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Cultivating a Seedling Charter: South Africa's Court Grows Its Constitution

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CULTIVATING A SEEDLING CHARTER: SOUTH AFRICA'S COURT GROWS ITS CONSTITUTION

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As South Africa emerges from the vestiges of apartheid, its Constitutional Court struggles to develop a jurisprudence that reflects the lasting ideals of a constitutional democracy. This Article examines the Court's use of international and foreign law in developing a unique form of constitutional jurisprudence. It argues that the Constitutional Court is in the process of developing an innovative form of decision-making that effectively combines domestically derived principles of justice with those developed in the international forum. This Article concludes that reliable methods of adjudication are firmly entrenched in the South African legal system and that its constitutional jurisprudence should serve as a model for other democratic systems.

No one gives us rights. We win them in struggle. They exist in our hearts before they exist on paper. Yet intellectual struggle is one of the most important areas of the battle for rights. It is through concepts that we link our dreams to the acts of daily life.[1]

INTRODUCTION

As South Africa wends its way through the difficult passage from apartheid to a multiracial democracy, its new Constitutional

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1. ALBIE SACHS, PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA vii (1990).

Court is carving out a critical role for itself. The Court must now spell out the details of those rights "won in struggle" for which Albie Sachs, one its eleven jurists, and others fought. In construing a constitutional text that many of its members helped to construct, the Court is searching for a balance between the immediate need for policy guidance on contentious matters arising from the dismantling of apartheid and the creation of enduring doctrinal principles.

Established under the terms of South Africa's first democratic Constitution[2]—the interim Constitution of 1994—the Constitutional Court held its first sitting in February 1995. The creation of a Constitutional Court[3] vested with the power of judicial review represents a break with the past that is both symbolic and pragmatic.[4] Deeply committed to the status quo, the old South African

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2. The Constitution of the Republic of South Africa, effective in February 1997, was created by the Constitutional Assembly. There were four previous Constitutions in South Africa. The South Africa Act of 1909, which constituted the Union of South Africa, granted political rights to Whites and Cape Coloreds only. *See* §§ 26(b), 34(i), 35(1) of South Africa Act of 1909. The Constitution of 1961 limited political rights to Whites only. *See* S. AFR. CONST. of 1961 §§ 43, 46(c). The Constitution of 1983 created a tricameral parliament that extended nominal rights to Coloreds and Indians, excluded Africans, and kept real power in the hands of Whites. *See* S. AFR. CONST. of 1983 §§ 39, 54, 55. *See generally* Johan van der Vyver, *Depriving Westminster of its Moral Constraints: A Survey of Constitutional Development in South Africa*, 20 HARV. C.R.-C.L. L. REV. 291 (1985). Between April 1994, when the first all-race elections took place, and the adoption of the current Constitution in February 1997, the country was governed by the interim Constitution of 1994, which established the Constitutional Assembly and the Constitutional Court. The Constitutional Assembly adopted the new Constitution in May 1996; it was then reviewed by the Constitutional Court. The Court issued a decision that the text adopted by the Constitutional Assembly in May 1996 could not be certified. Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 744 (CC). On October 11, 1996, the Constitutional Assembly adopted an amended text to conform with the Court's ruling. This text was again reviewed by the Constitutional Court, which, with its decision in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*, 1997 (2) SALR 97 (CC), approved the new draft and certified that the text satisfied the requirements of the Constitutional Principles that formed the basis of the negotiated political settlement leading up to the 1994 election.

3. Section 167 of the Constitution provides for the creation of the Constitutional Court. *See* S. AFR. CONST. § 167. The creation of the Court signaled the end of parliamentary sovereignty in South Africa. Under that doctrine, the courts could not strike down enactments of Parliament and there was neither judicial review of such legislation nor a bill of rights constitutionally limiting government intrusion upon civil rights. *See, e.g.*, ALBIE SACHS, JUSTICE IN SOUTH AFRICA 132 (1981) (examining the practical application of the principle of parliamentary sovereignty); Joshua Davidson, Note, *The History of Judicial Oversight of Legislative and Executive Action in South Africa*, 8 HARV. J.L. & PUB. POL'Y 687 (1985) (exploring the practical application and other considerations stemming from the principle of parliamentary sovereignty).

4. Only a new institution could be entrusted faithfully to apply the new Constitution that is itself both a symbol and a vehicle for change:

judiciary realistically could not be entrusted to grant full consideration to the provisions of the new Constitution, or to include all citizens within the provisions' purview.[5] In contrast, the new Court reflects the divergent voices of South African society. As specified by the Constitution, eleven judges comprise the Court.[6] Currently, four Black men and two women, one of whom is also Black, serve on the Court.[7] All judges serve for non-renewable terms of twelve years.[8]

If constitutional adjudication were to become an effective partner in the social transformation envisioned by the Constitution, the text first would require implementation of new judicial leadership empowered with broad authority. To that end, the Court appears committed to a vision of judicial activism that reflects the democratic and human rights ideals embodied in the general constitutional language. As part of this process, the Court has tackled problematic questions of rights enforcement in constitutional adjudication, questions that have engendered many years of commentary by critical legal scholars.[9] While it is far

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> [a]bove all, the Constitution is a vehicle for expressing fundamental notions of freedom, at the conceptual, symbolic, and practical levels. . . . An effective bill of rights can become a major instrument of nation-building. It can secure for the mass of people a sense that life has really changed, that there will be no return to the oppressive ways of apartheid society.

ALBIE SACHS, PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA 189 (1990).

5. *See, e.g.*, JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (1978) (examining the features of the South African legal order as of 1977); DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY 49–51 (1991) (describing the history of an acquiescing South African Judiciary); Lynn Berat, *Courting Justice: A Call for Judicial Activism in a Transformed South Africa*, 37 ST. LOUIS U. L.J. 849 (1993) (arguing that South Africa's history of judicial conservatism must give way to activism); Lynn Berat, *The South African Judiciary and the Protection of Human Rights: A Strategy for a New South Africa*, 5 TEMP. INT'L & COMP. L.J. 181 (1991) (suggesting a pro-human rights approach for the South African judiciary); A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 514–21 (1990) [hereinafter *Racism*] (describing South Africa's history of judicial racism); A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028 (1993) (examining the problems inherent in a judiciary not reflective of a nation's population and suggesting that South Africa's judiciary adopt pluralism as a means of promoting justice).

6. S. AFR. CONST. § 167(1).

7. For a description of how the jurists were selected and their background, see Brice Dickson, *South Africa's Constitutional Court*, 145 NEW L.J. 246 (1995).

8. S. AFR. CONST. § 176(1).

9. On the question of whether constitutional adjudication is an ineffective means of enlarging political and social rights to meet human needs, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 289–311 (1990); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the*

too early for a conclusive reading of the Court's contributions to the monumental changes taking place in the country, the fact that several of the Court's jurists, like Sachs, contributed both to the political struggle leading up to the new Constitution as well as to the actual drafting of the document itself, has profoundly influenced the Court's vision of its own role in the delicate transformation now taking place.

Analysis of a number of the Court's rulings indicates that the Court has already established itself as an innovative voice in the country's new constitutional democracy. The Constitution provides that eight judges are sufficient to hear a matter;[10] however, in practice all eleven judges hear every case. The Court's decisions, which are at times long and discursive, have included extensive minority opinions. Perhaps hoping to foreclose the possibility that a disaffected population may not continue to support judicial enforcement of human rights and social justice standards once the honeymoon period presently enjoyed by the Court and other new government institutions ultimately draws to a close, the Court has moved quickly to place its voice among the country's new political structures and to generate public support for its role. To this end, the Court has addressed itself to many of the constitutional silences bequeathed to it by the Constitutional Assembly that created the text, while at the same time seeking to define its own role in the transition to democracy. As a result, the Constitutional Court's decisions provide a provocative model of an unabashedly progressive, value-laden jurisprudence for the South African judiciary and, indeed, the world.

This Article examines a number of areas of the Constitutional Court's jurisprudence that, I argue, demonstrate its singular importance to other states seeking to identify the role of classical individual rights ideology in mediating ethnic conflict and in overcoming a legacy of political repression and racial subordination. This examination of some of the Court's opinions addresses questions of both adjudicative methodology and substantive law. I begin by discussing two critical methodological tools the Court employs in its adjudicative process. First, I describe how, in my view, the Court has advanced comparative jurisprudence by consistently drawing

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Withdrawn Selves, 62 TEX. L. REV. 1563, 1572–81 (1984); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1393–94 (1984). The counter-argument to the critical rights theory's critique is set forth in Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 323–330 (1087); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987). For a helpful guide to critical race theory, see Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

10. S. AFR. CONST. § 167(2).

on international human rights law and principles and on foreign law in its opinions. Second, I describe the way in which the Court has centered its jurisprudence within a political context by embracing the agenda defined by the Constitution itself. Finally, I argue that these two methodological tools provide legitimacy for the Court as it seeks to construct a jurisprudence that makes a clear break with apartheid justice,[11] reflects the distinct values of the new South Africa,[12] and is faithful to international human rights norms.[13]

I. INTERNATIONALIZING CONSTITUTIONAL ADJUDICATION

During the apartheid years, South Africa remained the focus of significant developments in international law concerning the compatibility of apartheid with international human rights norms,[14] the international status of the "homelands,"[15] and the international status of the liberation movement and its armed opposition to

11. The extensive literature on the apartheid legal system, which was designed to enforce rigid racial segregation in all areas of life and to suppress Black political activity, is beyond the scope of this article. The key elements of apartheid justice are discussed in DUGARD, *supra* note 5, at 53–104. Despite the legal death of apartheid, its legacy continues to cast a long shadow over the South African legal system. *See* Daisy M. Jenkins, *From Apartheid to Majority Rule: A Glimpse into South Africa's Journey Towards Democracy*, 13 ARIZ. J. INT'L & COMP. L. 463, 479 (1996).

12. The founding provisions of the Constitution identify those values as, *inter alia*, the promotion of "human dignity," "equality," "non-racialism," and "non-sexism." S. AFR. CONST. §§ 1(a), 1(b).

13. Describing the Constitutional Court as "a central pillar in [the government's] efforts to build [a] human rights culture," Minister of Justice Dullah Omar observed that the Court's "function and purpose [is to] ensur[e] that never again will our citizens be deprived of their human rights . . . ." Minister of Justice Dullah Omar, Address at the Inauguration Ceremony of the Constitutional Court (Feb. 14, 1995), *available at* <http://sunsite.wits.ac.za/law/court/jdinaug.html>.

14. *See* J. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 222–27 (1979); JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 156–58 (1987); Johan van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 39–42 (1991).

15. In the early years of the apartheid era, the Group Areas Act 41 of 1950, together with the Population Registration Act 30 of 1950, divided the South African population according to race and assigned each group to a particular area. The Promotion of the Bantu Self-Government Act 46 of 1959 created eight Black "nations"—there would ultimately be 10—that came to be known as "bantustans" or "homelands." "Bantu" was the apartheid term for Black Africans. The Bantu Homelands Citizenship Act 57 of 1970 required Black South Africans to become citizens of a particular homeland, regardless of whether they had lived there or not. Of the 10 homelands, South Africa conferred nominal independence on 3 of them, Transkei, Bophuthatswana, and Venda (the "TBVC" states), but they were never recognized as independent states by the international community. *See* John Dugard, *South Africa's "Independent" Homelands: An Exercise in Denationalization*, 10 DENV. J. INT'L L. & POL'Y 11, 19–33 (1980); Henry Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185, 214–17 (1978).

apartheid.[16] Indeed, world-wide condemnation of the apartheid state increased general support for South Africa's international accountability to human rights norms. The international community codified its opposition to apartheid in numerous resolutions and judicial rulings, thereby extending the reach and authority of human rights standards beyond those applicable to South Africa. It is therefore ironic that South Africa has moved from being a subject of international human rights deliberations to being a leading exponent of international public law in the world today.[17] In this regard, South Africa owes much of its transformation to the work of the Constitutional Court.

The Constitution provides that, in interpreting its Bill of Rights clauses, the Court "must" consider international law, and "may" consider foreign case law.[18] The new Constitutional Court has remained remarkably faithful to this injunction. In virtually every case it has decided, and on a wide variety of issues, ranging from jurisdictional matters to substantive law, it has referred both to international and to foreign law. When considering such outside sources, the Court has carefully explained that its decisions are shaped by the South African legal experience and are dictated by a commitment to the political transformation now taking place.[19]

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16. *See, e.g.*, State v. Petane, 1988 (3) SA 51 (CC) (discussing the status of ANC combatants under Protocol I of the Geneva Conventions of 1949); P.Q.R. BOBERG ET AL., ANNUAL SURVEY OF SOUTH AFRICAN LAW 66, 67–68 (1983) (noting distinction between treatment of captured national liberation movement members as "traitors" by South African law and as "prisoners of war" by international law).

17. In a recent work, John Dugard suggests that South Africa has always been attentive to international law principles in its domestic law, citing, in particular, the courts of the pre-apartheid era. JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 45–47 (1994).

18. Section 39 of the Constitution provides that in interpreting the Bill of Rights, courts "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom," and "must consider international law" and "may consider foreign law." S. AFR. CONST. § 39(1)(a)–(c). John Dugard suggests that this section requires the Court to look not only to international treaties ratified by South Africa and customary law accepted by South African courts, but, also to "international law contained in general treaties, custom, general prinicples of law, the writings of jurists, and the decisions of international and municipal courts." John Dugard, *Public International Law, in* CONSTITUTIONAL LAW OF SOUTH AFRICA 13–11 (Matthew Chaskalson et al., eds., 1996).

19. In its decision striking down the death penalty, for example, the Court observed that "[c]omparative 'bill of rights' jurisprudence . . . [was] importan[t] . . . in the early stages of the transition when there is no developed indigenous jurisprudence . . . on which to draw" but that, in the final analysis, a judgment had to be made with "due regard to [the South African] legal system, [its] history and circumstances, and the structure and language of [its] Constitution." State v. Makwanyane, 1995 (3) SALR 391, 414–15 (CC). Gunter Frankenberg applies critical theory to comparative constitutionalism by noting that

The jurists have utilized several approaches in deriving guidance and support from these non-South African sources. In *Gauteng School Education Bill of 1995*,[20] Justice Sachs, in a concurring opinion, authored a veritable primer on the treatment of group rights in international law. In this case, the applicants challenged the constitutionality of sections of the School Education Bill of Gauteng Province[21] that prohibited public schools from denying access based on language proficiency.[22] The Afrikaner community, seeking to preserve publicly supported, all-Afrikaans schools, argued that the challenged provisions denied them their group right to cultural integrity.[23] The Court upheld the challenged law, reasoning that the relevant constitutional guarantees relied upon by the applicants[24] imposed no affirmative state duty to establish exclusive schools for linguistic groups, but merely prohibited the state from interfering with private initiatives to set up such special language schools.[25]

> [i]nstead of pretending to the posture of a neutral, objective, and disinterested observer, the comparatist has to regard herself as being involved: involved in an ongoing, particular social practice constituted and pervaded by law; involved in a given tradition (a peculiar story of law); and involved in a specific mode of thinking and talking about law. . . . It becomes clearer then than any vision of the foreign laws is derived from and shaped by domestic assumptions and bias.

Gunter Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 HARV. INT'L L.J. 411, 443 (1985).

20. 1996 (3) SALR 165 (CC).

21. The bill was codified as the School Education Act 6 of 1995 (Gauteng). *Gauteng Sch.*, 1996 (3) SALR at 170.

22. *Id.*

23. *Id.* at 177.

24. The applicants argued that the challenged language in the Gauteng School Education Bill of 1995 violated the provisions of the interim Constitution that protected the right to education on an equal basis. *Id.* at 172. However, the education provisions of the final Constitution remove the ambiguity that led to the *Gauteng School* case, and make clear that linguistic groups have a qualified right to state-supported single-language schools. The Constitution provides that

> [e]veryone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—
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> (a) equity;
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> (b) practicability; and
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> (c) the need to redress the results of past racially discriminatory laws and practices.

S. AFR. CONST. § 29(2).

25. *Gauteng Sch.*, 1996 (3) SALR at 173.

Justice Sachs analyzed the question in its broadest sense, i.e., whether genuine application of the protection guaranteed to individuals against discrimination requires, in the South African context, affirmative state measures to protect cultural minorities like the Afrikaner community.[26] This inquiry led him to canvass the history of the group rights/individual rights split in the international law context, commencing with League of Nations-era principles.[27] The "current trend" in international law, Justice Sachs explained, does not oblige states to act affirmatively to protect minority groups that have not been the victims of past discrimination.[28] Accordingly, special measures need not be undertaken to protect the group rights of the Afrikaner.[29]

Justice Sachs followed a similar approach in his concurring opinion in *Coetzee v. Government of the Republic of South Africa*,[30] a case challenging the constitutional validity of a law providing for imprisonment of judgment debtors. Asserting the need to "locate ourselves in the mainstream of international democratic practice,"[31] the Justice canvassed such international instruments as the American

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26. Justice Sachs stated that "[t]he question . . . is whether there is a current trend towards supplementing individual rights expressed mainly by the principles of non-discrimination and equality, with additional group rights claimable against the State in the form of obligatory state support for fostering cultural linguistic and religious diversity." *Id.* at 206.

27. *Id.* at 190.

28. *Id.* at 194.

29. *Id.* Justice Sachs was careful to explain his point:

> the central theme that runs through the development of international human rights law in relation to protection of minorities is that of preventing discrimination against disadvantaged and marginalised groups, guaranteeing them full and factual equality and providing for remedial action to deal with past discrimination. . . . There is nothing to indicate in the present case that the petition based itself on arguments that the clause in dispute imposed discrimination, denied equality[,] or repudiated remedial action for a marginalised or deprived language minority. On the contrary, the contention was that existing rights to language exclusivity in relatively affluent schools were well endowed because of past State support, while the majority of schoolchildren in the province were, as result of past State discrimination, forced to attend schools that were grossly deprived in comparison. Thus the thrust of international human rights law principles would be far more in favour of supporting the so-called "sociological" or "functional" minority, than of upholding the claims of what might be termed the "sociological" or "functional" majority.

Id.

30. 1995 (4) SALR 631, 651–74 (CC).

31. *Id.* at 659.

Declaration of the Rights and Duties of Man,[32] the American Convention on Human Rights,[33] and the UN International Covenant on Civil and Political Rights.[34] He concluded that "international instruments strongly repudiate the core element of the institution of civil imprisonment, namely the locking-up of people merely because they fail to pay contractual debts, but that there is a penumbra relating to money payments in which imprisonment can be used in appropriately defined circumstances."[35]

In a case challenging the amnesty provisions of the Truth and Reconciliation Act,[36] *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa*,[37] the Constitutional Court approached international principles from two directions by simultaneously rejecting the applicability of international law while embracing general international principles of justice. The applicants argued that the Protocols to the Geneva Convention prohibited a signatory state from granting amnesty to state actors guilty of torture and other human rights violations.[38] In his opinion for the Court, Justice Mohamed rejected this argument, reasoning that the instruments relied upon by the applicants were not applicable to South Africa since the country was not a signatory of the Convention or its later protocols.[39] Further, even if the instruments were applicable, international law did not bar amnesty programs such as the one provided for in the Truth and Reconciliation Act.[40]

Justice Mohamed's discussion of the applicability of the Geneva Convention seems somewhat anomalous. On one hand, he appears to undermine the ability of private litigants to rely on international law to test the constitutionality of domestic law while at the same time recognizing the instructive value that international legal consensus and experience play in the Court's decision-making process. In first determining whether the challenged domestic law violated the Constitution, Justice Mohamed ruled that if there were no constitutional violation—as he found in this challenge to the

32. *American Declaration of the Rights & Duties of Man*, O.A.S. Off. Rec., OEA/Ser.L/V/II.23, doc. 21 rev. 6 (May 2, 1948).

33. *American Convention on Human Rights*, O.A.S. Off. Rec., OEA/Ser.K/XVI/I.1, doc. 65 rev. 1 corr. 2 (Jan. 7, 1970).

34. *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (Mar. 23, 1976).

35. *Id.* at 661.

36. The Promotion of National Unity and Reconciliation Act 34 of 1995 establishes a procedure for granting amnesty to individuals guilty of apartheid-era political offenses as long as they provide full disclosure of their human rights violations.

37. 1996 (4) SALR 671 (CC).

38. *Id.* at 687–91.

39. *Id.* at 689 n.29.

40. *Id.* at 689–90.

Truth and Reconciliation Act—there could be no resort to international law by a private litigant except as such law might provide guidance to the Court.[41] He then reviewed the Geneva Conventions and their relevant protocols as relied upon by the applicants and found them inapposite for the reason, among others, that at the time of the offenses South Africa was not a party to these instruments through which amnesty could be granted.[42] Unfortunately, however, Justice Mohamed's approach appears to misapprehend the thrust of the constitutional embrace of international human rights law by unduly limiting the application of international law only to those treaties actually ratified by the apartheid state. In the end, the Justice concluded that even if the Geneva Conventions and their protocols applied to South Africa do not prohibit states from granting amnesty, but rather could be read as endorsing such measures.[43]

In addition to international legal instruments, Justice Mohamed also considered the international experience of other states emerging from repressive regimes. Using Chile, Argentina and El Salvador as examples, Justice Mohamed found support for amnesty as a fair, just and internationally acceptable solution for adjudicating the gross human rights violations of repressive states.[44] In acknowledging the similarities between the democratic restructuring in these Latin American states and the task facing South Africa, the Court placed the South African commitment to the truth commission model of amnesty, coupled with truth-telling, within the context of the international community's growing acceptance of these quasi-judicial agencies.[45]

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41. *Id.* at 688.

42. *Id.* at 689 n.29.

43. For this proposition, Justice Mohamed cited Article 6(5) of Protocol II to the Geneva Conventions of 1949, which provides that "[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." AZAPO, 1996 (4) SALR at 689–90.

44. *Id.* at 686.

45. According to Justice Mohamed,

> [w]hat emerges from the experience of these and other countries that have ended periods of authoritarian and abusive rule, is that there is no single or uniform international practice in relation to amnesty. Decisions of states in transition, taken with a view to assisting such transition, are quite different from acts of a state covering up its own crimes by granting itself immunity. In the former case, it is not a question of the government agents responsible for the violations indemnifying themselves, but rather, one of a constitutional compact being entered into by all sides, with former victims being well-represented, as part of

It appears that the Constitutional Court is equally prepared to adopt the lessons drawn both from international jurisprudence and from foreign jurisdictions, notwithstanding that the Constitution mandates consideration of the former while merely permitting consideration of the latter.[46] In several cases interpreting the South African Bill of Rights, the Court has most frequently discussed the constitutional law of the United States,[47] India,[48] neighboring southern African countries,[49] Canada,[50] and the United Kingdom.[51]

One prominent case, *Du Plessis v. De Klerk*,[52] raised the issue of whether one private party could enforce the free speech guarantees

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an ongoing process to develop constitutional democracy and prevent a repetition of the abuses.

Id. at 671, 687.

46. S. AFR. CONST. § 39(1)(a)–(c). Indeed, in its consideration of foreign law the Court continues the comparativist approach that characterized the constitutional drafting process. *See, e.g.*, ZIYAD MOTALA, CONSTITUTIONAL OPTIONS FOR A DEMOCRATIC SOUTH AFRICA: A COMPARATIVE PERSPECTIVE (1994); THE U.S. CONSTITUTION AND CONSTITUTIONALISM IN AFRICA (Kenneth W. Thompson ed., 1990).

47. *See, e.g.*, Fose v. Minister of Safety and Sec., 1997 (3) SALR 786, 801–07 (CC) (discussing the right to damage awards for civil rights violations under § 42 U.S.C. 1983); Fraser v. Children's Court, 1997 (2) SALR 261, 276 (CC) (reviewing *Stanley v. Illinois*, 405 U.S. 645 (1972), and other case law on the rights of unwed fathers); Du Plessis v. De Klerk, 1996 (3) SALR 850, 871–72 (CC) (discussing *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) with regard to the applicability of the Bill of Rights to private conduct); State v. Makwanyane, 1995 (3) SALR 391, 415–23 (discussing the U.S. Supreme Court's death penalty jurisprudence); State v. Williams, 1995 (3) SALR 632, 641, 643, 646–47 (CC) (discussing cases that apply the United States' Eighth Amendment protection against cruel and unusual punishment).

48. *See, e.g.*, Brink v. Kitshoff, 1996 (4) SALR 197, 215–16 (CC) (discussing case law interpreting equality provisions of the Indian Constitution); *Makwanyane*, 1995 (3) SALR 391, 426–29 (distinguishing the Indian Supreme Court's ruling in *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684, which declared the Indian death penalty constitutional).

49. *See, e.g.*, *Makwanyane*, 1995 (3) SALR at 413 (noting the abolition of the death penalty in Namibia, Mozambique, and Angola); *Williams*, 1995 (3) SALR at 642–43 (citing with favor decisions of Namibia and Zimbabwe prohibiting corporal punishment).

50. *See, e.g.*, *Fose*, 1997 (3) SALR at 807–09 (discussing the right to constitutional and punitive damages under the Canadian Charter); *Fraser*, 1997 (2) SALR at 276-82 (reviewing case law on rights of unwed fathers); State v. Coetzee, 1997 3 SALR 527, 545 (CC) (distinguishing Canadian decisions on the burden of proof in criminal cases); Gauteng Sch. Educ. Bill of 1995, 1996 (3) SALR 165, 206 (CC) (discussing Canadian Charter provisions requiring state-supported education for the French minority in Canada).

51. *See, e.g.*, State v. Zuma, 1995 (2) SALR 642, 646, 656 (CC) (discussing English legal principles that place the burden of proving the voluntariness of a confession on the prosecution).

52. 1996 (3) SALR 850 (CC).

of the Constitution against another private party.[53] The question concerned the applicability of the Bill of Rights to private conduct or, as the South Africans put the issue, whether constitutional rights apply horizontally as well as vertically.[54]

In *Du Plessis*, individuals sued the *Pretoria News* and its publisher, editor, and a reporter for defamation in connection with a series of articles charging certain private citizens with financing the UNITA forces in the Angolan civil war.[55] The appellants-defendants asserted as a defense that their actions in publishing the allegedly defamatory material were protected by the free speech provision of the Bill of Rights.[56] However, the Court declined to apply the protections of the Bill of Rights to wholly private conduct.[57] Once again, the Court based its reasoning in large measure on what it considered to be the prevailing weight of authority in foreign jurisdictions, specifically the constitutional law of the United States,[58] Canada,[59] Germany,[60] and Ireland.[61]

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53. *Id.*

54. In South African jurisprudence, the term "horizontality" refers to the application of the guarantees of the Bill of Rights to private disputes, in contrast to "vertical" application, which protects individuals from state violation of these guarantees. *See Du Plessis*, 1996 (3) SALR at 860–61; Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 744, 791–92 (CC). The question of horizontality was the subject of much discussion during the drafting period. *See, e.g.*, Gilbert Marcus, *Freedom of Expression Under the Constitution*, 10 S. AFR. J. ON HUM. RTS. 140, 143 & n.16 (1994); H. A. Strydom, *The Private Domain and the Bill of Rights*, 10 SAPR/PL 52 (1995); Johan van der Vyver, *The Private Sphere in Constitutional Litigation*, 57 THRHR 378 (1996). As it stands, the Constitution calls for the horizontal application of some rights, such as the right to equality, but not others: "[a] provision of the Bill of Rights binds a natural or 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." S. AFR. CONST. § 8(2).

55. *Du Plessis*, 1996 (3) SALR at 858.

56. *Du Plessis*, 1996 (3) SALR at 858–59.

57. *Id.* at 859. The 1996 Constitution ultimately superseded this decision. *See* S. AFR. CONST. § 8(2).

58. The *Du Plessis* Court discussed the state action requirement in connection with the United States Supreme Court opinions applying Bill of Rights protections to seemingly private conduct in *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Du Plessis*, 1996 (3) SALR at 871–72.

59. *Id.* at 872. In holding that the South African Bill of Rights did not apply to conduct between private parties, the Court found the Canadian case of *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1987] 33 D.L.R.4th 174, to be analogous. *Du Plessis*, 1996 (3) SALR at 872.

60. *Id.* at 874–75 (discussing the German rule of law applying constitutional rights directly in matters involving state action and indirectly in private law disputes).

61. *Id.* at 872 (citing the Irish case of *C.M. v. T.M.*, [1991] I.L.R.M. 268, which held that the common law rule that a wife's domicile is determined by that of her husband violated the equality provisions of the Constitution, for the proposition that, in Ireland, constitutional rights apply horizontally in some circumstances).

In *Fose v. Minister of Safety and Security*,[62] a review of foreign precedent helped the Court define the proper remedies for constitutional violations.[63] At issue was the proper measure of damages in an action involving a tortious assault by police officers.[64] The Court considered whether, in a situation involving a constitutional tort, the victim should be permitted to recover for the constitutional violation over and above the amount he would recover in common law tort.[65] In the instant case, the victim sought both punitive damages and exemplary damages for the constitutional breach.[66]

As the Court had never before addressed this issue, most of its opinion comprised a summary of discussions from other jurisdictions, including the United States,[67] Canada,[68] the United Kingdom,[69] Trinidad and Tobago,[70] and New Zealand.[71] The Court explained that although foreign law was a helpful guide, the resulting decision was shaped by features unique to the South African legal system—namely, the lack of strict sovereign immunity, the unitary court system, and the interaction of the common law with constitutional law.[72] Moreover, the Court observed that as a matter of public policy, punitive damages would exert a strain on the public purse that the country, given its other obligations, could ill afford:

> [i]n a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications . . . it seems to me to be

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62. 1997 (3) SALR 786 (CC).

63. *Id.* at 801–16 (examining the laws of the United States, Canada, the United Kingdom, Trinidad and Tobago, New Zealand, Ireland, India, Sri Lanka, and Germany regarding damage awards).

64. *Id.* at 795.

65. *Id.* at 796.

66. *Id.*

67. *Id.* at 803 (citing with approval *Smith v. Wade*, 461 U.S. 30 (1983) (punitive damages available against state actors in their individual capacities), *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (punitive damages not available against municipalities), and *Carey v. Piphus*, 435 U.S. 247 (1978) (propriety of awarding damages for a constitutional breach)).

68. *Id.* at 808 (observing that punitive damages are available for violations of Canadian Charter of Rights and Freedoms, but infrequently employed).

69. *Id.* at 810 (discussing the English case of *Rookes v. Barnard*, [1964] App. Cas. 1129 (H.L.), which contains an argument of Lord Devlin in favor of placing limits on punitive damages).

70. *Id.* at 811–12 (citing *Maharaj v. Attorney-Gen. Trin. & Tobago (No. 2)*, [1979] AC 385 (PC), which held that a judge is not personally liable for unlawfully detaining a lawyer for contempt).

71. *Id.* at 812–13 (citing *Simpson v. Attorney-Gen. (Baigent's case)*, [1994] 3 N.Z.L.R. 667 (C.A.)).

72. *Id.* at 819.

> inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement.[73]

Accordingly, the Court deemed neither constitutional nor punitive damages appropriate where common law damages would adequately compensate the victim.[74]

The Court has moved quickly to develop a "comparative bill of rights jurisprudence,"[75] particularly in its adjudication of criminal cases. In *State v. Makwanyane*, a case ultimately declaring that the imposition of the death penalty violated the Bill of Rights, the Court weighed several factors relating to non-South African law. It considered relevant, but not dispositive, the fact that public international law does not prohibit capital punishment.[76] In reaching its conclusion, the Court examined rulings of the Human Rights Committee of the United Nations[77] and the European Court of Human Rights.[78] It reviewed at length the United States' convoluted adjudication of the issue, finding merit in the *Furman v. Georgia*[79] decision discussing the inherently arbitrary nature of the sanction.[80] In the end, the Constitutional Court rejected the U.S. Supreme Court's ultimate conclusion that the penalty could be constitutional

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73. *Id.* at 827–28.

74. *Id.* at 828.

75. State v. Makwanyane, 1995 (3) SALR 391, 414–15 (CC). According to the Court,

> [c]omparative "bill of rights" jurisprudence will no doubt be of importance, particularly in the early stages of the transition where there is no developed indigenous jurisprudence in this branch of the law on which to draw. Although we are told by Section 35(1) that we "may" have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter Three of our Constitution.

Id. (footnote omitted).

76. *Id.* at 415.

77. *Id.* at 424–25.

78. *Id.* at 425–26.

79. 408 U.S. 238, 245 (1972). In that case, Justice Douglas wrote that "it is 'cruel and unusual' to apply the death penalty . . . selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." *Id.* (Douglas, J., concurring).

80. *Makwanyane*, 1995 (3) SALR at 420–21.

in certain circumstances.[81] Instead, it adopted the reasoning of the U.S. Supreme Court's death penalty opponents[82] and of the courts of Massachusetts and California, which ruled that the penalty violated their respective state constitutions.[83] In reaching its decision, the Constitutional Court compared its Bill of Rights protections with those of the United States, as well as with the constitutions of India, Germany, Hungary, Canada, and Tanzania.[84] Consequently, the South African Court cast a critical eye to a vast array of judicial views on the propriety of capital punishment, ultimately applying the perspectives of those courts it believed demonstrated the soundest reasoning.

Two other criminal cases in which the Court relied heavily on foreign and international law bear mentioning. In *State v. Williams*,[85] petitioners challenged the practice of caning juvenile offenders, finding support for their position in the 1994 interim Bill of Rights.[86] Here, too, the Court found persuasive Justice Brennan's views, expressed in *Furman v. Georgia*, regarding the constitutional obligation to protect human dignity.[87] In surveying those states which have abandoned juvenile whipping, the Court perceived "a

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81. *See Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that capital punishment is not *per se* unconstitutional, but that statutes must specify the aggravating and mitigating factors that would form the basis of such a sentence).

82. For example, the South African Constitutional Court cited with favor Justice Brennan's dissent in *Gregg*:

> [t]he fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. (It is) thus inconsistent with the fundamental premise of the [Cruel and Unusual Punishment] Clause that even the vilest criminal remains a human being possessed of common human dignity.

Makwanyane, 1995 (3) SALR at 422–23 & n.88 (citing *Gregg*, 428 U.S. at 238 (1976) (Brennan, J., dissenting)).

83. In California and Massachusetts, the penalty was found to be unconstitutionally cruel. People v. Anderson, 493 P.2d 880 (Cal. 1972); District Att'y for Suffolk Dist. v. Watson, 411 N.E.2d 1274 (Mass. 1980). California subsequently amended the constitution to reinstate the death penalty. CAL. CONST. art. I, § 27.

84. *Makwanyane*, 1995 (3) SALR at 426–30, 436-38, 440-41.

85. 1995 (3) SALR 632 (CC).

86. *Id.* at 638–49. The Court considered whether the practice of corporal punishment as applied to juveniles violated section 10 of the interim Bill of Rights, which guaranteed to every person "the right to respect for and protection of his or her dignity," and section 11(2), which provided that "[n]o person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment." S. AFR. CONST. of 1994 §§ 10, 11(2). Similar language is found in the 1996 Constitution, which protects the right of persons to "have their dignity respected and protected," "not to be tortured in any way;" and "not to be treated or punished in a cruel, inhuman or degrading way." S. AFR. CONST. §§ 10, 12(1)(d)–(e).

87. *Williams*, 1995 (3) SALR at 641.

growing *consensus* in the international community" that the practice offended societal notions of decency and violated human dignity.[88]

In another criminal case, *State v. Coetzee*,[89] the Court declared unconstitutional a provision of the Criminal Procedure Act requiring a defendant charged with making a false representation to prove that he made the representation without knowledge of its falsity.[90] The Court noted early in its opinion that the government had failed to demonstrate that other countries employed a similar burden-shifting scheme.[91] It also discussed at length Canadian decisions that were based on the Presumption of Innocence Clause in the Canadian Charter of Rights and Freedoms.[92] The Court observed that under Canadian case law, the constitutionality of statutory schemes shifting burdens of proof to the criminal defendant depended, in part, upon whether the offense was regulatory or "truly criminal" in nature.[93] However, the Court rejected this approach, ruling instead that distinctions based upon the nature of the offense could not be justified under the South African Constitution's Presumption of Innocence Clause.[94]

By demonstrating such discriminating reliance on foreign and international law, the Constitutional Court is at once embracing the country's grand project of political transformation and claiming its place among the world's constitutional democracies. In locating authority for its actions in the legal expression of the international community, the Court is establishing the legitimacy of its own actions while strengthening the international norms upon which it relies. The Court's work continues to define constitutional adjudication as an interactive international conversation, and its progressive approach to universal human rights problems potentially may realign comparative constitutionalism, to the particular benefit of other

88. *Id.* at 644 (emphasis in original).

89. 1997 (3) SALR 527 (CC).

90. *Id.* Similarly, in *State v. Zuma*, 1995 (2) SALR 642 (CC), the Court struck down a provision of the criminal code permitting the admission of confessions made before a magistrate without proof that they were freely and voluntarily made. The Court held that the provision unconstitutionally shifted to the defendant the burden to prove that the confession was not free and voluntary, and thereby violated certain guarantees of the Bill of Rights. *Id.* at 662.

91. *State v. Coetzee*, 1997 (3) SALR at 537.

92. *Id.* at 542–46.

93. *Id.* at 545–46.

94. *Id.* at 546–47. Justice Langa wrote that "[t]he presumption of innocence is breached whenever the effect of a reverse *onus* provision is such that the accused could be convicted despite the existence of a reasonable doubt as to guilt or innocence. . . . It is the substance of the [criminal] provision, not its form, that is decisive." *Id.*

African states that have recently rejected the Westminster model in favor of constitutional systems.

Spirited debate and dialogue are the hallmarks of these opinions, both within the Court and between the Court and its international counterparts. Unlike the United States Supreme Court, the South African high court is willing to apply the legal theories of any other state that has grappled with the same issues. In so doing, it creates a global jurisprudence in which its own voice promises to be unique, refreshing, and compelling.

II. POLITICAL TRANSFORMATION AND CONSTITUTIONAL PRACTICE

The Constitutional Court has drawn generously from foreign experience, and in particular from U.S. law, but it would be a mistake for American observers to read the South African constitutional rights project merely as a flattering imitation of American constitutionalism.[95] The South African Constitution, unlike our own, reflects a value system that comprehends and seeks to redress racial and class oppression.[96] While it is true that the document represents political compromise, it is not simply a rewrite of the Freedom Charter.[97] In its essence, it embraces a progressive

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95. One commentator wrote that "[i]n some loosely metaphorical ways, South Africa is both a mirror for and the child of the American legal system." Carol Steiker, *Pretoria not Peoria:* S v. Makwanyane and Another, *1995 (3) SA 391*, 74 TEX. L. REV. 1285, 1285 (1996). There is a rich literature comparing individual rights in the American and South African legal systems prior to the adoption of the present Constitution. *See, e.g.*, John Dugard, *Toward Racial Justice in South Africa, in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 349 (Louis Henkin & Albert Rosenthal eds., 1990) (suggesting South Africa would have coped better with racial tensions had it adopted a Constitution similar to the U.S. Constitution); Higginbotham, *Racism, supra* note 5, at 484–85 (comparing racism in the courts of South Africa and the United States and concluding that constitutional protections are of limited effectiveness as a remedy).

96. As Justice Holmes stated, the U.S. "[C]onstitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

97. The *Freedom Charter* sets forth the fundamental human rights principles embraced by the African National Congress (ANC). *See* AFRICAN NATIONAL CONGRESS, FREEDOM CHARTER, *reprinted in* 21 COLUM. HUM. RTS. L. REV. 249–51 (1989). The Charter was adopted in 1955 at a conference of the ANC at Kliptown. The Charter was the result of a process in which the Congress canvassed the population for a year, seeking to identify the grievances and aspirations of the oppressed communities. At the Kliptown conference, 2884 delegates considered the draft Charter and ultimately adopted it. *See* RAYMOND SUTTNER & JEREMY CRONIN, THIRTY YEARS OF THE FREEDOM CHARTER 12–104 (1986). Later, in its Constitutional Guidelines for a Democratic South Africa, the ANC sought to constitutionalize the principles of the Freedom Charter. *See* AFRICAN NATIONAL CONGRESS, CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA, *reprinted in* 21 COLUM. HUM. RTS. L. REV. 235–39

ideology and vision for South Africa. Like the United States' Bill of Rights, the South African Bill of Rights guarantees classical fundamental human rights.[98] Unlike the American experience, however, those rights came to be identified and codified, *ab initio*, in a goal-oriented process which prioritized the elimination of racism, sexism, and economic exploitation. It was a process that not only resulted in the written words of the Bill of Rights, but also informed and anchored the work of its interpreters, the Constitutional Court.[99] In this sense, the South African constitutional project is strikingly different from its American counterpart, where rights that were shaped by an oppressor class

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(1989). The guidelines called for a Constitution that would create a non-racial democracy, terminate apartheid and outlaw racism, encourage redistribution of wealth, promote sexual equality, protect cultural, linguistic and religious rights, and employ affirmative action to correct past discrimination. *Id.* For a discussion of the guidelines, see Albie Sachs, *Post-Apartheid South Africa: A Constitutional Framework*, 6 WORLD POL'Y J. 589 (1989).

98. The ANC was not always a firm advocate of inclusion of a justiciable bill of rights in the new Constitution. Skepticism within the Congress reflected the view that a bill of rights might serve to entrench White authority and deprive the democratically elected bodies of the power they needed to effectuate change. *See* Charles Villa-Vicencio, *Whither South Africa?: Colonialism and Law-Making*, 40 EMORY L.J. 141, 148 (1991).

In a paper presented to the ANC in 1986, Albie Sachs discussed the limitations of a bill of rights, noting that the claim for such protections came from people who had not been active against apartheid. *See* Albie Sachs, *A Bill of Rights for South Africa: Areas of Agreement and Disagreement*, 21 COLUM. HUM. RTS. L. REV. 13 (1989). Sachs argued that the judiciary could not be trusted to implement a bill of rights in a manner that would enhance rights for the oppressed communities. *Id.* at 15. Thereafter, the ANC changed its views somewhat, concluding that widespread participation in the drafting of a bill of rights might reinforce, rather than undermine, democratic values. *Id.* at 16–17.

Ultimately, in 1991, the ANC put forward a draft of a fairly comprehensive bill of rights that included civil and political, as well as economic, social and cultural rights. *A Bill of Rights for a Democratic South Africa—Working Draft for Consultation, reprinted in* 18 SOC. JUST. 49 (1991). Then, in 1992, the ANC published a revised text of its Draft Bill of Rights. *ANC Draft Bill of Rights: A Preliminary Revised Text* (May 1992), *reprinted in* ALBIE SACHS, ADVANCING HUMAN RIGHTS IN SOUTH AFRICA 215–35 (1992). For a discussion of the early debate leading to adoption of the Bill of Rights, see Nicholas Haysom, *Democracy, Constitutionalism, and the ANC's Bill of Rights for a New South Africa*, 18 SOC. JUST. 40 (1991); Penuell M. Maduna, *Judicial Review and Protection of Human Rights under a New Constitutional Order in South Africa*, 21 COLUM. HUM. RTS. L. REV. 73 (1989); Nathaniel M. Masemola, *Rights and a Future South African Constitution: The Controversial and the Non-Controversial*, 21 COLUM. HUM. RTS. L. REV. 45 (1989); Johan van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L.J. 745 (1991).

99. For example, in considering what constitutional language could best guarantee meaningful gender equality, Albie Sachs observed that "the Constitution should permit and require the law to look at the actual lives that women lead and thereby enable women to define for themselves what their expectations and priorities are." ALBIE SACHS, PROTECTING RIGHTS IN A NEW SOUTH AFRICA 57 (1990).

have been dispensed in small pieces and from the top to the bottom.[100] The South African jurists are not crippled by the interpretive problems that plague constitutional jurists such as those comprising the United States Supreme Court, whose touchstone is a document born of an era in which racism was the prevailing ideology.[101]

Nevertheless, the problem remains that constitutional rights are by nature indeterminate and contingent. Theoretically they exist off in a stratosphere hovering somewhere above *realpolitique*. Rights are colorless, genderless, and classless, and therefore a system which privileges individual rights can invite resort to them for purposes antithetical to progressive social change. Rights ideals are not synonymous with progressive ideals.[102] The American experience

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100. As Justice Thurgood Marshall pointed out in a bicentennial address in 1987, the government created by the Constitution "was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional governmental, and its respect for individual freedoms and human rights, we hold fundamental today." Thurgood Marshall, *Remarks on the Bicentennial of the U.S. Constitution, in* 13 SIGNS 2, 2 (1987). For the rich literature on the racism and sexism imbedded in the U.S. Constitution and the efforts to rise above that history, see generally Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death, in* BEYOND CONFEDERATION 188–225 (Richard Beeman et al. eds., 1987); STAUGHTON LYND, CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION 153–84 (1967); WILLIAM M. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848 (1977); Ellen C. DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Women's Suffrage, and the United States Constitution, 1820–1878*, 74 J. AM. HIST. 836 (1987).

In the final analysis, constitutions codify existing political relationships. One commentator stated it this way:

> [a]lthough constitutional arrangements vary, they may be generally characterized as instruments that establish rules for making rules. Legalism is, accordingly, a function of a larger phenomenon which ultimately determines the content and construction of laws and other legal instruments. Although the legitimacy of a government may be said to reside in the rule of law, in reality, the political distribution of power determines how a society is governed.

Melanie Beth Oliviero, *Human Needs and Human Rights: Which are More Fundamental?*, 40 EMORY L.J. 911, 914–15 (1991).

101. *See, e.g.*, Derrick Bell, *An Allegorical Critique of the United States Civil Rights Model, in* DISCRIMINATION: THE LIMITS OF LAW 3, 8–12 (Bob Hepple & Erika M. Szyszczak eds., 1992) (discussing the ambivalence of the U.S. Supreme Court decisions regarding racism as a consequence, *inter alia*, of the Framers' racism); Jonathan R. Macey & Geoffrey P. Miller, *The End of History and the New World Order: The Triumph of Capitalism and the Competition Between Liberalism and Democracy*, 25 CORNELL INT'L L.J. 277, 290 (1992) (distinguishing between inclusionary democracies, such as South Africa, and exclusionary ones, such as the United States).

102. Indeed, some commentators have argued that an individual democratic rights regime is fully consistent with racial subordination. Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy and the State*, 42 UCLA L. REV 721, 729 (1994).

illustrates that when rights are not anchored to a progressive political process, they can become counter-rights that have nothing to do with building community and redressing inequity and have everything to do with maintaining the status quo.[103] Consider, for example, the "inequality" arguments raised by the White male "victim" of affirmative action.[104]

In a system that distinguishes constitutional rights from policy and that places its highest value on the abstract right in contrast to policy, how can rights be transformative engines of social change? And equally troublesome is, should they be?[105] Is an individual rights system always ideologically problematic? Put another way, is there any way of insulating rights from ideological capture in a fluid political system? Is it appropriate for rights interpreters to construct a framework of legal analysis that renders them highly visible proponents of progressive social change?[106]

The South African Constitutional Court continues to seek answers to these issues by contextualizing its rights jurisprudence. In its opinions, the Court employs a new juridical language that

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103. Derrick Bell's fictional heroine, Geneva Crenshaw, stated it this way:

> we have attained all the rights we sought in law and gained none of the resources we need in life. Like the crusaders of old, we sought the holy grail of "equal opportunity" and, having gained it in court decisions and civil rights statues, find it transformed . . . into one more device the society can use to perpetuate the racial status quo.

Derrick Bell, *The Elusive Quest for Racial Justice: The Chronicle of the Constitutional Contradiction*, *in* THE STATE OF BLACK AMERICA 9, 9 (Janet Dewart ed., 1991).

104. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 277–78 (1978) (challenging the University of California at Davis Medical School admissions program as a violation of the Equal Protection Clause). For discussion of the inadequacy of the U.S. Constitution's equality provisions to redress the suppression and discrimination experienced by racial minorities and women, see Owen Fiss, *Groups and the Equal Protection Clause*, *in* EQUALITY AND PREFERENTIAL TREATMENT 84 (Marshall Cohen et al. eds., 1977). There is a considerable literature arguing that the history of the equality provisions supports a more generous interpretation of their reach than the Supreme Court has ever been willing to give. *See* Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 HARV. C. R.-C.L L. REV. 299 (1993); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111 (1991).

105. The legal realist denies that law either can be or should be socially transforming:

> [a]s lawyers we will do well to be on our guard against any suggestion that, through law, our society can be reformed, purified, or saved. The function of law . . . is altogether more modest and less apocalyptic. It is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is general consensus among us.

GRANT GILMORE, THE AGES OF AMERICAN LAW 109 (1977).

106. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY 286 (1977).

consistently and repeatedly identifies the values underlying its choices, which it unmasks as just that—moral choices rather than scientific results.[107] Yet the Court perceives that its moral authority as the ultimate interpreter of rights is wholly dependent upon its ability to be faithful to the constitutional vision. Thus, even as the jurists take great care to describe at length their value choices, they return time and again to the political imperatives that gave rise to and are the life-blood of the Constitution. In situating rights claims within a defined political project, the Court is better able to identify and reconcile the tensions existing between freedom and alienation, autonomy and community, and group rights and individual rights. Abstract theoretical rights are tested against their practical effects and, ultimately, against the constitutional vision of a new dispensation reflected in the actual text.[108] This, the Court appears to say, is the ultimate *raison d'etre* of a rights jurisprudence.

I have identified four areas which, I suggest, taken together, begin to define the way in which the Court contextualized its constitutional adjudication. First, the Court has sought to describe its own role and processes as the interpreter of rights in the country's new constitutional system. In other words, it has defined the nature of transparency[109] for the judicial branch. Second, the

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107. As Justice Sachs stated,

> [the Court] should not engage in purely formal or academic analysis, nor simply restrict ourselves to *ad hoc* technicism, but rather focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case. . . . In the end, we will frequently be unable to escape making difficult value judgments, where . . . logic and precedent are of limited assistance.

Coetzee v. Government of the Republic of South Africa, 1995 (4) SALR 631, 656–57 (CC). For a discussion of values and choice in constitutional adjudication in South Africa, see Bernard E. Harcourt, *Mature Adjudication: Interpretive Choice in Recent Death Penalty Cases*, 9 HARV. HUM. RTS. J. 255 (1996).

108. *See* Gauteng Sch. Educ. Bill of 1995, 1996 (3) SALR 165 (CC). Justice Sachs wrote that

> [o]ne may accept that even abstract questions of law have to be considered in the concrete context of history, and we cannot ignore the fact, urged upon us by counsel, that, although the words of the Constitutional text are generalised, they are also suffused with specific and (frequently contradictory) life experiences. Yet, even if the poignancy of history flows through the veins of the Constitution, we must always be guided by the words and spirit of the constitutional text itself, supporting, not this group or that, but the values articulated by the Constitution.

Id. at 188.

109. "Transparency" in the South African political discourse concerns itself with the accessibility and visibility of political processes. *See* Harcourt, *supra* note 107, at 263

Court has acknowledged the transitional nature of this particular political and constitutional moment. It has described the travesties of the past and the vision for the future. Third, the Court has identified those values which it believes are at the core of the democratic enterprise in South Africa. Fourth, and finally, the Court has sought to articulate the relationship between civil and political rights on the one hand, and economic, social, and cultural rights on the other. It has, in other words, attempted to unmask the material consequences of the law's choices about rights.

A. *The Court Defines its Role*

Staking out a role for itself as teacher in the national discourse on the relative rights and responsibilities of the individual and the state,[110] the Court has repeatedly identified its task as that of "promot[ing] and develop[ing] . . . a new culture" of respect for human rights.[111] Perhaps its ruling abolishing capital punishment[112] best exemplifies the method of self-examination through which the Court has undertaken to inculcate a new value system. There the Court refused to ignore a reality that has haunted abolitionist-minded jurists and lawyers—that in an age of increased crime, public opinion has increasingly favored the death penalty.[113] Even if

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(describing the court's decision in *State v. Makwanyane*, 1995 (3) SALR 391 (CC), which outlawed capital punishment, as providing a "vision of transparent adjudication that articulates the values that underlie . . . interpretive choice, making them available for criticism . . . .").

110. As Alexander Bickel stated regarding the U.S. Supreme Court, "[t]he discussion of problems and the declaration of broad principles by the Court is a vital element in the community experience through which American policy is made. The Supreme Court is, amongst other things, an educational body and the justices are inevitably teachers in a vital national seminar." ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 91 (1970).

111. State v. Williams, 1995 (3) SALR 632 (CC). The Court noted that

> [c]ourts do have a role to play in the promotion and development of a new culture "founded on the recognition of human rights", in particular with regard to those rights which are enshrined in the Constitution. It is a role which demands that a court should be particularly sensitive to the impact which the exercise of judicial functions may have on the rights of individuals who appear before them; vigilance is an integral component of this role, for it is incumbent on structures set up to administer justice to ensure that, as far as possible, these rights, particularly of the weakest and the most vulnerable, are defended and not ignored.

Id. at 635.

112. State v. Makwanyane, 1995 (3) SALR 391 (CC).

113. *Id.* at 431–32. In *Furman v. Georgia*, Justice Brennan explained that although opinion polls reflected majority support for the death penalty, the fact that the penalty was rarely inflicted suggested that society considered it an "unusual" punishment, and

true, that fact was mere politics. Instead, constitutional values, as identified by the Court, were all that mattered in assessing the propriety of the ultimate penalty. According to Chief Justice Chaskalson,

> [p]ublic opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. . . . The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. . . . It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected.[114]

B. *The Court and the Bridge to the New World*

Political transitions are both challenging and perilous, for although the old world has been rejected, it nevertheless retains its power to influence the creation of the new world not yet realized. In studying transitions from autocratic regimes to constitutional democracies, scholars have begun to identify some of the factors that distinguish the successes from the failures.[115] Certainly one critical ingredient is whether the judiciary is an active, co-equal partner with other state structures in advancing human rights and democratic ideals.[116] The Constitutional Court has taken a number of

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was, therefore, a more meaningful barometer of true public sentiment for purposes of the Eighth Amendment. 408 U.S. 238, 299 (1972) (Brennan, J., concurring).

114. State v. Makwanyane, 1995 (3) SALR 391, 431 (CC).

115. *See, e.g.*, THEODORE SISK, DEMOCRATIZATION IN SOUTH AFRICA: THE ELUSIVE SOCIAL CONTRACT (1995) (discussing the transformation of South Africa from a divided society to an inclusive democracy); SOUTH AFRICA: THE POLITICAL ECONOMY OF TRANSFORMATION (Stephen John Stedman ed., 1994) (examining political, economic, and social transition and reformation in South Africa); Samuel Decalo, *The Process, Prospects, and Constraints of Democratization in Africa*, 91 AFR. AFF. 7 (1991) (identifying common patterns and likely future developments in African democratization).

116. For a discussion of the importance of a strong judiciary in the new South Africa, see Lynn Berat, *Courting Justice: A Call for Judicial Activism in a Transformed South Africa*, 37 ST. LOUIS U. L.J. 849 (1993); Maduna, *supra* note 98, at 78; Ziyad Motala, *Independence of the Judiciary, Prospects and Limitations of Judicial Review in Terms of the United States Model in a South African Order: Towards an Alternative Judicial Structure*, 55 ALBANY L. REV. 367 (1991). On the nature of the judicial restructuring required by democratic transformation, see Heinz Klug, *The South African Judicial Order and the Future: A Comparative Analysis of the South African Judicial System and Judicial Transi-*

opportunities to articulate its understanding of the demands of the transitional period, and to coax and cajole the citizenry to appreciate both the horrors of the past and the challenges of the future. The epilogue[117] to the interim Constitution stated that

> [t]his Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.[118]

In *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa*,[119] a case challenging the constitutionality of the amnesty provisions of the Truth and Reconciliation Act, the Court addressed itself to the need for creative approaches to governance during this "bridge" phase. The applicants argued that the Constitution did not grant Parliament the authority to establish non-judicial structures empowered with adjudicatory functions such as pardoning criminal actors.[120] Ultimately, the Court found that the legislation passed constitutional muster,[121] but in reaching its decision, the Court went to great lengths to endorse the Act's rationale as essential to successful democratic transition. In his opinion for the Court, Justice Mohamed opened with a compelling introduction about the harms of the past:

> [f]or decades South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the State and a majority who sought to resist that domination. Fundamental human rights became a major casualty of this conflict as the resistance of those punished by their denial was met by laws designed to counter the effectiveness of such resistance.... The result was a debilitating war of internal political dissension and confrontation, massive

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tions in Zimbabwe, Mozambique, and Nicaragua, 12 HASTINGS INT'L & COMP. L. REV. 175 (1988).

117. The "epilogue" addresses national unity and reconciliation. S. AFR. CONST. of 1994 National Unity and Reconciliation.

118. S. AFR. CONST. of 1994. The epilogue was dropped from the 1996 Constitution; however, the preamble provides that the Constitution is adopted so as to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights." S. AFR. CONST. preamble.

119. 1996 (4) SALR 671 (CC).

120. *Id.* at 680.

121. *Id.* at 692–93.

> expressions of labor militancy, perennial student unrest, punishing international economic isolation, widespread dislocation in crucial areas of national endeavor, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among expanding proportions of the populace. The legitimacy of law itself was deeply wounded as the country haemorrhaged [sic] dangerously in the face of this tragic conflict which had begun to traumatise the entire nation.[122]

Justice Mohamed wrote further about the difficulties encountered in building a new democratic order:

> [i]t was wisely appreciated by those involved in the . . . negotiations [leading to the political détente] that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past.[123]

Perhaps Justice Mohamed placed this extraordinary exposition so prominently in the opinion in order to render the Court's reasoning more accessible to lay readers. It identifies political realities and seeks to build consensus for the conclusions it reaches by openly embracing amnesty as an essential part of reconciliation. It acknowledges that the violations suffered by the victims were neither random nor insignificant, but rather were horrific and systemic. It suggests that the case raises the issue of how best to traverse the bridge from the illegitimacy of the past to the rule of law. It not only accepts that Parliament could address such an issue as it did in the Truth and Reconciliation bill, but it takes the next step of endorsing the choice made by Parliament. According to the Court, Parliament's choice was not only legal, but wise and perhaps even necessary for a successful transition:

> [t]he alternative to the grant of immunity . . . is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependents of such

122. *Id.* at 676.
123. *Id.*

> victims in many cases substantially ignorant about what precisely happened to their loved ones . . . and correspondingly to allow the culprits of such deeds to remain perhaps physically free but inhibited in their capacity to become active, full and creative members of the new order . . . . Both the victims and the culprits who walk on the "historic bridge" described by the epilogue will hobble more than walk to the future with heavy and dragged steps delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge, which is the vision which informs epilogue.[124]

If the *AZAPO* case is result-driven, its approach can be justified by the urgency of navigating a safe passage over the bridge to the future South Africa.

C. *The Court Establishes the Core Values of the Bill of Rights*

If some constitutional rights deserve more solicitous judicial protection than others, how are they selected for such preferential treatment? The Bill of Rights instructs that judicial interpreters of its guarantees "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom."[125] A founding provision of the Constitution declares that the values upon which the state is based include "human dignity," "equality," "non-racialism" and "non-sexism."[126] A review of the Court's decisions suggests that the rights to equality, freedom, and personal security are accorded preferred standing. The opinions illustrate that the special status results from the history of inequity and state-sponsored violence that the Bill of Rights was designed to redress.

Throughout its case law, the Court has repeatedly underscored the primacy of the equality principle. In one case, *Fraser v. Children's Court*,[127] the Court struck down as discriminatory an adoption law that eliminated the consent requirement for unwed fathers, but not for unwed mothers. Justice Mohamed wrote that "[t]here can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised."[128] In *Coetzee v. Government of the*

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124. *Id.* at 684–85.
125. S. AFR. CONST. § 39(1)(a).
126. S. AFR. CONST. § 1(a)–(b).
127. 1997 (2) SALR 261 (CC).
128. *Id.* at 272 (footnotes omitted).

Republic of South Africa,[129] the case challenging the constitutionality of a law providing for the imprisonment of judgment debtors, one Justice found the law discriminatory because poor debtors faced imprisonment while wealthier ones could pursue bankruptcy proceedings.[130]

Perhaps the most spirited debate on the nature of the equality right is contained in the Court's *Du Plessis*[131] opinion. In determining whether the Constitution's free speech clauses applied to private conduct, the Court also considered whether the Bill of Rights could be applied horizontally—a subject that had pierced the heart of the debates that preceded the adoption of the Constitution.[132] In effect, the horizontality question was one of whether disadvantaged groups could rely on equal treatment in both the public and private sphere.[133] In a sharply divided opinion, the Court declined to apply the Bill of Rights to wholly private torts like defamation. In his opinion for the majority, Justice Kentridge reasoned that the applicability of constitutional values to private conduct was best left to be determined incrementally within the framework of the common law.[134] Justices Madala and Kriegler, two of the three justices in the minority, wrote unusually forceful dissents in which they argued that the primacy of equality in the Constitution's structure compelled horizontality.[135] In particular, Justice Madala's opinion suggests that she viewed the outcome as a betrayal of the constitutional commitment to equality. She noted that "the verticality approach is unmindful of the modern day reality—that in many instances the abuse in the exercise of power is perpetrated less by the State and more by private individuals against other private individuals."[136] Ultimately, the Constitution's silence on the issue left it up to the Court to decide which, if any, provisions of the Bill of Rights should be applied horizontally.[137]

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129. 1995 (4) SALR 631 (CC).

130. *Id.* at 670 (Sachs, J., concurring).

131. Du Plessis v. De Klerk, 1996 (3) SALR 850 (CC).

132. *Id.* at 860–61.

133. For a discussion of the feminist view that full equality for women requires "deprivatizing" offenses like domestic violence, and attention to other forms of discrimination within the home, see, for example, Vivienne Goldberg, *South Africa: Private Law in Transition / The Effect of the New Constitution*, 33 U. LOUISVILLE J. FAM. L. 495, 496–500 (1995); Celina Romany, *Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender*, 21 BROOK. J. INT'L L. 857, 870–76 (1996).

134. *Du Plessis*, 1996 (3) SALR at 885.

135. *Id.* at 908–27.

136. *Id.* at 922.

137. The Constitution states that "[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the na-

Apart from equality, the Court has focused on the crisis of endemic violence that has plagued the country as well as its implications regarding enforcement of the right to freedom and personal security. The Court has remained steadfastly committed to the principle that violence sanctioned by the state engenders disrespect for law and authority. For example, in rejecting the argument that the death penalty is necessary for deterrence, the Court observed that the root causes of violence could be found in inequitable social conditions.[138] The death penalty, the Court concluded, was not a remedy for such conditions.[139] Likewise, in *State v. Williams*,[140] the case banning the caning of juvenile offenders, the Court expressed similar views regarding the need for the State to protect liberty and personal security of all of its citizens, even in the face of the crime epidemic.

D. *The Interdependence of Civil and Political Rights, and Economic, Social, and Cultural Rights*

The Court has shown little hesitance in expressing its perspective on the relationship between social and economic conditions and the exercise of civil rights.[141] It has clearly indicated its recognition of

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ture of the right and the nature of any duty imposed by the right." S. AFR. CONST. § 8(2).

138. *State v. Makwanyane*, 1995 (3) SALR 391 (CC). Justice Chaskalson observed that

> [t]he cause of the high incidence of violent crime cannot simply be attributed to the failure to carry out the death sentences imposed by the courts. The upsurge in violent crime came at a time of great social change associated with political turmoil and conflict. . . . Homelessness, unemployment, poverty and frustration consequent upon such conditions are other causes of the crime wave.

Id. at 442–43.

139. *Id.* at 441–45.

140. 1995 (3) SALR 391 (CC).

141. As to the propriety of expanding constitutional rights to include second generation economic, social and cultural rights, and third generation environmental rights, see, for example, David M. Davis, *The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, 8 S. AFR. J. HUM. RTS. 475, 486–88 (1992); Nicholas Haysom, *Constitutionalism, Majoritarian Democracy and Socio-Economic Rights*, 8 S. AFR. J. HUM. RTS. 451, 456–60 (1992); Rhoda Howard, *The Full Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q., 467, 482–87 (1983); Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?* 10 AM. U.S. INT'L L. & POL'Y 1233 (1995); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 43–85 (1992); Cass Sunstein, *Against Positive Rights: Why Social and Economic Rights Don't Belong in the Constitutions of Post-Communist Europe*, E. EUR. CONST. REV., Winter 1993, at 35. Some commentators who support the expansion of constitutional entitlements to include second generation rights nevertheless worry that the courts are not

class bias embedded in the law. In so doing, it has alerted the legal community of the need to revamp legal structures that perpetuate inequity. In *Fraser v. Children's Court*,[142] Justice Mohamed went so far as to caution Parliament to be aware of the potentially discriminatory consequences of its lawmaking.[143] Justice Mohamed addressed the issue of equality in the following manner:

> [t]he question of parental rights in relation to adoption bears directly on the question of gender equality. In considering appropriate legislative alternatives, parliament should be acutely sensitive to the deep disadvantage experienced by the single mothers in our society. Any legislative initiative should not exacerbate that disadvantage. In seeking to avoid doing so, it may well be that the legislative approaches adopted in "first-world" countries . . . should be viewed with caution. The socio-economic and historical factors which give rise to gender inequality in South Africa are not always the same as those in . . . "first-world" countries.[144]

In *Mohlomi v. Minister of Defence*,[145] Justice Didcott wrote compellingly about the need to be cognizant of the poverty-based impediments to civic and democratic participation. In that case, the applicants challenged the constitutionality of a short statute of limitations for claims against the State.[146] Critical of the statute's consequences for poor and unsophisticated litigants, Justice Didcott wrote "[t]hat disparity must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law . . . ."[147]

In this manner, the Court has contextualized its rights jurisprudence by demonstrating that poverty defines the way in which individuals experience rights. This point is illustrated in

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institutionally prepared to enforce such rights. *See* LORD MCCLUSKEY, LAW, JUSTICE AND DEMOCRACY 38 (1987). In the South African case, as a practical matter the issue is moot, because the Constitution does in fact contain guarantees of positive economic and social rights, including the right of access to housing, health care, education, and a safe environment. *See* S. AFR. CONST. §§ 24, 26, 27, 29.

142. 1997 (2) SALR 261 (CC).

143. *Id.* at 283.

144. *Id.* at 282.

145. 1997 (1) SALR 124 (CC).

146. *Id.* at 126.

147. *Id.* at 131.

Coetzee v. Government of the Republic of South Africa,[148] a case in which the Court declined to accept the facial neutrality of the law requiring the imprisonment of judgment debtors. Instead, the Court looked beyond the text to identify the law's operational bias against the poor and ruled the statute unconstitutional for granting the right of judicial review of one's financial status to the bankruptcy litigant but not to the poor debtor.[149] In *Gauteng School Education Bill of 1995*,[150] where the Court considered whether linguistic minorities enjoy a group right to state-supported separate schools, the jurists refused to accept at face value the claim that the state owed a duty to protect a numerical minority by underwriting cultural segregation.[151] Rather, the Court drew a distinction between the rights entitlement of various groups based on the prior history of disadvantage.[152]

CONCLUSION

Many complex issues continue to confront the South African Constitutional Court, and many textual silences have yet to be addressed. However, a review of the Court's work to date establishes that reliable methods of adjudication—transparency, contextualization, and comparative study—are firmly entrenched in the South African legal system. As the Constitutional Court of South Africa develops its jurisprudence in the aftermath of the social, political, and judicial changes, proper use of these tools will continue to enable the country, through its adjudicative processes, to assume its place among the preeminent constitutional democracies of the world.

148. 1995 (4) SALR 631 (CC).
149. *Id.* at 641–44.
150. 1996 (3) SALR 165 (CC).
151. *Id.* at 191.
152. *Id.* at 173.