

CHAPTER 9

TRANSFORMATION AS CONSTITUTIONAL IMPERATIVE: JUSTICE ZAK YACOOB AND THE MAKING OF A CIVIL PRACTICE

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Source: <http://www.constitutionalcourt.org.za/site/judges/justicezakYacoob/index1.html>

1 Introduction

This chapter provides an empirical and analytical template that foregrounds the legal personality of Justice Zak Yacoob and his contributions in promoting the transformative objectives and vision of the Constitution. Our approach sees as inseparable the making of the man and his contribution to the Constitution. We propose therefore that Yacoob's engagement with matters constitutional has its origins in an ongoing project rooted in his social, historical and political shaping. His identity, physical blindness and Muslim upbringing have shaped his contribution to the Constitution in unique ways. Identity, following Stuart Hall,⁸⁸¹ is a

881 S Hall 'Fantasy, identity, politics' in E Carter *et al* (eds) *Cultural remix: Theories of politics and the popular* (1995).

function of 'processes that constitute and continuously reform the subject who has to act and speak in the social and cultural world.'⁸⁸²

The argument herein takes as a point of departure a central thread in the volume in which it appears, which is concerned, following Ngcobo's 2016 public address,⁸⁸³ with the question as to *why* the Constitution matters in so far as it frames the character, role, and identity of Justice Zak Yacoob on the Constitutional Court Bench. Justice Yacoob surfaces in this sense as a signal torchbearer for the value of the Constitution and its transformative imperative. Our argument zeroes in on the character, nature and attributes of the meaning of the Constitution, and we deploy a reading that motivates that the developing identity of Yacoob is a central thread that gains currency over time, for it is difficult to separate the man from his understanding, interpretation and execution of the constitutional mandate.

The chapter provides in part a legal biography of Justice Zak Yacoob, drawing on a series of sources (namely interviews, vignettes, speeches, journal articles, insights from court judgements and media clippings) for an argument about Yacoob's contributions to and advancement of the South African Constitution in particular, and transformative constitutionalism more broadly. The chapter formulates an interpretation of Yacoob's vision and practice and its alignment to a transformative social justice – not purely in terms of demographical variables but rather in respect of 'how the court does its work'. The idea that the work of the court is fundamentally about incrementally building towards 'being pro-transformation, pro-poor, respectful of human beings' and that it enables the 'government gently to account' appears central to the kind of jurisprudence that Yacoob espouses.⁸⁸⁴

Conceptually, we read Yacoob's jurisprudence and civil practice through the lens of social justice. In his judgments and speeches, Yacoob has recognised injustices as expressed in inequalities as being born of the *apartheid* past. He therefore advocates for recognition of the poor as full citizens deserving of dignity. He clearly views the Constitution as one of

882 See, for example, RB Flemming *et al* *The craft of justice: Politics and work in political court communities* (1992); E Goffman *The presentation of self in everyday life* (1959); JT Ulmer *Social worlds of sentencing: Court communities under sentencing guidelines* (1997); P Wice, *Justice and lawyers: The human side of justice* (1991). These references provide a clarification in respect of how the social worlds of judges also shape their identities (Goffman; Wice), while Flemming *et al* and Ulmer provide a perspective in criminal law as to how judges are embedded into communities where communication and interaction define courtroom duties. See also JL Huck & DR Lee 'The creation of sentencing decisions: Judicial situated identities' (2014) 25(2) *Criminal Justice Policy Review* for a quantitative paper that responds to a gap in knowledge as to how the social worlds of the courtroom and judge relate to sentencing decisions.

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

884 N Bohler-Muller 'HSRC Constitutional Justice Project: Interview with Justice Zak Yacoob' (2015): 15.

the key tools to address the severe material, racial and class inequalities of the *apartheid* past, while at the same time creating a platform for the full realisation of constitutional citizenship. Yacoob views citizenship as therefore intractably linked to questions of redistributive justice and sees the courts as important players in this process.

We argue below that Yacoob's views of social justice align with Nancy Fraser's notion of social justice, where justice is viewed as a matter of fair distribution and reciprocal recognition.⁸⁸⁵ From the distributive perspective, injustice appears in the guise of class inequalities, rooted in the economic structure of society. Injustice in this case is maldistribution, understood broadly to encompass not only income inequality but also deprivation and marginalisation.⁸⁸⁶ The remedy is a more equitable (re)distribution of resources and goods. In contrast, from the recognition perspective, injustice appears in the guise of status subordination, rooted in institutionalised hierarchies of cultural value. The paradigm of injustice here is misrecognition, broadly understood to encompass non-recognition and disrespect. The remedy, therefore, is recognition of the cultural identities of groups that suffer experiences of social discrimination and exclusion.

While Fraser's ideas have a bearing on a narrow type of identity politics, there is a particular saliency in her insights for understanding Justice Zak Yacoob (the activist and Constitutional Court judge), who as a champion of the Constitution has shown that social justice as a primary value has overarching relevance to the idea of equality in just practice – also known as substantive equality – that requires efforts to understand people's life circumstances and how these interact with their ability to live in the world. We also introduce insights from critical social justice theory to critique Yacoob's vision of social justice.

At the core, we have assembled in this chapter sources that confirm Yacoob's vision that socioeconomic transformation is contingent on remedies for social injustices, requiring ongoing efforts to restructure and democratise in order to reorganise the procedures by which decisions are made. As indicated earlier, the constitutional imperative remains paramount in respect of the identity and practice of Yacoob's life mission and work. In this sense the chapter initiates a set of descriptive, empirical and analytical perspectives that show *how* insights from his life's work provide opportunities for meaning-making and, in particular, for understanding Yacoob's perspective on the transformative imperative of the South African Constitution.

885 N Fraser 'From redistribution to recognition? Dilemmas of justice in a "post-socialist" age' (1995) 212 *New Left Review*.

886 N Fraser 'Social justice in the knowledge society: Redistribution, recognition, and participation' (Beitrag zum Kongress "Gut zu Wissen", Heinrich-Böll-Stiftung, 5/2001).

The chapter comprises four interconnected sections. In the first part, we provide an abbreviated biography of Yacoob that articulates his formative beginnings. In the second part, we investigate Yacoob's conception and interpretation of the Constitution by tracing particular perspectives that help distil a set of identifying beliefs and practices that show how his engagement, information-sharing and collective norm setting articulate meanings for the application of the law, as well as his thoughts on current issues of national import. In the third part, we offer a critique of Yacoob's politics of redistributive justice through the lens of critical social justice. Finally, in the fourth part we tentatively delve into the scope of the foregoing description and analysis for possible deductions about Yacoob's ethic of social justice and its undergirding by a constitutional imperative.

2 The biographical beginnings of Justice Zak Yacoob

The intersection between private and public life is what in essence characterises the person who is Zak Yacoob. An array of social forces and codes, such as language, disability, race and gender, shape the attributes of, and mediate, his identity.

Born on 3 March 1948, Justice Zakeria 'Zak' Mohammed Yacoob became blind at 16 months of age following a bout of meningitis. He attended the Arthur Blaxall School for the Blind in Durban from 1956 to 1966. In an interview on 6 May 2016 with Melanie Verwoerd on Cape Talk (Radio 702),⁸⁸⁷ Yacoob not only mentioned the personal disability, but indicated his awareness and recognition that his disability was further compromised by the *apartheid* system in which he was located – about which he said that if he had been a black child he would not have received formal education. 'It was difficult,' he said, 'in the sense that I had to get people to read things to me and I had to record all my lectures [...] it did take long hours.'

In an earlier interview focused on the relevance of difference between gender and race,⁸⁸⁸ Yacoob maintained that 'disability is an extremely

887 'Justice Zak Yacoob's life journey and his lifelong dedication to social justice' *Capetalk* 6 May 2016 <http://www.capetalk.co.za/articles/13357/justice-zak-yacoob> (accessed 15 May 2017).

888 University of the Witwatersrand 'Constitutional Court Oral History Project: Interview with Justice Zak Yacoob' 7 December 2011 http://www.historicalpapers.wits.ac.za/inventories/inv_pdf/AG3368/AG3368-Y86-001-jpeg.pdf (accessed 15 May 2017).

important factor. One of the historic things about this Court is that it had two people on it with disability, for a period of eleven years.⁸⁸⁹

Following school he studied for a Bachelor of Arts degree from 1967 to 1969, and from 1970 to 1972 for a Bachelor of Law degree at the University College, Durban (now the University of KwaZulu-Natal). Yacoob's life in law and justice beyond his professional qualifications is shaped by a sense of deep and meaningful equality, with an innate dedication to the plight of the poor and marginalised in relation to the idea of social justice. In an interview he provided the following response to a question about the origins of his interest in social justice and socio-economic rights:

I didn't understand the idea of social justice. I accepted everything. It was only at university that my social justice things came to the fore [...] I come from a very conservative Muslim family, but the nice thing about that was that my father treated me like you would treat any other child [...] But social justice, at university certainly not before. If you asked me when I was in standard ten whether a gardener who earned fifty cents a day in those days earned enough, I probably would have said yes.⁸⁹⁰

In a later interview with *City Press*,⁸⁹¹ recalling his university experiences, he indicated that while a student he was surrounded by debates on Marxism and non-racialism that soon had him realising that 'this racism thing was nonsense. I realised that unless I committed myself to getting rid of it, I would not be myself.' In the same interview, Yacoob indicated that he met his wife when she introduced herself to him when he was lost. He subsequently married her and they had a daughter, who has followed in his footsteps to become an advocate, and a son, a scientist who works at the Large Hadron Particle Collider at Cern. Yacoob indicates that his upbringing and foundations were strongly influenced by his father, a Muslim cleric: 'My father said that I was going to be treated strictly despite the fact that I couldn't see. I think that was the beginning of who I was.' And if there were any question that Yacoob's identity had been pre-given or complete, in the same interview he remarked: 'I don't know what it is to see. For me, this has been a normal life. But I think to myself, even if Yacoob could not see, his life would still not have been just a "normal" one.'

889 He was referring here to Albie Sachs, former judge on the Constitutional Court of South Africa, who in 1988 lost an arm and lost sight in one eye in a car bomb attack in Mozambique.

890 University of the Witwatersrand (n 888 above).

891 As above.

An ongoing commitment to equality and dignity shapes and animates his life as a constitutional icon, with credentials rooted in the struggle for social justice and democracy. As an activist in the struggle against *apartheid*, he was also an Executive of the now defunct Natal Indian Congress (NIC) and he represented, counselled and advised people, between July 1973 and May 1991, in high-profile political trials (such as Operation Vula),⁸⁹² where people were prosecuted for contraventions against security laws, emergency measures, and other forms of discrimination (the latter particularly in the arena of public law). Between 1985 and 1988, as an active member of the United Democratic Front (UDF), he defended members and UDF affiliates in the famous Delmas Treason Trial. In 1990 and 1991 he similarly defended several high-ranking members of the African National Congress (ANC), including members of civil society who were victims of unfair eviction. During the transition from *apartheid* to post-*apartheid*, Yacoob served on the Independent Electoral Commission (December 1993 to June 1994). In the interview with Melanie Verwoerd⁸⁹³ he recalled that Nelson Mandela had asked to see him:

He said, boy, I wanted to see you because I wanted to tell you that I know you are a committed member of the ANC, but when you are on the commission, my instructions to you that you must not take our side. And that for me was wonderful.

The plea to Yacoob for independence probably had its roots in his earlier work, preceding the formation of the Constitutional Court, in which he had distinguished himself. He was also a member of the panel of Independent Experts of (as a legal advisor to) the Constitutional Assembly in the early 1990s, which entailed 'advising the political parties on options, which they had, and suggesting other options if existing options, which they thought of were not good enough for them to agree. And then drafting, making sure that what they had agreed was actually written down accurately, clearly and as simply as possible.'⁸⁹⁴ Yacoob had previously spoken about his keen desire to serve on the Constitutional Court (he was unsuccessful in his 1994 application), and following a nomination by the University of Natal (now the University of KwaZulu-Natal), he was appointed to the Constitutional Court in 1998 by former President Nelson Mandela.

Yacoob retired in 2013, but remains an active and animated force in respect of national concerns that directly bear on the plight of South Africans.

892 Open Vula was an underground operation established by the ANC in 1986. The main objectives of this operation were to smuggle freedom fighters into South Africa and maintain open communication links between the ANC leaders in exile, at home and in prison.

893 *Capetalk* (n 887 above).

894 University of the Witwatersrand (n 888 above).

We turn now to specific themes in relation to his experience as a member of the Constitutional Court.

3 The idea of the law and becoming constitutional

In 'Amend constitution and poverty will be eradicated', while offering a critique of and recommending the removal of the limitation clause in the Constitution, Nojekwa⁸⁹⁵ maintains that the opening paragraph on the Constitution is a praiseworthy testimony that speaks to countering past injustices and future developmental challenges:

The South African Constitution is hailed as one of the most progressive constitutions internationally because it entrenches as judiciable the rights to a variety of socioeconomic rights. The Constitution of South Africa was drafted as a conscious living testament to those that sacrificed their lives and their being to opposing the evils brutally enforced under *apartheid* rule.

Our central argument is that Justice Zak Yacoob's location in this world cannot be separated from his commitment to fairness and equality, resulting in part from his own life experiences of overcoming personal, political and social obstacles in so far as they relate to the Constitution and his ability to render probing and difficult questions on all matters that concern inequalities when the values of the Constitution are transgressed.

For many the law is viewed as not entirely neutral or objective, but rather discursive (in other words, shaped by a range of forces in society). If the law is about power (and if we recognise that power could be interpreted to be the play of politics) and a set of practices that is directed toward mobilising change, then it stands to reason that the South African constitutional process, especially the mandate assigned to the Constitutional Court (through the cases brought before it), continually reflects the law as a site of struggle and its effects on and relations of power. By the latter phrase we mean the implications of democracy for the distribution and implementation of power in so far as this places responsibilities on the judiciary.⁸⁹⁶ The issue and exercise of power is an important concern in relation to the location and usage of a Constitutional Court judge in relation to such power. Yacoob argues that 'we have different powers, we use it differently, and we must use it to the best of our ability.'⁸⁹⁷

895 'Amend constitution and poverty will be eradicated' *City Press* 14 December 2008.

896 See R Abel *Politics by other means: Law in the struggle against apartheid* (1995) for a discussion on how law was utilised in the struggle against *apartheid*; see also D Davis *Democracy and deliberation: Transformation and the South African legal order* (1999).

897 University of the Witwatersrand (n 888 above) 22.

In response to a question about whether there are non-legal considerations that play a part in the judgement process, Yacoob motivates that every consideration is legal:

There are not strictly positivist law considerations. I think that in everything you decide, a context in which you decide it is important, what's happening in society at the time is important, and words mean things only in terms of their context. They have no meaning otherwise. So I think context is extremely important and we must bear that in mind. And therefore in everything that we do [...] my sense is that when judging cases we are not repairing motorcars, with the result that it's not an objective business because there's no so such thing. You're not getting the law right, what you are doing is making orders, which affect human beings.⁸⁹⁸

If the law is an active agent in political processes, the constitution-making process is likewise not an innocent bystander, but rather an active agent in mediating meanings about the law and social justice. In effect, if the law is a set of principles, then justice is to be interpreted as an effect of the law, stimulating a restorative and curative process that addresses the problem of inequality. The Constitutional Court has been assigned a number of cases over the years, but cases focused on socio-economic rights have drawn significant attention as they can be seen to represent broader concerns of service delivery and transformation which, in turn, direct us to questions as to who is benefiting from them and, crucially, *why* some forms of development appear to work and why others do not. For Yacoob his position on socio-economic rights – as expressed in the same interview for the Oral History project – is about finding a balance between human suffering and social justice and fairness:

I am a strong proponent of socio-economic rights. I'm also a strong believer in the fact that you can't ask the government to do what it can't do. That the balancing exercise in this country is a very difficult one. And that's why we've developed a standard, and we apply that standard and so on [...] for me, it is strictly a matter of logic and nothing else. If you have no food, you have no clothes to wear, and you are really physically in a mess, it is ridiculous to talk about the right to vote [...] So for me the thing about social and economic rights has to do more with a tight logical frame than with the emotion of feeling sorry for people [...] If you said to me that you met with an accident and you are my friend, I wouldn't sympathise with you say how bad it is, and so. My mind would go in a different direction. Are you okay? You're sure you're okay? Is there anything I can do to help you?

Underlining these views is the idea that socio-economic rights require ongoing adjudication in respect of tangible material and dedicated efforts to reduce and minimise human suffering. For Yacoob, Court decisions are contingent on a care ethic, directed toward concern and benefit for citizens.

898 As above, 13.

Yacoob also clarifies the context and reasons for turning to the idea and practice of the law firstly, and secondly to the idea of the Constitution:

The idea of the law being used to achieve justice, came much later. That came after I became a lawyer, and we had to work out how [...] the trouble really was, how a law, specifically designed for the purposes of exploitation and oppression, could firstly be challenged at every level, and secondly, how such a law could be turned around somehow in our favour. Because we thought that law was a kind of dialectical weapon almost. It could be used by them and it could be used by us. And that's the context in which our ideas of law and justice came up. And then the idea of the Constitution came up because in the late 1980s, the ANC had begun to think about constitutions and constitutionalism and how constitutions can be used to achieve good things for society [...] So I had to start studying, in the late 1980s, '86/'87, about constitutionalism, constitutions in other countries, the relationship between constitution and justice, constitutions and socio-economic rights.⁸⁹⁹

The idea of difference and the accommodation of his disability within the realm of the Court is also a factor in Yacoob's evolving identity. Memories of his initial days at the Court when it was still located at Braampark, Johannesburg recall his experience of collegiality, respect and 'genuinely good interpersonal relationships'⁹⁰⁰ among his peers. More importantly, Yacoob expresses gratitude for the assistance of the state in providing him with a Braille printer and a professional assistant: 'that level of accommodation can never be overemphasised. I could not do my work without that under any circumstances.'⁹⁰¹

Flowing from the preceding observations we may deduce that Yacoob's legal mind and responses to constitutionalism can be explained as 'a description of an institutional framework which places constitutional limits on the exercise of state power.'⁹⁰² Van Huyssteen further clarifies that the Constitution 'provides a topography of the distribution and exercise of political power', maintaining that 'constitutionalism focuses more widely on the implications for the distribution and exercise not only of political power, but also of social and economic power, and not only within the state, but also between the state and civil society and within civil society'.⁹⁰³ Turning more directly to Yacoob's views on the Constitution, we note that he offers insight as a sterling legal mind, coupled with academic rigour and an uncompromising commitment to the protection of human rights.

899 As above, 2.

900 As above, 11.

901 As above, 11-12.

902 E van Huyssteen 'The Constitutional Court and the redistribution of power in South Africa: Towards transformational constitutionalism' (2000) 59(2) *African Studies* 246.

903 As above.

4 Views on the Constitution

While Yacoob played a critical role as a member of the Bench in respect of high-profile cases, he is best known for the majority judgement he wrote in *Government of the Republic of South Africa and Others v Grootboom and Others* and his poignant dissent in the *Le Roux v Dey* matter. Over the years he has demonstrated extensive dedication to constitutional interpretation and application, as well as civil practice. Active in efforts to achieve and deepen democracy, Yacoob views the Constitution not simply as a flexible and dynamic framework but rather as a 'living instrument' that gives impetus for all of us to 'live by Constitutional values.'⁹⁰⁴ For Yacoob the meaning (and by implication the *benefits* and *value*) of the Constitution is 'to give settlement between opposing forces in the struggle for our democracy.'

In an interview with Narnia Bohler-Muller,⁹⁰⁵ Yacoob articulated a number of key aspects that foreground:

- (1) His vision of the Court: 'the court has an obligation to enforce the Constitution, and the Constitution says the court is right when it does so.'⁹⁰⁶
- (2) Policy questions related to the court: 'that courts do not determine policy and courts cannot determine whether policy is right or not. But where the policy gives rise to action or conduct, then our Constitution says that any conduct inconsistent with the Constitution is invalid.'⁹⁰⁷
- (3) The meaning of an apex court: 'The real point is that neither you nor I have the right to say to the Constitutional Court – the majority decisions in the Constitutional Court are wrong. That's our system, and that's what my position is',⁹⁰⁸ and
- (4) The transformative dimension of the Court's work: 'Not only transformation demographically, but transformation in terms of how the court does its work',⁹⁰⁹ 'you cannot assume what the government does is necessarily transformative. And therefore again, transformation is a constitutional imperative.'⁹¹⁰

But such an ethos, it seems, is only possible with a set of performative strategies that suggest a *modus operandi* for how the court functions.

904 Constitutionally Speaking 'Justice Zak Yacoob on the "dynamic constitution"' <http://constitutionallyspeaking.co.za/justice-zac-yacoob-on-the-dynamic-constitution/> (accessed 15 May 2017).

905 Bohler-Muller (n 884 above).

906 As above, 4.

907 As above, 4, 5.

908 As above, 5.

909 As above, 13.

910 As above.

5 Working in the Court and a humane approach

Yacoob's insights into the procedures and work ethic within the Court are incisive. Emerging in his perspective is a consultative, collegial ethos that pervades Court proceedings, recognising a separation of powers and the obligation to enforce the Constitution:

We all understood that the reason why we have eleven judges in this country is that on the assumption that there is such a thing as the absolute truth, and I'm not sure whether there is, but if there is something like that, then it is good for what you might call the final earthly truth. But the final earthly truth actually is determined by eleven people who do come from different backgrounds, who do see life differently, who do think about things differently. So if that's the philosophy then a prerequisite for that philosophy to work is that we take each other seriously. We have to listen to each other. We can't be tied to our own positions and own views. We can't be here thinking that we are right and no one else is, and so on [...] So that sort of collegiality, discussion, taking people seriously, was for me a very important thing. And then you know, by our very nature, some of us are softer than others. So for some reason I'm a harder human being than many of my colleagues are. So that I have to listen to their softer positions, and I suppose I've grown a little softer too in the process.⁹¹¹

Getting to the 'truth' by striving for a judgement that moves beyond personal positions to weigh in on a judgement is one that is always directed to benefits that have impact for those that matter.

Another theme featured in Yacoob's view is that the Court's procedure is intimately aligned to a concern for humanity and the humane:

We always have respected humanity, we've always respected human beings, and none of our judgements can be regarded as being disrespectful or insulting of poor people. In fact our judgements have always been very sympathetic to the needs of poor people, and the needs of vulnerable people, the needs of vulnerable minorities, and I make no excuse for that, because I think that is how a court should be.⁹¹²

Those who matter are ultimately the poor and the vulnerable:

Vulnerable people are important members of our society and we want to appreciate and care for them for OUR own sakes because WE do not want to live in a society in which vulnerable people are trampled upon.⁹¹³

911 University of the Witwatersrand (n 888 above) 12.

912 Bohler-Muller (n 884 above) 14.

913 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 15 May 2017) 14 (emphasis original).

The question arises whether, in spite of our earlier observation, personal opinion can be displaced by elements of bias and subjectivity.

5.1 Subjectivity

As indicated earlier, the assumption that the law is entirely neutral and free from the burdens of subjectivity and erased of emotion is countered by Yacoob in several ways:

We come from different parts; we understand things differently, and so on. So the things to do, if you don't admit the subjective without knowing it, because you believe you're not being subjective. On the other hand, if you're aware of the dangers of subjectivism and you're also aware of the importance of subjectivism, then the struggle becomes a difficult one. Because the struggle is not whether it should be totally objective. The question is, how much subjectivity must you allow to get into judging a particular thing, and therefore the question becomes, what is the right balance between subjectivity and objectivity? What is the right balance between the normative elements of the society in which we live and strict law? So I think that the balance of subjective and objective, the reliance on societal norms, the reliance on moral norms, the reliance on your own self to the extent that it is permissible to do so, are all actually appropriate legal considerations.⁹¹⁴

Yacoob also makes the observation that self-awareness is a factor in response to the question of finding a balance between subjectivity and objectivity:

Absolutely, because all those things, and we are not free – judges are not free of all of these differences. We remain, unfortunately, vulnerable, or fortunately, probably. Actually, with our failings and our own weaknesses, and we try, as best as we possibly can, to do our job and carry out the Constitution.⁹¹⁵

It seems therefore that, in Yacoob's jurisprudence, it is the case that striving for objectivity comes with a dual responsibility for recognising experience, socialisation, and a sense of self. The *Grootboom* case demonstrates to some extent how this tension was played out.

5.1.1 *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)*

Over and above indicating that he was flattered to be assigned writing the majority judgment for the *Grootboom* case, Yacoob indicates that it was not solely his judgement (he merely produced the first draft). The *Grootboom* case involved an eviction order given to Mrs Grootboom and others to

914 University of the Witwatersrand (n 888 above) 13.

915 Bohler-Muller (n 884 above) 16.

vacate land they were occupying. After failing to get a positive outcome in the High Court, which ruled that the government was not in violation of section 26 of the Constitution (the right to access to adequate housing), citing the state's limited resources and their existing efforts to implement a housing programme, the case went on appeal. The Constitutional Court ruled that Grootboom and others had a right to demand reasonable action from the state to provide access to housing to all South Africans by devising and implementing a housing policy that did not neglect the most poor and vulnerable members of society. This would be in line with the requirement for the state to ensure the 'progressive realisation' of socio-economic rights within 'available resources'. Children, however, were held to be entitled to immediate access to shelter in terms of section 28 of the Constitution.

Yacoob opined that the key feature of the case was how the Court 'linked reasonableness to poverty and vulnerability, and how we interpreted the section to mean that the state must have a coherent, co-ordinated, workable programme. So I think those were the important things.'⁹¹⁶ In the same interview he said the following: 'So strictly speaking, we didn't decide on the case at all, because the case was not decided to benefit Grootboom, because Mrs Grootboom's case had been settled with government. The case was decided in relation to settling the principles for other people.'

In this case, he explained that it was not the Court's view of reasonableness, but rather:

If there is doubt about whether something is reasonable or not, and if the case is such that our view of reasonableness differs from the government's view of reasonableness, then we defer to the government. Having said that we said that a programme which does not cater sufficiently for vulnerable people is not reasonable. A programme which does not take housing forward as time progresses, is not reasonable. So we've set those sorts of conditions for reasonableness, and then we have to decide in every case what it is. And there are differences of opinion on these things. So you'll find that quite often when we say something is reasonable, if we say government policy is reasonable, the activists in the community will say, this Court is gone out of its head.⁹¹⁷

In his interview with the Human Sciences Research Council, Yacoob confirms that 'the Constitution says the government must act reasonably, and it is my job to make sure that the government does act reasonably and I must protect my views at that level.'⁹¹⁸ The role of judge and advocate for social change takes on new meanings with these views.

916 University of the Witwatersrand (n 888 above) 15.

917 As above, 16.

918 Bohler-Muller (n 884 above) 11.

Following his departure from the Court, Yacoob has been quite vocal on other matters of state – particularly, corruption and Nkandla – which he locates within the category ‘patriotic criticism’.⁹¹⁹

5.2 Corruption, Nkandla and patriotic criticism

In the last few years, the ANC leadership has been embroiled in several corruption scandals. Given the growing debates on political corruption and concerns about its consequences for the future of the country, in an interview with *City Press* Yacoob made the following observation:

There are societies where corrupt people never get caught. So for me, every time corruption is discovered, I feel our transparency has resulted in something positive. If I can do anything about making a contribution to picking up this problem and making sure people talk about it, I will.⁹²⁰

On the topic of Nkandla (President Zuma’s private home in KwaZulu-Natal), following evidence of extraordinary use of public funds for upgrades of a personal property, Yacoob, in an interview with Melanie Verwoerd on Cape Talk / Radio 702, had this to say:

It is quite obvious that the Public Protector’s order had to be obeyed. It is quite obvious that the President had to know what was going on in his own house and I thought the judgment was too gentle.⁹²¹

The observations that address current topics of the state’s relationship to citizens, such as corruption broadly and specifically that which is centred on state capture, are to be viewed as part of what Yacoob describes as ‘patriotic criticism’. State capture in the South African context refers to the alleged influence of the Gupta family, personal allies of President Zuma, in the state’s decision-making processes. Viewed as part of the right to freedom of speech, patriotic criticism ‘creates an obligation on us to achieve a particular kind of open society [...] in which we can honestly engage with each other [...] in which we can honestly talk to each other [...] in which we try to understand each other’s points of view [...] in which we are not impacted by political point scoring.’⁹²² For Yacoob, the urgency to speak out arises out of the constitutional imperative ‘to engage in discourse, to criticise, to be honest and to engage without risk’, because the dangers, as he warns, have particular negative effects, namely that ‘private criticism contributes to the erosion of democracy, [...] openness is a constitutional imperative; secrecy destroys openness as does private

919 Yacoob (n 913 above).

920 *City Press* (n 891 above).

921 *CapeTalk* (n 887 above).

922 Yacoob (n 913 above) 18.

criticism.⁹²³ Silence and secrecy point to limitations that imply a weakening of the democratic project.

5.3 Strengths and failures of the Constitutional Court

There are a number of strengths and weaknesses that have characterised the Court. One of the strengths of the Court, apart from its landmark decisions, is its accessibility. All judgments are written in plain language, a relatively new development in law – former judgments having tended in the past to be expressed in technical jargon inaccessible to laypersons, thereby limiting access to justice. Judgments are also available on the Constitutional Court website. The judgments in South Africa are prepared in a deliberative and consultative manner by the judges. Yacoob confirms that these achievements point to a ‘body of law that all of us have created together’, while simultaneously referencing some of its inherent weaknesses:

I think it [the Court] reflects an interesting balance between different values which are at stake in our country [...] But that’s a contradiction in terms, isn’t it? Because on the one hand I moan about the fact that the judgments are too long, on the other hand I’m proud not of the length of the judgments, but of the values and the body of law, and the honesty with which we have done things, and proud of the fact that people can try and guess, as much as they like, which judge on our Court is on the side of government, and which judge is not.⁹²⁴

Commenting on the weaknesses, Yacoob indicates two failures: first, that he has ‘written judgments which are too long, too scholarly, and inaccessible’; and second, ‘that sometimes we talk too long about things, and we go in circles too much, which is another weakness.’⁹²⁵

5.4 Constitutional endings, civil society and retirement

Beyond a distillation of what he conceives as his greatest achievements (namely being a member of the Court, working in the electoral commission, and life in the ANC), if retirement signifies an end of a chapter on the Court Bench (he retired in January 2013), Yacoob recommits his work to further enhancing the meaning of the Constitution: ‘I want to teach young people. I think that I have the power to inspire young people about our Constitution and get them to truly understand it.’⁹²⁶

923 As above, 19.

924 University of the Witwatersrand (n 888 above) 24.

925 As above, 23.

926 As above, 25.

6 Beyond a distributive paradigm: Yacoob's jurisprudence and the limits of social justice

In examining the legal biography of Yacoob and his contribution to transformational constitutionalism, we would be remiss not to reflect on some contradictions and limitations in his vision of social justice and transformation in South Africa. It is evident that Yacoob is intensely concerned about the plight of the poor and that this is made clear in his pronouncements on various platforms. For instance in his Helen Suzman Memorial lecture in 2013, he said:

In other words, I work to the achievement of a constitutional democracy, not because I feel sorry for vulnerable people, but because I don't want to LIVE in a society where there are so many poor people, where there are so many vulnerable people, where there is so much discrimination and where the law of the jungle reigns supreme [...] The point is that people still suffer. The point is that there are too many people in this country who are still far too poor. The point is that there are far too many people in this country who live a sub-optimal existence and the plight of poor people is not part of the dominant discourse. The discourse is something else.⁹²⁷

However, the Fraserian social justice framework that we have read into Yacoob's view of social justice, as alluded to earlier, does not easily translate to central issues surrounding broad manifestations of injustice in South Africa: racism, *apartheid*, social stratification, patriarchy, and capitalism. Critical social justice, on the other hand, informed by postcolonial and feminist perspectives, provides a useful lens through which to examine the power imbalances that are often at the root of systemic, or structural, inequities. Inequalities have implications for human well-being and for the human condition, and are amongst the most perilous issues confronting the world. Central to inequality is the idea of the unequal distribution of resources and attributes (whether income, wealth, status, knowledge, or power) across various units (individuals, social groups, communities, nations). Inequality in the context of Yacoob's vision refers to the existence and distribution of unequal opportunities and rewards for different social positions and statuses in society, resulting in high levels of deeply entrenched social and economic exclusion that inhibit sustainable human development and self-actualisation.

While Yacoob is clearly committed to seeing the end of inequalities in South Africa, he does not closely examine the power dynamics that lie behind the inequities in people's access to socio-economic rights. He also seems to prefer not to foreground race (viewing this in generic terms, broadly) and the fact that the country has retained an economic edifice that

927 Yacoob (n 913 above) 15 & 20 (emphasis original).

is biased toward racialised capital that has huge implications for social injustice, marginalisation and poverty.

The critical view of social justice encourages us to examine the effects of policies and practices that undermine the attainment of social justice. For instance, in the South African context, the language of citizenship and social justice contained in the Constitution counters the neo-liberal discourse of commodification contained in government policies to legitimate the extension of market forces in the provision of basic needs to the poor and excluded. Kirkham and Browne state that commitment to critical social justice 'takes us beyond the righting of distributive (economic) inequities to include the need for political, economic and relational transformations.'⁹²⁸ While Yacoob has recognised the limitations of the law and courts to change government policy, as articulated in his interview with Bohler-Muller ('that courts do not determine policy and courts cannot determine whether policy is right or not'),⁹²⁹ his extra-curial views seem to point to the shortcomings of liberal democracy:

Freedom to achieve one's full potential is extremely important but in a society as unequal as ours, limiting equality in the advancement of individual freedom, will not, in my view, begin to cut the ice.⁹³⁰

What we have done by providing for socio-economic rights is create a constitutional situation in which a person's dignity is more than about freedom. I believe and would stress that, unless you have certain basic standards of living, to even talk about freedom is not to understand the realities of life itself. I would suggest that the inclusion of social and economic rights in our Constitution militates against the idea of mere liberal democracy [...] the liberal democracy tone doesn't sit well with me. I would say that we should develop ourselves to be a people's democracy. A democracy that is truly interested in people, a democracy which begins to understand that power is there to be used for the benefit of the people in our country.⁹³¹

In the above passages, Yacoob in subtle terms critiques the liberal 'rights' discourse that places emphasis on freedom at the expense of dignity and social worth. Yacoob believes in freedom from poverty and does not believe that liberal democracy is capable of achieving this. While he acknowledges the limitations of liberal democracy, at the same time he seems to commit to a form of citizenship based on what has been termed 'inclusive neoliberalism'.⁹³² Distinguishing features of inclusive neoliberalism as compared to pure neoliberalism include an explicit focus

928 SR Kirkham & AJ Browne 'Toward a critical theoretical interpretation of social justice discourses in nursing' (2006) 29(4) *ANS Advances in Nursing Science* 324-339.

929 Bohler-Muller (n 884 above).

930 Yacoob (n 913 above) 12.

931 As above, 18 & 21.

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

on the poor and recognition of the role of the state in ameliorating the plight of the poor. Thus the state should not leave the poor and vulnerable to fend for themselves in the market, but rather ensure that they are 'wrapped around with inclusive support'.⁹³³ Furthermore, Yacoob states,

For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention.⁹³⁴

Across his many speeches and interviews, Yacoob espouses the virtues of constitutional democracy in achieving a transformative society. For example:

We know that inequality, suffering, poverty, inhumanity and indignity remain the order of the day for many millions of people in this country. 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. This is essential to a dynamic Constitution ... 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.⁹³⁵

Yacoob's vision for social justice is to live in a society where poor and vulnerable people are taken care of and given dignity:

Vulnerable people are important members of our society and we want to appreciate and care for them for OUR own sakes because WE do not want to live in a society in which vulnerable people are trampled upon.⁹³⁶

In his career as a judge and beyond the courts, Yacoob has used diverse platforms to motivate and reinforce the fundamental duty and obligation of the state to realise socio-economic rights, the fundamental and inalienable right to dignity that the poor have, and the fact that the success of the country's democracy needs always to be measured against the substantive (rather than the formalistic) realisation of socio-economic

933 D Craig & D Porter *Development beyond neoliberalism? Governance, poverty reduction and political economy* (2006). Cited in S Hickey (2011) 'The government of chronic poverty: From exclusion to citizenship?' In S Hickey (ed) *The government of chronic poverty: From the politics of exclusion to the politics of citizenship?* (2011) 3.

934 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 36.

935 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.

936 Yacoob (n 913 above) 14 (emphasis original).

rights. However, his vision seems to be locked within a (re)distributive paradigm that fails to clearly articulate the dangers of a neoliberal capitalist South African governance system (albeit with social welfare provisions) that is underpinned by increasing exclusion, poverty and marginalisation – the very issues that Yacoob is most concerned about addressing. Poverty in South Africa is arguably the result in the main of racialised capitalism and structural inequality – phenomena that defined *apartheid* and continue to do so in post-*apartheid* South Africa.

7 Conclusions

Obstacles to social justice, whether through socio-economic inequities or other patterns of power that privilege some and marginalise others, promote inequalities and become the source of substantive injustices. Reading Fraser's conception of social justice into the perspective and life's work of Yacoob as a judge reveals that his mission – whether as judge or latterly as a member of civil society – is to contribute to a legacy of social justice in South Africa. Yacoob reminds us of the need 'to regenerate our understanding of our dynamic Constitution and express our views of its importance to our society',⁹³⁷ alerting us that the Constitution was a 'launching pad', a 'negotiated compact', 'a document of compromise' which he did not take lightly: 'I have taken an oath to respect it, obey it and act in terms of it and I did so because I agreed with every word of it.'

Yacoob's pledge to uphold the values of the Constitution corroborates his view that the Constitution has the capacity to address 'not only the problems arising out of a lack of freedom, but also the problems arising out of the lack of equality for hundreds of years.'⁹³⁸ Aspects of equity (fair access to resources and justice) that see justice as a 'common good' emerge in the Greek philosophers and ancient Judeo-Christian tradition. The idea of the 'common good' encapsulates at its core an idea of what is shared and what is beneficial for a given society that is achieved through claims to citizenship, collective action, and active participation.⁹³⁹ The cases on which Yacoob has adjudicated seem to confirm that there is no full consensus about social justice but, rather, that the quest for social justice remains an ongoing journey, a process defined by incremental achievements rather than being a destination point. The jurisprudence of Yacoob argues for a new kind of politics, a performative one that is grounded in social democracy and predicated on social justice as a response to the failure of the state to address matters that impact on the lives of ordinary citizens.

937 As above, 5-6.

938 As above, 10.

939 See, for example, M Novak & P Adams *Social justice isn't what you think it is* (2015); H Sluga *Politics and the search for the common good* (2014); C Tyler *Common good politics: British idealism and social justice in the contemporary world* (2017).

Yacoob's judgments and roles in judgements highlight the importance on the one hand of the relationship between the socio-economic needs of the marginalised and on the other hand the state's duties to poor people. Beyond mismatches between court judgments and implementation following legal decisions, his views on the ways in which the Court operates also foreground the state's obligations with regard to development and planning. Legal gains and losses (both for citizens and the state) indicate that there are winners and losers in respect of decisions, and more especially that legal decisions cannot satisfy everybody.

Yacoob also contests narrow, instrumental interpretations in favour of more expansive forms of judgment that foreground the human and humane, which, he suggests, contribute to a more socially just politics in the development of a fairer and more equitable society:

So all I am saying that our Court has been pro-transformation, pro-poor, respectful of human beings, regardless of their station [...] We've tried to hold the government gently to account. We could have been harsher I think, but we did the best we could, and I am actually quite proud of the contribution made by the Constitutional Court ... You must understand that your judgement is about human beings, and you need to know that you bring your own humanity into the judgement as much as you possibly can.⁹⁴⁰

At the heart of Yacoob's jurisprudence is a frustration with the slow pace of transformation and the desire to counter persistent forms of inequality. The implementation of Court judgments in which practical legal promises are made have not been fully implemented, according to Yacoob. The consequence has been no real, tangible change; and in situations where Court decisions have been transformative, lack of implementation due to bureaucratic inefficiencies has compromised the value (and by extension, the impact) of the Court. The implied compact between the Constitution and peoples and the state's relationship to all role players within this equation has been, in Yacoob's estimation, minimised. This may erode not only the rule of law, but also, most importantly, trust in the rule of law.

Yacoob is fully cognisant of and a vocal advocate for the bigger issues that make up democratic citizenship: the meaning of diversity, equity, dignity, respect, equality – central tenets of a transformative social justice. His jurisprudence broaches resistance to domination and opposition to discrimination on all grounds. Clearly, for Yacoob, exploitation along the lines of sex, race, class, and disability remain salient forms of domination (which probably warrant further elaboration in one's thinking about Yacoob's jurisprudence). While Yacoob's reflections on the Constitution demonstrate a positive vision, he is simultaneously aware of the dilemmas of a democracy (with regard to what constitutes democratic citizenship) and of fully recognising the blind alleyways that can take us off course in

940 Bohler-Muller (n 884 above) 15.

the struggle for real transformation and social change. The 'blind alleyways' of law and justice that result in unimplementable benefits for citizens that end in further blind spots in the full execution of justice in the democratic project show correlations to Yacoob's experience of physical blindness and the consequences of such experience. Yacoob's jurisprudence and activism suggest that the personal, the political, and the public and private identification matter; we need to persist with ongoing efforts to make meaningful change to improve the lives of all in South Africa.

There is a sense in Yacoob's vision that the Constitution encapsulates the means to improve the human condition in order ultimately to cultivate citizens' well-being. He emphasises the dual and interrelated meta-implications of the Constitution: 'I must emphasize that our Constitution is not about freedom alone. It is about much more than liberalism. It is more about humanity and it does other things too.'⁹⁴¹ There is, in other words, an ethical responsibility that flows from the Constitution in which the values of the Constitution are brought into association with the principles of human life. A transformative social justice is shaped by important preconditions (central to which is a profound concern for humanity) that are directed to a deeper, richer, more textured and more nuanced life than people already have.

Yacoob's contribution as Constitutional Court judge, as activist, and as civil society voice is a stark reminder that the Constitution is an iconic democratic tool to counter human suffering in all its forms. In his thinking we are compelled to recognise a language that actively rejects silence, apathy and immobilisation. In Yacoob's scheme of constitutionality there is also equally no room for despair, but instead hope in the recuperative and restorative powers of constitutional values. Beyond the immediate concerns about socio-economic and political inequalities, there is a deeper and more pervasive sense of creating a more empathic life, one that is shaped by ensuring the transformation of the law into justice.

Yacoob believes that social inclusion and economic inclusion are interdependent and form the core of social justice. The valuing of social justice and inclusiveness permeates the identity and judicial practice of Justice Yacoob – which is the legacy he leaves to the on-going project of transformative constitutionalism.

941 Yacoob (n 913 above) 10.

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