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# A Champion for African Freedom: Paul Robeson and the Struggle Against Apartheid

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# A CHAMPION FOR AFRICAN FREEDOM: PAUL ROBESON AND THE STRUGGLE AGAINST APARTHEID

*Penelope Andrews\**

## I. INTRODUCTION

On February 28, 2013, I was honored to deliver the Paul Robeson lecture at Columbia Law School, an annual event to commemorate the life and legacy of Paul Robeson, a graduate of Columbia Law School (Class of 1923). This article is a slightly expanded version of my lecture.<sup>1</sup>

This article will have four components: first, it will highlight the achievements of this extraordinary man, an advocate for social justice, a world-renowned artist, and an accomplished sportsman. Second, in this article I explore Paul Robeson's connections and commitment to the African anti-colonial struggle, and in particular the struggle against apartheid in South Africa. Third, this article examines the legal developments in South Africa with the collapse of formal apartheid, and outlines the broad contours of the constitutional text, particularly the bill of rights and the constitutional and human rights jurisprudence of the Constitutional Court. Finally, the article will end with the question: what would Paul Robeson say about the contemporary moment that post-apartheid South Africa finds itself in?

Professor Acklyn Lynch, in his 1976 article, *Paul Robeson: His Dreams Know No Frontiers*, said this of Paul Robeson: "Mr. Robeson

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<sup>1</sup> In my lecture I noted that it was a great honor for me to be at Columbia Law School to celebrate the life of one of America's finest sons—Paul Robeson. Before I began my comments, I noted my gratitude to my friend and colleague, Professor Kendall Thomas, for inviting me to address the distinguished audience. I always like returning to Columbia Law School, where as a graduate student in the 1980s I was privileged to encounter many wonderful people who have become lifelong friends and colleagues, and where I had some of the most memorable experiences of my life. I particularly wanted to remember the late Professor Kellis Parker, who was a teacher, a friend, and an all-round terrific bloke, without whom my Columbia Law School experience would have been less memorable.

was a man whose versatility has been unparalleled in American history as scholar, linguist, actor, singer, athlete, humanitarian, and whose striving for excellence in every undertaking was embroidered by a deep humility which endeared him to the hearts of millions of people around the world.”<sup>2</sup>

On February 19, 2001, the Columbia Daily Spectator, in an article to accompany the Paul Robeson Annual Lecture, said this about Paul Robeson:

Paul Robeson, [Columbia] Law ‘23, struggled against racism his entire life. As a scholar he encountered intolerance while trying to achieve a higher education. As an artist he tried to unify people through music, once performing slave spirituals alongside Russian serf songs. And, most significantly, Robeson risked his entire artistic career to break down barriers of race not only in the United States but around the world as well.<sup>3</sup>

## II. BIOGRAPHY

We know that Paul Robeson was born in Princeton, New Jersey on April 9, 1898, the son of a former slave who became a preacher.<sup>4</sup> He was a talented child who demonstrated great promise in academics, music, and athletics.<sup>5</sup> At the age of seventeen, Paul Robeson won a statewide writing competition that earned him a four-year scholarship to Rutgers University.<sup>6</sup>

Paul Robeson was the third African-American ever to enroll in the university, and despite intimidation from his teammates, he joined the football team.<sup>7</sup> A two-time All-American for football, he also earned fifteen varsity letters in basketball, baseball, and track.<sup>8</sup> During his college career, Paul Robeson won the school’s annual oratory contest four times, once speaking out against the inadequate educational opportunities for African-Americans.<sup>9</sup>

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<sup>2</sup> Acklyn R. Lynch, *Paul Robeson: His Dreams Know No Frontiers*, 45 J. OF NEGRO EDUC. 225, 225 (1976).

<sup>3</sup> Michelle J. Lee, *Broadway Legend Paul Robeson Remembered*, COLUM. DAILY SPECTATOR, Feb. 19, 2001, at 9.

<sup>4</sup> MARTIN BAUML DUBERMAN, PAUL ROBESON 4 (1989).

<sup>5</sup> See Lamont H. Yeakey, *A Student Without Peer: The Undergraduate College Years of Paul Robeson*, 42 J. OF NEGRO EDUC. 489, 490 (1973).

<sup>6</sup> LINDSEY R. SWINDALL, PAUL ROBESON: A LIFE OF ACTIVISM AND ART 18 (2013).

<sup>7</sup> See DUBERMAN, *supra* note 4, at 19.

<sup>8</sup> *Id.* at 22.

<sup>9</sup> See Yeakey, *supra* note 5, at 498. It is interesting to note that another great African-American legal legend, the late Justice Thurgood Marshall, was also an excellent orator, a

After graduating from Rutgers, Paul Robeson was accepted to Columbia Law School, and to help pay for tuition, he played professional football and tutored in Latin.<sup>10</sup> He graduated from Columbia and worked briefly at a law firm, but he resigned when a white secretary refused to work for him.<sup>11</sup> Paul Robeson then vowed that he would never enter “any profession where the highest prizes were from the start denied to [him],” and turned to the stage.<sup>12</sup>

### A. *An Internationalist Humanitarian*

Paul Robeson was one of those early twentieth century internationalist humanitarians who connected at a deep and profound level with the struggles of his own community in the United States, but also with those people everywhere who struggled against racism, fascism, colonialism, imperialism, and apartheid.<sup>13</sup> What is remarkable is his courage and determination, operating in the much diminished space for dissent during the Cold War era.<sup>14</sup> To talk about Paul Robeson is almost to peddle in clichés: a renaissance man, a fearless fighter for freedom, brilliant.<sup>15</sup> And yet, these words describe him so accurately.<sup>16</sup>

There is no doubt that Paul Robeson set the stage for future generations of African-Americans to connect the struggle against racism in the United States to the global struggle for peace, justice, economic equality, and human dignity, including leaders like Martin Luther King, Malcolm X, and others.<sup>17</sup> He participated very actively in the struggles for independence from colonial domination by organizing in 1937 the Council on African Affairs, which was

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skill which was cultivated very early on in his life. See LARRY S. GIBSON, *YOUNG THURGOOD: THE MAKING OF A SUPREME COURT JUSTICE* 68 (2012).

<sup>10</sup> DUBERMAN, *supra* note 4, at 34.

<sup>11</sup> *Id.* at 54–55.

<sup>12</sup> *Id.* at 55.

<sup>13</sup> See Frankie Nicole Weaver, *Art Against Apartheid: American and South African Cultural Activism and Networks of Solidarity* 62–69 (Feb. 2013) (unpublished Ph.D. dissertation, University at Buffalo, State University of New York), available at <http://gradworks.umi.com/3554519.pdf>.

<sup>14</sup> See *id.* at 75.

<sup>15</sup> Paul Robeson’s artistic talents, his passion for justice, and his oratory skills were exceptional. See Philip S. Foner, *Paul Robeson: Great Artist, Great American*, in PAUL ROBESON SPEAKS: WRITINGS, SPEECHES, INTERVIEWS, 1918–1974, at 3, 23–24 (Philip S. Foner ed., 1978) (introducing writings, speeches, and interviews of Paul Robeson); SWINDALL, *supra* note 6, at 2.

<sup>16</sup> Foner, *supra* note 15, at 23–24; SWINDALL, *supra* note 6, at 2.

<sup>17</sup> See Henry J. Richardson, III, *Dr. Martin Luther King, Jr. As An International Human Rights Leader*, 52 VILL. L. REV. 471, 472 (2007).

dedicated to new relations with Africa.<sup>18</sup> At a rally sponsored by the Council at Madison Square Garden in 1946, Paul Robeson stated, “[t]he race is on in Africa as in every other part of the world—the race between the forces of progress and democracy on one side and the forces of imperialism and reaction on the other.”<sup>19</sup> Paul Robeson’s central influence in the global anti-colonial movement has been analyzed by international legal scholars<sup>20</sup> and scholars of Africa.<sup>21</sup>

These are brief comments about the dedication of Paul Robeson to the anti-colonialist and anti-apartheid struggle. One indication of his profound contribution was the *Tribute to Paul Robeson* at the United Nations on April 10, 1978, what would have been his eightieth birthday.<sup>22</sup> In his tribute to Paul Robeson, Mr. Mfanafuthi J. Makatini, Representative of the African National Congress of South Africa at the United Nations, noted: “In South Africa, Paul Robeson is considered an outstanding champion of the emancipation of the country, no doubt, when the time comes, since victory in South Africa is now as certain as sunrise, he will be one of the first to be honoured by our people.”<sup>23</sup>

Paul Robeson was a brilliant man, astonishing in his many abilities, “who unfortunately had to pay dearly for the specifics of his politics,” notes Professor Marcellus Blount, who continued:

“That’s always the difficult historical scenario, particularly when African-American leaders achieved a certain degree of notoriety, which can militate against their actual accomplishments. In that regard Paul Robeson is a product of American society of contradictions that his life story presents, which seems to me to be inherent in the African-American experience.”<sup>24</sup>

And Paul Robeson did pay for his political convictions, commencing in 1950, when his passport was revoked for speaking out against the Korean War and for his refusal to deny he was a

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<sup>18</sup> UNITED NATIONS SPECIAL COMM. AGAINST APARTHEID, DIMENSIONS OF THE STRUGGLE AGAINST APARTHEID: A TRIBUTE TO PAUL ROBESON 10, 45 (John Henrik Clarke ed., 1979).

<sup>19</sup> FRANCIS NJUBI NESBITT, RACE FOR SANCTIONS: AFRICAN AMERICANS AGAINST APARTHEID, 1946–1994, at 1 (2004).

<sup>20</sup> See e.g., *id.* at 1–2.

<sup>21</sup> See e.g., Charles Musser, *Presenting “A True Idea of the African of To-day”: Two Documentary Forays by Paul and Eslanda Robeson*, 18 FILM HIST. 412, 412 (2006).

<sup>22</sup> UNITED NATIONS SPECIAL COMM. AGAINST APARTHEID, *supra* note 18, at 1.

<sup>23</sup> *Id.* at 58.

<sup>24</sup> Lee, *supra* note 3.

Communist.<sup>25</sup>

Although the passport was finally restored in 1958, Robeson was blacklisted for his political views. According to Blount, the backlash proved a double-standard.

“What fascinates me is the way in which Americans, even today, are more inclined to respond to African-Americans who achieve a degree of artistic brilliance, but the spectrum of the black politician, especially the black male politician, produces anxieties. Paul Robeson’s life is instructive of the American willingness to accept leadership in a certain context.”<sup>26</sup>

For his political views, particularly his unflinching commitment to justice and equality, Paul Robeson spent many years in political exile, vilified by the political establishment.<sup>27</sup>

### *B. Testimony of Robeson and Mandela*

While I was preparing to deliver the Paul Robeson Annual Lecture, I unearthed the testimony of Paul Robeson to the House Committee on Un-American Activities. This testimony provided for me a point of comparison between Nelson Mandela’s testimony in the dock during the Rivonia trial.<sup>28</sup> I abbreviate and summarize the two testimonies below.

#### 1. Paul Robeson’s Testimony Before House Committee On Un-American Activities

I have struggled for years for the independence of the

<sup>25</sup> DUBERMAN, *supra* note 4, at 329, 388.

<sup>26</sup> Lee, *supra* note 3, at 9; *see also* DUBERMAN, *supra* note 4, at 389–90, 463 (describing the revocation and restoration of Robeson’s passport).

<sup>27</sup> *See generally* DUBERMAN, *supra* note 4, at 406, 409, 423–24 (describing various instances of Robeson’s vilification).

<sup>28</sup> For Paul Robeson’s testimony, *see Investigation of the Unauthorized Use of United States Passports—Part 3: Hearing Before the H. Comm. on Un-American Activities*, 84th Cong. 4492–4510 (1956) [hereinafter *Passport Hearing*] (statement of Paul Robeson) and THIRTY YEARS OF TREASON: EXCERPTS FROM HEARINGS BEFORE THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1938–1968, at 770–89 (Eric Bentley ed., 1971). In 1963, Nelson Mandela and nine leaders of the African National Congress were tried for treason and acts of sabotage in their role to overthrow the apartheid government. KENNETH S. BROUN, *SAVING NELSON MANDELA: THE RIVONIA TRIAL AND THE FATE OF SOUTH AFRICA* 6, 7–9 (2012). Known as the Rivonia trial because of the place where the arrests were made, the trial lasted two years. *Id.* at xviii. For a thoughtful and expansive discussion of the trial, *see* KENNETH S. BROUN, *SAVING NELSON MANDELA: THE RIVONIA TRIAL AND THE FATE OF SOUTH AFRICA* (2012); and JOEL JOFFE, *THE STATE VS. NELSON MANDELA: THE TRIAL THAT CHANGED SOUTH AFRICA* (2007).

colonial peoples of Africa. . . . The other reason that I am here today is . . . that when I am abroad I speak out against the injustices against the Negro people of this land. . . . This is the basis and I am not being tried for whether I am a Communist, I am being tried for fighting for the rights of my people who are still second-class citizens in this United States of America. . . . I stand here struggling for the rights of my people to be full citizens in this country and they are not. They are not in Mississippi and they are not in Montgomery, Ala., and they are not in Washington, and they are nowhere, and that is why I am here today. You want to shut up every Negro who has the courage to stand up and fight for the rights of his people, for the rights of workers and I have been on many a picket line for the steelworkers too. And that is why I am here today.<sup>29</sup>

## 2. Nelson Mandela's Testimony at the Rivonia Trial

The lack of human dignity experienced by Africans is the direct result of the policy of white supremacy. White supremacy implies black inferiority. Legislation designed to preserve white supremacy entrenches this notion. . . . [W]hites tend to regard Africans as a separate breed. They do not look upon them as people with families of their own; they do not realise that we have emotions—that we fall in love like white people do; that we want to be with their wives and children like white people want to be with theirs; that we want to earn money, enough money to support our families properly, to feed and clothe them and send them to school. . . . 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.<sup>30</sup>

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<sup>29</sup> *Passport Hearing*, *supra* note 28, at 4499.

<sup>30</sup> Nelson Mandela, *I Am Prepared to Die: Nelson Mandela's Statement from the Dock at the Opening of the Defence Case in the Rivonia Trial* (Apr. 20, 1964), *available at* [http://db.nelsonmandela.org/speeches/pub\\_view.asp?pg=item&ItemID=NMS101&txtstr=prepared%20to%20die](http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS101&txtstr=prepared%20to%20die).

I provide a comparison of these two men because of some similarities. There are the obvious ones; first are their identities as black men, highly educated, extraordinarily attuned to the second-class status of their communities. Second, both men were trained in law at premiere universities, as minorities in their classes, and both excelled despite the hostile learning environments and limited post-graduate career opportunities.<sup>31</sup> But the comparison is most compelling because both men lived and advocated for their principles at a time when the demands for justice, dignity, and equality for black people were treated with hostility by the wider (white) society. They risked not just vilification (both men were accused of being Communists, for example), but they certainly risked their freedom and death.<sup>32</sup>

### III. PAUL ROBESON'S VALUES AS EMBODIED IN THE SOUTH AFRICAN CONSTITUTION

I will broadly outline several values that are embodied in Paul Robeson's advocacy, and which are incorporated in South Africa's Constitution and Bill of Rights, and which have been interpreted in a series of judgments of South Africa's Constitutional Court. These values include: democracy and rights of citizenship, dignity, equality, social and economic justice, and cultural rights.<sup>33</sup> I deal with these values separately below.

#### *A. Democracy and Rights of Citizenship*

The transition from apartheid and authoritarianism to democracy in South Africa at the end of the twentieth century captured the global imagination.<sup>34</sup> Operating during a different historical phase

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<sup>31</sup> See DUBERMAN, *supra* note 4, at 30, 53, 54; ANTHONY SAMPSON, MANDELA: THE AUTHORIZED BIOGRAPHY 36, 37 (1999).

<sup>32</sup> DUBERMAN, *supra* note 4, at 414; NELSON MANDELA, LONG WALK TO FREEDOM 218–19, 248, 341 (1994).

<sup>33</sup> The Constitution of the Republic of South Africa was published in 1996. Chapter 2 of the Constitution is the Bill of Rights, which contains sections including protective measures to ensure protection for the values outlined. S. AFR. CONST., 1996, ch. 2.

<sup>34</sup> See HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS 46 (2010); NIGEL WORDEN, THE MAKING OF MODERN SOUTH AFRICA: CONQUEST, APARTHEID, DEMOCRACY 160 (4th ed. 2007). See also Seo Sang-Hyun, A Study on Democratic Transition in South Africa: Democracy Through Compromise and Institutional Choice 431–32 (Nov. 2008) (unpublished Ph.D. thesis, University of South Africa), available at [http://uir.unisa.ac.za/bitstream/handle/10500/3401/thesis\\_seo\\_s.pdf;jsessionid=EB21F85FCA46110AB86A731041885160?sequence=1](http://uir.unisa.ac.za/bitstream/handle/10500/3401/thesis_seo_s.pdf;jsessionid=EB21F85FCA46110AB86A731041885160?sequence=1) (describing the role that international players had in the transitional process in South Africa).



of international politics, the anti-apartheid movement proved to be one of the most captivating and ubiquitous of the twentieth century global human rights movements. The anti-apartheid movement generated advocacy and activism on all continents, from a range of constituents within government and in the private sphere.<sup>35</sup> After the release of Nelson Mandela from prison, and as the country geared up for its first ever democratic elections, scores of people from around the globe participated in the electoral process, including serving as electoral monitors in the first democratic election.<sup>36</sup> As the most famous political prisoner of the twentieth century, Nelson Mandela became the penultimate symbol of freedom and democracy, and conversely of the illegitimacy of the apartheid regime.<sup>37</sup> His election and ascendancy to the Presidency of a free and democratic South Africa, demonstrating a moral leadership unparalleled in Africa (or indeed much of the global community), created a palpable national and global euphoria.<sup>38</sup>

Nelson Mandela's capacity to forgive his previous jailers and tormentors also set him apart from other leaders,<sup>39</sup> and South Africa's Truth and Reconciliation Commission contributed to a global burgeoning in transitional justice, truth commissions, and other post-conflict processes and institutions.<sup>40</sup> Seen as the "gold standard" of truth commissions, South Africa's Truth Commission has served as a yardstick for societies undergoing transitions to democracy.<sup>41</sup>

Between 1990 and 1994—that is between Nelson Mandela's release from prison and the first democratic elections—legal theorists and constitutional scholars from around the world traveled to South Africa, committed to using their experience, skills, and talents in the hope that the new democratic South Africa would

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<sup>35</sup> HÅKAN THÖRN, *ANTI-APARTHEID AND THE EMERGENCE OF A GLOBAL CIVIL SOCIETY* 2–3 (2006).

<sup>36</sup> Douglas G. Anglin, *International Monitoring of the Transition to Democracy in South Africa, 1992–1994*, 94 AFR. AFF. 519, 519, 541–42 (1995).

<sup>37</sup> See SAMPSON, *supra* note 31, at 415.

<sup>38</sup> *Id.* at 486.

<sup>39</sup> See LYN S. GRAYBILL, *TRUTH AND RECONCILIATION IN SOUTH AFRICA: MIRACLE OR MODEL?* 18–21 (2002).

<sup>40</sup> See Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 3, 5, 6, 15, 19–20 (Robert I. Rotberg & Dennis Thompson eds., 2000).

<sup>41</sup> See Audrey R. Chapman & Hugo van der Merwe, *Introduction: Assessing the South African Transitional Justice Model*, in *TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER?* 1, 8 (Audrey R. Chapman & Hugo Van Der Merwe eds., 2008); Penelope E. Andrews, *Reparations for Apartheid's Victims: The Path to Reconciliation?*, 53 DEPAUL L. REV. 1155, 1173 (2004).

embrace the legal and constitutional principles and values that they held dear, and which had become the corpus of the formal international human rights framework.<sup>42</sup> Indeed, during these four years, South Africa was virtually one long constitutional law workshop.<sup>43</sup>

The end result of this concerted intellectual energy was a vindication for these scholars and advocates, and they were not disappointed. The South African constitutional text incorporated a comprehensive set of civil, political, economic, social, and cultural rights.<sup>44</sup> Most significantly, the constitution reflected the most idealistic and progressive constitutional developments globally, including a consideration of foreign and international law by those interpreting the constitution.<sup>45</sup>

From this historical distance, it is apparent that the post-apartheid “revolution” in South Africa was largely a legal one.<sup>46</sup> Just as the processes of law and legalism entrenched and reinforced the system of apartheid, so too does the inclusion of rights, legal processes, and constitutional law underpin the establishment and maintenance of the democratic state.<sup>47</sup>

The political transition since the country’s first democratic election in April 1994 was spearheaded by a bold and overarching constitutional framework, underpinned by a bill of rights that embraced a range of classic civil and political, as well as economic, social, and cultural rights.<sup>48</sup> This constitutional framework left no doubt as to the transformative possibilities captured in its substance and processes.<sup>49</sup> The constitution was a purposive

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<sup>42</sup> See e.g., Sang-Hyun, *supra* note 34, at 412–22 (analyzing election results for each branch of the government and the establishment of the Truth and Reconciliation Commission).

<sup>43</sup> This remark was shared with me by my friend, the Honorable Justice Dennis Davis of the Cape High Court, who has written extensively on comparative constitutional issues. For an example of these writings, see DENNIS DAVIS, *DEMOCRACY AND DELIBERATION: TRANSFORMATION AND THE SOUTH AFRICAN LEGAL ORDER* (1999).

<sup>44</sup> See S. AFR. CONST., 1996, ch. 2.

<sup>45</sup> “When interpreting the Bill of Rights, a court . . . must consider international law. *Id.* § 39(1). “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” *Id.* at ch. 14, § 233.

<sup>46</sup> See MARTIN CHANOCK, *THE MAKING OF SOUTH AFRICAN LEGAL CULTURE 1902–1936: FEAR, FAVOUR AND PREJUDICE* 513 (2001).

<sup>47</sup> See *id.* at 513, 529.

<sup>48</sup> See MARK S. KENDE, *CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES* 6 (2009).

<sup>49</sup> See, e.g., Dennis M. Davis & Karl Klare, *Transformative Constitutionalism and the Common and Customary Law*, 26 S. AFR. J. HUM. RTS. 403, 404 (2010) (discussing the transformative nature of the South African Constitution).

document moving the country from a racist, authoritarian past, to a state that embraced human rights for all.<sup>50</sup> This point has been most profoundly made by the prominent American-Kenyan human rights scholar, Dean Makau wa Matua:

The construction of the post-apartheid state represents the first deliberate and calculated effort in history to craft a human rights state—a polity that is primarily animated by human rights norms. South Africa was the first state to be reborn after the universal acceptance, at least rhetorically, of human rights ideals by states of all the major cultural and political traditions.<sup>51</sup>

### *B. Dignity and Equality*

The South African Constitution, in particular the Bill of Rights, has been universally heralded as one of the most impressive human rights documents of the twentieth century.<sup>52</sup> Chapter one states very clearly the supremacy of the constitution, and also states that the new democratic state is founded on values that include “[h]uman dignity [and] the achievement of equality” as well as “[n]on-racialism and non-sexism.”<sup>53</sup> The constitution’s generous coverage of a broad range of categories of discrimination, including race, gender, sexual orientation, and social origin, seeks to reassure all South Africans that discrimination in its obvious, as well as intricate, variations will not be tolerated.<sup>54</sup>

Covering both direct and indirect discrimination and recognition of the tenacity of institutionalized discrimination,<sup>55</sup> the bill of rights also covers intersectional discrimination, noting that “[n]o person may unfairly discriminate directly or indirectly against anyone *on one or more grounds*.”<sup>56</sup> This comprehensive definition of equality also embodies a clear commitment to affirmative action, which provides that “[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or

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<sup>50</sup> *Id.* at 404 n.6.

<sup>51</sup> Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 65 (1997).

<sup>52</sup> Penelope E. Andrews, *Incorporating International Human Rights Law in National Constitutions: The South African Experience*, in PROGRESS IN INTERNATIONAL LAW 835, 841 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

<sup>53</sup> S. AFR. CONST., 1996, ch. 1, § 1(a)–(c).

<sup>54</sup> *Id.* at ch. 2, § 9(3).

<sup>55</sup> Penelope E. Andrews, “Big Love”? *The Recognition of Customary Marriages in South Africa*, 64 WASH. & LEE L. REV. 1483, 1487–88 (2007).

<sup>56</sup> S. AFR. CONST., 1996, ch. 2, § 9(4) (emphasis added).

categories of persons, disadvantaged by unfair discrimination may be taken.”<sup>57</sup> The dignity provision is stated succinctly, namely, that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”<sup>58</sup>

### *C. Social and Economic Justice*

But the incorporation of a broad range of social and economic rights is arguably the most significant, and potentially potent weapon, against poverty and economic inequality.<sup>59</sup> The incorporation of these rights as well as their enforcement may hold the key to unraveling much of the poverty and despair that continues to disproportionately burden on a large proportion of South Africans, the majority of whom are black South Africans.<sup>60</sup> The bill of rights includes a broad array of social and economic rights, including the right of access to education,<sup>61</sup> the right of access to housing,<sup>62</sup> the right of access to health care,<sup>63</sup> the right of access to food,<sup>64</sup> water,<sup>65</sup> and social security.<sup>66</sup> These rights provide, at least within the formal legal paradigm, a limited access for those who are the most marginalized to pursue social and economic rights in the courts.

The rights of children are comprehensively covered in the bill of rights, especially as they relate to their social and economic well-being.<sup>67</sup> Children are given the right “to basic nutrition, shelter, basic health care services and social services.”<sup>68</sup> Children are also “protected from maltreatment, neglect, abuse or degradation”<sup>69</sup> and

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<sup>57</sup> *Id.* § 9(2).

<sup>58</sup> *Id.* § 10.

<sup>59</sup> See Jeremy Seekings, *Poverty and Inequality in South Africa, 1994–2007*, in AFTER APARTHEID: REINVENTING SOUTH AFRICA? 21, 22–23 (Ian Shapiro & Kahreen Tebeau eds., 2011) (analyzing post-Apartheid issues in South Africa, including social and economic rights and poverty).

<sup>60</sup> See *id.* at 41–46.

<sup>61</sup> S. AFR. CONST., 1996, ch. 2, § 29.

<sup>62</sup> *Id.* § 26.

<sup>63</sup> *Id.* § 27(1)(a).

<sup>64</sup> *Id.* § 27(1)(b).

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

<sup>66</sup> *Id.* § 27(1)(c).

<sup>67</sup> See *id.* § 28.

<sup>68</sup> *Id.* § 28(1)(c).

<sup>69</sup> *Id.* § 28(1)(d). This section also provides that children have the right “not to be required or permitted to perform work or provide services that— (i) are inappropriate for a person of that child’s age; or (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development.” *Id.* § 28(1)(f).

“exploitative labour practices.”<sup>70</sup> These rights are provided on demand, and the provision does not include the limitation found in other socio-economic rights in the bill of rights, namely, that the state provides them progressively and “within its available resources.”<sup>71</sup>

#### *D. Cultural Rights*

One of the challenges facing the new democratic South Africa in the post-1990 era was its political, economic, and cultural transition from a European-centric country in Africa, to one that embraced its history, legacy, and geography as an African state.<sup>72</sup> As a European-centric country, successive colonial and apartheid governments continuously relegated African law and custom as secondary in the legal framework and legal hierarchy. This created a formidable challenge of transition to South Africa as an African State.<sup>73</sup>

This task of transition, with the goal of transformation, was largely left to the constitutional drafters, and the fruits of their efforts are incorporated in the South African Constitution. The constitution is a thoughtful hybrid of “western” and African values and principles. Indeed, the incorporation of indigenous and religious minority rights in the constitution and bill of rights has been much heralded and constantly referenced by constitutional and human rights scholars and advocates.<sup>74</sup> In addition, judgments of the Constitutional Court in this regard have been admired, particularly in the court’s human rights jurisprudence.<sup>75</sup> Idealistically labeled the “rainbow nation,” the political transition through the lens of the comprehensive constitution and under the leadership of President Nelson Mandela was particularly

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<sup>70</sup> *Id.* § 28(1)(e).

<sup>71</sup> *See, e.g., id.* §§ 25, 26, 27.

<sup>72</sup> *See* Heinz Klug, *Constitution-Making, Democracy and the “Civilizing” of Irreconcilable Conflict: What Might We Learn From the South African Miracle?*, 25 WIS. INT’L L.J. 269, 271 (2007) (describing two distinct stages in South Africa’s democratic transition; the first, a violent stage, loosely controlled by existing political bodies and the second, a structured transition controlled by new democratic governing bodies).

<sup>73</sup> *See* CHANOCK, *supra* note 46, at 30 (describing the development of South African law as being tied to the history of colonialism).

<sup>74</sup> S. AFR. CONST., 1996, ch. 2, § 31; *see* Eric C. Christiansen, *Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lessons From South Africa*, 13 UCLA J. INT’L L. & FOREIGN AFF. 369, 371–72 (2008); Henry J. Richardson III, *Patrolling the Resource Transfer Frontier: Economic Rights and the South African Constitutional Court’s Contributions to International Justice*, 9 AFR. STUD. Q. 81, 82 (2007).

<sup>75</sup> *See infra* Part IV; Richardson, *supra* note 74, at 84.

inspirational on a continent like Africa, that had experienced decades of violent conflict and civil strife, often linked to issues of ethnic identity or cultural rights.<sup>76</sup>

#### IV. THE CONSTITUTIONAL COURT AND TRANSFORMATION

As of 2014, the Constitutional Court has been in existence for twenty years.<sup>77</sup> During that span of time it has achieved a solid reputation and an impressive degree of credibility amongst South Africa's leaders and citizens.<sup>78</sup> Its judgments have been seen as central to the transformative project of nation-building in South Africa.<sup>79</sup>

As mentioned earlier, South Africa had to transition from an authoritarian racist system of parliamentary sovereignty to a system of constitutional democracy.<sup>80</sup> This was a mandate for a comprehensive restructuring of the legal system with respect to laws, legal processes, legal institutions, legal culture, and staffing of the courts, administrative tribunals, and other sectors of the legal system.<sup>81</sup> The drafters of the constitution envisaged a fundamental restructuring of the legal foundations, the legal structure, and the laws to make the operation of the legal system representative, accountable, and accessible to all South African citizens.<sup>82</sup> The constitutional principles and values were intended to transform all aspects of the legal system.

The Constitutional Court has deliberated on issues central to this transformation, and has handed down some judgments that have had a profound impact on the law in South Africa. I will outline them through the prism of the issues articulated earlier, that

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<sup>76</sup> See RICHARD STENGEL, *MANDELA'S WAY: FIFTEEN LESSONS ON LIFE, LOVE, AND COURAGE* 40, 41, 64, 98 (2009); see also SIRI GLOPPEN, *SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION 6* (1997) (describing the culture of violence that has haunted South Africa).

<sup>77</sup> See HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* 141 (2000).

<sup>78</sup> See Penelope Andrews, *Without Fear, Favor, or Prejudice: Judicial Independence and the Transformation of the Judiciary in South Africa*, in *THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE* 197, 210 (Scott L. Cummings ed., 2011).

<sup>79</sup> See *id.* at 210. In addition to its stature within South Africa, the Constitutional Court has a large international audience. Many American law professors are former clerks of the court, and many have focused their scholarship on the Constitutional Court. In addition, scholarly groups like the South Africa Reading Group, hosted by the author and Professor Stephen Ellmann of New York Law School, regularly focus their attention on the judgments of the court, and many judges have presented papers at the Reading Group.

<sup>80</sup> See KLUG, *supra* note 77, at 115; Andrews, *supra* note 78, at 203.

<sup>81</sup> See Andrews, *supra* note 78, at 202, 203; see also GLOPPEN, *supra* note 76, at 68 (discussing societal transformation using the legal system).

<sup>82</sup> See KLUG, *supra* note 77, at 119; GLOPPEN, *supra* note 76, at 68.

formed the core of Paul Robeson's belief system, values, and advocacy.

### *A. Democracy and Rights of Citizenship*

In this area of law the Constitutional Court has articulated a broad vision of democracy and the rights of citizenship, seeking to overturn the legacy of exclusion and discrimination to one of democracy and equality. The court has been particularly attentive not just to those groups of South Africans who have been discriminated against because of their race, ethnicity, gender, or sexuality, but also to minority groups often ignored in the wider society.

In 1999, the Constitutional Court confronted the issue of the right of prisoners awaiting trial and prisoners who have been sentenced to vote.<sup>83</sup> The key issue before the court was whether the constitutional right of prisoners to vote is infringed "if no appropriate arrangements are made to enable them to register and vote."<sup>84</sup> In this case the lower court held that the Independent Electoral Commission had no obligation to facilitate the registration and voting of prisoners.<sup>85</sup> The Constitutional Court overturned the lower court's decision, dismissing the notion that prisoners had no right to vote because they were considered to be "the authors of their own misfortune."<sup>86</sup>

The Constitutional Court noted that any adult South African citizen in possession of an identity document is entitled to apply for registration as a voter on the national common voters roll and "has the right to vote in elections for any legislative body established in terms of the Constitution."<sup>87</sup> It is unconstitutional, in the absence of any disqualifying legislative provision, to preclude prisoners from registering as voters as well as voting in the general elections.<sup>88</sup>

Referring to the preamble to the constitution, the court referenced "that one of the values on which the one, sovereign and democratic state of the Republic of South Africa is founded is '[u]niversal adult suffrage' and 'a national common voters roll.'"<sup>89</sup> The constitution further guarantees the right of every adult citizen "to vote in

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<sup>83</sup> See *August v. Electoral Comm'n* 1999 (3) SA 1 (CC) at para. 1 (S. Afr.).

<sup>84</sup> *Id.* at para. 19.

<sup>85</sup> See *id.* at paras. 1, 8.

<sup>86</sup> *Id.* at paras. 20, 42.

<sup>87</sup> *Id.* at para. 15 (quoting S. AFR. CONST., 1996, ch. 2, § 19(3)).

<sup>88</sup> See *August*, (3) SA 1 at paras. 23, 31.

<sup>89</sup> *Id.* at para. 3 (quoting S. AFR. CONST., 1996, ch.1, § 1(d)).

elections for any legislative body established in terms of the Constitution.”<sup>90</sup> The court stated that the universal franchise is significant to the individual to reinforce dignity, and for the nation to reinforce genuine democracy.<sup>91</sup> This right must therefore be interpreted expansively, to enfranchise rather than disenfranchise eligible voters.<sup>92</sup>

In addition to protecting the civil and political rights of citizens, The Court has struck down executive action deemed unconstitutional, including action that may have popular resonance. For example, although the Court could not provide relief to the complainant, the Court found the executive had acted unlawfully when it handed over a terrorist suspect to the American authorities without obtaining an undertaking that he would not be executed if found guilty. In another judgment assessing the principles of representative democracy, the Court delivered a textbook illustration of the importance of the doctrine of separation of powers and, more significantly, the central role of judicial review to strengthen the doctrine. The Court rejected a bill passed by the parliament on the basis that there had not been sufficient public consultation, as required by the Constitution. In an exploratory and thoughtful judgment, Justice Ngcobo, delivering the opinion for the Court, noted that South Africa’s representative democracy would be rendered “meaningless without massive participation by the voters.” In addition, he observed that “[t]he participation by the public on a continuous basis” is crucial to the “functioning of representative democracy.”<sup>93</sup>

### *B. Dignity*

In the first case before the newly established Constitutional Court in 1995, the judges had to decide the constitutionality of the death

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<sup>90</sup> S. AFR. CONST., 1996, ch. 2, § 19(3). The court pointed out that “[t]he right to vote by its very nature imposes positive obligations upon the legislature and the executive.” *August*, (3) SA 1 at para. 16. This is the reason why the constitution provides for the establishment of the Independent Electoral Commission as an independent and impartial body to manage the elections and ensure that they are free and fair. *Id.*

<sup>91</sup> See *August*, (3) SA 1 at para. 17.

<sup>92</sup> *Id.*

<sup>93</sup> Andrews, *supra* note 78, at 211 (quoting *Doctors for Life Int’l v. Speaker of the Nat’l Assembly* 2006 (6) SA 416 (CC) at para. 115 (S. Afr.)).



penalty.<sup>94</sup> In a much-anticipated and highly watched decision, the court heard arguments for three days about whether the death penalty violated sections nine, ten, and eleven of the interim constitution, which guaranteed every individual the right to life, the right to dignity, and the right to be free from torture and cruel punishment.<sup>95</sup> In a detailed judgment, drawing on international human rights law, the court unanimously found that the death penalty was indeed unconstitutional, violating the rights to life and dignity.<sup>96</sup> Writing the majority opinion, Constitutional Court President Arthur Chaskalson noted:

The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.<sup>97</sup>

The court revisited this issue again when it examined the constitutionality of extraditing an accused person to a country that imposes the death penalty.<sup>98</sup> The applicant, a foreign national, was on trial in New York on numerous capital charges arising out of the bombing of the United States embassy in Dar es Salaam, Tanzania, in 1998.<sup>99</sup> The South African and American authorities traced the accused to Cape Town where he was living under an assumed name and with a false passport.<sup>100</sup> He was arrested and interrogated by South African immigration authorities as an illegal immigrant and handed over to the FBI for removal to the United States, where the court told him he was facing the death penalty.<sup>101</sup>

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<sup>94</sup> *S v. Makwanyane* 1995 (3) SA 391 (CC) at para. 1 (S. Afr.).

<sup>95</sup> S. AFR. (INTERIM) CONST., 1993, ch. 3, §§ 9, 10, 11(2); *Makwanyane*, (3) SA 416 at para. 10. The South African Constitution was a two-stage drafting process, which included an interim constitution of 1993 and a final constitution of 1996. For a detailed discussion of the two constitutions, see *THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW* (Penelope Andrews & Stephen Ellmann eds., 2001).

<sup>96</sup> *Makwanyane*, (3) SA 391 at para. 144.

<sup>97</sup> *Id.*

<sup>98</sup> *Mohamed v. President of the Republic of South Africa* 2001 (3) SA 893 (CC) at para. 4 (S. Afr.).

<sup>99</sup> *Id.* at paras. 8–9.

<sup>100</sup> *Id.* at paras. 9–10.

<sup>101</sup> *Id.* at paras. 2–4.

The applicant approached the Constitutional Court for an order declaring his removal to the United States as unconstitutional without the assurance that he would not be executed.<sup>102</sup> The applicant was supported by the Society for the Abolition of the Death Penalty and the Human Rights Committee Trust, which argued that the handing over and subsequent removal were a disguised extradition without a safeguard against the death sentence.<sup>103</sup> This violated his constitutional right to life, dignity, and not to be subjected to cruel, inhuman, or degrading punishment. The South African government argued that the applicant had been subject to deportation because he had entered South Africa illegally, had been lawfully arrested, and had been properly deported to the United States.<sup>104</sup>

The court found that the precedent established in *Makwanyane*, namely that “capital punishment is inconsistent with the values and provisions of the interim [c]onstitution” applied with even greater force to the final constitution.<sup>105</sup> This applied whether the removal was a deportation or an extradition, regardless of consent by the applicant.<sup>106</sup>

The court upheld the applicant’s appeal, declaring the handing over unlawful in the absence of an undertaking that he would not be executed. Such action infringed his constitutional right to life, to dignity, and not to be subjected to cruel, inhuman, or degrading punishment.<sup>107</sup> The court also held that the deportation breached the Aliens Control Act.<sup>108</sup> The court authorized and directed the director of the court to draw the judgment to the attention of the trial court in New York as a matter of urgency.<sup>109</sup>

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<sup>102</sup> *Id.* at paras. 4–5.

<sup>103</sup> *Id.* at para. 3. The South African officials were said also to have breached the law relating to deportation as specified by the Aliens Control Act 96 of 1991 and its regulations. *Id.*

<sup>104</sup> *Id.* at para. 6. The applicant had requested that he be deported to the United States and not Tanzania, his country of citizenship. *Id.* at para. 18.

<sup>105</sup> *Id.* at paras. 39–40.

<sup>106</sup> *Id.* at para. 43. *Makwanyane* established that South Africa cannot expose a person to the risk of execution, whether by deportation or extradition and regardless of consent. *Id.* at paras. 38–39. The Aliens Control Act did not permit deportation of the applicant to the United States, even if he consented. *Id.* at paras. 35–36. The court held that the applicant was unaware of his right under the Act to appeal against deportation and he therefore could not validly consent to the deportation. *Id.* at paras. 65–68.

<sup>107</sup> *Id.* at para. 74.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

### C. Equality

In the area of equality, the Constitutional Court has consistently given effect to the meaning and text of the constitutional provisions, and has articulated an expansive definition of equality—mindful of South Africa's racist, sexist, and homophobic past—and committed to ensuring that all marginalized South Africans benefit from the constitutional text.<sup>110</sup> The court has been vigilant about ensuring that the principle of non-discrimination remained unequivocal and on the issue of discrimination based on sexuality, the court has been particularly strident. For example, in 1998 the court struck down the criminal prohibition on sodomy between consenting adult males.<sup>111</sup> The court has also proscribed discrimination against HIV-positive individuals in the workplace.<sup>112</sup> In 2005, the court held that the common law definition of marriage and a section of the Marriage Act were inconsistent with the constitution.<sup>113</sup> The court found "that the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right[s]."<sup>114</sup>

The court has also been vigilant in ensuring that women have access to and benefit from the equality provisions in the constitution, and that discrimination against women on the basis of sex and gender be dealt with expeditiously and comprehensively.<sup>115</sup> Some of the most insightful equality jurisprudence has emanated from the court, and its judgments have been hailed for the clarity

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<sup>110</sup> Penelope Andrews, *The South African Constitution as a Mechanism for Redressing Poverty*, in *DEMOCRATIC REFORM IN AFRICA: ITS IMPACT ON GOVERNANCE & POVERTY ALLEVIATION* 57, 59 (Muna Ndulo ed., 2006).

<sup>111</sup> *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC) at paras. 2, 73 (S. Afr.).

<sup>112</sup> *Hoffmann v. S. African Airways* 2001 (1) SA 1 (CC) at paras. 40–41 (S. Afr.).

<sup>113</sup> *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at para. 114 (S. Afr.).

<sup>114</sup> *Id.*

<sup>115</sup> See Julie Goldscheid, *Gender Violence and Work in the United States and South Africa: The Parallel Processes of Legal and Cultural Change*, 19 AM. U. J. GENDER SOC. POL'Y & L. 921, 947–48, 954 (2011) (discussing South Africa's gender violence and employment reform efforts under South Africa's domestic and sexual violence reform movements); Felicity Kaganas & Christina Murray, *Law and Women's Rights in South Africa: An Overview*, in *GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER* 1, 35–36 (1994); but see Deborah Zalesne, *Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms*, 25 HARV. WOMEN'S L.J. 143, 196–201 (2002) (discussing the inequality that is still present for most women despite the progressive sexual harassment legislation).

with which the judges, particularly the first two female judges of the court, have articulated the notion of substantive equality.<sup>116</sup> For example, in 1996 the court outlawed unfair discrimination on the grounds of sex and women's access to insurance policies.<sup>117</sup> In an oft-cited opinion, the court had occasion to rule on a constitutional challenge on the basis of sex and gender, brought by a male prisoner, the father of a twelve-year old child, to an executive order by President Mandela, which granted special remission of sentences for certain categories of prisoners.<sup>118</sup> The only prisoners who stood to benefit from the executive order were "all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years."<sup>119</sup> In a lengthy and controversial opinion, the court examined the reasons for the President's pardon and despite its generalization about mothers being the primary caregivers of children, the court found that this did not amount to unfair discrimination.<sup>120</sup> The court saw the need "to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved."<sup>121</sup> The court has also insisted on equality between South African citizens and those who are lawful permanent residents, striking down regulations that prevent permanent residents from holding permanent posts as teachers.<sup>122</sup>

Dealing with the issue of violence against women as interfering with a women's right to equality, the court has determined that there is a duty on the part of courts to develop the common law, including the law of negligence, by imposing a duty on the police to prevent sexual violence against women.<sup>123</sup>

#### *D. Cultural Rights*

In the area of cultural rights, the Constitutional Court has been attentive to the challenges of contemporary South Africa, and the

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<sup>116</sup> See Andrews, *supra* note 78, at 208, 210.

<sup>117</sup> *Brink v. Kitshoff* 1996 (4) SA 197 (CC) at paras. 43, 50, 60 (S. Afr.).

<sup>118</sup> *President of the Republic of S. Afr. v. Hugo* 1997 (4) SA 1 (CC) paras. 1–3 (S. Afr.).

<sup>119</sup> *Id.* at para. 2 (quoting Presidential Act No. 17 of 27 June 1994).

<sup>120</sup> See *Hugo*, 1997 (4) SA 1 (CC) at paras. 37, 48.

<sup>121</sup> *Id.* at para. 41.

<sup>122</sup> *Larbi-Odam v. Member of the Exec. Council for Educ. (Nw. Province)* 1998 (1) SA 745 (CC) at paras. 2, 49 (S. Afr.).

<sup>123</sup> *Carmichele v. Minister of Safety & Sec.* 2001 (4) SA 938 (CC) at paras. 36, 62, 78, 80 (S. Afr.).

need to marry the traditional and the contemporary within a legal framework that has always relegated indigenous law to the margins of the formal legal system.<sup>124</sup> South Africa's transition from an authoritarian state embedded in racism to one premised on democracy and human rights for all its citizens meant that appropriate deference had to be provided to indigenous law and custom. As mentioned earlier in this article, the constitutional text provides for the right of all South Africans who belong "to a cultural, religious or linguistic community . . . to enjoy their culture, practise their religion and use their language."<sup>125</sup> The constitution also provides for members of such communities "to form, join and maintain cultural, religious and linguistic associations."<sup>126</sup>

But the constitution also recognizes that certain individuals and groups within these communities may be disadvantaged by traditional laws and custom, and therefore it includes the caveat that these rights "may not be exercised in a manner inconsistent with any provision of the Bill of Rights."<sup>127</sup>

The number of cases decided by the Constitutional Court regarding the issues of cultural rights has been rather limited. This may be that communities or individuals have chosen an informal path in settling disputes, or it may be that parties who wish to bring claims before the court have limited resources. Nonetheless, the cases decided by the court have generally indicated a fine balancing by the judges between the rights of individuals and groups to exercise their cultural rights within the human rights framework of the constitution.<sup>128</sup>

For example, in 2007 the court found that the prohibition against wearing a nose stud to a public school amounted to unfair discrimination on grounds of religion and culture.<sup>129</sup> The court has also mandated that the customary law be developed to bring it in line with the constitutional commitment to gender equality.<sup>130</sup> The

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<sup>124</sup> See Penelope E. Andrews, *Who's Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa*, 2009 UTAH L. REV. 351, 353-54 (2009).

<sup>125</sup> S. AFR. CONST., 1996, ch. 2, § 31(1).

<sup>126</sup> *Id.* § 31(1)(b).

<sup>127</sup> *Id.* § 31(2).

<sup>128</sup> See Waheeda Amien, *Overcoming the Conflict Between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages*, 28 HUM. RTS. Q. 729, 748 (2006); Tumi Mmusinyane, *The Role of Traditional Authorities in Developing Customary Laws in Accordance with the Constitution: Shilubana and Others v Nwamitwa 2008 (9) BCLR 914 (CC)*, 12 POTCHEFSTROOM ELEC. L.J. 136, 154 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1595964](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1595964).

<sup>129</sup> *MEC for Educ.: Kwazulu-Natal v. Pillay* 2008 (1) SA 474 (CC) at para. 112 (S. Afr.).

<sup>130</sup> See *Shilubana v. Nwamitwa* 2009 (2) SA 66 (CC) at para. 75 (S. Afr.).

court found that the appointment of a female chief by customary institutions, contrary to tradition, was constitutionally permissible.<sup>131</sup> On the other hand, the court has struck down as constitutionally impermissible long-standing indigenous practices that continue to discriminate against women. They did this in 2004, reinforcing the primacy of the principle of gender equality and the right of African women to inherit under the African customary law of intestate succession.<sup>132</sup>

### *E. Socio-economic Rights*

Arguably, it is in the area of socio-economic rights that Paul Robeson's vision of justice is most pronounced. Referring to the South African Constitution as transformative, Karl Klare has noted that the constitution is

[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.<sup>133</sup>

It is with respect to the implementation of socio-economic rights that the constitution holds much promise. The Constitutional Court's decisions regarding the enforcement of socio-economic rights has shown that these rights can bring meaningful relief to the poorest in the country.<sup>134</sup> In 2000 the Constitutional Court had to consider the right to housing as incorporated in section 26.<sup>135</sup> Although the court had had occasion to interpret the right to health a few years prior,<sup>136</sup> the *Grootboom* decision was awaited with much anticipation and is widely regarded as an international test case on the enforceability of social and economic rights.<sup>137</sup> The case

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<sup>131</sup> *Id.* at paras. 82–84.

<sup>132</sup> *Bhe v. Khayelitsha Magistrate* 2005 (1) SA 580 (CC) at para. 210 (S. Afr.).

<sup>133</sup> Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 150 (1998); see also Dikgang Moseneke, *Transformative Adjudication*, 18 S. AFR. J. ON HUM. RTS. 309, 314 (2002) (describing the need for all branches of government to aid in the transformative nature of the constitution).

<sup>134</sup> David Robitaille, *Adjudication of Social and Economic Rights in South Africa: Beyond the Rhetoric of Illegitimacy and Excessive Complexity*, 23 NAT'L J. CONST. L. 215, 223 (2007/2008).

<sup>135</sup> *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) at para. 1 (S. Afr.).

<sup>136</sup> See *Soobramoney v. Minister of Health, Kwa Zulu-Natal* 1998 (1) SA 765 (CC) at paras. 11–12 (S. Afr.).

<sup>137</sup> *Grootboom*, 2001 (1) SA 46 (CC) at paras. 1–3.

concerned an application for temporary shelter brought by a group of people, including a number of children, who were without shelter following their brutal eviction from private land on which they were squatting.<sup>138</sup> The conditions under which the community lived were deplorable; they had access to one tap and no sanitation facilities.<sup>139</sup> The court affirmed that the government had a duty in terms of section 26 of the constitution (the right to adequate housing) to adopt reasonable policy, legislative, and budgetary measures to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions.<sup>140</sup> Justice Yacoob, writing for a unanimous court noted:

I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognized by the constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.<sup>141</sup>

The judgment also dealt in detail with the implications of the children's socio-economic rights enshrined in the bill of rights.<sup>142</sup>

In *The Treatment Action* case,<sup>143</sup> the appeal to the Constitutional Court was

directed at reversing orders made in a high court against [the] government because of perceived shortcomings in its response to an aspect of the HIV/AIDS challenge. The court found that [the] government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting the disease to their babies at birth. More specifically the finding was that government had acted unreasonably in (a) refusing to make an antiretroviral drug called nevirapine available in the public health sector where the attending doctor considered it medically indicated and (b) not setting out a timeframe for a national programme to

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<sup>138</sup> *Id.* at para. 4.

<sup>139</sup> *See id.* at para. 7.

<sup>140</sup> *Id.* at para. 13.

<sup>141</sup> *Id.* at para. 94.

<sup>142</sup> *Id.* at paras. 70–79.

<sup>143</sup> *Minister Of Health v. Treatment Action Campaign* 2002 (5) SA 703 (CC) at para. 2 (S. Afr.).

prevent mother-to-child transmission of HIV.<sup>144</sup>

In addition to focusing on the positive aspects of socio-economic rights, that is, the obligation of the state to provide certain rights, the court has also focused on what has been seen as the negative component of socio-economic rights. In a case involving the protection of a tenant against eviction in the process of executing a judgment on debts, the court held that such a process violated the constitutional right to housing.<sup>145</sup> The court has also reaffirmed the right of access to social security by permanent residents.<sup>146</sup>

In a novel decision regarding the eviction of tenants and squatters in the downtown area of Johannesburg, the court has mandated that before the government may evict residents from their homes, it has the duty to engage meaningfully with them about possible steps that can be taken to alleviate their homelessness.<sup>147</sup> The court has also held that when depriving residents of electricity, the local authority is obliged to provide residents with procedural fairness, including fair notice of the disconnection.<sup>148</sup> But, the court has also been mindful of its institutional capacity, and has found constitutionally valid the policies of local governments that pursue revenue collection when delivering services in the fulfillment of their constitutional and statutory duties. So, for example, the court has found the use of prepayment water meters by a city council reasonable and lawful.<sup>149</sup>

## V. PAUL ROBESON AND CONTEMPORARY SOUTH AFRICA

If Paul Robeson was around today, what might he say about the “rainbow nation” and its transformative constitutional project? He might join in the chorus of applause about the text of South Africa’s constitution, the formal imprimatur of rights, and the mostly impressive series of judgments handed down by the Constitutional Court.<sup>150</sup> He would no doubt celebrate the peaceful transition in South Africa from apartheid and authoritarianism to democracy, and particularly the significant role of the Truth and Reconciliation

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<sup>144</sup> *Id.* at para. 2.

<sup>145</sup> *Jaftha v. Schoeman* 2005 (2) SA 140 (CC) at paras. 4, 52 (S. Afr.).

<sup>146</sup> *Khosa v. Minister of Soc. Dev., Mahlaule* 2004 (6) SA 505 (CC) at para. 52 (S. Afr.).

<sup>147</sup> *Occupiers of 51 Olivia Rd., Berea Twp., and 197 Main St., Johannesburg v. City of Johannesburg* 2008 (3) SA 208 (CC) at paras. 18–19 (S. Afr.).

<sup>148</sup> *Leon Joseph v. City of Johannesburg* 2010 (4) SA 55 (CC) at paras. 47, 61 (S. Afr.).

<sup>149</sup> *Lindiwe Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) at para. 169 (S. Afr.).

<sup>150</sup> See KENDE, *supra* note 48, at 2–3, 6.



Commission.<sup>151</sup>

But he might pause and ponder the dissonance between the fine constitutional text and its accompanying court decisions, and the limited signs of a human rights culture, as evidenced by widespread violence, particularly against women, African migrants, and homosexual South Africans.<sup>152</sup> He might wonder why the Mandela government and its successors have openly embraced the “Washington consensus” and a form of unregulated capitalism that has resulted in great wealth for some and the persistent impoverishment of others?<sup>153</sup> He might wonder why the kind of crony capitalism euphemistically labeled “Black Economic Empowerment” empowers and enriches only so few, and continues to fan the flame of black resentment—but now leveled against their black compatriots.<sup>154</sup>

Paul Robeson would no doubt be shocked at the specter of black miners being shot by police officers in a manner reminiscent of Sharpeville and the dark days of apartheid.<sup>155</sup> He might wonder what happened to that wonderful African concept of dignity—*ubuntu*—and why it often seems in such short supply.<sup>156</sup>

Paul Robeson would no doubt ponder the bundle of contradictions that make up South Africa: first world and third world; contemporary and traditional; great wealth and extreme poverty; hope and despair.

And he would no doubt wonder why the promise of dignity, equality, and rights for women, including the right of security in the public and private domain, still eludes so many South African women, particularly those who are poor.

<sup>151</sup> See Andrews, *supra* note 41, at 1159.

<sup>152</sup> Penelope Andrews, *Learning to Love After Learning to Harm: Post-Conflict Reconstruction, Gender Equality and Cultural Values*, 15 MICH. ST. J. INT'L L. 41, 43–44 (2007); see Charlayne Hunter-Gault, *Violated Hopes: A Nation Confronts a Tide of Sexual Violence*, NEW YORKER, May 28, 2012, at 40, 41.

<sup>153</sup> See Johannes G. Hoogeveen & Berk Özler, *Not Separate, Not Equal: Poverty and Inequality in Post-Apartheid South Africa* 2, 22 (William Davidson Institute, Working Paper No. 739, 2005).

<sup>154</sup> See Susan R. Jones & Peggy Maisel, *Implementing the Social and Economic Promise of the Constitution: The Role of South African Legal Education*, in LAW AND RIGHTS: GLOBAL PERSPECTIVES ON CONSTITUTIONALISM AND GOVERNANCE 243, 250–51 (Penelope E. Andrews & Susan Bazilli eds., 2008).

<sup>155</sup> See Charlayne Hunter-Gault, *A Massacre and a Test for South Africa*, THE NEW YORKER (Aug. 21, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/08/a-massacre-and-a-test-for-south-africa.html>.

<sup>156</sup> Interpreted as the interconnectedness of our shared humanity, Archbishop Desmond Tutu utilized this concept frequently as the Chair of South Africa's Truth and Reconciliation Commission. See DESMOND MPIOLO TUTU, NO FUTURE WITHOUT FORGIVENESS 31 (1999).

Yes—Paul Robeson may have celebrated and he may have lamented—but his legacy has shown that even as one struggle ends, new ones surface. And that the project of justice, human dignity, and equality requires ongoing vigilance and continuous struggle.

Paul Robeson started his activism as a student at Rutgers University in 1915.<sup>157</sup> It was only in the 1960s and beyond that we begin to see the fruits of his commitments, namely, independence in many African countries; the Civil Rights Act, and the Voting Rights Act; the release of Nelson Mandela in 1990; and democratic elections in South Africa in 1994. It is now nearly a century since Paul Robeson embarked on his journey of international human rights activism. South Africa is barely twenty years old. All the promises of the constitution will take some time to come to fruition.

#### VI. POST-SCRIPT: PAUL ROBESON IN ALBANY, MAY 1947

In 1947,

Paul Robeson scheduled a concert of Negro spiritual music in Philip Livingston Junior High School in Albany. The Albany Board of Education had approved the concert in September 1946. On April 22, 1947 the concert permit was revoked after Mayor Corning called the Board's attention to the fact that the House Committee on Un-American Activities had named Robeson as "one of a group invariably found supporting the Communist Party and its front organizations and that on one occasion Robeson had sung Communist songs as an encore at a concert."<sup>158</sup>

Although Mayor Corning persuaded the Board to revoke Robeson's permit, Robeson successfully challenged the revocation on the grounds of breach of contract, and Judge Isadore Brookstein of State Supreme Court found in his favor. The concert took place at Livingstone Junior High School as planned.

In 1998, the Albany Common Council unanimously adopted a resolution, presented by Alderperson Sarah Curry-Cobb, honoring Paul Robeson and the residents of Albany who, in 1947, insisted that Paul Robeson be permitted to sing in Albany and declaring May 9, 1998, "Paul Robeson Day" in the City of Albany.

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<sup>157</sup> See SWINDALL, *supra* note 6, at 19–21, 33, 42.

<sup>158</sup> Kevin J. Roberts, *Paul Robeson in Albany—May 9th, 1947*, SUNY AT ALBANY DEP'T OF HISTORY (1999), <http://www.albany.edu/history/robeson1947.html> (quoting Charles Padula, *Court Rules Robeson May Sing in City*, TIMES UNION, May 7, 1947, at 1).