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1 Introduction

1.1 Making the road by walking

The Constitution of the Republic of South Africa, the final draft of which was forged over a two-year period between 1994 and 1996, assumed a particular profile in the body politic in 2016. Following the release of the Public Protector's 2014 report on improvements to President Zuma's Nkandla residence,¹ the Constitutional Court in March 2016 declared binding her findings and recommendations about the need for the President to repay public monies spent on non-security upgrades to his residence.²

Such high-profile cases, however, can distract us from the importance of the Constitution in shaping the lives of ordinary people. In catapulting the Constitution into the limelight, the 'Nkandla judgement', as it is known colloquially, has created renewed interest in what meaning the Constitution has for South Africans in 2018 and beyond.

The initial impetus for this book came from a public address by former Chief Justice Sandile Ngcobo. Delivered on 30 June 2016 and entitled 'Why does the Constitution matter?', his address began with an almost throwaway comment: that he was 'privileged enough ... to participate in constructing our foundational jurisprudence on constitutional law.'³ Ngcobo went on to say that the process of building a constitutional

1 Public Protector South Africa 'Secure in comfort' http://www.pprotect.org/library/investigation_report/2013-14/Final_Report_19_March_2014.pdf (accessed 23 May 2017).

2 *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

3 S Ngcobo 'Why does the Constitution matter?' HSRC public address, Gallagher Estate, Midrand (30 June 2016) 2.

jurisprudence was a ‘work in progress’.⁴ Lest there be any misunderstanding about the place of the Constitution as the ‘supreme law of the Republic’,⁵ however, Ngcobo’s words betoken not the unfinished nature of the document that is the Constitution, but the incremental nature of its meanings as Justices of the Constitutional Court interpret its laws and precepts through the judgments they hand down in a society seeking transformation and social justice.

Ngcobo has stated that the role of judges must be circumscribed by the democratic principle of separation of powers, and thus by the powers of the other two branches of the state, namely the executive and legislature.⁶ For the third and former Chief Justice, the Constitution is not merely a matter for the courts, or only for these three branches of state, but should be embedded in our hearts and, as such, guide the way in which we interact with our fellow human beings.⁷ In this sense Ngcobo acknowledges the need for a normative order that is informed by the Constitution.

Further impetus for the book is provided by a couple of key phrases from the Western Cape High Court judgment in the Nkandla matter: ‘the contours of constitutional democracy’; and ‘this period of constitutional adolescence’.⁸ It is clear that the High Court and Ngcobo alike perceive a constitutional democracy as a phenomenon whose shape is undulating and whose nature is maturing.

So while the Constitution (including the interim version) was a long time in the making and its acceptance into law on 4 December 1996 (with effect from 4 February 1997) might appear to have signalled the end of the process of formulating the supreme law of the Republic, the Constitution – as in the Spanish poet Antonio Machado’s depiction⁹ – is a road made by walking:

Wanderer, your footsteps are
the road, and nothing more;
wanderer, there is no road,
the road is made by walking.

4 As above.

5 ‘The Constitution of the Republic of South Africa, 1996’ (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005) sec 2.

6 Ngcobo (n 3 above) 19-21.

7 As above, 27. Ngcobo cites an excerpt from L Hand ‘The spirit of liberty’ http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=1199 (accessed 14 July 2017): ‘Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.’

8 *Economic Freedom Fighters* (n 2 above) para 6. Cited in Ngcobo (n 3 above) 2.

9 A Machado *The Castilian camp* trans J Green (1982).

By walking one makes the road,
 and upon glancing back
 one sees the path
 that must never be trod again.
 Wanderer, there is no road –
 Only wakes upon the sea.

South Africa charted a new path from 1994, leaving in its wake a reprehensible system of governance and the absence of true democracy – the ‘path/that must never be trod again.’

The language of the Constitution itself, in its use of the terms ‘progressive’, ‘develop’ and ‘advance’ or their variations, reflects the sense of movement embodied in Machado’s poem. The Constitution allows for the ‘*progressive* realisation’ of the rights to housing; to healthcare, food, water and social security; and to education.¹⁰ Every court, tribunal or forum, ‘[w]hen *developing* the common law or customary law ... must *promote* the spirit, purport and objects of the Bill of Rights,’¹¹ courts possessing the inherent power ‘to *develop* the common [and customary] law, taking into account the interests of justice.’¹² The ‘*advancement* of human rights and freedoms’ is a founding value of the Republic of South Africa.¹³

Kate O’Regan’s claim that Constitutional Court judges were ‘[setting] out on *the journey* to develop a *progressive* jurisprudence of social and economic rights’¹⁴ epitomises the task the Justices set for themselves. Making the road by walking, we can hardly forget, finds its ultimate correlative in Nelson Mandela’s ‘long walk to freedom’.¹⁵

1.2 The composition of the first Bench

If the South African Constitution is a road made by walking, there are certain architects, engineers and artists who have played a larger role than most in designing and developing it. A total of 79 persons – 49 full members and 30 alternates – under the chairpersonship of Cyril Ramaphosa were appointed to a Constitutional Assembly tasked with drafting the final Constitution.¹⁶ The judges, both former and current, appointed to the Constitutional Court have in turn played a major role in shaping the Constitution through their judgments.

10 ‘The Constitution’ (n 5 above) (emphasis added).

11 As above, sec 39(2) (emphasis added).

12 As above, sec 173 (emphasis added).

13 As above, sec 1(a) (emphasis added).

14 K McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009) viii (emphasis added).

15 N Mandela *Long Walk to Freedom* (1994).

16 South African History Online (SAHO) ‘A history of the South African Constitution 1910-1996’ <http://www.sahistory.org.za/article/drafting-and-acceptance-constitution> (accessed 18 May 2017).



Source: <http://ccac.org.za/>

The Justices appointed to the Constitutional Court in 1994 were Arthur Chaskalson (Chief Justice), Lourens (Laurie) Ackermann, Richard Goldstone, Tholie Madala, Ismail Mohamed, Johann Kriegler, John Didcott, Pius Langa, Kate O'Regan, Yvonne Mokgoro, and Albie Sachs. Chaskalson, senior counsel and the then national director of the Legal Resources Centre (LRC), was the first to be appointed: President Nelson Mandela, in consultation with the Cabinet and the Chief Justice of the Supreme Court at the time, Judge Michael Corbett, appointed Chaskalson as President of the Constitutional Court in June 1994. The process of appointing the other ten members, set out in the interim Constitution,¹⁷ required the President, in consultation with the Cabinet and the Chief Justice, to appoint four judges from the ranks of the then Supreme Court.

17 South African Government 'Constitution of the Republic of South Africa Act 200 of 1993' <http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993> (accessed 14 July 2017) sec 19.

These were Ackermann, Goldstone, Madala, and Mohamed. Thereafter the President, after consultation, selected the remaining six judges from a shortlist of ten sent to him by the Judicial Service Commission (JSC), which had trimmed an initial list of 100 down to 25. These 25 candidates were interviewed by the JSC over a period of four days in October 1994. The list was finally reduced to ten candidates – Kriegler, Didcott, Langa, O'Regan, Mokgoro, Sachs, Dugard, Dlamini, Ngoepe, and Skweyiya¹⁸ – of whom six (Kriegler, Didcott, Langa, O'Regan, Mokgoro, and Sachs) were appointed to the Court. The judges were each to serve a non-renewable term of seven years – subsequently extended to a period of between 12 and 15 years, depending on the age of the judge on first appointment.¹⁹

The composition of the first Bench reflected, to the extent that it could,²⁰ the diversity of the legal landscape of the time. The *nature* of the diversity present in that composition was evocatively captured by Albie Sachs in his interview for the Human Sciences Research Council's (HSRC's) Constitutional Justice Project:²¹

And then certainly all the judges on the Constitutional Court recognised the need for major transformations in society, not only the ugliness and unfairness and injustice of *apartheid* and dreadfulness, but the fact that it had left quite deeply entrenched patterns of inequality and disparity. So that was never an issue on our Court, and we came from very different personal backgrounds. It's quite astonishing, and again, a very South African phenomenon, that you would have somebody like Yvonne Mokgoro ... growing up in, what was that called, a location, who studied law and then going on to be assistant nurse and then a part-time prosecutor and then prosecutor and so on, and then someone like Laurie Ackermann, who collected wine labels, and a very cultivated person and totally different social background, and yet Laurie and Yvonne could speak to each other truly as equals on that Court in conceptual constitutional terms; and in that sense we're all in heart, soul and mind ... in favour of acknowledging that the role of our Constitution was not simply to consolidate gains that have been made through decades of struggles in terms of advancing human rights. It was to bring about major transformation; and the extent to which we did it, that raised the question of how much depends on the Courts, and how much depends upon the elected bodies ... but the notion of transformation was certainly very strong and it was unanimous.

18 Skweyiya chose not to accept this appointment, as reflected in the chapter addressing his jurisprudential contributions to the evolution of the Constitution.

19 South African History Online (SAHO) 'Historical background of the Constitutional Court. The appointment of judges' <http://www.sahistory.org.za/article/appointment-judges> (accessed 14 July 2017).

20 Given that almost the entire judiciary was white and male during the *apartheid* era, achieving the kind of representivity enjoined in sec 174 of the Constitution was never going to be possible at the outset.

21 N Bohler-Muller 'HSRC Constitutional Justice Project: Interview with Justice Albie Sachs' (2014) 24.

The transformation of society for which Sachs argues here began, appropriately enough, with the breaking down of race, gender and class barriers *within the Court itself* as, in Sachs's example (whether hypothetical or not), a formerly disenfranchised black woman engaged on an equal footing with a privileged white Afrikaner male, their worlds brought together by a Constitution forged from bodies of legal precept (the Canadian Charter of Rights and Freedoms,²² the National Party proposals regarding Constitutional Principle II [fundamental rights and freedoms],²³ a Charter for Social Justice,²⁴ and the Freedom Charter)²⁵ representing the diverse aspirations of those across the political spectrum. The Constitutional Court's racial profile has evolved over time, but its gender composition remains a challenge to this day.²⁶

1.3 The evolution of the South African Constitution

The jurisprudence of the first Bench of the Constitutional Court constituted the first steps along the new path charted by South Africa from 1994. Johann Kriegler speaks of its having been 'very exciting indeed to start with a complete blank slate in virtually every respect. We had no rules, we had no principles, we had no background, there was no South African body of constitutional precedent in the context of a predominant Constitution with a Bill of Rights and a testing power for the courts.'²⁷ Albie Sachs speaks of the tensions involved in being 'a fairly new Court ... feeling our way, the government's feeling its way and ... so we don't want to pick up the reins of government and take over and be too pushy.'²⁸

As these extra-curial reflections suggest, Constitutional jurisprudence has been shaped not by court judgments alone but by the pronouncements

- 22 Justice Laws Website, Government of Canada 'Constitution Act, 1982: Part 1: Canadian Charter of Rights and Freedoms' <http://laws-lois.justice.gc.ca/eng/Const/page-15.html> (accessed 14 July 2017).
- 23 ConstitutionNet 'Proposals of the National Party on the fundamental rights and freedoms' <http://www.constitutionnet.org/vl/item/proposals-national-party-fundamental-rights-and-freedoms> (accessed 14 July 2017).
- 24 H Corder *et al A charter for social justice: A contribution to the South African Bill of Rights debate* (1992).
- 25 African National Congress 'The freedom charter' <http://www.anc.org.za/content/freedom-charter> (accessed 14 July 2017).
- 26 Of the 227 judges appointed to the Constitutional Court, the Supreme Court of Appeal and the 13 High Courts, only 82 (or 36 per cent) were female as at 29 March 2017 – see Judges Matter 'The make-up of South Africa's judiciary' 29 March 2017 <http://www.judgesmatter.co.za/opinions/south-africa-judges/> (accessed 26 November 2017). This figure represents a 6 percentage point increase on the 2013 figure reported by the Commission for Gender Equality in *Lack of gender transformation in the judiciary. Investigative report 2016* (2016) 30.
- 27 University of the Witwatersrand 'Constitutional Court Oral History Project: Interview with Justice Kriegler' http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-K40-001-jpeg.pdf (accessed 24 May 2017) 5.
- 28 Bohler-Muller (n 21 above) 5.

of Constitutional Court judges *between* judgments – curial and extra-curial words together rendering the Constitution a living entity.

The idea of a living Constitution is hardly foreign to theorists and practitioners of jurisprudence in South Africa. Stu Woolman's notion of 'experimental constitutionalism', for example, implies a dynamic Constitution.²⁹ The judiciary, he suggests, should resolve intractable rights disputes by 'mov[ing] away from traditional models of adjudication and adopt[ing] such experimentalist, problem-solving modalities as meaningful engagement orders, structural injunctions and remedial equilibration' and by initiating 'debates between shareholders that are often essential for information gathering, information pooling, information sharing, collective action and collective norm setting.'³⁰

Engagement, information sharing, and collective norm setting involve taking collective responsibility for the making and application of the law. But wherever the collective is concerned there will be contestation that needs to be resolved through negotiation. Deploying the same road metaphor used in the title of the present book, Langa writes:

*The way, however, is not always certain. The provisions of our Bill of Rights are expressed in a manner that calls explicitly for **judicial application of open-textured political values** such as dignity, equality and freedom. They call implicitly for judicial choice from amongst a variety of possible solutions to various deep problems of governance and social interaction. It thus falls ultimately to judges to decide finally *where we must place our feet as we walk our path*.*³¹

The two kinds of emphasis in this excerpt draw attention to two related, though paradoxical, ideas. The first (expressed through the italicised words) is that the onus is on judges, 'ultimately' and 'finally', to chart the path to be followed by the body politic. The second idea (expressed through the words in bold typeface) is that such a charting cannot happen without judges applying '*open-textured political values*' (emphasis added) – implying not only transparency and a measure of latitude in interpretation, but also consultation.

Indeed, the need for far-reaching consultation is expressed in the early Constitutional Court judgment in *S v Mhlungu*,³² part of which argued that constitutional interpretation should take the form of 'a principled judicial dialogue, in the first place between members of this Court, then between

29 S Woolman *The selfless constitution: Experimentalism and flourishing as foundations of South Africa's basic law* (2013).

30 As above, 425.

31 P Langa 'Foreword' in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) (italics and bold text emphasis added) x.

32 *S v Mhlungu* 1995 (3) SA 867 (CC) para 129.

our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large'.³³

The title of the book from which the foregoing quotation is taken – *Constitutional conversations* – is apt: the book comprises essays on a number of topics by prominent legal academics, each followed by a 'reply' by the judges. The book is structured, then, as a set of conversations. Three of the replies are by former Constitutional Court judges – Justices Albie Sachs, Kate O'Regan, and Laurie Ackermann. Albie Sachs replies to criticism of his comment that the academic role in forging the Constitution ended with the finalisation of the Constitution, while Kate O'Regan engages with a legal academic on the remit of the Constitutional Court's jurisdiction. Laurie Ackermann takes issue with his interlocutor's definition of dignity, arguing for an inner, spiritual interpretation rather than an external, secular interpretation of the term. The dialogue thus created through the book's structure provides a useful prequel to the present book, which seeks to extend the dialogue through examining the ways in which the words of prominent former Justices of the Court have not merely informed the legal interpretations of sections of the Constitution but have also begun to shape a jurisprudence of social justice – an interpretation of the Bill of Rights forged through, and in the interstices between, curial judgments and extra-curial pronouncements.

1.4 Social justice

While *social justice* is a slippery term that eludes simple definition,³⁴ one denotation that seems to have found salience in the South African context is the following:

a state of affairs [...] in which a) benefits and burdens in society are dispensed in accordance with some allocative principle (or set of principles); b) procedures, norms and rules that govern political and other forms of decision making preserve the basic rights, liberties and entitlements of individuals and groups; and c) human beings (and perhaps other species) are treated with dignity and respect not only by authorities but also by other relevant social actors, including other citizens.³⁵

These aspects of the definition correspond, claim Chipkin and Meny-Gibert,³⁶ to what Jost and Kay call redistributive justice, procedural

33 Cited in S Woolman & M Bishop 'Introduction: Law's autonomy' in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 7.

34 D Miller 'Recent theories of social justice' (1991) 21(3) *British Journal of Political Science* 373.

35 JT Jost & AC Kay *Social justice: History, theory and research* (2010), 1122. Cited in I Chipkin & S Meny-Gibert 'Understanding the social justice sector in South Africa: A report to the RAITH Foundation and Atlantic Philanthropies' 5 <http://www.raith.org.za/docs/Report-Social-justice-Sector-7Feb2013-FINAL-10022013.pdf> (accessed 14 July 2017).

36 Chipkin & Meny-Gibert (n 35 above) 5.

justice, and interactional justice – which in South Africa are more commonly known as economic justice, public participation, and social cohesion.

It might seem anomalous that, if *social justice* is indeed quite so important, it is mentioned just once in the Constitution – part of the Preamble to which reads:

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.³⁷

But while a simple definition of the term may be elusive, *social justice* undergirds the Constitution and what it represents in terms of both redress – ‘[recognising] the injustices of [the] past’ and ‘[healing] the divisions of the past’³⁸ – and progress –

[Laying] the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; [and]

[Improving] the quality of life of all citizens and [freeing] the potential of each person.³⁹

The Preamble in this regard constitutes the prelude to a manifesto for social justice which is elaborated in the Bill of Rights. Stewart has argued that the other constitutional values of ‘human dignity, equality, freedom, accountability, responsiveness and openness’ should be used side-by-side, or even interactively, to achieve the goal of social transformation,⁴⁰ which we understand to mean social justice. ‘In terms of this reasoning,’ claim the authors of the final report on the HSRC’s Constitutional Justice Project, ‘progress towards the attainment of social justice can be used as a yardstick to measure the impact of the judgments of the [Constitutional Court] and [Supreme Court of Appeal], which of course depends upon implementation by all [three] spheres of government.’⁴¹

For the first Bench of the Constitutional Court, the issue of redistributive justice proved to be a major challenge. In the face of the requirement that ‘States should use all the available resources, including

37 ‘The Constitution’ (n 5 above) Preamble.

38 As above.

39 As above.

40 L Stewart ‘Adjudicating socio-economic rights under a transformative constitution’ (2010) 28(3) *Penn State International Law Review* 487. Cited in Human Sciences Research Council & Nelson R Mandela School of Law ‘Constitutional justice project: Final report’ (2015) 38.

41 Human Sciences Research Council & Nelson R Mandela School of Law (as above) 38.

international assistance, to make sure that every individual in their territory enjoys a bare minimum of [economic, social and cultural rights],⁴² – especially ‘[p]rotection from starvation, primary education, emergency healthcare, and basic housing’ – the Constitutional Court had constantly to find a balance between meeting these core needs and the state’s ability to afford the rights to them.

Justice Richard Goldstone’s view was that ‘It’s pointless having a minimum core ... where government simply cannot, where there’s not enough money’,⁴³ while the judgment in *Minister of Health and Others v Treatment Action Campaign and Others* read:

Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation [by the courts]. Such determinations of reasonableness *may in fact have budgetary implications*, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.⁴⁴

This judgment acknowledges that the courts do have a role to play in achieving the constitutional objective of social justice, but emphasises that the primary responsibility for such achievement lies with the executive.

Notwithstanding the perceived deference of the Court in *Treatment Action Campaign*, the most remarkable aspect of the jurisprudence of the first Bench was the justiciability of socio-economic rights, South Africa’s Constitution being globally remarkable in this sense.⁴⁵ This aspect of the foundational jurisprudence of the Constitutional Court, addressed in each of the chapters in this book, highlights the unique ways in which the individual judges understood socio-economic rights and their relationship with the complexities of transformation and social justice.

42 ESCR-Net ‘Minimum core obligations’ <https://www.escr-net.org/resources/minimum-core-obligations> (accessed 2 May 2017).

43 G Pienaar ‘HSRC Constitutional Justice Project: Interview with Justice Richard Goldstone’ (2014) 27 (emphasis added).

44 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) para 38 (emphasis added).

45 Etienne Mureinik argued for the inclusion of socio-economic rights as justiciable rights in the Bill of Rights of a new South African Constitution, the role of the courts being confined to judicial review of the extent to which relevant policy and legislation were justifiable. See E Mureinik ‘Beyond a charter of luxuries: Economic rights in the Constitution’ (1992) 8(4) *South African Journal on Human Rights* 471-474.

1.5 Constitutional interpretation and amendment

In his public address ‘Why does the Constitution matter?’ Sandile Ngcobo asked: ‘How can we tell the difference between a court interpreting the Constitution and a court amending the Constitution?’⁴⁶ Technically, amendment of the Constitution requires the introduction and passing of a bill supported by either three-quarters or two-thirds of the legislature (depending on which aspects of the Constitution are to be amended) – which at face value renders Ngcobo’s question somewhat puzzling. But in the context of recent calls for amendments to the South African Constitution – regarding land and property rights⁴⁷ – and given the relative youth of the Constitution, the line between amendment and interpretation may have become blurred. Ngcobo’s question therefore provides a useful entry point to a consideration of the issue of constitutional amendment.

De Vos points out that the South African Constitution was amended on 17 occasions between 1996 and 2014 but that most of the amendments were of a technical nature.⁴⁸ By contrast, the US Constitution was amended only 27 times between 1787 (when it was adopted) and 2014 – a time span of 225 years⁴⁹ – despite over 10,000 amendments having been proposed by members of Congress. Jeff Jacoby argues that amendment of the US Constitution *is* possible,

but only with time, persistence, and public support that is both wide and deep. The process was designed to be difficult. For all the talk about a ‘living Constitution,’ it is the nation’s legal bedrock; it isn’t supposed to change except under extraordinary circumstances, and only after following the deliberately convoluted, hurdle-filled course set out in Article V... But a fundamental altering of the Constitution’s meaning — a tectonic shift in the bedrock — should come not from judges but from the people, through the affirmative democratic act of amending the Framers’ text.⁵⁰

Notwithstanding the conservatism of the US Constitution in its resistance to amendment, Jacoby’s point that it is not the judiciary but ‘the people’ who should drive amendment is a critically important one – though arguably not only in cases involving ‘a tectonic shift in the bedrock’.

46 Ngcobo (n 3 above) 21.

47 Pierre de Vos discusses this and other areas of contention in ‘Changing the Constitution: Much ado about nothing’ *Daily Maverick* 12 January 2014 <https://www.dailymaverick.co.za/opinionista/2014-01-12-changing-the-constitution-much-ado-about-nothing/#.WfnGMmiCw2w> (accessed 1 November 2017).

48 As above.

49 ‘The way to alter the Constitution is by amendment, not interpretation’ *The Boston Globe* 16 July 2014 <https://www.bostonglobe.com/opinion/2014/07/16/the-way-to-alter-constitution-amendment-not-interpretation/Iq4HyjuKPUUMGGEj7WicDM/story.html> (accessed 4 August 2017). The Framers are the people who wrote the US Constitution.

50 As above.

Recent attacks on the South African Constitution are wont to engender concerns about its sustainability. In their exhaustive study of the endurance of the world's constitutions, Elkins, Ginsburg and Melton found that three features are crucial for facilitating constitutional endurance: flexibility; inclusion; and specificity. They define these features as follows:

Flexibility represents the constitution's ability to adjust to changing circumstances, and is captured in the empirical analysis by the ease of formal and informal amendment. Constitutions can be changed through both formal processes **as well as interpretative changes that update the understanding of the text among relevant actors.** *Inclusion* captures the degree to which the constitution includes relevant social and political actors, both at the time of drafting and thereafter. Inclusion facilitates both enforcement of the constitution as well as investment in its endurance. *Specificity* refers to the breadth of coverage and level of detail of constitutional provisions.⁵¹

Flexibility of amendment was found by Elkins *et al* to be associated with constitutional endurance, constitutions that are highly changeable and highly rigid both being subject to early demise (in which regard India's constitution appears to have forged an optimal path between malleability and rigidity). Inclusion of actors was similarly found to be associated with endurance, continual participation by individuals and institutions in constitutional processes maximising constitutional longevity. Finally these authors found that, counterintuitively, the more detailed the constitution, the more likely it was to endure.

The bold text emphasis in the excerpt from Elkins *et al* brings us back to Ngcobo's question about the difference between amendment and interpretation, suggesting that the question is not so perplexing after all. 'Interpretative changes that update the understanding of the text among relevant actors' is a key focus of the present volume: how the Constitution is interpreted by those entrusted with its care finds it metaphorical correlative in that journey along the road that is made by walking.

What makes interpretation of a constitution possible, however, is not merely the participation of all the actors in constitutional processes (in South Africa, 'all stakeholders' would constitute a key part of 'all the actors') but the extent to which the Constitution serves as a framework within which interpretation may occur. We may construe from the description in Jacoby's article⁵² of the drafters of the US Constitution as *framers* that in drafting the Constitution they were in fact providing a *frame*: 'an *open structure* that gives support to something'.⁵³ The operative words

51 Z Elkins *et al* *The endurance of national constitutions* (2009) 8 (italics emphasis original, bold emphasis added).

52 *The Boston Globe* (n 49 above).

53 *American Heritage Dictionary of the English Language Fifth Edition* (Houghton Mifflin Harcourt Publishing Company: Boston MA. 2016) (emphasis added).

here are ‘open structure’ – a paradox suggesting that though the framework that is the visible text of the Constitution is there, this does not imply that the Constitution is fixed. There is, therefore, room for interpretation of and within the Constitution. The *frame* it provides enables those entrusted with its protection and application – in the first instance the judiciary, but also the legislature, the executive, and by extension the population as a whole – to interpret it without the need for automatic recourse to its amendment. As Yacoob has said, ‘The Constitution creates a framework, a launching pad if you like, for the achievement of the society described in the Bill of Rights. It places an undeniable obligation on all the people of our country including everyone present here to leave no stone unturned in the process of achieving this result.’⁵⁴

A good example of the power of interpretation versus the need for amendment was recently provided by Justice Albie Sachs’s reflections on property and land reform. Sachs argued that:

any deficiencies with land reform thus far have stemmed from failure either to use at all or to exercise effectively the full powers given under the Constitution. The Constitution as it stands provides powerful instruments to bring about comprehensive land reform. The problem so far has been one of implementation rather than of impediments created by the Constitution. Before seeking to amend the Constitution, it would be wise to utilise its redistributory powers properly *and to rely on the fact that the Constitution is a living tree capable of responding creatively and with vigour to new problems.*⁵⁵

As a ‘living tree’ the Constitution allows the three branches of government ‘considerable latitude’ – as Sachs says earlier in the same piece – to interpret the law progressively, purposively and transformatively, as required by section 39 of the Constitution.⁵⁶

The import of Sachs’s pronouncements about ‘deficiencies with land reform’ is that it is incumbent upon the legislature and the executive to use the Constitution as a framework within which to make laws and to

54 Z Yacoob (2012) ‘A dynamic constitution. Opening address by Justice Yacoob, Judge of the Constitutional Court of South Africa (Acting Deputy Chief Justice of South Africa) presented at Constitution Week on Monday 12 March 2012 at the University of Cape Town, South Africa’ <http://constitutionallyspeaking.co.za/justice-zac-yacoob-on-the-dynamic-constitution/> (accessed 2 August 2017) n.p.

55 A Sachs, ‘Oliver Tambo Centenary Series, Part 2: Does the Constitution stand in the way of radical land reform?’ *Daily Maverick* 5 May 2017 <https://www.daily-maverick.co.za/article/2017-05-05-oliver-tambo-centenary-series-part-3-does-the-constitution-stand-in-the-way-of-radical-land-reform/#.WYhQgYh942x> (accessed 7 August 2017; emphasis added).

56 The image of the Constitution as a tree is used fruitfully by O’Regan also. For her, the Constitution is a fruit tree requiring ongoing cultivation; but though ‘bold and generous in spirit ... its vision is still far from the daily experience of most South Africans. As the Constitution takes root and grows, the challenge is to bring its bold and generous vision to fruition in our daily lives.’ See K O’Regan ‘Cultivating a constitution: Challenges facing the Constitutional Court in South Africa’ (2000) 2 *Dublin University Law Journal* 18.

implement the policies that follow from this – in effect, to interpret and apply the Constitution.

The notion of the Constitution as a frame or a framework should not, however, be interpreted to suggest that no amendment is possible. As the glossing of *frame* as an ‘open structure’ implies, the borders are porous – and so where amendment is necessary, calls for this must be entertained. Not only is the Constitution, within limits, open-ended; it is also ‘open-sourced’ in the sense that it has drawn and continues to draw on a wide range of influences and experiences, nationally and internationally. In terms of section 39(1) of the Constitution, any court, tribunal or forum, when interpreting the Bill of Rights,

- (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.

Nor was the Constitution altogether the ‘clean slate’ Ngcobo described it as being, as there was continuity from the Freedom Charter and from many other influences in its drafting.

1.6 The limits of constitutional transformation

Justice Sandile Ngcobo has reflected thus on the role of the Constitution in social transformation:

A constitution is a document we look to for answers to some of the intractable societal problems that confront us whether they are social, economic or political. But the text of the Constitution does not always provide a straightforward answer to the problems confronting us. In such a case we are compelled to look outside of and beyond the text of the Constitution ‘to various possible historical accounts, political and moral philosophy, theories of meaning and language, to practical and pragmatic considerations [and] to a host of matters beyond the Constitution that we can all see and read.’⁵⁷

Compare this with Justice Johann Kriegler’s account of the role of the Constitution in social transformation:

I had a habit of saying to young colleagues who used to come to the old greybeard and ask for advice, I’d say, go and look at your certificate of appointment. You were appointed a judge, not God. There’s only so much you can do. The limitations of the law ... we got starry-eyed because we came from where we came from and we came to where we are, in a constitutional democracy with a Bill of Rights, and independent and competent judiciary to enforce it and the public opinion in favour of it, and we all got a little starry-

57 Ngcobo (n 3 above) 5-6.

eyed. I don't think you can change societal structures and its essentials solely through court cases. Absent the political will, you really can do very little. You know, the breakthrough that the TAC made with AIDS was a combination of public opinion, advocacy, public demonstrations, media exposure – *and* litigation – *and* the law: working hand-in-hand ... You've got to use the law and public awareness at the same time.⁵⁸

The Constitution, both Ngcobo and Kriegler suggest, can go only so far in transforming society. The democratically elected government bears the primary responsibility for leading us along the constitutional path, but it is unable to meet that responsibility without first empowering the country's citizens to accept their own responsibility for making the path. Ultimately the Constitution remains a framework within which different forces act to effect change: historical accounts, political and moral philosophy, and theories of meaning and language; and such practical and pragmatic considerations as public opinion, advocacy, public demonstrations, media exposure, and litigation – all 'working hand-in-hand'. This is both the Constitution's weakness and its strength.

But its weakness *is* its strength. Consider Ngcobo's distinction between the visible and invisible Constitution:

The task of discovering the *invisible Constitution* belongs to the judiciary, which it conducts through the process of constitutional adjudication. The constitutional rules and principles that are formulated in the course of adjudication do not appear from the text of the Constitution but they are regarded as part of the Constitution because they illuminate the text of the *visible* Constitution. They constitute what has been described as an unwritten constitution or an invisible constitution. In this sense the 'Constitution that we can all see and read' is a shadow cast by the invisible constitution.⁵⁹

Compare this with the excerpt from Kriegler's separate judgment in *Fose*:⁶⁰ 'When courts give relief they attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of [the supremacy clause of Constitution]'

The image of an ideal construct recalls the relationship between the real and the ideal explored by Plato in his 'Allegory of the cave' in *Republic*.⁶¹ Ngcobo's notion – borrowed from Tribe⁶² – of the text of the Constitution being a shadow cast by the invisible constitution is consonant with this image. The meaning of the Constitution is created through adjudication that mediates between the visible and invisible texts of the Constitution. This renders the Constitution an archetype – 'something

58 N Bohler-Muller 'HSRC Constitutional Justice Project: Interview with Justice Johann Kriegler' (2014) 22-23.

59 Ngcobo (n 3 above) 6.

60 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94.

61 *Plato: The republic* trans RE Allen (Yale University Press: New Haven, CT. 2006).

62 LH Tribe *The invisible constitution* (2008) 211.

moulded first as a model' (Greek *arkhetupon*)⁶³ – the ideal towards whose image judicial adjudication seeks to conform. If the text of the Constitution were fixed it would be a weak Constitution indeed: it needs the interpretation of the judiciary – and as we have seen earlier, of the legislature and the executive also – to bring it to life and to give it substantive meaning.

1.7 Do we really need the Constitution?

A variation of Sandile Ngcobo's question 'Why does the Constitution matter?'⁶⁴ is: Do we really need the Constitution? Commentator Barney Mthombothi in a March 2017 opinion piece on the effectiveness of Chapter 9 institutions reflected wryly: 'World's best constitution, you say? Pity people can't eat it ...'.⁶⁵ In responding to this sentiment, Richard Calland, another respected commentator, wrote in a piece entitled 'Why South Africa's Constitution is under attack'.⁶⁶

... the Constitution is an unavoidable victim of the political zeitgeist. It's therefore potentially collateral damage to vicious power struggles currently consuming both the ANC and the government.

However, this analysis is not to deny that the Constitution is, and should be, a site of authentic contestation. 'Did we talk enough about land?' Moseneke asked law students at the University of Cape Town last week. 'No. But we reached a starting point compromise in section 25. We can't have millions of South Africans as unlawful occupiers of the land of their birth.'

A constitution should have a dynamic quality; it is not a tablet of stone Of course you can't eat a constitution. But, as time and again South Africa's Constitution has proved – not least this week with the SASSA [South African Social Security Agency] judgment – *it can help ensure that the poorest citizens can eat*. Moreover, and perhaps even more importantly, it can ensure that their government does not lose sight of their everyday needs and its responsibility to serve them.

The point that Calland is making, indicated in italics, is that the Constitutional Court should, and usually does, interpret the Constitution in such a way that realises its promises. To illustrate this point, he refers to the judgment of *Black Sash Trust v Minister of Social Development and Others*,⁶⁷ wherein Froneman J, for the majority, held that SASSA was under a

63 Oxford English Dictionary <https://en.oxforddictionaries.com/definition/archetype> (accessed 10 August 2017).

64 Ngcobo (n 3 above).

65 'World's best constitution you say? Pity people can't eat it' *Sunday Times* 12 March 2017 <https://www.pressreader.com/south-africa/sunday-times/20170312/282046211900618> (accessed 11 August 2017).

66 'Why South Africa's constitution is under attack' *The Conversation* 17 March 2017 <http://theconversation.com/why-south-africas-constitution-is-under-attack-74763> (accessed 11 August 2017) (emphasis added).

67 2017 (3) SA 335 (CC).

constitutional obligation to pay social grants to beneficiaries in terms of section 27(1)(c) of the Constitution. In this case the Court held that payment should be made to vulnerable beneficiaries despite the fact that the Court had declared the contract concluded with the distributors of the social grants, Cash Paymaster Services (CPS), invalid in 2013.

The Court held that CPS and SASSA would be closely monitored through a supervisory interdict and independent and technical advisors during the 12 months within which a new entity was to be appointed. In paragraph 8 of the judgment, Froneman J expressed the frustrations of the Court:

This Court and the country as a whole are now confronted with a situation where the executive arm of government admits that it is not able to fulfil its constitutional and statutory obligations to provide for the social assistance of its people. And, in the deepest and most shaming of ironies, it now seeks to rely on a private corporate entity, with no discernible commitment to transformative empowerment in its own management structures to get it out of this predicament.

Put simply, the Court had to bend over backwards to ensure that social grant beneficiaries did not suffer after 1 April 2017 as a result of the negligent (or worse) conduct of the Department and the Minister. Thus the Constitution and the Court ensured that poor South Africans could eat.

The Constitutional Court in this most extreme of examples referenced the Constitution to rescue social grant recipients from the weakness of the executive. Without the Constitution, millions would quite literally have gone hungry.

Such an extreme example of executive weakness may be an outlier – and in any case exemplifies a deficit approach towards understanding the value of the Constitution. More pertinently, then, in what ways is the Constitution a force for positive change? The answer seems to lie not in other people’s interpretations of the Constitution but in one’s own. In his famous exchange with Myles Horton about education and social change, Paulo Freire reflected:

The question for me is how is it possible for us, in the process of making the road, to be clear and to clarify *our own making* of the road

Let’s look at [how one acquires legitimate authority] in a very practical way. First of all, let us take a situation at home, in the relationship between the father and the mother and the kids. I am very sure, absolutely sure, that if the father, because he loves his kids, lets them do what they want to do and never shows the kids that there are limits within which we live, create, grow up, then the father does not assume vis-à-vis the kids the responsibility he has to guide and to lead. And what is beautiful, I think, philosophically is to see how, apparently starting from outside influence, at some point this discipline begins

to start from inside of the kid. *That is, this is the road in which we walk, something that comes from outside into autonomy, something that comes from inside.*⁶⁸

In the same way, appropriating for oneself the values of the Constitution signals the first step along the constitution-building road that instantiates the collective journey of a nation, in the vanguard of which are the Justices of the Constitutional Court.

2 Structure of the book

In 2013 the Democracy, Governance & Service Delivery research programme of the Human Sciences Research Council (HSRC) was contracted by the Department of Justice and Constitutional Development (DoJ&CD) to conduct research into a developmental jurisprudence of the rights enshrined in the South African Constitution.⁶⁹ The Constitutional Justice Project (CJP), as it was known, sought to locate South Africa's jurisprudence within the developmental state as outlined in the National Development Plan (NDP), focusing on the need for progressive jurisprudence that would advance the objects of the Bill of Rights and, in particular, socio-economic rights. Further objectives of the project were to assess the capacity of the state (at national, provincial and local levels) to implement courts' decisions and to advance the transformation of the administration of justice with regard to access to justice, the development of common- and customary law, and the cost of litigation.⁷⁰

The interviews with Justices that formed part of the CJP yielded a rich source of data which has not been adequately mined. Having learned first-hand from the judges interviewed for the CJP something about their lives and roles, we seek to celebrate them through charting their journeys, which ended for some in the Constitutional Court but for others has extended beyond that Court.

The selection of judges for inclusion in the book is based on the 'Chaskalson court' – more specifically, all the Justices who had served under Chief Justice Chaskalson who were still alive at the commencement of the CJP in 2013 and who were not sitting judges at the time. The Chaskalson court comprised Arthur Chaskalson, Laurie Ackermann, Richard Goldstone, Tholie Madala (deceased), Ismail Mohamed

68 M Horton & P Freire *We make the road by walking. Conversations on education and social change* (1990) 6-7, 187 (emphasis added).

69 The project was conducted by the HSRC in partnership with the University of Fort Hare between 2013 and 2015. For more information about the project, see Department of Justice & Constitutional Development 'Constitutional Justice Project: Presentation to the Justice Portfolio Committee, 5 September 2014' https://pmg.org.za/files/140905constitutional_justice_project.ppt (accessed 17 July 2017).

70 The Minister of Justice, Mr Mike Masutha, launched the report on 3 November 2017. For a full statement, see http://www.justice.gov.za/m_speeches/2017/20171103-CJPreport.html (accessed 6 November 2017).

(deceased), Johan Kriegler, John Didcott (deceased), Pius Langa (deceased), Kate O'Regan, Yvonne Mokgoro, and Albie Sachs. The composition of the Court has changed somewhat since its inauguration in 1994, but those on the Bench included: Justice Pius Langa (deceased), Justice Tholie Madala (deceased), Justice Yvonne Mokgoro, Justice Dikgang Moseneke (sitting Deputy Chief Justice at the time of the project), Justice Sandile Ngcobo, Justice Bess Nkabinde (sitting judge at the time of the project), Justice Kate O'Regan, Justice Albie Sachs, Justice Thembile Skweyiya, Justice Johann van der Westhuizen (sitting judge at the time of the project); and Justice Zak Yacoob.

The book accordingly pays tribute to eight Justices: Ackermann, Goldstone, Kriegler, Mokgoro, O'Regan, Sachs, Skweyiya, and Yacoob. Chapter outlines – the chapters are ordered alphabetically by last name – are provided below.

2.1 Lourens Ackermann

Protestant Christianity – perhaps little different from the Calvinism to which Kriegler was exposed in his youth – also shaped Ackermann's conceptualisation of human rights. Jonathan Klaaren, the author of this chapter, locates Ackermann (by the judge's own admission) within a Christian legal tradition traceable to a Dutch jurist, but argues that 'In his forthright acknowledgement of these beliefs, Ackermann is ever the careful lawyer, indeed as careful with his religion as he is with his law ... disavow[ing] any attempt to subvert a secular Constitution.'⁷¹ There are parallels here with Goldstone, both men careful not to foreground their religion but rather to recognise, in Ackermann's words in his book *Human dignity: Lodestar for equality in South Africa*, 'the theological and secular philosophic background, and indeed grounding, of the legal concepts of human worth and equality.'⁷²

The Christian undercurrent in Ackermann's life and work is not, however, the main thrust of the chapter, which is 'the Constitution's continuity and discontinuity with the legal order that preceded it as well as its equally constitutive relationship with other national and global legal orders.' In this regard, the author identifies three strands of (r)evolution that characterised Ackermann's contribution to the South African Constitution: the human rights (r)evolution, epitomised by Ackermann's resignation from the *apartheid* Bench to take up the Harry Oppenheimer Chair in Human Rights Law at the University of Stellenbosch; the substantive legal (r)evolution, which in Ackermann's words '[turned] the

71 This could also be said about Goldstone and Kriegler, whose religious influences did not override their obligations under a secular Constitution that demands religious freedom.

72 L Ackermann *Human dignity: Lodestar for equality in South Africa* (2012) 18.

whole structure of the state and state organs ... upside down';⁷³ and the comparative (r)evolution, marked by Ackermann's fondness for and consequent use of (western) comparative law.

2.2 Richard Goldstone

Justice Richard Goldstone was brought up in a secular home by parents of Jewish origin. While his references to his Jewishness are understated, a function perhaps of his characteristic diffidence, there is a religious undercurrent that runs beneath his life and work. Michael Cosser argues that, while there are no demonstrable influences of Judaism upon the Constitution, the centrality of justice and dignity in Judaic law and prophecy, the representation of Jews in the liberation struggle for freedom, the generosity of spirit of a Jewish law firm, and the commitment of Jewish lawyers to social justice in South Africa coalesce in the person of Richard Goldstone, who succeeds in achieving a 'rare balance' between promoting a secular Constitution and upholding the right to religious freedom of expression. This sense of balance, Cosser shows, is the hallmark of Goldstone's life and work, his jurisprudence being modelled, in his court judgments, on the notion of finding compromise in cases involving seemingly irreconcilable opposites in a way that seeks a just outcome for both parties, and the quest for fairness for all permeating the reports arising from his judicial inquiries (both national and international) and his extrajudicial pronouncements in articles, addresses, and books.

2.3 Johann Kriegler

Justice Johann Kriegler, Khulekani Moyo observes, came to the Constitutional Court as a 'human-rights lawyer, with a fairly strong religious background',⁷⁴ his Calvinist upbringing having engendered in him a sense of 'an immortal spark that every human being possesses as of right, by the very fact that you are a human being, that you're entitled to dignity, to respect, to a say in the affairs of the community in which you live, to express your views, to have your opinions, to have your right to privacy.'⁷⁵ In an account that spans a prodigious range of topics reflecting Kriegler's engagement with different facets of the law, Moyo argues that Kriegler's understanding of and commitment to equality is in fact the bedrock of his jurisprudence. 'Rather than viewing the constitutionally guaranteed rights contained in the Bill of Rights as a check on democracy,' maintains Moyo, 'Kriegler's jurisprudential approach shows his

73 University of the Witwatersrand 'Constitutional Court Oral History Project: Interview with Lourens Ackermann' (6 December 2011) http://www.historicalpapers.wits.ac.za/index.php?inventory_enhanced/U/Collections&c=213564/R/AG3368-A1 (accessed 23 May 2017).

74 University of the Witwatersrand (n 27 above) 1.

75 Bohler-Muller (n 58 above) 15.

appreciation of the significance of the Bill of Rights as a vehicle for enabling broad substantive transformative social change in South Africa.’ The articulation of this approach reaches its peak in Kriegler’s dissenting judgment in the *Hugo* case,⁷⁶ in which he held that ‘[t]he South African Constitution is primarily and emphatically an egalitarian constitution.’⁷⁷ For Kriegler, Moyo shows, equality entails ‘the full and equal enjoyment of all rights and freedoms as defined in section 9(2) of the Constitution’ and therefore requires an ‘[emphatic] rejection of the deployment of stereotypes’ – exemplified in the *Hugo* case as the caricature of women as caregivers and mothers.

2.4 Yvonne Mokgoro

Justice Yvonne Mokgoro was the first Black South African woman to grace the Bench, the youngest amongst her peers. She was one of only two women at the outset, the other being Kate O’Regan. Coming from humble beginnings in the Northern Cape, Mokgoro rose through the ranks of academia swiftly. Even before her stint on the Bench she had built a solid scholarship related to the role of *ubuntu*⁷⁸ in the constitutional jurisprudence of the new South Africa. Despite not having ‘practised’ law in the narrow sense of the word, Mokgoro’s intellect and invaluable contribution to jurisprudence as a scholar rendered her suitable for appointment. She brought with her a fresh approach to values and argued strongly throughout her time on the Bench that the African value of *ubuntu* be operationalised in legal judgments and discourse.

Although she was not the only judge to rely on *ubuntu* in her judgments, the way Mokgoro approached this value was in a deeper and more Africanist way. Rather than focusing on the universality of the concept of *ubuntu* as Sachs tended to do, Mokgoro embedded her understanding of this value in her heritage and her identity as an African woman. Notably she also emphasised the inter-relationship between *ubuntu* and reconciliation in law, arguing for a less punitive and more restorative justice system. Her pronouncements on *ubuntu* in the *Makwanyane*, *Khosa* and *Dikoko* cases in particular⁷⁹ continue to resonate as legal discourse that reflects the kind of care required by the Constitution. Since retiring from the Court, Mokgoro has continued with her work on developing *ubuntu* conceptually and practically as a value unique to South African jurisprudence, and has simultaneously focussed on matters related to social cohesion.

76 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

77 As above, para 74.

78 In using the term ‘*ubuntu*’ here and throughout the book, we take its non-Nguni correlative ‘*botho*’ as understood.

79 *S v Makwanyane and Another* 1995 (3) SA 391 (CC); *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC); *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

2.5 Kate O'Regan

In his chapter on Justice Kate O'Regan, Gary Pienaar notes that her interpretation of the doctrine of separation of powers has led to her having faced considerable criticism for her position on judicial deference (or 'modesty' and 'restraint') in the realm of public law and its impact on socioeconomic rights. In this, she resembles Ngcobo and Skweyiya, who, though perhaps for different reasons, have been similarly absorbed with the (somewhat strict) maintenance of the separation of powers. But O'Regan's judicial record, Pienaar argues, reveals that she is hardly averse to a degree of judicial activism in pursuit of the constitutional value of equality. Recognising the dangers of both activism and restraint, her UCT colleague Professor Pierre de Vos has suggested that there is an imperative for judges to find a morally justifiable path 'between judicial activism and judicial restraint'.⁸⁰ The 'restraint' of which O'Regan has been accused is consistent with her view of the role of the Constitutional Court as a forum for 'public reasoning'.⁸¹

As Pienaar sets out to demonstrate, the rudder of reason and rationality can be identified as a strong guiding principle in her body of work, along with the principle of legality. On the other hand, she is quoted as saying that the Constitution's transformation project requires all of us to engage with empathy as we try to imagine life from the perspective of the other⁸² – attributable perhaps to the fact that she was one of two women on the Bench at that time, the other being Justice Yvonne Mokgoro, who is well known for her views on *ubuntu* and rights.⁸³ The possibility of establishing from Justice O'Regan's judicial, academic and public record whether she has succeeded in navigating a justifiable middle way through the tensions arising between the imperatives of legality and experimentation, between rationality and imagination, and between deference and empathy is the central question Pienaar attempts to address in his chapter.

80 P de Vos 'Between judicial activism and judicial restraint' *Constitutionally speaking* (20 January 2009) <http://constitutionallyspeaking.co.za/between-judicial-activism-and-judicial-restraint/> (accessed 18 December 2013).

81 K O'Regan 'A Forum for reason: Reflections on the role and work of the Constitutional Court' Helen Suzman Memorial Lecture, Johannesburg (22 November 2011) <http://hsf.org.za/resource-centre/lectures/hsf-memorial-lecture-2011/view> (accessed 3 August 2017).

82 'Have empathy, that's what you can do for constitutional democracy – Kate O'Regan' *City Press* 8 September 2015.

83 See, for example, her decision in *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC); 2004 6 BCLR 569 (CC) (4 March 2004).

2.6 Albie Sachs

In their chapter on Justice Albie Sachs, Narnia Bohler-Muller and Thobekile Zikhali maintain that it is apposite, in 2018, to listen carefully to the Justice's voice to understand the difference between his activism before and after 1994. Bohler-Muller had formerly been critical of Sachs: while recognising the remarkable contributions he had made to building an understanding of the South African Constitution and its values, she 'accused' him, in 2010,⁸⁴ of having left his activism behind when he reached the Bench. With hindsight, Bohler-Muller and Zikhali claim, Sachs's activism is, ironically, perhaps the most important contribution he has made in 'walking the path' to a post-*apartheid* democratic South Africa. For activism, they go on to argue, takes different forms; and at times the Constitutional Court needs to defer to the other two branches of government to ensure that it is not seen to be 'over-reaching' or being counter-majoritarian (or, even worse, according to the ANC's former Secretary-General, Gwede Mantashe, counter-revolutionary).⁸⁵

Prior to 1994 Sachs fought bravely against the oppression of *apartheid*; he paid a high price, losing limb and almost life, for his courage. After 1994 he entered into a new phase of 'activism' more suitable to South Africa's democratic dispensation. As a member of the first Bench of the Court he continued to fight, in new more nuanced ways, to protect the Constitution and to ensure that its interpretation reflected an ethic of care and *ubuntu*. Through a unique combination of story-telling, *ubuntu*, reconciliation and the restoration of balance, the authors maintain, Sachs's life and words have shown him to be a deeply caring man often torn between his empathy for the plight of the poor and dispossessed and the pragmatic realities of limited state resources. This care extends to the present as he draws the attention of a polarised public to a more balanced reading of the land reform provisions in the Constitution.

2.7 Thembile Skweyiya

Justice Thembile Skweyiya was known for his efforts in making the Constitution a lived reality for communities and not simply a charter of rights – his interpretation of the Constitution, Ndlovu and Omino argue, having been heavily influenced by his dedication to social justice. His judgments often encapsulated his pragmatic interest in the manner in which the law affected people and communities at large beyond individual cases. Skweyiya was particularly known for his critical contributions to the interpretation of children's rights contained in section 28 of the Constitution (on 'Children'), his court contributions to judgments or his

84 N Bohler-Muller 'The strange alchemy of the judge and the blue dress' (2010) 25(1) *Southern African Public Law* 152.

85 'Counter-revolutionary coalition emerging' *Cape Argus* 23 September 2014.

own majority author judgments epitomising the notion that ‘A child’s best interests are of paramount importance in every matter concerning the child.’⁸⁶

But while Skweyiya, perhaps more than any other judge on the Constitutional Court Bench, was able to identify with the downtrodden by virtue of an empathy born of his familiarity with the conditions in which they lived, his primary jurisprudence, argue Ndlovu and Omino, centred around attempts to infuse the South African Constitution with elements of African jurisprudence and the continental resonances of *ubuntu* it embodied. ‘Ultimately my message’, he said in an HSRC colloquium in 2015, ‘is that we ought to be not only more attentive and receptive to the African voice when we conduct our comparative constitutional interpretation but also more conscious of our responsibility to strengthen that voice in our judgments from which the rest of the continent and even the world may find assistance.’⁸⁷

2.8 Zak Yacoob

For Vasu Reddy and Sarah Chiumbu, identity is a function of ‘processes that constitute and continuously reform the subject who has to act and speak in the social and cultural world.’⁸⁸ The authors take an approach in their chapter on Justice Zak Yacoob that sees as inseparable the making of the man and his contribution to constitutional jurisprudence. More specifically, their central argument is that Yacoob’s location in the world is inseparable from ‘his commitment to fairness and equality’, which is born of his own life experiences in ‘overcoming personal, political and social obstacles ... and his ability to render probing and difficult questions on all matters that concern inequalities when the values of the Constitution are transgressed.’ For Yacoob, equality resides in ‘just practice’, the law finding true meaning only in ‘efforts to understand people’s life circumstances and how these interact with their ability to live in the world.’

Yacoob himself claims that ‘the inclusion of social and economic rights in our Constitution militates against the idea of *mere liberal democracy* ... I would say that we should develop ourselves to be a people’s democracy ... that is truly interested in people’ (emphasis added)⁸⁹ – which leads Reddy and Chiumbu to posit that Yacoob in fact believed in ‘inclusive neoliberalism’⁹⁰ with its ‘explicit focus on the poor and

86 As above, sec 28(2).

87 TL Skweyiya ‘Presentation at the HSRC colloquium for the Constitutional Justice Project’ (26 November 2014) 9.

88 S Hall ‘Fantasy, identity, politics’ in E Carter, J Donald & J Squires (eds) *Cultural remix: Theories of politics and the popular* (1995) 95.

89 Z Yacoob ‘The Constitution: A liberal democracy and patriotic criticism’ Helen Suzman memorial lecture 2013 <http://hsf.org.za/resource-centre/lectures/hsf-memorial-lecture-2013/view> (accessed 3 August 2017) 21.

recognition of the role of the state in ameliorating the plight of the poor.’ Epitomising the core argument of the present volume, Yacoob maintains that ‘a dynamic Constitution also implies a living instrument, a facilitator that has a life of its own and which breathes life and positive energy into the people of the country.’⁹¹ Through his words and actions, and yearning for inclusiveness, Yacoob is the living embodiment of the first three words of the Preamble to the Constitution: ‘We, the people’.⁹²

3 Contributors to this volume

This book is unique among books published by legal publishing houses for the diversity of its contributors: the editors and authors are drawn not only from the legal profession or legal academia but include scholars and researchers from different disciplines. A quick perusal of the authors’ biographies shows that there is a mix of disciplines, ranging from law to sociology to development theory to education. The chapters themselves, moreover, are written in a multi-, inter- and cross-disciplinary style, building a mosaic that seeks to enrich future conversations about the evolution of the Constitution – which after all is not the sole preserve of the law and lawyers.

Some of the chapters in this volume are voluminous; others are rather shorter. This discrepancy is due in some instances to the amount of available material on the judges – a function of the extent of the documentation of their backgrounds, the nature and extent of their legal careers, and their personal dispositions. But it is due also to the different writing styles of the authors – a function in turn of their disciplinary bents. As such, the authors have worked with the materials at their disposal and within the confines of their personality types and writing styles. The process, much like the making of the Constitution, is uneven, yet oriented towards the building of the mosaic that is the Constitutional narrative.

90 O Eggen ‘Making and shaping poor Malawians: Citizenship below the poverty line’ (2013) 31(6) *Development Policy Review* 697.

91 Z Yacoob ‘A dynamic Constitution’ Opening address by Justice Yacoob, Judge of the Constitutional Court of South Africa (Acting Deputy Chief Justice of South Africa) presented at Constitution Week on Monday 12 March 2012 at the University of Cape Town, South Africa <http://constitutionallyspeaking.co.za/justice-zac-yacoob-on-the-dynamic-constitution/> (accessed 3 August 2017) n.p.

92 ‘The Constitution’ (n 5 above) Preamble.

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