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Introduction

It is said in Africa that Western Culture has a 'big mouth and small ears.'
Patrick Glenn, Legal Traditions of the World 84 (2007)

For years, South Africa looked as if it would explode. The oppressed black majority and its allies were battling the powerful, wealthy, and racist apartheid regime on political and military fronts. In turn, apartheid security forces murdered heroic figures like Steven Biko and tried to assassinate Constitutional Court Justice Albie Sachs, blowing off one of his arms with a car bomb in Mozambique. South Africa's relatively peaceful transition to a multiracial democracy during the 1990s was therefore miraculous, especially compared to the civil wars that have broken out in other nations.[1]

Historians, political scientists, and others offer explanations for why this peaceful transition occurred. Nobel Peace Prize winners Nelson Mandela and Desmond Tutu provided crucial leadership. International political and economic pressure played a role as did global developments such as the end of the Cold War.[2] Most important, many South Africans took to the streets at great personal risk.[3] Despite the country's AIDS pandemic,[4] the massive gap between rich and poor that has

[1] *See generally* Patti Waldmeir, Anatomy of a Miracle (1997).
[2] Heinz Klug, Constituting Democracy: Law, Globalism, and South Africa's Political Reconstruction 52–61 (2000).
[3] *Id.* at 81.
[4] UNAIDS, 2006 Report on the Global AIDS Epidemic, Annex 2 (5.5 million South Africans have AIDS including 18.8% of those between ages 18–49), http://data.unaids.org/pub/GlobalReport/2006/2006_GR_ANN2_en.pdf (last visited Nov. 19, 2007). In 2007, UNAIDS admitted their statistics had been overstating the problem. Donald G. McNeil Jr., "A Time to Rethink AIDS Grip," N.Y. Times, Week in Review (Nov.

helped produce terrible crime,[5] and political domination by one party,[6] South Africa now has a vibrant economy,[7] a relatively strong infrastructure,[8] and a critical press which enhance the prospects for social stability.[9]

Numerous scholars have chronicled South Africa's constitutional revision process.[10] As of 1983, the country had a bizarre tricameral system with parliamentary chambers for whites, coloured people, and Indians, but not blacks.[11] Moreover, the government had established artificial black homelands in destitute regions.[12] By contrast, South Africa now has a democratically elected bicameral parliament and a new Constitutional Court that authoritatively interprets the Bill of Rights. It also has a rational provincial system.

25, 2007) http://www.nytimes.com/2007/11/25/weekinreview/25mcneil.html?_r=1&ref=weekinreview&oref=slogin (last visited Nov. 27, 2007). There is no doubt, however, that South Africa's situation in this area is dire.

[5] The United Nations and other international organizations use the gini coefficient as a statistical measure of the gap between the rich and poor in a nation. The South African divide is the second largest in the world next to Brazil. Jerome A. Singh, Michelle Govender, Nilam Reddy, "South Africa a Decade after Apartheid: Realizing Health through Human Rights," 12 Geo. J. on Pov. L. & Pol'y 355, 358 (2005). For adiscussion of the South African crime problem and its link to factors such as the wealth gap, *see generally* Diana Gordon, Transformation and Trouble: Crime, Justice, and Democratic Participation in South Africa (2007).

[6] *See generally,* Roger Southall, (Ed)., Opposition and Democracy in South Africa (2001); Michael Wines, "Dark Turns of Party Struggle Enthrall South Africa," N.Y. Times A4 (Oct. 12, 2007).

[7] Sharon LaFraniere, "World Bank Reports Progress in Sub-Saharan Africa," N.Y. Times A3 (Nov. 15, 2007) ("South Africa is ranked among the top third of the best nations in which to do business" in the world, and is part of a region that has a growth rate above many developed countries.).

[8] CIA, The World Fact Book: South Africa, Economy: overview (Nov. 15, 2007) (South Africa has "a modern infrastructure supporting an efficient distribution of goods to major urban centers throughout the region.") http://www.cia.gov/library/publications/the-world-factbook/geos/sf.html (last visited Nov. 19, 2007).

[9] U.S. Department of State, 2006 Country Reports on Human Rights Practices – Africa, South Africa, Sec. 2A., Respect for Civil Liberties, Freedom of Speech and Press (March 6, 2007) ("The constitution and law provide for freedom of speech and of the press, and the government generally respected these rights. Several apartheid era laws that remained in force posed a potential threat to media independence. Individuals criticized the government both publicly and privately without reprisal. The independent media were active and expressed a wide variety of views, although some journalists expressed concern that the government heavily influenced the media.") http://www.state.gov/g/drl/rls/hrrpt/2006/78758.htm (last visited Nov. 19, 2007).

[10] *See e.g.* Lourens du Plessis, Hugh Corder, Understanding South Africa's Transitional Bill of Rights (1994); Hassan Ebrahim, The Soul of a Nation (1998).

[11] Ebrahim, *id.* at 18.

[12] Klug, *supra* n. 2 at 40.

This book examines a crucial aspect of the South African transition: the Constitutional Court's role in social change. The Court has enforced socioeconomic rights,[13] supported gay marriage,[14] and struck down the death penalty.[15] How did the Court address these significant issues without much domestic human rights case law on which to draw?[16]

Certainly, President Nelson Mandela's adherence to the Court's adverse decisions against his government enhanced the Court's authority and the rule of law.[17] Moreover, the Court's Justices have been impressive. They include apartheid opponents, human rights advocates, leading academics, and individuals of different races, genders, and sexual orientations, all with an acute political sensibility. The Court has also gradually become more representative of the population, which is another crucial aspect of transformation.[18] The drafters of the Constitution's judicial selection process deserve credit here. But a comparative perspective can illuminate the Court's rulings.

[13] Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC)(Court orders national government to develop a policy to help the homeless). *See* Rosalind Dixon, "Creating Dialogue about Socio-Economic Rights: Strong-Form versus Weak-Form Judicial Review Revisited," 5 Int'l J. of Const. L. 391 (2007) (Grootboom "is one of the most important examples of the judicial enforcement of socio-economic rights known to comparative constitutional lawyers.").

[14] Minister of Home Affairs v. Fourie, 2006 (1) SA 524 (CC).

[15] State v. Makwanyane, 1995 (3) SA 391 (CC).

[16] John Dugard wrote that apartheid's "parliamentary sovereignty and . . . primitive positivist outlook have combined to produce a system of law with no constitutional safeguards for individual liberty and a legal profession with neither the power nor, perhaps, the will to resist invasions of the most basic human freedoms." John Dugard, Human Rights and the South African Legal Order xii (1977). *See also* Albie Sachs, "A Bill of Rights for South Africa: Areas of Agrement and Disagreement," 21 Colum. Hum. Rts. L. Rev. 13, 14 (1989) ("South Africa has had anti-slavery agitation and the struggle for a free press as far back as the 1820's, the emerging movement for African rights of the 1880's, the campaigns over the treatment of Boer women and children in concentration camps . . . the feminist movement shortly after that..trade union struggles."); Arthur Chaskalson, "Equality and Dignity," 5 Green Bag 2d 189, 191 (2002) ("There was a continuing tension between what might often have been equitable values of the common law and the grossly inequitable values of the Apartheid laws."). One prominent South African scholar has described the Constitutional Court's job as building a bridge from a culture of authority to a culture of justification. Etienne Mureinik, "A Bridge to Where?: Introducing the Interim Bill of Rights," 10 S. Afr. J. Hum. Rts. 32 (1994).

[17] Klug, *supra* n. 2 at 150 (quoting President Mandela).

[18] Jackie Dugard, Theunis Roux, "The Record of the South African Constitutional Court," in Robert Gargarella, et al., (Eds.), Courts and Social Transformation in New Democracies 108 (2006) ("The racial composition of the Court itself has changed over the last ten years, from the position in 1994 when seven of the judges were white and four black, to the position today in which that ratio has been reversed.").

THE COMPARATIVE ANGLE

To evaluate South Africa's jurisprudence, this book analyzes Constitutional Court rights decisions and compares them with U.S. Supreme Court rulings on similar issues. This comparison should clarify the assumptions underlying the decisions of each Court and its different ways of approaching issues. This comparative approach is consistent with constitutional discourse's increasingly transnational nature, which has been brought about by globalization, democratization, the Internet, and even social networking.[19] The book focuses more on South Africa because the U.S. Supreme Court has been the centerpiece of so much academic attention.

There are other reasons why the juxtaposition of South Africa and the U.S. high courts makes sense. Both nations grew out of revolutions that rejected tyranny, and both high courts are seminal institutions. The U.S. Supreme Court interprets the oldest written constitution in the world – the model for all that followed. Its framers relied on the latest jurisprudential, philosophical, and political thought from both eighteenth-century Europe and the ancients.[20] Though relatively new, the South African charter has been called "the most admirable constitution in the history of the world" by Cass Sunstein, a leading law professor[21] Indeed, the South African Constitution's framers surveyed the world's constitutions for the best ideas.[22]

In addition, the United States and South Africa share a history of institutionalized racism and a struggle "to overcome," and each is now racially diverse.[23] Moreover, the United States is the world's military and

[19] *See generally*, Anne Marie Slaughter, A New World Order (2004).

[20] Melvin Urofsky and Paul Finkelman, A March of Liberty, Vol. I, 45 ("Colonial Constitutional Thought") (2002).

[21] Designing Democracy, What Constitutions Do 261 (2001).

[22] 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, 181 (1998). Sarkin explains that the framers relied heavily on Canadian and German constitutional developments, as well as international human rights principles.

[23] Several distinguished commentators have compared the history of the two legal systems and societies regarding racial and other issues. *See e.g.* A. Leon Higginbotham, Jr., "Racism in American and South African Courts: Similarities and Differences," 65 N.Y.U. L. Rev. 479, 497 (1990); George M. Frederickson, Black Liberation: A Comparative of History of Black Ideologies in the United States and South Africa (1996); George M. Frederickson, White Supremacy: A Comparative Study in American and South African History 136–198 (1981).

economic superpower whereas South Africa is a regional superpower, perhaps only rivaled by Nigeria.[24] The legal systems of both nations are historically tied to England and their judicial opinions are written in English. In addition, both nations had "precursor" constitutions albeit written under different circumstances.[25] Furthermore, some of the key political figures in these nations initially opposed the creation of a Bill of Rights.[26]

There are, of course, major differences between the two countries. A diverse group of elected representatives wrote the South African Constitution during an era of unprecedented globalization and the spreading of democracy. The underlying legal system is a Roman-Dutch-English hybrid of civil code and common law.[27] Moreover, South Africa is a developing country, in the Southern hemisphere, which calls itself the "rainbow nation" to express its adherence to multiculturalism.[28] Blacks have always been a majority of the population but until recently were oppressed and treated like an inferior minority.[29]

The American Constitution was written by unelected and propertied white British men. The nineteenth-century Civil War constitutional amendments were progressive but the Supreme Court restricted their impact almost immediately.[30] The underlying legal system is based on English common law. The United States is an industrialized "first world" nation with a large and diverse middle class. Moreover, multiculturalism is controversial,[31] and African Americans remain a disadvantaged minority though their situation has improved from the days of slavery and Jim Crow.

[24] *Supra* n. 7 ("South Africa and Nigeria, the continent's leading oil producer, accounted for more than half of sub-Saharan Africa's domestic product.").

[25] As discussed in Chapter 2, the Articles of Confederation came before the U.S. Constitution, and the South African Interim Constitution came before the "Final" Constitution.

[26] As discussed in Chapter 2, Alexander Hamilton and James Madison initially opposed a Bill of Rights. Moreover, the African National Congress leadership had to be convinced of its importance as well.

[27] Dugard, *supra* n. 16.

[28] Eric Berger, "The Right to Education under the South African Constitution," 103 Colum. L. Rev. 614, 657 (2003).

[29] Fredrickson, *supra* n. 23, *Black Liberation* at 6.

[30] *See e.g.* The Slaughterhouse Cases, 83 U.S. 36 (1873) (limiting the scope of the Fourteenth Amendment Privileges & Immunities Clause); The Civil Rights Cases, 109 U.S. 3 (1883) (limiting the Civil War Amendments to prohibiting state action, not private action).

[31] *See e.g.* Allan Bloom, The Closing of the American Mind (1987) (deploring the influence of politically correct multiculturalism on our educational system).

These differences in social context do not undermine the project, but must be kept in mind as law does not exist in a vacuum.[32] The prominent former American jurist A. Leon Higginbotham and the American scholar George Fredrickson have written valuable comparisons of the racial histories of these two nations while issuing similar cautions.[33]

TWO CONSTITUTIONS

The U.S. Constitution was revolutionary because it made the people sovereign. It set up a presidential republic with many democratic qualities. The Bill of Rights gave people basic political and civil rights such as freedom of expression and freedom of religion. The Civil War amendments provided for equal protection. These "first-generation" rights are considered "negative" as they typically prohibit the government from interfering with individuals.

More than two hundred years later, South Africa enacted a lengthier and more detailed constitution that is designed to be socially transformative.[34] It has a Bill of Rights that includes not just first-generation rights but also second and third-generation rights. It guarantees human dignity, which is not specifically mentioned in the American Constitution. The South African equality provision goes beyond the American one by prohibiting discrimination based on sexual orientation and authorizing affirmative action. The South African Bill of Rights also protects the right to unionize and diverse rights for children.

The second-generation socioeconomic provisions cover housing, health care, the right to an education, and the like. These "positive" rights require the government to provide resources that enable those rights to be fulfilled. As discussed later, however, the distinction between negative

[32] *See* Ran Hirschl, "Constitutionalism, Judicial Review and Progressive Change: A Rejoinder to McClain and Fleming," 84 Tex. L. Rev. 471, 504 (2004) (criticizing the "emerging 'armchair' anthropology style study of comparative constitutional law" where the scholar really is not embedded in studying the comparative society outside of knowing about a few interesting legal cases). Ironically, as discussed later in this book, Hirschl himself may be guilty of this approach in his important book's discussions of South Africa. Ran Hirschl, Towards Juristocracy (2004).

[33] *Supra* n. 23. *See also* Ronald W. Walters, The Price of Reconciliation (2008) (comparing American and South African racial reconciliation and reparations narratives).

[34] Chief Justice Pius Langa, "Transformative Constitutionalism," Prestige Lecture delivered at Stellenbosch University on 9 October 2006, http://law.sun.ac.za/LangaSpeech.pdf (last visited June 15, 2008); Deputy Chief Justice Dikgang Moseneke, "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication," 18 S. Afr. J. Hum. Rts. 309 (2002).

and positive rights breaks down because the government expends funds for negative rights, and positive rights have negative dimensions. The right to a clean environment and the cultural membership rights are third-generation solidarity rights. The South African Constitution also provides for eleven official languages, though English is the most commonly used for business and other official transactions. In addition, the Bill of Rights outlaws violations by private actors, not just the government.

Another important issue addressed differently by the two Constitutions is property. Because the South African government and whites used apartheid to steal the land of many blacks and others, its Constitution governs land redistribution. In contrast, the U.S. Constitution's property provision authorizes government expropriation in certain instances but not for wealth redistribution.

To assist with its implementation, the South African Constitution established several government agencies including a Human Rights Commission and a Commission on Gender Equality. It also established a Truth & Reconciliation Commission that was supposed to facilitate national healing. There are no similar government agencies to guide the implementation of the U.S. Constitution.

In sum, the South African Constitution looks somewhat like the charter that American liberals thought the U.S. Supreme Court was going to create out of cases like *Brown v. Board of Education*[35] and other decisions in the 1960s and early 1970s favoring civil rights plaintiffs, criminal defendants, and the poor.[36] Scholars such as Frank Michelman were writing about the right to welfare and finding sympathetic ears.[37] The U.S. Supreme Court, however, backtracked for reasons that Cass Sunstein,[38] Gregory Alexander,[39] and Gerald Rosenberg[40] dispute.

[35] 347 U.S. 483 (1954).

[36] Goldberg v. Kelly, 397 U.S. 254 (1970) (government cannot terminate welfare benefits without a hearing); Douglas v. California, 372 U.S. 353 (1963) (appellate court must provide counsel to impoverished criminal defendant).

[37] Frank Michelman, "On Protecting the Poor through the Fourteenth Amendment," 83 Harv. L. Rev. 705 (1969).

[38] Cass Sunstein, The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need it More than Ever 163 (2004) (arguing that changes in the Court's membership caused it to backtrack).

[39] Gregory Alexander, "Socio-Economic Rights in American Perspective: The Tradition of Anti-Paternalism in American Constitutional Thought," in A. J. van der Walt, (Ed.), Theories of Economic and Social Justice 6 (2005) (rejecting Sunstein's view and arguing that anti-paternalist traditions explain the Court's unwillingness to find socioeconomic rights).

[40] The Hollow Hope (1991) (arguing the Court will not take any radical actions to alter existing distributions of power and wealth).

THE TWO COURTS

Constitutions are pieces of paper. The judiciary usually gives them life. This book reveals important distinctions between the jurisprudence of the South African Constitutional Court and the U.S. Supreme Court.

First, the U.S. Constitution provides no interpretive directions. This partly explains why the U.S. Supreme Court is divided between "liberals" who suggest they favor a "living constitution" and conservatives who say they believe in "originalism."[41] A living constitution evolves over time to accommodate changes in society, people's values, and other developments.[42] Originalists supposedly interpret the Constitution in accord with its meaning when adopted.[43]

Section 39 of the South African Constitution reads as follows:

(1) When interpreting the Bill of Rights, a court, tribunal or forum –
  (a) must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom;
  (b) must consider international law; and
  (c) may consider foreign law.

The Constitutional Court must therefore follow a progressive agenda, which includes relying on foreign law, unlike the U.S. Supreme Court.[44]

[41] Some scholars have argued that there are also divides within the conservative quarters. Mark Tushnet, A Court Divided, The Rehnquist Court and The Future of Constitutional Law (2005).

[42] As former U.S. Supreme Court Justice William Brennan said, "The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs." William J. Brennan Jr., "The Constitution of the United States: Contemporary Ratification," in Alpheus Thomas Mason & Donald Grier Stephenson Jr. (Eds.), American Constitutional Law: Introductory Essays and Selected Cases 607, 609 (8th ed. 1987).

[43] Steven G. Calabresi (Ed.), Originalism: A Quarter-Century Debate (2007); Randy Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2005); Dennis Goldford, The American Constitution and the Debate over Originalism (2005).

[44] *See e.g.* Roper v. Simmons, 543 U.S. 551 (2005) (outlawing death penalty for juveniles); Lawrence v. Texas, 539 U.S. 558 (2003). Justice Scalia dissents from the use of foreign law in these cases as do some scholars. *See e.g.* Robert DelaHunty, John Yoo, "Against Foreign Law," 29 Harv. J. L. & Pub. Pol'y 291 (2005). *See generally* Justices Antonin Scalia & Stephen Breyer, Discussion at the American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), http://www.freerepublic.com/focus/f-news/1352357/posts (last visited June 15, 2008).

Second, the Constitutional Court takes a more communitarian and dignity-oriented approach unlike the individualistic and liberty-oriented U.S. Supreme Court. For example, the Constitutional Court recently ruled that a school could not prevent a female student from wearing a nose-stud. Doing so would violate her cultural and religious heritage. In his ruling, Chief Justice Pius Langa wrote,

> The notion that "we are not islands unto ourselves" is central to the understanding of the individual in African thought. It is often expressed in the phrase *umuntu ngumuntu ngabantu* which emphasizes "communality and the inter-dependence of the members of a community" and that every individual is an extention of others. . . . This thinking emphasizes the importance of community to individual identity and hence to human dignity.[45]

Third, the Constitutional Court embraces "substantive equality" as opposed to the U.S. Supreme Court's "formal equality."[46] Laws that benefit historically disadvantaged groups are generally permitted in South Africa because they facilitate societal transformation. In contrast, the U.S. Supreme Court presumes that all people should be treated the same. There is some tension, though, between substantive equality and the South African ideal of reconciliation, which this book discusses.[47]

Fourth, the Constitutional Court has rejected the American view that fundamental rights trump all other concerns. Instead, the South African

[45] Kwa Zulu Natal MEC v. Pillay, Par. 53, CCT 51/06 (Oct. 5, 2007). As referenced in the Preface, even the Constitutional Court's new building embodies this ethos. It was born of a "remarkable and uniquely inclusive process – one that resulted in a public building like no other. This structure, South Africa's first major post-apartheid government building, was designed to embody the openness and transparency called for by the Constitution itself. . . . The building is noted for its transparency and entrancing volumes. In contrast to most courts, it is welcoming rather than forbidding, filled with sparkle and warmth. It has no marble cladding or wood panelling, but has come to be admired for its graceful proportions. And the principal materials – timber, concrete, steel, glass and black slate – infuse the court with an African feel." http://www.constitutionalcourt.org.za/site/thecourt/thebuilding/htm (last visited Nov. 21, 2007). By contrast, the U.S. Supreme Court has sixteen corinthian marble columns holding up an imposing edifice that approaches four stories in height. National Park Service, The U.S. Constitution, Supreme Court Building, Description, Aug. 30, 2000 http://www.nps.gov/history/history/online_books/butowsky2/constitution9.htm (last visited Nov. 21, 2007).

[46] Ian Currie & Johan de Waal, The Bill of Rights Handbook 232 (2005).

[47] This tension is ironic as the Truth & Reconciliation Commission was supposed to provide reparations to those who were victimized during apartheid, suggesting the compatibility of reconciliation with reparations. Yet. even in the TRC context, there has been little reparations in return for the reconciliation, as discussed in Chapter 2.

Court weighs a variety of factors, including the state's interests, in determining whether a rights infringement can be justified. This context-sensitive approach differs from the U.S. Supreme Court's more categorical analysis.[48]

Fifth, despite its transformative mission, the Constitutional Court has pragmatically refused to decide certain issues. Justice Albie Sachs once told me this approach was "minimalist maximalism." For example, in *Case v. Minister of Safety*,[49] the Court avoided deciding the criteria for obscenity. Moreover, in *Christian Education South Africa v. Minister of Education*,[50] the Court would not address the underlying religious issue in a case about the government restricting a Christian school's ability to use corporal punishment. By contrast, the U.S. Supreme Court has taken varying approaches regarding the scope of its rulings.

What explains the Constitutional Court's general cautiousness? Justice Richard Goldstone told me the following in an interview: "I . . . strongly believe that in the formative years it would be a serious mistake to craft wider opinions than necessary. It is far better to hasten slowly and be more certain of building a coherent jurisdiction. I have no doubt that principles should be clear but that is another matter."[51] This view reveals pragmatic concerns about institutional integrity as well as doctrine.

SOCIAL CHANGE

One of this book's major themes is what role can and should the Constitutional Court play in social change. The comparative dimension is valuable in illuminating that theme as well.

American conservatives have long criticized the U.S. Supreme Court as being activist and undemocratic.[52] Yet, many American progressives also criticize the Court, either for being ineffectual or for creating a backlash against social change. This progressive view is exemplified by

[48] One Canadian scholar, active in the South African constitutional deliberations, wrote a book arguing that constitutional law is fundamentally about the weighing of interests. David Beatty, The Ultimate Rule of Law (2005). Several non-American scholars, however, have recently criticized such balancing. *See e.g.* Denise Meyerson, "Why Courts Should Not Balance Rights against the Public Interest," 31 Melbourne L. Rev. 801 (2007).

[49] 1996 (3) SA 617 (CC).

[50] 2002 (2) SA 794 (CC).

[51] Mark S. Kende, "The Fifth Anniversary of the South African Constitutional Court: In Defense of Judicial Pragmatism," 26 Vermont L. Rev. 753, 761 (2002).

[52] Robert H. Bork, Coercing Virtue: The Worldwide Rule of Judges (2003).