



CHIEF JUSTICE MARGARET H. MARSHALL
MASSACHUSETTS SUPREME JUDICIAL COURT
2021 BOLCH PRIZE RECIPIENT



DEPUTY CHIEF JUSTICE DIKGANG MOSENEKE
SOUTH AFRICA CONSTITUTIONAL COURT
2020 BOLCH PRIZE RECIPIENT



The Bolch Prize

FOR THE RULE OF LAW

Honoring *the* 2020 & 2021 Recipients of *the* Bolch Prize

The Bolch Judicial Institute at Duke Law School honored the 2020 and 2021 recipients of the Bolch Prize for the Rule of Law during a virtual program hosted by PBS News-Hour's Judy Woodruff in June. The program highlighted the extraordinary lives and careers of **Dikgang Moseneke**, former Deputy Chief Justice of the South Africa Constitutional Court and the 2020 Prize recipient, and **Margaret H. Marshall**, former chief justice of the Massachusetts Supreme Judicial Court and the 2021 Prize recipient.

Chief Justice Marshall led the Massachusetts Supreme Judicial Court from 1999 to 2010 and wrote hundreds of opinions, including the groundbreaking 2003 decision in *Goodridge v. Department of Public Health*, which held that the Massachusetts Constitution prohibits the state from denying same-sex couples access to civil marriage. The opinion made Massachusetts the first state to legalize gay marriage and laid the groundwork for a sea change in attitudes and law across the United States. Born in South Africa, Marshall was an anti-apartheid advocate as a young adult before she emigrated to the United States. After attending graduate school at Harvard and law school at Yale, she practiced law for 16 years in Boston and became a partner in the Boston firm of Choate, Hall & Stewart. In 1992, she was appointed vice president and general counsel of Harvard University. She was the first woman to hold that position as well as the first woman to serve as the chief justice of Massachusetts.

As a lifelong advocate for justice, human rights, and the rule of law, Justice Moseneke's career as a lawyer and judge was shaped by his experiences as a political prisoner during apartheid. At age 15, he was imprisoned at Robben Island, alongside future president Nelson Mandela, for protesting his country's segregated system. Justice Moseneke earned two of his three degrees during the decade he spent there. He later became a prominent lawyer and, when apartheid ended, was called upon to help draft South Africa's Interim Constitution, laying the groundwork for a post-apartheid society rooted in the just and equal application of law. He later served 15 years as a justice and then deputy chief justice of South Africa's Constitutional Court, authoring many influential opinions that helped clarify and strengthen democratic principles and the separation of powers among the branches of government in South Africa. Moseneke has recently been called upon again to help lead his country through difficult times: This summer, he chaired the Electoral Commission of South Africa's (IEC) investigation into whether free and fair local government elections could be held during the Covid-19 pandemic.

In addition to remarks from Anthony Kennedy, Associate Justice of the United States Supreme Court and the 2019 Bolch Prize recipient, and Mandisa Maya, the first woman to serve as President of the Supreme Court of Appeal of South Africa, among others, the 2021 Bolch Prize program included an excerpt of a moving and illuminating conversation with Justice Moseneke, Chief Justice Marshall, and David F. Levi, director of the Bolch Judicial Institute, recorded in May 2021. They discussed the importance of the rule of law, human rights, and how the experience of growing up under apartheid informed both justices' jurisprudence. That conversation, lightly edited for clarity, follows. — *Editors*



DAVID F. LEVI: It is wonderful to be able to speak with our two Carl and Susan Bolch Prize recipients from 2020 and 2021. It's a particular privilege for me because I know and admire you both so much. Deputy Chief Justice Dikgang Moseneke was our 2020 Bolch Prize winner, but we were not able to have the ceremony that we had planned. We're so pleased to finally recognize and honor you.

DIKGANG MOSENEKE: David, thank you ever so much. I'm deeply grateful for the way in which you and Duke Law School and the Bolch Judicial Institute hosted me when I was at Duke. And it was a very special privilege to be there, to interact with the law school, and with you as well as with so many other people. So, thank you.

LEVI: Thank you, Justice Moseneke. It's been such a privilege to get to know you. Now, I turn to the wonderful recipient of our 2021 Carl and Susan Bolch Prize for the Rule of Law, the former chief justice of the Massachusetts Supreme Judicial Court, Margaret H. Marshall. What an honor to have you here with us today.

MARGARET H. MARSHALL: Thank you, David. It is such an honor for me to accept the Bolch Prize for the Rule of Law. And I am so honored to follow in the footsteps of the two earlier recipients of this prize, Justice Anthony Kennedy of the United States Supreme Court, and Justice Dikgang Moseneke of the Constitutional Court of South Africa. Two great justices of two great constitutional courts. You know, as I thought about it, I thought how wise it was of Carl and Susan Bolch and how very generous of them to recognize that there's absolutely no better way to shore up the rule of law — which

has been so important to me and I know has been important to Justice Moseneke — and to build a strong, independent judiciary, than to create the Bolch Judicial Institute, to focus on the study of judges and judicial institutions, judicial training and education and law reforms, and to advance the administration of justice.

LEVI: That is so lovely. Today I hope to talk about your lives, your work in the judiciary and in public service, and your thoughts on the rule of law and how to protect it and advance it. Perhaps we can start with your connection to one another. You are both from South Africa and you know each other. Justice Marshall, how do you know Justice Moseneke?

MARSHALL: Well, David, it's one of those great things where his towering reputation preceded my meeting him. I left South Africa in 1968, and I'm now a United States citizen. I've lived in the United States for 50 years. So my path has been very different from Dikgang's.

The South African Constitutional Court has emerged, of course, as one of the great constitutional courts. It has just been a sparkling example of what happens when you establish a new democracy. And I was very interested in its development. Even before Dikgang was appointed to the court, I knew several of the justices, including the first three chief justices. Every time I went to South Africa, I visited the court. And I kept hearing this name, Dikgang Moseneke. I met him during one of my visits to South Africa, I think probably around 2009 or '10, when he was a member of the Constitutional Court.

MOSENEKE: Chief Justice Marshall, you have been so eloquent, I feel there's

little left to say. But there is talk about you all the time with the University in South Africa, Witwatersrand, where I became chancellor. Arthur Chaskalson, our former chief justice, talked repeatedly about your role, your rise to the top of the judiciary in Massachusetts. We South Africans became increasingly proud about one of our own becoming America's very own and in an incredible performance.

I took some detours from law. I went into business after a long career in the struggle for freedom and in law practice, only to be pressed so hard, as I described in my new book, *All Rise*, to join the judiciary. Chief Justice Arthur Chaskalson always pressed on me. So I joined the court. And ultimately you came as a guest at our court, and there we met. Justice Ruth Bader Ginsburg came ahead of you as a resident justice. That made us deeply proud. And then our court became a destination of sorts. And of course, you and I spent a lot of time together at Duke, where I was privileged to be a visitor. And it's just wonderful to share this honor with you, a towering human being. Thank you.

LEVI: Fortunately for the rest of us, Justice Moseneke has written two wonderful volumes of memoirs about his experiences. *My Own Liberator*, which I've read twice now, is gripping. You were 15, I think, when you were sentenced to Robben Island, and you disappeared for 10 years. You used that time to become a lawyer and to get two undergraduate degrees. And then the second volume, which you referred to, *All Rise*, is a very interesting account primarily of your time as a judge. Not all judicial biographies are gripping, but that's what it is because you have this extraordinary experience. ►

Could we talk about the early days in your time as a lawyer? You came out of prison, and you had a decision to make. Many of your colleagues left the country to pursue the fight from elsewhere. You decided to stay, be a lawyer, and work against the system from within the system. Could you talk about that decision and how you view it today?

MOSENEKE: David, let me say, there was no clear rationality in the decision as I made it. I came out of prison when I was 25 years old. I had a law degree, and I knew that I had to study more to get an equivalent of a JD, an LLB, to qualify to appear in the highest courts in the land. But somehow, it was clear to me that you're going to have to come close to the belly of the beast if you want to really bring it down. So, some of my colleagues and comrades left the country, went into exile, and trained themselves as soldiers.

I took a different decision, to hold the hand of activists inside the country — just thrilling in a bizarre way. You'd be close to danger. You'd be close to risk. You'd be the “ambulance” of the revolution, if you like. As people fail, you're the one who would clear them out, who would defend them, and who would be exposed to constant if not abiding threats from the security arrangements and apparatus of South Africa. That's the choice I made. It's not always rational. When you talk to people about destroying a system from inside, everybody loves that stuff.

I thought there were many examples of outstanding lawyers of all races and colors [who stayed in South Africa] — Arthur Chaskalson, and George Bizos, whom we buried not so long ago, and Ismail Mahomed. It was an odd way of living next to what you did not respect as law, but what you sought to exploit in order to expose its bankrupt state. It

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was so easy to raise arguments to show how unjust the outcome might very well be. So it was fun in a strange way.

LEVI: And you had a certain number of victories despite the overall unfairness of the system. That must've been very, very satisfying when it happened.

MOSENEKE: Yes. Very true, David. We, as a collective of activist lawyers, could insist on the rule of law because *they* believed in the rule by law. Apartheid was always that schizophrenic system that sought to rely on the prescript of the law, and yet the law was patently imperfect because it was oppressive. It excluded the majority. It had no high ideals of human dignity and decency. So you are able to make the point to a judge that this departs from these norms. Sometimes we would draw from international law, from American decisions, and other decisions around

the world that are progressive. The world observes different normative schemes on this matter. For instance, torture is outlawed by international law and in many systems. And so the judges had it hard as we insisted on the rule of law within a situation which was never intended to uphold the rule of law but rather, as I often say, rule by law, oppressing people by law and using the law to an end which was never intended.

LEVI: Chief Justice Marshall, you were a student opponent of apartheid, and you left South Africa and came to the United States, not with the intention of becoming a lawyer. You then discovered that you probably could not go back to South Africa, at least in the near term, as you were not welcome there any longer. And you came to the United States during an important time in our history. It was the full flowering of the civil rights movement and the Vietnam War protests. Looking back at that period, how did that time in South Africa, and then in the United States, affect your views on human rights and the rule of law, and what was it that made you want to become a lawyer?

MARSHALL: Let me just say that I agree so powerfully with Dikgang that the law of apartheid was a powerful instrument of oppression. And I, of course, grew up as a white child. I was born there, my parents were born there, grandparents, etc. And I was educated and went through college as a white child, and I had immense privileges simply because of my race. But I would add one other thing, which is that I think my gender ironically protected me as much if not more than my race. And even as I grew up as a white child, I could not be blind to the consequences for the majority of South

Africans who were, of course, Black South Africans.

But while I was visiting the United States as a high school exchange student, that was the first time that I began to have an inkling that the rule of law, if properly understood, can be an instrument of liberation. Dikgang noted that the common law was one tiny little window through which very courageous advocates like himself could perhaps achieve something. Essentially the law of apartheid was based on parliamentary law. There was no written constitution. There was no guarantee of fundamental rights. And almost as soon as an advocate like Dikgang had accomplished a judicial victory, white South Africa and the white, male, Nationalist Party parliament simply changed the law. What I saw in the United States was civil rights lawyers leading cases. One of the names that I knew was Justice Thurgood Marshall.

I went back to South Africa, I finished my high school and my college education, and then I was given a scholarship to come to Harvard. And this is where I want to pick up the gender point: It had never occurred to me as a white South African woman that I would have a profession. It just simply never occurred to me. In my high school, which was a high school for girls — there were 51 girls, and I think four of us went to college — it was a very different life experience from the one that Dikgang was going through. And in the United States, as the civil rights movement was blossoming, so was the second or third or fourth iteration of the gender equality movement. And I think I became swept up in that and began to look at my own life at the same time that I had to make a decision as to whether or not to return to South Africa. And for a variety of reasons, I decided to stay in the United States.

I had never intended it to be a life-long stay in the United States, but it became one because I decided to go to law school. And from that moment, the rule of law, the pursuit of the rule of law, has really shaped my life in a very different context from South Africa. But one of the most exciting things for me was when South Africa was liberated, when it established its new democratic government, when it established the Constitutional Court, and when its Constitutional Court began to issue some of the most powerful and profound decisions of any constitutional court in the world.

I never like to overplay whatever small role I played in the anti-apartheid movement. I am not sure that I would have had the courage, and the dignity, and the stick-to-itiveness of Dikgang and other Black lawyers practicing in South Africa. We have challenges in the United States, of course, we do. I have so many Black lawyer friends in the United States who've been told they can't sit inside the bar where lawyers sit and so on. But it was not what Dikgang was facing. He must have known every single morning, at any moment, the South African government could arrest him and charge him, not for violating any written law, but because you could simply be detained without trial, without access to a lawyer, or banned or banished. I think we know that in Justice Moseneke we have one of the great, great, great lawyers of all time.

As you have said before, David, history throws up people like this, and it's frankly what gives me the courage to keep moving on and have hope for those of us who are so committed to the development of the rule of law.

LEVI: Let's come a little bit more to the present here. Chief Justice Marshall, your 2003 opinion in *Goodridge vs.*

Department of Public Health was groundbreaking, as it marked the first time a state supreme court ruled in favor of same-sex marriage. And at the time, you said in your very humble way that you didn't think the opinion was historic. But now we know it is. How do you view it today, looking back to almost 20 years ago?

MARSHALL: It was the first decision of a court of last resort recognizing same-sex marriage. There had been two judicial opinions in Canada, but they were provincial decisions that hadn't reached the Canadian Supreme Court. There was a very important decision by the Supreme Court of Hawaii, but that had been overturned, and so same-sex marriage had not progressed.

Of course, today I understand the historic significance of it. The United States is unusual because we have our federated system. A case can be brought in Massachusetts and decided by Massachusetts judges under the Massachusetts Constitution, and it cannot be reviewed in any circumstances by the United States Supreme Court. That concept is very difficult for many people in the United States to understand, and certainly many people who live abroad.

Massachusetts is one of 50 states, and the genius of the model of having state supreme courts decide matters of great import under state constitutions is that if there is disagreement with a decision, there can be attempts to change the Massachusetts Constitution, as there were [after *Goodridge*] in Massachusetts. It's difficult, but it's much easier to change a state constitution in the United States than it is to change the federal Constitution.

What caught me by surprise was how quickly this became a nationally and internationally known decision. ►

I think that is a function of modern technology. When I first came to the United States, there were three television channels, and whichever program you watched would scarcely — if ever — mention any judicial decision of the United States Supreme Court. And all of the sudden this decision is on multiple outlets, newspapers, televisions around the globe. And that's what frankly took me somewhat aback.

Now I understand that it was a groundbreaking decision that has had a huge impact on people's lives. Even now, in 2021, I will be somewhere and somebody will come up to me and thank me. I can't tell you how many thousands of times people have thanked me or sent me a note or recognized me.

I have been asked whether my experience in South Africa, growing up as a white child in South Africa, informed my decision in any way. I think I can fairly say that, as I was reaching for the correct interpretation of the Massachusetts Constitution, I was not thinking about my experience in South Africa. But on reflection, I have come to understand one thing: It was so clear to me that everything that the government had been telling me as a white child — what Black South Africans were not capable of and could not do, that they could not run a democracy, could not be brilliant lawyers, could not be successful businessman, could not be leading theorists — it was so patently wrong that I have often thought that when somebody tells me that the other is not capable of something or the other is different, or the other does not belong as a member of our society, there's a deep-seated nerve that is triggered in my system that makes me think very, very deeply about whether that is the case. I think I was so profoundly understanding of that in South Africa, even before I left.

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LEVI: Justice Moseneke, did you become aware of this groundbreaking opinion in Massachusetts? Could you speak about that and also about the status of gay rights in South Africa under your new Constitution?

MOSENEKE: Of course, yes. *Goodridge* was a groundbreaking judgment. Our courts were in full flight then, and would have been very, very infused by learning and judicial learning in particular that would reaffirm our own position. Let me take a few steps back. And as I acknowledge and praise the thoughtfulness of Chief Justice Marshall at the time, she's right: We,

in 1994, took a very firm decision to shut the door on everything that was distasteful of our past. Our past was characterized by exclusion. The most obvious and known exclusion is the one based on race. In other words, white male toxicity being the power broker of society, and therefore deciding all norms of what's right and wrong. Race is one layer.

Remember, under apartheid, patriarchy also was truly well and healthy. White women voted only in the late 1920s in South Africa, and even then many women were still kept out, though they'd been classified whites, because the oppression was also about religion. It was supposed to be a Christian state. All other faiths would have been excluded. It was a crime to be gay, and sodomy was an offense punishable by imprisonment. You can take it further at different layers of oppression, let alone the right of assembly, for instance, the right to express oneself freely on a political front.

Think of any right that today is encrusted in our notions of human decency and the rule of law. These were observed in the breach rarely. Apartheid was a whole matrix of oppression. And therefore the gay issue popped up quite early in our jurisprudence because [the Constitution's] Chapter Nine equality provision made it quite plain that any discrimination on the grounds of sexual orientation would be inconsistent with the law, and to that extent invalid. So in our roots it was quite plain, and we wrote it in very plain language to make sure that it would never raise his head again. All of those old laws, including laws governing marriage, had immediately to be struck down, alternatively to be amended by parliament.

So our courts, as you know, echoed what Chief Justice Marshall decided,

and in a whole series of cases we have had to confront what was established orthodoxy within apartheid, in which oppression was very pervasive. It was a retrogressive system and deeply intolerant of people's choices. In apartheid, the laws of miscegenation were called "immorality laws," and police with torches would go running around to people's bedrooms. If there were two males they were arrested. If they were a Black and a white person, they were arrested. It was state gone bizarre, right into people's bedrooms.

So the new state had no equivocation around gay rights, which were placed on the same pedestal as equality rights, rights to human decency, rights to equal worth of choices that people make. And that's substantive rule of law, that's when the law moves an acre further to actually crystallize things that matter in people's lives. And that is really what we fought for — law put into useful service of actually changing lives and affording people the dignity that they've always deserved. So yes, this was a very important part of our understanding of our freedom.

I can't complete without saying this: I worked side by side with Edwin Cameron, who was openly gay in a South Africa that was so, so retrogressive, and rose to the court where I served, and was my colleague for years. And, as you know, he wrote the foreword in my newest book, *All Rise*. So there we are complete, where you vindicate rights of people to the level where they get their worth on their own merit, aside from the choices they might make about their sexuality, for instance. So there is a glowing example of South Africa in full flight, and of achieving the rule of law in a substantive sense.

LEVI: Let's talk about some of the challenges facing modern democracies.

One of them is the election process. Dikgang, because of your stature, you've been asked, during several elections both in South Africa and elsewhere, to be an election monitor and to certify to the public that an election was fair, or that it wasn't fair. You played that role in the very first election in South Africa that led to the election of Nelson Mandela.

We've just come through a difficult election process in the United States. And we can see that there will continue to be these challenges as we try to integrate technology into our system. And there's so much suspicion born out of, I suppose, hundreds of years of elections, some of which have been maybe not as clean as we would've liked. And there's the concern about suppression, of making it difficult for people to actually exercise their ballot. Any modern democracy has to deal with some of the same issues. What thoughts do you have about this?

MOSENEKE: David, let me start with a few fundamentals. Electoral democracy is premised on the notion that every individual has worth, and that worth is expressed by choosing representatives. And every one of those votes ought to count in the hope that the representatives will be a manifestation of the wishes of those who cast their vote. So the notion is fairly elementary: You will go and stand in my stead and do those things that I would have wished be done. When electoral hygiene disappears, all of the normative glue, the ethical glue gives way. And globally, increasingly, actually, you see questions of electoral integrity, sometimes real, sometimes apparent. And often, it matters not which of the two. You remember me going out to Zimbabwe as a monitor. And we called out the elections as not being free and fair. And

one of our politicians raised the question, which is often raised in Africa, but now lately in the U.S.: What is more potent, justice or peace? Is there a time when you have to trade peace for electoral integrity? Do you barricade places appointed by law to do certain roles, in relation to the elections? Do you appease those who barricade, [rather than] upholding what you understand the law to require or the electoral law of a country to require?

And this has posed challenges across the world, where people would pose a physical threat, a threat of anarchy, of dissonance, against insistence on electoral laws being properly and fully observed and what I often call "electoral hygiene." And I think increasingly as we move on, you're going to find that people are going to be more and more doubtful of elections and are going to try to find other means. I've many examples that I bring to mind. But the better choice I think for virtually all nations is to go back and examine the electoral arrangements and try to make them as accessible as possible, as fair as possible, as transparent as possible, even with the backdrop of technology. Because mere appearance of unfairness, as we saw in your country and in other countries, is often sufficiently persuasive. And, therefore, there should be mechanisms. I know many exist already. In our country, you may go to the courts and try to strike the elections down in particular areas. And sometimes you might want to attack the entire outcome, which is near impossible. In your country, too, I know you do that. But I do think that there's an increasing notion that those who are in power are going to try to steal elections. And that moral fabric I talked about of electoral democracy is being challenged. And we have to think anew how we make it all bare, transparent, inclusive, and trustworthy. ►

LEVI: It's really a tough issue. Justice Marshall, the states are in charge of the election process in the United States, by and large, and they vary tremendously. I learned when I had an opinion to write some years ago that involved the blanket primary in California just how varied our system is. What are your thoughts on this?

MARSHALL: I agree with Dikgang that fundamental to democracy as we understand it is the right of every person to vote. And so one would hope that in any democracy, whatever the state mechanisms are, they would be to enhance the accessibility of every qualified person. And by qualified, I certainly don't mean qualifications other than age. In some countries, it's age 18, some it's 20, some it's 21. The whole thrust of democracy so far has been to give every person easy and safe access to the ballot. Because we are such a huge country, you are correct that the states devise their own systems in the sense that some have written ballots, others have electronic ballots. I think what I fear in the United States is that there are barriers being erected that make it more difficult for people to exercise their right to vote.

There is a tension, as you suggested, David, between technology and actually watching somebody arrive at a polling station, have their name checked off so that only one person with that name and that person votes, and then go into a cubicle of some kind and deliver their vote. What disturbs me is how difficult we are now making it in the United States, through actions at the state level, for people — even those who are waiting in line — to exercise their right to vote. We have a very, very painful history in the United States of denying the vote to all of our people — Black Americans,

It was not so very long ago that when the United States Supreme Court issued a judgment, there were state and other authorities who refused to follow that judgment, and we had to send out federal troops. I hope we are not reverting to that, but I have to say that I am deeply troubled about the threats to the rule of law that I see in this country, and that we have seen something of in South Africa.

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women, Asian Americans. We've done this since the beginning of our nation. But I would have thought that by the time we got to the 1960s and the passage of a powerful federal piece of legislation that we had at least

accepted that making it easy for every person to have safe access to the ballot is what counts.

Dikgang mentioned the connection between that and the judiciary. And as I look around the democracies of the world, there are essentially three aspects that I think are fundamental to any democracy. The first is the right of every adult person to exercise their right to vote. The second is that we have a strong and independent judiciary, so where there is a challenge to the outcome of an election, you will have a judiciary and judges who are not partisan in any case. And the third is freedom of a press. Without each of those in place, I think democracy falters.

My life's commitment has been to promote the rule of law. And with that, you need a strong and independent judiciary. One of the most meaningful contributions, I think, that the South African Constitutional Court has made is that there is no question that the justices on the Constitutional Court are independent, that they have issued judgments that are profoundly disagreeable to the executive and legislative branches; and the most important thing is that their judgments have been obeyed.

Yes, I know there has been kicking and screaming, but their judgments have been obeyed. We tend to take that for granted in the United States, and yet we should not. It was not so very long ago that when the United States Supreme Court issued a judgment, there were state and other authorities who refused to follow that judgment, and we had to send out federal troops. I hope we are not reverting to that, but I have to say that I am deeply troubled about the threats to the rule of law that I see in this country, and that we have seen something of in South Africa. But from my point of view, and I recognize

I'm speaking as a lawyer and as a judge, the most important linchpin is to have a strong and independent judiciary.

And that means judges who are appointed, who understand that it is not their job to look over their shoulder to see who appointed them and to try to comply with whatever political pressures being put on them. And for the moment in South Africa, and it is a very powerful example, the Constitutional Court is holding strong. In the United States, many states have elected judges. Judicial elections in states have now become so partisan and so political that I fear what happens in state courts now, where there are challenges to the state laws that have been enacted, that one could reasonably say these are attempts to close down the ballot rather than to expand its access to all adults.

LEVI: Let's talk also about the disarray and disharmony that we see in our societies. In South Africa, you have this wonderful experiment of reconciliation. And so far, I think it's fair to say it's truly astonishing, how you moved from apartheid into something else. But it's not perfect. I think, Dikgang, you would agree with me. And in the United States, we have citizens of obviously very diverse backgrounds and histories, religions, races, and there are many people who feel that they've been unfairly treated. And we're trying to deal with all these tensions that we're all experiencing and that maybe got intensified during the pandemic to some extent, and also perhaps by the internet.

How do we make a more perfect union, to quote the U.S. Constitution? How do we move forward, maintain robust debate, have progress, and not fall apart at the same time? Dikgang, what are your thoughts?

What I've learned over 25 years, starting with the writing of the Constitution, is that the honeymoon doesn't last forever. The nicely arranged institutions of democracy very soon started going through turmoil.

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MOSENEKE: Twenty-five years ago, David, we inducted a new Constitution, and the intentions were high up there. And we sat down and line-by-line wrote some of the details of our notion of a just society. And if you go look at our Constitution, you'll see it's in simple language, readable, accessible, and it looked at just about everything. It's a kind of "wall-to-wall" constitution. If you want to know whether we'll have *Roe v. Wade*, we won't have that, because we have resolved the question of reproductive rights, and they reside with the woman. If we want to look at gay issues, we have resolved that in our Constitution.

What I've learned over 25 years, starting with the writing of the Constitution, is that the honeymoon doesn't last forever. The nicely arranged institutions of democracy very soon started going through tur-

moil. Americans have just come out of institutional turmoil where democratic institutions were shaken to their core, and we're going through that, young as we are. And principally, the courts continued to try to uphold the rule of law and the finest tenants of our Constitution — which, as you know, in your country has implications for executive decisions and for laws, whose constitutional validity depends on whether they can stack up against the higher order set up by a supreme constitution.

Our Constitution — meant to manage our diversity, to manage our democratic ideals, to try to migrate our society from the horror of apartheid and colonialism to a new space — began to rattle quite badly. The supposition in implementing a document like that is that you have near-perfect people. And very quickly, you saw challenges around diversity, around the rights to cultural practices, the rights regarding electoral issues, and whether or not Parliament is exercising its mandate fully. And in particular, it's holding the executive to account. So when the political glues gave way and the combat between political actors within the public power space increased, the courts had to deal with that. And it's not different in your country.

You need continual assessment of your institutions. Certainly you're going to have to ensure that your judiciary is what Chief Justice Marshall was talking about — properly appointed, committed to notions that it must act fairly and justly and, above all, competently. This competence is an important part of garnering respect.

I saw a poster only yesterday on TV here in South Africa: "We are tired of Judiocracy" — people saying you have a dominant judiciary that tells us just about everything to do. And like in ►

your country, we are beginning to have people question whether the electoral process is appropriate and whether a party-based electoral system is the right way to go, because party bosses are seen to be corrupt and incapable of delivering on this wonderful Constitution. Everybody tends, of course, to look to the judges, and the judges have become quite important parts. You have a fairly strong legislative arm in the U.S. We need a strong legislative arm to stand side by side with the judiciary, so that we can deliver on our constitutional mandates.

So that's how it comes to us, and it is a challenge. And we were amazed to see that you Americans are not immune from these challenges.

LEVI: These are challenges. And history isn't over yet. I'd like to hear both of you talk about the experience of judging and your reflections on the rule of law, whatever they may be. And Chief Justice Marshall, why don't we start with you?

MARSHALL: David, I feel so privileged to have participated in this amazing experiment that the United States has undertaken, and to be able to sit as a justice. I say amazing experiment because we are a whole continent almost. We have 320 million people. We have admitted immigrants from all over the world. We have indigenous people who are a very small part of our population, but an important part. And we have built a constitutional democracy, which at its core relies on a strong and independent judiciary, which is the point we have made in this conversation. What is a judge doing? What is the rule of law? So many philosophers and judges and teachers and students have tried to define it. But for me, it has certain component parts — equal-

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— DIKGANG MOSENEKE

ity, fairness, protection of fundamental rights, access to the courts, limitations on the exercise of power.

So when do we lean on an executive branch? And when do we say that the legislature has gone beyond its powers? Those are enormous decisions that sit in the hands of judges. The other parts as well, the resolution of civil disputes, and I think, for me, not only to look at that from the outside, but to actually have to reach decisions from the inside. There was not a day that I did not feel privileged to be in that position. And of course, for me to have grown up in South Africa and to have come here as an immigrant on my own and to have been given this opportunity has been just a deeply moving experience. But we can never take any of this for granted in the United States, as Dikgang has made perfectly clear and as we should all know and understand.

So I want to come back to why it is so important to have institutions like the Bolch Judicial Institute, and why

what Carl and Susan Bolch have done is so important. Because we simply cannot take anything for granted. So for this institute to focus on the judiciary at a moment in our time, in our history, when we feel that there is any sort of weakening in some of the strong poles on which our democracy rests — I think it is extraordinary. And I can only say that judging has affected my life in profound ways, and to sit on the oldest court in the United States with its own great constitution, the Massachusetts Constitution, and to have the federal Constitution, I think is an experience that is very hard to describe.

MOSENEKE: Chief Justice Marshall has been right there, and I'm most grateful that she's made most of the points that I had hoped to make. But starting with history, we know that law can be — I think the word is "a bastard." Law can be harnessed to destroy our best notions of good living, of democracy, of human dignity, and all of those wonderful things, of living in peace and living within one's diversity and choices without limitations and so on. Law sits as something very important in society. And those of us who have lived in lawlessness within the law know that it can all go awry, and that there should be a continual attempt to focus on the importance of the rule of law.

There are many tyrannical states and predatory rulers who wouldn't care two hoots about proper electoral processes and what the people deserve. I mean we can look around the world. So I take your point, Chief Justice Marshall, about the privilege of being a judge within a democracy, the privilege of an agreement by a nation that decisions of courts would be adhered to. It's a very important plank of the rule of law. Somebody must blow the whis-

tle. You don't have to agree with the referee's decision all the time to know that you need a referee.

That's one important plank of democracy. Not only to elect people into power, but to have the judiciary play the referee and say that it is important to accept that the referee will make decisions that will not suit us all. When I teach young judges, I often say every time you hand down an opinion, somebody's nose is out of joint. You must have smashed somebody. And if they're powerful, it's not always that they will find it suitable. You ask: Is there a law for this dispute? Have I decided the facts in relation to the law at hand? Have I brought relief to disputants who are before me? Yes. Some may be unhappy. Have I explained in clear opinions how I have come to the decision?

And the last point I want to make is that when we talk about the rule of law we often talk about the higher, larger context, the superstructure of the democratic arrangements in a society. But the many years that I've been counsel and then a judge, there are so

many disputes of people, of neighbors or spouses, of children. And ask anybody who has been in courts, those disputes require the law to step in and to restore the equilibrium that is brought on by an invasion of rights or perceived invasion of rights. And over the years we gain a certain level of sensitivity over the fact that the law serves a purpose much more than the big and powerful in society.

Exercising public power — that's one level and the most conspicuous level. To think about a situation where people thought they were entitled to upset any election, and that there will be no consequences — that is an easy example. But think about people invading a private residence or going out to hurt people or rape people or dispossess people. Judges come in and step in. And that's probably the most fundamental sense where the rule of law comes in, to find that equilibrium that escapes us when we invade rights of others. And that was my privilege as a judge. I've tried to write it in my second book, *All Rise*, about my perceptions of

the role of a judge. But what was most impactful for me was how we actually could intervene in what I call ordinary lives and change them and restore the harm that might have occurred. And that's the simplest thing I want to say about the rule of law. May it live long, because without it, Hobbes told us ages ago, life will be short, nasty, and brutish.

LEVI: Yes, indeed. One of the joys of contemporary life is being able to spend time with the two of you. And for me it would be a joy to go on with this conversation for a very long time. I want to congratulate you both. You are remarkable people, remarkable judges. Your dedication to your craft and to the rule of law are extraordinary. You have life histories that are so interesting, and you've made of your history something very special for the contemporary moment that we're in. You're shining examples of what good judges can be. Thank you for what you've done for the rule of law and the promise of equal justice for all.

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