

The Secretariat
The Judicial Services Commission
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SOUTH AFRICA

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This Memo is in response to the Judicial Services Commission's call for public comments on the nomination of Justice Mogoeng Mogoeng as the next Chief Justice of South Africa. We are a group of USA-based law professors who have written extensively on South African constitutional issues, and who have followed the proceedings of the Constitutional Court since its establishment in 1995. We are all admirers of the jurisprudence of the Constitutional Court, particularly the court's path breaking and innovative human rights jurisprudence.

We write to express our concern at President Zuma's decision to nominate Justice Mogoeng Mogoeng as the next Chief Justice. We do so not to impugn the integrity of Justice Mogoeng, but to suggest that his appointment will betray the transformative vision embodied in the constitutional text and in the jurisprudence of the Constitutional Court thus far. Those of us who write and teach in the area of the constitutional law and human rights law have been inspired by that vision.

The Constitution of South Africa has been much heralded and constantly referenced by constitutional and human rights scholars and advocates. In addition, judgments of the Constitutional Court have been admired, particularly in the court's human rights jurisprudence. Although some problems since 1994 have tested the capacity of the

legal system, especially in the area of criminal justice, the South African legal system is for the most part highly regarded and widely admired. Several reasons account for this, but one is the caliber of judges appointed to the nation's highest courts, including the Supreme Court of Appeal, but particularly the Constitutional Court. Indeed, the Constitutional Court's first appointed judges constituted an impressive range of the country's most admirable legal talent, including legal giants of the anti-apartheid legal establishment. The judgments of the court, and particularly its human rights jurisprudence, are widely cited and analyzed. It may not be an overstatement to suggest that the South African Constitutional Court is currently viewed as one of the pre-eminent constitutional courts for interpreting international legal principles, particularly as those principles pertain to human rights. Since its establishment in 1995, the Constitutional Court has achieved a solid reputation and an impressive degree of credibility among the international legal community. Its judgments have been seen as central to the transformative project of nation-building in South Africa, and a model to countries of the global north and global south.

The Constitutional Court is in fact one of the pre-eminent contemporary institutions articulating the transformative possibilities embodied in the international human rights texts. The Court has interpreted these texts in their judgments, and in doing so has provided a vehicle for lawyers, activists and law teachers internationally to pursue rights in their respective locations. The Constitutional Court may be a South African institution, but its reach and its audience are international. We are members of that international audience.

We believe the JSC has a responsibility to do more than decide whether the President's nominee is "qualified" to serve as Chief Justice. Rather, the JSC's special task is to reach a judgment about whether the nominee will sustain the momentum of the rights revolution in South Africa. As law scholars in the United States, we are well aware that the individuals serving on the highest court of the country can profoundly change the direction of its jurisprudence, for good or for ill, without any change in the words of the Constitution. We fear that as Chief Justice, Justice Mogoeng will fail to build on the enormous efforts that have been made in South Africa to transform the lives of those subordinated and marginalized under apartheid. In particular, recent reports about Justice Mogoeng's judgments in cases involving violence against women and the rights of sexual minorities raise concerns about his commitment to the values the Constitutional Court till now has protected under South Africa's Constitution.

Is it a response to these concerns to say that this appointment is part of the transformation of the South African judiciary? We agree that South Africa's judiciary is, like South Africa itself, engaged in a complex and vital process of transformation. Moreover, the JSC has a special responsibility to further that transformative process. But this is not the issue here. We are especially concerned that President Zuma has made this decision while overlooking other jurists who not only have more substantial judicial experience than Justice Mogoeng, but have also themselves played important roles in South Africa's transition to democracy, and who fully embrace the transformative vision of the Constitution, including the current Deputy-Chief Justice Motsenke, who has served two Chief Justices.

We urge the members of the Judicial Services Commission to consider our perspectives even though we are located in the USA and do not live in South Africa. We may be far away physically but we feel a deep connection to constitutional developments in South Africa.

We respectfully submit these perspectives and thank you for your consideration.

Sincerely

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