ARTICLE

Constitution in the World: The External Dimensions of South Africa's Post-Apartheid Constitution

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While South Africa's post-apartheid constitution is often heralded as a model for other countries, particularly in Africa, the xenophobic attacks on foreigners in South Africa and the failure of South African foreign policy to support the progressive development of human rights raise questions about the external dimensions of the South African Constitution. This article explores these questions through an analysis of the jurisprudence of the South African Constitutional Court involving a range of cases in which the issues or consequences reach beyond the borders of South Africa. The external dimensions of the constitution may be seen, from this perspective not only in its influence as a post-conflict model but also more directly in the Court's jurisprudence dealing with the status of foreigners, refugees and deportees as well as cases arising from South Africa's regional engagements, whether in relation to Zimbabwe or in the demise of the Southern African Development Community Tribunal. In this sense this article adopts an inclusive approach to what might be considered the external dimensions of constitutions to explore the most productive lens through which to understand this specific dimension of constitutions and the South African Constitution in particular.

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Modern South Africa has always been integrated within a broader Southern African political economy while the peoples of Southern Africa are related by a history that defies the formal colonial boundaries of the region. At the same time, as a settler colony, South Africa has long been well-integrated into the global political economy including the social and intellectual world of both European and Anglo-American law. While most of these lineages were based on the colonial and apartheid history of the country, with apartheid's demise South Africa experienced a wave of immigration from across Africa that transformed its major metropolitan area—the Johannesburg/Pretoria urban conglomeration—into a truly African cosmopolitan region. With the economic collapse of neighboring Zimbabwe at the turn of the twenty-first century, South Africa became home to a significant portion—possibly one fifth—of the Zimbabwean population, who arrived as a combination of political and economic refugees. It is within this broader context that this paper seeks to explore the external dimensions of South Africa's post-apartheid constitutions.

While constitutions are traditionally understood within the context of state sovereignty,[1] and the notion that the constitution or domestic law in general does not have extraterritorial effect is a standard refrain, it is possible to recognize that constitutions do have external dimensions beyond the binding legal obligations flowing from the state's international commitments. A primary means of framing the limits of a constitution is to distinguish between citizens and non-citizens.[2] While this distinction has played a foundational role in the history of social and political exclusion of individuals and groups both within and across boundaries, the expansion of democratic inclusion and the rise of human rights significantly reshaped the role of citizenship as a constitutional dimension of exclusion. This first dimension of a constitution's relationship with the traditional boundaries of the nation-state has important effects both within and beyond the borders of the country.[3]

The effects of constitutions can also carry across borders in how they influence foreign constitutional jurisprudence and development, an external dimension understood as a constitution's normative radiance. With the increase in the writing and rewriting of constitutions as well as the proliferation of constitutional courts with the power of constitutional

1 Benvenisti and Versteeg note that "[a]s some have observed, constitutions are a statement to the outside world. They are a declaration of sovereignty and independence." *See* Eyal Benvenisti & Mila Versteeg, *The External Dimensions of Constitutions*, 57 VA. J. INT'L L. 515, 517-18.

2 *See id.*

3 "Today, there is one boundary regime to regulate the foreign trade and investment, several others to regulate the in- and outflow of different types of people (refugees, migrants, trafficked persons), yet several others to regulate the flow of pollutants and various types of natural resources, as well as regimes that seek to regulate the boundless virtual space." *Id.* at 518–19.

review, there is a growing realm in which constitutions and the constitutional jurisprudence of different courts serve as sources of political, legal, and constitutional inspiration and warning to others. This normative dimension ranges from the use of different constitution-making experiences as models and anti-models as well as in the debates over the use of foreign jurisprudence in the case law of different countries. Another aspect of this normative dimension is the emergence of a global canon of constitutional jurisprudence, a body of judicial decisions that has become central to the growing intellectual field of comparative constitutional law.

Another approach to understanding the different ways in which the external dimensions of the South African Constitution manifest is to explore the jurisprudence of the constitutional court through a specific regional lens. While this contextual approach to exploring the external dimensions of constitutions will be shaped by each particular engagement—whether within the European Union, in the context of the "global war" on terrorism, or in relation to a particular cross-boundary crisis—it enables us to view the interaction between trans-border issues and the development of domestic constitutional norms and issues. In the context of the South Africa-Zimbabwe relationship, the engagement has produced a significant body of constitutional jurisprudence that produces a dynamic and complex picture of the external dimensions of the South African Constitution.

This article will explore the jurisprudence of the South African Constitutional Court over the last twenty years to identify and evaluate the different aspects of the Constitution's external dimensions. First, the article will consider the traditional distinction between citizen and non-citizen and how this divide has been shaped by both the formal language of the constitution, its interpretation, and by the social realities of post-apartheid South Africa. Second, the article will explore the Constitution's trans-boundary existence, including its use as a post-conflict model as well as the role of its jurisprudence in the emerging global canon of comparative constitutional law. Finally, the article will use the Constitutional Court's jurisprudence around the conflict in Zimbabwe to explore the Constitution's external dimensions within the specific regional context of Southern Africa.

I. CONSTITUTIONS AND CITIZENSHIP

Traditionally, citizenship has served as a marker of constitutional boundaries. While the constitution served as the foundation of each "community's legal order and structure" the designation of citizenship to

define the "parameters of community within the nation state" assisted one "in understanding the boundaries of constitutions."[4] If citizenship in this context has been described as "the right to have rights"[5] the "final" 1996 Constitution of South Africa embraces a newer conception of the role of a constitution that is more in concordance with the post-World War II rise of human rights. Instead of merely protecting citizens, the South African Constitution "enshrines the rights of all people"[6] in the country, and only distinguishes between citizens and non-citizens in two broad instances: first, in the protection of political rights, such as the right to vote and to participate in politics;[7] and second, in the recognition of a few specific privileges that address the legacies of apartheid, including access to land,[8] and individual freedom to choose a trade, occupation, or profession.[9] The bill of rights makes a few other specific references to citizenship. It protects citizens from the deprivation of their citizenship[10] and guarantees the right of citizens to a passport and to enter and reside anywhere in the country.[11] Finally it distinguishes between citizens and non-citizens to provide prisoner of war status for non-citizens detained in the context of an international armed conflict.[12] All other rights are guaranteed to all people in the country.

Within a very short time, the implications of these broad guarantees became apparent when foreign teachers who had been working in the schools in the North-West Province challenged an attempt by that province to replace them with South African teachers. Although 700 foreign teachers worked in the schools, they "were ineligible for permanent teaching employment because of regulations issued under section 12 of the Bophuthatswana National Education Act 2 of 1979."[13] Those regulations provided in Regulation 2(1)(a) "that a person could not be appointed or promoted in a permanent post unless he or she was a citizen of Bophuthatswana."[14] After the adoption of the 1993 Constitution

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4 Kim Rubenstein & Niamh Lenagh-Maguire, *Citizenship and the Boundaries of the Constitution*, *in* COMPARATIVE CONSTITUTIONAL LAW 143, 163–64 (Tom Ginsburg & Rosalind Dixon eds., 2011).

5 Trop v. Dulles, 356 U.S. 86, 102 (1958) (cited in Kim Rubenstein & Niamh Lenagh-Maguire, *Citizenship and the Boundaries of the Constitution*, *in* COMPARATIVE CONSTITUTIONAL LAW 158 n.134 (Tom Ginsburg & Rosalind Dixon eds., 2011).

6 S. AFR. CONST., 1996 Ch. 2, § 7(1).

7 S. AFR. CONST., 1996 Ch. 2, § 19.

8 *Id.* § 25(5).

9 *Id.* § 22.

10 *Id.* § 20.

11 *Id.* §§ 21(3), 21(4).

12 *Id.* § 37(8).

13 *Larbi-Odam v. Member of the Exec. Council for Educ. (Nw. Province)* 1998 (1) SA 745 (CC) ¶¶ 4–5 (S. Afr.).

14 *Id.* ¶ 5.

the new North-West Province reissued the regulation, which then read: "no person shall be appointed as an educator in a permanent capacity, unless he or she is a South African citizen."[15] When the foreign teachers were given notice of termination they filed suit, claiming discrimination under the Constitution.

While citizenship is not an enumerated ground on which the state is prohibited from discriminating, when the case got to the Constitutional Court Justice Mokgoro applied the early equality jurisprudence of the Court to argue that while citizenship is not specified "the ground [of discrimination] is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner."[16] Noting that "[t]he right of persons who are not South African citizens to live and work in South Africa is regulated by the Aliens Control Act 96 of 1991" and that the "Aliens Control Act distinguished between permanent residents and temporary residents"[17] the Court held that:

> the regulations clearly constitute unfair discrimination as regards permanent residents of South Africa [since] they have been selected for residence in this country by the Immigrants Selection Board . . . [and] [p]ermanent residents are generally entitled to citizenship within a few years of gaining permanent residency, and can be said to have made a conscious commitment to South Africa. Moreover, permanent residents are entitled to compete with South Africans in the employment market. As emphasized by the appellants, it makes little sense to permit people to stay permanently in a country, but then to exclude them from a job they are qualified to perform.[18]

On these grounds the Court held that differentiation on the basis of not being a South African citizen also constitutes an analogous ground of discrimination.[19]

In *Lawyers for Human Rights and Ann Eveleth v. Minister of Home Affairs*,[20] the Constitutional Court was asked to consider whether the bill of rights applies to a foreign national not formally admitted into the country but within South Africa's territorial borders. The case concerned the detention prior to deportation of individuals arriving at ports of entry on South

15 *Id.* ¶ 12.
16 *Id.* ¶ 19 (quoting *Harksen v. Lane No* 1998 (1) SA 300 (CC) (S. Afr.)).
17 *Id.* ¶ 21.
18 *Id.* ¶ 24.
19 *Id.* ¶ 25.
20 2004 (4) SA 125 (CC) (S. Afr.).

Africa's borders. While the Court held that the Constitution applies even to illegal foreigners held at the border, it relied on the limitations analysis to allow for such detention to extend beyond forty-eight hours and read into the Immigration Act the requirement that a court confirm the detention if it were to extend beyond thirty days.

In contrast to the Court's generous interpretation of the Constitution, the plight of non-citizens in South Africa has been marked over the last decade by a backdrop of violent xenophobic events in which South Africans have attacked and even killed foreigners living among them.[21] At the same time, the Court has continued to issue decisions protecting the rights of foreigners living in the country. In *Khosa and Others v. The Minister of Social Development*,[22] the Constitutional Court recognized the claim of permanent residents to social welfare payments, while in *Union of Refugee Women v. Director of Private Security*[23] the Court upheld a legislative scheme regulating the private security industry but held that the scheme was unconstitutional to the extent that it precluded refugees within the country from employment in the industry without a vetting process that would allow them access to such employment.

II. NORMATIVE DIMENSION

One of the most significant ways in which constitutions deliver cross-border effects is through their normative dimension. We may identify a number of different modes that this dimension takes, including the establishment of general normative standards, such as the availability of the death penalty; the use of different models in constitution-making processes; and the use of constitutional jurisprudence as means of argument or even in the establishment of a global constitutional canon. South Africa's post-apartheid constitutions and the jurisprudence of the Constitutional Court have served all these purposes. On the one hand, the South African experience is frequently referred to as a post-conflict model, whether in reference to its two-stage constitution-making process or in its role in the truth and reconciliation process.[24] On the other hand, the

21 HUMAN SCIENCES RESEARCH COUNCIL, VIOLENCE AND XENOPHOBIA IN SOUTH AFRICA: DEVELOPING CONSENSUS, MOVING TO ACTION (Adrien Hadland ed. 2008), http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/081119xencontents.pdf.

22 2004 (6) SA 505 (CC) (S. Afr.).

23 2007 (4) SA 395 (CC) (S. Afr.).

24 South Africa's two-stage constitution-making process involved first the negotiation of the 1993 "interim" Constitution and then after democratic elections the creation of a Constitutional Assembly which produced the "final" 1996 Constitution. For discussion of the embrace of this model outside of South Africa, see Andrew Arato, *Post-Sovereign Constitution-Making and its Pathology in Iraq*, 51 N.Y. L. SCH. L. REV. 535, 538–43 (2006/7).

jurisprudence of the Constitutional Court has been cited for its establishment of a socio-economic rights jurisprudence and has become a significant reference point in the growth of comparative constitutional law around the globe.[25] The radiating effects of these different elements, beyond the borders of any particular state, make up the normative dimension of the constitution in the world.

The South African post-apartheid constitution-making process has been heralded as a model of post-conflict reconstruction.[26] Elements of this process, including the two-stage constitution-making process and the truth and reconciliation process, have become standard references that have been used to justify elements of political reconstruction from Iraq and Cambodia to East Timor and El Salvador.[27] As a result, a number of the lawyers who played significant roles in the South African constitution-making process have become advisers to constitution-making processes in Afghanistan, Iraq, Kenya, Somalia, and other post-conflict contexts.[28] In the case of transitional justice, it was the former co-chair of the South African Truth and Reconciliation Commission (TRC), Alex Boraine,[29] who founded the Center for Transitional Justice in New York City, which became a global non-governmental organization promoting the legitimacy and use of truth and reconciliation commissions in post-conflict situations around the world.[30] In the case of both the constitution-making process as well as the TRC, it was the perceived legitimacy of the South African

25 *See* D. M. Davis, *Socio-Economic Rights*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1020, 1027–30, 1033–34 (Michel Rosenfeld & Andras Sajo, eds., 2012); *see also* Mark S. Kende, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES 243–85 (2009).

26 JAMES FOWKES, BUILDING THE CONSTITUTION: THE PRACTICE OF CONSTITUTIONAL INTERPRETATION IN POST-APARTHEID SOUTH AFRICA 1 (2016).

27 *See, e.g.*, Congressional Testimony, Neil Kritz, U.S. Inst. of Peace, Constitution-Making Process: Lessons for Iraq (June 25, 2003), https://www.usip.org /publications/2003/06/constitution-making-process-lessons-iraq.

28 Three prominent examples of participants in the South African process who went on to work with the United Nations in various capacities involving state reconstruction and constitution-making are Hassan Ebrahim, Nicholas Haysom, and Christina Murray. For a description of international support for constitution-making processes, see UNITED NATIONS DEVELOPMENT PROGRAMME, UNDP GUIDANCE NOTE ON CONSTITUTION-MAKING SUPPORT (2014), http://www.onu.cl/onu/wp-content/uploads/2016/06/Constitution-Making-Support-Guidance-Note.pdf. *See also*, MICHELE BRANDT, JILL COTTRELL, YASH GHAI & ANTHONY REGAN, INTERPEACE, CONSTITUTION-MAKING AND REFORM: OPTIONS FOR THE PROCESS (2011), http://constitutionmakingforpeace.org/wp-content/themes/cmp/assets/handbooks/Constitution-Making-Handbook-English.pdf; Cheryl Saunders, *Constitution-Making in the 21st Century*, 4 INT'L REV. L. 1 (2012), http://dx.doi.org/10.5339/irl.2012.4; Heinz Klug, *Constitution-Making, Democracy and the "Civilizing" of Irreconcilable Conflict: What Might We Learn from the South African Miracle?*, 25 WIS. INT'L L.J. 269, 269–299 (2007).

29 *See* ALEX BORAINE, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION (2000).

30 *See About Us*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, https://www.ictj.org/about (last visited Feb. 14, 2018).

process, heightened by Nelson Mandela's personal legitimacy, that saw the South African experience being held out as a model and which enhanced the trans-border effects of the Constitution.

It was within this context that the South African Constitutional Court emerged and caught the world's attention with its first major judgment striking down the death penalty.[31] While this moment reflected a rather peculiar aspect of the South African transition, in which the major negotiating parties could not agree and left open the question of the death penalty, it provided the Constitutional Court with an extraordinary opportunity to open the jurisprudence of the Court with a dramatic decision promoting human rights and individual dignity over both a history of inhuman treatment and popular opinion that continued to support the punishment. Emerging at the same time as other post-Cold War constitutional courts, such as the Hungarian Constitutional Court, the jurisprudence of the South African Constitutional Court soon gained international attention as part of a burgeoning new wave of comparative constitutional law. This development saw both an increase in contacts among the judges of apex courts around the world, who met in regular seminars and conferences, as well as a growing academic interest in comparative constitutional law.[32] The resulting debates have enhanced the normative impact of constitutional court decisions but also produced heated debates over the legitimacy of the use of foreign jurisprudence by domestic courts, particularly among judges of the United States Supreme Court.[33]

References to the jurisprudence of foreign courts as well as the emergence of a vibrant academic debate over comparative constitutional law has enhanced the significance and normative influence of constitutional jurisprudence across borders.[34] This process has produced what might be described as an emerging cannon of constitutional law cases that are commonly discussed and referenced by apex courts around the globe.[35] South Africa's constitutional court was an early contributor to

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31 *S v. Makwanyane and Another* 1995 (3) SA 391 (CC) ¶¶ 144–51 (S. Afr.).

32 For example, the Yale Law School Global Constitutionalism Seminar has met annually since 1996 to provide a forum for international jurists. *See Global Constitutionalism Seminar*, YALE LAW SCH., https://law.yale.edu/centers-workshops/gruber-program-global-justice-and-womens-rights/global-constitutionalism-seminar (last visited Feb. 15, 2018).

33 *See* Gabor Halmai, *The Use of Foreign Law in Constitutional Interpretation*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1328–48 (Michel Rosenfeld & Andras Sajo, eds., 2012); *see also* Heinz Klug, *The Constitution in Comparative Perspective*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 943–50 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015).

34 *See generally* VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2013); THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2007).

35 *See* Noga Morag-Levine & Barbara Bean, Foreign Precedents and the Global Canon: A Preliminary Exploration (Feb. 24, 2012) (draft article),

this emerging canon in three specific areas: the abolition of the death penalty;[36] the recognition of sexual orientation as a categorical basis for equality claims;[37] and the justiciability of social and economic rights.[38] On the one hand the Court's decision striking down the death penalty, despite public opinion and without clear textual support, marked its emergence as a defender of human rights, while on the other hand, the Court's jurisprudence recognizing sexual orientation as a basis for equality claims is rooted in the Constitution's explicit recognition of sexual orientation as one of the grounds on which discrimination is prohibited. If the death penalty case responded to a history of inhumanity and followed a global trend away from the death penalty, the jurisprudence around sexual orientation was at the forefront of a global process that has led to the recognition of same-sex marriage in a growing number of jurisdictions.

The normative cross-border impact of the Court's death penalty case was made explicit in the Court's decision condemning the handing over of a terrorism suspect to the United States Federal Bureau of Investigation who removed him from South Africa to stand trial in New York. In *Mohamed and Another v. President of the Republic of South Africa*, the Constitutional Court held that the disguised extradition of Khalfan Mohamed to face capital charges in New York was in violation of his constitutional rights to life, to dignity, and to not be subject to cruel and unusual punishment.[39] Even though Mohamed had entered South Africa illegally, the South African authorities failed to respect his rights by failing to demand that the United States give an assurance that Mohamed would not be subject to the death penalty if extradited to the United States. In its order, the Court required that its decision be transmitted immediately to the federal district court in New York where Mohamed was standing trial for his part in the bombing of the U.S. Embassy in Tanzania. He was subsequently sentenced to life in prison.[40] In a subsequent case, *Minster of Home Affairs v. Tsebe*, the Constitutional Court ruled that it would be unconstitutional for South Africa to deport individuals accused of murder in Botswana unless that country would give assurances that the death penalty would not be carried out.[41]

The South African Constitution's recognition of justiciable social and

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http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1143&context=schmooze_papers; *cf.* Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 57–69 (2004).

36 *S v. Makwanyane & Another* 1995 (3) SA 391 (CC) (S. Afr.).

37 *Nat'l Coal. for Gay and Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC) (S. Afr.).

38 *See Gov't of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC); *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

39 *Mohamed v. President of the Republic of South Africa* 2001 (3) SA 893 (CC) ¶ 74.

40 United States v. Bin Laden, 116 F. Supp. 2d 489 (S.D.N.Y. 2000).

41 *Minster of Home Affairs v. Tsebe* 2012 (5) 467 (CC) (S. Afr.).

economic rights brought specific attention to the Constitutional Court's jurisprudence on access to healthcare, housing, and water. The most canonical of these cases is the *Grootboom* case in which the Court found that the government's housing program was unconstitutional because it failed to provide for emergency housing for someone in the position of Irene Grootboom.[42] *Grootboom* was the first case in which the South African Constitutional Court upheld a "positive" right. The case was decided at the same time as various constitutional decisions from different jurisdictions were being embraced by activists and academics, revitalizing a tradition of comparative constitutional law.[43] In the growing field of comparative constitutional law, *Grootboom* loomed large as a standard reference for the justiciability of social and economic rights as well as for a form of rights implementation that is conducive to the development of a sustainable role for courts in this arena. In the Jackson and Tushnet text on comparative constitutional law,[44] the authors use *Grootboom* together with its immediate successor, the *Treatment Action Campaign* case,[45] to highlight both the judicial enforcement of social and economic rights as well as the inherent limits to judicial enforcement that *Grootboom* seems to reveal. Significantly, it is this second aspect of the decision that seems to be the mark of its canonization.

This is most obvious in the Dorsen et al.[46] text that uses *Grootboom* to focus on the nature of the obligations recognized by the Constitutional Court and the relationship of these obligations to the problem of limited state resources. Noting that the Court "does not create direct individual claims for access to adequate housing," but rather confers "on the government a duty to establish and maintain a system that provides adequate access to housing," Dorsen et al. conclude that "[*Grootboom*] is more important for what it does not say about social rights; in fact, it refuses the claim of petitioners to recognize a substantive social right."[47]

Grootboom, and most specifically its remedy, has come to represent an acceptable approach to the problem of the judicial implementation of social and economic rights. Despite his earlier concerns,[48] Cass Sunstein seems to have been persuaded and has embraced the Court's remedy as a form of administrative law which he describes as "a novel and highly

42 *Gov't of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC).

43 *See generally* RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 2–3 (2014).

44 *See* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1671–708 (2d ed. 2006).

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

46 NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 1427–29 (3d ed. 2016).

47 *Id.* at 1428.

48 *See* Cass R. Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35 (1993).

promising approach to judicial protection of socio-economic rights."[49] Others have embraced *Grootboom* as an example of democratic experimentalism and Mark Tushnet uses the case as one model of weak-form judicial review in his development of a taxonomy of judicial review that accepts "the proposition that the state action/horizontal effect doctrine, social welfare rights, and background rules of property and contract are equivalent."[50]

The case has also been adopted in international law discussions of the incorporation and enforcement of those social and economic rights contained in the International Covenant on Economic, Social and Cultural Rights.[51] Even though *Grootboom* explicitly declines to adopt the approach of the United Nations Committee on Economic, Social and Cultural Rights which defines the "'minimum core obligations" to assure "minimum essential levels"[52] both major international human rights texts, authored by David Weissbrodt et al.[53] and Henry Steiner et al.[54] respectively, present *Grootboom* as an example of the impact or implementation of the International Covenant on Economic, Social and Cultural Rights. While the Weissbrodt text uses *Grootboom* to explore the debate over the justiciability of economic, social, and cultural rights,[55] the Steiner text argues that *Grootboom* and its immediate successor, the *Treatment Action Campaign* case, show the way forward for the implementation of social and economic rights.[56] This focus on the role of *Grootboom* in finding a means of addressing the inherent difficulty of imagining a court dictating the allocation of scarce resources in circumstances that raise obvious problems for judicial enforcement, separation of powers, and concern over the capacity of courts more generally has brought canonical status to the case.

In contrast to this broadly normative vision of *Grootboom* beyond South Africa's borders, social and economic rights jurisprudence has continued to develop within the context of post-apartheid South Africa.

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49 CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 236 (2001).

50 *See* Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435, 445, 448 (2002).

51 *See* BRUCE PORTER, REASONABLENESS AND ARTICLE 8(4) IN THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A COMMENTARY 191–95 (Malcolm Langford, Bruce Porter, Rebecca Brown & Julieta Rossi eds., 2016).

52 *See* VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 78 (2010).

53 *See* DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS (4th ed. 2009).

54 *See* HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (3d ed. 2008).

55 *See* WEISSBRODT ET AL., *supra* note 53, at 105–17.

56 STEINER ET AL., *supra* note 54, at 327–47.

While many South African academics did question whether the new constitution should include social and economic rights and have continued to debate whether the included rights are truly justiciable and enforceable by the Constitutional Court, the line of jurisprudence that began in earnest with *Grootboom* has become a central part of ongoing struggles to gain access to scarce social and economic resources in South Africa. Exploring the difference between the development of the domestic jurisprudence that attempts to concretely apply *Grootboom* and the image of *Grootboom* beyond South Africa's borders demonstrates how the normative dimension often plays a distinct role in the global imagination quite separate from the continuing application of the jurisprudence in the domestic setting.

Delivery, or the failure to deliver social and economic resources, has become the dominant mantra of South African politics over the last decade. Despite over twenty years of democracy, the legacies of apartheid remain ever present, including poverty, unemployment, limited government capacity, as well as criminal and domestic violence. In addition, the country has faced new challenges including a devastating HIV/AIDS pandemic and increasing inequality.[57] At the local government level, this is reflected in extraordinary levels of inequality between and within municipalities[58] producing an uneven landscape in which contestation over resources, unfulfilled expectations, and governance failures are reflected in ongoing—and at times violent service delivery and other protests. Local protests increased after the 2004 national elections, growing to a crescendo of around 6,000 in 2006,[59] and have continued sporadically since then. While these forms of public resistance are clear evidence of local anger and disenchantment with ineffective delivery or unpopular government decisions—such as the redrawing of municipal and provincial boundaries—the vast majority of municipalities have been engaged in a protracted process of transformation with decidedly mixed results. Analysts have identified three underlying problems that they argue are the main causes of public anger: "ineffectiveness in service delivery, the poor responsiveness of municipalities to citizen's grievances, and the conspicuous consumption entailed by a culture of self-enrichment on the part of municipal councilors and staff."[60] Tackling these problems, in

57 *See* JEREMY SEEKINGS & NICOLI NATTRASS, CLASS, RACE AND INEQUALITY IN SOUTH AFRICA (2006).

58 *See* Neva Seidman Makgetla, *Local Government Budgets and Development: A Tale of Two Towns*, *in* STATE OF THE NATION: SOUTH AFRICA 2007 146–67 (Sakhela Buhlungu et al. eds., 2007).

59 *See* Sydney Letsholo, *Democratic Local Government Elections in South Africa: A Critical Review* 5 (Electoral Inst. for Sustainable Democracy in Afr., Working Paper Number No. 42, 2006).

60 Doreen Atkinson, *Taking to the Streets: Has Developmental Local Government Failed in South Africa?*, *in* STATE OF THE NATION: SOUTH AFRICA 2007 53 (Sakhela Buhlungu et al. eds., 2007).

order to deliver the benefits of democracy, is viewed by government and social movements as both addressing pressing needs as well as being a constitutional imperative.

While the government has remained publicly committed to addressing these legacies, debates over government priorities and policies have led some activists to stress the Constitution's provision of justiciable social and economic rights and the duty of the government to promote and fulfill these rights. Increasingly, this has led activists to seek redress in the courts with the hope of redirecting government policies and resources. The most successful of the new social movements to emerge in the post-apartheid era have adopted a multilayered strategy of appeals to government, public mobilization, and legal strategies. These questions of "delivery" are reflected in a multitude of legal challenges involving a range of government programs and obligations, from the distribution of social grants and other government benefits to challenges over the provision of housing and access to water.[61] Significantly, the constitutional issues that have arisen in this arena have implicated both the negative and positive aspects of social and economic rights. This demonstrates the intimate relationship between, and even the entanglement of, these different dimensions of constitutional rights. Responding to these cases, the Constitutional Court has steadily built and refined its social and economic rights jurisprudence. It has also been called upon to decide cases that impact service delivery through claims that government action or inaction has interfered with property rights or has violated the obligation to perform its duties diligently and without delay.

Despite the complexity and difficulty of effectively implementing the social and economic rights guaranteed in the 1996 Constitution, the social and economic rights jurisprudence of the Constitutional Court continues to serve as a global example. While academics have provided critical commentary on the application of these rights and activist lawyers have at times declared their disappointment with specific decisions of the Constitutional Court, the social and economic rights jurisprudence of the Court continues to attract international attention and admiration. To this extent, the normative effect of the Constitution's rights jurisprudence

61 The developing "jurisprudence of delivery" is most evident in a series of cases from *Machela v. Mailula* 2010 (2) SA 257 (CC) (S. Afr.); *Residents of Joe Slovo Community, W. Cape v. Thubelisha Homes* 2010 (3) SA 454 (CC) (S. Afr.); *Residents of Joe Slovo Community, W. Cape v. Thubelisha Homes* 2011 (7) BCLR 723 (CC) (S. Afr.); and *Abahlali baseMjondolo Movement SA v. Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) (S. Afr.); involving evictions and housing; on to, *Reflect All 1025 CC v. Member of the Exec. Council for Pub. Transp. Rds. and Works, Gauteng Provincial Gov't* 2009 (6) SA 391 (CC) (S. Afr.); *Nokotyana v. Ekurhuleni Metro. Municipality* 2010 (4) BCLR 312 (CC) (S. Afr.); *Joseph and Others v. City of Johannesburg and Others* 2010 (4) SA 55 (CC) (S. Afr.); and *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) (S. Afr.); that address broader issues of service delivery including property rights, infrastructure planning, procedural fairness and access to electricity and water services.

tends to live in the constitutional imagination beyond the realities of its domestic implementation and contestation.

III. THE CONSTITUTION IN ITS REGIONAL CONTEXT—CROSS-BORDER EFFECTS AND THE ZIMBABWE CASES

The Constitution's most direct cross-border effects have been in response to a series of cases that have arisen as a consequence of regional issues, particularly coming out of the economic collapse and human rights violations in neighboring Zimbabwe. These cases have arisen in three distinct contexts. First, numerous cases have been brought on behalf of South African citizens who have demanded that the South African government intervene to protect them from actions taken by the government of Zimbabwe that have violated their rights.[62] Second, a case demanding that the South African Police investigate charges of crimes against humanity being committed in Zimbabwe.[63] Finally, a case enforcing a costs order made by the Southern African Development Community Tribunal that arose out of claims for compensation by Zimbabwean farmers that had their land expropriated under the Zimbabwe government's land reform program.[64] While not all of these cases involved the application of rights guaranteed in the South African Constitution, the outcomes were based on interpretations of the duties imposed on South African authorities by the Constitution.

The first category of cases involved claims by South African citizens that the government of South Africa had a constitutional duty to act to protect them from actions by the government of Zimbabwe. In *Kaunda v. President of the Republic of South Africa*, sixty-nine South African citizens requested an order to compel the South African government to demand their extradition to South Africa so that they would not face criminal charges in Zimbabwe or be deported to the Republic of Equatorial Guinea where they were accused of participating in a failed coup attempt.[65] The sixty-nine South Africans were arrested when their aircraft, which had departed from South Africa, landed in the Zimbabwean capital of Harare to load weapons. While their initial application was based on the fear that they would not be granted a fair trial and could be executed, the demand that the South African government intervene on their behalf with the

62 *Van Abo v. President of the Republic of South Africa* 2009 (5) SA 345 (CC); *Kaunda v. President of the Republic of South Africa* 2005 (4) SA 235 (CC).

63 *Nat'l Comm'r of the South African Police Servs. v. Southern African Human Rights Litig. Ctr. and Another* 2015 (1) SA 315 (CC).

64 *Gov't of the Republic of Zimbabwe v. Fick and Others* 2013 (5) SA 325 (CC) (S. Afr.).

65 *Kaunda v. President of the Republic of South Africa* 2005 (4) SA 235 (CC) ¶¶ 1–4.

government of Zimbabwe was dismissed by the Pretoria High Court. The applicants claimed that the South African government had a constitutional duty to act on their behalf. The Constitutional Court considered two possible sources of such a duty: first, a rule of customary international law that the Constitution makes part of South African law, unless it is in conflict with either a provision of the Constitution or national legislation; second, claiming that their rights to freedom from torture and inhuman treatment were being violated and "[r]elying on section 7(2) of the Constitution, which requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights', [the Counsel for the applicants] contended that the state is obliged to protect these rights of the applicants, and the only way it can do so in the circumstances of this case is to provide them with diplomatic protection."[66] They also claimed that the state had a duty to intervene since they faced the threat of capital punishment if tried in either Zimbabwe or if extradited to Equatorial Guinea.

Considering international law, the Constitutional Court reviewed international human rights instruments and customary international law but noted that there is no right to diplomatic protection in customary international law or any of the international treaties to which South Africa is a party. The Court also refused to imply such a right stating that this would be a very specific right that the framers of the Constitution, who were fully aware of international human rights law, would have explicitly included if they meant to include it. While the Court accepted that the state has a duty to "respect, protect, promote and fulfill the rights in the Bill of Rights" it noted that this duty "depends of whether the Constitution can be construed to have extraterritorial effect."[67] Considering this question, the Court first referred to the text of the Constitution that provides a system of governance for South Africa and explicitly states that the rights in the Bill of Rights apply to everyone within the borders of South Africa.[68] Here the Court found that it would be illogical to hold that the constitutional rights that apply to everyone in South Africa continue to apply beyond South Africa's borders.[69] Since the Constitution makes no distinction between citizens and noncitizens, the Court found that South African citizens cannot claim that their constitutional rights apply beyond the country's borders.[70] The Court then considered international law and found that international law is premised

66 *Id.* ¶ 31.
67 *Id.* ¶ 32 (quoting S. AFR. CONST., 1996 § 7(2)).
68 *Kaunda*, 2005 (4) SA 235 (CC) at ¶¶ 36–37.
69 *Id.* ¶ 36.
70 *Id.*

on the principle of territorial sovereignty and thus:

> [f]or South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign state and its officials meet not only the requirements of the foreign state's own laws, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of state sovereignty.[71]

While the Court recognized that South African citizens abroad have a right to request diplomatic assistance from the government, it held that "[a] court cannot tell the government how to make diplomatic interventions for the protection of its nationals."[72] Although the Court refused to recognize the right of citizens to demand diplomatic protection it did find that the government's decision whether to respond to a request for diplomatic protection is within the jurisdiction of the courts since "[t]he exercise of all public power is subject to constitutional control."[73] As a result, the Court argued that while courts could not "order the government to provide a particular form of diplomatic protection" the courts could intervene if the government's decision was irrational.[74] Here the Court noted that while the government's "broad discretion" in diplomatic matters should be respected by the courts, "[i]f government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require [the] government to deal with the matter properly."[75]

In *Van Abo v. President of the Republic of South Africa*,[76] the Court was asked to review the government's refusal to take up a claim for diplomatic protection by a South African citizen against the government of Zimbabwe for the violation of his property rights. In this case, the government did not appeal a high court order that the government should intervene diplomatically on Van Abo's behalf but objected to the order's determination that the President had failed to perform his constitutional obligations. The Constitutional Court focused on this latter question and held that while the government did not appeal the High Court decision and the Department of Foreign Affairs stated it was in fact engaged in diplomatic activities on Van Abo's behalf, there was no relevant presidential conduct in this case. The Court held that the responsibility for

71 *Id.* ¶ 44.
72 *Id.* ¶ 73.
73 *Id.* ¶ 78.
74 *Id.* ¶ 79.
75 *Id.* ¶ 80.
76 2009 (5) SA 345 (CC).

foreign affairs is an executive function and therefore the collective responsibility of the executive and not presidential conduct "within the meaning of section 172(2)(a) of the Constitution."[77] Van Abo's claim that the President had failed to provide him with diplomatic protection was thus dismissed.

Zimbabwe's land reform was at the center of another case that not only ended up before the South African courts but also had dramatic consequences for the Southern African Development Community (SADC) Tribunal that had been established as a regional court with the power to hear cases brought by individual litigants challenging violations of the treaty commitments among Southern African states, so as to "respect, protect and promote human rights, democracy and the rule of law."[78] When Zimbabwe refused to comply with the Tribunal decision that the applicants should be paid compensation for the expropriation of their farms, they turned to the South African courts to enforce a costs order against Zimbabwean government property in South Africa.[79] While Zimbabwe claimed sovereign immunity and disputed whether the Treaty's provisions for the compulsory jurisdiction of the Tribunal had been made part of South African law,[80] the Constitutional Court held that the amended Treaty was part of South African law[81] and argued that the request to enforce the costs order was analogous to the enforcement of a foreign judgment provided for by South African statutory law.[82] Since the Tribunal's decision was not a decision by a foreign domestic court, the Constitutional Court applied sections 8(3)(a) and 39 of the South African Constitution to develop the common law so as to allow for the enforcement of the decision of an international tribunal and to thereby uphold South Africa's international commitments.[83] Zimbabwe's refusal to accept the decision of the SADC Tribunal created a political crisis that had profound effects on the Tribunal. First, the Tribunal was suspended and then the state parties to the SADC amended the treaty to limit the jurisdiction of the tribunal to interstate conflicts—removing the ability of individuals to bring cases before the tribunal for violations of human rights.

Finally, in *National Commissioner of the South African Police Services v. Southern African Human Rights Litigation Center and Another*[84] the

77 *Id.* ¶ 53.
78 *Gov't of the Republic of Zimbabwe v. Fick and Others* 2013 (5) SA 325 (CC) ¶ 1 (S. Afr.).
79 *Id.* ¶ 3.
80 *Id.* ¶ 18.
81 *Id.* ¶¶ 27–31.
82 *Id.* ¶ 54.
83 *Id.* ¶ 72.
84 2015 (1) SA 315 (CC).

Constitutional Court was asked to determine whether the South African Police Services (SAPS) had a constitutional duty to investigate claims that Zimbabwean officials were committing crimes against humanity based on allegations of torture. The Constitutional Court's decision in this case began with a quote from President Nelson Mandela, who outlined South Africa's post-apartheid foreign policy, stating:

> South Africa's future foreign relations will be based on our belief that human rights should be the core concern of international relations, and we are ready to play a role in fostering peace and prosperity in the world we share with the community of nations . . . The time has come for South Africa to take up its rightful and responsible place in the community of nations. Though the delays in this process, forced upon us by apartheid, make it all the more difficult for us, we believe that we have the resources and the commitment that will allow us to begin to make our own positive contribution to peace, prosperity and goodwill in the world in the very near future.[85]

The Court argued that this vision of South Africa's international role was echoed in the preamble to the Constitution and that the heart of the case before the Court was "[t]he extent of our country's responsibilities as a member of the family of nations to investigate crimes against humanity… ."[86]

The case involved detailed accounts of the torture of opposition party members by the Zimbabwe police in the lead up to the 2007 national elections in Zimbabwe.[87] The allegations were brought to the Priority Crimes Litigation Unit of South Africa's National Prosecuting Authority by the Southern African Human Rights Litigation Center in March 2008.[88] The dossier included a memorandum outlining the substance and procedure for prosecuting crimes against humanity[89] and the Court concluded that there was sufficient indication that the Zimbabwean authorities would not take up these claims, thus satisfying the condition in international law that all local remedies had been exhausted.[90] After an extensive discussion of South Africa's international obligations and the domestication of the Rome Statute of the International Criminal Court into South African law, the Court concluded that:

> [b]ecause of the international nature of the crime of torture, South

85 *Id.* ¶ 1.
86 *Id.* ¶ 3.
87 *Id.* ¶ 9.
88 *Id.* ¶ 11.
89 *Id.* ¶ 11.
90 *Id.* ¶ 12.

> Africa, in terms of sections 231(4), 232 and 233 of the Constitution and various international, regional and sub-regional instruments, is required, where appropriate, to exercise universal jurisdiction in relation to these crimes as they offend against the human conscience and our international and domestic law obligations.[91]

The SAPS argued that since the perpetrators and victims were all Zimbabwean citizens and the accused were not within South Africa's borders they did not have a duty to investigate. The Court refused to accept this argument, holding that: "[t]orture, as a crime against humanity, is listed in schedule 1 to the ICC Act and forms part of the category of crimes in which all states have an interest under customary international law" and that South Africa may, "through universal jurisdiction, assert prescriptive and, to some degree, adjudicative jurisdiction by investigating the allegations of torture as a precursor to taking a possible next step against the alleged perpetrators such as a prosecution or an extradition request."[92] On this basis, the Court rejected the claim by the SAPS that without the presence of a suspect the police could not investigate. In fact, the Court held that under both international law and domestic law—both statutory and constitutional—the SAPS had a duty to investigate the allegations of torture. The Court also rejected the SAPS's second line of argument that to investigate these accusations would be detrimental to political relations between South Africa and Zimbabwe. Here the Court noted that when it comes to the application of universal jurisdiction, the Rome Statute, or South Africa's own statute domesticating its obligations under the Rome treaty, such interstate tensions are "virtually unavoidable" and to accept the SAPS argument would undermine the "very cornerstone of the universality principle" which "is to hold torturers, genocidaires, pirates and their ilk, the so-called *hostis humani generis*, the enemy of all humankind, accountable for their crimes, wherever they may have committed them or wherever they may be domiciled."[93] Despite this clear statement of a duty to investigate, the Court agreed that this was limited in that unless they were able to gain jurisdiction over an accused individual the "South African courts would have no jurisdiction to adjudicate upon crimes committed in Zimbabwe by and against Zimbabwean nationals."[94] This however did not preclude the duty to investigate.

The Zimbabwean cases provide a useful lens through which to

91 *Id.* ¶ 40.
92 *Id.* ¶ 49.
93 *Id.* ¶ 74.
94 *Id.* ¶ 76.

conduct a contextual exploration of the cross-border effects of the South African Constitution. The cases highlight both the trans-boundary effects of the Constitution as well as the limitations imposed by international law and its organization around the concept of sovereignty. Despite these limitations, litigants have found ways to use South Africa's constitutional order to highlight the plight of foreigners—including refugees within South Africa's borders—as well as to expose the violation of rights inflicted by the Zimbabwean government on its own as well as on South African citizens. While the Constitutional Court has rejected the claim that the rights guaranteed to all who live in South Africa are carried beyond the borders of the country, the very assertion of these claims as well as the recognition that the South African authorities may have a duty to investigate violations of human rights that might amount to international violations, such as crimes against humanity and torture, demonstrate trans-border dimensions of the Constitution.

IV. CONCLUSION

The external dimensions of the South African Constitution provide a lens through which to view the Constitution in the world. Apart from the general sense that the process of constitution-making enabled South Africa's democratic transition, the new constitutional dispensation allowed the world to embrace the new South Africa and facilitated the country's readmittance into the international community. At the same time, South Africa's constitution-making process and Constitution were embraced by the world as models of democratic transition and constitutionalism despite the many challenges posed by the limitations and constraints of this process. While South Africa has not achieved the degrees of social transformation promised by the Constitution, it remains a significant domestic achievement and has become central to ongoing political contestation in the country. A significant aspect of these developments has been the ways in which the Constitution has reshaped the notion of citizenship and human rights both domestically and beyond South Africa's borders on a number of different dimensions.

Beyond the borders of South Africa, the Constitution and jurisprudence of the Constitutional Court has highlighted the changing status of citizenship in constitutional law, particularly in the extension of constitutional rights to non-citizens within the territory over which the Constitution is supreme. While this has offered foreigners, even illegal foreigners, protections not historically given in law, in the case of South Africa it has not protected foreigners, legally and illegally resident in the country, from xenophobic violence—highlighting their political marginality and the failure of government to adequately incorporate and

integrate these newcomers into South African society. Despite these limitations, the Constitution remains a global model for its commitment to the protection of rights beyond citizenship.

In regard to the death penalty, the jurisprudence of the Constitutional Court has seen the Constitution produce direct effects beyond the borders of South Africa. On the one hand, in the cases of the accused wanted for murder in Botswana, the Court prevented their extradition until the government obtained assurances from Botswana that they would not be executed if found guilty and subjected to the mandatory death penalty in that country's law. On the other hand, in the unique case of Khalfan Mohamed, who was spirited out of South Africa by the U.S. Federal Bureau of Investigation with the cooperation of the South African government, the Constitutional Court found that his removal from South Africa—without assurances that he would not be subject to capital punishment—was a violation of his constitutional rights under the South African Constitution, and the Court had their decision transmitted directly to the court in New York where he was sentenced to life imprisonment.

Finally, the South African Constitution, and particularly its socio-economic jurisprudence, has had a profound normative impact on post-conflict constitution-making processes around the world as well as in debates over the emergence of justiciable social and economic rights. In this way, the South African Constitution has had significant normative effects beyond the borders of South Africa, particularly in the re-emergence of the field of comparative constitutional law. At a more empirical level the example of the ways in which the Constitution has been called upon by litigants impacted by the violation of their rights in neighboring Zimbabwe provides a contextual example of how these external dimensions of the Constitution have been deployed and relied upon by citizens and non-citizens within and beyond South Africa's borders.