A Reply to Professor William Binchy on "Constitutionality, the Rule of Law and Socio-Economic Development"

Chief Justice Pius Nkonzo Langa

Dear Colleagues,

It is a pleasure to be asked to respond to a paper so thoughtfully written by Professor Binchy and so carefully orated by Mr. Aylmer. I thank them for their endeavors. Professor Binchy has raised one of the most delicate conundrums borne by a judge. From where may I permissibly source interpretive aids for the laws that I must, with principled character, apply? Professor Binchy has also characterized the positions in the severe debates following this question – national reflections; international aspirations; foreign comparisons – accurately. What guidance, indeed, from those positions will allow an enlightened approach to a written law, whilst not leading me astray and breaching the character of my society?

In my jurisdiction, South Africa, the question is textually settled in our foundational law. Our Constitution directs us to consider international law and encourages thought over foreign law. As you may imagine, this has neatly settled potential disputes, disputes that, as Professor Binchy alluded to, have become particularly aggressive within some jurisdictions, such as that of the United States of America. The presence of constitutional directives does not,

however, transform South African law into a mere reflection of that which transpires beyond our borders.

Some years ago, Tanya Poole, a South African artist, presented a most engaging. It was a video of two canvases upon which an old man and a young girl were drawn. Digital enhancement allowed the canvases to 'speak'. And so the old man spoke, and the young girl would close her eyes. And then he would finish, and she would open her eyes. And then she would speak, and he would close his eyes. They continued this way. They continued speaking past one another. They continued missing each another. Hence the title of the piece – *Missing*.

That is what we wish to avoid. It is why I am heartened by Professor Binchy's inclusion of Justice Claire L'Heureux-Dube's astute observation that

> "…the process of international influences has changed from reception to *dialogue*."

For, in many ways, that observation closely allies the subtle but-yet-distinct shifts in the relationship that our Constitution, as applied by the Constitutional Court, bears with foreign and international law.

The early judgments in the formative years of the Constitutional Court of South Africa are replete with careful considerations of international and foreign law. In those early years, we hunted prodigiously through global jurisprudence, seeking that which appeared closest to what we might conceive of as appropriate for our new constitutional order. There was little of our own, indigenous jurisprudence upon which to go; guidance was necessary.

And yet, we were careful to indicate that we were not bound by international law, at times wondering whether comparative jurisprudence was entirely necessary. Any remark on the usefulness of foreign and international law was immediately followed by a cautionary note on the vagaries of context and the difficulties of direct transplantation. Matters such as *S v Makwanyane, Fose v Minister of Safety and Security, Coetzee v Government of the Republic of South Africa and President of the Republic of South Africa v Hugo* come to mind. We accepted and acknowledged the guidance received and were grateful for it, but also wanted to be clear that, in this new constitutional order, we would hold steady to a sensitive approach that was mindful of our history and accommodating of South Africa's peculiar necessities.

However, in sum, despite the stated misgivings we had, I think it fair to say that, in those early years, we were an anxious and eager recipient of foreign and international law. Allegorically, it was the Southern Cross by which we navigated, not unlike the early European seafarers who tacked our shores.

The first shifts as the Court neared what, in 2009, may be considered its half-life. A wearing-off process began with *Sanderson v Attorney-General, Eastern Cape*. There, foreign precedents were received with some circumspection. Not out of suspicion of that which lies beyond our borders, but because a unique South African constitutional jurisprudence was appearing, giving us indigenous material to employ, which, naturally, was more context-appropriate.

Then, by dint of good fortune, once we had molded and adapted these indigenous approaches, our blend of law began to find use elsewhere, much in the same way that Canadian jurisprudence has, as Professor Binchy notes, for the systems were borne out of consensus and so that consensus found welcome homes elsewhere.

Perhaps most notable was the decision in the notable socio-economic rights-based *Government of the Republic of South Africa v Grootboom and Minister of Health v Treatment Action Campaign* to reject the Committee on Economic, Social and Cultural Rights' concept of 'minimum core' housing and health care entitlements, and instead choosing a path of 'reasonableness'. To be sure, the Court received some criticism for this in the years immediately following those decisions, but the reasonableness approach has held steady. These cases marked the growing confidence that the Court had in forging a different path to that adopted elsewhere.

Today, with the assistance of a healthy internal jurisprudential legacy, our consideration of international and foreign law has altered once more. Although apartheid-era South African courts played scant regard to international human rights instruments, consideration and application of foreign law in crafting the common law has been a feature of the South African judiciary since its earliest days, a consideration and application that regarded foreign law as a complementary companion.

I think, perhaps, we are now observing a shift to that consideration and application in the province of Constitutional interpretation. One of our most recent judgments in the Constitutional Court was that of *Minister for Justice and Constitutional Development v Centre for Child Law*, which presented the difficult social and legal question of minimum sentences being made applicable to children between the ages of 16 and 17. Counsel submitted extensive comparative foreign positions and, when he came to write the majority judgment, Justice Cameron chose a path and validated it with international law, rather than either exclusively subscribing to foreign positions or dismissing them as context insensitive. Gone were warnings to regard foreign law as possibly inappropriate, so too over-encouragement. Foreign and international law has established a known niche within South Africa law and is beginning to function as that companion with which we may have constitutional dialogue.

So, as you may see, there has been a distinct molding of our relationship with foreign and international law in the context of constitutional interpretation. The constants are two – first, that the constitutional directives to engage with international and foreign law are enshrined in the Constitution, and, second, that the sources of law which are more 'privileged', as Professor Binchy calls them, remain privileged. A comment should be made on that second point.

The so-called 'national approach', which advocates the shunning of outside influence, and has had, as Professor Binchy notes, a somewhat maligned history in jurisdictions where it is not practiced with gusto, does indeed had more to be said for it than is often acknowledged. Not in its self-contained sense, but in the manner in which the other approaches, far from depart from the national approach in substance, actually replicate it, but over a wider terrain.

When casting our eye abroad – be it to the international jurisdiction or to foreign jurisdictions – we most certainly apply the wisdom of particular jurisdictions and reject, usually in silence, others. We are attracted to jurisdictions that look like ours. Sometimes it is for affirmation; and at other times for assimilation. Thus, in many ways, those who look embrace an international and foreign approach are not dissimilar to those who endorse national law. All wish to know what 'we' – our society – think, and, if your society is sufficiently like ours, we can incorporate your society's ideas into our own. It can then with some fair legitimacy be contended that we are exposing ourselves to a broader range of mutually

intelligible views. That may go some way to explaining why it is that particular jurisdictions are more favoured than others.

With this sketch of past, 'half-life' and present constitutional interpretation, I suppose that the next logical step would be to enquire of the future. This, I think, is the scene for the 'shared African jurisprudence' urged by Professor Binchy, and why it could possibly prove so attractive in acting as a communal repository for interpretations of national laws, and could expand the 'privileged' jurisdictions to which we refer.

Professor Binchy identifies equality and dignity as features which, although not peculiar to African jurisprudence, are certainly common in the fundamental social and – it seems – legal norms. I wish to add a third common feature, one that partly grows out of the mutually-supportive relationship between equality and dignity. The feature of which I am thinking is *ubuntu*.

Put simply, and in its complete Zulu, the phrase *umuntu ngumuntu ngabantu* – a person is a person through another person – describes the essence of humanity and what it means to be a human being. It is a principle common throughout Sub-Saharan Africa. And, in South Africa, it has gone beyond its profound social meaning to gain a legal meaning, too.

In the post amble of our interim Constitution, a passage seeking national unity and reconciliation, the then-Constitution spoke of

> "… a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization."

The term *ubuntu* does not appear in the Final Constitution, but in the preamble the Constitution speaks of adopting the Constitution so as to

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

This is the ethos of *ubuntu*. The presence of its spirit in our Constitution has caused it much employment in constitutional interpretation. It formed one of the centerpieces of our rejection of the death penalty as a judicial punishment in *S v Makwanyane*; it underscored the need to extend the protection of the law to all persons, equally, in *Hoffman v South African Airways* where discrimination on the basis of HIV status was struck down; it also reinforced the value of human interdependence in *Port Elizabeth Municipality v Various Occupiers,* where illegal evictions were prevented.

Now, gradually, we are seeing it enter socio-economic rights jurisprudence, too. For *ubuntu* blends individual rights with communal philanthropy and philosophy, and, in so doing, unifies the many provisions of the Bill of Rights. Socio-economic rights are communal in nature because they extend to society, as a collective, that which is required for the individual to survive.

Dialogue – the sort that Justice Clare L'Heureux-Dube's encouraged – can only occur and be strengthened where there is – or there is an attempt at founding – a shared language. *Ubuntu* is that shared language in Africa. And, should it come to percolate African legal systems equally, I can see no reason why it should not bind us closer together in sharing the difficult burden of legal interpretation.

I thank you.