

South Africa under the Rule of Law: Peril and Promise

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Good morning. It is an honor to be here with you and to give this keynote. My warrant for accepting your invitation is that I am a justice in South Africa's highest court, the Constitutional Court.

Yesterday, on the flight from Atlanta, I sat next to a man called Clint, who had spent twenty-four years in the U.S. Navy. We had an interesting conversation about the work he was coming to do in New Orleans mapping the seabed. Then he asked me a question: What is the point of your coming to America to speak to American law professors? It was a good question, and I wasn't sure how to answer it. The answer I gave was that my country's journey in law has been arresting, and challenging, in ways that I hope will engage you.

Let me tell you how I hope to do this. First, my introduction lays out South Africa's transformation from an oppressive racial autocracy to a constitutional democracy. Then I tell three arresting stories that show what the law and lawyers and social activists have achieved under our Constitution. In conclusion, I mention three suggestive lessons I have learned about the law and the role of judges in South Africa, which I hope may have pertinence to you.

We are a young democracy, not quite a quarter-century old. The past twenty-five years have been characterized by searing debates and intense contestation about our country's past and its future—always amid the threat of conflict.

South Africa began its journey away from 350 years of racial subordination and oppression in February 1990, when Nelson Mandela was released after twenty-seven years in prison.

Four years of perilous negotiations followed. At their culmination, in April 1994, South Africa became a constitutional democracy. At this very time,

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Rwanda—just 2,700 kilometers to the north—plunged into a terrible genocide in which many hundreds of thousands of people perished.¹ This was not industrial murder as Europeans had perfected it just fifty years before. It was face-to-face death, inflicted by handheld machetes on colleagues, neighbors, fellow congregants, family members, whole communities. Apartheid did not inflict bloodshed and death of this kind, or on this scale. The damage it wrought was different—and in certain precise ways perhaps more lastingly injurious.²

Apartheid systematized, was *designed* to systematize, the conviction that black people were inferior, just because of their skin color and culture. It denied the majority of South Africans the right to vote, to live where they would or could, to marry whom they chose, to move around freely, to meet, to organize, to assemble, and to express themselves as human and political beings. In short, it systematically stripped them of their civic status in ways calculated to make them seem and feel less than human. None of this will seem novel to those familiar with America's history (or even its present).

What was distinctive about apartheid was the extent to which it was minutely regulated through law. The apartheid legal system prided itself on its antiquity and respectability. It went back to the Twelve Tables of the Roman law and to the refinements and elegances of the Renaissance writers who created Roman-Dutch law.³ All this legal sophistication and power was employed for degrading ends—to subordinate, to denigrate, to suppress and oppress—on the premise of racial less-ness, denoted solely by skin color.

Apartheid inflicted gigantic injustices, personal and communal. The civil and foreign wars to sustain it were brutal and bloody. The material privileges apartheid secured for white people, like me, and the deprivations it inflicted on black people live on in my country's present state of dispossession and inequality. Yet it is in the shameful stigma of racial subordination that apartheid's sting most distinctively endures.

How then, after more than three centuries of systematized racial hatred and injustice, at the very time that Rwanda was in thrall to genocide, did South Africa move into a dawn of constitutionalism, embodied in what is rightly lauded as the world's most progressive constitution? The primary answer lies in the mass popular struggle for dignity that South Africa's people waged against apartheid in the townships and cities and countryside, particularly from 1984 onward. Yet it lies also elsewhere—and here is my main theme this morning. It also lay in the unflagging, principled courage of lawyers—men and

1. *The Genocide*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <http://unictr.irmct.org/en/genocide> (last visited Mar. 15, 2019).
2. The scars apartheid left were not as bloody or as murderous as those of many other conflicts on the African continent in which the acknowledged death tolls are in the millions (as in the Democratic Republic of Congo; the Biafran war; and South Sudan).
3. See EDWIN CAMERON, *JUSTICE: A PERSONAL ACCOUNT* ch. 1 (2d ed. 2014).

women who saw the apartheid system as an aberration, a perversion of the law rather than its proper embodiment.

Nelson Mandela and his law partner Oliver Tambo were two justly famous lawyers who fought to secure justice under the law even as the space for it became more and more suffocatingly occluded.⁴ My own mentors, including Arthur Chaskalson, Sydney Kentridge, George Bizos, and John Dugard, held out a vision of the law that repudiated the uses to which apartheid put it. In their vision, the enforcement through law of inferiority and exclusion were aberrant. Their lives and work were built on a nobler premise: that the purpose of the law was to dignify those subject to it, and to create the conditions in which they could flourish. To this end, they relentlessly employed the laws and the courts and legal processes—the very refinements and edifices of apartheid law—to resist the increasing degradations and injustices that apartheid inflicted.

Amidst many disheartening failures, they attained some signal successes. It was lawyers who shattered the pass laws. These degrading laws required every adult black person in an urban area to carry a document giving permission to be there. Unless you had your pass on you, instant arrest, imprisonment, and deportation to the designated areas in which you were allowed to live as a black person followed. The enforcement of these laws was brought to a juddering halt by two magnificent, highly technical decisions of the apartheid appeal court.⁵

Perhaps more important, even, was the growth of strongly organized black workforces under apartheid. In 1979, the apartheid government for the first time permitted black people to join trade unions.⁶ Apartheid's opponents saw the promising opportunities this offered. They seized it. They worked through the apartheid courts, using the maze of apartheid labor laws to strengthen workers and to create the fastest-growing union movement anywhere in the world.⁷ One of its foremost leaders, Cyril Ramaphosa, is now the President of South Africa.

All this meant two things. First, when Mandela was released, there was a strong cadre of experienced lawyers committed to the notion of law as an instrument of justice, dignity, and equality.⁸ As important, there was a cautious but widespread conviction among South Africa's people that the law was not only an instrument of injustice. It could be more. It could be used to secure

4. See NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* (1995).

5. *Komani NO v. Bantu Affairs Admin. Bd., Peninsula Area* 1980 (4) SA 448 (A) (S. Afr.); *Rikhoto v. E. Rand Admin. Bd.* 1983 (4) SA 278 (W) (S. Afr.). See also RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID 1980-1994* (1995); Stacia L. Haynie, *Judicial Decision-Making and the Use of Panels in the South African Appellate Division 1950-1990*, 29 *POLITIKON: S. AFR. J. POL. STUD.* 147 (2002).

6. See Industrial Conciliation Amendment Act 94 of 1979 (S. Afr.).

7. See MANDELA, *supra* note 4, at chs. 9-10.

8. *Id.* at ch. 11.

justice. If properly adapted, its enlistment for the evil ends of apartheid could be transformed.

The result was South Africa's Constitution, an instrument Justice Ruth Bader Ginsburg has praised as a model for modern constitution-makers, in preference even to your own.⁹ Among its founding values, our Constitution fixes the supremacy of the rule of law. At its heart is a commitment to human dignity for all. It requires accountable, open, and transparent government for the good of all.

Now we come to the three stories I promised: one is about AIDS; another is about political power; the third is about LGBTI equality.

First: AIDS

In seeking to overcome the dispossession apartheid inflicted, our Constitution goes further than traditional "first-order rights." It recognizes a pivotal human truth—that it is no use to confer upon humans rights to free speech, association, conscience, belief, religion, and movement unless you also ensure that their material circumstances enable them in some meaningful measure to enjoy these rights.¹⁰

In this, the South African Constitution differs brightly from that of your own. The Due Process Clause of the United States Constitution, Chief Justice Rehnquist famously said, is not "a guarantee of certain minimum levels of safety and security" but "a limitation on the State's power to act."¹¹ This is a sharply constricted conception of constitutionalism. Its primary objective is to negate despotism by limiting the powers of government.

It is alien to my country's history. The logic of our constitution-makers was not obscure. For over three centuries government power and the law were used to divide, oppress, humiliate, and exclude the majority. They did so with great efficacy. This constructed deep vestiges of racial privilege, which

9. Justice Ruth Bader Ginsburg, in February 2012, on Egyptian TV described the South African Constitution as a "great piece of work" and a model for constitution-makers. Rowan Philp, *In Love with SA's Constitution*, MAIL & GUARDIAN (Feb. 24, 2012, 2:00 PM), <http://mg.co.za/article/2012-02-24-in-love-with-sas-constitution> [<https://perma.cc/DY8F-9MMB>].

10. As Karl Klare noted:

Unlike classical liberal bills of rights, whose chief purpose was to secure individual liberty and property from imposition by government, the South African Constitution embodies the idea that the power of the community can (and must) be deployed to achieve goals consistent with freedom, that collective power can be tapped to create social circumstances that will nurture and encourage people's capacity for self-determination.

Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 153 (1998). The late Chief Justice Pius Langa affirmed the need for economic transformation as a requirement for creating conditions for transformative constitutionalism. Justice Pius Langa, *Transformative Constitutionalism*, 17 STELLENBOSCH L. REV. 351 (2006).

11. *DeShaney v. Winnebago Cty. Dep't. of Soc. Servs.*, 489 U.S. 189, 195 (1989).

it is now necessary, coordinately, for government power to rectify. Hence the Constitution enshrines entitlements to social and economic goods. These include rights of access to social security,¹² food and water,¹³ basic education,¹⁴ healthcare,¹⁵ and housing.¹⁶ The entitlements are for the most part not absolute or immediate.¹⁷ The Constitution requires the government to “take reasonable legislative and other measures, within available resources, to achieve the progressive realization” of each.¹⁸

And it was the judicially enforceable right of access to healthcare that afforded the basis for the most famous decision given by the Court on which I now sit.

This concerned the AIDS epidemic that has ravaged my continent for the past thirty-plus years. The epidemic beset my country just as we were becoming a democracy. In the overwhelming majority of cases, HIV is transmitted through sexual intercourse. This has caused a profound feeling of shame to settle over the disease and efforts to manage it. That shame bedeviled our government’s response to the epidemic.

When President Mbeki took office in 1999, anti-retroviral drugs (ARVs) had just become available. These drugs are not miracle cures. They stop the virus from replicating inside the body of the person infected by HIV. But they do not eliminate it. They were nevertheless near-miraculous. They made HIV a chronic manageable infection and promised to all but end death from AIDS.

When President Mbeki took office, I knew this from deep personal experience.¹⁹ After coming out as a proudly gay man in the mid-1980s, and joining the struggle for LGBTI dignity against the apartheid government, I became infected with HIV. I kept my infection a long, deep, and painful secret. The very shame about sexual transmission of HIV affected me profoundly. But when I fell ill, more than twenty years ago, I had an extraordinary benefit—I was earning a judge’s salary. President Mandela had appointed me a judge in 1994. I could afford to pay for ARV treatment for myself—when all across Africa, many tens of millions could not. They faced unspeakable suffering and death, their families, unimaginable bereavement and grief.

12. S. AFR. CONST., 1996, § 27(1)(c), <https://www.gov.za/documents/constitution-republic-south-africa-1996>.

13. *Id.* at § 27(1)(b).

14. *Id.* at § 29(1)(a).

15. *Id.* at § 27(1)(a).

16. *Id.* at § 26(1).

17. There is an absolute or immediate entitlement to basic education, *id.* at § 29(1)(a), and the provision that no one may be refused emergency medical treatment. *Id.* at § 27(3). The right to further education is subject to progressive realization. *Id.* at § 29(1)(b).

18. *Id.* at §§ 26(2) & 27(2).

19. See EDWIN CAMERON, WITNESS TO AIDS (2005).

I could not remain silent—about my privilege, about stigma and shame, or about the imperative necessity for AIDS treatments to be made available. For ARV drugs could change all this. But President Mbeki refused to make them generally available. He disputed the origin of HIV. He challenged its virology. And, most alarmingly, he queried the medical science of ARV therapy.²⁰ It was a profoundly tragic moment in our national history. I knew how grievously tragic it was—for I knew that ARVs had given me back my life, in the face of certain death.

At the end of the year in which President Mbeki took office, the annual death toll from AIDS in South Africa was staggeringly high.²¹ It was a national catastrophe. And our government refused to act.²²

Fortunately, apartheid left us with the tradition of angry, principled activism that I have mentioned. The Treatment Action Campaign (TAC) had been founded to tackle the outrageous prices that the drug companies were demanding for lifesaving ARVs.²³ Yet a worse nightmare than drug prices now threatened millions of lives. It was the nightmare of presidential skepticism and denial. To its astonishment, the TAC faced a new and very different enemy in President Mbeki. Although I held office as a judge, I had to speak out. My life had been saved by ARV therapy. I joined the campaign for lower drug prices and against President Mbeki's denialism.

The TAC exercised every available right under the new Bill of Rights—the rights to protest, to freedom of movement, freedom of speech and expression, freedom of access to information. The TAC took to the streets. It held marches. It waged a massive public information and media campaign. It lobbied the governing party and its opponents. It enlisted the churches and the trade unions. When President Mbeki would not budge, the TAC was forced to use the most important right of all—the right of access to courts.²⁴ It took President Mbeki's government to court.²⁵

It asserted that the President's refusal to make ARVs available failed the test of reasonableness demanded from government under the Bill of Rights for

20. *See id.* at chs. 3-5.

21. The UNAIDS 2017 Annual Report on HIV/AIDS in South Africa indicates that the number of AIDS-related deaths in South Africa is 110,000—making the monthly death toll approximately 9,166. UNAIDS SOUTH AFRICA, <http://www.unaids.org/en/regionscountries/countries/southafrica> (last visited Mar. 15, 2019).

22. *See* the speech by President Mbeki in the National Council of Provinces on 28 October 1999, <https://www.sahistory.org.za/archive/address-national-council-provinces-cape-town-28-october-1999> [<https://perma.cc/5H9G-NWPR>] (last visited 24 May 2010).

23. That battle was won. With the eventual help of the Clinton and Gates Foundations, the TAC and its allies forced the drug companies—it shamed them—into radically reducing the cost of ARVs in Africa. The role of the foundations is documented in the film *FIRE IN THE BLOOD* (Sparkwater India 2013).

24. S. AFR. CONST., 1996, § 34.

25. *Minister of Health v Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC) (S. Afr.).

providing social and economic rights.²⁶ The High Court ruled that President Mbeki's ARVs policy was not reasonable. It ordered him to start making the drugs available.²⁷ President Mbeki appealed. The Constitutional Court heard the appeal in dramatic circumstances.²⁸ At stake was a linchpin of the President's intellectual and policy legacy. The Court ruled against him. It held his policy was not reasonable, and it ordered him to start making ARVs available.²⁹

For some terrible moments, it seemed uncertain whether President Mbeki would obey the court order. We stood at the edge of the chasm of lawlessness and brutality into which President Robert Mugabe had recently plunged Zimbabwe, South Africa's close neighbor. But President Mbeki did not follow President Mugabe. He bowed his head before the court ruling. Within months, the government had committed to providing large-scale free ARVs. Compliance was hesitant, halting, even grudging. But the drugs became available. The death toll fell. Sickness and suffering and disablement diminished dramatically.³⁰

Today, I am proud to say, South Africa has the largest publicly provided AIDS treatment program in the world.³¹ I am also proud to tell you that it is enormously assisted by U.S. dollars from the United States President's Emergency Plan for AIDS Relief (PEPFAR) program.³² More than 4 million people, like myself, receive drugs that enable them to live healthy, vigorous, productive, and joyful lives.³³

26. *Id.* at §27(2). Section 27(2) obliges government to take "reasonable legislative and other measures," within its available resources, to progressively realize the right of access to healthcare services.
27. The High Court judgment along with all the litigation documents corresponding this case and the appeal to the Constitutional Court is collated on this site: *Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC)*, ESCR-NET, <https://www.escri-net.org/caselaw/2006/minister-health-v-treatment-action-campaign-tac-2002-5-sa-721-cc> (last visited June 6, 2019).
28. Preliminary skirmishes underscored the drama. See e.g., *In Re: Certain Amicus Curiae Applications; Minister of Health v. Treatment Action Campaign* 2002 (5) SA 703 (CC) (S. Afr.).
29. *Minister of Health v. Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC) at para. 135 (S. Afr.).
30. See Nathan Geffen & Edwin Cameron, *The Deadly Hand of Denial: Governance and Politically-Instigated AIDS Denialism in South Africa*, CENTRE FOR SOCIAL SCIENCE RESEARCH, <https://open.uct.ac.za/handle/11427/19825> (last visited May 24, 2019).
31. See STATS SA, STATISTICAL RELEASE P0302, MID-YEAR POPULATION ESTIMATES (2018), <https://www.statssa.gov.za/publications/P0302/P03022018.pdf> (last visited May 24, 2019); Kate Wilkinson, *Yes, South Africa Has the World's Largest Antiretroviral Therapy Programme*, AFR. CHECK: SORTING FACT FROM FICTION (Nov. 30, 2015, 10:28 AM), <https://africacheck.org/reports/yes-south-africa-has-the-worlds-largest-antiretroviral-therapy-programme/> (last visited May 24, 2019).
32. U.S. EMBASSY & CONSULATES IN SOUTH AFRICA, ABOUT PREPFAR, <https://za.usembassy.gov/our-relationship/pepfar/about-pepfar/> (last visited May 24, 2019).
33. See Leigh F. Johnson, Robert E. Dorrington, & Haroon Moolla, *Progress Towards the 2020 Targets for HIV Diagnosis and Antiretroviral Treatment in South Africa*, 18 S. AFR. J. HIV MED. (2017),

The TAC decision was a victory for people dying of AIDS—but, more, it was a victory for reason, and, most important, a triumph for the rule of law and for constitutionalism. It was the decision that cemented the power of the Constitution and of reasoned decisions by the courts, exercising the judicial power the Constitution entrusted to them.

The TAC decision has produced a rich harvest. It established the Constitutional Court as an authoritative and scrupulous check on governmental folly and misrule. This leads to my second story.

Second: Political Power and Securing Transition

In the past four years, the courts in South Africa have become the forum for dramatic battles against corruption and malfeasance in government. The Constitutional Court has been called upon to adjudicate claims that then-President Zuma abused his power.

In 2014, accusations that President Zuma misused public funds to vastly improve his private home in Nkandla roiled the nation. The Public Protector, an independent constitutional institution supporting democracy, was asked to investigate.³⁴ The Constitution empowers the Public Protector to investigate any official conduct alleged to be improper or to result in any impropriety or prejudice.³⁵ It also, significantly, gives her the power, when she finds impropriety or prejudice, “to take appropriate remedial action.”³⁶ On March 19, 2014, less than eight weeks before scheduled elections, the Public Protector released a report confirming that state funds had been misappropriated for President Zuma’s private residence.³⁷

In a first decision arising from the controversy, we upheld, by a majority of 7-4, the right of the main opposition, Democratic Alliance (DA), to send a text message to nearly 2 million voters stating that the Nkandla Report “shows how Zuma stole your money.”³⁸ The majority judgment emphasized the vital significance of freedom of expression “in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed.”³⁹

But the issue had not yet played itself out. The Public Protector had also directed the President to pay back a portion of the money misappropriated

<https://sajhivmed.org.za/index.php/hivmed/article/view/694/980> (last visited May 24, 2019).

34. PUB. DEF. S. AFR., SECURE IN COMFORT REP. NO. 25 OF 2013/14 (2014), http://www.publicprotector.org/sites/default/files/Legislation_report/Final%20Report%2019%20March%202014%20.pdf (last visited May 24, 2019).

35. S. AFR. CONST., 1996, § 182.

36. *Id.* at § 182(1)(c).

37. SECURE IN COMFORT, *supra* note 34.

38. *Democratic All. v. Afr. Nat'l Cong.* 2015 ZACC (S. Afr.).

39. *Id.* para. 122.

for his private residence.⁴⁰ When the President did not do so, Parliament fell back, supine. It failed to hold him to account. Two opposition parties took the President to court. In a momentous decision, the Court held that the President's failure to comply with the Public Protector's remedy requiring partial repayment breached his duties under the Constitution.⁴¹

Five days after the Court's ruling, an opposition leader in Parliament proposed a motion to remove the President. Amid allegations of threats of violence and removal of governing party members who voted for removal, some argued that a secret ballot was essential to enable delegates to vote according to conscience. The Speaker refused to order a secret ballot. She said she had no power to do so. The Constitutional Court ruled that she was wrong. She did indeed have the power to do so.⁴²

President Zuma narrowly survived the secret ballot that ensued. But his litigation woes were not over. Opposition parties turned to the Court to secure a proper process to activate the provision enabling a sitting President to be impeached.⁴³ In a dramatic 7-4 split decision, just one year ago, the Court ordered the National Assembly to create rules regulating the impeachment of a President and start the process to determine whether President Zuma had in fact committed an impeachable violation of the Constitution.⁴⁴ Despite charges in dissent from Chief Justice Mogoeng that the majority decision was "a textbook case of judicial overreach,"⁴⁵ the charge has not stuck, either among academic critics of the Court or among the public. Doctrinally, the majority decision was a plain and simple exegesis of the impeachment clause in the Constitution.

Just over six weeks later, on February 14, 2018, President Zuma resigned from office. The way in which he did so contrasted dramatically with the resignation of President Mugabe, less than three months before, on November 21, 2017. President Mugabe resigned surrounded by army tanks, military strong-arming and the menace of civil war. By contrast, President Zuma's resignation was the culmination of legal and constitutional processes that made it impossible for him to resist the pressures to vacate office. There were no tanks and no military. The pressure was personal, but, acutely, it stemmed from a series of court rulings that put President Zuma in a parliamentary corner and eventually impelled him to resign. Thus we observe the power of legal process, and of judges who enforce it. And many were glad to see President Zuma go. They have welcomed the integrity and obvious competence his successor exudes.

40. SECURE IN COMFORT, *supra* note 34.

41. The Court also held that the National Assembly's failure to hold the President to account was contrary to its constitutional obligation to scrutinize and oversee executive action. *Econ. Freedom Fighters v. Speaker of the Nat'l Assembly* 2016 (3) SA 580 (CC) (S. Afr.).

42. *United Democratic Movement v. Speaker of the Nat'l Assembly* 2017 (5) SA 300 (CC) (S. Afr.).

43. S. AFR. CONST., 1996, § 89.

44. *Econ. Freedom Fighters v. Speaker of the Nat'l Assembly* 2018 (2) SA 571 (CC) (S. Afr.).

45. *Id.* para. 223.

The Court's sharply defined role in these events has brought it greater credit and enhanced authority.

Third: Minority Rights and LGBTI Equality

My first two stories have explained the role of the law and the courts in containing and correcting political power. My third story goes wider. It explains how the law can liberate minds and secure popular embrace for a vulnerable minority.

In 1994, South Africa became the first country in the world to afford express constitutional protection against unfair discrimination on the ground of sexual orientation. We secured the inclusion of sexual orientation by arguing, successfully, that protection for a vulnerable and widely despised minority was a test case for the authenticity of the Constitution's anti-discrimination commitment.

In the twenty-three years since then, the Constitutional Court has issued half a dozen decisions vindicating the constitutional rights of lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons. This included a decision that required Parliament to enact, within one year, marriage-equality legislation.⁴⁶ Amid stormy public debate, the legislature did so.⁴⁷ The first gay marriage under the new law took place not in the suburbs, but in Soweto,⁴⁸ the black dormitory township southwest of Johannesburg.

These decisions have had obvious practical consequences for LGBTI persons in protecting their equality and dignity and security. Yet just as constitutional promises have not secured an end to gender subordination or to racism or poverty or inequality, they have also not ended discrimination against gays and lesbians. Nor have they ended homophobic attacks, particularly upon lesbians living in townships.

Even so, the Constitution has had an empowering impact. The right to equality on the ground of sexual orientation has included LGBTI people within the dignified ambit of moral citizenship. And this has afforded LGBTIs a powerful sense of personal agency as the bearers of equal rights. And this, in turn, has led to a remarkable shift in public attitudes toward sexual orientation and gender identity—one that is unique outside Western Europe, Australasia, and the Americas.

In 2013, a Pew Foundation study of global attitudes to LGBTI people asked a forbidding question—*Should society accept homosexuality?* Despite the unenticing inquiry, fully thirty-two percent of South Africans answered “Yes.” Through much of the rest of Africa and elsewhere, those answering “Yes” were

46. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

47. Civil Union Act 17 of 2006 (S. Afr.), http://www.saflii.org/za/legis/num_act/cua2006139.pdf (last visited May 24, 2019), which, despite its name, enacts the right of same-sex marriage.

48. Andrew Meldrum, *Out in Africa*, GUARDIAN (Dec. 4, 2006), <https://www.theguardian.com/world/2006/dec/04/worlddispatch.southafrica> [<https://perma.cc/HGF4-6XTD>].

a small minority.⁴⁹ A 2016 South African study revealed even more affirming attitudes.⁵⁰ It reported that 50.6% South Africans believe that LGBTI people deserve the same human rights as others⁵¹—while the ratio of South Africans who supported keeping the constitutional protections against discrimination on the ground of sexual orientation, as opposed to those seeking its removal was 2:1.⁵²

We must bear in mind that most of South Africa's immediate neighbors punish consensual, private same-sex activity with criminal penalties, and recall the horrific abuses that LGBTI people continue to suffer throughout the rest of Africa—including torture, beatings, imprisonment, increasing legislative repression and death. South Africa remains, to this day, the only country in Africa to legalize same-sex marriage. This makes these findings tellingly significant. The disparity between support for equal rights and antipathy to their removal from the Constitution itself shows a sophisticated approach to rights. It means a significant proportion of South Africans appreciate that one may consistently resist or reject a moral claim to equality yet, at the same time, believe that those rights should remain constitutionally protected. Thus we see the transformative power of legal principle and constitutional value.

Concluding Thoughts

But why do I tell you these three stories, on a wintry morning, in the American South, in a beautiful city that is deeply imbued with a history of French and white settlers and Native Americans and humans transported from West Africa for slave labor? It is because—though our countries are so very different—our national struggles have suggestive touching points.

I nevertheless hesitate to suggest that South Africa's history with law provides any “lessons” for you. Let me rather suggest three lessons that I have myself learned from my own engagement with the law.

First: After practicing first as an anti-apartheid lawyer, and then as a judge in democratic South Africa, I remain perplexed by the limitations, but also awed by the power and complexity, of law and legal institutions.

The law can be cruel and heartless and petty and degrading. But it can also be majestic in its reach, inspiring in what it enables us to achieve, and trustworthy in what it delivers. That is a lesson of especial poignancy and urgency for law teachers to convey. This is the lesson not only of South Africa's transition from racial injustice, but of South Korea's transition from military

49. PEW RESEARCH CENTER, THE GLOBAL DIVIDE ON HOMOSEXUALITY (June 4, 2013), <https://www.pewresearch.org/wp-content/uploads/sites/2/2014/05/Pew-Global-Attitudes-Homosexuality-Report-REVISED-MAY-27-2014.pdf>.

50. THE OTHER FOUNDATION, PROGRESSIVE PRUDES: A SURVEY OF ATTITUDES TOWARDS HOMOSEXUALITY & GENDER NON-CONFORMITY IN SOUTH AFRICA (2016), https://theotherfoundation.org/wp-content/uploads/2016/09/ProgPrudes_Report_d5.pdf.

51. *Id.* at 46.

52. *Id.*

dictatorship, and of Colombia's transition from civil insurrection and war. In both countries, as in South Africa, constitutional courts have played vital roles in securing peace and justice and expanding rights.

South Africa remains a nation deeply divided by class and race, riven by crime and corruption, continuing gender and race discrimination, by extremes of dispossession and poverty, and by state institutions enervated after nearly a decade of calamitous misrule and corruption under President Zuma.

What unites us is often only a belief in our aspirations and a commitment to realizing them through the values and mechanisms our Constitution affords. We are a nation defined and distinguished by our commitment to realizing our better aspirations under law. The national AIDS program, the decisions exposing malfunction under President Zuma, and the widespread acceptance of LGBTI equality, quite extraordinary outside the Americas, Western Europe, and Australasia, all point to the distinctive power and authority of the law and of constitutional rights when justly and prudently employed.

But there is a key condition here. And that leads to my second lesson to myself.

Second: If the law is to function there must be judges who pronounce it, and who pronounce it boldly and honestly. That is a lesson from not only the apartheid years but from our twenty-five years as a constitutional democracy.

Who is an honest judge? It is a judge who has not been appointed to serve a preordained agenda or to secure a predetermined outcome. It is a judge who, notwithstanding inevitable predispositions and attachments and beliefs and political commitments and positions, retains a readiness to being persuaded. It is a judge who resists the temptation to insist, in the telling words of Justice David Souter in his 2009 Harvard commencement address, that the law is able to provide "a world without ambiguity," or that it might be able to offer "the stability of something unchangeable in human institutions?"⁵³

South African judges—including those in the court on which I sit—have so far managed to avoid ideological precommitment; and their openness to persuasion has been a pivotal factor in the authority the judiciary has gained in our democracy. It may also be a pivotal factor in the survival of the rule of law.

When I think of the hopes invested in my country's Constitution, my mind turns, sometimes with anguish, to Germany's Weimar Republic (1918-1933). That was a noble experiment with enlightenment under law. It ended in catastrophe, with hyperinflation and the rise of Adolf Hitler. The roots of the catastrophe can rightly be traced to World War I and the Treaty of Versailles. But one of the reasons the Weimar Republic failed was that too many of its

53. Justice David H. Souter, Harvard University Commencement Remarks (as delivered) (May 27, 2010), in *Text of Justice David Souter's Speech*, HARV. GAZETTE, <https://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/> [https://perma.cc/5KHK-SAST] (last visited Mar. 15, 2019).

judges were crooks.⁵⁴ Some were communists, others fascists and Nazis. They used their judicial office to promote partisan political agendas, regardless of the facts and irrespective of the arguments before them. The tragic failure of law under the Weimar Republic can in part be laid at the door of crooked judges and those who appointed them.

In Brazil, many see the imprisonment of the man most likely to have won the most recent presidential election, Mr. Luiz Inácio Lula da Silva,⁵⁵ as the work of crooked judges—judges who were predetermined to disable him, whatever the law, from standing as a candidate. Brazil will pay a heavy price if this proves true.

A judge naturally assumes office with preconceptions, experiences, and values, but undertakes with all the fallibilities inherent in the judicial process to seek truthful answers to the uncertainties that can never be eradicated from the law.⁵⁶ Here the important recent intervention of Chief Justice Roberts comes to mind. He rightly emphasized:

We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them...That independent judiciary is something we should all be thankful for.⁵⁷

This is a lesson not only for conservatives but also for liberals.

Of course every judge must have a guiding set of values—and, in this sense, some sort of “agenda.” Mine are two. They sound simple, though in application they can be enormously difficult. The first is to be suspicious, always suspicious, of power—whether corporate, governmental, trade union, or populist. When power is exercised, its provenance, its license and its effects must necessarily be subjected to rigorous judicial scrutiny. That scrutiny should, in my view, be skeptical. For it is the powerful who are most able to inflict injustice and most often do. My second guiding principle as a judge is to use my office where I truthfully can in the protection of the weak. Judges should be skeptical of power and they should protect the weak. Beyond that, I hope my oath to uphold the Constitution and its values suffices as a guide to my decisions and pronouncements as a judge.

Third: Keep faith in the law—never give up. Never, ever give up.

54. See e.g., RICHARD M. WATT, *THE KINGS DEPART: THE TRAGEDY OF GERMANY: VERSAILLES AND THE GERMAN REVOLUTION* (1969).

55. Dom Phillips, *Brazilian Court Bars Lula from Presidential Election*, *THE GUARDIAN* (Sept. 1, 2018, 5:40 AM), <https://www.theguardian.com/world/2018/sep/01/brazilian-court-bars-lula-from-presidential-election>.

56. See Souter, *Commencement*, *supra* note 53.

57. *Quoted in* Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, *ASSOCIATED PRESS* (Nov. 21, 2018), <https://apnews.com/c4b34f9639e141069c08cf1e3deb6b84> [<https://perma.cc/DX5E-DK5X>].

The institutions of the law may be captured by venal men and women (and it is often men). The instruments it affords may be applied to advance iniquity. Many may fear that the rule of law in the United States is under assault right now.

In the dark days of apartheid it seemed unlikely that law and legal values would survive at all. The sense of peril that many may feel reminds me of the long years of legal struggle, when we doubted that the rule of law could even survive. Yet Mandela never lost his faith in the law. Even when the obduracy of the apartheid government forced him into becoming a revolutionary. Even after he was sentenced to life imprisonment, with his people subordinated and humiliated as inferior citizens in their own country. Through all this, Mandela kept his belief in law. He held faith that the law, properly applied, was an instrument of justice, not injustice; a mechanism for fairness and equality; a means to secure human dignity, not indignity.

Even when explaining his decision to defy apartheid's law, he restated his commitment to its values.

The law as it is applied, the law as it has been developed over a long period of history, and especially the law as it is written and designed by the Nationalist government, is a **law which, in our view, is immoral, unjust, and intolerable**. Our consciences dictate that we must protest against it, that we must oppose it, and that **we must attempt to alter it**.⁵⁸

Our faith as lawyers has to be that the law should be upheld for justice but not injustice; that the law should be for achieving equality, not entrenching inequality; that its values bend toward social justice and not entrenched injustice. That is a lesson of especial poignancy for you, as law teachers, for you carry in your classrooms and seminars the future of your country. You, too, must avoid the lessons of Weimar and of Brazil, while nurturing the faith of justice. We have to keep on doing what we are doing, even during what seem the darkest and most forbidding times.

That faith kept Mandela through prison, and it will surely keep us through these much less dark times.

Thank you.

58. Nelson Mandela, *Black Man in a White Man's Court, Closing Speech After Being Convicted - Evidence in Mitigation of Sentence* (Nov. 7, 1962), http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS1522&txtstr=NMS1522 [<https://perma.cc/2QPT-AE5E>] (emphasis added).