26 Vt. L. Rev. 753

Vermont Law Review
Summer, 2002

SYMPOSIUM
THE FIFTH ANNIVERSARY OF THE SOUTH AFRICAN CONSTITUTION

THE FIFTH ANNIVERSARY OF THE SOUTH AFRICAN CONSTITUTIONAL COURT: IN DEFENSE OF JUDICIAL PRAGMATISM

Mark S. Kende[a1]

Introduction

On October 11, 1996, the Constitutional Assembly for the Republic of South Africa adopted the South African Constitution.[1] Professor Cass Sunstein has calls it "the most admirable constitution in the history of the world."[2] One reason the document engenders admiration is its lengthy list of political, civil and socio-economic rights. To ameliorate Apartheid's effects, it provides for a right to housing, education, and health care, among others.
An important question is how the new South African Constitutional Court should implement these socio-economic and other rights in a country with limited financial resources; severe social problems (like poverty, crime, and AIDS); and significant racial, ethnic, tribal, and cultural divisions. If the Court is too aggressive implementing the right to housing, it might leave scarce resources to deal with the AIDS epidemic.[3]

To the chagrin of critics, the Court has navigated this dilemma by taking a pragmatic approach. The Court issues narrow decisions that give careful attention to the facts of a case, and that pay heed to the social and political ramifications of a decision.[4] The Court hesitates to announce broad, inflexible legal principles.

The goal of this Article is to examine academic criticisms of this pragmatism and evaluate whether the Court or the critics have the better argument. Part I discusses the pragmatic aspects of several Constitutional ***754** Court cases.[5] Part II offers three distinct criticisms of the South African Constitutional Court's pragmatism. Part III provides several responses to the critics including excerpts from some never before published interviews I conducted with several Constitutional Court Justices. It is my hope that this Article demonstrates that the South African Constitutional Court has generally been correct in issuing narrow decisions that vindicate the South African Bill of Rights, while maintaining the Court's legitimacy by reserving a significant remedial role for the more democratic branches of government.

I. South African Constitutional Pragmatism

A survey of several Constitutional Court cases reveals the Court's pragmatic side.

A. Political and Civil Rights Issues

Like the United States Constitution, the South African Constitution contains political and civil rights. The South African charter is unique in its comprehensive list of such rights. For example, it does not just provide "equal protection"; it expressly forbids the state from unfairly discriminating against people on the basis of their gender, race, disability, religion, sexual orientation, and several other group characteristics.[6] It even contains separate sections protecting the right to unionize,[7] and the right of people to enjoy their culture.[8]

This extensive list of rights, however, invites conflict. For example, the prohibition on gender discrimination could conflict with those tribal cultures that practice polygamy. Perhaps this is one reason why the Constitutional Court has been pragmatic in deciding cases involving these rights. Justice Albie Sachs even stated in a religious freedom case, Christian Education South Africa v. Minister of Education, that, "This is clearly an area where interpretation should be prudently undertaken so that appropriate constitutional analysis can be developed over time in the light of the multitude of different situations that will arise."[9] An unnecessarily broad ruling in one case could come back to haunt the Court later.

**755* In Ferreira v. Levin NO, the Court determined the meaning of the right to freedom in section 11(1) of the South African Interim Constitution.[10] Justice LWH Ackermann authored a very philosophical opinion advocating a broad notion of the right as encompassing many basic liberties.[11] However, the Court said the right only protected the physical liberty of the person.[12] The Court examined the constitutionality of an old statute that criminalized the possession of obscene material in Case v. Minister of Safety and Security.[13] The Court could have used the case to define obscenity standards in the free speech area. Instead, it explicitly deferred that issue and held that the law violated the right to privacy.[14]

The Court confronted gender discrimination in President of the Republic of South Africa v. Hugo, when it ruled that it was constitutional for President Nelson Mandela to pardon non-violent female prisoners who had children under the age of twelve, even though he did not pardon similarly situated male prisoners.[15] The Court said the public would not have accepted a broader pardon that included numerous male prisoners, given the country's crime problem.[16] The core of the Court's rationale was also pragmatic. The Court acknowledged that African women do most of the childcare in families, and that the pardon could help these women and their children.[17] The majority rejected the dissent's view that such a ruling would perpetuate unacceptable stereotypes.[18]

B. Socio-Economic Rights Cases

The South African Constitution probably contains the most comprehensive list of socio-economic rights of any national charter. The list reflects the influence of the International Covenant on Economic, Social and **756* Cultural Rights.[19] It includes second-generation rights (the right to housing, and to an education) and third generation or "green" rights (the right to a healthy environment). These rights were only included in the South African Constitution after exhaustive debate. Some scholars argued against their inclusion because of the nation's resource limitations, and because of the difficulty posed for courts in enforcing such rights given conflicting national priorities.[20] Due to these concerns, the Constitutional Court has taken a pragmatic tack in cases involving these rights.

In Soobramoney v. Minister of Health, the Court examined whether a terminally ill individual had a right to dialysis (to prolong his life) under the Constitution's right to health care.[21] The health care provision states:

1) Everyone has the right to have access to

a) health care services . . . .

2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3) No one may be refused emergency medical treatment.[22]

The Court said that the health care provision did not mean individuals had an automatic right to demand specific kinds of care.[23] The Court said instead:

What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.[24]

**757* The Court further explained that the province had developed guidelines prioritizing who should receive renal dialysis.[25] Unfortunately for the appellant, the terminally ill were not at the top of the list.[26] The pragmatism in the Court's consideration of limited resources, budgetary constraints, and established guidelines is obvious.

The decision in Soobramoney left some Constitutional Court watchers nervous that the Court might shy away completely from enforcing socio-economic rights. The decision was all the more distressing because the appellant died shortly after

learning of the decision.[27] But the Court's recent ruling in South Africa v. Grootboom shows these rights will be enforced, albeit in a pragmatic manner.[28]

Grootboom involved the right to housing in Article II, section 26. That provision states: "Everyone has the right to have access to adequate housing. . . . The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."[29]

Irene Grootboom was part of a group of homeless adults and children who lived in appalling conditions, one legacy of Apartheid.[30] Some government officials decided Grootboom's group was trespassing and had their fragile shacks bulldozed, destroying their few possessions.[31] The Cape High Court ruled that the right to housing did not mandate that the government always protect homeless people like Grootboom given resource constraints.[32] However, the Court decided that children have an absolute right to shelter and that their parents have a right to reside with their children.[33] The right to shelter, for children, is set forth in section 28(1)(c) of the Constitution.[34] Therefore, the Court ordered the government to provide basic shelter to Grootboom's group including, "tents, portable latrines, and a regular supply of water (albeit transported)."[35]

**758* The Constitutional Court affirmed the result in part, but rejected the lower court's reasoning. The Constitutional Court said that section 28 imposed an obligation primarily on parents to provide shelter and only alternatively on the state.[36] Professor Sunstein has said that, "[t]his was an exceedingly narrow reading of section 28, evidently a product of pragmatic considerations. The Court's responsiveness to those pragmatic considerations is itself noteworthy, especially insofar as it suggests judicial reluctance to intrude excessively into priority-setting at the democratic level."[37] Apparently, the Court was reluctant to endorse an absolute right for children, especially if parents could piggy-back off this right.

On the other hand, the Constitutional Court issued a more generous interpretation of section 26. The Court said the right to housing means the government must have a "coherent" housing policy that addresses the problems of the homeless.[38] In supporting the decision, the Court relied in part on international human rights precedents about the minimum core obligations governments must meet regarding socio-economic rights.[39] The Court said that the national government failed because it was building homes for low-income individuals, yet ignoring the homeless in its housing program.[40] But even here the Court did not say that there was an individual right to housing on demand.[41]

The Court then instructed the government to revise its housing policy in accordance with the decision.[42] The Court was therefore pragmatic in three ways: its concern about resources; its refusal to dictate the new government policy; and its decision not to create an individual right on demand.

The latest major socio-economic rights case, which has received international attention, involved a lawsuit by an AIDS advocacy group the Treatment Action Center (TAC) challenging the national South African **759* refusal to provide Nevirapine to pregnant women.[43] Nevirapine prevents the spread of HIV to fetuses.[44] The Transvaal High Court ruled late last year that the government policy violated the right to health care, but not because every pregnant women automatically has a right to free Nevirapine.[45] The High Court said the government had no rational policy for more broadly distributing Nevirapine, even if the clinical trials occurring in several places went well.[46] The High Court followed Grootboom and gave the government an opportunity to devise such a policy.[47] The Constitutional Court then affirmed the High Court and ordered the government to provide the drug to pregnant women pending creation of the policy.[48] Professor Heinz Klug's article discusses this case in more depth.[49]

II. Criticisms of Pragmatism

In South Africa, judicial pragmatism gets criticized from three perspectives.

A. The Rainbow Criticism

Professor Alfred Cockrell has described the Court as adopting a "rainbow jurisprudence"[50] which fails to make clear substantive value choices. Instead, the Court has issued narrow decisions and sought consensus. Just as a rainbow cannot be touched, Cockrell argues the Court's underlying interpretive principles are elusive.[51] Similarly, Judge Dennis Davis, a former law professor, and the Cape High Court judge in Grootboom, has authored a book called Democracy and Deliberation where he asserts the Court has not yet spoken clearly about equality.[52]

**760* B. Post-Modern Criticism: The Absence of Judicial Candor

A related, but analytically distinct criticism, is that the Court's decisions embody hidden value choices that reflect a lack of

judicial candor.[53] Advocates of this view argue it would be better if each of the Justices went into detail about their true beliefs and the principles they were relying on, even if that meant many opinions in each case.[54] Otherwise, the Court is mystifying the law in a pre-Apartheid manner. The idea that law embodies political value choices is characteristic of several so-called post-modern schools of legal thought, such as the Critical Legal Studies movement. Admittedly, this criticism is pungent when applied to a Court with so few legal precedents to rely upon (due to the new Constitution).

C. Transformation?

A third major criticism is that the Court's decisions are not sufficiently transformative. Soobramoney has been criticized on these lines, as have some of the Court's equality cases. Saras Jagwanth, Cathi Albertyn, and Beth Goldblatt are among those critical of the Court's equality cases.[55] Albertyn and Goldblatt, for example, have argued that Hugo did not treat the gender discrimination issue correctly.[56] Grootboom has also been criticized as overly cautious.

III. Responding To The Critics.

Professor Iain Currie authored an excellent article defending the Constitutional Court's decisional minimalism by analyzing specific cases and showing the value of such an approach.[57] This is one element of the Court's pragmatism. This Article, however, offers five policy oriented ***761** justifications for pragmatism in the South African context. The Article also responds to the criticisms just mentioned.

A. The Hippocratic Oath Argument

During December of 2000, I interviewed several Constitutional Court Justices.[58] Virtually all of them said that the Court in its early years should refrain from issuing unnecessarily broad rulings that could be incorrect, and that could damage the Court's credibility and its infant jurisprudence. In other words, the Court seeks to avoid doing any harm, much like the Hippocratic Oath instructs doctors.

For example, I interviewed Justice Richard Goldstone[59] and asked the following question: "Other scholars have suggested, sometimes critically, that the Court has taken an overly minimalist approach in several important areas such as equality doctrine and that it would be better for the Court to state broader and clearer principles. What do you think of this criticism?"[60] Justice Goldstone responded by saying, "I understand the criticism but 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."[61]

Justice Kate O'Regan[62] told me the following in an interview:

The Court has been maximalist in some cases and minimalist in others. I'm a great defender of minimalism. It's very important that the Court after all avoid mistakes. It can't provide meaningful guidance to attorneys and clients and businesses if it's reversing itself. Of course the Court can't be perfect, but it should generally only issue broad rulings when it's pretty sure ***762** it's right. It should keep its powder dry in cases and certainly avoid issuing numerous 6-5 decisions. Cautiousness is helpful because it promotes the rule of law.[63]

Justice Ackermann likewise informed me in an interview that:

The critique that the Court should be broader on substantive equality ignores Popper's warning that science requires incremental development and testing of premises, not broad unwarranted conclusions. It's good to be modest, and leave much of the real equality action to the legislature. I'm dismayed that critics like Dennis Davis aren't more specific as to what cases the Court should decide differently and how.[64]

These reflections of the Justices are a strong rebuttal to those critics who seek deeper decisions (like Davis and Cockrell) and to those who believe the Court should be as transformative as possible (like Jagwanth, Albertyn, and Goldblatt). They also reveal an interesting divide between the bench and the academy in South African legal circles, not unlike the divisions that exist in the United States.

B. The Argument from Democracy

Another reason why it is important for the Constitutional Court to vindicate the Bill of Rights, albeit in a restrained manner,

is the need to bolster the country's new and fragile democracy.[65] The more restrained the Court's remedies are, the more responsibility the Parliament and the President must take in enforcing rights. This makes sense because those are the elected institutions whose ultimate responsibility is to represent the people. Under Apartheid, these institutions failed miserably in that responsibility **763* so they must not be allowed to shirk responsibility now.[66] This kind of judicial restraint also minimizes the counter-majoritarian dilemma.

Justice Ackermann has described the tightrope that the Court must walk in cases involving socio-economic rights:
The difficulty with this issue of course is where do you draw the line in the Court's involvement telling the legislature how to spend money or how to have an administrative structure to implement the rights. This raises separation of power problems as the Court can't rewrite the budget or declare the whole budget unconstitutional. In some ways, the Court's job is to prompt the elected representatives to act where necessary. Though the Court can't declare the budget unconstitutional, it can issue in real cases what amounts to advice that the budget is not in accord with the obligation on social rights and that it should be reassessed. The Court has done this by giving the legislature say six months to come up with some revised transparent budget and plan in this type of case like Grootboom. It's better that the legislature be given that chance.[67]

This argument for democracy provides a strong response to those who want the Court to be more transformative. It is the elected branches of government who should lead the transformation. Moreover, it is in Parliament where open and divisive public debates over basic values should occur, not in the Court's decisions as the post-modern critics suggest.

C. Institutional Legitimacy

Another reason why the Court should be cautious and bolster the democratic process is to preserve its institutional legitimacy. The most empirically rigorous study of the South African Constitutional Court's public legitimacy suggests it is lagging significantly behind even the Russian Constitutional Court.[68] The authors say that the South African Court must be mindful of its legitimacy shortfall and take action to ensure a **764* reservoir of good will among the public as broad as possible.[69] Moreover, the African National Congress government has, at times, suggested it might wish to reduce the judiciary's power and independence.[70] Plenty of other scholarly literature confirms the vulnerability of active courts that contest the political branches. The most recent African example is in Zimbabwe where the judges on the nation's highest court were replaced with judges from President Mugabe's political party after the court opposed Mugabe's views on land seizures.[71]

The legitimacy concern also means it would be a mistake for the Court to follow the post-modern critics and start issuing multiple and conflicting opinions in each case. As Justice O'Regan told me,
the amount of consensus you see in this Court does not mean dissent isn't valued. It's valued highly and helps bring about engagement. But the Court's members do try to avoid dissenting over smaller issues. They strive for consensus as it's not worth making a big deal over something little. The Court must try to provide clear leadership after all.[72]

Justice O'Regan's comments about consensus do not involve a mere abstraction. During a recent trip to the United States, one of the Justices told me that the Court was badly divided on the remedy in Grootboom. The Court, however, eventually united behind Justice Yacoob's opinion. This is essentially what the U.S. Supreme Court did in two of the Court's most well regarded cases, Brown v. Board of Education[73] and Cooper v. Aaron.[74] Unified decisions in important cases promote institutional credibility.

D. The Impossibility of Deeper and Wider

As mentioned previously, Dennis Davis and Alfred Cockrell have argued the Court has not established fundamental principles in areas such as equality. Moreover, the post-modern critics have argued the Court's **765* members should be more candid and reveal their personal agendas.[75] Justice O'Regan has a helpful response to both of these criticisms:
Moreover it's an illusion to think that narrow decisions hide the Justices' broader views as some critics suggest. As Iain Currie and Cass Sunstein point out, most people don't operate from a broad philosophical basis and do everything, like tip waiters, in accordance with that philosophy. People and Justices function at lower levels of abstraction and that's also where they can generally come to agreement easier. And it's simply not okay for the Court to be broad all the time with the idea that the Court can later reverse itself as that's inconsistent with the rule of law and the need for certainty. Sunstein's got it right. Caution matters and promotes legitimacy.[76]

Developing overarching theories regarding the South African Constitution is particularly difficult because, as Professor Lourens du Plessis has pointed out, the Constitution actually reflects an ideological tension between libertarian and egalitarian liberalism, as well as between modernism and three different types of traditionalism (African communitarianism, religious conventionalism, and Afrikaaner nationalism).77 Thus, while there are provisions in the Constitution that strongly endorse gender equality,78 there are other provisions that suggest that customary law (which sometimes supports polygamy) should not be unnecessarily undermined.79 Similarly, the Constitution respects the religious views of different cultures (which may support corporal punishment) but also protects the rights of children. These conflicts will not be easy to resolve and it may be best to avoid them as long as possible.80

*766 E. Minimalist Maximalism

Lastly, it is important to point out that the Court is not always minimalist. It has issued strikingly broad decisions in the death penalty area81 and in protecting homosexual rights.82 But the Court has been pragmatic in selecting only a few cases on which to expend its institutional capital.

Conclusion

In slightly more than five years, the South African Constitution has already become a model for other nations.83 The Constitutional Court has wisely developed a pragmatic jurisprudence that vindicates rights, helps bring about transformation, and yet respects the elected branches of government. This is certainly an impressive legacy.

What lessons does this hold for American constitutionalists? Well it should not be misconstrued to necessarily favor pragmatism here. Judicial pragmatism in South Africa makes sense because the Constitution is so filled with progressive substantive values that they cannot all be carried out at once. But at least the values are embodied in the text. By contrast, the U.S. Constitution lacks such progressive explications about the meaning of equality or liberty in its text. Thus, in order to promote progressive values, U.S. courts must take approaches recommended by theorists such as Ronald *767 Dworkin.84 Unfortunately, the U.S. Supreme Court has developed a reactionary jurisprudence in decisions like Bowers v. Hardwick85 and Bush v. Gore.86

Perhaps then, the key lesson is that constitutional law teachers in the U.S. should try to integrate some South African comparative perspectives into their classes to illustrate the possibility of a progressive, non-formalistic jurisprudence. This is feasible because the South African Constitutional Court decisions are in English, are thoughtful, and are written to be accessible. Though some Americans provided advice regarding the drafting of the new South African Constitution, perhaps it is time for Americans to learn from the South African Constitutional Court's excellent work.

Footnotes

a1 Professor of Law, The University of Montana School of Law; Chair-elect, Association of American Law Schools (AALS), Africa Section. J.D. 1986, University of Chicago Law School; B.A. 1982, Yale University. This Article grows out of a speech I delivered at the January 2002 AALS Annual Meeting in New Orleans. The speech was part of a panel sponsored by the Africa Section on "The Fifth Anniversary of the South African Constitution." I would like to thank the United States Fulbright Commission for the fellowship that enabled me to spend the year 2000 teaching and doing research in South Africa at the University of Stellenbosch Faculty of Law.

1 Johan De Waal et al., The Bill of Rights Handbook 6 (2000).

2 Cass R. Sunstein, Designing Democracy: What Constitutions Do 261 (2001).

3 Rachel L. Swarns, AIDS Drug: Giving the Gift of Life in South Africa, N.Y. Times, Feb. 18, 2001, § 1, at 3. The South African government estimates AIDS will kill one in five South Africans if the epidemic is unchecked.

4 For a more detailed definition of pragmatism, see, e.g., Daniel Farber, Legal Pragmatism and the Constitution, 72 Minn. L. Rev. 1331 (1988). Richard Posner has also advocated pragmatism, though his approach seems to favor judicial decisions that are more

conservative and libertarian than would be compatible with the South African Constitution. See generally Richard A. Posner, The Problems Of Jurisprudence ch. 5 (1990).

5 A similar view of the Court's decisions can be found in Iain Currie, Judicious Avoidance, 15 S. Afr. J. Hum. Rts 138 (1999).

6 S. Afr. Const. ch. 2, § 9.

7 Id. § 23.

8 Id. §§ 30-31.

9 Christian Educ. S. Afr. v. Minister of Educ., 2000 (10) BCLR 1051 (CC), 2000 SACLR LEXIS 79, ¶ 27.

10 Ferreira v. Levin NO, 1996 (1) BCLR 1 (CC), 1995 SACLR LEXIS 298, ¶¶ 45-54.

11 Id. Before joining the Constitutional Court, Justice Ackermann was a Professor and the first Harry Oppenheimer Chair in Human Rights Law at the University of Stellenbosch.

12 Ferreira, 1996 (1) BCLR 1 (CC), ¶ 170.

13 Case v. Minister of Safety and Sec., 1996 (5) BCLR 609 (CC), 1996 SACLR LEXIS 72.

14 Id., ¶ 91.

15 President of the Republic of S. Afr. v. Hugo, 1997 (6) BCLR 708 (CC), 1997 SACLR LEXIS 91.

16 Id., ¶ 46.

17 Id., ¶ 37.

18 Id., ¶ 48. More detailed treatments of this case can be found in: Mark S. Kende, Gender Stereotypes in South African and American Constitutional Law: The Advantages of a Pragmatic Approach to Equality and Transformation, 117 S. Afr. L.J. 745 (2000) [hereinafter Gender Stereotypes]; Mark S. Kende, Stereotypes in South African and American Constitutional Law: Achieving Gender Equality and Transformation, 10 S. Cal. Rev. L. & Women's Stud. 3 (2000) (shorter version of the previous article).

19 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, arts. 1-3, 8, 993 U.N.T.S. 3.

20 See, e.g., Dennis Davis, The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles, 8 S. Afr. J. Hum. Rts. 475, 476 (1992).

21 Soobramoney v. Minister of Health, 1997 (12) BCLR 1696 (CC), 1997 SACLR LEXIS 41, ¶¶ 1,4,5,7.

22 S. Afr. Const. ch. 2, § 27.

23 Soobramoney, 1997 (12) BCLR 1696 (CC), ¶ 5.

24 Id., ¶ 11. The Court elaborated by saying that if appellant's view of the health provision prevailed then
it would make it substantially more difficult for the state to fulfill its primary obligations . . . to provide health care services to 'everyone' within its available resources. It would also have the consequence of prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the state for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening.
Id., ¶ 19.

25 Id., ¶ 46 (Madala, J., concurring).

26 Id.

27 Carmel Rickard, Government "Heartless" Toward Homeless, Sunday Times (S. Africa), May 7, 2000, at http://www.sundaytimes.co.za/2000/05/07/politics/pol05.htm.

28 Republic of S. Afr. v. Grootboom, 2000 (11) BCLR 1169 (CC), 2000 SACLR LEXIS 126.

29 S. Afr. Const. ch.2, § 26.

30 Grootboom, 2000 (11) BCLR 1169 (CC), ¶ 3. As footnote two of the opinion says, "[t]he respondents are 510 children and 390 adults . . . Grootboom . . . brought the application . . . on behalf of all the respondents." Id., ¶ 4 n.2.

31 Id., ¶¶ 9-10.

32 Id., ¶ 14.

33 Id., ¶¶ 15-16.

34 S. Afr. Const. ch. 2, § 28(1)(c).

35 Grootboom, 2000 (11) BCLR 1169 (CC), ¶ 4.

36 Id., ¶ 77.

37 Sunstein, supra note 2, at 232. It is worth noting that this is one example of the Court's interpretive pragmatism going too far in my view. As Sunstein has written: "It might seem to make sense to say that children should have a particular priority here-that their right should be more absolute-hence that adults with children would have a preferred position. Why would that view be

especially peculiar?" Id. at 233.

38 Grootboom, 2000 (11) BCLR 1169 (CC), ¶ 41.

39 Id., ¶¶ 27-33.

40 Id., ¶ 66.

41 Id., ¶ 95. I had an opportunity to view the Grootboom oral arguments first hand before the Constitutional Court. One of the central themes in the Justices' questions was how to vindicate the right without usurping democratic decision-making powers.

42 Id., ¶ 96.

43 Treatment Action Campaign v. Minister of Health, 2002 (4) BCLR 356 (T), 2001 SACLR LEXIS 123.

44 Aidsmap, Nevirapine Overview, at http://www.aidsmap.com/treatments/ixdata/english/5416032E-A9FB-4351-9863-5D7F04ED8E07.htm (last visited Apr. 10, 2002).

45 Treatment Action Campaign, 2002 (4) BCLR 356 (T), at *64-65.

46 Id. at *59.

47 Id. at *66.

48 Minister of Health and Others v. Treatment Action Campaign and Others, 2002 (10) BCLR 1033 (CC), 2002 SACLR LEXIS 26; see also Henry E. Cauvin, World Briefs, South Africa: Provide AIDS Drug, Court Says, N.Y. Times, Apr. 5, 2002, at A6.

49 See generally Heinz Klug, Five Years On: How Relevant is the Constitution to the New South Africa?, 26 Vt. L. Rev. 803 (2002).

50 Alfred Cockrell, Rainbow Jurisprudence, 12 S. Afr. J. Hum. Rts. 1, 3 (1996).

51 Id. at 2.

52 Dennis Davis, Democracy And Deliberation: Transformation and the South African Legal Order 95 (2000). I respond specifically to this objection of Davis in my South African Law Journal article, Gender Stereotypes, supra note 18.

53 While in South Africa in the year 2000 on a Fulbright grant, I was involved in the discussions of the Research Unit for Legal and Constitutional Interpretation, jointly directed by the Departments of Public Law of the University of Stellenbosch and the University of the Western Cape. One of the constant refrains expressed there by some critics was that the Court was not being completely candid.

54 Id.

55 Ms. Jagwanth has published an article critical of Pretoria City Council v. Walker, 1998 (2) SA 363 (CC). Saras Jagwanth, What is the Difference?: Group Categorisation in Pretoria City Council v. Walker, 1998 (2) SA 363 (CC), 15 S. Afr. J. Hum. Rts. 200 (1999). See also Cathi Albertyn & Beth Goldblatt, Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality, 14 S. Afr. J. Hum. Rts. 248 (1998) (discussing the Court's failure in Hugo to place the role of the single father within the proper social context).

56 Albertyn & Goldblatt, supra note 55, at 264.

57 Currie, supra note 5, at 147-50. For a critique of Currie's view, see Christopher J. Roederer, Judicious Engagement: Theory, Attitude, and Community, 15 S. Afr. J. Hum. Rts. 486 (1999). I have briefly responded to some of Roederer's arguments in Gender Stereotypes, supra note 18, at 769 n.117.

58 It is worth mentioning for completeness that I sought to interview Justice Yvonne Mokgoro but was unsuccessful in my effort.

59 Justice Goldstone is considered to be one of the greatest experts on international human rights law in South Africa and the world. For example, he was a chief prosecutor of the United Nations International Criminal Tribunals for former Yugoslavia and Rwanda. He has written a book about his noteworthy legal and judicial career. Richard J. Goldstone, For Humanity, Reflections of a War Crime Investigator (2000).

60 E-mail from Mark S. Kende, Associate Professor of Law, University of Montana School of Law to Hon. Richard J. Goldstone, Justice, Constitutional Court of S. Afr. (Nov. 29, 2000) (on file with author).

61 E-mail from Hon. Richard J. Goldstone, Justice, Constitutional Court of S. Afr. to Mark S. Kende, Associate Professor of Law, University of Montana School of Law (Dec. 4, 2000) (on file with author).

62 Justice O'Regan was a Professor of Law at the University of Cape Town before being selected for the Constitutional Court. She had long been an advocate for abolishing Apartheid and for adopting a Bill of Rights.

63 Telephone interview with Hon. Kate O'Regan, Justice, Constitutional Court of S. Afr. (Dec. 7, 2000) (notes on file with author).

64 Telephone interview with Hon. LWH Ackermann, Justice, Constitutional Court of S. Afr. (Dec. 6, 2000) (notes on file with author). The reference to Popper is to the famous philosopher of science Karl Popper.

65 The fragility of democracy in South Africa should not be underestimated. With 266 of the National Assembly's 400 seats, the African National Congress is such a dominant party in Parliament that it can almost amend the Constitution unilaterally based on a straight party line vote. Official web site of the Parliament of South Africa, The National Assembly, at a (last visited Apr. 1, 2002). Amendments to Section One of the Constitution require a seventy-five percent supporting vote in the National Assembly, while amendments to all other sections require two-thirds supporting vote (or 267 votes, close to what the African National Congress currently has). S. Afr. Const., ch. 4, § 74. Moreover, ANC party leaders have recently accused dissenters within the party of treason. In my view, South Africa has not yet stepped into the ranks of a healthy, truly multi-party democracy.

66 Forcing the Parliament to make sensible decisions enforcing rights is one way to ensure that a culture does not develop, as in the United States, where the legislative branch does whatever it thinks is in its political interest and leaves the constitutional analysis

up to the courts.

67 Telephone interview with Hon. LWH Ackermann, supra note 64.

68 Gregory A. Caldeira & James L. Gibson, The Emerging Legitimacy of the South African Constitutional Court 13-14 (July 31, 2000) (unpublished manuscript, on file with author). For a very brief summary of this study's methodology and results, see Gender Stereotypes, supra note 18, at 769 n.116.

69 Caldeira & Gibson, supra note 68, at 14.

70 See, e.g., Official Web Site of the African National Congress, Highlights in South African History ANC Daily News Briefing (Sept. 11, 1996), at http://www.anc.org.za/anc/newsbrief/1996/news0911 (last visited Apr. 11, 2002).

71 Zimbabwe; Mugabe Court Says Land Grab Legal, Farmers Abandon Court Appeals, Afr. News, Dec. 4, 2001, available at LEXIS, News Library, Africa News File.

72 Telephone interview with Hon. Kate O'Regan, supra note 63.

73 Brown v. Bd. of Educ., 347 U.S. 483 (1954) (ruling unanimously that public school segregation in the South violated equal protection).

74 Cooper v. Aaron, 358 U.S. 1, 19-20 (1958) (ruling unanimously that states must comply with Brown).

75 See supra notes 53-54 and accompanying text.

76 Telephone interview with Hon. Kate O'Regan, supra note 63. Justice O'Regan's references to Sunstein's work center on Sunstein's concept of "incompletely theorized agreements" developed in his book, Cass R. Sunstein, Legal Reasoning and Political Conflict 35-61 (1996). "Incompletely theorized agreements" are the result of a personal or group failure to accept both general theory and the steps that connect that theory to concrete conclusions. Id. at 35.

77 Lourens du Plessis, Constitutional Construction and the Contradictions of Social Transformation in South Africa, 72 Scriptura 31-45 (2000).

78 See S. Afr. Const. ch. 2, § 9 (prohibiting discrimination based on gender).

79 See S. Afr. Const. ch. 2, § 39 (reaffirming the Constitution's recognition of customary law that is consistent with the Bill of Rights).

80 Harvard Law Professor Frank Michelman has addressed the difficulty of developing overarching theories regarding the South African Constitution. Frank Michelman, Postmodernism, Proceduralism, and Constitutional Justice: a Comment on van der Walt & Botha, 9 Constellations 246 (2002) (reprinting the text of the keynote address that Professor Michelman delivered in August 2000 to the University of Stellenbosch's Colloquium on Legal Interpretation in South Africa's Age of Constitutionalism). Professor Michelman utilized John Rawls' liberal social contract theory and Rawls' concept of "public reason" to provide a normative basis to explain why citizens should follow laws, and to evaluate Constitutional Court decisions. Id. Yet at the core of

Professor Michelman's argument was the view that individualism is essential to constitutional contractarianism. Id.
The problem though is that it is not clear how to reconcile this Western individualism with the large part of South African society that still consists of Africans living in social cultures that value tradition, duties, community, and cooperation above the individual. See Thomas Dibodu, Ethical Foundations of Affirmative Action, 36 Codicillus 18, 25-27 (1995) (discussing the cultural obstacles confronting affirmative action programs that focus on the individual per se without accounting for the firmly entrenched communitarian value systems of most black South Africans). The term "Ubuntu" is sometimes used to describe the South African idea that the social nature of each being is fundamental. Ubunto includes an ethic of neighborliness and fellowship. Dirk J. Louw, Ubuntu: An African Assessment of the Religious Other, Paideia (Aug. 1998), at http://www.bu.edu/wcp/MainAfri.htm (last modified June 15, 2000). Moreover, Adrienne van Blerk has said that African society places a premium on "allegiance to family, respect for elders and traditional values, mutual generosity and the promotion of the collective good." Adrienne Van Blerk, Jurisprudence: an Introduction 216 (1998). In fairness, I should disclose that I was the commentator on Professor Michelman's address at this conference and that these were some of my comments.

81 S. v. Makwanyane, 1995 (3) SA 391 (CC) ¶¶ 57-62, 80-86, 151 (declaring the death penalty unconstitutional on numerous grounds such as the right to life and the right to dignity).

82 Nat'l Coalition for Gay & Lesbian Equality v. Minister of Justice, 1999 (1) SA 6 (CC) (striking down as unconstitutional laws that make sodomy illegal).

83 While I was in Africa, I traveled to the Democratic Republic of the Congo to make a presentation on comparative constitutionalism to a civil society working group. Those attending had a stronger interest in the South African constitutional model than any other.

84 See, e.g., Ronald Dworkin, Taking Rights Seriously (1977).

85 Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding the constitutionality of laws that make sodomy illegal).

86 Bush v. Gore, 531 U.S. 98 (2000) (ruling that the Florida Supreme Court violated equal protection in ordering Presidential ballot recount). Judge Richard Posner has said the strongest justification for this case is the pragmatic need to prevent potential electoral chaos. Richard Posner, Bush v. Gore: Prolegomenon to an Assessment, in The Vote: Bush, Gore & The Supreme Court 165 (Richard A. Epstein & Cass R. Sunstein eds., 2001). His reasoning is an example of the dangers of pragmatism absent some underlying value scheme.

End of Document