthur Blaxall School for the Blind in Durban from 1956 to 1966. In an interview on 6 May 2016 with Melanie Verwoerd on Cape Talk (Radio 702),<sup>887</sup> Yacoob not only mentioned the personal disability, but indicated his awareness and recognition that his disability was further compromised by the *apartheid* system in which he was located – about which he said that if he had been a black child he would not have received formal education. 'It was difficult,' he said, 'in the sense that I had to get people to read things to me and I had to record all my lectures [...] it did take long hours.'

In an earlier interview focused on the relevance of difference between gender and race,<sup>888</sup> Yacoob maintained that 'disability is an extremely

887 'Justice Zak Yacoob's life journey and his lifelong dedication to social justice' *Capetalk* 6 May 2016 <http://www.capetalk.co.za/articles/13357/justice-zak-yacoob> (accessed 15 May 2017).

888 University of the Witwatersrand 'Constitutional Court Oral History Project: Interview with Justice Zak Yacoob' 7 December 2011 [http://www.historical.papers.wits.ac.za/inventories/inv\\_pdfo/AG3368/AG3368-Y86-001-jpeg.pdf](http://www.historical.papers.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-Y86-001-jpeg.pdf) (accessed 15 May 2017).

important factor. One of the historic things about this Court is that it had two people on it with disability, for a period of eleven years.<sup>889</sup>

Following school he studied for a Bachelor of Arts degree from 1967 to 1969, and from 1970 to 1972 for a Bachelor of Law degree at the University College, Durban (now the University of KwaZulu-Natal). Yacoob's life in law and justice beyond his professional qualifications is shaped by a sense of deep and meaningful equality, with an innate dedication to the plight of the poor and marginalised in relation to the idea of social justice. In an interview he provided the following response to a question about the origins of his interest in social justice and socio-economic rights:

I didn't understand the idea of social justice. I accepted everything. It was only at university that my social justice things came to the fore [...] I come from a very conservative Muslim family, but the nice thing about that was that my father treated me like you would treat any other child [...] But social justice, at university certainly not before. If you asked me when I was in standard ten whether a gardener who earned fifty cents a day in those days earned enough, I probably would have said yes.<sup>890</sup>

In a later interview with *City Press*,<sup>891</sup> recalling his university experiences, he indicated that while a student he was surrounded by debates on Marxism and non-racialism that soon had him realising that 'this racism thing was nonsense. I realised that unless I committed myself to getting rid of it, I would not be myself.' In the same interview, Yacoob indicated that he met his wife when she introduced herself to him when he was lost. He subsequently married her and they had a daughter, who has followed in his footsteps to become an advocate, and a son, a scientist who works at the Large Hadron Particle Collider at Cern. Yacoob indicates that his upbringing and foundations were strongly influenced by his father, a Muslim cleric: 'My father said that I was going to be treated strictly despite the fact that I couldn't see. I think that was the beginning of who I was.' And if there were any question that Yacoob's identity had been pre-given or complete, in the same interview he remarked: 'I don't know what it is to see. For me, this has been a normal life. But I think to myself, even if Yacoob could not see, his life would still not have been just a "normal" one.'

889 He was referring here to Albie Sachs, former judge on the Constitutional Court of South Africa, who in 1988 lost an arm and lost sight in one eye in a car bomb attack in Mozambique.

890 University of the Witwatersrand (n 888 above).

891 As above.

An ongoing commitment to equality and dignity shapes and animates his life as a constitutional icon, with credentials rooted in the struggle for social justice and democracy. As an activist in the struggle against *apartheid*, he was also an Executive of the now defunct Natal Indian Congress (NIC) and he represented, counselled and advised people, between July 1973 and May 1991, in high-profile political trials (such as Operation Vula),<sup>892</sup> where people were prosecuted for contraventions against security laws, emergency measures, and other forms of discrimination (the latter particularly in the arena of public law). Between 1985 and 1988, as an active member of the United Democratic Front (UDF), he defended members and UDF affiliates in the famous Delmas Treason Trial. In 1990 and 1991 he similarly defended several high-ranking members of the African National Congress (ANC), including members of civil society who were victims of unfair eviction. During the transition from *apartheid* to *post-apartheid*, Yacoob served on the Independent Electoral Commission (December 1993 to June 1994). In the interview with Melanie Verwoerd<sup>893</sup> he recalled that Nelson Mandela had asked to see him:

He said, boy, I wanted to see you because I wanted to tell you that I know you are a committed member of the ANC, but when you are on the commission, my instructions to you that you must not take our side. And that for me was wonderful.

The plea to Yacoob for independence probably had its roots in his earlier work, preceding the formation of the Constitutional Court, in which he had distinguished himself. He was also a member of the panel of Independent Experts of (as a legal advisor to) the Constitutional Assembly in the early 1990s, which entailed ‘advising the political parties on options, which they had, and suggesting other options if existing options, which they thought of were not good enough for them to agree. And then drafting, making sure that what they had agreed was actually written down accurately, clearly and as simply as possible.’<sup>894</sup> Yacoob had previously spoken about his keen desire to serve on the Constitutional Court (he was unsuccessful in his 1994 application), and following a nomination by the University of Natal (now the University of KwaZulu-Natal), he was appointed to the Constitutional Court in 1998 by former President Nelson Mandela.

Yacoob retired in 2013, but remains an active and animated force in respect of national concerns that directly bear on the plight of South Africans.

892 Open Vula was an underground operation established by the ANC in 1986. The main objectives of this operation were to smuggle freedom fighters into South Africa and maintain open communication links between the ANC leaders in exile, at home and in prison.

893 *Capetalk* (n 887 above).

894 University of the Witwatersrand (n 888 above).

We turn now to specific themes in relation to his experience as a member of the Constitutional Court.

### 3 The idea of the law and becoming constitutional

In 'Amend constitution and poverty will be eradicated', while offering a critique of and recommending the removal of the limitation clause in the Constitution, Nojekwa<sup>895</sup> maintains that the opening paragraph on the Constitution is a praiseworthy testimony that speaks to countering past injustices and future developmental challenges:

The South African Constitution is hailed as one of the most progressive constitutions internationally because it entrenches as justiciable the rights to a variety of socioeconomic rights. The Constitution of South Africa was drafted as a conscious living testament to those that sacrificed their lives and their being to opposing the evils brutally enforced under *apartheid* rule.

Our central argument is that Justice Zak Yacoob's location in this world cannot be separated from his commitment to fairness and equality, resulting in part from his own life experiences of overcoming personal, political and social obstacles in so far as they relate to the Constitution and his ability to render probing and difficult questions on all matters that concern inequalities when the values of the Constitution are transgressed.

For many the law is viewed as not entirely neutral or objective, but rather discursive (in other words, shaped by a range of forces in society). If the law is about power (and if we recognise that power could be interpreted to be the play of politics) and a set of practices that is directed toward mobilising change, then it stands to reason that the South African constitutional process, especially the mandate assigned to the Constitutional Court (through the cases brought before it), continually reflects the law as a site of struggle and its effects on and relations of power. By the latter phrase we mean the implications of democracy for the distribution and implementation of power in so far as this places responsibilities on the judiciary.<sup>896</sup> The issue and exercise of power is an important concern in relation to the location and usage of a Constitutional Court judge in relation to such power. Yacoob argues that 'we have different powers, we use it differently, and we must use it to the best of our ability.'<sup>897</sup>

895 'Amend constitution and poverty will be eradicated' *City Press* 14 December 2008.

896 See R Abel *Politics by other means: Law in the struggle against apartheid* (1995) for a discussion on how law was utilised in the struggle against *apartheid*; see also D Davis *Democracy and deliberation: Transformation and the South African legal order* (1999).

897 University of the Witwatersrand (n 888 above) 22.

In response to a question about whether there are non-legal considerations that play a part in the judgement process, Yacoob motivates that every consideration is legal:

There are not strictly positivist law considerations. I think that in everything you decide, a context in which you decide it is important, what's happening in society at the time is important, and words mean things only in terms of their context. They have no meaning otherwise. So I think context is extremely important and we must bear that in mind. And therefore in everything that we do [...] my sense is that when judging cases we are not repairing motorcars, with the result that it's not an objective business because there's no such thing. You're not getting the law right, what you are doing is making orders, which affect human beings.<sup>898</sup>

If the law is an active agent in political processes, the constitution-making process is likewise not an innocent bystander, but rather an active agent in mediating meanings about the law and social justice. In effect, if the law is a set of principles, then justice is to be interpreted as an effect of the law, stimulating a restorative and curative process that addresses the problem of inequality. The Constitutional Court has been assigned a number of cases over the years, but cases focused on socio-economic rights have drawn significant attention as they can be seen to represent broader concerns of service delivery and transformation which, in turn, direct us to questions as to who is benefiting from them and, crucially, *why* some forms of development appear to work and why others do not. For Yacoob his position on socio-economic rights – as expressed in the same interview for the Oral History project – is about finding a balance between human suffering and social justice and fairness:

I am a strong proponent of socio-economic rights. I'm also a strong believer in the fact that you can't ask the government to do what it can't do. That the balancing exercise in this country is a very difficult one. And that's why we've developed a standard, and we apply that standard and so on [...] for me, it is strictly a matter of logic and nothing else. If you have no food, you have no clothes to wear, and you are really physically in a mess, it is ridiculous to talk about the right to vote [...] So for me the thing about social and economic rights has to do more with a tight logical frame than with the emotion of feeling sorry for people [...] If you said to me that you met with an accident and you are my friend, I wouldn't sympathise with you say how bad it is, and so. My mind would go in a different direction. Are you okay? You're sure you're okay? Is there anything I can do to help you?

Underlining these views is the idea that socio-economic rights require ongoing adjudication in respect of tangible material and dedicated efforts to reduce and minimise human suffering. For Yacoob, Court decisions are contingent on a care ethic, directed toward concern and benefit for citizens.

898 As above, 13.

Yacoob also clarifies the context and reasons for turning to the idea and practice of the law firstly, and secondly to the idea of the Constitution:

The idea of the law being used to achieve justice, came much later. That came after I became a lawyer, and we had to work out how [...] the trouble really was, how a law, specifically designed for the purposes of exploitation and oppression, could firstly be challenged at every level, and secondly, how such a law could be turned around somehow in our favour. Because we thought that law was a kind of dialectical weapon almost. It could be used by them and it could be used by us. And that's the context in which our ideas of law and justice came up. And then the idea of the Constitution came up because in the late 1980s, the ANC had begun to think about constitutions and constitutionalism and how constitutions can be used to achieve good things for society [...] So I had to start studying, in the late 1980s, '86/'87, about constitutionalism, constitutions in other countries, the relationship between constitution and justice, constitutions and socio-economic rights.<sup>899</sup>

The idea of difference and the accommodation of his disability within the realm of the Court is also a factor in Yacoob's evolving identity. Memories of his initial days at the Court when it was still located at Braampark, Johannesburg recall his experience of collegiality, respect and 'genuinely good interpersonal relationships'<sup>900</sup> among his peers. More importantly, Yacoob expresses gratitude for the assistance of the state in providing him with a Braille printer and a professional assistant: 'that level of accommodation can never be overemphasised. I could not do my work without that under any circumstances.'<sup>901</sup>

Flowing from the preceding observations we may deduce that Yacoob's legal mind and responses to constitutionalism can be explained as 'a description of an institutional framework which places constitutional limits on the exercise of state power.'<sup>902</sup> Van Huyssteen further clarifies that the Constitution 'provides a topography of the distribution and exercise of political power', maintaining that 'constitutionalism focuses more widely on the implications for the distribution and exercise not only of political power, but also of social and economic power, and not only within the state, but also between the state and civil society and within civil society'.<sup>903</sup> Turning more directly to Yacoob's views on the Constitution, we note that he offers insight as a sterling legal mind, coupled with academic rigour and an uncompromising commitment to the protection of human rights.

899 As above, 2.

900 As above, 11.

901 As above, 11-12.

902 E van Huyssteen 'The Constitutional Court and the redistribution of power in South Africa: Towards transformational constitutionalism' (2000) 59(2) *African Studies* 246.

903 As above.

## 4 Views on the Constitution

While Yacoob played a critical role as a member of the Bench in respect of high-profile cases, he is best known for the majority judgement he wrote in *Government of the Republic of South Africa and Others v Grootboom and Others* and his poignant dissent in the *Le Roux v Dey* matter. Over the years he has demonstrated extensive dedication to constitutional interpretation and application, as well as civil practice. Active in efforts to achieve and deepen democracy, Yacoob views the Constitution not simply as a flexible and dynamic framework but rather as a ‘living instrument’ that gives impetus for all of us to ‘live by Constitutional values.’<sup>904</sup> For Yacoob the meaning (and by implication the *benefits* and *value*) of the Constitution is ‘to give settlement between opposing forces in the struggle for our democracy.’

In an interview with Narnia Bohler-Muller,<sup>905</sup> Yacoob articulated a number of key aspects that foreground:

- (1) His vision of the Court: ‘the court has an obligation to enforce the Constitution, and the Constitution says the court is right when it does so.’<sup>906</sup>
- (2) Policy questions related to the court: ‘that courts do not determine policy and courts cannot determine whether policy is right or not. But where the policy gives rise to action or conduct, then our Constitution says that any conduct inconsistent with the Constitution is invalid’<sup>907</sup>
- (3) The meaning of an apex court: ‘The real point is that neither you nor I have the right to say to the Constitutional Court – the majority decisions in the Constitutional Court are wrong. That’s our system, and that’s what my position is’,<sup>908</sup> and
- (4) The transformative dimension of the Court’s work: ‘Not only transformation demographically, but transformation in terms of how the court does its work’;<sup>909</sup> ‘you cannot assume what the government does is necessarily transformative. And therefore again, transformation is a constitutional imperative.’<sup>910</sup>

But such an ethos, it seems, is only possible with a set of performative strategies that suggest a *modus operandi* for how the court functions.

904 Constitutionally Speaking ‘Justice Zak Yacoob on the “dynamic constitution”’ <http://constitutionallyspeaking.co.za/justice-zac-yacoob-on-the-dynamic-constitution/> (accessed 15 May 2017).

905 Bohler-Muller (n 884 above).

906 As above, 4.

907 As above, 4, 5.

908 As above, 5.

909 As above, 13.

910 As above.

## 5 Working in the Court and a humane approach

Yacoob's insights into the procedures and work ethic within the Court are incisive. Emerging in his perspective is a consultative, collegial ethos that pervades Court proceedings, recognising a separation of powers and the obligation to enforce the Constitution:

We all understood that the reason why we have eleven judges in this country is that on the assumption that there is such a thing as the absolute truth, and I'm not sure whether there is, but if there is something like that, then it is good for what you might call the final earthly truth. But the final earthly truth actually is determined by eleven people who do come from different backgrounds, who do see life differently, who do think about things differently. So if that's the philosophy then a prerequisite for that philosophy to work is that we take each other seriously. We have to listen to each other. We can't be tied to our own positions and own views. We can't be here thinking that we are right and no one else is, and so on [...] So that sort of collegiality, discussion, taking people seriously, was for me a very important thing. And then you know, by our very nature, some of us are softer than others. So for some reason I'm a harder human being than many of my colleagues are. So that I have to listen to their softer positions, and I suppose I've grown a little softer too in the process.<sup>911</sup>

Getting to the 'truth' by striving for a judgement that moves beyond personal positions to weigh in on a judgement is one that is always directed to benefits that have impact for those that matter.

Another theme featured in Yacoob's view is that the Court's procedure is intimately aligned to a concern for humanity and the humane:

We always have respected humanity, we've always respected human beings, and none of our judgements can be regarded as being disrespectful or insulting of poor people. In fact our judgements have always been very sympathetic to the needs of poor people, and the needs of vulnerable people, the needs of vulnerable minorities, and I make no excuse for that, because I think that is how a court should be.<sup>912</sup>

Those who matter are ultimately the poor and the vulnerable:

Vulnerable people are important members of our society and we want to appreciate and care for them for OUR own sakes because WE do not want to live in a society in which vulnerable people are trampled upon.<sup>913</sup>

911 University of the Witwatersrand (n 888 above) 12.

912 Bohler-Muller (n 884 above) 14.

913 Z Yacoob 'The Constitution: A liberal democracy and patriotic criticism' Helen Suzman memorial lecture 2013 <http://hsf.org.za/resource-centre/lectures/hsf-memorial-lecture-2013/view> (accessed 15 May 2017) 14 (emphasis original).



The question arises whether, in spite of our earlier observation, personal opinion can be displaced by elements of bias and subjectivity.

## 5.1 Subjectivity

As indicated earlier, the assumption that the law is entirely neutral and free from the burdens of subjectivity and erased of emotion is countered by Yacoob in several ways:

We come from different parts; we understand things differently, and so on. So the things to do, if you don't admit the subjective without knowing it, because you believe you're not being subjective. On the other hand, if you're aware of the dangers of subjectivism and you're also aware of the importance of subjectivism, then the struggle becomes a difficult one. Because the struggle is not whether it should be totally objective. The question is, how much subjectivity must you allow to get into judging a particular thing, and therefore the question becomes, what is the right balance between subjectivity and objectivity? What is the right balance between the normative elements of the society in which we live and strict law? So I think that the balance of subjective and objective, the reliance on societal norms, the reliance on moral norms, the reliance on your own self to the extent that it is permissible to do so, are all actually appropriate legal considerations.<sup>914</sup>

Yacoob also makes the observation that self-awareness is a factor in response to the question of finding a balance between subjectivity and objectivity:

Absolutely, because all those things, and we are not free – judges are not free of all of these differences. We remain, unfortunately, vulnerable, or fortunately, probably. Actually, with our failings and our own weaknesses, and we try, as best as we possibly can, to do our job and carry out the Constitution.<sup>915</sup>

It seems therefore that, in Yacoob's jurisprudence, it is the case that striving for objectivity comes with a dual responsibility for recognising experience, socialisation, and a sense of self. The *Grootboom* case demonstrates to some extent how this tension was played out.

### 5.1.1 *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)*

Over and above indicating that he was flattered to be assigned writing the majority judgment for the *Grootboom* case, Yacoob indicates that it was not solely his judgement (he merely produced the first draft). The *Grootboom* case involved an eviction order given to Mrs Grootboom and others to

914 University of the Witwatersrand (n 888 above) 13.

915 Bohler-Muller (n 884 above) 16.

vacate land they were occupying. After failing to get a positive outcome in the High Court, which ruled that the government was not in violation of section 26 of the Constitution (the right to access to adequate housing), citing the state's limited resources and their existing efforts to implement a housing programme, the case went on appeal. The Constitutional Court ruled that Grootboom and others had a right to demand reasonable action from the state to provide access to housing to all South Africans by devising and implementing a housing policy that did not neglect the most poor and vulnerable members of society. This would be in line with the requirement for the state to ensure the 'progressive realisation' of socio-economic rights within 'available resources'. Children, however, were held to be entitled to immediate access to shelter in terms of section 28 of the Constitution.

Yacoob opined that the key feature of the case was how the Court 'linked reasonableness to poverty and vulnerability, and how we interpreted the section to mean that the state must have a coherent, co-ordinated, workable programme. So I think those were the important things.'<sup>916</sup> In the same interview he said the following: 'So strictly speaking, we didn't decide on the case at all, because the case was not decided to benefit Grootboom, because Mrs Grootboom's case had been settled with government. The case was decided in relation to settling the principles for other people.'

In this case, he explained that it was not the Court's view of reasonableness, but rather:

If there is doubt about whether something is reasonable or not, and if the case is such that our view of reasonableness differs from the government's view of reasonableness, then we defer to the government. Having said that we said that a programme which does not cater sufficiently for vulnerable people is not reasonable. A programme which does not take housing forward as time progresses, is not reasonable. So we've set those sorts of conditions for reasonableness, and then we have to decide in every case what it is. And there are differences of opinion on these things. So you'll find that quite often when we say something is reasonable, if we say government policy is reasonable, the activists in the community will say, this Court is gone out of its head.<sup>917</sup>

In his interview with the Human Sciences Research Council, Yacoob confirms that 'the Constitution says the government must act reasonably, and it is my job to make sure that the government does act reasonably and I must protect my views at that level.'<sup>918</sup> The role of judge and advocate for social change takes on new meanings with these views.

916 University of the Witwatersrand (n 888 above) 15.

917 As above, 16.

918 Bohler-Muller (n 884 above) 11.

Following his departure from the Court, Yacoob has been quite vocal on other matters of state – particularly, corruption and Nkandla – which he locates within the category ‘patriotic criticism’.<sup>919</sup>

## 5.2 Corruption, Nkandla and patriotic criticism

In the last few years, the ANC leadership has been embroiled in several corruption scandals. Given the growing debates on political corruption and concerns about its consequences for the future of the country, in an interview with *City Press* Yacoob made the following observation:

There are societies where corrupt people never get caught. So for me, every time corruption is discovered, I feel our transparency has resulted in something positive. If I can do anything about making a contribution to picking up this problem and making sure people talk about it, I will.<sup>920</sup>

On the topic of Nkandla (President Zuma’s private home in KwaZulu-Natal), following evidence of extraordinary use of public funds for upgrades of a personal property, Yacoob, in an interview with Melanie Verwoerd on Cape Talk / Radio 702, had this to say:

It is quite obvious that the Public Protector’s order had to be obeyed. It is quite obvious that the President had to know what was going on in his own house and I thought the judgment was too gentle.<sup>921</sup>

The observations that address current topics of the state’s relationship to citizens, such as corruption broadly and specifically that which is centred on state capture, are to be viewed as part of what Yacoob describes as ‘patriotic criticism’. State capture in the South African context refers to the alleged influence of the Gupta family, personal allies of President Zuma, in the state’s decision-making processes. Viewed as part of the right to freedom of speech, patriotic criticism ‘creates an obligation on us to achieve a particular kind of open society [...] in which we can honestly engage with each other [...] in which we can honestly talk to each other [...] in which we try to understand each other’s points of view [...] in which we are not impacted by political point scoring.’<sup>922</sup> For Yacoob, the urgency to speak out arises out of the constitutional imperative ‘to engage in discourse, to criticise, to be honest and to engage without risk’, because the dangers, as he warns, have particular negative effects, namely that ‘private criticism contributes to the erosion of democracy, [...] openness is a constitutional imperative; secrecy destroys openness as does private

919 Yacoob (n 913 above).

920 *City Press* (n 891 above).

921 *Capetalk* (n 887 above).

922 Yacoob (n 913 above) 18.

criticism.<sup>923</sup> Silence and secrecy point to limitations that imply a weakening of the democratic project.

### 5.3 Strengths and failures of the Constitutional Court

There are a number of strengths and weaknesses that have characterised the Court. One of the strengths of the Court, apart from its landmark decisions, is its accessibility. All judgments are written in plain language, a relatively new development in law – former judgments having tended in the past to be expressed in technical jargon inaccessible to laypersons, thereby limiting access to justice. Judgments are also available on the Constitutional Court website. The judgments in South Africa are prepared in a deliberative and consultative manner by the judges. Yacoob confirms that these achievements point to a ‘body of law that all of us have created together’, while simultaneously referencing some of its inherent weaknesses:

I think it [the Court] reflects an interesting balance between different values which are at stake in our country [...] But that’s a contradiction in terms, isn’t it? Because on the one hand I moan about the fact that the judgments are too long, on the other hand I’m proud not of the length of the judgments, but of the values and the body of law, and the honesty with which we have done things, and proud of the fact that people can try and guess, as much as they like, which judge on our Court is on the side of government, and which judge is not.<sup>924</sup>

Commenting on the weaknesses, Yacoob indicates two failures: first, that he has ‘written judgments which are too long, too scholarly, and inaccessible’; and second, ‘that sometimes we talk too long about things, and we go in circles too much, which is another weakness.’<sup>925</sup>

### 5.4 Constitutional endings, civil society and retirement

Beyond a distillation of what he conceives as his greatest achievements (namely being a member of the Court, working in the electoral commission, and life in the ANC), if retirement signifies an end of a chapter on the Court Bench (he retired in January 2013), Yacoob recommits his work to further enhancing the meaning of the Constitution: ‘I want to teach young people. I think that I have the power to inspire young people about our Constitution and get them to truly understand it.’<sup>926</sup>

923 As above, 19.

924 University of the Witwatersrand (n 888 above) 24.

925 As above, 23.

926 As above, 25.

## 6 Beyond a distributive paradigm: Yacoob's jurisprudence and the limits of social justice

In examining the legal biography of Yacoob and his contribution to transformational constitutionalism, we would be remiss not to reflect on some contradictions and limitations in his vision of social justice and transformation in South Africa. It is evident that Yacoob is intensely concerned about the plight of the poor and that this is made clear in his pronouncements on various platforms. For instance in his Helen Suzman Memorial lecture in 2013, he said:

In other words, I work to the achievement of a constitutional democracy, not because I feel sorry for vulnerable people, but because I don't want to LIVE in a society where there are so many poor people, where there are so many vulnerable people, where there is so much discrimination and where the law of the jungle reigns supreme [...] The point is that people still suffer. The point is that there are too many people in this country who are still far too poor. The point is that there are far too many people in this country who live a sub-optimal existence and the plight of poor people is not part of the dominant discourse. The discourse is something else.<sup>927</sup>

However, the Fraserian social justice framework that we have read into Yacoob's view of social justice, as alluded to earlier, does not easily translate to central issues surrounding broad manifestations of injustice in South Africa: racism, *apartheid*, social stratification, patriarchy, and capitalism. Critical social justice, on the other hand, informed by postcolonial and feminist perspectives, provides a useful lens through which to examine the power imbalances that are often at the root of systemic, or structural, inequities. Inequalities have implications for human well-being and for the human condition, and are amongst the most perilous issues confronting the world. Central to inequality is the idea of the unequal distribution of resources and attributes (whether income, wealth, status, knowledge, or power) across various units (individuals, social groups, communities, nations). Inequality in the context of Yacoob's vision refers to the existence and distribution of unequal opportunities and rewards for different social positions and statuses in society, resulting in high levels of deeply entrenched social and economic exclusion that inhibit sustainable human development and self-actualisation.

While Yacoob is clearly committed to seeing the end of inequalities in South Africa, he does not closely examine the power dynamics that lie behind the inequities in people's access to socio-economic rights. He also seems to prefer not to foreground race (viewing this in generic terms, broadly) and the fact that the country has retained an economic edifice that

927 Yacoob (n 913 above) 15 & 20 (emphasis original).

is biased toward racialised capital that has huge implications for social injustice, marginalisation and poverty.

The critical view of social justice encourages us to examine the effects of policies and practices that undermine the attainment of social justice. For instance, in the South African context, the language of citizenship and social justice contained in the Constitution counters the neo-liberal discourse of commodification contained in government policies to legitimate the extension of market forces in the provision of basic needs to the poor and excluded. Kirkham and Browne state that commitment to critical social justice ‘takes us beyond the righting of distributive (economic) inequities to include the need for political, economic and relational transformations.’<sup>928</sup> While Yacoob has recognised the limitations of the law and courts to change government policy, as articulated in his interview with Bohler-Muller (‘that courts do not determine policy and courts cannot determine whether policy is right or not’),<sup>929</sup> his extra-curial views seem to point to the shortcomings of liberal democracy:

Freedom to achieve one’s full potential is extremely important but in a society as unequal as ours, limiting equality in the advancement of individual freedom, will not, in my view, begin to cut the ice.<sup>930</sup>

What we have done by providing for socio-economic rights is create a constitutional situation in which a person’s dignity is more than about freedom. I believe and would stress that, unless you have certain basic standards of living, to even talk about freedom is not to understand the realities of life itself. I would suggest that the inclusion of social and economic rights in our Constitution militates against the idea of mere liberal democracy [...] the liberal democracy tone doesn’t sit well with me. I would say that we should develop ourselves to be a people’s democracy. A democracy that is truly interested in people, a democracy which begins to understand that power is there to be used for the benefit of the people in our country.<sup>931</sup>

In the above passages, Yacoob in subtle terms critiques the liberal ‘rights’ discourse that places emphasis on freedom at the expense of dignity and social worth. Yacoob believes in freedom from poverty and does not believe that liberal democracy is capable of achieving this. While he acknowledges the limitations of liberal democracy, at the same time he seems to commit to a form of citizenship based on what has been termed ‘inclusive neoliberalism’.<sup>932</sup> Distinguishing features of inclusive neoliberalism as compared to pure neoliberalism include an explicit focus

928 SR Kirkham & AJ Browne ‘Toward a critical theoretical interpretation of social justice discourses in nursing’ (2006) 29(4) *ANS Advances in Nursing Science* 324-339.

929 Bohler-Muller (n 884 above).

930 Yacoob (n 913 above) 12.

931 As above, 18 & 21.

932 O Eggen ‘Making and shaping poor Malawians: Citizenship below the poverty line’ (2013) 31(6) *Development Policy Review* 697.

on the poor and recognition of the role of the state in ameliorating the plight of the poor. Thus the state should not leave the poor and vulnerable to fend for themselves in the market, but rather ensure that they are 'wrapped around with inclusive support'.<sup>933</sup> Furthermore, Yacoob states,

For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention.<sup>934</sup>

Across his many speeches and interviews, Yacoob espouses the virtues of constitutional democracy in achieving a transformative society. For example:

We know that inequality, suffering, poverty, inhumanity and indignity remain the order of the day for many millions of people in this country. The Constitution creates a framework, a launching pad if you like, for the achievement of the society described in the Bill of Rights. It places an undeniable obligation on all the people of our country including everyone present here to leave no stone unturned in the process of achieving this result. This is essential to a dynamic Constitution ... a dynamic Constitution also implies a living instrument, a facilitator that has a life of its own and which breathes life and positive energy into the people of the country.<sup>935</sup>

Yacoob's vision for social justice is to live in a society where poor and vulnerable people are taken care of and given dignity:

Vulnerable people are important members of our society and we want to appreciate and care for them for OUR own sakes because WE do not want to live in a society in which vulnerable people are trampled upon.<sup>936</sup>

In his career as a judge and beyond the courts, Yacoob has used diverse platforms to motivate and reinforce the fundamental duty and obligation of the state to realise socio-economic rights, the fundamental and inalienable right to dignity that the poor have, and the fact that the success of the country's democracy needs always to be measured against the substantive (rather than the formalistic) realisation of socio-economic

933 D Craig & D Porter *Development beyond neoliberalism? Governance, poverty reduction and political economy* (2006). Cited in S Hickey (2011) 'The government of chronic poverty: From exclusion to citizenship?' In S Hickey (ed) *The government of chronic poverty: From the politics of exclusion to the politics of citizenship?* (2011) 3.

934 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 36.

935 Z Yacoob 'A dynamic Constitution' Opening address by Justice Yacoob, Judge of the Constitutional Court of South Africa (Acting Deputy Chief Justice of South Africa) presented at Constitution Week on Monday 12 March 2012 at the University of Cape Town, South Africa <http://constitutionallyspeaking.co.za/justice-zac-yacoob-on-the-dynamic-constitution/> (accessed 3 August 2017) n.p.

936 Yacoob (n 913 above) 14 (emphasis original).

rights. However, his vision seems to be locked within a (re)distributive paradigm that fails to clearly articulate the dangers of a neoliberal capitalist South African governance system (albeit with social welfare provisions) that is underpinned by increasing exclusion, poverty and marginalisation – the very issues that Yacoob is most concerned about addressing. Poverty in South Africa is arguably the result in the main of racialised capitalism and structural inequality – phenomena that defined *apartheid* and continue to do so in post-*apartheid* South Africa.

## 7 Conclusions

Obstacles to social justice, whether through socio-economic inequities or other patterns of power that privilege some and marginalise others, promote inequalities and become the source of substantive injustices. Reading Fraser's conception of social justice into the perspective and life's work of Yacoob as a judge reveals that his mission – whether as judge or latterly as a member of civil society – is to contribute to a legacy of social justice in South Africa. Yacoob reminds us of the need 'to regenerate our understanding of our dynamic Constitution and express our views of its importance to our society',<sup>937</sup> alerting us that the Constitution was a 'launching pad', a 'negotiated compact', 'a document of compromise' which he did not take lightly: 'I have taken an oath to respect it, obey it and act in terms of it and I did so because I agreed with every word of it.'

Yacoob's pledge to uphold the values of the Constitution corroborates his view that the Constitution has the capacity to address 'not only the problems arising out of a lack of freedom, but also the problems arising out of the lack of equality for hundreds of years.'<sup>938</sup> Aspects of equity (fair access to resources and justice) that see justice as a 'common good' emerge in the Greek philosophers and ancient Judeo-Christian tradition. The idea of the 'common good' encapsulates at its core an idea of what is shared and what is beneficial for a given society that is achieved through claims to citizenship, collective action, and active participation.<sup>939</sup> The cases on which Yacoob has adjudicated seem to confirm that there is no full consensus about social justice but, rather, that the quest for social justice remains an ongoing journey, a process defined by incremental achievements rather than being a destination point. The jurisprudence of Yacoob argues for a new kind of politics, a performative one that is grounded in social democracy and predicated on social justice as a response to the failure of the state to address matters that impact on the lives of ordinary citizens.

937 As above, 5-6.

938 As above, 10.

939 See, for example, M Novak & P Adams *Social justice isn't what you think it is* (2015); H Sluga *Politics and the search for the common good* (2014); C Tyler *Common good politics: British idealism and social justice in the contemporary world* (2017).



Yacoob's judgments and roles in judgements highlight the importance on the one hand of the relationship between the socio-economic needs of the marginalised and on the other hand the state's duties to poor people. Beyond mismatches between court judgments and implementation following legal decisions, his views on the ways in which the Court operates also foreground the state's obligations with regard to development and planning. Legal gains and losses (both for citizens and the state) indicate that there are winners and losers in respect of decisions, and more especially that legal decisions cannot satisfy everybody.

Yacoob also contests narrow, instrumental interpretations in favour of more expansive forms of judgment that foreground the human and humane, which, he suggests, contribute to a more socially just politics in the development of a fairer and more equitable society:

So all I am saying that our Court has been pro-transformation, pro-poor, respectful of human beings, regardless of their station [...] We've tried to hold the government gently to account. We could have been harsher I think, but we did the best we could, and I am actually quite proud of the contribution made by the Constitutional Court ... You must understand that your judgement is about human beings, and you need to know that you bring your own humanity into the judgement as much as you possibly can.<sup>940</sup>

At the heart of Yacoob's jurisprudence is a frustration with the slow pace of transformation and the desire to counter persistent forms of inequality. The implementation of Court judgments in which practical legal promises are made have not been fully implemented, according to Yacoob. The consequence has been no real, tangible change; and in situations where Court decisions have been transformative, lack of implementation due to bureaucratic inefficiencies has compromised the value (and by extension, the impact) of the Court. The implied compact between the Constitution and peoples and the state's relationship to all role players within this equation has been, in Yacoob's estimation, minimised. This may erode not only the rule of law, but also, most importantly, trust in the rule of law.

Yacoob is fully cognisant of and a vocal advocate for the bigger issues that make up democratic citizenship: the meaning of diversity, equity, dignity, respect, equality – central tenets of a transformative social justice. His jurisprudence broaches resistance to domination and opposition to discrimination on all grounds. Clearly, for Yacoob, exploitation along the lines of sex, race, class, and disability remain salient forms of domination (which probably warrant further elaboration in one's thinking about Yacoob's jurisprudence). While Yacoob's reflections on the Constitution demonstrate a positive vision, he is simultaneously aware of the dilemmas of a democracy (with regard to what constitutes democratic citizenship) and of fully recognising the blind alleyways that can take us off course in

940 Bohler-Muller (n 884 above) 15.

the struggle for real transformation and social change. The 'blind alleyways' of law and justice that result in unimplementable benefits for citizens that end in further blind spots in the full execution of justice in the democratic project show correlations to Yacoob's experience of physical blindness and the consequences of such experience. Yacoob's jurisprudence and activism suggest that the personal, the political, and the public and private identification matter; we need to persist with ongoing efforts to make meaningful change to improve the lives of all in South Africa.

There is a sense in Yacoob's vision that the Constitution encapsulates the means to improve the human condition in order ultimately to cultivate citizens' well-being. He emphasises the dual and interrelated meta-implications of the Constitution: 'I must emphasize that our Constitution is not about freedom alone. It is about much more than liberalism. It is more about humanity and it does other things too.'<sup>941</sup> There is, in other words, an ethical responsibility that flows from the Constitution in which the values of the Constitution are brought into association with the principles of human life. A transformative social justice is shaped by important preconditions (central to which is a profound concern for humanity) that are directed to a deeper, richer, more textured and more nuanced life than people already have.

Yacoob's contribution as Constitutional Court judge, as activist, and as civil society voice is a stark reminder that the Constitution is an iconic democratic tool to counter human suffering in all its forms. In his thinking we are compelled to recognise a language that actively rejects silence, apathy and immobilisation. In Yacoob's scheme of constitutionality there is also equally no room for despair, but instead hope in the recuperative and restorative powers of constitutional values. Beyond the immediate concerns about socio-economic and political inequalities, there is a deeper and more pervasive sense of creating a more empathic life, one that is shaped by ensuring the transformation of the law into justice.

Yacoob believes that social inclusion and economic inclusion are interdependent and form the core of social justice. The valuing of social justice and inclusiveness permeates the identity and judicial practice of Justice Yacoob – which is the legacy he leaves to the on-going project of transformative constitutionalism.

941 Yacoob (n 913 above) 10.

## Bibliography

- Abel, R *Politics by other means: Law in the struggle against apartheid* (Routledge: New York 1995).
- Craig, D & Porter, D *Development beyond neoliberalism? Governance, poverty reduction and political economy* (Routledge: London 2006).
- Davis, D *Democracy and deliberation: Transformation and the South African legal order* (Juta & Co Ltd: Cape Town 1999).
- Eggen, O 'Making and shaping poor Malawians: Citizenship below the poverty line' (2013) 31(6) *Development Policy Review* 697.
- Flemming, RB; Nardulli, PF & Eisenstein, J *The craft of justice: Politics and work in criminal court communities* (University of Pennsylvania Press: Philadelphia 1992).
- Fraser, N 'From redistribution to recognition? Dilemmas of justice in a "post-socialist" age' (1995) 212 *New Left Review* 68.
- Fraser, N *Social justice in the knowledge society: Redistribution, recognition, and participation* (Beitrag zum Kongress 'Gut zu Wissen', Heinrich-Böll-Stiftung, 5/2001).
- Goffman, E *The presentation of self in everyday life* (Anchor Books: New York 1959).
- Hall, S 'Fantasy, identity, politics' in Carter, E; Donald, J & Squires, J (eds) *Cultural remix: Theories of politics and the popular* (Lawrence & Wishart: London 1995).
- Hickey, S 'The government of chronic poverty: From exclusion to citizenship?' in Hickey, S (ed) *The government of chronic poverty: From the politics of exclusion to the politics of citizenship?* (Routledge: New York & London 2011).
- Huck, JL & Lee, DR 'The creation of sentencing decisions: Judicial situated identities' (2014) 25(2) *Criminal Justice Policy Review* 185.
- Kirkham SR & Browne AJ 'Toward a critical theoretical interpretation of social justice discourses in nursing' (2006) 29(4) *ANS Advances in Nursing Science* 324.
- Novak, M & Adams, P *Social justice isn't what you think it is*. (Encounter Books: New York 2015).
- Sluga, H *Politics and the search for the common good* (Cambridge University Press: Cambridge 2014).
- Tyler, C *Common good politics: British idealism and social justice in the contemporary world* (Palgrave Macmillan: London 2017).
- Ulmer, JT *Social worlds of sentencing: Court communities under sentencing guidelines* (SUNY Press: Albany, NY. 1997).
- Van Huyssteen, E 'The Constitutional Court and the redistribution of power in South Africa: Towards transformative constitutionalism' (2000) 59(2) *African Studies* 245.
- Wice, P *Justice and lawyers: The human side of justice* (Harper Collins: New York 1991).