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The Universal Declaration and South African Constitutional Law: A Response to Justice Arthur Chaskalson

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It is a great honor to have the opportunity to respond to the remarks of Chief Justice Arthur Chaskalson. As Clinton Bamberger indicated in his elegant introduction, Arthur Chaskalson will stand in history as one of the founding figures in the new South Africa—first, as legal counsel to Nelson Mandela and as guiding spirit of the Legal Resources Centre (a focus of legal opposition to the old regime), and then as Chief Justice and a guiding spirit (*primus inter pares*) of the South African Constitutional Court. It was during his period as first Chief Justice that this tribunal rightfully took its place as one of the most interesting and important constitutional courts of the world.

It is fitting that Justice Chaskalson is with us today to celebrate the 60th anniversary of the Universal Declaration of Human Rights, because the South African Constitution, as amplified by the work of the Constitutional Court, probably reflects the values and aspirations of that seminal document as well as any constitution existing in the world today.

Justice Chaskalson rightly begins his discussion of these issues with a reference to the “inhumanity of the Nazi regime,”¹ whose demise preceded, and in effect gave rise to, the Universal Declaration of Human Rights. Moreover, the history of South Africa since 1990 shares many similarities with the history of Germany from 1945, after the end of World War II. The Nazi dictatorship took an

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1. Arthur Chaskalson, *Dignity and Justice for All*, 24 MD. J. INT. L. 24, 24 (2009).

unparalleled toll in Europe, through genocide and a war of aggression on a massive, indeed incomprehensible, scale. Over a longer period, the South African regime under the National Party also took a fearful toll in killings, mass removals, and the imposition of unbearable conditions which led to injuries, sickness, and death on a scale that will never be fully known. Both regimes based their genocidal actions on an unsupportable theory of the “inferiority” of certain racial, religious, or ethnic groups. As Justice Chaskalson notes, the South African regime was drawn from the white minority population, dominating the majority black population by terror and force.² While the Nazi regime was probably supported by a majority of the German people, it still represented a small minority of the vast populations of Eastern and Western Europe that it sought to dominate and control.

Yet, in a way that still seems little short of miraculous, German legal and political elites (under the strong hand of the western Allies) drafted and adopted a new democratic constitution after World War II. Over a long period of time, that constitution—which is also interpreted and enforced by an extraordinarily strong Constitutional Court—has come to be fully accepted and largely internalized by the German population, which has now become one of the most democratic and rights-conscious populations of the world. In a parallel manner, South Africa, in its much shorter democratic history, seems to be making its own way toward achieving similar goals. (This is also a development that seems slightly miraculous. When I was growing up and for many years thereafter, South Africa under the apartheid regime was considered the most retrograde and hopeless of all of the African countries; now, however, it seems to be—even with all of its social, political, and economic problems—a great beacon and guide for that continent and beyond.)

As Justice Chaskalson indicates, the Universal Declaration of Human Rights contains two basic types of rights.³ Rights of the first type are referred to as “negative” rights, rights that could well be called “fencing-out” rights.⁴ These are the traditional constitutional rights that we find, for example, in the Bill of Rights of the United States—rights of speech and religion, rights of criminal procedure and property, and, more recently, abortion rights. These rights say to

2. *Id.* at 25–26.

3. *Id.* at 25.

4. See, e.g., Albie Sachs, *Enforcement of Social and Economic Rights*, 22 AM. U. INT’L. L. REV. 673, 704 (2007).

the government: “You may not invade a person’s life, liberty, or property in a particular way.” Thus, as noted, these are “fencing-out” rights: if the state stays away and does nothing, then the rights are not violated.

Rights of the second type, however, are the so-called “positive” rights—rights that oblige the state to take some sort of positive or affirmative action, for example by granting a measure of social welfare to the population. These rights require the state to be more “activist”: if the state does nothing, its failure to act may violate rights of this kind. Accordingly, these provisions may impose significant obligations on the state.

The German Basic Law (Constitution) of 1949 contained both sorts of rights, although the positive welfare provisions are generally set forth only in very laconic and general language.⁵ The South African Constitution contains both sorts of rights as well, and the positive welfare rights are spelled out in much greater detail than they are in the German Constitution.⁶ In contrast with the considerably simpler language of the Universal Declaration,⁷ the formulation of these rights in the South African Constitution is hedged with qualifications, to make clear that the rights are not absolute and will not demand unrealistic exertions from a perhaps impoverished government. Nonetheless, in the short history of the South African Constitution, the positive rights have occasioned perhaps more concentrated litigation in a shorter period than anywhere else.

I would like to comment briefly on two cases that illuminate the adjudication of the South African Court in each of these two areas—the separate areas of “negative” and “positive” constitutional rights.

Justice Chaskalson points out that the role of a constitution in the historical position of the Constitution of South Africa is, fundamentally, the task of “transformation.”⁸ (This was true, as well, of the Constitution of the Federal Republic of Germany after World War II.) Not only an entire legal system, but more broadly the political and social system of an entire country must be transformed from a

5. Grundgesetz für die Bundesrepublik Deutschland [GG] [Constitution] arts. 20(1), 28(1) (F.R.G.); *cf. id.* art. 6(4).

6. S. AFR. CONST. 1996 ss. 26 (housing), 27 (health care, food, water, and social security), 28 (children), 29 (education); *see also id.* s. 25(5) (equitable access to land).

7. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25(1), U.N. Doc. A/810 (Dec. 10, 1948).

8. Chaskalson, *supra* note 1, at 30.

type of dictatorship to a rights-based democracy. Of course, no single judicial decision, or constitutional provision, can in itself effect a “transformation” of this type. Yet there seems to me to be one fundamental decision in the history of the South African Constitutional Court that stands—indeed even more than other decisions—for this form of transformation. It is a decision that Justice Chaskalson did not discuss today—perhaps out of modesty, because his ground-breaking opinion in that case will stand as one of the landmarks of constitutional jurisprudence. This is the great *Makwanyane* case,⁹ one of the first cases decided by the South African Constitutional Court, in which the Court declared that the death penalty was unconstitutional. This was (and remains) a controversial decision: there was no constitutional provision which explicitly invalidated the death penalty, and Justice Chaskalson’s long and careful opinion drew from many textual sources, including the guarantees of life, dignity, and equality in the interim South African Constitution. The opinion also included an influential discussion of the use of foreign constitutional law and international law by the Constitutional Court. Justice Chaskalson’s opinion in *Makwanyane*, as well as the other separate opinions in that case, will give food for thought for years to come—particularly, perhaps, on the important concept of *ubuntu* which, when fully elucidated and understood, may represent a unique South African contribution to comparative constitutional law.¹⁰

But I call the *Makwanyane* case a “transformative” decision because it seems to me to rest, at bottom, on one very simple proposition, and that proposition is this: “In light of the South African past under the National Party, there has been enough killing; there will be no more killing, at least not by the State. Our Constitution looks toward life, not toward death.” Together with other aspects of the South African Constitution, including the choice of “truth and reconciliation” over widespread criminal penalization of the past, it seems to me that, in this way, the *Makwanyane* opinion is an essential capstone in the “historic bridge” between the past and future of South Africa.¹¹ And interestingly, in a similar manner, the Federal Republic

9. *State v Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

10. See, e.g., *id.* at 498–504 (opinion of Mokgoro, J.).

11. For the “historic bridge,” see S. AFR. (Interim) CONST. 1993, epilogue (National Unity and Reconciliation), and Chaskalson, *supra* note 1, at 27. For discussion of *Makwanyane* as a “transformative” decision on grounds rather different from those advanced

of Germany made essentially the same “transformative” decision in 1949, when—against the background of the gruesome Nazi past—it expressly prohibited the death penalty in its constitution.¹²

Justice Chaskalson also devotes particular attention to the development of social and economic rights in South Africa.¹³ Certainly rights of this kind—although they do not exist in the Constitution of the United States—are an essential part of the “human dignity” contemplated by the Universal Declaration of Human Rights. On the other hand, I agree with Justice Chaskalson that rights of this kind form a problematic and difficult body of material for a Constitutional Court that seeks to enforce them seriously. The problem is that these rights by themselves cannot create the resources necessary for their implementation, and there may be significant political obstacles to the transfer of wealth that might be required to sustain these rights in a country—like South Africa—in which, as Justice Chaskalson states, there are great gulfs of inequality between the rich and the poor.¹⁴ As noted, the Federal Republic of Germany, which is one of the richest countries in the world, also has provisions of this kind. Yet the German Constitutional Court has been extremely careful and deliberate in enforcing these provisions, using its “social state” clause only in connection with other explicitly-guaranteed constitutional rights.

So the real question about these positive rights is whether their primary function will be only as an exhortation to the legislature—in which role they may indeed have some purpose, but not probably the purpose foreseen and advocated by their most enthusiastic proponents—or whether, as enforced by constitutional courts, these rights may indeed have some significant independent effect.¹⁵

It seems to me that in South Africa, as elsewhere, the jury is still out on this question. The Constitutional Court announces that the positive rights are “justiciable,”¹⁶ but there may be a very thin line between non-justiciability and the kind of deference that courts may

here, see Carol S. Steiker, *Pretoria, Not Peoria*, 74 TEX. L. REV. 1285 (1996).

12. Grundgesetz für die Bundesrepublik Deutschland [GG] art. 102 (F.R.G.).

13. Chaskalson, *supra* note 1, at 31–36.

14. *Id.* at 39.

15. For a discussion of this question in the German context, see Peter E. Quint, *The Constitutional Guarantees of Social Welfare in the Process of German Unification*, 47 AM. J. COMP. L. 303 (1999).

16. Chaskalson, *supra* note 1, at 32.

feel impelled to give governmental judgments of fact and policy under the “reasonableness” test.

Indeed, there is principally one case in which the South African Constitutional Court has appeared to give serious enforcement to economic and social rights. This is the *Treatment Action Campaign* case,¹⁷ in which a program was struck down for failure to extend a certain anti-AIDS transmission treatment to an adequate number of recipients. Yet this case involved at least one important factor that made it a very special case: the drug manufacturer in that case had agreed to provide the relevant anti-retroviral treatment without cost to the government, and so the expenses of extending the treatment were indeed much reduced. Moreover, the order of the Constitutional Court was not as rigorous as the “structural interdict” issued by the lower court in that case,¹⁸ and it would be well worth knowing exactly what the results of the case have been in reality.

Other decisions handed down by the Court have been more limited in their scope. In one case (a very controversial case) the government’s failure to give dialysis treatment to a patient with chronic kidney disease was held to be reasonable.¹⁹ In another case, the Court found a local housing plan insufficient, but its order seemed to focus principally on changes that would only have, at best, a very long term effect.²⁰ Another case, which extended certain benefits to non-citizens, may actually be viewed as a traditional equality decision.²¹ So the South African Constitutional Court, while no doubt one of the most adventurous courts in this area, is still feeling its way, and the ultimate results are still not certain. In these cases, the path from the aspirations of the Universal Declaration to actual social reality remains somewhat obscure.

One final note on Justice Chaskalson’s discussion of affirmative action.²² The constitutional provisions and jurisprudence cited by Justice Chaskalson make clear that it is constitutionally permissible in South Africa for the state to undertake affirmative action to compensate for past racial discrimination by government and society. This is a position which has attracted strong minority support in the

17. *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

18. *See id.* at 763.

19. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (S. Afr.).

20. *South Africa v Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

21. *Khosa v Minister of Soc. Dev.* 2004 (6) SA 505 (CC) (S. Afr.).

22. Chaskalson, *supra* note 1, at 36–39.

Supreme Court of the United States.²³ It seems to me that it is the correct position—not only under the explicit South African provisions, but also in the United States under the equal protection clause. And so it is to be hoped that the Supreme Court of the United States, in its long trajectory of adjudication in this area, will follow the cue of South Africa (and of India) and ultimately agree that this form of affirmative action accords with the Fourteenth Amendment to the Constitution of the United States—and with the demands of human dignity as well.

23. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 362–69 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part & dissenting in part). *See also* *Fullilove v. Klutznick*, 448 U.S. 448 (1980).