

Book Review: Moseneke D *All Rise: A Judicial Memoir* (Pickado Africa Johannesburg 2020) ISBN 9781770105355



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H 'Nyane*

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Author

Hoolo 'Nyane

Affiliation

University of Limpopo, South Africa

Email

hoolo.nyane@ul.ac.za

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Abstract

The contribution is the review of the book published by former Deputy Chief Justice, Dikhang Moseneke, about his illustrious 15-year term in the Constitutional Court as both the judge and Deputy Chief Justice. The book uniquely provides a rare window into the dynamics of judicial decision-making at the apex court. So often, legal academics only interact with the judiciary through the judgements. Yet, Moseneke gives the reader much more to the judicial decision-making process than just the judgements. The book further traverses one of the most controversial aspects of the Constitutional Court's jurisprudence, such as same-sex marriages, succession to chieftainship, children spanking and equality jurisprudence.

Keywords

Constitutional Court, Jurisprudence, Dikhang Moseneke, appointment of Chief Justice.

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1. Introduction

Justice Moseneke's work is unique and defies all the established book categorisations – biographies, fiction, textbook or academic research. At one point, it looks like an autobiography, as he gives the reader a glimpse of his personal history as he starts with the story of how he ended up choosing law, as opposed to being a traffic cop.¹ But he does not go far enough with that personal account. Instead, he cuts the chase by immediately taking the reader to his trials and tribulations when he started his legal career until it crested with a fifteen-year term at the Constitutional Court. To the extent that he uniquely gives a veiled story about his career development, it has the feature of an autobiography. Unfortunately, the way these personal accounts features in this work is primarily truncated in a manner markedly different from his previous work, *My Own Liberator*,² which may be categorised as his autobiography *par excellence*.

Typical of his authorships, the book is also figuratively written, and it captivates, like a work of fiction. But it is not. It is a unique account of the judicial practice by an insider. Hence the second portion of the title, *A Judicial Memoir*. It gives the details of judicial practice that we do not often get from the law reports. The law reports often report about judgements and reasons behind the judgments. The other minute details, which often have profound ramifications on conclusions themselves, are left untold. And legal scholars are often more preoccupied with judicial precedent as manifested by the written judgements themselves than the backroom tentacles that preceded such decisions. These are the gaps that Moseneke fittingly plugs concerning the Constitutional Court. Much more importantly, the work provides a rare account of the undertones that underlie the jurisprudence of the Constitutional Court during his era – an era which is a mixed bag. It is an era that straddles many generations of the Constitutional Court. By his classification, the author puts the generations of the Constitutional Court that he became part of throughout all its generations – "Chaskalson Court", "Langa Court", "Ngcobo Court" and latterly "Mogoeng Court". He has therefore served in all the four generations of the Court.

* Hoolo 'Nyane. LLB (Lesotho) LLM (NWU) LLD (UNISA). Associate Professor and Head of Public and Environmental Law Department, School of Law, University of Limpopo, South Africa. E-mail: hoolo.nyane@ul.ac.za. ORCID: <https://orcid.org/0000-0001-5674-8163>. The review is an adapted presentation I made during the book launch at the University of Limpopo on 20 October 2020 in the presence of the author, Justice Dikgang Moseneke.

¹ Moseneke *All Rise* 3.

² Moseneke *My Own Liberator*.

This book is, therefore, an intriguing and somewhat unique piece of work. It, therefore, merits careful academic attention. The purpose of this contribution is to review this twenty-eight-chapter work. The review is unconventional as it does not necessarily scan all the chapters but instead identifies the salient features of this work.

2. The title of the book: "All Rise – A Judicial Memoir"

The title of the book comes in two parts: All Rise and A Judicial memoir. The second part is straightforward. We all know that a memoir is based on personal experience or where the author gives a historical account based on personal involvement.³ It is, therefore, a reflection of the author's involvement with the project of transformation as a lawyer of silk status, as a member of the drafting team of the current constitution, as a judge of the High Court and a judge of the apex court (Constitutional Court) throughout all its generations – Chaskalson Court, Langa Court, Ngcobo Court and latterly Mogoeng Court.

There is, therefore, no insider so well placed to tell the story of transformative constitutionalism in South Africa than Justice Moseneke, hence this intellectually compelling memoir. The less straightforward part is the first part of the title, *All Rise*. Unfortunately, this part is not defined in the book. The least we get is from the dedication note where he dedicates the book to all the people of South Africa and Africa who he says deserve respect, freedom and social justice; and he prays that if they are absent, "they will know and will revolt so that they All Rise". Hence, the book is a clarion call for the underprivileged masses of our people who must rise and revolt against the stubborn and persistent forces of social injustice. The call 'couldn't have come at the right time when most people continue to live on the periphery of the economy when they live the life of squalor, virtually three decades after liberation.

It is not immediately from the book how the choice of the title was influenced by the famous American courthouse drama called *All Rise*.⁴ This drama acts out the chaotic and sometimes absurd lives of judges and court officials. It is staged in Los Angeles amidst a very flawed legal process. However, having read this memoir, one can immediately draw the similarities between *All Rise* the drama and *All Rise* the Book.

³ Dukes <https://celadonbooks.com/what-is-a-memoir/>.

⁴ All Rise <https://www.cbs.com/shows/all-rise/>.

The style used in the book is also worthy of brief observation. At first sight, this work looks like an autobiography. But upon closer look, the work astutely straddles two writing traditions: that of an autobiography-*cum*-memoir and that of an academic piece of writing. Intriguingly, the author has cleverly avoided the usual restraints of writing within a particular style. For instance, he provides such an academically rich insight into the behind-the-scenes operations of the judiciary. This part is so palpably missing in our usual analysis of the Constitutional Court. In most instances, our primary sources for the study of the patterns in the Constitutional Court are the decided cases and no more, which do not give the complete picture of the judicial decision-making process.

One may call this approach the I-write-what-I-like style; the author has a masterly free hand to write without being constrained by the traditions of authoring styles. Very few people have these capabilities. But the author can fill the void without being constrained by the well-known chains and fetters of academic writing. As a result, he has traversed deep jurisprudential questions with so much ease and freedom.

3. The pass over in the appointment of Chief Justice

In the foreword to the book, Justice Cameron notes that Justice Moseneke has been passed over three times for the position of Chief Justice. This was during the appointment of Langa in 2005, during the appointment of Ngcobo in 2009 and during the appointment of Mogoeng in 2011. This was so even though Moseneke has served in all the generations of the Court. Yet, in the book, the author does not make any qualms or issues about this. Instead, he magnanimously calls it the prerogative of the President to appoint the Chief Justice, which prerogative we must all respect.

The matter has already stirred sufficient media frenzy. Yet, its sensibilities do not necessarily enthuse constitutional law scholars. Instead, what captivates our curiosity is its constitutional ramifications. The captivating question is whether the presidential prerogative to appoint the Chief Justice is not, like all exercise of public power, subject to justification which is the touchstone of the new constitutional edifice. Therefore, the crisp question still lingers. While there may be the justification why Justice Moseneke was passed over during the appointment of Langa CJ in 2005, the year he (Moseneke) was appointed Deputy Chief Justice, is there a justification for the next two pass overs? If it is shrouded in the mystery of executive prerogative, then the current constitutional jurisprudence still has dark

corners and wholes that are entirely antithetical to the new constitutional order.

4. The two big questions: African jurisprudence and the judicialisation of politics

The author makes a masterly analysis of the Constitutional Court in all its generations since its first decision in *S v Makwanyane* in 1995.⁵ He dedicates the whole of Chapter 9 of the book to the jurisprudential patterns of the Court. Arguably, the Court has largely followed its strong and courageous jurisprudence, mainly (post) liberal. It is an envy of most illiberal democracies littering the African continent. But the two questions still pend. The first one is the question of African jurisprudence – the extent to which this liberal human rights jurisprudence has enhanced the African jurisprudence, particularly as part of the broader project of de-coloniality. The doctrine of *ubuntu* peppers the few judgements of the Court, but in the main, the Court appears to favour liberal rights jurisprudence against African jurisprudence; the examples are in those cases such as succession to the chieftainship, same-sex marriages, children spanking, and equality jurisprudence.

The second question relates to the threat of judicialisation of politics.⁶ There is a burgeoning trend that the political branches (the executive and legislature) have gone derelict about their duties. Consequently, the judiciary in general, and the Constitutional Court in particular, finds itself in a space where it must be a forum for disputes that belong to the realms of the other branches. This phenomenon (which comes by many incarnations, "lawfare", "judicialisation of politics", "juristocracy" or "judicial supremacy") sees the Court crossing its legitimate boundaries, thereby becoming omnipotent. If this trend solidifies, it will be just as disturbing as the erstwhile parliament that was supreme.

Indeed, the Constitutional Court must ensure that other branches do not falter in their constitutional mandates. However, it is judicialisation when the Court instructs and sometimes literally manage the other two political branches.

⁵ *S v Makwanyane* 1995 3 SA 391 (CC).

⁶ Nyane 2021 SAJHR 1

5. Conclusion

Although the book is pre-eminently a memoir, it gives much more than an ordinary memoir would provide. It shines a light on some of the perennial questions in South Africa, such as, but not necessarily limited to, the executive power to appoint a Chief Justice. While the question has been a bit personal to him, having been overlooked for the position at least three times, it raises fundamental issues about the appointment of the Chief Justice and the ultimate independence of the judiciary. The appointment process of the judiciary in general and of the Chief Justice specifically should be a matter of concern for all interested in the court's independence.

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