CONSTITUTIONALISM IN DEMOCRATIC SOUTH AFRICA: CELEBRATIONS, CONTESTATIONS AND CHALLENGES

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Woolman, S (2013), *The Selfless Constitution. Experimentalism and Flourishing as Foundations of South Africa's Basic Law.* Cape Town: Juta, xv and 632 pp.

1. Introduction

> *South Africans often proudly proclaim that our Constitution is one of the most progressive in the world. Yet if you ask most South Africans how they really feel about gay rights, abortion and the death penalty, their answers, more often than not, contradict the values enshrined in the Constitution. (Ahmed 2014)*

This is the sobering assessment of the Chief Executive of the South African Human Rights Commission 20 years into democratic South Africa. The document adopted by The Constitution of the Republic of South Africa Act 108 of 1996 was considered an exemplary showpiece for the new democratic, human rights based era — embraced as "proudly

South African" among the world's most enlightened legal frameworks. Taking stock almost two decades later, however, constitutionality seems to have not yet been deeply and firmly anchored in public awareness or ingrained into a social fabric guiding the fundamental values, ethics and norms as reflected by ordinary public perception and opinion. Nor have policy makers in the government seemingly internalised an unconditional respect for and recognition of the governance principles enshrined in this Constitution, as some recent examples seem to suggest. The current controversy around the "spy tapes",[1)] but even more so the contested role of the public protector — dubbed "a jewel in South Africa's constitutional crown" (Pieters 2014) — and her stance with regard to Nkandla and the obligations of the head of state to respond to her recommendations are obvious tips of the iceberg.

But current discourses at the same time are a mirror image of the ongoing struggles over the power of definition and the interpretation, as well as adherence, to the rules of the game as laid down in the normative framework. As constitutions elsewhere, there is a discrepancy between what is stated, how it ought to be understood and interpreted, how it should be adhered to and applied, and what the intended effects, as well as the real consequences are. It therefore is not by accident that debates and contestations over the meaning and implications of constitutional principles are an eminently political affair and an integral part of governance. It would be more worrying, if this would not be the case, since this would suggest that those in control over society reign supreme in the sense of governing without checks and balances. So then let's have a closer look at the issues at stake.

2. The infamous half empty and half full glass

In a state with a vibrant civil society and multiple agencies, such as in current democratic South Africa, it should not come as a surprise that the stocktaking exercises with regard to the country's constitutional democracy present rather mixed results. "Mind the gap", the warning announced since many years by a recorded voice message routinely for the London subway and elsewhere, has emerged as a popular slogan. Not by coincidence it served as the *Leitmotiv* that informed a seminar series during 2009/2010, whose presentations provided the basis for a volume edited by *Kristina Bentley, Laurie Nathan* and *Richard Calland*. The contributions, mainly by scholars in law and

human rights advocates, explore the scope and especially limitations of what Sipho M Pityana as Chairman of the Council for the Advancement of the South African Constitution in his Foreword to the volume qualifies as "a vision for the transformation of our country into a non-racial, non-sexist and equitable society" (p v).

As Laurie Nathan in his Introduction ("Mind the gap! The Constitution as a blueprint for security") points out, the Constitution "can be read as a comprehensive blueprint for security", including "vital components of physical and psychological security" (p 3). He points out that the Constitution's own articulated understanding in section 198(*a*) considers national security "no longer … separate from, and potentially in conflict with, human rights, fundamental freedoms and human security" but is "covering all these imperatives" (p 3).

The eight chapters following scrutinise several core issues at stake. These include the promotion and protection of socio-economic rights, xenophobia, customary law, the independence of the judiciary and intelligence services, and point to the limitations of the Constitution in terms of the implementation of its declared spirit and intentions. The guiding question, if the Constitution has in the past indeed been able to "mind the gap" and — more importantly — managed to get not overtly restricted by it, is addressed by Richard Calland. His Conclusion summarises:

> The Constitution is, by virtue of South Africa's transition, an aspirational document: Chief Justice Chaskalson wrote in one of the first cases on socio-economic rights that a "commitment … to transform our society … lies at the heart of the constitutional order". It offers a vision of a different society, one based on substantive and procedural equality, as well as political freedom and democratic institutions such as the rule of law. But as this volume records, the gap between this vision and the reality is very substantial indeed (p 196).

For him and other contributors, 16 August 2012 marked a horrific turning point with the Marikana massacre at the Lonmin mine. As noticed by Pityana, this traumatic event, "showed how shallow our post-1994 social compact is, and how the rights of the poorest members of society can be trampled upon" (p viii). The hearings of the Farlam Commission of Inquiry not only bring back the trauma, but also serve as a reminder, that the best Constitution cannot prevent that what has been fixated on paper as an aspired guiding principle remains often far from the harsh

reality.

Despite such concerns, the document has been and remains a marker for South Africa's constitutional democracy to promote and protect human dignity through the implementation of the law as conceptualised and codified during the initial stages of democratic society. The essentials have since then been observed to a large extent by an independent judiciary. The constitutional law and the guardian as institutionalised in the Constitutional Court have left a strong imprint on society. Re-visiting some of the most principled judgments passed, through the eyes of one of those sitting on the bench (Sachs 2009; see also Cameron 2014), is an impressive reminder that a Constitution and the pursuance of a rights-based approach do matter despite shortcomings in the implementation. The *Grootboom* case is a significant reference point.[2)] So is the verdict based on the case initiated by the Treatment Action Campaign with regard to the state's obligation to provide to HIV-positive patients free anti-retroviral treatment as part of their entitlement. The decision by the constitutional judges that being HIV-positive does not allow work related discriminations, as in the case of a flight attendant with South African Airways, is another case in point, as well as the anti-homophobic rulings.[3)] These and other verdicts speak to the integrity of those on the bench, who are loyal to what they consider as constitutional principles setting the framework. Justices, who are not afraid to speak truth to power in pursuance or protection of human dignity as a core principle of democratic South Africa's declared fundamental governance principles. "The judge who cried"[4)] was in tears "because of an overwhelming pride at being a member of a court that protected fundamental rights and secured dignity for all" (Sachs 2009: 183).

3. Promoting human dignity

Stu Woolman, who holds the Elizabeth Bradley Chair of Ethics, Governance and Sustainable Development at Wits Business School reminds us at the end of his philosophical-legal engagement, "only a decidedly significant degree of common beliefs and common property — a 'commons' — will allow us all to flourish" (p 508). He takes the readership through a *tour de force*, during which he applies essentials of the moral and political philosophy mainly of Amartya Sen and Martha Nussbaum (but also Ludwig Wittgenstein, Michael Walzer and others) as his guiding compass and shows his familiarity with the humanist

deliberations. This elevates the comprehensive volume above the narrow engagement within the South African social and political context and uses the empirical basis for a much more principled interrogation of the meaning of a rule of law. In particular chapter seven ("Flourishing and Fundamental Rights under the South African Constitution", pp 381-421) makes a pioneering link between the constitutional principles and their implementation with the guiding notion of securing human dignity and flourishing. He acknowledges the "transformation of the Court's dignity jurisprudence — from an initial, basic concern with the manner in which the law denied the majority of South Africans their dignity to a more robust set of doctrines designed to foster the flourishing of each and every person" (p 398). Scrutinising the link between civil rights, community rights and socio-economic rights and flourishing in subsequent sub-chapters, he concludes that the "notion that Court has, over time, become desensitized to the conditions of South Africans who continue to live in strained circumstances is inconsistent with clear developments in our socio-economic rights jurisprudence" (p 410).

In chapter eight ("Tweaking Doctrine: Constitutional Court Cases Revisited and Revised", pp 422-502), *Woolman* revisits 20 of the norm setting judgments. He finally argues that the Court, despite increasingly critical observations concerning its role in human rights advocacy, "still has teeth … to promote the development and the capabilities of rights bearers at the same time as it compels various parties confronted with a seemingly intractable problem to come up with a creative solution" (p 479). He therefore concludes:

> However imperfect our current union may be, however ill equipped our current one party-dominance might be to deliver *fully* upon the aspirations of our basic law, we ought to view the Cassandra-like predictions of political scientists and comparative constitutional law scholars with a healthy dose of skepticism. That's not to say that my peers and betters who engage in comparative constitutionalism are wrong. Their bracing assessments of how recently created constitutional courts have failed to operate as hedges against democratic authoritarianism are often spot on the mark. The problem is the framing of the picture, of zooming in too tight. These scholars inevitably concentrate on too limited a period of time in assessing the merits of newly minted constitutional democracies and the demerits of what we have long acknowledged as "the weakest branch": a constitutional court without the arms to execute its orders or the

> bread and butter for those who require such sustenance in order to pursue lives worthy valuing (p 507; Italics in the original).

Woolman uses in this context the laugh line by the US-American comedian Chevy Chase, who in 1975 reminded an audience that, "Generalissimo Francisco Franco is *still* dead" (p 507; italics in the original). In a similar vein, *apartheid* is not on the verge of making a comeback to South Africa, despite many features still reminiscent of the structural legacies, mindsets and behavioral patterns rooted in this era. Many significant cases in the Court and the legal precedence they were setting during the last years speak to the major achievement this Constitution represents when compared to the *apartheid* days under white minority rule. The Bill of Rights, defined in section 7 of the Constitution as rights to Human Dignity, Equality and Freedom, prioritise and pursue an all-encompassing humanist agenda.

Laurie Ackermann spent time and energy since 2005, after his retirement as Justice of the first South African Constitutional Court, to draft an impressive celebration of the achievements of the Constitution by giving recognition to its judgments concerning the application of a concept of equality in human dignity among citizens. He draws extensively on a comparison mainly with German and to a lesser extent Canadian approaches to this equation. Especially the notion of *Menschenwürde* is introduced in much detail with regard to German Basic Law, while Human Worth as Dignity under Canadian law features less prominently. Like Woolman, *Ackermann* resorts to a discourse on secular philosophical perspectives from Aristotle via Kant to Roland Dworkin and John Rawls (with Bernard Williams, Amartya Sen, Martha Nussbaum and Louis Henkin as stop overs) in his second chapter. This ends by also devoting some pages to the notion of *Ubuntu*, currently so *en vogue* in South African humanist, philosophical and even legal/judicial deliberations (see the book review by Gerhard Wolmarans in this issue). He concludes the conceptual exploration by suggesting that human worth (dignity) is the answer to the question, in respect of which human beings are equal and may not be discriminated against (p 85).

As *Ackermann* clarified already at the beginning, when addressing the Constitution's provisions on equality, non-discrimination and dignity, his contention is —

> … that human beings, regardless of their many other differences, are equal in law with regard to their human dignity (worth) and may

> not be discriminated against in a manner that negatively affects their human dignity. Differently stated, human dignity (worth) is the *criterion of reference*, or the *criterion of attribution* in seeking to answer (as one must), the question (which one cannot avoid asking): "In respect of what are all human beings equal and in respect of what may no one be discriminated against?" If this criterion of reference proposition is correct, then this close linkage between equality and dignity makes it implausible to discuss equality without some reference to dignity and vice versa (p 19f; italics in the original).

Inspired by his mentor Laurie Ackermann, *Theunis Roux* sets out to recapitulate the first ten years of the Constitutional Court (which he refers to as "the Chaskalson Court") in a similar trajectory. By doing so he seeks to reconcile the rather critical (political sciences oriented) assessments of the judiciary and their political outcome often diagnosed by social scientists with the more optimistic and positive approaches advocated by those engaged in the legal profession practicing and applying law. Having been affiliated to the Centre for Applied Legal Studies and as the founding director of the South African Institute for Advanced Constitutional Public, Human Rights and International Law (declared as the brainchild of Laurie Ackermann), *Roux* — now a professor of law at the University of New South Wales in Sydney — knows his trade. He was "part of a close-knit community of legal academics whose efforts to support South Africa's constitutional democracy are insufficiently recognised" (p xiii). He acknowledges Stu Woolman as one of the central players in this community. Hence it is not a surprise, that the three monographs under review, in some contrast to the contributions in the edited volume, resonate closely with each other and reinforce a certain message slightly different from the assessments alerting us to "mind the gap".

Moving into 'unknown' territory established after the democratic elections of 1994 and the newly institutionalised structures of political governance, *Roux* manages to put the Court's first decade into the context of the hitherto untested waters of a liberal, rights-oriented society. The emerging settings created a new arena for establishing and instilling a sense of and respect for a rule of law culture guided by the recognition, cultivation and protection of human rights norms in a pluralist political environment. As documented above, the notion of human dignity emerged as the relevant reference point guiding the search for justice. A major merit of *Roux*'s approach — and in contrast to the rather

legal-philosophical reflections of Woolman and Ackermann — is his ability to emphasise the ultimately political nature and character of the Court during these first years in terms of upholding democratic principles also by accepting to be "at least a political actor of a particular type: one whose institutional role is limited to holding other political actors to the terms of the Constitution" (p 387). He attributes the achievements of the Chaskalson Court "to the judges understanding of this politico-legal dynamic" (p 387). And he suggests, that in the midst of emerging contestation over the role and authority of the Court in a—

> deteriorating political environment for judicial review, the Court continued to be a very effective veto player in South African politics. It was also largely successful in managing South African legal-professional culture's transition to the Bill of Rights era. While its failure to construct a comprehensive political theory of the post-apartheid Constitutions was disappointing to some, it developed an authentically South African style of moral reasoning that was arguably more appropriate (p 391).

But while this might be an undisputed achievement, the challenge to be finally discussed returns again to the question raised at the beginning: how much has a Constitution, which is considered among the most progressive and enlightened in our world, been able to graft and enforce a rights-based social culture, which fosters respect, recognition and the promotion of justice guided by the notion of human dignity for all in real terms?

4. Between ideal and reality

As alerted by Meyer (2014: 19 and 20): "Having the right to something is only relevant when we are in a position to realize that right" and "when all people have equal capacity to access the means through which choices are presented, only then are they free to choose". After all,

> … where citizens are unaware of what the law offers them and how it protects them; do not have immediate access to courts and; cannot afford legal representation, it cannot convincingly be said that all citizens are equal before the law. It is a concern when our constitutional rights do not translate to practical, realized rights and, more so that we are not actively and pragmatically looking for ways to change this (Meyer 2014: 17).

Not surprisingly, despite the spectacular, widely praised rulings of the Constitutional Court especially during the first decade, voices of concern are growing. Not least when it comes to the protection of the autonomy for those on the bench, which such rulings require. Boraine (2014: 88) is therefore concerned foremost about the independence of the judiciary and the appointment of judges. In his view, the supremacy of the Constitution is at risk. Suttner (2014: 13) concurs when stating, "there has been a disturbing tendency to pack the Judicial Service Commission, responsible for the appointment of judges, with those loyal to the current faction leading the ANC". After all, the best constitutional framework is of little value and impact if those who are supposed to give it meaning and power are guided by party political loyalty towards those occupying the commanding heights of the legislative and the executive. The risk grows accordingly, that the rule of law might degenerate into the law of the rulers.

Would then the Court play a supportive role towards further party dominance by moving away from the praised principles of the Constitution and be more passive and less interventionist? This is a matter of enquiry, which deserves closer scrutiny through further scholarly undertakings in the near future. The aim should be to establish if there has been a shift from the "Chaskalson Court" during the first decade of democratic South Africa to the subsequent role and ruling of the Court in the following decade. While criticism seems to mount and a growing reservation mainly among scholars in the social sciences indicates some disillusionment, it should be a matter of further discussion. Significantly so, as indicated towards the end of this essay, there is not really any general agreement that this criticism seems indeed a justified diagnosis or correct characterisation. While identifying a growing tendency within government to not fully respect the constitutional provisions and institutions is certainly a correct observation, this is not sufficient reason to blame the judicial institutions for this trend. Rather, it is the sphere of the policy, which modifies the agenda and impacts more so on the limitations of the Court than the Justices in their common and shared understanding as concerns their role.

Raymond Suttner bemoans a lack of resources to allow institutions adequate delivery of enabling provisions provided by the Constitution and diagnoses the selectivity of their applications as well as the pursuance of some substantive notions over and above others: "in practice, there is a more powerful constituency behind some rights, like

combating racism, than others, for example freedom of sexual orientation and gender equality" (Suttner 2014: 13). For him, "constitutionalism has been undermined at the highest level", and "the rule of law has been undermined and it is widely believed that there are wrongdoers who are untouchable" (Suttner 2014: 13 and 14).

The predatory behaviour of a party-state bourgeoisie might result in a turn to populism, which represents another threat to constitutionalism: "If constitutional rule is to survive and advance in Southern Africa, it will need the support of counter-elites and wider society to contest the repressive components of liberation movement culture in order to secure the freedoms for which the liberation movements themselves claim to have fought" (Southall 2014: 97). Similarly, Suttner (2014: 17) ends with the appeal that as "a way out of the present morass … one should try to identify agreement on a range of core issues, like constitutionalism, … and build a coalition of forces, on a non-sectarian basis to clamp down on the violence and illegality, the corruption and abuse of the dignity and attacks on the very lives of people".

In a comparative, historically rooted in-depth review of the trajectory of settler-colonial regimes, the anti-colonial struggle and former liberation movements as governments in Southern Africa, Southall (2013) deals with the legacies of these former regimes under the new dispensation and the impact of negotiated transitions on the new institutions established under majority rule. In a subsequent article, which takes matters further, he warns of the policy of these new dominant party agencies entrenched by the former liberation movements as a threat to the constitutions adopted in the course of the negotiated transition towards popular democracy. In Zimbabwe (ZANU-PF), Namibia (SWAPO) and South Africa (ANC), the movement turned parties "predisposition to exclusive nationalism, defining themselves as representatives of fused conceptions of 'the nation' and 'the people', reinforce majoritarian conceptions of democracy, and hence are at odds with central tenets of constitutionalism" (Southall 2014: 89). Levels of inequality and the all too limited and often ineffective social redistributive policies sacrificed on the altar of neoliberal socio-economic priorities for the benefit also of a new privileged black elite can undermine the legitimacy and authority of democratic constitutionalism.

5. Progress or regression?

This brings us once again to the fundamental question, which had been raised at the beginning: How relevant and effective is a Constitution and a Constitutional Court — or a constitutional democracy, for that matter — in a society characterised by gross ignorance of the constitutional norms and principles (both in terms of rights and entitlements as well as obligations). A society characterised by gross inequalities in all spheres of life, which are determining factors in terms of access to opportunities. A society in which "minding the gap" is not necessarily an insight that by itself is already enabling to reduce it?

In a critical assessment, Wilson and Dugard (2014: 59) express their frustration about the reluctance of the Constitutional Court to demand full implementation and enforcement of "normative standards towards which the State must strive in the progressive realization of socio-economic rights". As they admit, it is difficult to compel state authorities to formulate and implement policy, which responds to the needs of the poor. But they bemoan the absence of what they qualify as a "reasonable measure to give effect to socio-economic rights", which according to them the "Court has simply not considered … since *Grootboom*" (Wilson and Dugard 2014: 59). They problematise the judgment in the *Mazibuko* case,[5)] which states with reference to *Grootboom*, "that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions … the Court may order that those are removed" (quoted in Wilson and Dugard 2014: 59). For them this lacks clarity as to "exactly what the constitutional standard of reasonableness is" (Wilson and Dugard 2014: 60). This prevents a certain degree of predictability "whether litigating positive rights obligations bear any prospect of success" (Wilson and Dugard 2014: 60).

Friedman (2014) points out, that the Court has only once so far — in the case of the Treatment Action Campaign — "told the government to take specific action, which would cost it money", when instructing the government to provide anti-retroviral treatment to prevent mother-child transmission of HIV. In all other cases, he suggests, the Court made reference to the said "reasonableness" or (in recent cases) instructed authorities to negotiate with those in protest over unfair treatment (such as evictions). But at least in the *Blue Moonlight*

judgment the ruling of the Court also gave a very specific order, that—

> The housing policy of the second respondent in the South Gauteng High Court, Johannesburg, the City of Johannesburg Metropolitan Municipality, is declared unconstitutional to the extent that it excludes the Occupiers and other persons evicted by private property owners from consideration for temporary accommodation in emergency situations.

Therefore:

> The City of Johannesburg Metropolitan Municipality must provide those Occupiers whose names appear in the document entitled "Survey of Occupiers of 7 Saratoga Avenue, Johannesburg" filed on 30 April 2008 with temporary accommodation in a location as near as possible to the area where the property is situated on or before 1 April 2012, provided that they are still resident at the property and have not voluntarily vacated it.[6)]

Arguing in contrast to and against the criticism by Wilson and Dugard (2014) as summarised above, however, Friedman maintains, "that the court's 'retreat' into telling the authorities to negotiate is really a step forward. It imports into the law an important principle — that the first task of a court, which takes social and economic rights seriously, is to empower people to claim rights themselves". As he warns, trying to quantify a decent life on behalf of those articulating such demand would open a Pandora's box in terms of *Beliebigkeit* as to what is considered a sufficiently acceptable minimum standard of living. He therefore concludes: "The missionary zeal of those who want the court to decide what poor people should get is not only patronizing it is sure to set the fight against poverty back. The court's 'step backwards' turns out to be an important step forward" (Friedman 2014).

In a similar vein, Pierre de Vos (2014) pointed out that, "the change happens not in the courts, but it happens on the ground". As he argued further: "The constitution is not really the document that is going to change the economic policies of the government. The voters are the ones that will change that because voters … have the power". This does of course neither render the Constitution nor the Constitutional Court with its interpretative powers irrelevant. The Constitution is the document that demarcates the borders of social principles that are supposed to guide governance. The Court is upon initiative of claimants

able to rule if government is respecting these principles. But it is the people that should be the ultimate sovereign.[7)] Twenty years of constitutional democracy in South Africa has offered credible evidence as to the relevance, but also the limitations of both, the Constitution and the Court.

As *Woolman* already pointed out:

> The responsibility for delivering on the promise of liberation and the delivery of basic goods lies elsewhere with the politically accountable branches of government, with those parties who control the public fiscus, and with those members of society (natural persons and juristic persons such as our largest firms) with sufficient capital to contrive solutions to the widespread deprivations that beset *all* of us. The ongoing contempt that the coordinate branches of government and organs of state have shown for court-declared remedies in this arena suggests that it is our politics and politicians — and those individuals and juristic persons that run our largest corporations — that remain culpable (in large part) for this failure to deliver the goods. Delivery of these basic goods, as the Court itself has repeatedly recognized, constitutes the minimal material condition for flourishing (p 410; italics in the original).

Trying to celebrate South Africa's achievements 20 years into its democratic order by assessing the constraints and the challenges the constitutional framework is exposed to, displays other stories too: It is the tale of courageous and committed individuals in the legal profession, many of whom had been socialised under *apartheid* and decided to take a stand for justice and human dignity, often at great personal risks and sacrifices. Continuing to execute such advocacy under a new dispensation has not protected them from occasional failures or flaws in their judgments. But they remain guided by a personal integrity, which permeates their decisions in the soul searching effort to find the best way in promoting the fundamental values and norms finally institutionalised in the Constitution of South Africa in response to the denial of such values under the previous regime. Often they were — to borrow a phrase from Albie Sachs — "A *Mensch* on the Bench".

But the look at the constitutional ideals and the social realities also reveals that the efforts of those sitting on the bench committed to the new legal system and its aspirations as well as the efforts of other like-minded outside of the judiciary remain an uphill battle. The fight for

democracy, human rights, dignity and justice will always continue, in different forms and degrees, under whichever social and political order. The story of a constitutional democracy promoting human dignity therefore includes, beyond the principles enshrined in the Constitution and Justices giving them meaning in practice by their ruling, first and foremost all those individual heroes and heroines, who are willing to stand up to claim their rights and thereby dare to speak truth to power. After all: "Where there's no fight for it there's no freedom"(Malamud 1966: 271).

Endnotes

1. After a prolonged legal battle, the Supreme Court of Appeal confirmed in August 2014 a judgment of March 2013 that all documents, which were the basis for a decision by the National Prosecuting Authority in 2009 to drop all charges of corruption against Jacob Zuma, have to be handed over to the Democratic Alliance. The political opposition party had claimed access to these, dubbed since then as "spy tapes", to establish on which grounds Zuma was at the time let off the hook.
2. Government of the Republic of South Africa and Others v Grootboom and Others was heard in the Constitutional Court in May 2000. In its ruling on 4 October 2000 the Court stated that the constitutional principles anchor socio-economic rights beyond doubt as entitlements, but was nevertheless at pains to find a solution how such an acknowledgment makes claims enforceable, given the overall demands and the limits to delivery by the state.

   It is a saddening and sobering fact that Mrs Irene Grootboom (1969-2008) lived not long enough to move into a house the state was obliged to provide her. But the Grootboom case nevertheless set some standards against which 'good governance' has to be measured on the basis of the Court's understanding of human dignity.
3. Excerpts of some of the reasoning in these landmark cases are included in Sachs (2009).
4. This is the title of chapter seven of the personal account of Albie Sachs (2009: 161-201): "The Judge Who Cried: The Judicial Enforcement of Socio-Economic Rights".
5. Mazibuko and Others v City of Johannesburg and Others, judgement delivered on 8 October 2009, concerned the right to water as entrenched in section 27 of the Constitution. Similar to Grootboom, the unresolved issue remained to quantify and enforce what might be considered as "reasonable".
6. See City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (2012 (2) BCLR 150 (CC); 2012 (2) SA

104 (CC)) [2011] ZACC 40; [2011] ZACC 33 (1 December 2011). http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2011/40.html&query=blue%20moonlight. I am grateful to Justice Edwin Cameron, who made me aware of this relevant additional ruling and generously shared the details quoted.

7. When I had the privilege to participate in an annual *Ubuntu* conference at the Faculty of Law of the University of Pretoria in mid-2012 and mid-2013 respectively with several previous and current Justices from the Court, the notion of human dignity was at the core of the discussions. I was deeply impressed by the repeatedly articulated views of the Justices, that they can only respond and react to what is brought to the Court, but not initiate the cases, in pursuance of further promoting human dignity. They made the point that the Court cannot and should not replace civil society and its struggles, but rather be a forum and arena where among others the struggle is fought.

I thank Maxi Schoeman for helpful comments on a first draft.

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