THE JOHN F. SONNETT MEMORIAL LECTURE

A PILLAR OF DEMOCRACY: REFLECTIONS ON THE ROLE AND WORK OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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> "The true administration of justice is the firmest pillar of good government."[1]

In his memorable judgment in the matter in which the Constitutional Court declared the death penalty to be unconstitutional, *S v. Makwanyane*,[2] former Chief Justice Ismail Mahomed spoke of the new South African Constitution in the following terms:

> All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised . . . and the moral and ethical direction which that nation has identified for its future. In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past . . . . The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic . . . . What the Constitution expressly aspires to do is to provide a transition from the[] grossly unacceptable features of the past to a conspicuously contrasting future founded on the recognition of human rights, democracy and

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1. This quote is inscribed on the facade of the New York Supreme Court courthouse at 60 Centre Street.
2. 1995 (3) SA 391 (CC).

> peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.[3]

The powerful message of this passage is that the South African Constitution is a transformative document which recognises that our society needs to change in fundamental ways and which articulates the values that are to guide the process of transformation. It is nearly eighteen years since constitutional democracy dawned in South Africa. Eighteen years in which constitutional democracy has been taking root and in which a strong form of judicial review has been undertaken by the courts. My purpose this evening is to describe to you the role of the courts, and particularly the Constitutional Court, in this new constitutional order.

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),[4] 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 more clearly the structural constraints that historical antecedents and present conditions impose. In so doing, it allows us to imagine different ways of being both democratic and respectful of human rights—the twin obligations of the modern state.

Before turning to the role of the Court, I am going briefly to describe how our Constitution was drafted. Then, I will discuss the genesis of the Court and how its members are appointed. And finally, I will describe the role of the Court under the Constitution by illustrating two aspects of our jurisprudence: how the Court deals with difference in our society; and how it adjudicates social and economic rights—two of the most challenging areas of constitutional jurisprudence, in our democracy, as well as in many others.

I. THE PROCESS OF CONSTITUTIONAL CHANGE

How was the South African Constitution drafted?[5] The process which culminated in our Constitution commenced in the 1990s 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

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3. *Id.* at 487–88 para. 262 (internal quotation marks omitted).

4. S. AFR. CONST., 1996 § 39(1)(c).

5. 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*, 22 DUBLIN U. L.J. 1, 3–7 (2000).

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 thirty-four 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!

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

> It is therefore important that as we put our vision to the country, we should do so directly, knowing that people out there want to be part of the process and will be responding, because in the end the drafting of the constitution must not be the preserve of the 490 members of this Assembly. It must be a constitution which they feel they own, a constitution that they know and feel belongs to them. We must therefore draft a constitution that will be fully legitimate, a constitution that will represent the aspirations of our people.[6]

Ramaphosa was right. If, as Ismail Mahomed says, a constitution is not merely a legal document but is a charter which identifies the shared aspirations of a nation and its common values,[7] a process of public participation is essential.

Consulting the public in any society is never an easy task. In South Africa, a society (at the time) of more than 40 million people, many of whom live in poverty in rural areas, many of whom are not fully literate, and many of whom have only irregular access to print or electronic media, it is daunting indeed.[8] The approach adopted by the Constitutional Assembly was multifaceted. Advertisements were placed in the print and broadcast media calling for submissions to the Constitutional Assembly. 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

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6. HASSEN EBRAHIM, THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA 239 (1998).

7. *Makwanyane* 1995 (3) SA at 487–88 para. 262.

8. *See* EBRAHIM, *supra* note 6, at 241.

717 organisations.[9] Of these meetings, Hassen Ebrahim, the executive Director of the Constitutional Assembly said:

> The public meetings held were extremely successful: discussions were lively, ideas original, and the exchange of views appreciated. These meetings also served to highlight the point that constitutions are about basic values affecting society and should be understood by even the least educated. It was a humbling experience to realize that constitutional debates and issues are not only the domain of the intellectual elite, but that they belong to everyone.[10]

In addition, there were television and radio programmes broadcast to air the key issues under negotiation. By and large, these programmes were structured as discussions between members of the Constitutional Assembly and members of civil society on issues under consideration in the Assembly such as the Bill of Rights, the separation of powers, the national anthem and flag, traditional leaders, and the death penalty.

A website 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.

How successful was the process of public participation? That is difficult to evaluate. Its purpose was clearly twofold: a substantive one to allow members of the public to affect the actual provisions of the Constitution itself; and a process-based one, rooted in a conception of democracy which is participative rather than merely representative. 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 doctoral 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 percent of South Africans.[11] The same research makes it clear that many members of the public were sceptical about the call for public participation.[12] 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.

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,

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9. *Id.* at 244.
10. *Id.* at 245.
11. *Id.* at 243.
12. *See id.* at 239–50.

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 their ground rules of their organisations. These processes were often conflictual 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.[13] The Constitutional Court has had to interpret these provisions on several occasions. Relying extensively on international law, the Court has held, by majority, that the provisions require Parliament to act reasonably to facilitate public involvement in law-making. If Parliament unreasonably fails to facilitate public involvement, 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.[14] As former Chief Justice Ngcobo said in his judgment:

> [T]he duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.[15]

13. S. AFR. CONST., 1996 §§ 59(1)(a), 72(1)(a).

14. *See Doctors for Life Int'l v. Speaker of the Nat'l Assembly* 2006 (6) SA 416 (CC) at 467 para. 124; *see also Matatiele Municipality v. President of the Republic of S. Afr. (2)* 2007 (6) SA 477 (CC) at 491–94 paras. 50–55.

15. *Doctors for Life* 2006 (6) SA at 474 para. 145.

II. 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. Although somewhat resistant to precise definition, a constitutional matter is a matter that involves the interpretation or enforcement of a provision of the Constitution. Given the scope of the Bill of Rights in our Constitution, the range of constitutional matters is far broader than it would be were the Bill of Rights to be less expansive.

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."[16] 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.[17] The Constitution then provides that the Court may make any "just and equitable" order.[18] Such an order may suspend the order of invalidity for any period and on any conditions in order to allow the competent authority, which may be Parliament, a provincial legislature, or an administrator, the 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.[19] Between five and ten cases are confirmed by the Court each year through this procedure.

A. *The Appointment of Judges*

The eleven judges of the Constitutional Court thus play an important and powerful role under our constitutional order. 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.[20] 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 twenty-three members[21]: 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

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16. S. AFR. CONST., 1996 § 2.
17. *Id.* § 172(1)(a).
18. *Id.* § 172(1)(b).
19. *Id.* § 172(2)(a).
20. *Id.* § 178(1); *see* Judicial Service Commission Act 9 of 1994 (S. Afr.).
21. S. AFR. CONST., 1996 § 178.

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).[22]

High Court judges and judges of the Supreme Court of Appeal (formerly the Appellate Division and the highest court of appeal in nonconstitutional matters) are appointed by the President on the advice of the Judicial Service Commission.[23] In practice, this has meant 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 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.

The Constitution itself expressly requires that a key factor for the Commission to consider in appointing judges is "[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa."[24] In 1994, of 166 judges all but four were white men. Today the figure has changed significantly. The composition of the Constitutional Court bench in July 2011 was as follows: eight men (three White and five Black) and two Black women. The current Chief Justice is Mogoeng Mogoeng; and the Deputy Chief Justice is Dikgang Moseneke. Constitutional Court judges serve a maximum period of fifteen years.[25]

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,[26] but for me two reasons stand out. The first is that a diverse bench

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22. *Id*.

23. *See id.* § 174(6).

24. *Id.* § 174(2).

25. *See* S. AFR. CONST., First Amendment Act of 2001.

26. *See, e.g.*, Sean Cooney, *Gender and Judicial Selection: Should There Be More Women on the Courts?*, 19 MELB. U. L. REV. 20 (1993); Rachel Davis & George Williams, *Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia*, 27 MELB. U. L. REV. 819 (2003); Richard F. Devlin, *We Can't Go on Together with Suspicious Minds: Judicial Bias and Racialized Perspective in* R. v. R.D.S., 18 DALHOUSIE L.J. 408 (1995); Murray Gleeson, *Judicial Selection and Training: Two Sides of the One Coin*, 77 AUSTRALIAN L.J. 591 (2003); Regina Graycar, *The Gender of Judgments: Some Reflections on "Bias,"* 32 U. B.C. L. REV. 1 (1998); Brenda Hale, *Equality and the Judiciary: Why Should We Want More Women Judges?*, 2001 PUB. L. 489; Claire L'Heureux-Dubé, *Making a Difference: The Pursuit of a Compassionate Justice*, 31 U. B.C. L. REV. 1 (1997); Errol P. Mendes, *"Promoting Heterogeneity of the Judicial Mind": Minority and Gender Representation in the Canadian Judiciary*, *in* ONT. LAW REFORM COMM'N, APPOINTING JUDGES: PHILOSOPHY, POLITICS AND PRACTICE 91 (1991); Martha Minow, *Equalities*, 88 J. PHIL. 663 (1991); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201 (1992); Jennifer Nedelsky, *Embodied Diversity and the Challenges to Law*, 42 MCGILL L.J. 91 (1997); Maryka Omatsu, *The Fiction of Judicial Impartiality*, 9 CAN. J.

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 the siren of identity determinism. Your identity determines your judgments. 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 they live; and that their race, gender, religion, schooling, and a variety of other factors have affected their beliefs and understanding of the world. But the task of judging in a democracy demands more of judges than that they merely give effect to a world-view inherited from their particular background. It demands a self-conscious appreciation of the impact of their background on their 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.

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, of whatever nature. We need to keep these constantly in mind and to endeavour actively and persistently to counteract them. Furthermore, we all need to understand the insidious influence of institutional culture and to appreciate the powerful effects of the class, social and political environments in which we live and work, and the potential that this has for making us insensitive to the context and views of others.[27]

So requiring diversity on a collegial court enables judges to interrogate their own prejudices or blind-spots. The more alike judges are, the more likely that they will mistake prejudices for simple truths; the more different they are, the more likely that they will interrogate the correctness of their assumptions. 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 persons alike

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WOMEN & L. 1 (1997); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Patricia M. Wald, *Some Real-Life Observations About Judging*, 26 IND. L. REV. 173 (1992); Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507 (1990).

27. L. W. H. Ackermann, *Submission to the Truth and Reconciliation Commission Re: The Role of the Judiciary*, 115 S. AFR. L.J. 15, 54 (1998).

without fear, favour or prejudice,"[28] we need to know where our prejudices lie. To me, therefore, this is the second reason for diversity on the bench: the fostering of judicial self-awareness is of great importance to me as a judge. It is a constant reminder not to delude myself that I am by nature impartial. Needless to say, it is a consideration which I like to draw to the attention of my colleagues from time to time as well!

B. The Work of the Court

The Constitutional Court has handed down 422 judgments in its first seventeen years of existence, a rate of just under twenty-five per year. This is not a prodigious judicial output compared to other senior courts around the world. But that relatively low output needs to be assessed in the light of three considerations.

The first is that the Court has eleven members, and the general rule is that all eleven judges sit in every case. Although there is no doubt that the size of the Court is valuable in many respects, it probably slows down the process of decision-making and writing. Just, for example, to go round the table and permit every judge to air his or her views on a case will often take an hour.

Secondly, the Court receives far more applications for access to the Court than it actually enrols for hearing. Each of these applications, which in the last four years that I was at the Court exceeded the number of cases heard on a ratio of between three and four to one (that is, an additional seventy-five to one hundred cases per annum to those that are actually enrolled for hearing) are considered by all the judges of the Court, unlike other senior appellate courts which often delegate this decision making responsibility to a few judges. As our Constitution stipulates that a quorum of the Court is eight, no one can be turned away from the Court without at least eight judges having considered the matter.[29]

Finally, the issues that have come before the court in its first seventeen years have been some of the most difficult considered by courts anywhere. Some have attracted much public comment, such as the constitutionality of the death penalty, gay marriage, and some high profile criminal matters. Other issues have required the Court to grapple with issues relating to the interpretation and protection of social and economic rights—where there is no tried and tested path—and questions of constitutional structure and relationship that involve interpretation of the provisions of the Constitution other than the Bill of Rights.

How often does the Court declare an Act of Parliament to be inconsistent with the Constitution? According to my records, the Court has heard 147 such challenges and in ninety cases has upheld the challenge, an average of just under six times a year. Interestingly, the average has not declined markedly over the period. In the first five years, twenty-nine legislative

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28. S. AFR. CONST., 1996 sched. 2, item 6.
29. *Id.* § 167(2).

provisions were declared to be invalid. In the following five years, twenty-nine legislative provisions were declared invalid, and in the seven years since, thirty-two provisions have been declared to be 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.[30] Similarly controversial was the order in the case of *Minister of Home Affairs v. Fourie*[31] 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."[32]

The model of judicial review adopted in the South African Constitution gives considerable powers to courts to determine the constitutionality of legislation, and once having done so, compels a court to declare legislation inconsistent with the Constitution invalid. Yet there are other provisions in the Constitution which make it plain that the Court must listen carefully to the reasons given by the legislature and executive for enacting legislation which limits rights entrenched in the Bill of Rights.

The model of rights adjudication is a two-stage model, perhaps most closely aligned with (though by no means identical to) the Canadian model.[33] This means that a court when considering a constitutional challenge to legislation asks two questions. The first is, does the legislation 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.

30. *S v. Makwanyane* 1995 (3) SA 391 (CC) at 453 para. 151.

31. 2006 (1) SA 524 (CC).

32. *Id.* at 585.

33. 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 such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, pt. 1, § 1 (U.K.).

Should the Court decide that the legislation does limit a right, the next question that will arise is whether the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."[34] This affords the executive 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 an infringement will nevertheless pass 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. The approach was summarised in an early decision of the Court as follows:

> In sum, therefore, the Court places the purpose, effect and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.[35]

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.

As we saw in relation to the legislature's obligation to public participation in the making of legislation, where the Court held that the legislature must openly and reasonably determine the extent of public participation it will facilitate in the making of any particular law, limitation analysis requires the government to disclose its reasons for enacting legislation which has infringed the Bill of Rights. The Court then assesses whether those reasons are sufficient given the nature of the limitation of rights concerned. 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.

III. "SOUTH AFRICA BELONGS TO ALL WHO LIVE IN IT, UNITED IN OUR DIVERSITY"

So 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

34. S. AFR. CONST., 1996 § 36(1).
35. *S v. Bhulwana* 1996 (1) SA 388 (CC) at 395 para. 18.

customary law, religious and cultural practices, and the rights of noncitizens. The Court has had cases in all these areas. Tonight I only have time to discuss two. The first concerns customary law; and the second cultural and religious practices in schools.

As a matter of social practice, traditional leaders still 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 "[t]he institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution."[36] It also provides that "[t]he courts must apply customary law when that law is applicable, subject to the Constitution."[37]

The first important case where the Court has had to consider customary law was the case of Mrs. Bhe.[38] She came to court seeking relief on behalf of her seven- and ten-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 Mrs. Bhe and the two young girls homeless. With the assistance of a local organisation, Mrs. 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 exclusion of women from inheritance on the grounds of gender is a clear violation of . . . the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.[39]

The Court thus declared that the rule of male primogeniture in customary law was inconsistent with the Constitution to the extent that it excludes women or extramarital 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

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36. S. AFR. CONST., 1996 § 211(1).
37. *Id.* § 211(3).
38. *Bhe v. Magistrate* 2005 (1) SA 580 (CC).
39. *Id.* at 621–22 para. 91.

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.

The second case that is illustrative of the approach to diversity in our constitutional framework is the case of Sunali Pillay.[40] Ms. Pillay was a fifteen-year-old student at a public school for girls in Durban. The school had a code of conduct which provided for a school uniform and which prohibited the wearing of jewelry at school, save for ear-studs (at the same level), watches, and medic-alert bracelets.

Ms. Pillay's family came originally from southern India and some of the women in her family had a tradition of wearing a nose stud, which is a widespread cultural and religious practice in Hindu communities in southern India. Contrary to the school rules, Ms. Pillay had her nose pierced and started wearing a tiny nose stud to school. The school objected but gave her three months' grace to allow the piercing to settle and then told her that she would have to remove the stud. When Ms. Pillay did not do so, the school asked her and her mother to explain on what basis they sought an exemption from the school's uniform code. Her mother explained that:

> It is a time-honoured family tradition. Sunali and I come from a South Indian family that has sought to maintain a cultural identity by respecting and implementing the traditions of the women before us. Usually, a young woman would get her nose pierced upon her physical maturity (the onset of her menstrual cycle) as an indication that she is now eligible for marriage. While this physically oriented reasoning no longer applies, we do still use the tradition to honour our daughters as responsible young adults.[41]

After consulting experts on Hindu religion and culture, the school decided that this reasoning did not warrant an exemption to be made and proceeded with school disciplinary hearings against Ms. Pillay, who then approached the Equality Court. The matter wound its way through the court system to the Constitutional Court, which by a majority upheld Ms. Pillay's claim. In the end result, although the Court was divided on the precise order, the principle that underlay both judgments was the principle that, under our Constitution, diversity must not only be tolerated but fostered.

IV. A SOUTH AFRICAN SPECIALITY: SOCIOECONOMIC RIGHTS

Time does not permit a full consideration of this aspect of the Court's jurisprudence, but I shall describe it briefly.

Rights that are protected are the right of access to adequate housing,[42] to a basic education,[43] the right of access to health care services, sufficient

40. *MEC for Educ. v. Pillay* 2008 (1) SA 474 (CC), CCT 51/06 (Oct. 5, 2007). This is an as yet unreported judgment of the Constitutional Court.

41. *Id.* at 67 para. 131.

42. S. AFR. CONST., 1996 § 26.

food and water, and social security.[44] 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."[45]

In including such rights within the Bill of Rights, South Africa went beyond the conventional terrain of a Bill of Rights in commonwealth countries. Most domestic rights instruments protect civil and political rights, such as the right to freedom of expression and association. Far fewer 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.

Indeed, in a recent fascinating book,[46] Cass Sunstein has suggested that a key reason for the inclusion of both civil and political rights, as well as social and economic rights, was Franklin D. Roosevelt's insistence that the two were interrelated. FDR famously identified four essential human freedoms: freedom of speech, freedom to worship God in one's own way, freedom from want, and freedom from fear.[47] This led him to draft what he called "the second Bill of Rights," which contained social and economic rights.[48]

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 healthcare 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 for shelter, nutrition, and clothing must 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

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43. *Id.* § 29.

44. *Id.* § 27.

45. *Id.* § 26.

46. CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004).

47. President Franklin D. Roosevelt, Address of the President of the United States to Congress (Jan. 6, 1941), *in* 87 CONG. REC. 44, 46–47 (1941).

48. *See* SUNSTEIN, *supra* note 46, at 61–95.

in the world, and one in which the colour of one's skin remains a strong predictor of socioeconomic status. Unless the basic needs of food, housing, and education are met, civil and political rights may seem mere luxuries. This 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 who had been historically dispossessed and excluded.

The real challenge in entrenching social and economic rights 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. Both civil and political rights, and social and economic rights may 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 is 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 from 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."[49] 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.

49. S. AFR. CONST., 1996 § 26(2).

In the Nevirapine case,[50] in which the government proposed to establish only two sites per province for Nevirapine to be provided to HIV positive pregnant mothers, the question was whether that constituted a reasonable measure to achieve the right of access to health care.[51] Given that the manufacturers of the medication were furnishing it to the government for free, and given that it was clear that the government had the capacity to establish testing and counselling centres in excess of two per province, and given the World Health Organization's assessment of the value of Nevirapine in reducing mother to child transmission of HIV, the Court held that the government's plan was not reasonable.[52] The order the Court made was:

> It is declared that:
>
> (a) Sections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.
>
> (b) The programme to be realised progressively within available resources must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them . . . .[53]

The Court went on to declare that the current policy fell short of compliance with this declaratory order and the government was ordered, "without delay to: Remove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites."[54] Finally, the Court ruled: "The orders made [above] do not preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV."[55]

The approach of the Court to social and economic rights, as the text of the Constitution requires and consistent with its approach to its relationship with the legislature and executive in other areas, is to consider whether the measures established by government in any respect of a particular right, or aspect of it, are reasonable. In considering what will be reasonable, the Court said in an early case:

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50. *Minister of Health v. Treatment Action Campaign (1)* 2002 (5) SA 721 (CC).
51. *Id.* at 764–65 para. 135.
52. *Id.* at 754 para. 95.
53. *Id.* at 764–65 para. 135.
54. *Id.* at 765 para. 135.
55. *Id.*

> Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving the realisation of the right.[56]

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 needed 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.[57] 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:

> [I]t is clear that there will be circumstances in which it will be 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 far outweighed by the immense prejudice and hardship caused to the debtor.[58]

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56. *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) at 69 para. 44.

57. *See Jaftha v. Schoeman, Van Rooyen v. Stoltz* 2005 (2) SA 140 (CC) at 155–56 paras. 31–34; *see also Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) at 225–29 paras. 14–23.

58. *Jaftha*, at 158–59 para. 43.

CONCLUSION

It is perhaps surprising given our history that courts should have been given such an important role in our new constitutional democracy. But I hope that I have illustrated tonight, neither tendentiously, nor in a manner insensitive to my own judicial role, that the role of courts under the South African Constitution is twofold. The first is to protect the fundamental rights of South African citizens—not only civil and political rights, but also social and democratic rights. The second is 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. I would like to end, perhaps surprisingly, with the words of FDR in his famous four freedoms speech to which I have already referred and which I think sums up the ongoing challenge of change in the South African Constitution: "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 quicklime in the ditch."[59]

59. Roosevelt, *supra* note 47, at 47.