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## Twenty Years of South African Constitutionalism

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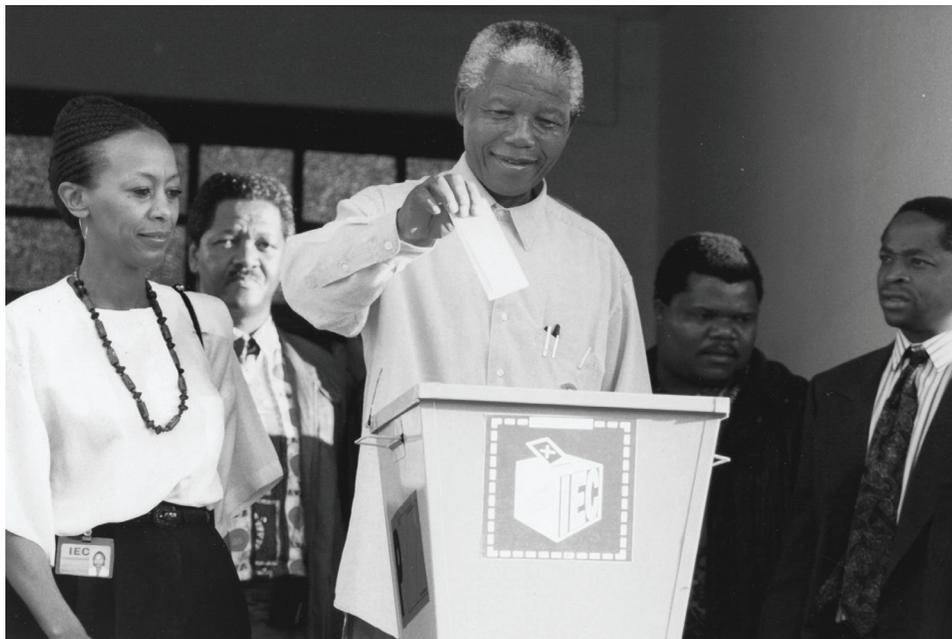
## Twenty Years of South African Constitutionalism

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## TWENTY YEARS OF SOUTH AFRICAN CONSTITUTIONALISM



The author with Nelson Mandela at the first democratic election in South Africa on April 27, 1994.<sup>1</sup>

Many people have asked me how I, an African American woman, found myself standing next to Nelson Mandela when he voted for the first time in his life in that schoolhouse in Inanda, KwaZulu-Natal, South Africa. What was the arc of my life that placed me there, and what was the larger meaning for me of that moment?

I was born in the late 1940s in Atlanta, Georgia. At that time, Georgia, as a southern state, had a legal framework that imposed what could be considered to be America's version of an apartheid system of racial segregation—the Jim Crow system.<sup>2</sup> The law required that every significant aspect of life be separate and unequal for African Americans. We lived in separate neighborhoods with substandard city services. We attended separate and inferior schools. Our professional choices were extremely limited. And if we stepped out of line, we faced personal humiliation, intimidation, violence, and even lynching.

My formative years were spent in the midst of the civil rights movement. Atlanta was—I think it is fair to say—the headquarters of that movement. Martin Luther King, Jr. and his family lived around the corner from my home in the segregated black neighborhood of Atlanta. The Student Non-Violent Coordinating Committee headquarters was not far away.<sup>3</sup>

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1. Photograph on file with the author.

2. See generally JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* (2002).

3. See generally *HANDS ON THE FREEDOM PLOW: PERSONAL ACCOUNTS BY WOMEN IN SNCC* (Faith S. Holsaert et al. eds., 2010).

In our quest for racial justice in the United States, we looked for inspiration from other, similar movements around the world. We found that inspiration in the struggle against apartheid and in the courage demonstrated by so many South Africans of that era. Our movement for racial justice had resonance in South Africa, and the struggle to end apartheid gave us examples of commitment and sacrifice. In 1964, the year after a quarter of a million Americans marched on Washington to demand racial equality here in the United States,<sup>4</sup> Nelson Mandela stood in a courtroom in South Africa and declared that the cause of racial justice was one for which he was willing to die.<sup>5</sup> His words had an impact on us here in the United States. That same year, Mandela and his co-defendants were sentenced to life imprisonment on Robben Island,<sup>6</sup> and three civil rights workers were murdered in Mississippi for encouraging African Americans to register to vote.<sup>7</sup>

When the civil rights struggle here in the United States was curtailed by the assassination of Martin Luther King, Jr. in 1968 and by internal conflicts about vision and direction, many black activists—myself included—looked to the liberation movements in South Africa, for inspiration, vision, and leadership. In the 1980s, it was the rallying cry to “release Nelson Mandela and all other political prisoners” that reignited the impulse in communities across this country to fight for racial equality.<sup>8</sup> I was a member of the small group of activists that initiated a number of demonstrations and symbolic arrests in front of the South African Embassy in Washington, DC.<sup>9</sup> Those demonstrations and arrests continued on a daily basis for a year and mushroomed into a national movement of Americans who engaged in civil

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4. See *March on Washington*, HISTORY.COM, <http://www.history.com/topics/black-history/march-on-washington> (last visited Feb. 15, 2016).

5. In Mandela's words:

During my lifetime I have dedicated my life to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons will live together in harmony and with equal opportunities. It is an ideal for which I hope to live for and to see realised. But, My Lord, if it needs be, it is an ideal for which I am prepared to die.

Nelson Mandela, Statement from the Dock at the Opening of the Defense Case in the Rivonia Trial, (Apr. 20, 1964), [http://db.nelsonmandela.org/speeches/pub\\_view.asp?pg=item&ItemID=NMS010&txtstr=I%20am%20prepared%20to%20die](http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS010&txtstr=I%20am%20prepared%20to%20die).

6. See Jeffrey Delviscio et al., *The Life and Legacy of Nelson Mandela: 1918-2013*, N.Y. TIMES, [http://www.nytimes.com/interactive/2013/12/05/world/africa/Mandela-Timeline.html#/#time216\\_6681](http://www.nytimes.com/interactive/2013/12/05/world/africa/Mandela-Timeline.html#/#time216_6681) (last visited Feb. 15, 2016).

7. See *June 21, 1964: The KKK Kills Three Civil Rights Activists*, HISTORY.COM, <http://www.history.com/this-day-in-history/the-kkk-kills-three-civil-rights-activists> (last visited Feb. 15, 2016).

8. See generally William Minter & Sylvia Hill, *Anti-Apartheid Solidarity in United States-South Africa Relations: From the Margins to the Mainstream*, in 3 THE ROAD TO DEMOCRACY IN SOUTH AFRICA 745 (2008).

9. See generally *U.S. Activists and Politicians Campaign at South African Embassy for End to Apartheid, 1984-1985*, GLOBAL NONVIOLENT ACTION DATABASE, <http://nvdatabase.swarthmore.edu/content/us-activists-and-politicians-campaign-south-african-embassy-end-apartheid-1984-1985> (last visited Feb. 15, 2016).

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disobedience—who took the opportunity to publicly stand up and be counted and even go to jail to oppose apartheid.<sup>10</sup> This movement helped galvanize support for U.S. economic sanctions against apartheid.<sup>11</sup>

The campaigns against apartheid that swept across the globe gave a sense of involvement to thousands of people—government workers, university faculty and students, trade unionists, churchgoers, non-governmental organizations, and just ordinary people—who saw in the struggle against apartheid their own aspirations for justice, equality, and human rights.<sup>12</sup> But I was doubly fortunate to play a unique role in this campaign. For fifteen years, starting in 1979, I worked directly with lawyers on the ground in South Africa and Namibia to get political prisoners out of jail.<sup>13</sup> And literally thousands were released as a result of our efforts. We filed litigation to challenge apartheid laws, and the courts invalidated many as a result.<sup>14</sup> When detainees died from torture at the hands of police,<sup>15</sup> we represented their families at inquests to press for police accountability. We helped families resist eviction from their homes to distant bantustans,<sup>16</sup> and when the leadership of the United Democratic Front was rounded up and charged with treason,<sup>17</sup> we secured the resources for the defense and trial publicity.

When townships exploded into defiance in the mid-1980s, I was working with attorneys in townships all across South Africa, scores of whom stepped forward to defend their neighbors and family members, who were increasingly putting their lives on the line to gain justice in their country. The names of most of those township lawyers will likely never be recorded in the history of the fight against apartheid. They studied law and opened law practices during that difficult and dark period. Many of these lawyers suffered humiliations in court: some had to enter through the side doors designated for blacks, some were officially banned, and others were

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10. See Pedro Noguera & Robert Cohen, *Remembering Reagan's Record on Civil Rights and the South African Freedom Struggle*, THE NATION (Feb. 11, 2011), <http://www.thenation.com/article/158506/remembering-reagans-record-civil-rights-and-south-african-freedom-struggle#>.

11. In 1986, Congress overrode then-President Ronald Reagan's veto on the sanctions. Steven V. Roberts, *Senate, 78 to 21, Overrides Reagan's Veto and Imposes Sanctions on South Africa*, N.Y. TIMES (Oct. 3, 1986), <http://www.nytimes.com/1986/10/03/politics/03REAG.html>.

12. See Kevin Hopkins, *Assessing the World's Response to Apartheid: A Historical Account of International Law and Its Part in the South African Transformation*, 10 U. MIAMI INT'L & COMP. L. REV. 241, 252 (2001).

13. See generally KENNETH S. BROUN, *BLACK LAWYERS, WHITE COURTS: THE SOUL OF SOUTH AFRICAN LAW* (2000) (providing narrative accounts from twenty-seven South African lawyers of their struggle to overcome apartheid and achieve justice). I served as director of the Southern Africa Project of the Lawyers' Committee for Civil Rights Under Law from 1980 to 1994.

14. See *id.* at 176, 191–92.

15. See DENNIS DAVIS & MICHELLE LE ROUX, *PRECEDENT & POSSIBILITY: THE ABUSE OF LAW IN SOUTH AFRICA* 87–88 (2009).

16. Penelope Andrews, *Apartheid: The Legal Death of the Black Worker*, HUM. RTS., Spring 1987, at 32, 34 (“The bantustans are fragmented areas designated for blacks . . . . Since 1960, the South African government has forcibly relocated at least one million blacks from white areas into the bantustans.”).

17. See BROUN, *supra* note 13, at 183–84.

imprisoned.<sup>18</sup> Two South African lawyers with whom I worked closely—Griffiths Mxenge and later, his wife and law partner, Victoria Mxenge—were brutally assassinated in retaliation for their work representing political prisoners.<sup>19</sup>

The historical record should surely include the names of lawyers like Godfrey Pitje, whom I met in the 1980s. At that time, Pitje was like an elder in the clan of black lawyers in South Africa.<sup>20</sup> I also worked with lawyers like Fikile Bam,<sup>21</sup> Phineas Mojapelo,<sup>22</sup> Boy Majodina,<sup>23</sup> Yvonne Mokgoro,<sup>24</sup> Justice Poswa,<sup>25</sup> George Maluleke,<sup>26</sup> Justice Moloto,<sup>27</sup> Pansy Tlakula,<sup>28</sup> and Kgomotso Moroka.<sup>29</sup> Some of these lawyers were influential in founding the Black Lawyers Association of South Africa, which has been critical in training judges for the post-apartheid era.<sup>30</sup> Others have gone on to play outstanding leadership roles in their country and for the world—

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18. See Kenneth S. Broun, *Black Lawyers Under Apartheid: The Soul of South African Law*, LITIG., Winter 2001, at 33, 35.

19. *Mlungisi Griffiths Mxenge and Victoria Nonyamezelo*, THE PRESIDENCY: REPUBLIC OF S. AFR. (Apr. 22, 2008), <http://www.thepresidency.gov.za/pebble.asp?reid=7951>.

20. See Broun, *supra* note 13, at 1–29.

21. Fikile Bam worked with Nelson Mandela in the 1950s at the law offices of Mandela and Oliver Tambo and later spent ten years on Robben Island with Mandela. See Interview of Fikile Bam by John Carlin, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/mandela/interviews/bam.html> (last visited Feb. 15, 2016). He also served as President of the Land Claims Court, which was established to adjudicate claims by people or communities deprived of land by racially discriminatory laws or practices. See Broun, *supra* note 13, at 31.

22. Phineas Mojapelo and his law firm engaged in significant political work during and up until the end of the apartheid era. See Broun, *supra* note 13, at 209.

23. Boy Majodina was a lawyer to activists and those killed by South African police on 1985's International Day for the Elimination of Racial Discrimination in Langa Township, Uitenhage. See generally Thole Majodina, *A Short Background to the Shooting Incident in Langa Township, Uitenhage*, 8 HUM. RTS. Q. 488 (1986).

24. Yvonne Mokgoro was an advocate during apartheid who decided to pursue a career in law after her arrest. Broun, *supra* note 13, at 132–35, 195–96. She served as a justice of the Constitutional Court of South Africa from 1994 to 2009.

25. Justice Poswa was involved in significant human rights cases. See *id.* at 66–67, 147–48, 175–76.

26. For an account of George Maluleke's work as an attorney, see *id.* at 67–69, 149–51, 207–09.

27. Justice Moloto was a political activist during apartheid and a former judge on the South African Land Claims Court. See *id.* at 69–72, 127–31, 142–43, 196–98.

28. Pansy Tlakula has served as Director of the Black Lawyers Association-Legal Education Centre and as Commissioner of the South African Human Rights Commission. See *id.* at 81–83, 204–05.

29. Kgomotso Moroka was a magistrate in Bophuthatswana and an advocate in Johannesburg, and served on the Judicial Service Commission. *Id.* at 211–12. She also represented Nelson Mandela in court. *Id.* at 212.

30. The Black Lawyers Association, formed in the 1970s, is a voluntary association of black lawyers in South Africa. *About Us*, BLACK LAW. ASS'N, <http://www.blaonline.org.za/aboutus> (last visited Feb. 15, 2016).

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like the late Chief Justice Ismail Mahomed<sup>31</sup> and the current Deputy Chief Justice of the Constitutional Court, Justice Dikgang Moseneke.<sup>32</sup>

I had the unique opportunity to work with the liberation movements—first during the days of exile<sup>33</sup> (in London and later in Lusaka, Zambia and the Frontline States) and then during the negotiations over the constitutional transition to democratic rule. I worked with monumental legal figures like Oliver Tambo,<sup>34</sup> Kader Asmal,<sup>35</sup> and Frene Ginwala<sup>36</sup> in London on the African National Congress's (ANC) ratification of the protocols to the Geneva Conventions.<sup>37</sup> I also worked with Zola Skweyiya<sup>38</sup> in Lusaka during the formative days of the ANC Legal and Constitutional Committee<sup>39</sup> and later with Albie Sachs<sup>40</sup> and Dullah Omar<sup>41</sup> on issues during the negotiations for the new Constitution and the transition to democracy.

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31. In 1991, Ismail Mahomed became the “first black person in [South Africa’s] history to be made a permanent judge of the Supreme Court.” *Ismail Mahomed*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/people/ismail-mahomed> (last visited Feb. 15, 2016).
  32. Dikgang Moseneke was the first black advocate to be admitted to the bar in Pretoria, South Africa. *See* BROUN, *supra* note 13, at 104.
  33. The “days of exile” refers to the period during which the ANC was forced to operate outside of South Africa after it was declared a banned organization in 1960. *See* Dominic Mahlangu, *Dark Days of Exile*, TIMES LIVE (Nov. 6, 2012), <http://www.timeslive.co.za/thetimes/2012/11/06/dark-days-of-exile>.
  34. Oliver Tambo started as a township lawyer, became a leader of the ANC, and spent nearly three decades in exile, during which he established and nurtured a formidable international solidarity movement that galvanized the global consensus to oppose apartheid. He died in South Africa in 1993. *See generally* OLIVER TAMBO REMEMBERED (Z. Pallo Jordan ed., 2007).
  35. Kader Asmal was an international lawyer, law professor, South African Cabinet Minister, and the driving force behind the Irish Anti-Apartheid Movement. *See generally* KADER ASMAL ET AL., KADER ASMAL: POLITICS IN MY BLOOD: A MEMOIR (2011).
  36. Frene Ginwala was the Speaker of the National Assembly of the South African government and headed the research department of the ANC and its Commission on the Emancipation of Women. *See Ginwala Frene Noshir*, S. AFR. HIST. ONLINE, <http://www.v1.sahistory.org.za/pages/people/bios/ginwala.f.htm> (last visited Feb. 15, 2016).
  37. *See generally* Max du Plessis, *The Geneva Conventions and South African Law*, ISS POLICY BRIEF 43, June 2013, at 1, <https://www.issafrika.org/uploads/PolBrief43.pdf>.
  38. Zola Skweyiya was a formative member of the ANC Legal and Constitutional Committee. *THE MAIL & GUARDIAN A-Z OF SOUTH AFRICAN POLITICS* 131–33 (Paul Stober & Barbara Ludman eds., 2004).
  39. The ANC formed a Legal and Constitutional Committee to work on issues relating to political trials and also to be the center of the thought process about options for a future constitution. *See* THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005*, at 157 (2013).
  40. Albie Sachs was a prominent member of the ANC Legal and Constitutional Committee in exile and Justice of the first impeached Constitutional Court. *See generally* ALBIE SACHS, *THE SOFT VENGEANCE OF A FREEDOM FIGHTER* (Univ. Cal. Press 2014) (1990).
  41. Dullah Omar was the first Minister of Justice in the first democratic government. He defended members of the Pan Africanist Congress and ANC and was a member of the Unity Movement throughout the early 1970s and 1980s before he joined and became a leading member of the United Democratic Front. He was a human rights activist throughout his life. “Banning orders” restricted his movement, and he was detained without trial repeatedly. He also survived plots by the apartheid government to assassinate him. In 1989, he became a spokesman for Nelson Mandela during the last

Later, I served on the Independent Electoral Commission, the South African governmental body that ran the 1994 elections, along with Justice Moseneke and Justice Zac Yacoob.<sup>42</sup> And that is how I had the tremendous privilege of standing beside Nelson Mandela when he achieved one of his greatest ambitions: voting for the first time in a democratic, non-racial South Africa. Standing there with him, I felt that moment symbolized the shared history of struggle between South Africa and the United States for racial justice and equality. It echoed the reverberations between our two movements throughout the twentieth century. Sharing that moment with Madiba<sup>43</sup> created a bond between us that he mentioned every subsequent time that we met. My life has been enriched immeasurably by these experiences. Since the elections, I have visited South Africa regularly—including in 2013, when I received an honorary degree from the University of Witwatersrand, and then again at the end of the year, when I attended the very moving funeral of Nelson Mandela.

I have been fortunate to learn a tremendous number of important lessons about defying injustice from the many friends that I have known in the fight against apartheid. Among those lessons was discovering the variety of different roles that lawyers and the law played in the *long walk to freedom* in South Africa. For example, even though the law was generally seen as an instrument of repression, lawyers were very skillful at using the legal structure and the courts of the regime, with their trappings of Western-style due process, to defend leaders accused of treason and sabotage and protect communities as they mobilized for change. I think of the litigation that attacked the pass laws,<sup>44</sup> challenged the many abuses under the State of Emergency regulations,<sup>45</sup> and made skillful use of inquest proceedings to shine light on the torture and killing of detainees.<sup>46</sup> As current-Deputy President of South Africa Cyril Ramaphosa wrote about those lawyers who challenged apartheid in this fashion, “It is a tribute to the tenacity and intellect of these people that, even within

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months of Mandela’s imprisonment. See *Dullah Mohamed Omar*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/people/dullah-mohamed-omar> (last visited Feb. 15, 2016).

42. Justice Zac Yacoob was a member of the 1994 Independent Electoral Commission and Justice of the Constitutional Court. See *Justice Zak Yacoob*, CONST. CT. S. AFR., <http://www.constitutionalcourt.org.za/site/judges/justicezakYacoob/index1.html> (last visited Feb. 15, 2016).

43. Madiba, Nelson Mandela’s clan name, is used to show respect and affection. Jolie Lee, *Why Nelson Mandela is Called Madiba*, USA TODAY (Dec. 6, 2013, 3:36 PM), <http://www.usatoday.com/story/news/nation-now/2013/12/06/nelson-mandela-madiba-meaning/3889469/>.

44. Pass laws, formerly known as “the system of influx control” severely restricted the free movement of black South Africans by requiring them to carry passbooks permitting their presence in “areas reserved for South Africa’s whites.” John D. Battersby, *Pretoria Pass Law Dies, but Spirit Lives*, N.Y. TIMES (June 27, 1988), <http://www.nytimes.com/1988/06/27/world/pretoria-pass-law-dies-but-spirit-lives.html?pagewanted=all>.

45. The State of Emergency regulations were an effort by the apartheid regime to suppress political dissent by suspending ordinary due process guarantees to facilitate the detaining of large numbers of political activists. See *States of Emergency in South Africa: The 1960s and 1980s*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/topic/state-emergency-south-africa-1960-and-1980s> (last visited Feb. 15, 2016).

46. See generally DAVIS & LE ROUX, *supra* note 15, at 81–99.

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the constraints of a legal system moulded to sustain an unjust regime, they were able to challenge the abuse of power and the violation of the rights of the individual.<sup>47</sup>

Some lawyers played the role of legal tacticians helping to shape the short-term objectives for collective action, and others were full participants in the social movements of resistance and transformation, playing a central role in articulating the long-term normative vision of the movement.<sup>48</sup> Of course, lawyers ultimately played key roles in codifying that vision into durable change as now enshrined in the Constitution.

In a few years, South Africa will have a new generation of upcoming “born free” lawyers who have inherited one of the world’s most progressive constitutions, an independent and robust judiciary, and enviable institutions of government—like the Office of the Public Protector and other Chapter 9 institutions.<sup>49</sup> But will this new generation also understand fully how South Africa has arrived at this day? Will they truly understand the sacrifices made to realize these institutions? And will they understand that, as with every struggle, some pieces of the dream get deferred and some aspects of the vision must be won in future rounds? Will the next generation understand that it is up to them to achieve the remaining, so-far-unfulfilled, measure of that vision?

Among the debates that I had the great privilege of overhearing during the 1970s and 1980s was whether the revolution in South Africa was going to be a one-stage revolution or a two-stage revolution. There can be no doubt that the struggle against apartheid transformed the normative culture of South Africa and that the South African Constitution has created an institutional foundation on which a different society can be built. That is the first stage of the revolution.

The fundamental values built into South Africa’s Constitution demand a concern for the poor and most marginalized. But do they provide the means by which those concerns can be addressed? It is the first constitution in the world to require the progressive realization of basic social and economic rights. The Constitution’s Bill of Rights sets out the fundamental rights of all South Africans, including a right to dignity<sup>50</sup> and a right to equality.<sup>51</sup> Section 27 of the Bill of Rights guarantees everyone the right to food, water, health care, and social security.<sup>52</sup> It stops short, however, of giving flesh to the concept of *transformation*.

South Africa’s Constitutional Court is admired around the world for applying those constitutional mandates to issues such as the HIV/AIDS crisis,<sup>53</sup> the right to

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47. Cyril Ramaphosa, *Foreword* to DAVIS & LE ROUX, *supra* note 15, at v, v.

48. Examples include Walter Sisulu, *infra* note 77, Oliver Tambo, *supra* note 34, and Albie Sachs, *supra* note 40, among many others.

49. See generally C. Murray, *The Human Rights Commission et al: What is the Role of South Africa’s Chapter 9 Institutions?*, 9 POTCHEFSTROOM ELECTRONIC L.J., 2006, at 122, [http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issuepages/2006Volume9no2/2006x2x\\_Murray\\_art.pdf](http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issuepages/2006Volume9no2/2006x2x_Murray_art.pdf).

50. S. AFR. CONST., 1996, § 10.

51. *Id.* § 9.

52. *Id.* § 27.

53. See *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 703 (CC).

medical care,<sup>54</sup> and the right to adequate housing.<sup>55</sup> Many South African constitutional scholars, litigators, and social activists, however, caution that those cases, and the legal doctrine that they articulate, must be highly contextualized by the particular political circumstances of South Africa's transition to democratic rule.<sup>56</sup> Some see the decisions of the Court on economic and social rights as being incremental, reticent, and offering only weak remedies.<sup>57</sup>

The Constitution has not given the Court the competence or the capacity to fully transform society. Additionally, the Constitutional Court has not yet shown an appetite to make political choices that are not narrowly grounded in either the Bill of Rights or legislation. The institutions of the new political order are well established in the Constitution. But the Court—in its decisions to date—has made clear that in performing its duty to enforce the guarantees of economic and social rights in the Constitution, it will give deference to the political and executive organs, which have the competence to establish a new economic order that will enable South Africa's realization of full transformation.<sup>58</sup>

What should transformation look like, and what resources need to be marshaled in order to bring that transformation into reality? There should be a concept of transformation that tackles robustly not only the civil and political abuses of apartheid but also the economic and social abuses. Is there a role for the Constitutional Court in shaping that vision? Has Parliament played its role in envisioning and enabling transformation? What role must South Africa's human rights lawyers play in envisioning and enabling the process of full transformation? Without a re-imagined economic model, the material means to enable transformation cannot be captured. That will have to be the second stage of South Africa's revolution.

South Africa has many success stories, and South Africans have much of which to be proud. South Africa, after all, is still a very young nation—just twenty years old—a nation born with structural deficits and nearly crippling disparities. However, there can be no doubt that while there have been tremendous advances and achievements in South Africa, the vision of a society built on equality—the vision that fueled passions during the liberation struggle<sup>59</sup>—is still far from reality, and I

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54. See *Soobramoney v. Minister of Health* 1998 (1) SA 765 (CC).

55. See *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC); *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC).

56. See, e.g., KIRSTY McLEAN, CONSTITUTIONAL DEFERENCE, COURTS AND SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA (2009); D.M. DAVIS, *Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?*, 22 SAJHR 301 (2006).

57. See McLEAN, *supra* note 56, at 210; see also Megan Heneke, Note, *An Analysis Of HIV-Related Law In South Africa: Progressive in Text, Unproductive in Practice*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 751, 770 (2009) ("It appears as though South Africa's legal framework for protecting those with HIV/AIDS is progressive in theory, but not in practice.").

58. In the cases on economic and social rights, the Court has chosen to test the "reasonableness" of the executive actions rather than establishing a minimum core that the executive actions must meet. See DAVIS & LE ROUX, *supra* note 15, at 153–54.

59. For a discussion of the ANC's vision for economic and social rights, see McLEAN, *supra* note 56, at 8–17.

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think it is fair to say that in some ways, things have gotten worse.<sup>60</sup> Income inequality in South Africa is greater today than it was in 1994.<sup>61</sup> South Africa is still a country of shocking disparities—on the one hand abject poverty, on the other hand luxurious gated communities. While there is now a significant new black middle class,<sup>62</sup> extreme poverty continues to fester in the townships.<sup>63</sup> Poverty among black South Africans has increased, and some estimates put the unemployment rate among black township youth at fifty-seven per cent.<sup>64</sup> These statistics speak of challenges every bit as formidable as the fight against apartheid.

South Africa's guarantees of economic and social rights may not be enough. Against the history of apartheid, even constitutionally-entrenched economic and social rights may be insufficient without a broader vision that drives and enables a real redistribution of wealth and power. Why has national transformation been slow to take effect? What are South Africa's plans for tackling the deep institutional discrimination and the structural barriers that are still in place? How will South Africa and the new generation of South African lawyers address the reality that there is still enormous social distance, as well as deep inequities, between white and black communities, and even between white and black professional and social groups? What ideas does South Africa have to jump start long-term systemic change? And why is the public interest law sector unable to grapple with its own demographic profile—why are there so few black lawyers in public interest law organizations?

One clear lesson provided by the civil rights movement in the United States is that it takes a really long time to heal the damage done to societies that have experienced corrosive racial divides, and there is no more toxic an intersection than that of generations of racism, sexual hierarchy, and economic exploitation, all enforced by a system of state violence. It is worthy of note that, just as in the past, the

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60. See generally MAMPHELA RAMPHELE, *CONVERSATIONS WITH MY SONS AND DAUGHTERS* (2012).

61. See Siphso Kings, *Inequality Mocks SA's Freedom*, MAIL & GUARDIAN (Oct. 31, 2014), <http://mg.co.za/article/2014-10-30-inequality-mocks-sas-freedom>.

62. See Ronelle Burger et al., *The Emergent Middle Class in Contemporary South Africa: Examining and Comparing Rival Approaches*, 32 DEV. S. AFR. 25 (2015).

63. See Thuletho Zwane, *MEC: Gauteng's Townships Need Huge Transformation*, MAIL & GUARDIAN (Feb. 23, 2015), <http://mg.co.za/article/2015-02-23-mec-gautengs-townships-need-huge-transformation>.

64. See Ama Biney, *Youth Unite for a Better World*, PAMBAZUKA NEWS (June 20, 2013), <http://www.pambazuka.net/en/category.php/features/87927>. See generally *GINI Index (World Bank Estimate)*, THE WORLD BANK, <http://data.worldbank.org/indicator/SI.POV.GINI> (last visited Feb. 15, 2016). Attempts have been made in the past to reduce persisting inequalities. In the early 2000s, the ANC passed the Broad-Based Black Economic Empowerment Act (B-BBEE), which was intended to expand business opportunities for those who had been excluded from them under apartheid. Unfortunately, initial versions of the law only benefitted a narrow group of prominent black businessmen. While the bulk of the population remained unaffected by the B-BBEE, the end of apartheid further contributed to inequalities as global trade and investment was reinstated and money flowed once again to those who controlled the business world. In fact, “[I]n 2012, white South Africans earned 7.6 times more than black South Africans—up from 6.9 times in 1996.” Fortunately, the government has recently revamped the B-BBEE, hoping to provide black-owned small businesses with the tools they need to grow. Jessica Pothering, *South Africa's 99 Percent*, BOS. REV. (Jan. 21, 2015), <http://bostonreview.net/blog/pothering-south-africas-99-percent>.

issues facing the United States have an uncanny resemblance to those facing South Africa. As is the case in South Africa, we in the United States are living in a society of near-obscene inequalities. Nearly one in four children in the United States live in poverty, and a disproportionately high percentage of those children are African American and Latino.<sup>65</sup> While developers are selling apartments in New York City for well over \$90 million each,<sup>66</sup> U.S. schools have registered an increasing number of homeless children.<sup>67</sup> Globally, inequality has reached such frightening levels that it has the potential to engulf us all. Nearly fifty per cent of the world's population lives on less than three dollars a day<sup>68</sup>—and that includes nearly seventy per cent of people in sub-Saharan Africa.<sup>69</sup> Currently, the richest eighty people hold almost as much wealth as the bottom 3.5 billion.<sup>70</sup>

Because the fight to end apartheid had such an international character, the struggle also impacted the normative culture globally. Those of us who participated in the worldwide anti-apartheid movement believed that South Africa's struggle was a reflection of the struggle of oppressed and progressive people everywhere. The South African Constitution articulates the highest aspirations of the human rights movement worldwide—a vision of a society based on justice, equality, and inclusion in which social development and environmental protection are human rights. As a result, we all feel a sense of ownership. We all feel included in the meaning of *Ubuntu*;<sup>71</sup> we all feel that we have a stake in what happens in South Africa. South Africa currently commands the moral leadership of the global community and is being called on to champion a broader struggle for human rights around the world. In my view, the fight against poverty and inequality is the most critical human rights battle humanity faces today.

South Africa must confront challenges and issues of injustice that are no less compelling, no less demanding of sacrifice and dedication, and no less in need of the

65. See Eileen Patten & Jens Manuel Krogstad, *Black Child Poverty Rate Holds Steady, Even As Other Groups See Declines*, PEW RES. CTR. (July 14, 2015), <http://www.pewresearch.org/fact-tank/2015/07/14/black-child-poverty-rate-holds-steady-even-as-other-groups-see-declines/>.

66. See Katherine Clarke, *The \$100 Million Home: Mystery Buyer Drops Staggering Amount on Palatial 57th St. Apartment as Deal Sets City Record*, N.Y. DAILY NEWS (Jan. 16, 2015, 4:59 PM), <http://www.nydailynews.com/life-style/real-estate/100m-condo-sale-breaks-city-record-article-1.2081765>.

67. See NAT'L CTR. FOR HOMELESS EDUC., EDUCATION FOR HOMELESS CHILDREN AND YOUTH: CONSOLIDATED STATE PERFORMANCE REPORT DATA 1 (Sept. 2014), <http://center.serve.org/nche/downloads/data-comp-1011-1213.pdf>.

68. See Tami Luhby, *71% of the World's Population Lives on Less than \$10 a Day*, CNN: MONEY (July 8, 2015, 4:27 PM), <http://money.cnn.com/2015/07/08/news/economy/global-low-income/>; *Resources for Speakers on Global Issues*, UNITED NATIONS, <http://www.un.org/en/globalissues/briefingpapers/food/vitalstats.shtml> (last visited Feb. 15, 2016).

69. See *Poverty & Equity: Sub-Saharan Africa*, THE WORLD BANK, <http://povertydata.worldbank.org/poverty/region/SSA> (last visited Feb. 15, 2016).

70. See Patricia Cohen, *Study Finds Global Wealth is Flowing to the Richest*, N.Y. TIMES, Jan. 19, 2015, at B6.

71. For a definition of *Ubuntu*, see *S v. Makwanyane* 1995 (3) SA 391 (CC) at para. 307 (“Generally, [*U*]buntu translates as *humaneness . . . personhood and morality . . .*. In South Africa [*U*]buntu has become a notion with particular resonance in the building of a democracy.”).

## TWENTY YEARS OF SOUTH AFRICAN CONSTITUTIONALISM

kind of transformative leadership provided in the past by South Africans like Nelson Mandela; Robert Sobukwe;<sup>72</sup> Steve Biko;<sup>73</sup> Lilian Ngoyi;<sup>74</sup> Oliver Tambo;<sup>75</sup> Albert Lutuli;<sup>76</sup> Walter Sisulu;<sup>77</sup> Kader Asmal;<sup>78</sup> and Arthur Chaskalson.<sup>79</sup>

South African lawyers are standing on the shoulders of giants. They should feel responsible for faithfully carrying into the future the principles and ideals that inspired South Africa's new democracy and captured the imagination of a generation of progressive activists around the world. Most importantly, they should take forward to completion the project of transformation that is still only partially realized.

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72. Robert Sobukwe was an attorney and anti-apartheid activist who founded the Pan Africanist Congress. *See Robert Sobukwe: South Africa's First Non-Racial Africanist*, SOUTHAFRICA.INFO, <http://www.southafrica.info/about/history/robert-sobukwe-overview.htm#VfxvHrS4mRs> (last revised Mar. 6, 2015).
73. Steve Biko was one of the founders of the South African Students' Organization. *See Steve Biko*, STEVE BIKO FOUND., <http://sbf.org.za/steve-biko.php> (last visited Feb. 15, 2016).
74. Lilian Ngoyi served as the President of the Federation of South African Women and the ANC Women's League and was the first woman to be elected to the ANC's National Executive Committee. *Lilian Masediba Ngoyi*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/people/lilian-masediba-ngoyi> (last visited Feb. 15, 2016).
75. *See supra* note 34.
76. Albert Lutuli, the President-General of the ANC in the 1950s and a recipient of the 1960 Nobel Peace Prize, was instrumental in organizing nonviolent campaigns against discriminatory laws. *See Albert Lutuli—Biographical*, NOBELPRIZE.ORG, [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1960/lutuli-bio.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1960/lutuli-bio.html) (last visited Feb. 15, 2016).
77. Walter Sisulu was Secretary-General and later Deputy President of the ANC. He formed the ANC Youth League along with Mandela and Tambo and was part of the ANC's armed wing, known as MK—Spear of the Nation. *See Walter Ulyate Sisulu*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/people/walter-ulyate-sisulu> (last visited Feb. 15, 2016).
78. *See supra* note 35.
79. The Honorable Arthur Chaskalson was the first President of South Africa's new Constitutional Court and eventually became the Chief Justice. *See Douglas Martin, Arthur Chaskalson, 81, Chief South African Jurist, Dies*, N.Y. TIMES, Dec. 4, 2012, at A23.