

## Lecture

# SINGAPORE ACADEMY OF LAW ANNUAL LECTURE 2014 – “TWENTY YEARS OF THE SOUTH AFRICAN CONSTITUTION: ORIGINS, ASPIRATIONS AND DELIVERY”

The Honourable Mogoeng **MOGOENG**  
*Chief Justice of the Republic of South Africa.*

## I. Introduction

1 Your Excellency, Sundaresh Menon, the Chief Justice of the Republic of Singapore and President of the Singapore Academy of Law, Vice Presidents of the Academy, Your Excellency the High Commissioner of South Africa to Singapore, Members of the Senate, distinguished guests, ladies and gentlemen, I greet you.

2 It is a singular honour and privilege to have been invited by my friend and colleague Chief Justice Menon, to deliver the Singapore Academy of Law Annual Lecture under the topic: “Twenty Years of the South African Constitution: Origins, Aspirations and Delivery”. The lecture could not have come at a better time. For it affords us the opportunity to reflect on where South Africa comes from, what informs its national vision, whether this vision was the dream that has been deferred or realised, and if actualised, to what extent.

3 One of the major things Singapore shares with South Africa, is that the founding fathers of our democracies are lawyers and they are world-acclaimed visionaries and nation builders. The fundamental difference is though, that one lived and ruled long enough to see his dream fully realised, whereas the other died long before the necessary radical paradigm shift could take place, on all fronts. This lecture takes place a little under a year after the death of the beloved founding father of our nation, Nelson Mandela or *Tata* Mandela. It is in his memory that I deliver this lecture, hoping to rekindle the fire of oneness, reconciliation, justice and shared prosperity within me and within the hearts of the few South Africans present here and those who will hopefully read this paper. By way of introduction, I also say that the most significant change that 20 years into the democratic order has delivered, is socio-political freedom. Anybody may be President, Minister, Member of Parliament or even Judge as long as they enjoy the requisite support or are suitably qualified and meet the necessary requirements. What still cries out loud for attention are the questions around land ownership and the equitable distribution of opportunities in the economic sector of our country.

4 Last year, the Constitutional Court had occasion to highlight these critical aspects of the state of our nation as follows:<sup>1</sup>

South Africa is not only a beauty to behold but also a geographically sizeable country and very rich in minerals. Regrettably, the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry.

That legislative intervention was in the form of the Mineral and Petroleum Resources Development Act. ... It also had the deliberate and immediate effect of abolishing the entitlement to sterilise mineral rights, otherwise known as the entitlement not to sell or exploit minerals. This ought to come as no surprise in a country with a progressive Constitution, a high unemployment rate and a yawning gap between the rich and the poor which could be addressed partly through the optimal exploitation of its rich mineral and petroleum resources, to boost economic growth.

And in conclusion we said:<sup>2</sup>

The MPRDA constitutes a break through the barriers of exclusivity to equal opportunity and to the commanding heights of wealth-generation, economic development and power. It seeks to address the injustices of the past in the economic sector of our country in a more balanced way, by treating individual property rights with the care, fairness and sensitivity they deserve.

5 Poverty, the inability to readily access the best available educational institutions and job opportunities, as well as the lack of capacity or means to effectively dictate the economic direction and practices of our country, are inextricably linked to these two key pillars: the land and the economic question.

## II. The origin

6 It all started when colonialists came to the southern-most tip of Africa. The indigenous people of South Africa were systematically

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1 *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC) at [1] and [2], per Mogoeng CJ.

2 *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC) at [73].

deprived of their land which was their primary source of pride and livelihood. When apartheid took effect, different African ethnic groups were confined to very small pieces of land known as “homelands”. This is where they were supposed to take “full responsibility” for their “own affairs” by governing themselves in these territories which could, and in some instances did, graduate into “independent countries”. Even those who lived in the periphery of cities, in townships like Soweto, were regarded as temporary sojourners in white South Africa, whose rights of citizenship could only be enjoyed in their tribal territories. It was divide and rule at its worst.

7 This painful past was touched on by the Constitutional Court in the *First Certification* case in these terms:<sup>3</sup>

South Africa’s past has been aptly described as that of ‘a deeply divided society characterised by strife, conflict, untold suffering and injustice’ which ‘generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge’. From the outset the country maintained a colonial heritage of racial discrimination: in most of the country the franchise was reserved for white males and a rigid system of economic and social segregation was enforced. The administration of African tribal territories through vassal ‘traditional authorities’ passed smoothly from British colonial rule to the new government, which continued its predecessor’s policy.

From time to time various forms of limited participation in government were devised by the minority for the majority, most notably the ‘homeland policy’ which was central to the apartheid system. Fundamental to that system was a denial of socio-political and economic rights to the majority in the bulk of the country, which was identified as ‘white South Africa’, coupled with a balkanisation of tribal territories in which Africans would, theoretically, become entitled to enjoy all rights. Race was the basic, all-pervading and inescapable criterion for participation by a person in all aspects of political, economic and social life.

8 Black people suffered the worst inhuman treatment imaginable. They were disenfranchised, rendered landless in their native land and had to contend with the worst form of deprivation, indignity and human suffering. Slums and the lowest-paying jobs were and are still largely “their preserve”. An education system designed to stultify the intellectual development and growth of black people, was introduced to ensure that they did not develop the capacity to analyse and begin to challenge more meaningfully the legitimacy of the apartheid system. Science, technology, economics and engineering were some of the fields

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3 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at [5]–[7].

of study that were virtually inaccessible to them. Numbers of black law graduates were tightly managed. Sports, recreational and medical facilities available to black people were predictably substandard notwithstanding the economic strength we have always commanded, as a country.

9 We were, for many years, therefore, a nation at war with itself. A deeply-divided nation, objectively desperate for unity and reconciliation but for some reason unable to connect with this reality. The deep and bleeding wounds that we had inflicted on ourselves over the years, had to be healed. When it finally dawned on all our leaders that the time had come to put an end to the war that had claimed many precious South African lives, all of the above realities had to feature prominently in guiding the constitutional dispensation that was going to order our lives, for generations to come.

10 Most political parties agreed to have a convention at which discussions took place on how best to change the South African political and constitutional landscape, for the common good of all our people. This extremely difficult and taxing process culminated in our Interim Constitution.

11 We started our journey as a constitutional democracy with that Interim Constitution whose aim was to provide:<sup>4</sup>

... a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

12 After the first democratic elections, the final Constitution was drafted to reflect the dominant aspirations of all South Africans. It was signed into law by former President Mandela on 10 December 1996, in Sharpeville,<sup>5</sup> Gauteng. Madiba cemented that historic occasion<sup>6</sup> with these words:<sup>7</sup>

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4 See the first paragraph of the postscript to the Interim Constitution of the Republic of South Africa (Act 200 of 1993).

5 This is a place where the apartheid police had opened fire on an unarmed crowd involved in a peaceful protest against some of the unjust laws, killing 69 people in March 1960.

6 This, by the way, is the incident that triggered the resort to armed struggle by the liberation movements.

7 Speech delivered by former President Mandela on 10 December 1996 at the signing of the Constitution of the Republic of South Africa 1996. Secretary-General Kofi Annan, eloquently emphasised the indivisibility of human rights by observing that “human rights ... are foreign to no culture and native to all nations”, that they are thus universal, that “one cannot pick and choose among human rights”, whether  
*(cont'd on the next page)*

Today we cross a critical threshold.

Let us now, drawing strength from the unity which we have forged, together grasp the opportunities and realise the vision enshrined in the Constitution.

Let us give practical recognition to the injustices of the past, by building a future based on equality and social justice.

Let us nurture our national unity by recognising, with respect and joy, the languages, cultures and religions of South Africa with all their diversity.

Let tolerance for one another's views create the peaceful conditions which give space for the best in all of us to find expression and to flourish.

Above all, let us work together to banish homelessness, illiteracy, hunger and disease.

### III. Constitutional aspirations

13 The constitutional aspirations of our people are summed up by the Preamble to the Constitution<sup>8</sup> as, to:

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

Lay 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 the law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

14 Our Constitution has a Bill of Rights that is aimed at safeguarding fundamental rights which are an embodiment of some of our major aspirations. Our Bill of Rights includes the traditional first-generation rights as well as second-generation rights or socio-economic rights. The essence of and the basis for the inclusion of socio-economic rights was eloquently captured by former President Mandela as follows:<sup>9</sup>

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civil, cultural, social economic or political, for a fundamental feature of these rights is their universality, indivisibility, interdependence and interrelatedness. (Statement by the former Secretary-General of the United Nations, Dr Kofi Annan, on the 50th anniversary year of the Universal Declaration of Human Rights delivered on 10 December 1997, at the University of Tehran, Iran.)

8 Constitution of the Republic of South Africa 1996.

9 Address by Nelson Mandela at his Investiture as Doctor of Laws (Soochow University, Taiwan) (1 August 1993).

[We] must warn against the language of rights being used to conceal attempts to maintain, in one form or another, the power, privileges or special status of one racial group. The Bill of Rights cannot be a device to secure the political or economic subordination of the majority or the minority. ...

We must address the issues of poverty, want, deprivation and inequality in accordance with international standards which recognise the indivisibility of human rights. The right to vote, without food, shelter and health care will create the appearance of equality and justice, while actual inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom.

15 The South African Constitution is aimed at redressing the socio-economic conditions that were created during the apartheid era about which former Chief Justice Chaskalson had this to say:<sup>10</sup>

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

16 Since a democratic South Africa inherited a society that was based on a deliberate and pernicious policy of white supremacy, favouritism and exclusivity to privilege and economic empowerment, it was morally obliged to remedy this strikingly abnormal situation. If the quality of life of the majority of people were not to be radically improved, then the very existence of our constitutional democracy would be meaningless, and the temptation to again wage some version of the struggle for freedom, would become irresistible. Alive to this reality, President Mandela observed that:<sup>11</sup>

The new constitution obliges us to strive to improve the quality of life of the people. In this sense our national consensus recognises that there is nothing else that can justify the existence of government but to redress the centuries of unspeakable privations, by striving to eliminate poverty, illiteracy, homelessness and disease. ...

While in the past, diversity was seen by the powers-that-be as a basis for division and domination; while in earlier negotiations, reference to

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10 *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC) at [8].

11 Address by former President Mandela to the Constitutional Assembly on the occasion of the adoption of the Constitution of the Republic of South Africa 1996 (Cape Town, South Africa) (8 May 1996).

such diversity was looked at with suspicion; today we affirm in no uncertain terms that we are mature enough to derive strength, trust, and unity from the tapestry of language, religious and cultural attributes that make up our nation.

17 In appreciation of what mattered the most to many South Africans, which was the main reason for their enthusiastic participation in such big numbers, in the first democratic elections, President Mandela said:<sup>12</sup>

The people of South Africa have spoken in these elections. They want change! And change is what they will get. Our plan is to create jobs, promote peace and reconciliation and to guarantee freedom for all South Africans.

#### IV. Truth and Reconciliation Commission

18 One of the key aspirations of South Africans was to: unearth the truth behind the loss of lives that were occasioned by the existence of the apartheid system, grant amnesty to all those who were motivated by political considerations to kill and who met all the requirements and to for amnesty, unite and reconcile the nation. *Tata* Nelson Mandela, must have had this in mind when he said:<sup>13</sup>

South Africans must recall the terrible past so that we can deal with it, forgiving where forgiveness is necessary, but never forgetting.

He went on to say:<sup>14</sup>

The time for the healing of these wounds has come.

The moment to bridge the chasms that divide us has come.

The time to build is upon us.

19 The Truth and Reconciliation Commission was, as I intimated, set up to dig out the truth behind the many disappearances and deaths of South Africans during the days of our struggle for liberation. The nation saw many, but not all of our people, come forward to tell what they knew. Others were granted amnesty but others not.

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12 Address by former President Mandela to the people of Cape Town on the occasion of his inauguration as President of the Republic of South Africa (Cape Town, South Africa) (9 May 1994).

13 Nelson Mandela, on leaving office as President of the Republic of South Africa (15 June 1999).

14 Statement of Nelson Mandela at his inauguration as President of the Republic of South Africa (Pretoria, South Africa) (10 May 1994).

20 Because we were deeply divided by our past, President Mandela devoted a lion's share of his Presidency and life as a free citizen to the project of nation building and reconciliation. It is, however, fair to say that a lot of work still needs to be done to arrest the outward manifestations of racial discrimination that many South Africans still have to contend with. But, broadly speaking, peace we have.

## V. Judicial independence

21 One of the key features of our Constitution is the entrenchment of judicial independence<sup>15</sup> which Chief Justice Larmer of Canada said "is essential for fair and just dispute-resolution in individual cases ... also the lifeblood of constitutionalism in democratic societies".<sup>16</sup> This independence is recognised as an essential ingredient for the existence of a genuine constitutional democracy and for its protection and advancement.<sup>17</sup> Court decisions bind the Legislature, the Executive and all organs of State. These structures are required to "assist and protect courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts". And judicial authority is vested in the courts, which are to be subject only to the Constitution and the law.<sup>18</sup>

22 In ensuring that the courts discharge their constitutional mandate independently, the Constitution prohibits any person or organ of State from interfering with this function. This underscores the separation of powers between the Judiciary, the Legislature and the Executive. The courts are final arbiters on all legal and constitutional disputes and the guardians of our Constitution. One of the issues that have occupied us a lot lately, is the institutional independence of the Judiciary. Additional to s 165 of the Constitution, the National Development Plan which our executive arm of government has sworn to implement requires of the Government to "accelerate the implementation of a judiciary-led court administration".<sup>19</sup>

23 And the establishment of the Office of the Chief Justice provides a platform for the implementation of initiatives designed to strengthen the institutional independence of the Judiciary and to help

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15 See s 165 of the Constitution of the Republic of South Africa 1996.

16 *Beauregard v Canada* [1986] 2 SCR 56 at 70.

17 Ackermann J captured the essence of this definition in *De Lange v Smuts NO* [1998] ZACC 6; 1998 (3) SA 785 (CC) at [59]: "... judicial independence which is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law. This independence, of which structural independence is an indispensable part, is expressly proclaimed, protected and promoted by subsections (2), (3) and (4) of section 165 of the Constitution".

18 See s 165 of the Constitution of the Republic of South Africa 1996.

19 Republic of South Africa, National Planning Commission, *National Development Plan 2030*, ch 14: "Promoting Accountability and Fighting Corruption" at p 409.

us weed out incidents of under-performance that have sneaked into segments of the Judiciary over the years. More functions, personnel and other resources relating to the administration of all 15 Superior Courts were earmarked for transfer from the Department of Justice and Constitutional Development to the Office of the Chief Justice during the course of this year. Happily, some of them were transferred to the Office of the Chief Justice with effect from 1 October 2014.

### **A. *Judicial appointments***

24 Before we became a democracy, Judges were appointed by the President in consultation with the Minister of Justice applying a criterion that was not known to the legal fraternity and the public. In order to bring about a credible and transparent process in the appointment of Judges, our Constitution provides for the establishment of the Judicial Service Commission (“JSC”).<sup>20</sup> The JSC interviews and recommends candidates to the President for appointment. In fulfilling its mandate, the JSC has to ensure that candidates to be recommended are fit and proper for judicial office and that the Judiciary reflects broadly the racial and gender composition of South Africa.<sup>21</sup>

### **B. *The courts’ delivery on constitutional aspirations***

25 The Constitution provides for the establishment of the Constitutional Court, as a court of final instance on all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution.<sup>22</sup> And our higher courts are empowered to declare invalid any law or conduct that is inconsistent with the Constitution because the Constitution is the supreme law of the Republic. Every declaration of invalidity is subject to confirmation by the Constitutional Court.<sup>23</sup>

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20 The composition of the Judicial Service Commission is provided for in s 178 of the Constitution of the Republic of South Africa 1996.

21 See ss 174(1) and 174(2) of the Constitution of the Republic of South Africa 1996. Progress in the judicial transformation process has been remarkable. In 1994, there were 165 judges of which 160 were white males, three black men and two white women. Today, the Judiciary comprises 243 judges across the country, of which 99 are black men, 56 black women, 65 white males and 23 white females. More still needs to be done.

22 See s 172 of the Constitution of the Republic of South Africa 1996.

23 Emphasising the importance of the supremacy of our Constitution, the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa, In re: Ex Parte Application of The President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC) at [44] said that: “There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.”

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26 As a result of the supremacy of the Constitution, the South African Constitutional Court, has been able to deliver ground-breaking judgments, in the furtherance of the constitutional project of creating a truly people-oriented democratic State. Below is an overview of some of those judgments.

(1) *Death penalty*

27 Very early in the life of our democracy, the Constitutional Court was called upon to decide whether capital punishment was consistent with the rights entrenched in the Bill of Rights like the rights to life and dignity.<sup>24</sup> The Court reasoned that, the State should demonstrate its commitment to human rights in everything it did including how it punished criminals even those convicted of heinous crimes like murder. It outlawed the death penalty on the basis that it constituted a violation of the right to life, dignity and that it also amounted to a cruel, inhuman and degrading punishment.<sup>25</sup>

(2) *Education*

28 Another important aspect of our national life that cried out for urgent attention was the education system. Access to previously white-only institutions of learning and strategic areas of study had to be opened up to all. Attempts have also been made to revolutionise education. Access is much better than before, although there are still challenges. It is work in progress and we optimistically look forward to experiencing the impact of the improved quality of education, particularly, on the job market and the economy. More schools have been and continue to be built in response to the constitutional injunction to provide education to our children.<sup>26</sup> Two public Universities, in addition to the pre-existing 23, have since been established. The demand for greater access to tertiary education dictates that the admission criteria to “white” universities be improved, the

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Chief Justice Mahomed had this to say about constitutional supremacy in a speech delivered at a dinner of the Johannesburg Bar, *Sunday Times* (29 June 1997):

The new Constitution gives lawyers a demonstrable leverage in attacking laws inconsistent with its ethos; it accords to lawyers an expanded field for real fulfilment in areas previously excluded by the doctrine of parliamentary sovereignty, and it equips them and the courts with sharp enough teeth to chew on visible manifestations of injustice – whatever its origin. To sustain a human rights culture it is no longer necessary to collide with the law. It is necessary only to harness it creatively.

24 This was provided for in s 77(1)(a) of the Criminal Procedure Act 1977 (Act 51 of 1977).

25 *S v Makwanyane* 1995 (3) SA 391 (CC).

26 This right is provided for in s 29 of the Constitution of the Republic of South Africa 1996.

capacity for more student intake of all the pre-existing ones be increased, the economic climate notwithstanding, and that more universities be established.

29 Our courts have had occasion to order the de-racialisation of some of our schools.<sup>27</sup> They have also ordered that school children be provided with textbooks by the Department of Education, as it was obliged to do so.<sup>28</sup>

(3) *Access to healthcare services*

30 The constitutional imperative to build a healthy nation was greeted with the building of more clinics and hospitals. Concerns were at some stage raised about our apparent inability to address the HIV and Aids pandemic appropriately. Our courts provided guidance and the results have reportedly been phenomenal.

31 We had a case concerning the provision of an anti-retroviral drug known as Nevirapine.<sup>29</sup> It is a life-saving drug that prevents mother-to-child transmission of the HIV virus during pregnancy or birth. The drug was offered to the South African Government for free for five years, to prevent mother-to-child transmission but the Government confined its initial use only to certain pilot sites. This denied most mothers access to the drug. A constitutional challenge was launched on the basis that this decision violated the right of access to healthcare services provided for in s 27 of the Constitution. The Court held that the restriction excluded those who could reasonably be included in the programme. The Government was thus ordered to make the drug available to hospitals and clinics, to provide counsellors and to take reasonable measures to extend the testing and counselling services to the entire public health sector.<sup>30</sup>

32 Otherwise, concerns were raised about inefficiencies in the provision of medical supplies and equipment to some health centres. The Ministry has since assured the nation not only that supplies are

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27 *Head of Department of Education: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC).

28 *Section 27 v Minister of Education* [2012] ZAGPPHC 114; 2013 (2) SA 40 (GNP).

29 *Minister of Health v Treatment Action Campaign* [2002] ZACC 15; 2002 (5) SA 721 (CC) (“TAC”).

30 Following this judgment, access to the Nevirapine and other drugs was made available in public healthcare centres. The TAC judgment led to the policy shift on the government’s side regarding the HIV treatment. Today, South Africa has about 2.6 million people on anti-retroviral treatment which is the largest in the world. The Ministry of Health has also assured the nation not only that supplies are always at hand, and that some hospitals are to be renovated but also that the new medical plan will make quality healthcare cheaper and accessible to all.

readily available, but also that more hospitals are to be renovated and others to be built. The Government also says that the new government-initiated national health scheme will make good treatment cheaply and more accessible to all.

(4) *Access to housing*

33 Turning to housing, a massive housing programme was embarked upon for the benefit of the poor. Millions of houses have been built. Other houses were, however, swallowed up by poor workmanship and the exorbitant charges by the corrupt. Some budgets for housing remained unspent at the end of the financial year notwithstanding the high demand for housing.

34 Our courts have had their hands full in dealing with incidents of illegal land invasion to build shacks and the illegal and mass occupation or hijacking of buildings. Cases of eviction and of ensuring that those who are evicted are provided with alternative accommodation have had their fair share of our court time and housing budget.

35 In the celebrated case of *Government of the Republic of South Africa v Grootboom*,<sup>31</sup> Mrs Grootboom and a group of residents living in appalling conditions in an informal settlement, illegally-occupied land, that was earmarked for low-cost housing. They were evicted. Their shacks were bulldozed and burnt during the eviction process. And they lost all their possessions.

36 The Constitutional Court held that the Constitution obliges the State to act positively and proactively within its available resources to ameliorate the plight of indigent people living in deplorable conditions. The Court further held that neither s 26 nor s 28(1)(c) of the Constitution gave the respondents the right to claim shelter immediately, for it is a right that is to be realised progressively. It issued an order requiring the State to devise and implement a programme that included measures to provide relief for those people who had not been provided with accommodation.

37 The Government responded to this judgment with a massive housing programme for the benefit of the poor, in that area, which was completed in 2013. Since 1994, the South African democratic government has delivered about 3.7 million houses to the poor.<sup>32</sup>

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31 [2000] ZACC 19; 2001 (1) SA 46 (CC).

32 The Presidency, Republic of South Africa, *Twenty Year Review South Africa 1994–2014* (2014). Our courts have had their hands full, dealing with incidents of land invasion to build informal settlements and the illegal or mass-occupations of privately-owned buildings.

38 In yet another case, the Constitutional Court dealt with the eviction of 86 poor people who illegally occupied a privately-owned property for many years. The occupiers contended that the City of Johannesburg was obliged to provide them with emergency housing. The Court ordered the city to provide temporary emergency accommodation to the occupiers and the property owner could only evict the occupiers from its property 14 days after the order was made.<sup>33</sup>

(5) *Gender equality*

39 Gender equality cried out for serious attention at the dawn of our constitutional democracy. Key public institutions in the life of South Africa had to respond in all earnestness to the constitutional imperative to ensure that women are properly represented.<sup>34</sup> Great strides have been made in the public sector but not so in the private sector.

(6) *Empowerment of the economically disadvantaged*

40 It is black people who remain the poorest of our society, who live in slums and generally do the most menial of jobs. The basis for a possible solution to this matter is s 217 of our Constitution which provides that:

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for

a. categories of preference in the allocation of contracts; and

b. the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

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33 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC).

34 Section 9(3) of the Constitution of the Republic of South Africa 1996 provides: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... gender ...".

41 Additional pieces of national legislation have been passed to facilitate an economic programme designed to empower women, the disabled and black people. In the employment sphere, employment equity and affirmative action are programmes employers are expected to implement to undo centuries-old discriminatory policies and practices such as job reservation.

42 Few women and black males have penetrated the higher echelons of the private sector. Only a handful of them are key players in the major economic sectors like mining, agriculture and manufacturing. So, some progress has been made but it is a far cry from what needs to be done. Looking from outside, it would appear that the executive and the legislative branches of government either do not as yet have an effective legislative framework or implementation strategy on the one hand, or there is resistance to change by the private sector on the other, or a combination of factors that an outsider like me is not privy to.

43 Our tender system has at times backfired as a result of the reportedly high levels of fronting and corruption in awarding tenders.<sup>35</sup> Price-fixing has also done our economy some harm and severely undermined the buying power of our people. Several cases have served before our courts to resolve economic empowerment-related disputes. The latest innovation that is likely to contribute significantly in the empowerment of the economically disadvantaged is the establishment of the new Ministry of Small Business Development.

(7) *Sexual orientation*

44 We had occasion to reflect on the constitutionality of the common law definition of marriage as a union between one man and one woman.<sup>36</sup> The ground for the constitutional challenge was that the common law definition violated the right to equality, dignity and privacy. The Court declared the common law definition of marriage inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status, benefits and responsibilities it accords heterosexual couples. The Court further held that no religious minister could be compelled to officiate in that marriage if it was inconsistent with their convictions.

45 Following the decision, Parliament enacted the Civil Union Act 2006<sup>37</sup> which provides for and regulates the conclusion of civil unions by same-sex and heterosexual couples.

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35 *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604.

36 *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC).

37 Act 17 of 2006.

(8) *Access to social security*

46 Poverty alleviation, for the unemployed and for the children of those in the low-income bracket, comes by way of social grants in our country. About 16 million of the population of some 50.2 million are on this programme. The budget runs into hundreds of billions of *rands*. A question did arise whether foreign nationals are entitled to these benefits in terms of our Constitution.

(9) *Enforcement of foreign orders*

47 In *Government of the Republic of Zimbabwe v Fick*,<sup>38</sup> 77 farmers had successfully challenged the non-compensable dispossession of their farms by the Republic of Zimbabwe in the SADC<sup>39</sup> Tribunal. They did so on the basis that the dispossession violated their human rights. Zimbabwe did not accept the order and it was therefore not executed. The Tribunal was again approached and it made a costs order against Zimbabwe which was also disregarded. Because some of the applicants were in South Africa where Zimbabwe had immovable property, the applicants turned to the South African courts for relief.

48 The Constitutional Court developed the common law on the enforcement of foreign judgments and orders, in line with our Constitution, to apply to orders of the Tribunal and similar international courts. This decision not only advanced the human rights agenda but it also challenged the Southern African region to honour its own human rights commitments as set out in its instruments.

## VI. Conclusion

49 Although we have a long way to go in realising our national dream of giving practical expression to all our constitutional aspirations, the implementation of our Constitution has brought about significant improvements in the lives of the majority of our people. We have a vibrant democracy and great strides have been made in the area of holding regular free and fair elections, freedom, openness, the rule of law and the overall advancement of human rights. The courts continue to play a significant role in ensuring that the rule of law is observed and that all institutions and public office-bearers perform their functions in line with the Constitution. The political branches of government have consistently honoured court orders and the inevitable tension among the branches of government have been managed very well so far.

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38 [201] ZACC 22; 2013 (10) BCLR 1103 (CC).

39 South African Development Community.

50 In the 20 years of our constitutional democracy, the Judiciary has gained more respect and public confidence.

51 By any standards, 20 years is too short a period to gauge the effectiveness of the mechanisms designed to undo at least 300 years of racial subjugation and economic disempowerment. A lot of good has been done. There has been quite a number of teething and unanticipated problems. But there has also been several self-inflicted and progress-inhibiting impediments. We need a radical paradigm shift in our approach to this.

52 The National Development Plan, our progressive Constitution and institutions established to undergird our constitutional democracy are strong beacons of hope that, like Singapore, which miraculously transformed itself from a third-world to a first-world country with no mineral or natural resources of note, we shall overcome.

53 Singapore remains a beacon of hope. It's a testimony of what can be achieved by or through cutting-edge visionary leadership, with a solid character, unshakeable love for your nation, and an abhorrence for corruption, a determination to make the most with less or something out of nothing, finding a way to forge the right partnerships, leading by example, commitment to the actualisation of the national vision and acting to realise the dream.

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