During a lunch-hour event with students at Duke Law School in February, David F. Levi, director of the Bolch Judicial Institute, interviewed former Deputy Chief Justice Dikgang Moseneke of the Constitutional Court of South Africa about his memoir, *My Own Liberator*. The book traces Moseneke’s remarkable life and career, from imprisonment on Robben Island at the age of 15 to becoming a justice on the Constitutional Court of South Africa, and the values, people, and experiences that have influenced his life in public service.

Moseneke, the recipient of the 2020 Bolch Prize for the Rule of Law, spent the early part of the spring 2020 semester teaching and writing at Duke as the University’s Rubenstein Fellow. Though his visit was cut short by the pandemic, Justice Moseneke left an indelible mark on the students and faculty he engaged with while at Duke. The following is a lightly edited transcript of his conversation with Levi.

David F. Levi: You’ve written a wonderful book called *My Own Liberator*. I read it with such tremendous enjoyment. Can you tell us how you came up with the title?

Dikgang Moseneke: I decided to wait and choose a title at the very end of my writing process. Throughout my process, I scratched and scratched my head, wondering, “What am I going to call all this?” In the end, I thought my book was really about how I liber-
ated myself, in multiple ways and on many levels, the most obvious level being the duty to liberate myself from colonialism and apartheid. Obviously, individual agency and collective agency intersect when you organize with others to resist a bad regime, but you individually are your own liberator, and I’ve always understood that to be true for myself.

Levi: How did you come to be arrested and convicted at age 15?

Moseneke: As a young person, my sense of injustice was heightened. Even from the age of 10, I understood very clearly the injustice of an unequal and segregated society. I was appalled by the fact that my school precincts were so much poorer than the school precinct on the other end of the town. I was just totally unhappy that the two towns were unequal and separate, that my people were kept out of any political activity. So it wasn’t too much for me to decide that my duty in life was to destroy apartheid, and I got swept up in the political activities. I was arrested as a high school student and ended up serving 10 years on Robben Island from the age of 15 to 25.

Levi: Robben Island was such a big part of your history and was a horrible place for a young person. While your experience there was terrible in many ways, you also talk about the joy you experienced there and that you made the most of it. What did you mean?

Moseneke: Yes. I don’t know why, how, or where the insight came from, but my primary focus was on survival. Robben Island is a political prisoner facility, so if you take 4,000 or 5,000 political prisoners and put them together, you end up validating their position. We regrouped, and we started reassuring each other that apartheid is bankrupt and mindless and that we have to reorder our society to make it more just.

My mother and father were teachers, so I also knew that I had to study. When I was arrested in high school, I was picked out of a class. So my natural instinct at the time was to want to study. We went on an 18-day hunger strike to make sure that we had a right to study. We set up, as we often called it, a university on Robben Island and started a reading club. In no time, reading became par for the course. In those days, you were compelled to work for no pay as part of your prison sentence. You had a full day of hard labor pushing around and breaking up stones. At the end of a day, you’d have a nice three or four hours of reading. We would read as a relay. For example, we would take *Grapes of Wrath*, remove the binding, and pass around every 10 pages. I’d read 10 pages, pass them on, and we read in a merry-go-round of sorts. When the book was done, we had a literary club discussion about the work. We picked up books that we thought would speak to our circumstances and, indeed, to prepare for university.

I, and others, qualified for college admission while studying on Robben Island. I was young and had nothing so it was quite easy to focus on the job at hand of getting a degree. I finished my degree in political science and English literature after three years and went on to a law degree and, ultimately, an LLB, the equivalent of a JD. So the prison actually turned into a space in which we were preparing revolutionaries with the tools to overthrow the apartheid regime.

Levi: You mention in your book that you were hungry all the time during your time at Robben Island. You were a young, growing person, and they did not give you adequate food. What was that like?

Moseneke: The food was very little. If you’re a very young boy or girl and you get into the refrigerator, you can easily clean it out. I used to do that before I was arrested. Then, I got arrested and suddenly received three meals a day, bang. No dessert, no cookies. All meals were measured based on the district surgeon’s recommended amount of sugar, coffee, and oatmeal. In prison, they fed us on a diet scale. Apartheid is a horrific system that was meant to divide people from birth to death. Even the grave sites were different. Everything else in between was also separated. So, in prison, “A diet” was for white women, or women of European extraction. “B diet” was for males of European extraction. “C diet” was for women who were classified as mixed race, Indian, or Asiatic.
“D diet” was for mixed race, Indian, or Asiatic males. “E diet” was for African women. And "F diet" was what I got. You can see how low I was on the hierarchy. You can see how meticulous our oppressors were about notions of race and immutable differences that human beings are supposed to have. And this was the law. Apartheid was oppression by law. So by the time you got to F, the food was so little, I thought I would die, you know, just out of hunger. After every meal, I felt so hungry. Every time after eating, my stomach was immediately empty again and purring.

So what I remember about my 10 years on Robben Island is that teenage hunger. But the human body can take quite a lot of deprivation. We eat more than our body actually needs. But I think if I had received enough food, I'd probably be twice as tall as I am now.

Levi: You left Robben Island at 25. You could have left the country and done other things. Instead, you chose to stay in South Africa with the determination to be a lawyer in an oppressive regime. Why?

Moseke: The trend at the time was for the people who came out of Robben Island to go into exile and join liberation forces. I remember at a certain point there was a decision to stage both an internal insurrection and an external military assault against apartheid. The anti-apartheid movement was quite strong, even in the United States. Certainly not in the mind of Ronald Reagan or Maggie Thatcher, who both supported the apartheid government. But among the people of the U.S. and across Europe, we had the strong support of anti-apartheid movements across the world. A combination of all of those forces would bring apartheid down.

I chose to remain in South Africa and to actually push the system to admit me as a practicing attorney. So I reached out for apprenticeship, and I took the exams. Even given all the impediments I had, I was first in my class nationally. I was better than everybody else who took the exams, even the 99 percent that were white. When I applied for admission as an attorney, the law society objected on the grounds that I was an ex-convict and questioned whether there was any moral turpitude on my part. My argument was uncomplicated: “No, I'm at the height of my sincerity. I seek to disestablish an unjust minority regime that oppresses the majority for reasons that are totally invalid. I'm the good guy. So you see, judge, you and your government are the bad guys.” I put forward the argument that there was no act of insincerity on my part. If anything, I was asserting my humanity and my rights to be governed properly. This wasn't an original argument since there was precedent when Nelson Mandela became an attorney. The three-judge panel bought the argument, and I was admitted as an attorney.

Then came the point of practicing. Practicing in South Africa was a complicated affair. Every element of apartheid existed through the law as oppression by law. This is not to be confused with the rule of law. Parliament was sovereign, so parliament could make laws to any effect, like the example I gave you about the scale of food in prison or another law that proscribed the employment of married women on the reasoning that they will soon become pregnant and require replacing. There is a whole range of intersectional oppressions that came out of apartheid. It was a heathen system.

So, how did I practice law under it? There were a number of progressive lawyers who practiced law within the same setting. The strategy was uncomplicated, frankly. For every single attack, you seek to find a procedural foible, a technical weakness, or what I call the soft belly of the beast. I can give you several fascinating examples of this, particularly in the realm of spatial apartheid. There was a law that permitted the government to forcibly remove African people from their homes without compensation. I would go and follow the legal trail: Where was [the order] issued? By whom? Which procedural process had been followed? Was it gazetted? If so, if it were published or proclaimed, was it
Levi: You use the rule of law, against the rule by law.

Mosekene: Yes. indeed.

Levi: So you went on to greatness as a lawyer and as a justice. Nelson Mandela and his spouse were clients and mentors. In fact, you’re still an executor of the estate. Please tell us about that.

Mosekene: Nelson Mandela was my father’s age. He was on Robben Island, in a different section from mine. I was in the general section, or the nonleader section. Over time, I think he came to hear of me. By the time I became an attorney and a counselor, I was one in a panel of five or so trusted lawyers that he often asked to do things for him. George Bizos [a noted human rights attorney] and Arthur Chaskalson, who would become our chief justice, were included in this group.

My first task was to defend his wife, Winnie Mandela. She was a freedom fighter of real note and was quite a fiery human being. She was near totally fearless and quite extreme in her views on many fronts. She would defy her banning orders quite often. In South Africa, some call it a banning order when you are restricted to your home. Winnie would get out there with her fist up in the air and the police would have her arrested in front of the TV cameras and so on. It was my job to intervene and to appear in court. “May it please the court, my Lord, I appear on behalf of the defendant and apply for bail.” She would repeat this over and over again, and I would defend her over and over again. So that got me quite close to the family.

Sadly, when our President had decided to divorce Winnie Mandela, we had a big fight about who I represented. Am I Nelson Mandela’s lawyer, or am I, as Winnie insisted, her lawyer? I became Winnie Mandela’s lawyer, and I had to be on her side in the divorce, which was quite a sad moment. She hung around for 27 years and, in the end, she lost out.

Levi: In your book, you discuss a time when Winnie Mandela was a minister, and she broke a rule that Mandela had in place. Despite still being married at the time, he wanted to fire her and you actually got caught up in this conflict.

Mosekene: Yes, indeed. Immediately after the transition, Nelson Mandela appointed Winnie Mandela to be a deputy or associate minister in his cabinet. There was a rule stating that no cabinet minister shall travel abroad without the president’s permission. Mandela was now the big chief, but part of the compromise during the interim included that Mandela could not rearrange his cabinet without consulting F.W. de Klerk and Mangosuthu Buthelezi, who were acting as deputy presidents.

When Nelson Mandela heard that Winnie had gone to Ghana, he fired her point blank upon her return. Obviously the relationship had really soured between them at this point. I was called up to seek an urgent interdict against the new democratic president of South Africa, for whom I’ve done a lot of work. However, Winnie insisted that I was never his lawyer. I did settle the papers and showed that Nelson Mandela had not acted constitutionally. This was not difficult since the constitution quite plainly stated that the president may not alter the cabinet without consulting the two deputy presidents, and I had an affidavit from Mangosuthu Buthelezi stating that he had not been consulted. It was the end of the story. When Mandela received the papers, he threw in the towel, tendered to pay all the costs, and took her back onto the cabinet. We insisted that he publicly announce that he
was going to reemploy Winnie. Since she was fired publicly, she was to be reemployed publicly. Within 48 hours of rehiring Winnie, the President followed the procedure that was required by the constitution and fired her again.

Levi: In your memoir, you highlight the responsibilities you had during the transition. The first major task was your role as a drafter of the new constitution. What was this like?

Moseneke: When Nelson Mandela was released from prison, I became one of his key troubleshooters. That is, in part, why I was roped into writing the new constitution. I was invited by Mandela personally and went out to write our interim constitution. It was a huge privilege. So, as fate would have it, one moment you’re a slave, saying, “I’m my own liberator.” The next moment, you are a founding father.

Our task was to write down the deals that were struck in the negotiations and to write them in constitutional language that would encapsulate the agreement and reconstruct a democratic state.

What we did was quite fascinating and explains why the South African transition was so special. We agreed that the transition would be within the purview of the law, and that we would draft the constitution in the form of legislation. An alternative way would have been simply to dissolve parliament in an anarchist way without any transition. But most of the institutions would have been in a state of stress, and we’d have had to start all over again. Instead, we made sure that we had an orderly transition. The minority would disestablish the apartheid parliament by law, stating that from Day X South Africa had a new constitution, which shall be interim until we had a final constitution.

In drafting our constitution, there weren’t many examples of modern constitutions. We looked quite closely at the U.S. Constitution but, I’m sad to say, your constitution is very sparse. Modern constitutions tend to be explicit about what you seek to provide for.

Because Mandela and his clerks were all lawyers, this whole transition, which otherwise would have been bloody and dangerous, was encased in legal processes. We adopted a charter of fundamental rights and freedoms peacefully within a setting that would totally disassemble apartheid. So in many ways, it was an incredible achievement, which used principles of law to re-create an otherwise unjust society.

Levi: Writing a late 20th-century constitution is quite a privilege. Did you have any models that you worked with?

Moseneke: Indeed, it is quite a privilege. I can’t resist repeating Justice Ruth Bader Ginsburg’s words. When asked where one should look for a new constitution, she said, “Certainly not the U.S., but certainly South Africa or Canada.” We framed that and put it up on every wall.

In drafting our constitution, there weren’t many examples of modern constitutions. We looked quite closely at the U.S. Constitution but, I’m sad to say, your constitution is very sparse. It has been one of the oldest and the most venerable constitutions, but it is certainly not a modern constitution and it says very little in relation to what we intended to say. Modern constitutions tend to be explicit about what you seek to provide for. So, instead, we looked a lot to newer constitutions in Europe, in Latin America, and in Canada.

Modern constitutions also tend to be in accessible language. We wanted people to be able to pick up our constitution and read it. It’s bedtime reading. You don’t need legal training to follow what it says, and we included very few arcane constructions of language.

We also made a number of decisions that were quite difficult at the time of drafting. The courts, for instance. Will we have a Supreme Court? Yes, we will. Will it have judicial review powers? Yes, it will. That’s inevitable in the light of a supreme constitution. What size of court will we have as a Supreme Court? Seven, nine, eleven? The German
Supreme Court has 16 justices sitting in two panels of eight. Canada had seven at the time. Other countries in Europe had nine. And others had eleven. We chose eleven.

We went backwards and forwards on the question of whether the justices would have tenure for life. We had the benefit of hindsight and were able to look at what the U.S. and others had done. We decided that we will have a fixed term, maximum of which will be 15 years. So I had to fall on my own sword and retire recently. My 15 years ran out very quickly. I had to leave the court and so did Justices Edwin Cameron and Richard Goldstone. All of us had to come off the bench despite feeling energized and fiery and at the height of our intellectual ability. But we opted for renewal, and we recognize that judicial power is a vast power.

We also restricted the presidential term to two terms, like the United States. We copied the two terms from you but made it two terms of five years instead of four. There was quite an anxiety to limit terms in order to not confer security of tenure and invite abuse. In fact, Nelson Mandela said, “thank you very much” after the first term and he left. He didn’t run for the second term. So he was all the time trying to set good examples for all of us. He could have asked for a lifetime term and, frankly, he would have got it. But he stuck with one term and stepped down.

Levi: A second responsibility that came to you from Mandela was the enormous task of overseeing the first democratic elections. Please tell us about that.

Moseke: Yes. I grieved for 10 years on Robben Island. My captors weren’t kind, but I drew courage from the fact that Nelson Mandela had stayed at Robben Island for 27 years, nearly three times my term. When he came out, he said to us, “We have to spare our energy and refocus on the reconstruction.” In other words, migrating our society from a horrible past to a more just society required that we focus on the quality and mechanics of the transition. Our end goal — to banish colonialism and to introduce a more just society — required that we be different from the perpetrators of apartheid, rather than re-enact our unequal past. Spending all our time being our own liberators and then immediately seeking to do what apartheid did would have been bankrupt in many, many ways. Nelson Mandela could have said, “let’s murder them.” If he had given that order, we would’ve had a blood bath. Obviously, state power would’ve still been in the hands of the white minority. They had a lot of big guns, so they would’ve shot many people. In the end, we would’ve won but with a lot of people dead.

I want to add a quick note about F.W. de Klerk because it would be unfair not to. He bit the bullet. He announced that he was going to release Nelson Mandela, which was a huge chance and a huge risk. He was going to lift the ban on all the political organizations and was going to implore these organizations to enter into negotiations with him. Everything was coming to an end shortly after the Berlin Wall had come down and the Cold War was tottering, so he wanted to take full advantage of that. But at the same time, had he not done what he did, we would’ve gone...
through a very bloody revolution. So I don’t want to finish without giving credit to him. He has had a few missteps, and he talks out of turn. I think he’s getting a little old. The other day, he said he thought apartheid was not that bad after all. That invited a lot of wrath from many, many people. But he’s the man who decided to release Nelson Mandela, and he saved us a lot of bloodshed. So F.W. de Klerk was quite an important factor in helping facilitate a peaceful transition.

Levi: Do you feel that South Africa has a stable democracy today?

Moseneke: I’d say yes. We’ve had five elections in a row. We have established institutions of state, notably, the judiciary where I worked for 15 years. The jurisprudence is available for all to read and see. We’ve continued to receive justices from around the world to join us, to support us, and to validate us.

The biggest trouble is not the democracy. It’s working fine. The biggest trouble is eliminating poverty. There is an inevitable intersection between class and race and sometimes gender. We still struggle with the full extent of social justice, equality, and the historical axis of apartheid. The impact of this still haunts our system.

A question from the audience: As a successful constitutional draftsman and a founding father, what sort of advice would you give the citizens of our country?

Moseneke: There’s an African adage that says, “When you are a visitor, your horns should be short.” You know, animals with sharp horns normally go and fight other animals. So the saying says that, “When you’re a visitor, please make sure your horns or your elbows are not that sharp.” I have to be careful here.

South Africans chose to look into the mirror. We chose to confront the inhumanity of our system. During the truth and reconciliation commission, the perpetrators of apartheid admitted the wrongful acts they had done, saying, “I arrested her, I tortured her, I raped her, and I killed her.” If they wanted amnesty, they had to tell the truth, fully and frankly. We created panels of judges to hear the evidence and to decide whether the admissions were full and frank. If it was, you were entitled to amnesty. If someone thought the perpetrator had unfairly received amnesty, you could go right up to our court to review the decision.

We had churches, for instance, who hadn’t killed anybody, but who would nevertheless come forward and make submissions about how they were complicit in a system that basically annihilated the humanity of other people, that exploited and rendered them significantly poorer, less educated, less healthy, and everything else that apartheid brought to us.

There were submissions about capital punishment under the apartheid system, which executed people compulsively as a habit. The old regime executed and killed black males consciously. Judges would sentence them to death in every single case. In our system, you were hung by your neck until you died. That’s how the warrant read. When we took over, we still had 480 people in the death row. So, we had to confront that, and we smashed the death penalty.

And the issues weren’t limited to race. You won’t find Roe v. Wade in my country, because we made sure that women are the holders of reproductive rights, and they make the decision. We dealt with each of these issues and wrote them down in our constitution.

In America, there are wounds that still show and contort your society. One of the candidates I see on television, Bernie Sanders, calls up the edgy things that might be seen as symptoms of social injustice and that still pervade your great country. It is quite remarkable that a country of this prominence has no charter of fundamental rights and freedoms. Instead, they have to be inferred from a very thin platform. Countries all the world round have inducted and adopted charters of fundamental rights and freedoms. Americans have to go and find the things that might ameliorate a horrific past. For example, maybe reparations. Maybe acknowledging slavery, what it really was, and what it meant. Maybe talking about America’s relationship with women and the patriarchy. Or sexual orientation. All of those things that are still jarring, you may want to revisit them.

Levi: It’s such an honor to have you here. Thank you very much.