

## KATE O'REGAN

### THE CHALLENGE OF CHANGE: THIRTEEN YEARS OF CONSTITUTIONAL DEMOCRACY IN SOUTH AFRICA

It is an honour to have been asked to give this lecture named in memory of two extraordinary British people, neither of whom I knew.

John Foster was a rare lawyer: he insisted that the law could and should be just. In that he shared the views of Earl Warren, one of the United States' great chief justices: "It is the spirit and not the form of law that keeps justice alive". In this assertion of the possibility that law can be just, not very fashionable in our post-modern world, lies the hope for a peaceful and just future.

Miriam Rothschild was not a lawyer. With a sensibility ahead of her time, she was an entomologist, a biologist, an environmentalist and a concerned inhabitant of her planet.

Both John Foster and Miriam Rothschild were exemplars of modern citizens and I am delighted to be reminding us of all that they stood for tonight in delivering this lecture. Both I think would have been interested in South Africa's constitutional project. The Constitution in its preamble explicitly states that it "seeks to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights". It is therefore a transformative Constitution, based on democratic values, that seeks to narrow the gap both between law and justice, and between its transformative vision of a society in which the quality of life of all citizens is improved and current reality.

It is thirteen years since constitutional democracy dawned in South Africa. My purpose this evening is to describe to you the role the courts, and particularly the Constitutional Court, plays in this new constitutional order. In so doing, I am aware that in the United Kingdom there is an ongoing debate about constitutional reform and I have selected five issues that may have some resonance for that debate. I should emphasise however that the South African constitutional experience is unique; rooted in our own history of colonialism, racism and oligarchy and my purpose is not to suggest that the South African approach should be adopted here or elsewhere.

To me the real strength of understanding other societies and their constitutions (and indeed the South African Constitution permits courts when interpreting its Bill of Rights to look at foreign law),<sup>1</sup> is that it often liberates one from the habits and assumptions of one's own training and experience. It can facilitate the identification of strengths and weaknesses in one's own system, and enable one to see possibilities more clearly. In so doing, it allows us to imagine different ways of being both democratic and respectful of human rights - the twin obligations of any modern democracy.

The five issues I have identified are the following:

- How was our Constitution drafted?

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- What role do the courts, and particularly the new Constitutional Court play under the new Constitution and what is the constitutional relationship between the courts and the other arms of government: the legislature and the executive?
- How does our Constitution approach the problems of a diverse society?
- There are two important novelties in the South African Bill of Rights: imposing obligations on private citizens; and the entrenchment of social and economic rights. How has the court approached these and what contribution do they make to South African democracy?
- How are judges and in making appointments why does our Constitution require that the judiciary needs “reflect broadly the racial and gender composition” of South African society?<sup>2</sup>

### 1. The process of constitutional change

How was the South African Constitution drafted?<sup>3</sup> The process which culminated in our Constitution commenced in the 1990 with the release from prison of the leaders of the liberation movements, the African National Congress and the Pan-Africanist Congress. Four years of intense negotiations followed, which resulted, initially, in deadlock. The liberation movements wanted a Constitution drafted by a democratically elected constituent assembly. The National Party government wanted a constitution drafted by negotiation prior to the first elections. Finally, it was agreed that a two-stage process to constitutional and political reform would be followed. A temporary or interim Constitution was negotiated and enacted by the minority government. In terms of the interim Constitution, elections would be held to elect a new Parliament.

The newly elected Parliament would have two roles: the first was as national legislature; and the second was as a Constitutional Assembly responsible for drafting a new Constitution. The fears of the National Party were met however by an agreement that the new Constitution would comply with certain constitutional principles agreed before 1994 and annexed as a schedule to the interim Constitution. It was agreed that a new Constitutional Court would be established which would have the duty of determining whether the new Constitution adopted by the Constitutional Assembly complied with the 34 constitutional principles set out in the interim Constitution. This compromise was the genesis of the Constitutional Court: it was to be established to decide if the new Constitution was indeed constitutional! This was a key political role conferred upon the Court which required the confidence of all parties in the negotiation process. Perhaps it was an auspicious genesis. Right from the start the Court was at the heart of constitution-making in a form of partnership with the Constitutional Assembly. In certifying the constitution, almost every provision of the Constitution was thoroughly scrutinised and debated both in public hearings before the Court and afterwards in our private deliberations.

The constitution-making process involved a high degree of public participation. Right from the start, key figures in the process identified the need to draw the public in. Cyril Ramaphosa speaking on 24 January, shortly after the Assembly was convened, stated:

“The drafting of this Constitution must not be the preserve of the 490 members of this Assembly, it must a constitution which [the people] feel they own, a constitution that they know and feel belongs to them.”<sup>4</sup>

Ramaphosa was right. If a Constitution is not merely a legal document but a charter which identifies the shared aspirations of a nation and its common values, a process of public participation in its drafting was essential.

Consulting the public in any society is never an easy task. In South Africa, a society of more than 40 million people, many of whom live in poverty in rural areas, many are not fully literate, and have only irregular access to print or electronic media, it is daunting indeed.<sup>5</sup> In performing this task, the Constitutional Assembly adopted a range of measures: advertisements were placed in the print and broadcast media calling for submissions. In excess of 1.7 million submissions were received, the bulk of which were petitions on discrete issues. In addition, a series of public meetings were held throughout the Republic, attended by more than 20,000 people and 717 organisations. According to the executive Director of the Constitutional Assembly, Hassen Ebrahim, these meetings were always "lively" and productive. He observed that having attended the meetings, "it was a humbling experience to realise that constitutional debates and issues are not only the domain of the intellectual elite, but that they belong to everyone."<sup>6</sup>

In addition, there were television and radio programmes broadcast to air the key issues under negotiations; an internet site was also created which contained a database of all the information produced by the Constitutional Assembly, including minutes, drafts, opinions and submissions. It was early days for the internet, especially in South Africa, but the site was very popular. The material on the site is currently being recaptured and indexed and it is hoped that it will soon be available on the Constitutional Court website [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za).

How successful was the process of public participation? That is difficult to evaluate. Its purpose was clearly threefold: a substantive one to allow members of the public to affect the actual provisions of the Constitution itself; a process-based one, rooted in a conception of democracy which is participative rather than merely representative; and a legitimating one, which aimed at giving South Africans a sense of ownership of our Constitution. No work has been done as far as I am aware on the extent to which the process of public participation affected the actual text of the Constitution and I cannot helpfully speculate on it. Perhaps there is an interesting PhD thesis to be written there.

And what of the process purpose of public participation? Independent market research at the time revealed that the campaign for public participation reached as many as 65% of South Africans. The same research makes it clear that many members of the public were sceptical about the call for public participation.<sup>7</sup> Yet the sheer number of submissions received and the extent of participation in public meetings suggested that there was great interest and significant involvement in the process.

And finally what of the legitimating purpose? Well, that too is perhaps hard to assess. Yet there can be no doubt that reference to the Constitution is audible in public debate and political processes at all levels of our society.

It is perhaps worth noting here that negotiated change has had to take place in many walks of South African life. Local government, for example, had been racially divided under apartheid with each town having separate municipal councils based on race. In each municipal area, negotiations had to take place to arrange for the manner in which the separate councils would merge. Similarly, many public organisations from school boards, to sporting codes have had to renegotiate the ground rules of their organisations. These processes often involved conflict at first, but by and large through compromise and negotiation, solutions to apparently intractable problems were reached.

Not surprisingly, then, inclusive processes that emphasise participation have become important values of our new constitutional democracy. They are widely accepted ground rules in many walks of South African life. And I think there can be no doubt that the public participation process around the Constitution contributed to this.

The importance of participation in law-making processes is also given expression in a wide variety of constitutional provisions. For example the new Constitution requires both houses of Parliament to “facilitate public involvement” in their legislative and other processes.<sup>8</sup> Recently, in two cases, the Constitutional Court had to interpret these provisions. Relying extensively on international law, a majority of the Court held that the provisions require Parliament to act reasonably to facilitate public involvement in law-making. If Parliament unreasonably fails to do so, the consequence may be that the legislation enacted will be invalid, though any order of invalidity, will ordinarily be suspended to enable Parliament to adopt a reasonable process to facilitate public involvement. The Court was clear that Parliament’s view of what would constitute reasonable facilitation of public involvement would be respected by the Courts.<sup>9</sup>

## 2. The role of the Constitutional Court: Fostering a democracy based on public reason

The Constitutional Court is the final court of appeal in constitutional matters. Given the scope of the Bill of Rights in our Constitution, the range of constitutional matters is far broader than it is in many other constitutional democracies. The Constitution provides for what can be called a strong form of judicial review - to those reared in a system committed to parliamentary sovereignty, often an alarming prospect.

Right at the beginning, the Constitution declares that the Constitution is “the supreme law of the Republic” and “law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.<sup>10</sup> The corollary of this is that a court, “when deciding a constitutional matter within its power” must declare law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency.<sup>11</sup> The Constitution then provides that the court may, in addition, make any “just and equitable” order including an order suspending the order of invalidity for any period and on any conditions to allow the competent authority which may be Parliament or a provincial legislature or an administrator an opportunity to correct the defect. The court may also limit the retrospective effect of the order of invalidity.

The special role of the Constitutional Court is recognised by a rule that an order of constitutional invalidity in respect of an Act of Parliament, provincial legislation or conduct of the President, will have no force unless it is confirmed by the Constitutional Court:<sup>12</sup> Between five and ten cases come before the Court each year for confirmation in terms of this procedure.

How often does the Court declare an Act of Parliament to be inconsistent with the Constitution? According to my records, it has happened 75 times so far: an average of just under six times a year. Interestingly, the average has not declined markedly over the period. In the first six years, 38 legislative provisions were declared to be invalid. In the following six years, 34 legislative provisions were declared invalid.

It is important to realise that in many cases, the declaration of invalidity is not controversial. Indeed the rules of the Court provide that the relevant government Minister responsible for the legislation must be given notice of the challenge and afforded an opportunity to oppose it. It is not infrequent that the Minister appears only to indicate

that the government does not vigorously wish to argue that the legislation is constitutional, but only wishes to make submissions as to the appropriate order to be made by the Court to regulate the effect of the declaration of invalidity.

Sometimes, of course, the declaration of invalidity is controversial particularly with the public. The leading example of this is the death penalty case that I mentioned at the outset in which the legislative provision which provided for capital punishment was declared to be inconsistent with the Constitution and invalid. The Court directed all persons sentenced to death would remain in custody until their sentences were substituted by lawful punishments.<sup>13</sup> Similarly controversial was the order in the case of *Minister of Home Affairs and Others v Fourie and Others*<sup>14</sup> which declared section 30(1) of the Marriage Act, 25 of 1961 to be inconsistent with the Constitution and invalid because it "does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples".<sup>15</sup>

In deciding whether a law is unconstitutional, a two stage model is followed.<sup>16</sup> This means that the court asks two questions: the first is does the law limit a right entrenched in the Bill of Rights? This exercise is by no means formal or automatic. The court has adopted a careful approach to delineating the scope of rights and a litigant bears the burden of establishing that his or her right is infringed by the legislation under attack. Should the court decide that the legislation does limit a right; the second question to be answered is whether the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".<sup>17</sup> This affords the government defending the constitutionality of legislation an opportunity both to lead evidence and present argument as to why the legislation is not unconstitutional.

How does the Court decide whether a limitation passes the test of justification? It considers whether the reason given by the government for limiting the right is sufficiently important to outweigh the impact it causes in limiting the right. This is essentially a proportionality analysis.<sup>18</sup>

The process of limitations analysis therefore permits the Court to consider the reasons proffered by government for the legislation under attack. In so doing, it affords a government an opportunity to set out its reasons for the limitation to persuade the Court, and the broader society, of the legitimacy of both its purpose and method.

In a real sense, the function of the Court here is twofold: most obviously, it serves as the guardian of fundamental rights; less obviously, but as importantly, it serves to create a forum for public debate about the reasons for the exercise of power. This role carries with it a conception of democracy which requires the exercise of public power to be accountable. Again and again, our Constitution confers power upon courts to enable citizens to hold public power accountable through requiring the disclosure of reasons for the exercise of power in a public and open forum.

What about the court's relationship with the executive, and in particular President? One of the very earliest cases before the Court concerned powers conferred upon the President by the legislation which was regulating the restructuring of local government (the Local Government Transition Act, 209 of 1993).<sup>19</sup> This legislation purported to confer powers on the President to amend it (the legislation) which the President purported to do in two proclamations. The empowering provision and the two proclamations were the subject of an urgent constitutional court challenge just before the first democratic local government elections were to be held. It was a tense time.

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The court held unanimously though for different reasons that the empowering provision in the legislation was inconsistent with the Constitution. A majority of nine held that the proclamations were also invalid. Because of the impending local government elections, the Court suspended the orders of invalidity for a period of a month to enable Parliament to be recalled to attend to rectifying the legislation. That evening, 22 September 1995, President Mandela went on national television to say that he accepted the decisions of the Court, that Parliament would be recalled, and that the constitutional defects in the legislation and proclamations would be rectified. It was an auspicious start for the Court's relationship with the executive.

Presidential conduct has been the subject matter of several important constitutional cases. One involved the President's power to pardon offenders.<sup>20</sup>

The Court held that the power had its origin in the prerogative powers exercised under former Constitutions (modelled in large part on the unwritten Westminster Constitution); and that no unenumerated prerogative powers existed under our Constitution.<sup>21</sup> The Court then had to determine what the scope of judicial review of such powers was. The Court held that the exercise of the powers had to be consistent with the Bill of Rights, and could be reviewed on that basis and also on the basis of *mala fides*.<sup>22</sup>

What is clear is that the conduct of the executive is subject to constitutional review by the Court; that in exercising that jurisdiction, the Court is respectful of and sensitive to the proper constitutional role of the Executive, but also mindful of its obligations to uphold the Constitution and protect the rights in the Bill of Rights.

3. "South Africa belongs to all who live in it, united in our diversity"...

Proclaims the Preamble to our Constitution. What is the role of the Courts and the Bill of Rights in realising this goal? The challenge posed by the principle arises in a variety of different arenas: traditional leaders and customary law; religious and cultural practices and the rights of non-citizens. The Court has had cases in all these areas. Tonight I only have time to discuss one which concerns customary law.

As a matter of social practice, traditional leaders play an important part in South African public life, particularly in the rural areas, and so does customary law. Our democratic Constitution recognises traditional leadership and confirms that "the institution, status and role of traditional leadership, according to customary law, are recognised subject to the Constitution."<sup>23</sup> It also provides that the courts must apply customary law when that law is applicable, subject to the Constitution.<sup>24</sup>

The most important case to date where the Court has had to consider customary law was the case of Mrs Bhe.<sup>25</sup> She came to court seeking relief on behalf of her 7 and 10-year old daughters. The father of the children, Mr Maboyisi Mgolombane died intestate in October 2002. He had been a carpenter and she a domestic worker and they lived together in an informal home in the giant township of Khayelitsha just outside Cape Town. Upon Mr Mgolombane's death, his father was declared sole heir in the deceased estate according to the customary principle of male primogeniture, Mr Mgolombane having no surviving male children. The father intended to sell the family home in order to cover funeral expenses which would have left Ms Bhe and the two young girls homeless. With the assistance of a local organisation, Ms Bhe launched a constitutional challenge to the customary law rule of male primogeniture which reached the Constitutional Court in 2004.

Speaking on behalf of the majority, Chief Justice Langa held that: the rule of male primogeniture in customary law was inconsistent with the Constitution to the extent that it excludes women or extra-marital children from inheriting property.

The message of the Bhe case, based on the express text of the Constitution, is that customary law is to be recognised as an important system of law in our society. Yet, like all laws in our legal system, it is subject to the Constitution and the Bill of Rights and, in this case, was held to be inconsistent with the right to be free from unfair discrimination. This is the first important principle of the constitution's protection of diversity in our society: it embraces the pluralist character of our society but on express terms: the fundamental rights entrenched in the Constitution may not be impaired by any community or culture.

#### 4. Two South African novelties: horizontality and socio-economic rights

Time does not permit a full consideration of these two aspects of the South African Bill of Rights. I shall describe them only briefly.

The Bill of Rights binds the legislature, the executive, the judiciary and all organs of state.<sup>26</sup> The latter is widely defined to include all departments of state in the national, provincial and local spheres of government; and any other functionary or institution exercising a public power or performing a public function in terms of the Constitution, or any legislation.<sup>27</sup> But the Bill of Rights also provides, somewhat enigmatically, that "a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and any duty imposed by the right".<sup>28</sup>

This provision thus provides that the Bill of Rights imposes obligations not only on government, but also on citizens. This aspect of our Constitution is often loosely referred to as its "horizontal effect": the precise scope of the horizontal application of rights is yet to be fully determined. In a sense, therefore, our Bill of Rights is a Bill of Rights and Obligations or responsibilities for citizens. What is clear already is that when a court develops the common law, for example, libel law (or defamation as we call it), the court must consider the obligations imposed by the Bill of Rights. In the case of libel, this involves several rights: freedom of expression on the one hand and the rights to dignity and privacy on the other. The Court has had to consider these rights in developing the rules of common law liability. What is equally plain, however, is that our Constitution does not carry a notion that one forfeits one's rights entirely if one does not observe one's obligations. So, in Makwanyane, sentenced prisoners were entitled to invoke their right to life<sup>29</sup> and their right to be free from cruel, inhuman or degrading punishment.<sup>30</sup>

The second novel aspect of the South African Constitution is its firm entrenchment of social and economic rights. Rights that are protected are the right of access to adequate housing,<sup>31</sup> to a basic education,<sup>32</sup> the right of access to health care services, sufficient food and water, and social security.<sup>33</sup> Apart from education, the format of the rights is similar so in the case of housing the right provides:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

In including such rights within the Bill of Rights, South Africa went beyond the conventional terrain of a Bill of Rights. Most domestic rights instruments protect civil and

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political rights, such as the right to freedom of expression and association. Few protect social and economic rights directly. However, a distinction between civil and political rights on the one hand and social and economic rights on the other was not followed when the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations in 1948.

In a recent book<sup>34</sup> Cass Sunstein has suggested that a key reason for this inclusion of both civil and political rights, as well as social and economic rights, was Franklin D Roosevelt's insistence that the two were inter-related. FDR's famously identified four essential human freedoms:<sup>35</sup> freedom of speech, freedom to worship God in one's own way, freedom from want and freedom from fear. This led him to draft what he called "the second Bill of Rights" which contained social and economic rights.

As a matter of normative desirability too, there is no difference between social and economic rights and civil and political rights. The desirability of ensuring that all citizens receive basic education, are properly housed, have access to food, clean water and health care is not, I think, a controversial one. Indeed, social and economic rights are in some sense anterior to civil and political rights. The basic needs of human beings to shelter, nutrition and clothing need to be met before a lively interest in freedom of expression and association arises. It is for this reason that many international documents acknowledge the indivisibility and interdependence of social and economic rights on the one hand and civil and political rights on the other.

In the South African context, however, the inclusion and protection of social and economic rights in the Constitution had great significance. The real effect of centuries of colonialism, followed by decades of apartheid has been the impoverishment of Black South Africans and the correlative enrichment of white South Africans. Our society is one of the most unequal in the world, and one in which the colour of one's skin remains a strong predictor of socio-economic status. Unless the basic needs of food, housing and education are met, civil and political rights may seem mere luxuries, and might have carried the message that the Constitution contained a charter for whites and the wealthy while remaining oblivious to the needs of Black South Africans and the poor who had been historically dispossessed and excluded.

The real challenge in entrenching social and economic rights, however is to determine the scope of their justiciability. There is a widespread view amongst politicians and lawyers that civil and political rights, on the one hand, and social and economic rights, on the other, are in some significant way conceptually different. Social and economic rights have been labelled "second generation" rights while civil and political rights are considered "first generation". (I might point out that this categorisation seems to me to be back-to-front - if food, water, and housing are indeed anterior as a matter of lived experience to civil and political rights, should they not be the first?)

The challenge is a complex one. I would like to make only three points. The first is that both civil and political rights, and social and economic rights impose an obligation upon the government that is essentially negative in character. Do not limit my right to free speech. Do not evict me from my home. Enforcement of the negative obligations that rights impose, are rarely controversial or difficult, whether the right concerned is the right of freedom of expression, or the right of access to housing.

The justiciability of both, however, becomes more difficult when one has to consider whether the right not only imposes a negative obligation, but also a positive one. Does the state have a duty to make it possible for people to exercise their right of freedom of

expression? Does the state have a duty to provide everyone with a house? Our intuitive anxiety about the justiciability of social and economic rights largely arises from our assumption that they primarily impose positive obligations upon government. And it is not different to the difficult questions that arise in the context of positive obligations that arise in respect of civil and political rights, whether it is the right to vote or the right to reasonable accommodation in disability law.

The South African Constitution helps to answer this question in relation to most of the social and economic rights by delineating quite carefully the extent of the positive obligation upon the state. So section 26(2) of the Constitution states: "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right". I probably don't need to highlight the word "reasonable" in the section to you. It is indeed the key to the Court's approach to the justiciability of social and economic rights.

The protection of social and economic rights does not mean that every individual can come to court and demand a house. The Constitution requires only that government take reasonable steps progressively and within available resources to afford citizens access to housing. The court is thus serving as a public forum where government is called upon to explain its policies. This form of justiciability is as much about facilitating participative and responsive democracy, as it is about social and economic rights.

What is increasingly clear, however, is that the negative aspects of social and economic rights will provide real shields for citizens to protect them against the withdrawal of their access to health care, housing and education. So, in one case, for example, the court held that the rules for the sale in execution of houses need to be reconceived to ensure that a court in ordering execution against immovable property would take into account the right of access to housing; and not make an order which would result in a person being rendered homeless which would be disproportionate.<sup>36</sup> The Court reasoned that there would be circumstances in which it would be disproportionate or unjustifiable to permit execution against a home. Such was the case before the court, in which one of the applicants had purchased vegetables in an amount of approximately R190 (less than £13) and as a result of the failure to pay that debt, and an absence of any movable property to satisfy the judgment, was at risk of her home being sold in execution of the debt. The other applicant had borrowed R250 (less than £15) and faced the same result. The court stated:

"It is clear that there will be circumstances in which it is unjustifiable to allow execution. .... There will be many instances where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be outweighed by the immense prejudice and hardship caused to the debtor."<sup>37</sup>

##### 5. How we appoint judges and why it matters that the Bench be diverse

From what goes before, it will be clear that judges play an important and powerful role under our constitutional order, especially, but by no means only in the Constitutional Court. Not surprisingly, then, the procedure for appointment of judges under our Constitution also marks a distinct change from the past when judges were appointed by the member of Cabinet responsible for the administration of justice (the Minister of Justice). In 1994, for the first time, a Judicial Service Commission was established to participate in the process of the selection of judges. Its first task was to assist in the appointment of judges to the Constitutional Court.

Under the terms of the 1996 Constitution, the Commission has 23 members:<sup>38</sup> the Chief Justice, who presides; the President of the Supreme Court of Appeal; the Minister of Justice; one Judge President (that is a judge who presides over one of the High Courts); four practising lawyers; a professor of law; four presidential nominees and ten members of Parliament (comprising four representatives from the National Council of Provinces (the upper House) and six representatives from the National Assembly - of these six, at least three must be members of the Opposition in parliament).<sup>39</sup>

High Court judges and judges of the Supreme Court of Appeal (formerly the Appellate Division and the highest court of appeal in non-constitutional matters), are appointed by the President on the advice of the Judicial Service Commission.<sup>40</sup> In practice, this has meant that the Judicial Service Commission advertises vacancies and calls for nominations. The Commission then produces a shortlist of candidates whom it interviews in public (though the proceedings may not be televised). The commission then sends to the President the names it recommends for appointment. As far as I am aware, the President has never rejected a name proposed by the Commission.

When vacancies arise, the Commission calls for nominations and then compiles a short list of candidates for interview. Interviews are held in public, though they are not televised. In the case of constitutional court judges, the transcripts of the interviews of the successful candidates for the Constitutional Court are available on the Court's website.

The Constitution itself expressly requires that a key factor for the Commission to consider in appointing judges is "the need for the judiciary to reflect broadly the racial and gender composition of South Africa".<sup>41</sup> In 1994, of 166 judges all but four were white men. Today the figure has changed significantly. The current composition of the Constitutional Court bench is as follows: there are three women (two Black and one White); and eight men (two White; and six Black). Our current Chief Justice is Pius Langa (one of the original appointments to the Court); and the Deputy Chief Justice is Dikgang Moseneke. Constitutional Court judges serve a maximum period of 15 years.<sup>42</sup>

Why should we be concerned about the demographics of the bench? There is an extensive literature on why it is appropriate for a judiciary to be diverse,<sup>43</sup> but for me two reasons stand out. The first is that a diverse bench enhances the legitimacy of the judiciary in the eyes of the broader community. It is important in a diverse society that the bench is not seen to be the preserve of a particular group or elite, or this will damage the institution. Within this reason, however, lurks a danger that can be described as identity determinism. If you are a black male judge, you will sympathise with a black male accused/complainant and your judgment will reflect this. The notion extends further: if you are a black male judge, you have an obligation to see the world in a particular way; and if you do not, you are to be criticised for that.

Such reasoning must be rejected vigorously. This is not to say that as human beings, judges are not products of the societies within which we live; and that our race, gender, religion, schooling and a variety of other factors have affected our beliefs and understanding of the world. But the task of judging in a democracy demands more of judges than that we merely give effect to a world-view inherited from our background. It demands a self-conscious appreciation of the impact of our background on our way of thinking and a conscientious attempt at all times to be impartial. In my view, the obligation of impartiality leads directly to the second important reason that our Constitution requires diversity on the bench.

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In his direct and honest statement to the Truth and Reconciliation Commission, my former colleague Justice Ackermann remarked:

"Judges who believe that they are wholly free of prejudice delude themselves. It behoves us all to seek out rigorously, painful as that might be, our own particular prejudices and of whatever nature."<sup>44</sup>

So requiring diversity on a collegial court enables judges to interrogate our own prejudices or blind-spots. The more alike judges are, the more likely that we will mistake prejudices for simple truths; the more different we are, the more likely that we will interrogate the correctness of their assumptions. In a sense this realisation is the corollary of John Griffith's research in his book *Politics and the Judiciary*<sup>45</sup> that found that a high percentage of the British judiciary were drawn from the same background: public schools (needless to say, male public schools), Oxbridge and the Bar. If our backgrounds are the same, it is very comfortable and easy to reinforce the prejudices that such backgrounds foster. When we are different, prejudices masquerading as "common sense" or "the ways things are" are much more likely to be uncovered. If judges are, as the South African oath of office requires, to "administer justice to all alike without fear, favour or prejudice",<sup>46</sup> we need to know where our prejudices lie. To me, therefore, this second reason for diversity on the bench: the fostering of judicial self-awareness is of great importance. It is a constant warning against self-delusion.

### Conclusion

But I hope that I have illustrated tonight, neither tendentiously, nor insensitive to my own judicial role, that the role of Courts under the South African Constitution is twofold: firstly, to protect the fundamental rights of South African citizens - not only civil and political rights, but also social and democratic rights; and secondly, to foster a process of public reason in our democracy by allowing citizens, through the process of litigation, to ask government for their reasons for the exercise of public power, which reasons are then scrutinised by the courts with careful attention to the need to protect the legitimate constitutional role of the Legislature and Executive. The important constitutional role entrusted to the Courts should enhance the possibility of participatory and responsive government. And also continue to facilitate the transformation of our broader society. As Franklin D Roosevelt stated in his famous four freedoms speech:

"Since the beginning of our... history", he said, "we have been engaged in change -- in a perpetual peaceful revolution -- a revolution which goes on steadily, quietly adjusting itself to changing conditions -- without the concentration camp or the quick-lime in the ditch."<sup>47</sup>

Our constitutional democracy similarly will continue to face the challenge of change for decades to come. The need to narrow the gap between the transformative vision of the Constitution, and the real lived experience of South Africans remains intense. Closing that gap, of course, is not primarily the task of the Courts but the task of all of us. In the words of another great American, Martin Luther King: "Change does not roll in on the wheels of inevitability, but comes through continuous struggle. And so we must straighten our backs and work for our freedom."

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<sup>1</sup> Section 39(I) of the Constitution

<sup>2</sup> Section 174(2) of the Constitution

<sup>3</sup> Some of this section of the speech draws on a speech I delivered at Trinity College Dublin in April 2000 and since published as "Cultivating a Constitution: Challenges facing the Constitutional Court in South Africa" (2000) 22 Dublin University Law Journal 1 - 18 especially from 3 - 7.

<sup>4</sup> Cited in I-Iassen Ebrahim *The Soul of a Nation: constitution-making in South Africa* 998 p 239.

<sup>5</sup> The difficulties are vividly described in Ebrahim *Id* 241.

<sup>6</sup> *Id* at 245

<sup>7</sup> See Hasscn Ebrahim

<sup>8</sup> See sections 59(1) and 72(1) of the Constitution

<sup>9</sup> See *Doctors for Life International v The Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at ; and *Matatiele Municipality and Others v President of the RSA and Others* 2007 (1) BCLR 47 (CC).

<sup>10</sup> Section 2 of the Constitution

<sup>11</sup> Section 172( 1) of the Constitution

<sup>12</sup> Section 172(2)(a) of the Constitution

<sup>13</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) at paragraph 151

<sup>14</sup> 2006 (1) SA 524 (CC)

<sup>15</sup> *Id* the Order, following paragraph 162

<sup>16</sup> Section 1 of the Canadian Charter of Rights and Freedoms provides that the "rights and freedoms set out ... [in this Charter] are subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

<sup>17</sup> Section 36(I) of the Constitution

<sup>18</sup> *S v Bhulwana* 1996 (1) SA 464 (CC) at paragraph 14

<sup>19</sup> *Executive Council, Western Cape Legislature and Others v President of the RSA and Others* 1995 (4) SA 877 (CC)

<sup>20</sup> The equivalent provision in the interim Constitution was section 82(1)(k). It was this provision which was under consideration in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC)

<sup>21</sup> Hugo at paragraph 8

<sup>22</sup> *Id* at paragraphs 28 - 29

<sup>23</sup> Section 211 (1) of the Constitution

<sup>24</sup> Section 211 (3) of the Constitution

<sup>25</sup> *She and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 563 (CC)

<sup>26</sup> Section 8(1) of the Constitution. See also section 7(2) which provides that the "state must respect, protect, promote and fulfil the rights in the Bill of Rights."

<sup>27</sup> See section 239 of the Constitution. This definition may be of interest in the light of the recent decision of the House of Lords in *YL (by her Litigation friend the Official Solicitor) (FC) (Appellant) v Birmingham CC and others* [2007] UKHL 27

<sup>28</sup> Section 8(2) of the Constitution

<sup>29</sup> Section 11 of the Constitution: "everyone has the right to life"

<sup>30</sup> Section 12(1)(e) of the Constitution" Everyone has the right ... not to be ... punished in a cruel, inhuman or degrading way."

<sup>31</sup> Section 26 of the Constitution

<sup>32</sup> Section 29 of the Constitution

<sup>33</sup> Section 27 of the Constitution

<sup>34</sup> Cass Sunstein *The Second Bill of Rights: FDR's Unfinished Revolution and why we need it*

<sup>35</sup> President Franklin in D Roosevelt Address to Congress January 6, 1941

<sup>36</sup> *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) at paragraph 31-34 ; see also *Port Elizabeth Municipality v Various Occupiers* 2005 (I) SA 217 (CC) at paragraphs 14 - 23

<sup>37</sup> Jaftha at paragraph 43

<sup>38</sup> Section 105 of the interim Constitution

<sup>39</sup> Section 178 of the 1996 Constitution

<sup>40</sup> See section 174(6) of the 1996 Constitution

<sup>41</sup> Section 174(2) of the Constitution

<sup>42</sup> Section 176 of the 1996 Constitution read with section XX of the Constitutional Court Complementary Act

<sup>43</sup> Davis and Williams "Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia" (2003) 27 *Melbourne University Law Review* 819; Gleeson "Judicial Selection and Training: Two sides of the One Coin" (2003) 77 *Australian Law Journal* 591; Hale "Equality and the Judiciary: Why should we want more Women Judges" (2001) *Public Law* 489; L'Heureux-Dube "Making a Difference: the Pursuit of a Compassionate Justice" (2000) International Bar Association Joint Session on "Women on the bench" 20 September 2000; Graycar "The Gender of Judgments: Some Reflections on 'Bias'" (1998) 32 *University of British Columbia* 1; Nedelsky "Embodied Diversity and the Challenges to Law" (1997) 42 *McGill Law Journal* 91; Omatsu "The Fiction of Judicial Impartiality"(1997) 9 *CJWL/RFD* 1; Devlin "We Can't Go on Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R v R. D.S'*" (1995) 18(2) *Dalhousie Law Journal* 408; Graycar "Law reform: Taking Gender into Account" (1995) Paper presented at Australian Law Reform Agencies Conference Brisbane 23 September 1995; Cooney "Gender and Judicial Selection: Should there be More Women on the Courts?" (1993) 19 *Melbourne University Law Review* 20; Minow "Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors" (1992) 33 *William and Mary Law Review* 1201; Wald "Some Real-life Observations about Judging" (1992) 26(1) *Indiana Law Review* 173; Mendes "'Promoting Heterogeneity of the Judicial Mind': Minority and Gender Representation in the Canadian Judiciary" (1991) in Ontario Law Reform Commission's *Appointing Judges: Philosophy, Politics and Practice* 91; Minow "Equalities" (1991) 88 *Journal of Philosophy* 663; Wilson "Will Women Judges Really Make a Difference?" (1990) 28(3) *Osgoode Hall Law Journal* 507; Sherry "Civic Virtue and the Feminine Voice in Constitutional Adjudication" (1986) 72 *Virginia Law Review* 543.

<sup>44</sup> Ackermann "Submission on the Role of the Judiciary" (1998) 115 *South African Law Journal* 54 (1981)

<sup>46</sup> Item 6, Schedule 2, Constitution of the Republic of South Africa, 1996

<sup>47</sup> President Franklin D Roosevelt *Address to Congress* 6 January 1941