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## South Africa's Constitutional Jurisprudence and the Path to Democracy: An Annotated Interview with Dikgang Moseneke, Acting Chief Justice of the Constitutional Court of South Africa

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SPECIAL INTERVIEW

SOUTH AFRICA’S CONSTITUTIONAL  
JURISPRUDENCE AND THE PATH TO  
DEMOCRACY: AN ANNOTATED INTERVIEW  
WITH DIKGANG MOSENEKE, ACTING CHIEF  
JUSTICE OF THE CONSTITUTIONAL COURT OF  
SOUTH AFRICA

*Introduction and Annotations by Conor Colasurdo & Rebecca Marlin,  
Members of the Executive Editorial Board of the Fordham  
International Law Journal\**

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INTRODUCTION

On October 21, 2013, Justice Dikgang Moseneke of the Republic of South Africa was invited by the Leitner Center for International Law and Justice (the “Leitner Center”)<sup>1</sup> at

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\* All history and analysis herein are that of Conor Colasurdo and Rebecca Marlin, members of the Executive Editorial Board (the “Board”) of the *Fordham International Law Journal*. Only direct quotes of Justice Moseneke may be attributed to him. The suggested citation for this interview is: Conor Colasurdo & Rebecca Marlin, Fordham Int’l Law Journal, *South Africa’s Constitutional Jurisprudence and the Path to Democracy: An Annotated Interview with Dikgang Moseneke, Acting Chief Justice of the Constitutional Court of South Africa*, 37 FORDHAM INT’L L.J. 279 (2014). When citing or quoting to the direct language used by Justice Moseneke, the suggested citation is: Conor Colasurdo & Rebecca Marlin, Fordham Int’l Law Journal, *South Africa’s Constitutional Jurisprudence*

Fordham University School of Law to deliver a lecture entitled “South Africa: Transition, Democracy and the Courts,” moderated by Gay McDougall, the Mulligan Distinguished Visiting Professor of International Law.<sup>2</sup> Shortly after the lecture, Justice Moseneke sat down with Zachary Cronin,<sup>3</sup> Conor Colasurdo,<sup>4</sup> and Rebecca Marlin,<sup>5</sup> members of the Executive

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*and the Path to Democracy: An Annotated Interview with Dikgang Moseneke, Acting Chief Justice of the Constitutional Court of South Africa*, 37 *FORDHAM INT’L L.J.* 279, \_\_\_ (2014) (quoting Justice Dikgang Moseneke). Mr. Colasurdo and Ms. Marlin would like to thank Christine Calabrese, John Keating, Ian King, and Jennifer Li, for their assistance transcribing this interview, and Zachary Cronin and Kieran Murphy for their editorial expertise.

1. The Leitner Center for International Law and Justice (the “Leitner Center”) was founded in September 2007 as a natural extension of the Crowley Program in International Human Rights (the “Crowley Program”) at Fordham University School of Law. The Leitner Center and the Crowley Program remain two of the preeminent programs for fieldwork-centered human rights scholarship and education. The Board thanks the Leitner Center for their assistance in securing this interview, as well as their dedication and devotion to the promotion of international law and justice. For more information, see LEITNER CTR. FOR INT’L LAW & JUSTICE AT FORDHAM UNIV., <http://www.leitnercenter.org> (last visited Feb. 12, 2014).

2. Professor Gay McDougall holds a B.A. from Bennington College, a J.D. from Yale University, and an LL.M. in Public International Law from the London School of Economics and Political Science. Professor McDougall was the Executive Director of Global Rights at Partners for Justice from 1994 to 2006. In 2005, she was named the first UN Independent Expert on Minority Issues. During the apartheid era in South Africa, Professor McDougall served as the Director of the Southern African Project of the Lawyers’ Committee for Civil Rights Under Law. In that capacity, she participated in the defense of thousands of political prisoners. In 1994, Professor McDougall served as an international member of the South African Independent Electoral Commission, which administered the nation’s first non-racial elections. The Board thanks Professor McDougall for her assistance in securing this interview, and for her exemplary work in the field of civil rights.

3. Zachary Cronin holds a B.A. in Politics and Economics from New York University, and expects to receive a J.D. from Fordham University School of Law in May 2014. Mr. Cronin serves as the Editor-in-Chief of Volume 37 of the *Fordham International Law Journal*.

4. Conor Colasurdo holds a B.A. in International Political Economy from Fordham College at Rose Hill, and expects to receive a J.D. from Fordham University School of Law in May 2014. Mr. Colasurdo serves as the Managing Editor of Volume 37 of the *Fordham International Law Journal*. In the summer of 2011, Mr. Colasurdo traveled with Fordham University’s Global Outreach program to Johannesburg and Cape Town, South Africa, where he visited the townships of Alexandra, Soweto, Kliptown, and Khayelitsha, among others, and worked with community organizations devoted to ameliorating the residual effects of apartheid.

Editorial Board (the “Board”) of the *Fordham International Law Journal*, for a brief interview. The transcript of that interview is included below, annotated with background information and commentary from the Board.

Born in Pretoria, South Africa, Justice Moseneke was arrested at the age of fifteen for his participation in anti-apartheid activism and sentenced to ten years’ imprisonment on Robben Island.<sup>6</sup> While imprisoned, Justice Moseneke earned his Bachelor of Arts in English and Political Science, as well as a Baccalaureate Juris degree. He later completed Legum Baccalaureus at the University of South Africa. In 1983, Justice Moseneke was called to the bar as an advocate in Johannesburg and Pretoria—in fact, he was the first Black advocate admitted to the Pretoria bar. In 2001, he was appointed as a Judge of the High Court in Pretoria, and, in 2002, as a Justice on the South African Constitutional Court. Justice Moseneke was then appointed Deputy Chief Justice of the Constitutional Court in 2005, and, in November 2013, as Acting Chief Justice during the long-term leave of Chief Justice Mogoeng Mogoeng.<sup>7</sup>

For years in the post-World War II era, South Africa stood out as an “inequalitarian pluralistic society.”<sup>8</sup> While most of the world moved, albeit slowly, toward broader ethnic cultural

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5. Rebecca Marlin holds a B.A. in Art History and French from Wellesley College, and expects to receive a J.D. from Fordham University School of Law in May 2014. Ms. Marlin serves as the Senior Articles Editor of Volume 37 of the *Fordham International Law Journal*. In the spring of 2013, Ms. Marlin traveled to Cape Town, South Africa, as a student of the Walter Leitner International Human Rights Clinic. There, she interviewed sex workers and activists at the Sex Worker Education and Advocacy Taskforce.

6. Since the beginning of the colonization of South Africa by the Dutch, and subsequently the British, Robben Island was used primarily as a prison. See *History of Robben Island*, ROBBER ISLAND MUSEUM, [http://www.robber-island.org.za/index.php?option=com\\_content&view=article&id=9&Itemid=46](http://www.robber-island.org.za/index.php?option=com_content&view=article&id=9&Itemid=46) (last visited Feb. 12, 2014). During apartheid, African leaders, Muslim leaders, and anti-apartheid activists, including South Africa’s first democratically-elected president, Nelson Mandela, were imprisoned on the island. See *id.*

7. See *Moseneke Steps in as Chief Justice*, MAIL & GUARDIAN: AFRICA’S BEST READ (Nov. 4, 2013, 7:00 PM), <http://mg.co.za/article/2013-11-04-moseneke-steps-in-as-interim-chief-justice>.

8. MARTIN N. MARGER, RACE AND ETHNIC RELATIONS: AMERICAN AND GLOBAL PERSPECTIVES 371 (Linda Schreiber-Ganster ed., 2008).

acceptance, the South African government legalized and enforced the racial oppression of Blacks, Coloureds, and Indians/Asians.<sup>9</sup> Throughout apartheid, Whites, the numerical minority, dominated South African society.<sup>10</sup>

The eventual end of apartheid, like many watershed moments in history, was the culmination of at least a decade's worth of developments, efforts, and events.<sup>11</sup> One event, though, stands out in particular. On June 16, 1976, Black high school students from the Soweto Township, outside Johannesburg, began a peaceful demonstration<sup>12</sup> protesting a directive of the Bantu Education Department mandating that Afrikaans be used

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9. *See id.* Under apartheid, the government classified each person in South Africa, primarily based on physical appearance, as Black, Coloured, Indian/Asian, or White. *See Race in South Africa: Still an Issue*, *ECONOMIST* (Feb. 4, 2012) <http://www.economist.com/node/21546062>. Although no longer legally enforced in South Africa, many still voluntarily identify in their respective categorizations. *Id.* Coloured, an unfamiliar term to American audiences in this context, was the official categorization of people of mixed-race backgrounds. *Id.* (noting that “if Barack Obama lived in South Africa, he might be called a coloured”). Regarded as “racial misfits,” the Coloured population was demoralized as “non-persons . . . the leftovers” by Marike de Klerk, the first lady of South Africa from 1989 to 1994. Perhaps the most visual representation of the arbitrary nature of apartheid policies, Coloureds range in skin tone and are sometimes indistinguishable from the Black and White population. In fact, in rare instances, some borderline Coloureds were reclassified after passing a pencil-in-the-hair test, where the blackness or whiteness of a person was determined by whether a pencil would slide out of that person’s hair. *Id.* (noting that curly hair that would trap a pencil was a “supposed indicator of blackness”). The majority of Coloureds reside in the Western Cape, and are thought to be the decedents of Dutch, French, German, and English Settlers and their slaves of Asian and African origin. *Id.*

10. Despite their dominance of society, Whites in South Africa were “by no means a culturally or even politically unified group.” MARGER, *supra* note 8, at 378. Over time, the Dutch settlers in South Africa developed a culture distinct from their European origins. *Id.* at 373. Such differences were most apparent in these settlers’ language of choice: Afrikaans, a Dutch-dialect that, over generations, became only “remotely related to the original Dutch.” *Id.* When the British eventually colonized South Africa, there was great tension between the Afrikaners and the British, who were more liberal with respect to race relations and never “coalesced into a nationlike unit” distinct from their European origins. *Id.* at 374–75. Under apartheid, Afrikaners controlled the political system, whereas the English-speaking Whites dominated the South African economy. *Id.* at 378. Interestingly, the majority of the Coloured population also speaks Afrikaans as their primary language. *See id.* at 379.

11. MARGER, *supra* note 8, at 390.

12. *See Hector Pieterse Memorial and Museum*, GAUTENG, [http://www.gauteng.net/attractions/entry/hector\\_pieterse\\_memorial\\_and\\_museum](http://www.gauteng.net/attractions/entry/hector_pieterse_memorial_and_museum) (last visited Feb. 12, 2014).

to an equal extent as English as the language of instruction of the Black population.<sup>13</sup> The same rule had failed twenty years previously because of a scarcity of teachers who spoke Afrikaans, a lack of textbooks in Afrikaans, and the difficulty of instructing students in multiple unfamiliar languages. This rule, like so many, was part of a system “designed specifically to condition Africans to accept the role of menials in a white man’s country.”<sup>14</sup> The students planned to march to the regional office of the Department of Bantu Education to voice their opposition to the new directive.<sup>15</sup> On their way, the students were subjected to a violent clash with the police. The students threw stones, while the police fired bullets.<sup>16</sup> News of the violence spread throughout the country, sparking uprisings and resulting in the death of more than 550 people.<sup>17</sup> One of the first to die in Soweto was Hector Pieterse, who was only twelve years old.<sup>18</sup>

In 1983, as a last attempt to secure White rule, the State adopted a new constitution, creating a parliament that represented Whites, Coloureds, and Asians, yet excluded Blacks.<sup>19</sup> The exclusion of Blacks in this new body was one of the factors that led to widespread violence between Blacks and the White establishment throughout the 1980s.<sup>20</sup> During this time, Black political organizations such as the African National Congress (“ANC”), led by Nelson Mandela,<sup>21</sup> were declared illegal.<sup>22</sup> By 1990, however, Prime Minister F.K. de Klerk had

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13. See *Down with Afrikaans*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/articles/down-afrikaans> (last visited Feb. 12, 2014).

14. See *id.*

15. See *Hector Pieterse Memorial and Museum*, *supra* note 12.

16. *Id.*

17. *Id.*

18. *Id.* A few blocks from where Pieterse was shot in Soweto are the Hector Pieterse Memorial and Museum, which are dedicated to memorializing the uprising and celebrating the role of students in ending apartheid. *Id.*

19. MARGER, *supra* note 8, at 391.

20. See *id.*

21. Nelson Mandela passed away on December 5, 2013, after the interview of Justice Moseneke and during the writing of this Annotated Interview. His passing was mourned by the world, and his legacy lives on as South Africa continues working towards equality and freedom for all.

22. *Id.* at 392. While always considered a “pariah” by western countries during apartheid, South Africa remained an important ally of the United States and Britain for

restored the legality of the ANC and other Black political organizations, and likewise had released Nelson Mandela from Robben Island.<sup>23</sup> Then, in 1994, the world bore witness to the effects of this radical transition: the first non-racial elections in South Africa, and the rise of Nelson Mandela as the first Black president of the South African State.<sup>24</sup>

This transition represents a truly remarkable moment in modern history. As Justice Moseneke has noted himself, the world watched as South Africans “stepped back from the edge of the cliff of violence, hatred and chaos and opted for a negotiated transition underpinned by reconciliation, restitution and reconstruction.”<sup>25</sup> Instead of continued civil unrest, South Africans chose peace. Instead of retribution, South Africans chose truth and reconciliation.<sup>26</sup>

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economic reasons. *Id.* at 391. In fact, Prime Minister Margaret Thatcher even described the African National Congress (“ANC”) as a “typical terrorist organization.” David Smith, *South Africans Give Mixed Response to Margaret Thatcher Death*, *GUARDIAN* (Apr. 8, 2013, 1:22 PM), <http://www.theguardian.com/politics/2013/apr/08/south-africa-margaret-thatcher-death>. President Ronald Reagan likewise placed the ANC on the US Terror List, where it remained until 2008, under the Bush Administration. *See Nelson Mandela Removed from US Terror List*, *TELEGRAPH* (July 2, 2008, 6:45 AM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/2233256/Nelson-Mandela-removed-from-US-terror-list.html> (“Today the United States moved closer at last to removing the great shame of dishonoring this great leader by including him on our government’s terror watch list.” (quoting then-Senator John Kerry)).

23. MARGER, *supra* note 8, at 392. In 1993, the Norwegian Nobel Committee named Nelson Mandela and F.W. de Klerk jointly as the recipients of the Nobel Peace Prize “for negotiating the end of the apartheid state and collaborating in the quest for a nonracial democracy.” Bill Keller, *Mandela Shares Nobel Accolade With De Klerk*, *N.Y. TIMES*, Oct. 16, 1993, <http://www.nytimes.com/1993/10/16/world/mandela-shares-nobel-accolade-with-de-klerk.html>.

24. MARGER, *supra* note 8, at 392.

25. Justice Dikgang Moseneke, Deputy Chief Justice of South Africa, Address at the 62nd Annual Meeting of the American College of Trial Lawyers: A Jurisprudential Journey from Apartheid to Democratic Constitutionalism (Oct. 19, 2012), *available at* <http://www.constitutionalcourt.org.za/site/judges/justicedikgangmoseneke/Speech-%20American-College-of-Trial-Lawyers-19-October-2012-Dikgang-Moseneke-10-Oct-2012.pdf>.

26. During the Truth and Reconciliation Commission hearings, Justice Moseneke learned that he was targeted for political assassination. *See Truth & Reconciliation Comm’n, Amnesty Comm., Application in Terms of Section 18 of the Promotion of National Unity and Reconciliation Act, No. 34 of 1995*, Paul Jacobus Janses van Vuuren Applicant, AC/99/0032 (AM 2777/96), *available at* <http://www.justice.gov.za/trc/>

Interestingly, this transition was born out of South Africa's preexisting legal institutions. The Interim Constitution, which called for the 1994 non-racial elections, was drafted by a technical committee on which Justice Moseneke served. Even more surprisingly, this transitional constitution, which virtually guaranteed the end of White-only rule, was enacted by the then-existing White-controlled parliament.<sup>27</sup> In accordance with this Interim Constitution, South Africa's then-newly elected parliament formed a Constitutional Assembly and drafted South Africa's current constitution.<sup>28</sup>

The South African government proudly explains that their Constitution is among the "most progressive . . . in the world [and] a beacon for emerging democracies."<sup>29</sup> Further, US Supreme Court Justice Ruth Bader Ginsburg recently suggested that Egyptians look to the South African Constitution, rather than the US Constitution, as inspiration for the Egyptian constitutional drafting process.<sup>30</sup>

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decisions/1999/99\_van%20vuuren.html ("The applicant stated in his application that he was instructed by Captain Loots to eliminate Adv. Dikgang Moseneke. He was also handed a file relating to Mr Moseneke at the same time. He kept Mr Moseneke under surveillance for a time. He thereafter received instructions to abandon the operation. He is seeking amnesty for the conspiracy to murder Mr. Moseneke. He also alleges that the offence was associated with a political objective as Mr Moseneke, a prominent member of the PAC, was promoting the struggle of the liberation movements.").

27. See Ziyad Motala, *Constitution-Making in Divided Societies and Legitimacy: Lessons from the South African Experience*, 15 TEMP. POL. & CIV. RTS. L. REV. 147, 151 (2005) (noting that the Interim Constitution was passed by the White parliament); *Judges: Deputy Chief Justice Dikgang Moseneke*, CONST. COURT S. AFR., <http://www.constitutionalcourt.org.za/site/judges/justicedikgangmoseneke/index1.html> (last visited Feb. 12, 2014) (stating that Justice Moseneke served on the technical committee that drafted the Constitution).

28. *The History of the Constitution*, CONST. COURT S. AFR., <http://www.constitutionalcourt.org.za/site/theconstitution/history.htm#1993> (last visited Feb. 12, 2014) (noting that the Constitutional Assembly had to work within particular parameters including: (a) a requirement of a two-thirds majority for the adoption of the new Constitution; (b) compliance with thirty-four constitutional principles agreed to in the interim Constitution; and (c) a deadline of two years).

29. Rowan Philip, *In Love with SA's Constitution: Why Does a US Supreme Court Justice Prefer South Africa's Constitution to Her Own?*, MAIL & GUARDIAN: AFRICA'S BEST READ (Feb. 24, 2012, 2:00 AM), <http://mg.co.za/article/2012-02-24-in-love-with-sas-constitution>.

30. See *id.*; Ariane de Vogue, *Ginsburg Likes S. Africa as Model for Egypt*, ABC NEWS (Feb. 3, 2012, 11:33 AM), <http://abcnews.go.com/blogs/politics/2012/02/ginsburg->



The South African Constitution, adopted in 1996, is unique in that, while incorporating many of the democratic ideals and structures present in the US Constitution, it also incorporates numerous human rights concepts taken from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights, among others.<sup>31</sup> Indeed, many nations have recognized human rights values in their constitutions, but South Africa is widely considered a leader in the progressive constitutional promotion of human rights through its full enumeration of civil, political, social, economic, and cultural rights.<sup>32</sup>

The South African Constitution currently consists of a Preamble, fourteen Chapters, and seventeen Amendments.<sup>33</sup> The most recent Amendment—the Seventeenth, adopted in February 2013—addresses an important issue that directly concerns Justice Moseneke. The Seventeenth Amendment realigned the Courts, positioning the Constitutional Court as the highest court, with review of all others, even the Supreme Court of Appeals.<sup>34</sup> The Amendment expanded the Constitutional Court’s jurisdiction, and it may now hear all

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likes-s-africa-as-model-for-egypt (“I would not look to the U.S. Constitution, if I were drafting a Constitution in the year 2012. I might look at the Constitution of South Africa . . . . That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights, had an independent judiciary . . . . It really is, I think, a great piece of work that was done. Much more recent than the U.S. Constitution.” (quoting Justice Ruth Bader Ginsburg)).

31. S. AFR. CONST., 1996; Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa’s Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 183 (1998) (“[A]ccording to two of the technical drafters of the interim Bill of Rights, Lourens du Plessis and Hugh Corder, international instruments such as the Universal Declaration of Human Rights (1948); the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) served as sources of inspiration.”). The Bill of Rights of the Interim Constitution of 1993 was codified in full in Chapter 2 of the Constitution of 1996, with the addition of some socio-economic rights. *Compare* S. AFR. CONST., 1996, ch. 2, *with* S. AFR. (INTERIM) CONST., 1993, ch. 3.

32. *See* S. AFR. CONST., 1996, §§ 7–39.

33. *See generally id.*

34. *See* S. AFR. CONST., Seventeenth Amendment Act of 2012.

matters, even those with no bearing on the Constitution.<sup>35</sup> With this Amendment, our guest, now the Acting Chief Justice of the Constitutional Court, is the highest-ranking Judge in South Africa. We are honored to have had the opportunity to speak with such an influential figure, and, furthermore, to have interviewed him at a time when South Africa's peaceful transition to democracy may shed light on methods to accomplish similar transitions in North Africa and the Middle East.

The interview that follows has been divided into four Parts: (I) social, economic, and cultural rights in the South African Constitution; (II) promoting rights of people with HIV/AIDS; (III) housing rights; and (IV) transitioning to democracy. Before each interview section, the Board has provided some legal and historical context for Justice Moseneke's remarks. These additions should *not* be considered the words of Justice Moseneke, and must be attributed, if cited, to Conor Colasurdo and Rebecca Marlin, on behalf of the *Fordham International Law Journal*. Questions asked by the Board have been marked "FILJ."

#### I. SOCIAL, ECONOMIC, AND CULTURAL RIGHTS IN THE SOUTH AFRICAN CONSTITUTION

The bedrock of the international human rights framework consists of three documents: the Universal Declaration of Human Rights (1948) ("UDHR"), the International Covenant on Civil and Political Rights (1966) ("ICCPR"), and the International Covenant on Economic, Social and Cultural Rights (1966) ("ICESCR"). Together, these documents are known as the "International Bill of Rights" of the human rights framework.<sup>36</sup> Though often taken as a group in the study of

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35. *See id.* The Constitutional Court may now hear all constitutional matters, as well as "any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court." *Id.*

36. *See* John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 527-28 (1976) (discussing the conceptualization of an International Bill of Rights, and its eventual construction as the three above-mentioned documents taken together).

international human rights, in application, there has been a large divide among States in promoting these documents. The rights enshrined in the ICCPR are frequently recognized and implemented by national governments, while many States have been reluctant to engage in the realization of the rights laid out in the ICESCR.<sup>37</sup> The United States, for example, has notably refused to ratify the ICESCR, after debating it for several years.<sup>38</sup>

The rights outlined in these two treaties have been categorized within the so-called “three generations of rights” framework: first generation rights are civil and political; second generation rights are socio-economic; and third generation rights refers to more far-reaching rights, such as environmental and developmental rights.<sup>39</sup> First generation rights are considered “negative” rights, meaning the State must refrain from interference, such as depriving an individual or group of

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37. HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 263–64 (3d ed. 2008) (noting that most states are conflicted as to whether to include economic and social rights in their governance, with the result that many vocally support economic and social rights, but “fail[] to take steps to entrench those rights constitutionally, to adopt legislative or administrative provisions based explicitly on the recognition of specific ESR as international human rights, or to provide effective means of redress to individuals or groups alleging violations of those rights”); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 839 (2012) (demonstrating through empirical study the greater rate of inclusion of civil and political rights in national constitutions, as compared to inclusion of economic, social, and cultural rights); OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS* 3–4 (lamenting that “[e]conomic, social, and cultural rights are . . . widely recognized in domestic legal systems, although not to the same extent as civil and political rights,” and recommending equal recognition within national governments).

38. *Id.* at 281–82. (describing the ambivalence of the United States towards the ICESCR, with varying opinions on the Covenant in each new presidential administration); <http://www.internationaljusticeproject.org/juvICCPR.cfm> (noting that although the United States has recognized civil and political rights through ratification of the ICCPR, it has done so with the inclusion of five “Reservations,” five “Understandings,” and three “Declarations,” which limit its application in the United States).

39. See Daniel Schneider, *The Constitutional Right to Housing in South Africa: The Government of the Republic of South Africa v. Irene Grootboom*, 2 INT’L J. CIV. SOC’Y 45, 47 (2004) (outlining the three generations of rights and their positive and negative obligations).

the right to vote or engage in civic life.<sup>40</sup> Second generation rights are “positive,” requiring action on the part of the State to provide citizens with access to food, housing, healthcare, workers’ rights, education, and more.<sup>41</sup> This stark contrast between State obligations under either a first or second generation rights regime may explain why some States have chosen not to adopt the ICESCR, even though the ICESCR is clear that socio-economic rights should be implemented progressively with regard to the capabilities of each individual state.<sup>42</sup>

Arguments on both sides of the debate are impassioned, and present different perspectives that may go to the core of a State’s self-conception. One scholar poses the question as:

What good was the right to free speech and to vote . . . if one was starving, homeless and illiterate? The opposing view was that civil and political rights were the only legitimate form of rights, and that socio-economic rights undermined individual freedom, interfered with free markets by justifying massive state intervention in the economy, and provided an excuse to ignore or even violate civil and political rights.<sup>43</sup>

The United States has been the most public opponent of the ICESCR, though the covenant was signed by former US President Carter and submitted to Congress for ratification.<sup>44</sup> Former Presidents Reagan and Bush opposed ratification, noting that “the idea of economic and social rights is easily abused by repressive governments which claim that they

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40. *Id.*

41. *Id.*

42. Article 2(1) of the ICESCR:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

International Covenant on Economic, Social and Cultural Rights art. 2(1), G.A. Res. 14531, 993 U.N.T.S. 3 (Dec. 16, 1966).

43. Schneider, *supra* note 39, at 47.

44. STEINER ET AL., *supra* note 37, at 281.

promote human rights even though they deny their citizens the basic . . . civil and political rights.”<sup>45</sup> The United States relaxed its position against socio-economic rights throughout the Clinton and second Bush administrations, and though President Obama has promoted extensive legislation on healthcare, his administration has stated that, “it does not seek action [on the ICESCR] at this time.”<sup>46</sup>

Alternatively, South Africa has been a major proponent of social, economic, and cultural rights. The South African Constitution purposely adopted the language and rights of both major covenants<sup>47</sup>: civil and political rights are enshrined in the right to vote,<sup>48</sup> the right to privacy,<sup>49</sup> the right to security of the person,<sup>50</sup> the right to life,<sup>51</sup> and the right to equality before the law,<sup>52</sup> among others. Economic, social, and cultural rights exist in the right to housing,<sup>53</sup> the right to food, water, and healthcare, and social assistance,<sup>54</sup> and labor rights such as the right to unionize.<sup>55</sup> The socio-economic rights listed in South Africa’s Bill of Rights make a bold and important statement about South Africa’s commitment to protecting these rights. The South African government has implemented these rights to varying degrees of success, and in the following portion of the

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45. U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICE FOR 1992, SUBMITTED TO THE S. COMM. ON FOREIGN REL. & H.R. COMM. ON FOREIGN AFF. 5 (J. Comm. Print 1993).

46. Barbara Stark, *At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement*, 20 *TRANSNAT’L L. & CONTEMP. PROBS.* 107, 108 (2011).

47. Lourens W.H. Ackermann, *The Legal Nature of the South African Constitutional Revolution*, in 1 *THE DIGNITY JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA* 43 (Drucilla Cornell et al. eds., 2013) (“[T]he rights and inherent values of dignity, equality, and freedom lie at the heart of the South African Constitution and enjoy the highest entrenchment in the Constitution, requiring for their amendment a supporting vote of at least 75 percent of the members of the National Assembly, and of at least six out of nine provinces in the National Council of Provinces.”).

48. S. AFR. CONST., 1996, § 19.

49. *Id.* § 14.

50. *Id.* § 12.

51. *Id.* § 11.

52. *Id.* § 9.

53. *Id.* § 26.

54. *Id.* § 27.

55. *Id.* § 23.

interview, Justice Moseneke describes how the Constitutional Court has served to protect socio-economic rights.

**FILJ:** During the lecture today you spoke a lot about the socio-economic rights that are within your Constitution. Do you think that this transition phase inspired them to be included in the Constitution?

**Justice Moseneke:** Yes, yes indeed. Now remember that all this caused in its original law about rights, and that categorization—so-called first generation rights, and second generation rights, and third generation rights—a lot of debate about the intersection between first and second generation rights. And that explains why subsequently, of course, you had the Social, Economic, and Cultural Rights Convention that came subsequent to the initial [civil and political] human rights. Because the debate had always been there; we are not the originators of the debate. The question was: “How do you protect so-called second generation rights?” And many governments, including [the United States’] and others, dismissed it as something that isn’t properly justiciable, that’s not enforceable by law, and that may be a matter of political contestation. And we each get a different view on it, and therefore we [South Africans] were part of that worldview that said that these were rights just *as* important as your right to freedom. You know? Freedom without water, it’s madness. We insisted that the connection is blatant. If you look at the Covenants—like, you know, Economic, Social, and Cultural Rights—the point is made that rights are indivisible. You can’t pick and choose what you like because they tend to be reinforcing. They quite indicate it’s a thin line between the two. Because really equality is about equal worth in society, and worth is about dignity.

So, we decided we’re not going to nitpick. We’re going to have a package that would protect those who were at the cutting end of an unequal society. And that’s what apartheid was. That’s what colonialism was. That’s what apartheid ultimately was. So there’s a deep desire to try and take active steps to equalize society. You could do a number of things. You could say, “We are all free men and women. The right to equality is

inalienable,” and a few other clever things. But in the end you actually have to confront inequality . . . . Without being overly ideological about it, that is the issue that we were concerned about. And South Africans had varying levels of concern about it. Those that were reasonably well-heeled didn’t care much about it, equality. And those who were the neediest cared much about it. And it’s quite natural.

**FILJ:** Would you say that South Africa has been a model for the region in terms of promoting economic and social rights?

**Justice Moseneke:** Yeah. I don’t want to sound arrogant, but you know we, we have shed some light, I think, on those issues. A lot of work has been done in the region and particularly with other stakeholders in other governments. But certainly the destruction of poverty and the reduction of social distance is a very big preoccupation of South Africans. There are many societies where, you know, the approach is, “Tough luck. You do what you can.” You know, “Get yourself straight and right,” you know? We say that, too, to our children, but we also say it’s important to have arrangements which would look after those who are vulnerable.

Social justice is a very important part of our understanding of democracy. I know it’s not what you have in [the United States]. That’s why you’re having this crazy debate around Obamacare. Which, as you heard in my lecture, we don’t have and can’t have. Government *must* build public hospitals. *Must* build clinics. It *must* provide pre-natal treatment for women. It must do it. So that means we must take part of our money . . . we must appropriate money to take care of that. So that is not an election or campaign thing. You can’t go and say, “If you vote me in, I will build you hospitals.” You have to do it. You can say, “I’ll make them run more efficiently,” of course. And that’s what most politicians are saying, you know. But you can’t say, “I’ll provide you with a public schooling system.” No, you must do it. And it’s a difference, I think, in our approaches and philosophy.

## II. PROMOTING RIGHTS OF PEOPLE LIVING WITH HIV/AIDS

South Africa's history with HIV/AIDS has been long and troubled; South Africa currently has a higher prevalence of HIV/AIDS than any other nation in the world—approximately 6.1 million people, or about eighteen percent, were living with HIV/AIDS in 2012—and nearly 240,000 people died of AIDS-related causes in the same year.<sup>56</sup> The amount of affected young women is even more dramatic, with 3.4 million HIV positive women in South Africa in 2012.<sup>57</sup> Today, there are 2.5 million children in South Africa who have been orphaned by HIV/AIDS,<sup>58</sup> and of the children who are maternal orphans, over seventy percent have lost their mothers to AIDS-related illnesses.<sup>59</sup>

Why has the AIDS epidemic affected South Africa so significantly? One large factor is South Africa's delayed response in addressing the epidemic and introducing antiretroviral treatments (“ARVs”) as part of a national strategy to combat HIV/AIDS.<sup>60</sup> Thabo Mbeki, President of South Africa from 1998 to 2008, and his Health Minister Manto Tshabalala-Msimang, infamously questioned both the realities of HIV transmission as well as the effectiveness of ARVs.<sup>61</sup> President Mbeki failed to implement a successful national AIDS prevention strategy; under his leadership, AIDS reduction was not a government priority. When he was recalled from the presidency in 2008,

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56. *HIV and AIDS Estimates (2012)*, UNAIDS, <http://www.unaids.org/en/regionscountries/countries/southafrica> (last visited Feb. 12, 2014).

57. *Global Health Facts: Women Living with HIV/AIDS (Aged 15 and Over)*, HENRY J. KAISER FAM. FOUND., <http://kff.org/global-indicator/women-living-with-hiv-aids> (last visited Feb. 12, 2014).

58. *HIV and AIDS Estimates (2012)*, *supra* note 56.

59. *HIV and AIDS in South Africa*, AVERT.ORG, <http://www.avert.org/hiv-aids-south-africa.htm> (last visited Feb. 12, 2014).

60. *HIV/AIDS in South Africa*, AIDS FOUND. S. AFR., <http://www.aids.org.za/hiv-aids-in-south-africa> (last visited Feb. 12, 2014) (citing a “history of poor leadership in response to the epidemic” as a factor in South Africa's extremely high prevalence rate).

61. *HIV and AIDS in South Africa*, *supra* note 59 (noting Mr. Tshabalala-Msimang's supposed cure for HIV of beetroot and garlic consumption).



more than 18.5% of the adult population was living with HIV/AIDS.<sup>62</sup>

While there is clearly much work to be done, there are reasons to be hopeful. In 2013, Health Minister Aaron Motsoaledi announced that South Africa had “turned the corner” in the fight against the AIDS epidemic, while still acknowledging the long road ahead.<sup>63</sup> The government has attempted to combat HIV/AIDS through the promotion of ARVs, and today more than two million South Africans are benefitting from these drugs.<sup>64</sup> Mother-to-child transmission reduction remains a top priority;<sup>65</sup> in 2011, over ninety-five percent of pregnant women received treatment to prevent transmission to their children.<sup>66</sup> The government has also worked to address the secondary effects of HIV/AIDS: the National Strategic Plan of 2012–2016 includes the provision of basic services to children orphaned by AIDS.<sup>67</sup> Finally, a huge media campaign was launched by the government in 2010 with

62. Thabo Mbeki—Biography, JOURNAIDS.ORG, [http://www.journaids.org/index.php/essential\\_information/hivaids\\_key\\_people/thabo\\_mbeki](http://www.journaids.org/index.php/essential_information/hivaids_key_people/thabo_mbeki) (last visited Feb. 12, 2014) (referencing President Mbeki’s 2008 recall, “triggering the start of a new era of AIDS governance”); *Epidemiological Factsheet on HIV and AIDS: South Africa*, UNAIDS (2009), <http://www.unaids.org/en/regionscountries/countries/southafrica> (follow “Epidemiological Fact Sheet on HIV and AIDS, 2009”).

63. Ron Allen, *South Africa ‘Turns Corner’ on HIV/AIDS, But Still Has a Long Way to Go*, NBC NEWS (Aug. 12, 2013, 3:39 PM), available at <http://theorio.com/2013/08/12/south-africa-turns-corner-on-hivaids-but-still-has-a-long-way-to-go> (quoting Motsoaledi: “We know it is a long way, still quite a journey, but we’ve definitely turned the corner”).

64. *Id.*

65. See S. AFR. DEP’T OF HEALTH, NATIONAL PMTCT ACCELERATED PLAN (A-PLAN) STATUS REPORT (Sept. 2010), available at <http://www.sarrahsouthafrica.org/LinkClick.aspx?fileticket=Qt5CxiOrHFc%3D&tabid=2326> (outlining a four-pronged approach to mother-to-child prevention: 1) including HIV prevention measures in pre-existing services such as reproductive health care; 2) counseling women with HIV to make informed decisions about their reproductive life; 3) preventing unintended pregnancies; and 4) addressing HIV treatment and management for already-pregnant HIV positive women).

66. UNAIDS, WORLD AIDS DAY REPORT 30 (2012), available at [http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/JC2434\\_WorldAIDSday\\_results\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/JC2434_WorldAIDSday_results_en.pdf).

67. The Plan intends to provide a “comprehensive package that will remove structural barriers” for orphans and vulnerable children. S. AFR. HIV CLINICIANS SOC’Y, NATIONAL STRATEGIC PLAN ON HIV, STIS AND TB 2012–2016, at 78 (2012), available at [http://www.sahivsoc.org/upload/documents/National\\_Strategic\\_Plan\\_2012.pdf](http://www.sahivsoc.org/upload/documents/National_Strategic_Plan_2012.pdf).

the purpose of raising awareness, with some signs of success three years later.<sup>68</sup>

A strategy to reduce the transmission and debilitating effects of HIV/AIDS would not be complete without the incorporation of human rights. South Africa's Bill of Rights contains numerous provisions adopted from the ICCPR and the ICESCR that address the rights of those living with HIV/AIDS. To specify several of the most significant, there is the right to human dignity, which ensures that no person or organization, such as a hospital or company, may degrade another person because of their HIV/AIDS status;<sup>69</sup> the right to freedom and security of the person, which prevents violations of a person's bodily integrity, such as forced HIV testing;<sup>70</sup> and the right to privacy, which gives each person the individual choice of whether to disclose their status.<sup>71</sup> Additional highly significant rights include the right to health care and social assistance;<sup>72</sup> the rights to housing<sup>73</sup> and education<sup>74</sup> for all, even those with HIV/AIDS; and freedom of trade, occupation, and profession without discrimination based on HIV status.<sup>75</sup> Finally, the freedom of association<sup>76</sup> and the right to have access to information<sup>77</sup> have been frequently exercised in allowing people

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68. Jodi McNeil, *A History of Official Government HIV/AIDS Policy in South Africa*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/topic/history-official-government-hiv-aids-policy-south-africa> (last visited Feb. 12, 2014) ("In April [2010], an HIV Counselling and Testing (HCT) media campaign was launched by the government to increase discussion of HIV in South Africa. It operated through door-to-door campaigning and billboards to promote the availability of free testing and counseling in health clinics, as well as to reduce the myths and stigma surrounding the disease. . . . There has been steady progress since, and by 31 May 2011 Health Minister Motsoaledi proudly announced that 11.9 million South Africans were being tested for HIV every year.").

69. S. AFR. CONST., 1996, § 10.

70. *Id.* § 12.

71. *Id.* § 14.

72. *Id.* § 27.

73. *Id.* § 26.

74. *Id.* § 29.

75. *Id.* § 22.

76. *Id.* § 18.

77. *Id.* § 32.

living with HIV/AIDS to organize and distribute life-saving information to others.

Justice Moseneke took some time to speak with us about one particular constitutional case that addressed the rights of those living with HIV/AIDS and put to the test how far the Constitutional Court would go in protecting the socio-economic rights listed in the Bill of Rights. The case concerned, specifically, the right to health care, both for adults and for children in the context of mother-to-child transmission. A group called the Treatment Action Campaign (the “TAC”) initiated the case. Launched in 1998, the TAC focuses on HIV/AIDS awareness and prevention, with the specific goal of ensuring that all South Africans, not just the wealthy, have access to ARVs.<sup>78</sup> The TAC has been extremely successful; in a 2003 article in the *New Yorker*, current US Ambassador to the United Nations Samantha Power lauded the TAC as “the most important dissident in the country since Nelson Mandela.”<sup>79</sup>

In 2002, the TAC came to international fame by suing the South African government in the Constitutional Court, in a case known as *Treatment Action Campaign v. Minister of Health*.<sup>80</sup> The case surrounded the drug Nevirapine, which, if taken at birth by mother and child, prevents mother-to-child transmission of HIV.<sup>81</sup> The government had been given a large supply of Nevirapine for free by its manufacturers, and had begun a program to distribute the drug at only two sites in the country.<sup>82</sup> The TAC argued that this was a violation of Articles 27 and 28 of the South African Bill of Rights, which state, respectively, that “Everyone has the right to have access to health care services, including reproductive health care,” and that “Every child has the right to basic nutrition, shelter, basic health care services

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78. *About Treatment Action Campaign*, TAC.ORG, [http://www.tac.org.za/about\\_us](http://www.tac.org.za/about_us) (last visited Feb. 12, 2014).

79. Samantha Power, *Letter from South Africa: The AIDS Rebel*, *NEW YORKER*, May 19, 2003, at 54.

80. 2002 (5) SA 721 (CC) (S. Afr.).

81. *Id.* para. 5 n.3.

82. *Id.* para. 19

and social services.”<sup>83</sup> The Constitutional Court, to which Justice Moseneke had recently been appointed, found that in declining to extend the program beyond the two designated sites, the government had failed to protect the rights of mothers and children to basic health care.<sup>84</sup> The government was ordered to distribute the drug to all women and infants as medically prescribed.<sup>85</sup> The decision was momentous and reaffirmed South Africa’s commitment to the protection of socio-economic rights for women, children, and those living with HIV/AIDS.

**FILJ:** Can you tell us about some of the earliest cases where you were implementing these new rights and maybe where they weren’t as easily accepted as they are today?

**Justice Moseneke:** Yes. I didn’t talk today about a very important case called *TAC v. The Minister of Health*. TAC is Treatment Action Campaign. After the transition, we stumbled into an AIDS epidemic. It must have been building up just before the transition, and then we found—and this was another brand of HIV, which came out of heterosexual sexual contact, not out of homosexual sexual contact, which was what was known and seen in California and other parts of the world, and this country and the world. So ours was a different brand on the African continent. It was mainly heterosexual. TAC was formed to try and bring solidarity around people who live or are affected by HIV and AIDS. And mothers, pregnant mothers, were affected by this, and the scourge would be transferred from mother to child. And there were antiretrovirals that had just been discovered, which could retard or exclude transmission or infection from mother to child, for instance, a child in utero. So this was something wonderful, very special in the sense that it’s good. Otherwise you have babies born with HIV and AIDS, and you increase the incidence in the country substantially. And many children who would live with HIV/AIDS from childhood.

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83. *Id.* para. 4; S. AFR. CONST., 1996, §§ 27(1), 28(1).

84. *Treatment Action Campaign*, 2002 (5) SA para. 135(2).

85. *Id.* para 135 (3).

The government dragged its feet about this. A bit . . . there's a bit of sophistry. The arguments were, "Do you spend money on the living or on the dead?" Limited resources. You know, do you spend them on those who, in any event, are going to pass on, or do you spend it on those who are young, healthy, vibrant and want to go on? The government refused to spend billions of rand buying pharmaceutical products—and mainly from the U.S. and other Western countries—so it would take a big part of our budget to buy this stuff and the government said, "No, we're not doing any of it." TAC came to court, and we ordered them to do it.

Today, we have I think the most progressive treatment regime—public treatment regime—in the world. And all the numbers of HIV/AIDS are all looking southwards. All of them. And the new infections, mother-to-child transmission, mortality among those already infected. We look at those numbers very closely in our country, and we have an expansive scheme where we provide HIV/AIDS treatment. It's a very progressive scheme, which has been joined by people like Bill Gates and others who have provided, at least now, funding. So it looks particularly good. So, it's an example of a socio-economic rights case which has made a real difference. Housing has been another area. Access to water has been another. Access to education with all of the government to supply textbooks and stuff where they have not done so. So in regards to the Constitution, we have tried to breath life into those cold words on paper.

### III. *HOUSING RIGHTS*

Like much of the developing world, South Africa struggles with the issue of adequate housing. From the time of colonization to the present, many Black, Coloured, and Indian/Asian South Africans have lived in what are commonly referred to as "townships," or areas designated for non-White dwellers under apartheid legislation.<sup>86</sup> As of 2005, approximately

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86. See S. AFR. DEP'T CO-OPERATIVE GOVERNANCE & TRADITIONAL AFF., TOWNSHIP TRANSFORMATION TIMELINE 6 (June 2009), available at <http://www.shisaka.co.za/documents/TownshipTransformationTLnarrative.pdf>. It should be noted that under

thirty-six percent of the South African population lives in the townships, and most of those living there are Black.<sup>87</sup> Within townships, there are both formal housing structures and informal housing structures, which commonly take the form of shacks. Life in these informal homes can be grim to Western observers, as many of these shacks lack running water, electricity, and basic sanitation services.<sup>88</sup> In 2000, the “appalling conditions” of some of South Africa’s housing culminated in a case before the South African Constitutional Court: *The Government of the Republic of South Africa v. Irene Grootboom and Others*.<sup>89</sup>

Irene Grootboom lived in Wallacedene, an informal settlement outside of Cape Town. All of the residents of Wallacedene lived in shacks, none of which had access to water, sewage, or garbage disposal services. Only five percent of the shacks had access to electricity. Grootboom lived with her sister and their families in a shack that was only twenty square meters (roughly 215 square feet).<sup>90</sup> To make matters worse, much of Wallacedene was waterlogged.<sup>91</sup>

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current South African law, “township” has a different non-racially-charged meaning. *See* Land Survey Act 8 of 1997 § 1(xxv) (S. Afr.) (defining “township” as “a group of pieces of land, or of subdivisions of a piece of land, which are combined with public places and are used mainly for residential, industrial, business or similar purposes, or are intended to be so used”).

87. S. AFR. DEP’T CO-OPERATIVE GOVERNANCE & TRADITIONAL AFF., *supra* note 86, at 8. Although not all homes in townships are informal settlements, around nine to ten percent of the South African population lives in informal settlements (shacks) outside of a backyard. *See* S. AFR. HOUS. DEV. AGENCY, SOUTH AFRICA: INFORMAL SETTLEMENTS STATUS 24 (2012), available at [http://www.thehda.co.za/uploads/images/HDA\\_Informal\\_settlements\\_status\\_South\\_Africa.pdf](http://www.thehda.co.za/uploads/images/HDA_Informal_settlements_status_South_Africa.pdf).

88. *See* Schneider, *supra* note 39, at 45.

89. 2000 (11) BCLR 1169 (CC) (S. Afr.).

90. As a contrast, the average New York City studio apartment, a typical home for one city dweller in New York, is 550 square feet. Pauline Kim, *NYC Mayor: Diminutive Dwelling Design Wanted*, CNN (July 10, 2012, 6:24 PM), <http://www.cnn.com/2012/07/10/us/new-york-microunits/index.html>. Grootboom lived with her common law husband, their child, her sister and her sister’s husband, and their three children. *See* Schneider, *supra* note 39, at 51. Grootboom, therefore, was living with seven other people in less than half the space of one New Yorker living on his/her own.

91. *See* Grootboom, 2000 (11) BCLR para. 7.

One of the first initiatives adopted by the newly elected ANC government was the Reconstruction and Development Programme (“RDP”), which initially aimed, among other things, at building one million low-cost affordable housing units within five years.<sup>92</sup> In 1997, the South African parliament enacted the Housing Act, which sought “to provide citizens and permanent residents with access to *permanent* residential structures with secure tenure ensuring internal and external privacy and to provide adequate protection against the elements.”<sup>93</sup> Noble as this may be, however, the Act had, according to the Court:

no express provision to facilitate access to *temporary* relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition.<sup>94</sup>

Indeed, as the Court then noted, “[t]hese are people in desperate need.”<sup>95</sup>

Like many of the people living in townships, Grootboom and her co-respondents had applied for low-cost permanent government subsidized housing, but faced a waiting list several years long.<sup>96</sup> Thus, Grootboom and others packed up their shacks and re-located to nearby privately owned land that was supposed to eventually become low cost housing.<sup>97</sup> The owner of the land then sought to evict Grootboom and the others, even though the group had no other place to go as their spaces back in Wallacedene had been filled by new residents.

As noted above, South Africa’s Constitution is, in a sense, an international oddity in that it enshrines socio-economic rights within its Bill of Rights. Specifically, two sections of the

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92. *Policy Documents: A Basic Guide to the Reconstruction and Development Programme*, AFR. NAT’L CONG., <http://www.anc.org.za/show.php?id=234> (last visited Feb. 12, 2014).

93. *Grootboom*, 2000 (11) BCLR para. 51 (emphasis added).

94. *Id.* para. 52 (emphasis added).

95. *Id.*

96. *Id.* para. 8 (“Many had applied for subsidised low-cost housing from the municipality and had been on the waiting list for as long as seven years.”).

97. *Id.*

South African Constitution appear to directly address the rights of South Africans to adequate housing. First, the Bill of Rights, section 26, declares that:

- (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.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.<sup>98</sup>

Second, the Bill of Rights, section 28, provides that “Every child has the right . . . (c) to basic nutrition, *shelter*, basic health care services and social services.”<sup>99</sup>

Though the South African Constitution requires the government to act to ameliorate the types of conditions affecting the Wallacedene community,<sup>100</sup> this duty is qualified by the fact that the State is not required to “go beyond available resources or to realise these rights immediately.”<sup>101</sup> Therefore, the housing rights found in these two sections of the Constitution do not entitle South Africans to housing on demand, but to a government that implements “a coherent, co-ordinated programme designed to meet” its socio-economic constitutional obligations.<sup>102</sup> The Constitutional Court did not lay out exactly what this means in the *Grootboom* opinion, but it did note that the situation in Wallacedene indicated that the State was failing to “devise, fund, implement and supervise measures to provide relief to those in desperate need.”<sup>103</sup>

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98. S. AFR. CONST., 1996, § 26

99. *Id.* § 28 (emphasis added).

100. *Grootboom*, 2000 (11) BCLR para. 93.

101. *Id.* para. 94.

102. *Id.* para. 95.

103. *Id.* para. 96. The above is only a *very* brief summary of *The Republic of South Africa v. Grootboom and Others*. The full opinion is available for free at: <http://www.saflii.org/za/cases/ZACC/2000/19.pdf>. For more on the housing situation in South Africa, see, for example, David Smith, *White South Africans' Move to Black*



**FILJ:** Earlier today, you were speaking about the right to housing, specifically in the context of the RDP housing and the townships. Can you talk to us about the process that citizens go through applying for RDP housing—and how that right is enforced by the courts?

**Justice Moseneke:** Sure. A lot of things happen, of course, besides and outside the courts. There will be a housing budget, some of the money is given to the municipality; the other money goes to the province, and then the national. But generally the money gets distributed to these two levels [municipality and province] to build homes, because national will find it difficult to build homes themselves. Homes are built, a waiting list is developed, and it's very long. And homes are allocated. It's one of the few places you'll see in the world where we build homes and give them away. If you show need and you're on the waiting list and you live in the area [in addition to a few other requirements], many people have been given homes. But you must demonstrate that you can't, you know, "I've got my home, I have to maintain my home, I pay bond," you know. Like anybody else, or you know . . . . Most Africans have collateral, so the banking system works. So we're talking about vulnerable people. Let's just get this clear. We don't have a jurisdiction where everybody says "Hello, I need a home," and they get a home. A jurisdiction where if you demonstrate the need, then you can lay a claim to be provided with access to housing.

Sometimes access takes the form of the government helping provide infrastructure available to own a home. Sometimes it takes the form of a government building "bachelor flats"—I don't know what they call them here, I don't know why they call them bachelors, because it could be a man or a woman but we call things "bachelor"—single apartments, or something like that. The government builds low-cost apartments, then

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*Township Draws Praise and Accusations*, *GUARDIAN* (Sept. 3, 2013, 5:28 AM), <http://www.theguardian.com/world/2013/sep/03/white-south-africans-move-black-township>.

people rent them. So if you're employed and it's within your range, then you rent a subsidized apartment. So access takes many forms, and has been happening for long, you know? The conspicuous lack of access relates to shack dwellers. They are conspicuous, you see them. When you fly to Cape Town, you go to Jo'burg, you go to Kliptown, you see people living . . . and as I say, many, many units have been built, many, many more have to be built. But, in twenty years, I think on balance the government has done well; they could have done better. In this bleak age, there is corruption related: the procurement process, the tenant process has not been as good as it could be, and many people feel that the government could have done better than it has done. I'd say that's probably true.

If you came and told us that you need a home, and you're entitled to one, and you meet the requirements, we'll ask the government, "Why doesn't she have a home?" There's a question to be answered there. They'll have to file a brief where they set out the facts, and they do that routinely. It happens in other contexts: when people are evicted as unlawful occupiers, they always cause the government to be joined as a party in those proceedings. Under our jurisprudence, the government must *always* be ordered to provide alternative accommodation. If an owner who has squatters on the land wants to get them away, we say to the owner, "You take it easy, you can't rush around, this is a social issue." We join the government and when we say an order ought to be made to evict the "unlawful" dwellers, the shack dwellers, whatever you want to call them, occupiers, the government must tell us how they plan to provide alternative accommodation. And it's worked like a bomb. So we indirectly compel the government to buy land to house landless people. And landlessness has come out of our community experience of dispossession. That's where it comes from. So you have millions of South Africans who have no place they can call home, they have no land that they can point to and say, "That's my land, I'm going to build there." So we, the Court hears, something we talked about today: we have succeeded a whole jurisprudence on unlawful occupiers. I've personally written several opinions on that, and the Court has generated opinions where we're slow at evicting people. Even you or I have to stay there patiently as we work out. Because if you throw someone out of farm A, what do

you think they're going to do? They have to live somewhere, they're going to live on farm B. The owner of farm B throws them out and then they go to farm C. And destroying their livelihoods. Think about it, their children, their schooling, everything that goes with it. So every time we have a claim, the government must find alternative accommodation, and they must give us a plan, where they're going to take them.

In urban dwellings, when inner city collapse happens, and people have to be moved, either because the building is unsafe, even in cases like that. It's fine, but where are you going to take them to? So government has begun to build in Jo'burg, for instance, urban stock, where they clean up urban buildings so they can put people in there. So there have been some success stories around socio-economic jurisprudence. The government hates it, but if there's a case, we order them to be joined because we know what's going to happen. It's a clash between private ownership and public need—that's where the conflict is. And we resolve it by placing it at the door of the government. In [the United States] I know what you'd do; you'd say, "We don't want big taxes, we don't want big government," but we do the other way around and it has worked, by and large. Are there many people who have don't homes? Yes. Are they all South African? No, let me tell you that. The burden of Zimbabwe, we carry. The burden of Somalia, we carry. Because most of the people you talk to in formal settlements they don't speak in South African languages, they come from somewhere else.

#### IV. *TRANSITIONING TO DEMOCRACY*

Transitional justice is one of the most-discussed topics of international legal discourse, and South Africa is rightfully at the center of it.<sup>104</sup> As apartheid slowly fell throughout the 1980s and

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104. See, e.g., Dustin N. Sharp, *Addressing Economic Violence in Times of Transition: Toward A Positive-Peace Paradigm for Transitional Justice*, 35 *FORDHAM INT'L L.J.* 780, 792 (2012); Thomas Obel Hansen, *Transitional Justice: Toward A Differentiated Theory*, 13 *OR. REV. INT'L L.* 1 (2011); Jamie Rowen, *Social Reality and Philosophical Ideals in Transitional Justice*, 7 *CARDOZO PUB. L. POLY & ETHICS J.* 93, 94 (2008); Eric Brahm, *Transitional Justice, Civil Society, and the Development of the Rule of Law in Post-Conflict Societies*, 9 *INT'L J. NOT-FOR-PROFIT L.* 62 (2007); Erika de Wet, *The "Friendly but Cautious" Reception of*

early 1990s, Latin American nations likewise shifted from military to civilian control, and Eastern Europeans crafted new democracies after the fall of the Berlin Wall.<sup>105</sup> Currently, much of North Africa and the Middle East are facing, often arduously, transitions from authoritarian rule. In 2010, the world's nineteen predominately Arab-speaking nations shared one characteristic: "constitutional veneers [that were] flimsy disguises for strongman rule."<sup>106</sup> In astonishingly quick succession in the spring of 2011, governments in Tunisia, Egypt, Libya, and Yemen fell to popular protest.<sup>107</sup> Other countries throughout the region have exploded into demonstrations and violence, typified by the civil war raging in Syria against the Bashar al-Assad regime.<sup>108</sup>

In the aftermath of the rapid shifts in power throughout Middle Eastern states, international discourse of the so-called "Arab Spring" turned to worries of an "Islamist Winter."<sup>109</sup> Some have claimed that events such as the Ennahda Party's win of the plurality vote in the Tunisian elections for their new Constitutional Assembly, and the inauguration of Mohammed Morsi of the Muslim Brotherhood as the President of Egypt, "promise[] nothing but sorrow and future conflict" for the region.<sup>110</sup>

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*International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks*, 28 FORDHAM INT'L L.J. 1529 (2005); Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L L. 47, 69 (2004); Brandon Hamber, *Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 FORDHAM INT'L L.J. 1074 (2003); Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003); Ruti G. Teitel, *Transitional Justice in A New Era*, 26 FORDHAM INT'L L.J. 893, 894 (2003).

105. See *supra* note 104.

106. Max Rodenbeck, *A Climate of Change*, ECONOMIST, July 13, 2013, at 2.

107. *Id.*

108. *Has the Arab Spring Failed?*, ECONOMIST, July 13, 2013, at 11.

109. Editorial, *From Arab Spring to Islamist Winter*, WASH. TIMES, Oct. 25, 2011, <http://www.washingtontimes.com/news/2011/oct/25/from-arab-spring-to-islamist-winter>.

110. Jonathan S. Tobin, *The Islamist Winter and the Middle East Peace*, COMMENTARY (Jan. 22, 2012, 1:48 PM), <http://www.commentarymagazine.com/2012/01/22/islamist-winter-peace-palestinians-hamas-fatah-israel/>; Tamara Cofman Wittes, *Learning to Live with the Islamist Winter*, FOREIGN POL'Y, July 19, 2012, <http://>

As a direct participant in South Africa's constitutional transition, Justice Moseneke is in a unique position to speak to the choices made by South Africans, and advise other societies-in-transition throughout the world.

**FILJ:** One of the key questions we're interested in is the transition from apartheid to democracy, and the Constitution as a reaction to apartheid. Do you have any general thoughts that you'd like to say about that?

**Justice Moseneke:** We had a few choices. One of the choices was to find a way through. We would have had a bloodbath. Our choice was to think through a mechanism that would leave both sides sort of simply confident to go through the process. And we cut up the process into comfortable, confidence-building exercises. And the first was: government and people, let's talk. Here are the bottom lines. And these were agreed to very quickly. The bottom lines were quite obvious. For instance, you know, adult franchise. Remember that Black people were not allowed to vote at all. So the demand was "Everybody's going to vote." It looks obviously simple, but what it really means is that the white man was going to lose political power. Because, you know, the numbers are self-evident. So, if we vote at all on adult suffrage, or franchise, it meant that there was going to be an instant change of government. It meant that Nelson Mandela was going to become President immediately after the elections. And this is what happened. So you're really not just asking them to allow everybody to vote; you're asking them to surrender power. Which they agreed to do.

**FILJ:** If you could give one piece of advice to societies in transition, given South Africa as an example, what would you say to them?

**Justice Moseneke:** We've used principles of democracy and the rule of law to structure our transition. We didn't leave it open-ended to political forces. Those are ever present but we did it with discipline. You need some form of discipline. If you look at Egypt, and you look at Libya, you look at . . . you have to decide, if you decide it's going to be a Muslim state, so be it; and then you have to find some path to take it from there to a Muslim state, and it must be, the principles must be . . . . In that case it was clear, that step one was going to be negotiation, was going to be peaceful. One thing is the law to dismantle apartheid, and the other the law to replace apartheid. There was a straightjacket that we created, and worked within it. And at every step, we were going to negotiate this agreement. One, we'll have an Interim Constitution, and, two, Parliament must adopt it. Three, Parliament must dissolve itself once the Constitution is adopted. Four, holding of elections by a credible body, the IEC [Independent Electoral Commission], that Professor McDougall and I served, we were eventually the government during that interim. We could commandeer this, commandeer that, because there basically was no real government; there was an outgoing government which had voted in this new Constitution, this Interim Constitution, which basically had a sell-by date. The 27th, the starting of elections, the government ceased to exist. So you need to think through carefully the milestones, and you need to think through the rules that will regulate the milestones. We set up a commission, the commission we set up and the law was passed by the apartheid government. So it's confidence building, step by step. And we're taking small, careful steps. But you can't have a transition overnight. You must think through the steps and go through them, because they're important for confidence building, for reassuring each other that you are . . . it's a little like, you know, first dinner, and you start seeing each other, you know, and Starbucks coffee, and then you move in, maybe you might move in, no you don't move in, you engage, but you need steps that reassure that you're on a good path, the wedding, and then forward to the babies. So you need these steps. And it looks simple, but it's common sense actually, a place like Libya and Egypt, most of those places have never taken a real deep breath and stopped, and said "what do we need, and what are the milestones that will

reassure everybody that we're still on track?" I think we did that rather well.

**Gay McDougall:** If I could just add here, the difference, though, was that the old government had been convinced that it had to go, and there was a long path to convincing it that it had no option but to go. And that's not been the case in Egypt and Libya, and that's been their problem; they didn't have the time to plan. In South Africa you all went through such extreme, extraordinary measures of thinking through every little piece of the way, because you had already convinced this government that there was no future for it. Even the army, even the generals—

**Justice Moseneke:** —that they would cooperate with us to bring their demise, that they would cooperate with us to terminate their rule.

But then, what it means and what you actually are saying is, you have to visualize an end, and everybody must live with that objective, everybody must say we're moving there. And there were challenges in the process, it's not easy: whether or not to indemnify the generals. It was a big, big issue. Many of the South Africans today are not convinced that it was the right thing. Whether or not to say anything at all in the Constitution about property, for instance. Some people wanted nothing, no property provisions, and we'll sort it out later. Some people wanted blanket protection of property acquired over the years. It wasn't easy, but the general objective was agreed to and we took steps to achieve it.