Law Commission of England and Wales

The Fourth Leslie Scarman Lecture

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What you can do with rights[*]

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1. It is a great honour and a privilege to give the Fourth Leslie Scarman lecture this evening. In a recent tribute to Lord Scarman, in which she cited him as her "legal hero", Baroness Deech spoke movingly about Lord Scarman's rich humanity, and of the establishment of the Law Commission, our host this evening, as his legacy. She also said his lasting legacy was the introduction of human rights legislation in the United Kingdom. And that takes me straight to my theme.[1]
2. Rights are claims or entitlements. They can be useful things, in language and in public debate. But there has long been scepticism about them. One needn't go back as far as Jeremy Bentham's justly famous description of natural rights as "nonsense upon stilts".[2] His target was the notion of

[1] Ruth Deech, "My legal hero: Lord Leslie Scarman", *Guardian*, Thursday 20 January 2011, available at http://www.guardian.co.uk/law/2011/jan/20/lord-scarman-brixton-human-rights (accessed 21 January 2012).

[2] See Jeremy Bentham, "Critique of the Doctrine of Inalienable, Natural Rights" in *Anarchical Fallacies – Being an examination of the Declaration of Rights issued during the French Revolution*, vol. 2 of Bowring (ed.), *The Works of Jeremy Bentham*, 1843 available at http://www.ditext.com/bentham/bentham.html (accessed 30 November 2011). Bentham considered that the term "natural rights" is "simple nonsense: natural and imprescriptible rights, rhetorical nonsense,--nonsense upon stilts":

> "How stands the truth of things? That there are no such things as natural rights--no such things as rights anterior to the establishment of government--no such things as natural rights opposed to, in contradistinction to, legal: that the expression is merely figurative; that when used, in the moment you attempt to give it a literal meaning it leads to error, and to that sort of error that leads to mischief--to the extremity of mischief."

Hence Bentham went on to dub natural-rights talk "terrorist language". (Bentham apparently titled the essay quoted "Nonsense upon Stilts", and this title has been restored in recent collections of Bentham's work.) See Sweet, W, "Jeremy Bentham (1748—1832)" in *Internet Encyclopaedia of Philosophy*, available at http://www.iep.utm.edu/bentham/ (accessed 30 November 2011). Sweet resumes: 'Rights—what Bentham

"imprescriptible" rights – those that aren't legally created. More recent rights-sceptics object precisely to "prescriptible" rights – those created by law.

3. Some say "the constitutional thought-schema", or "rights-consciousness" are "intended to secure the denial of desire in the face of contingency and the fear of loss by representing ourselves as legally compelled",[3] and that rights-talk enacts a reproduction of the status quo or "the State", and that in doing so rights merely "make the reproduction of alienation a condition of group membership".[4]
4. Less abstrusely, rights-sceptics have contended that rights are simply too context-dependent, or too wobbly,[5] and too woolly, to be instructive about ourselves or the social frameworks we live in, or to be politically useful in securing real improvements to people's lives.[6]
5. Whether rights should be entrusted to lawyers or judges is specially controversial. In the High Court of Australia, Justice Heydon recently denounced a human rights charter, which tasked judges with determining whether a law reasonably limits a human right, for containing language that was "highly general, indeterminate, lofty, aspirational and abstract" as well as "nebulous, turbid and cloudy". What it required courts to do "are not tasks for judges. They are tasks for a legislature".[7]
6. In your own country, Mr Jonathan Sumption, QC, who has recently taken office in the Supreme Court, has charged that the European Convention on Human Rights has required judges to deal with "the merits of policy

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calls "real" rights—are fundamentally legal rights. All rights must be legal and specific (that is, having both a specific object and subject).'

[3] Peter Gabel, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves", *Texas Law Review* vol 62 (1984) 1563 at 1581.

[4] Gabel, op cit at 1573-1574. I am indebted for the lead to this and other readings to Marius Pieterse "Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited" *Human Rights Quarterly* 29 (2007) 796.

[5] James Griffin *On Human Rights* (2008) page 2 notes drily: "One of the first things that one notices about the historical notion [of human rights] is that it suffers from no small indeterminateness of sense."

[6] The arguments are wittily and incisively made by Mark Tushnet, "An Essay on Rights", *Texas Law Review* vol 62 (1984) 1363-1403 – instability ("It does not advance understanding to speak of rights in the abstract. It matters only that [the content of] some specific right is or is not recognised in some specific social setting" – page 1364); indeterminacy ("…rights-talk often conceals a claim that things ought to be different within an argument that things are as the claimant contends. … Because rights-talk is indeterminate, it can provide only momentary advantages in ongoing political struggles" – page 1371); reification ("… the language of rights attempts to describe how people can defend the interests they have by virtue of their humanity against efforts by others to suppress those interests or to live indifferent to the suffering caused by failing to recognise the interests … But … treating those experiences as instances of abstract rights mischaracterises them" – page 1382).

[7] In *Momcilovic v The Queen* [2011] HCA 34 (8 September 2011), available at http://www.austlii.edu.au/au/cases/cth/HCA/2011/34.html (accessed 13 January 2012), para 431, regarding section 7(2) of the Victoria Charter of Human Rights and Responsibilities (available at http://www.austlii.edu.au/au/legis/vic/consol_act/cohrara2006433/s7.html (accessed 13 January 2012).

decisions". In a democracy, he says, these "are the proper function of parliament and of ministers answerable to parliament and the electorate". The Strasbourg judges, he stated, regard the Convention "not just as a safeguard against arbitrary and despotic exercises of state power but as a template for most aspects of human life".[8]

7. For related reasons, some influential thinkers cautioned against including social and economic claims against government as rights in my country's Constitution. Their argument was that entrusting these to judges (rather than to the legislature alone) would obstruct, rather than help, democratic transformation:[9]

> "To over-emphasise the importance of rights by introducing a battery of social and economic demands in a constitution is to place far too much power in the hands of the judiciary, which, however appointed or elected, is never as accountable to the population as is the legislature or the executive."[10]

8. Theorists have even argued that rights-talk is "affirmatively harmful" to social progress.[11] This is because it enables powerful groups to insulate privilege and to "silence challenges by vulnerable sectors of society to existing social power structures and … to thwart state efforts at social redistribution".[12]
9. This form of scepticism was recently given vivid expression in my country, when a prominent politician described the constitutional transition of 1994 as a victory for apartheid forces that sought to retain "white domination under a black government". He said, "This they achieved by emptying the

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[8] Jonathan Sumption, QC, "Judicial and Political Decision-Making – The Uncertain Boundary", FA Mann Lecture 9 November 2011, downloadable at http://www.guardian.co.uk/law/interactive/2011/nov/09/jonathan-sumption-speech-politicisation-judges (accessed 18 January 2012).

[9] Sandra Liebenberg *Socio-Economic Rights – adjudication under a transformative constitution* (2010) page 13.

[10] DM Davis "The Case against the Inclusion of Socio-economic Demands in a Bill of Rights except as Directive Principles", (1992) 8 *South African Journal on Human Rights* 475 at 489, warning against "an ill conceived rights discourse" at 490, in reply to Etienne Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *South African Journal on Human Rights* 464-474. The objections to including social and economic rights into a constitution ("institutional", "majoritarian" and "contractarian") are perceptively rebutted by Frank I Michelman "The constitution, social rights, and liberal political justification" *International Journal of Constitutional Law* vol 1 (2003) 13-34.

[11] Tushnet op cit note 5 above page 1384 ("the idea of rights is affirmatively harmful" to progressive social forces, instancing cases that "are unequivocally pernicious uses of the first amendment", page 1388ff; in 1982, "the Supreme Court upheld free speech claims by newspapers seeking reduced taxes, by contraceptive manufacturers seeking access to mails for advertising, … by people who wished to carry political banners on the grounds of the Supreme Court, and by the Socialist Workers' Party seeking to conceal the names of contributors to its campaign fund. These add up to something, to be sure, but one can wonder whether the benefits the cases provide to the party of humanity outweigh the cost of the rest of the first amendment doctrine", pages 1391-1392 – a theme the author would no doubt be willing to elaborate after *Citizens United v Federal Election Commission*, 558 US 08-205 (2010)).

[12] Marius Pieterse "Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited" *Human Rights Quarterly* 29 (2007) 796, 800.

legislature and executive of real political power" while (it was claimed) vesting it in the judiciary and other constitutional institutions and civil society movements.[13]

10. A commentator sympathetic to this critique warned that for so long as the Constitution –

> "cements the political agreements that left white control of the economy largely intact, it should surprise no one if rights talk is experienced by many black people as a strategy by white people to maintain their privileges".[14]

11. In addition to assailing the conceptual fuzziness of rights in general, rights-sceptics therefore emphasise the role of rights-talk in masking entrenchment of privilege and power, and in deferring or diverting action for change; and they question whether rights can be useful to securing progressive change at all.

12. And rightly so. It is a bad business to put too much trust in lawyers, judges and the law. Doing so mistakes the value of legal regulation, which is not to plan or initiate social change, or make the public policy choices essential to it. It is rather to resolve conflicts, and to protect against mistakes in the exercise of power by measuring decisions against a framework of public values.

13. To trust legal regulation and legal rights too much overloads the legal system.[15] It may strain, crack or even break under the resultant political and social burden.[16]

14. But if we accept the limited value of legal rights – if we accept that the law is an adjunct social instrument, that it cannot mend society, nor choose its pathways, and that its remedies and rhetoric should be approached with

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[13] See Ngoako Ramatlhodi (deputy minister for correctional services), "ANC's fatal concessions – Constitution is tilted in favour of forces against changes", Johannesburg *Times* 1 September 2011, available at http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions (accessed 2 December 2011).

[14] Jane Duncan "The Problem with South Africa's Constitution", 5 September 2011, available at http://www.sacsis.org.za/site/article/741.1 (accessed 2 December 2011).

[15] Geoff Budlender, "People's Power and the Courts", Bram Fischer Memorial Lecture, 11 November 2011, available at http://www.lrc.org.za/images/stories/Desktop/2011_11_23__Bram_Fischer_lecture_-_Speech_by_Geoff_Budlender.pdf (accessed 15 January 2011) (warning against the "judicialisation of politics" in which "litigation and the courts become a new form of substitutionism", and asserting that the struggle for a better society "is essentially a political struggle").

[16] "For reasons of institutional legitimacy, resources, expertise, capacity and clout, the legislative and executive branches are typically regarded as being best placed to articulate specific socio-economic entitlements and to establish the administrative and other processes through which these may be effectively claimed" – Marius Pieterse, "Legislative and executive translation of the right to have access to health care services" (2010) 14 *Law, Democracy and Development* 1 at 1-2.

scepticism[17] – then we may nevertheless be able to defend a modest role for it.

15. It is that the law and legal rights can, despite rightful misgivings about them, play a practical part in securing what a decent society should promise its citizens.
16. What rights can bring lies not only in tangible goods consisting in bricks and mortar, but also in less tangible benefits that resonate in people's sense of civic well-being and entitlement.
17. My argument is that South Africa's experience of democratic constitutionalism and the rule of law, and of rights-talk, over the last eighteen years since the end of apartheid, powerfully instances what can be achieved with rights.
18. Constitutionalism has not been a panacea. Nor has the jurisprudence giving effect to it been flawless.[18] But it has secured some signal achievements. And these should be celebrated.
19. To do this, I look at three aspects of our constitutional achievements over the past eighteen years – the role of legal rights in securing the material conditions of life; law as a corrective of public irrationality; and law as a determinant of civic dignity and moral citizenship.
20. After considering these achievements, I reflect on what law and constitutionalism cannot do. But I conclude by returning to a modest re-assertion of what rights can do.

Bricks and mortar – legal rights and the material conditions of life

21. The first democratic elections in South Africa were in April 1994. They took place under an interim Constitution negotiated principally between the outgoing apartheid government and the African National Congress (ANC).[19] South Africa's first Parliament, functioning as a constitutional assembly, then drafted the final Constitution. The negotiated terms of transition required that this Constitution be vetted (or "certified") by the newly-established Constitutional Court against thirty four constitutional principles

[17] See Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991) for a very sceptical assessment of the impact of decisions of the Supreme Court of the United States on social change.
[18] See Jonathan Lewis, "The Constitutional Court of South Africa" (2009) *Law Quarterly Review* 440-467 for a scathing critique of the Constitutional Court.
[19] See LM du Plessis and HM Corder *Understanding South Africa's Transitional Bill of Rights* (Juta, 1994); Carl F Stychin *A Nation by Rights* (Temple University Press, 1998); Richard Spitz and Matthew Chaskalson *The Politics of Transition – a hidden history of South Africa's negotiated settlement* (Witwatersrand University Press, 2000).

the negotiators had previously agreed.[20] This happened. After court-required changes were made, the Constitution was finally certified and took effect.[21]

22. Unlike the interim Constitution, the final Constitution enshrined rights to social and economic goods ("subsistence rights"[22]). Apart from the right to basic education[23] and the provision that no one may be refused emergency medical treatment,[24] the entitlements are not absolute or immediate. They are expressed as rights "to have access" to various social goods. These include adequate housing,[25] health care services,[26] sufficient food and water,[27] social security[28] and further education.[29]

23. And government is not required to realise them immediately: the obligation on the state is to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of each right.[30]

24. Given these intricate qualifications, and the high hopes pinned on the transition to democracy, the first rulings on these rights were awaited with very considerable expectation. And the first two judgments of the Constitutional Court both proved controversial.

25. The first was in November 1997, just nine months after the Constitution came into effect. The judgment denied a dying man access to kidney dialysis.[31] He died soon after. The decision attracted extensive criticism.[32]

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[20] In the first certification judgment (*Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC)), the Constitutional Court described the transition thus (para 13):

> "Instead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government, established and functioning under an interim constitution agreed to by the negotiating parties, would govern the country on a coalition basis while a final constitution was being drafted. A national legislature, elected (directly and indirectly) by universal adult suffrage, would double as the constitution-making body and would draft the new constitution within a given time. But - and herein lies the key to the resolution of the deadlock - that text would have to comply with certain guidelines agreed upon in advance by the negotiating parties. What is more, an independent arbiter would have to ascertain and declare whether the new constitution indeed complied with the guidelines before it could come into force."

[21] *Certification of the Amended Text of the Constitution of The Republic Of South Africa, 1996* [1996] ZACC 24; 1997 (2) SA 97 (4 December 1996), available at http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/1996/24.html&query=certification.

[22] Amy Gutmann, Introduction to Michael Ignatieff, *Human Rights as Politics and Idolatry* (2001) page ix.

[23] Constitution section 29(1)(a) (everyone has the right "to a basic education, including adult basic education").

[24] Constitution section 27(3).

[25] Constitution section 26(1).

[26] Constitution section 27(1)(a).

[27] Constitution section 27(1)(b).

[28] Constitution section 27(1)(c).

[29] Constitution section 29(1)(b).

[30] Constitution sections 26(2), 27(2).

[31] *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC).

[32] See Linda Jansen van Rensburg "Ínterpreting Socio-Economic Rights – Transforming South African Society?" 6 *Potchefstroom Electronic Law Journal* (2003) 1 at 6-7 ("Such a contextual approach can be criticised. Context should not be used to limit rights. Context should be used to interpret rights."); Charles Ngwena "Adjudicating Socio-Economic Rights – Transforming South African Society?: A response to Linda

But the ruling was correct.[33] The challenged health policy limited dialysis to patients with acute renal failure who could be successfully treated. The claimant's condition was irreversible: he was in the final stages of chronic renal failure.[34] Dialysis would prolong his life. But giving it to him would deny it to others who had a better chance of survival. Though agonising, the Court could not have told the healthcare administrators their policy was wrong.[35]

26. The second decision proved not much less controversial. Mrs Irene Grootboom was one of a group of desperately poor people who moved onto private land to erect informal homes, or shacks. But the land had already been set aside for formal low-cost housing. So government evicted them. But they had nowhere to go. It was the middle of an exceptionally wet and cold Cape winter. Emergency accommodation was provided, but government's obligations were unclear.

27. The Court, in a unanimous judgment, refused to grant an order realising specifically Mrs Grootboom's entitlement to housing. Instead, it faulted government's housing programme generally for making no express provision for those in desperate need.

28. Hence the Court granted only a general order declaring that government housing programmes were obliged to provide for people in Mrs Grootboom's position, namely for those "who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations". It declared government's programme invalid for failing to do so, but gave her no specific relief.

29. Mrs Grootboom died in August 2008, eight years after the judgment. She was still living in a shack. It has become a commonplace taunt directed at

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Jansen van Rensburg's paper" 6 *Potchefstroom Electronic Law Journal* (2003) (court's approach was legalistic; the Court's deference to executive claims of resource-shortage "sits uneasily with" justiciable rights); Darrel Moellendorf "Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims" (1998) 14 *SAJHR* 327 (the appeal was rightly dismissed on the grounds advanced, but the Court's reasoning "plays on an ambiguity").

[33] Frank Michelman, "The Constitution, Social Rights and Reason – A Tribute to Etienne Mureinik" (1998) 14 *SAJHR* 499 at 502 (while one might be "concerned about" "some loose language of the Court", the decision is "undoubtedly correct".

[34] As Professor Ngwena points out (op cit note 30 above), Mr Soobramoney was suffering from end-stage renal failure, coronary heart disease, ischaemic heart disease and diabetes and hypertension; he also had a history of stroke.

[35] See David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (2003) pages 175-177, who points out that "the injustice was one created by lack of public resources, and a judgment about how to distribute the resources was one legitimately made by those responsible for allocating medical resources … in explicitly recognising both the injustice and the limits of their role, [the Constitutional Court] pointed out that, other things being equal, the dilemma of how to distribute scarce public resources was not a dilemma of the rule of law".

the Court's socio-economic rights rulings that she died without a home.[36] The litigation had failed to secure her a house.

30. The taunt is well-directed.[37] It is a humbling reminder to those in the business of law and of constitutional rhetoric that our craft has limits.

31. But the judgment did not achieve nothing. On the contrary. It is now recognised as providing a productive seedbed for the Court's socio-economic jurisprudence.[38] Its "multiple indirect material and symbolic effects" have rightly received international commendation.[39]

32. But it achieved far more than only "indirect and symbolic" benefits. The decision has had a direct material impact on many people's lives – perhaps many millions of lives. The nub of the judgment was to require the state to take active steps to create access to social services and economic resources for the most vulnerable.[40]

33. To this injunction government proved responsive. It enacted Chapter 12 of the National Housing Code,[41] an obligatory guide that requires national, provincial and municipal government to plan for and act where people are in desperate need.

34. The Code itself calls *Grootboom* a "landmark judgment". And it puts on record that, a year after judgment, the decision impelled national and provincial ministers responsible for housing to authorise a national

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[36] See Pearlie Joubert, "Grootboom dies homeless and penniless", *Mail and Guardian* 8 August 2008, available at http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless (accessed 7 December 2011) (quoting Ms Grootboom's lawyer saying that her death, homeless, "shows how the legal system and civil society failed her").

[37] Pierre de Vos "Irene Grootboom died, homeless, forgotten, no C-class Mercedes in sight" (11 August 2008) ("Mrs Grootboom's death shames us all"; "She put her trust in the law, our courts and in politicians to help her to get access to a house"), available at http://constitutionallyspeaking.co.za/irene-grootboom-died-homeless-forgotten-no-c-class-mercedes-in-sight/ (accessed 7 December 2011).

[38] See, for instance, Danie Brand "The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights for?'" in *Rights and Democracy in a Transformative Constitution* (Henk Botha, André van der Walt, & Johan van der Walt eds., Sun Press 2003) 33 at 41; Marius Pieterse "Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience" *Human Rights Quarterly* 26 (2004) 882 at 892-892; Dennis Davis "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?" (2006) 22 *SAJHR* 301 at 310-311.

[39] Cesar Rodriguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" 89 *Texas Law Review* 1669 (2010-2011) at 1681-1682 (rejecting the "neorealist" analysis seeking only "direct material effects" and hence concluding that Grootboom and other landmark socio-economic rights cases have had little impact).

[40] Sandra Liebenberg, op cit note 7 above, page 58. See also page 52 (*Grootboom*'s importance in affirming "the interdependence and interrelatedness of all rights").

[41] National Housing Programme: Housing Assistance In Emergency Circumstances – Policy Prescripts and Implementation Guidelines (April 2004), available at http://www.bloemfontein.co.za/docs/Emergency%20Housing%20Programme.pdf (accessed 7 December 2011).

programme for quick action "to relieve the plight of persons in emergency situations with exceptional housing needs".[42]

35. The clear implication is that without Mrs Grootboom's rights-directed litigation, and without the Court's declaratory order, the country's housing programme would have continued to omit provision for the emergency needs of the poorest and most vulnerable.

36. More direct executive impact and outcome are difficult to instance.

37. Eleven years later, the practical implications of *Grootboom* still grow. The Court has recently held that the Housing Code requires local government to make emergency provision not only for those whom its own relocations and evictions render homeless, but also for those evicted at the instance of private landlords.[43] The decision will have a very significant impact on allocation of resources to the poorest urban households.

38. The Court's socio-economic jurisprudence is far from perfect. Commentators have criticised its basic approach, which flinches from specifying that each of the social rights has a claimable minimum content.[44] Critics have also bitterly denounced the Court for refusing some claimants relief, and for its reasons when doing so.[45]

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[42] Id, page 5, recording MinMEC decision of 5 November 2001. See too Socio-Economic Rights Institute of South Africa (SERI) "A Review of Housing Policy and Development in South Africa since 1994" (September 2010) (*Grootboom* "gave rise to a right to emergency housing and a means for its enforcement", quoting Stuart Wilson), available at http://www.spii.org.za/agentfiles/434/file/Research/Review%20of%20the%20Right%20to%20Housing.pdf (accessed 7 December 2011).

[43] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CCT 37/11) [2011] ZACC 33 (1 December 2011), available at http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2011/33.html&query=blue%20moonlight (accessed 7 December 2011).

[44] David Bilchitz *Poverty and Fundamental Rights – The Justification and Enforcement of Socio-Economic Rights* (2007). By contrast, Evelyne Schmid "Thickening the Rule of Law in Transition: The Constitutional Entrenchment of Economic and Social Rights in South Africa", chapter 3 in André Nollkaemper and others (eds) *Importing International Law In Post- Conflict States: The Role Of Domestic Courts* (forthcoming), cautions against over-emphasising the rejection of the minimum core concept (page 73). Karin Lehmann "In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core" 22 *American University International Law Review* (2006-2007) page 163 considers the minimum core approach "both conceptually and pragmatically misconceived" and argues that it will aggravate the plight of some poor people (at 165 and 196-197).

[45] See Jackie Dugard and Malcolm Langford "Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism", (2011) 27 *SAJHR 39-64* (attacking the Court's decision in *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC), which overturned high court and appeal court decisions granting relief against the local authority's minimum water specification, and its decision to install water meters in Soweto) and David Bilchitz "Citizenship and Community: Exploring the Right to Receive Basic Municipal Services in *Joseph" Constitutional Court Review* 2010 vol 3 page 45 (attacking the Court's decision in *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* [2009] ZACC 33; 2010 (4) BCLR 312 (CC)).

39. From other commentators the Court's jurisprudence has elicited high praise.[46]

40. The debate does not require resolution here.[47] My thesis is modest. It is only that *Grootboom* and its progeny are a telling example of how rights-directed litigation can improve the conditions of a considerable group of socially vulnerable people, in ways that would not have eventuated without rights.[48] These decisions also show how rights-claims can be practically translated into material improvements to people's lives.[49]

41. Mrs Grootboom's death without a house does not mean we should give up on legal rights and on public interest litigation.[50] It means only that we should do better.[51]

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[46] Cass Sunstein *Designing Democracy* (2001) at pages 221, 234, 237 says the Court's deferent standard of review in socio-economic rights cases is "novel and exceedingly promising" since it is "respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met." Brian Ray "Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights", 45 *Stanford Journal of International Law*, 151 (2009) at page 153 contends that the Court's distinctive approach consists in "a sharing of interpretive authority with the legislative and executive branches of government", thus enhancing the courts' decision-making capacities by giving them the benefit of the other branches' perspectives on policy choices; in creating incentives for the other branches to take seriously their own roles in enforcing these rights by recognising their authority; and by allowing the courts to be flexible in choosing weaker or stronger remedies on a case-by-case basis.

[47] See Marius Pieterse "Resuscitating socio-economic rights: Constitutional entitlements to health care services" (2006) 22 *South African Journal on Human Rights* page 474 at 501 (arguing that even without an exigible minimum, recognition "a valid and enforceable entitlement inherent to a right" opens the door to wider claims and also encourages government to satisfy the needs in question so as to avoid litigation); Jackie Dugard and Kate Tissington, "In Defence of the ConCourt" Johannesburg *Star* 14 December 2011 (commending the Court's "spectacular record on the right to housing", and calling it "a formidable tool in the hands of those seeking a more just and equal society"), available at http://www.iol.co.za/the-star/in-defence-of-the-concourt-1.1198152 (accessed 10 January 2012).

[48] Elisabeth Wickeri "*Grootboom*'s Legacy: Securing the Right to Access for Adequate Housing in South Africa?" Center for Human Rights and Global Justice Working Paper No 5, 2004, New York University School of Law, available at http://www.chrgj.org/publications/docs/wp/Wickeri%20Grootboom's%20Legacy.pdf (accessed 6 December 2011) (arguing that positive post-*Grootboom* changes in housing policy and case law indicate the decision's "significant, but limited" impact, since, despite the fact that millions of South Africans continue to live in deplorable conditions, the decision has had "two distinct positive impacts" –

> "First, it has created a powerful tool for the advocates of specific communities involved in evictions proceedings, building a growing body of right-to-housing case law. That tool has led to discrete victories for local communities, even if that victory is simply the difference between being evicted and left homeless, or being allowed to remain in their, albeit informal, homes. Second, a recently adopted national program for housing assistance in emergency circumstances is a very promising document that if actually implemented could lead to meaningful change in the lives of millions of South Africans." (pages 6-7 and see too pages 21ff)

[49] See Marius Pieterse, "Legislative and executive translation of the right to have access to health care services" (2010) 14 *Law, Democracy and Development* 1 at 3 (rights and rights-directed litigation assist with the "translation of politically validated needs into lived reality").

[50] See Geoff Budlender, note 13 above: "If litigation and the courts are to perform the function of democratising our society, then the manner in which the litigation is conducted becomes of critical importance...lawyers need to find ways of working which empower their clients..."

[51] A case instancing "the capacity of courts to make direct, pragmatic orders for the improvement of the material conditions in children's lives" (Liebenberg, op cit note 7 above at page 239-241) is *Centre for Child Law and others v MEC for Education and others* 2008 (1) SA 223 (T), where children sent to a school of industry under

Rights and public discourse – TAC v Minister of Health

42. Rights can also achieve more ethereal, though no less dramatic, effects. They can change the spirit of the times. Wielding them can radically alter the terms and indeed the outcome of national debate on fiercely contested social policy. Differently put, rights-talk and rights-assertion can alter social discourse in signal ways.

43. In 1999, President Thabo Mbeki plunged South Africa into a ghastly nightmare. The reason was his support for AIDS denialism.[52] When he assumed the presidency in May 1999, the AIDS epidemic was cruelly corroding the country's life and health. In less than ten years, the prevalence among women attending antenatal clinics had soared from 0,07%, in 1990, to over 20%, in 1999.[53]

44. The death toll was frightening. In 1999, perhaps one quarter of a million people died in South Africa of AIDS-related causes.

45. I had close personal knowledge of death from AIDS, since I had escaped it. In 1997, twelve years after becoming infected with HIV, I fell severely ill with AIDS – but my judge's salary meant I could start taking anti-retroviral (ARV) therapy. The result, for me, was momentous. From facing certain death, my health and energy and vigour were restored to me. Little less than a year later, by 1999, I was so well that I could start campaigning for the drugs that saved my life, at very high cost, to be made available to all on my continent.

46. President Mbeki did not agree. From October 1999, he lent endorsement to a group of discredited dissidents who cast doubt on the medical science of AIDS. He repeatedly questioned the viral aetiology of AIDS, the efficacy

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court order were inadequately housed and cared for. The court granted relief that included an order that each child be immediately supplied "with a sleeping bag with a temperature rating of at least five degrees Celsius".

[52] AIDS denialism is the systematic rejection, deriving from pseudo-scientific premises, and supported by quasi-rational arguments, of evidence establishing that HIV causes AIDS, that ARVs significantly reduce mortality and morbidity associated with HIV infection, and that there are tens of millions of people in Africa living with HIV or dying from AIDS. See Nathan Geffen and Edwin Cameron "The deadly hand of denial: Governance and politically-instigated AIDS denialism in South Africa" Centre for Social Science Research - Aids and Society Research Unit (July 2009), available at http://www.cssr.uct.ac.za/sites/cssr.uct.ac.za/files/pubs/WP257.pdf (accessed 8 December 2011). See too Nattrass, N, *Mortal Combat: AIDS denialism and the struggle for antiretrovirals in South Africa* (2007), chapter 2, "AIDS Science and the Problem of AIDS Denialism".

[53] "National HIV and Syphilis Antenatal Seroprevalence Survey in South Africa, 2005", Department of Health (2006), available at http://www.doh.gov.za/docs/reports/2005/hiv.pdf (accessed 8 December 2011). The figures for the period 1990 to 2005 are tabulated at page 10.

and safety of drug treatments for it, and the reliability and meaning of statistics showing that AIDS was having a cataclysmic effect.[54]

47. Worse, he refused to allow his government to distribute ARVs, the only known treatment for AIDS.

48. The effects were horrific. As hundreds of thousands fell ill and died, decisive government action was delayed for years in the mists of an absurd, obfuscatory debate. Conservative calculations show that more than 330,000 lives (or what epidemiologists call 2.2 million "person-years") were lost because President Mbeki thwarted a feasible and timely ARV treatment programme.[55]

49. This horror did not go unchallenged. The Treatment Action Campaign (TAC), founded to tackle the iniquities of drug pricing, was forced to turn its attention to presidential denialism instead. It did so, unflinchingly. The Congress of South African Trade Unions, the South African Council of Churches and other organisations joined the TAC in challenging the President and in campaigning for rational policies and treatments.

50. But their courage was isolated. Large sectors of society were cowed into silence. President Mbeki was a forbidding man who headed a governing party with an illustrious history and a massive electoral majority. Many were fearful of crossing him. The issue – a mass epidemic of sexually transmitted disease on a continent oppressed by centuries of racism – was explosive.[56]

51. As a result, most members of South Africa's political elite stayed mute.[57] Business leaders were silent. Some intellectuals actively kowtowed to the President.[58] Members of his party and Cabinet, even those regarded as

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[54] For the history and effects of Mbeki's denialist postures see Nattrass, N, *The Moral Economy of AIDS in South Africa* (2004); Cameron, E, *Witness to AIDS* (2005); Nattrass, N, *Mortal Combat: AIDS denialism and the struggle for antiretrovirals in South Africa* (2007); Gevisser, M, *Thabo Mbeki: The Dream Deferred* (2007); Feinstein A, *After the Party* (2007); Cullinan, K and Thom, A, *The Virus, Vitamins and Vegetables – The South African HIV/AIDS Mystery* (2009); Geffen, N *Debunking Delusions* (2010).

[55] See Pride Chigwedere and others "Estimating the Lost Benefits of Antiretroviral Drug Use in South Africa" 49 *Journal of Acquired Immune Deficiency Syndrome* (2008) 410–415, available at http://www.aids.harvard.edu/Lost_Benefits.pdf (accessed 8 December 2011).

[56] See especially Nattrass, N., *Mortal Combat: AIDS denialism and the struggle for antiretrovirals in South Africa* (2007).

[57] Democratic Alliance leader Tony Leon, an outspoken opposition politician, was an exception. He squarely challenged President Mbeki's absurd stance – and was isolated as a result. The correspondence between President Mbeki and Mr Leon is proudly displayed on a website that foments scepticism about the science of AIDS. See http://www.virusmyth.com/aids/news/letmbeki.htm (accessed 10 December 2011).

[58] On 4 November 2004, the University of Cape Town conferred an outstanding leadership award on President Mbeki. Its Vice-Chancellor, Professor Njabulo Ndebele, commended President Mbeki for his "thoughtful steadfastness" in the face of activism: "It could be said that you lead with pain and resolve, helped on by your enormous sense of responsibility". See http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=270558&sn=Detail (accessed 9

forceful, would not say openly that HIV caused AIDS.[59] Even international diplomats were cowed.[60]

52. Out of fear, conformity, deference or sycophancy, the establishment maintained an appalled silence, while activists and their allies struggled to persuade the President that his stance was ruinous.[61] Their struggle was in vain. President Mbeki "didn't budge an inch".[62]

53. In this gloomiest hour, the activists turned to the courts.[63] They sought an order requiring President Mbeki's government to make available a cheap drug, Nevirapine, that enabled pregnant mothers to halve the risk of transmitting HIV to their babies. Government vehemently opposed. But in December 2001, the High Court granted the order sought. Government appealed to the Constitutional Court. In an historic judgment, the Court ordered government to make Nevirapine, or a suitable substitute, available at public clinics to pregnant mothers who sought it.[64]

December 2011). In *The Dilemmas of Leadership* (2004), Professor Ndebele commended Mbeki's "steadfast and intelligent refusal to be trapped in a web of assumptions" about AIDS and asserted that "it seems possible to argue that HIV/AIDS does not constitute a major and serious threat to society because, given the reporting restrictions on HIV/AIDS-related deaths, the prevalence statistics did not bear out the contention that it was such a threat". Quoted by Seepe, Sipho "Educated jesters of Mbeki's court", *Business Day* 18 September 2006, available at http://ccs.ukzn.ac.za/default.asp?3,28,11,2794 (accessed 10 December 2011).

[59] See Khadija Magardie "Call for clear stance on HIV/Aids: Mixed signals from government are undermining HIV/Aids education" *Mail & Guardian* (Johannesburg) 4 October 2000, available at http://www.aegis.com/news/DMG/2000/MG001008.html (accessed 9 December 2011) (Dr Kader Asmal).

[60] Former Ambassador Stephen Lewis vividly reminded an audience in Addis Ababa of –

> "all those years of denialism, and not a single voice at the most senior levels of the United Nations—Under-Secretaries-General, the Secretary-General himself. Not one of them said publicly to Thabo Mbeki, 'You're killing your people'. Oh, to be sure, it was said in private by everyone. They took Thabo Mbeki aside and begged him to reverse course. He didn't budge an inch. Around him, in every community in South Africa, and in communities throughout a continent heavily influenced by South Africa, were the killing fields of AIDS. As we come to this thrilling moment of progress, I can't forget the millions who died on Thabo Mbeki's watch, while those who should have confronted him before the eyes of the world stood mute."

See Stephen Lewis "Remarks to ICASA 2011, Addis Ababa", 6 December 2011, available at http://www.aidsfreeworld.org/Publications-Multimedia/Speeches/Stephen-Lewis-remarks-to-ICASA-2011.aspx (accessed 8 December 2011).

[61] It may or may not be worth adding that some of what we now know about HIV and its treatment was not as clearly established in the heyday of presidential denialism (1999-2004) as it is now – not the viral aetiology of AIDS, for that was incontestably established, nor the efficacy of ARV treatment, for that too was established. What was still unknown was how effectively mass distribution of ARVs in relatively resource-deprived populations could diminish the deadly impact of the disease, with relatively minimal side-effects. In short, it wasn't as well known then as it is now that AIDS drugs work as well amongst poor Africans as they work in more affluent (mostly West European and North American) settings.

[62] See Stephen Lewis, quoted in note 58 above, 278-315.

[63] See Heywood, Mark, "Preventing Mother to Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the TAC case against the Minister of Health" (2003) 19 *South African Journal on Human Rights*,

[64] *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) [2002] ZACC 15; 2002 (5) SA 721 (CC) (5 July 2002).

54. The judgment was a ringing victory for treatment access as well as for rational public discourse. As a simple matter of history, it was the pivot that eventually forced government to take decisive action in the epidemic.[65] Government, albeit grudgingly at first,[66] eventually gave effect to it. Large-scale provision of ARVs began late in 2004, 30 months after the Court's ruling.[67]

55. Today, nearly 1.5 million people in South Africa are on ARV treatment.[68] It is the largest publicly-provided AIDS treatment programme in the world. This is undoubtedly the most significant material consequence of the decision. More even than *Grootboom*, *TAC* materially changed the conditions of life for hundreds of thousands of people: it enabled them to not to die.

56. That is an important point – a "bricks and mortar" point – but it is not what I want to highlight here. My present point is that the assertion of legal rights, and their vindication by the courts, can fundamentally alter the framework, the terms and the weight of public debate. That in turn enables changes in public policy and decision-making.[69]

57. The decision in *TAC* had a dramatic institutional and operational force.[70] But it also had a discursive and ideological effect. Twenty one months

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[65] See Heywood, Mark "South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health", *Journal of Human Rights Practice* (2009) 1(1) 14-36, available at http://jhrp.oxfordjournals.org/content/1/1/14.full (accessed 10 January 2012).

[66] See Heywood, Mark "Contempt or compliance? The TAC case after the Constitutional Court judgment" *Economic and Social Rights Review* Vol.4 No.1 March 2003, p.3; De Vos, Pierre "So Much to Do, So Little Done: The Right of Access to Anti-retroviral Drugs Post-Grootboom" *Law, Democracy and Development* Vol 7, No. 1, 2003, 83-112.

[67] The ruling itself was confined to drugs preventing mother-to-child transmission of HIV. But thirteen months later, on 8 August 2003, government endorsed a "principled approach that antiretroviral drugs do help improve the quality of life of those at a certain stage of the development of AIDS, if administered properly", and charged the department of health to develop a comprehensive plan on universal treatment (Cabinet statement, "Enhanced programme against HIV and AIDS", 8 August 2003, available at http://www.gcis.gov.za/newsroom/releases/cabstate/2003/030808.htm (accessed 4 January 2012)). On 19 November 2003, the Cabinet announced an "A Plan for Comprehensive Treatment and Care For HIV and AIDS in South Africa" and thus committed itself to providing ARVs through the public health system (see http://www.info.gov.za/speeches/2003/03111916531001.htm (accessed 4 January 2012)).

[68] The figure is widely stated and probably sound, but is hard to document. It is asserted in "Resolution of the South African National AIDS Council (SANAC) Sector Leaders Forum held on May 17 2011 Regarding the South Africa Country Position in Negotiations for the United Nations High Level Meeting (HLM) '2011 Declaration on HIV/AIDS'", available at http://www.section27.org.za/wp-content/uploads/2011/06/SANACresolutionUN_HLM.pdf (accessed 4 January 2012) .

[69] See E Cameron and M Richter "HIV/AIDS and Human Rights in the context of Human Security" in A. Ndinga-Muvumba & R. Pharoah (eds) *HIV/AIDS & Society in South Africa* (2008).

[70] Another signal feature of *TAC* is the dramatic way it vindicated constitutionalism. It is to the credit of President Mbeki that he accepted the decision, despite the stunning reverse it represented for his irrational position on ARVs. Much more than President Mandela's famous public acceptance of *Executive Council, Western Cape Legislature and Others v President of the RSA and Others* 1995 (4) SA 877 (CC), which overturned a presidential proclamation amending local government legislation, President Mbeki's submission to

before the *TAC* ruling, the Court had outlawed irrational job discrimination against those living with HIV.[71] Its decision then had pointedly set out the medical facts of AIDS, even though the science was not in dispute. Despite these passages in the judgment,[72] the decision was noted mainly for its effect in damning discrimination in employment. Though delivered eleven months after President Mbeki's public flirtation with denialism began, the decision was not seen as rebuking it.[73]

58. There could be no similar ambiguity about the *TAC* judgment. It was a rebuke not only for government inaction on AIDS drugs, but for the absurd obfuscation that underlay it.

59. That poor women had a legal right to use anti-retroviral drugs to protect their babies from HIV transmission, and that government was constitutionally obliged to offer them the choice to do so, dealt a blow that would eventually prove fatal to the ludicrous discourse of denialism.

60. President Mbeki had made his stand on AIDS an article of faith of his administration. He had proved impervious to anguished activist pressure, international scientific entreaty,[74] and impassioned condemnation by commentators.[75] But large sectors of the established elite, including members of his own party and government, had maintained a cowed silence.

61. By contrast, the Court unerringly committed its moral capital to the issue. Its stand, affirming medical science, proved pivotal. Presidentially-licensed denialism continued to dog the Mbeki government's response to the

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the TAC decision was a pivotal moment for the rule of law. It is true that public pressure, lead by the TAC, and pressure within his own party and Cabinet, were mounting, but his submission nevertheless deserves credit.

[71] *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC) (28 September 2000).

[72] Paras 11-15.

[73] Compare Pierre De Vos "World AIDS Day 2010", http://constitutionallyspeaking.co.za/category/hivaids/ (accessed 5 January 2012) (reflecting on how at the crucial time the Court "came out on the right side of the argument" in *Hoffmann*; implying, rightly, that this was not appreciated at the time).

[74] The "Durban Declaration on AIDS", signed in June/July 2000 by more than 5000 scientists in the field, asserted the scientific facts of AIDS and its medical management as "clear-cut, exhaustive and unambiguous" (see http://www.nature.com/nature/journal/v406/n6791/full/406015a0.html (accessed 4 January 2012)). President Mbeki's spokesman, Mr Parks Mankahlana, said the Declaration would "find its comfortable place among the dustbins of the office" (see http://www.journaids.org/index.php/essential_information/the_politics_of_hivaids_in_south_africa/the_durban_declaration_july_2000/ (accessed 4 January 2012)). Mr Mankahlana died, reportedly of AIDS, a few months later. See Carolyn Dempster, "Questions over death of Mbeki aid", BBC News, 27 October 2000 http://news.bbc.co.uk/2/hi/africa/994505.stm (accessed 4 January 2012).

[75] In *Witness to AIDS* (2005), I mention some of those who publicly challenged President Mbeki on AIDS: Archbishop Desmond Tutu, his successor Archbishop Njongonkulu Ndungane, Dr Mamphela Ramphele, opposition leader Tony Leon, trade union leaders Willie Madisha and Zwelinzima Vavi, Professor Malegapuru Makgoba, Dr Olive Shisana, Dr Kgositsile Letlape and Pregs Govender, and commentators including Ferial Haffajee, Justice Malala, Mondli Makhanya, Barney Mthombothi, Jovial Rantao, Khathu Mamaila and Xolela Mangcu.

epidemic,[76] but the Court's authoritative assertion of reason proved a vital intervention that shifted public and governmental discourse in ways that eventually triggered action.

62. The judgment constituted an authoritative, morally cogent and politically irrefutable assertion of the science of AIDS, and of the necessity for public action in accordance with it.

63. It showed the Court as a source not merely of institutional decision-making power, but of unparalleled moral and intellectual authority.

64. My retired colleague Justice O'Regan has recently emphasised the importance of the Court as a forum for reasoned debate on contested issues of public policy.[77] The *TAC* decision shows the immense public power of that reason,[78] when rightfully employed.

Rights talk and moral citizenship

65. Rights and rights-talk serve a further important function. They can confer the dignity of moral citizenship.[79]

66. Moral citizenship is a person's sense that he or she is a fully entitled member of society, undisqualified from enjoyment of its privileges and opportunities by any feature of his or her humanhood.

67. It does not consist in mere freedom from criminal penalties and other legal burdens, but is something richer, subtler and perhaps deeper: it is a state of mind produced by the absence of criminal penalties and legal burdens.

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[76] See Geffen, N, *Debunking Delusions* (2010) page 61 (recounting need to threaten contempt of court application in order to secure compliance with TAC judgment in province of Mpumalanga, where denialist-supporting politician resisted implementation); Keeton, Claire, "Speaking Truth to Power", chapter 12 in Cullinan, K and Thom, A, *The Virus, Vitamins and Vegetables – The South African HIV/AIDS Mystery* (2009).

[77] Kate O'Regan, "A Forum for Reason: Reflections on the role and work of the Constitutional Court", Helen Suzman Memorial Lecture, 22 November 2011, available at http://www.hsf.org.za/siteworkspace/helen-suzman-memorial-lecture-november-2011.pdf (accessed 4 January 2012).

[78] Mureinik, E., "Beyond a Charter of Luxuries: Economic Rights in the Constitution", (1992) 8 *South African Journal on Human Rights*, 464 at p468 argued that the process of judicial scrutiny of social and economic allocations would improve the quality of government decisions. Even if no measure was struck down substantively, the procedural benefits of scrutiny would be significant, since "any decision maker who is aware in advance of the risk of being asked to justify a decision will always consider it more closely than if there were no risk".

[79] In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 107 and 127, Sachs J used the phrase "moral citizenship" (and see *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) para 13; *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC) para 15) . The phrase is sometimes understood as meaning "good" or "diligent" citizenship. See Richard Paul, "Critical Thinking, Moral Integrity, and Citizenship" in Critical Thinking: How to prepare students for a rapidly changing world? (1995), available at http://www.criticalthinking.org/pages/critical-thinking-moral-integrity-and-citizenship/487 (accessed 13 January 2012).

68. It is the sense of non-disqualification, of non-exclusion, and of positive entitlement that freedom from disqualification and from official sanction engender.
69. If all this seems impossibly abstract, let me recount my first experience of the heady sense of moral citizenship.
70. It was Saturday 13 October 1990 in Johannesburg. I was among a small band of marchers who set out on the first gay pride march on African soil.[80] It was just eight months after the apartheid government had agreed to negotiate toward democracy. The atmosphere of repression was still intense, but possibility was richly alive – and after some nail-biting ups and downs we had obtained official permission for our march.
71. We made our way through a busy urban district, but had to cross a main artery leading from the city. It was twelve noon, and Saturday traffic was at a peak. As we reached the intersection, we saw an extraordinary sight: the police, assisted by municipal traffic officials, had cordoned off the crossing. Police vehicles with flashing lights barred the phalanx of vehicles to enable our small band, with banners and festive outfits, to march across the road. The business of the city was brought to a halt, while we clamantly asserted our entitlement to full citizenship in a democratic South Africa.
72. It was a moment of exhilarated insight, and it has never entirely left me.
73. I had grown up knowing I was gay in a society that despised same-sex orientation as a dangerous and unseemly perversion, and that suppressed and punished its expression. I felt deep shame at my feelings and desires – but, worse, I felt deep shame at what I *was*: a "homosexual". I deplored not being heterosexual, with the comfortable conformity, acceptance and career and family benefits I thought this entailed.
74. I lacked moral citizenship in a society that would confer it on me only to the extent I could pretend I was straight.
75. That the apartheid police could subdue the arterial flow of Africa's richest city, even if only for a few minutes, to create passage for a demonstration for gay and lesbian rights, offered a glimpse of what full moral citizenship could entail.
76. Much of the Constitutional Court's achievement since 1994 has consisted in the somewhat intangible process of asserting the moral citizenship of South Africa's people.

[80] See De Waal, S and Manion, A (editors) *Pride: Protest and Celebration* (2006), "Preface", by Edwin Cameron.

77. This has been especially significant in a society that, under apartheid, owed its very existence to the processes of definition-out, of exclusion, division, subordination, and condemnation.

78. In declaring the death penalty unconstitutional, the Court affirmed that the core of constitutionalism is to protect the rights of minorities and others who cannot do so through the democratic process – even "the worst and the weakest":

> "Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected."[81]

79. Some of the Court's strongest decisions have aimed at reversing "women's subordination in society"[82] – in other words, in undoing their legal disabilities as well as their moral disqualification – and the Court has expanded the boundaries of legal claims to make it easier for women to gain recompense for violent attack.[83]

80. In a country pulsing with xenophobic tensions, the Court has confirmed that non-citizens illegally in the country can benefit from constitutional rights and protection.[84] It has voided a regulation prohibiting foreign teachers from finding permanent employment in state schools.[85] And it has found that non-citizens with permanent residence are entitled to claim social security benefits.[86]

81. In this task the Court is attentive to the power of language in creating exclusion. Recently, in granting an order declaring a city-ordered eviction unlawful, it deplored the city's and the lower court's description of the occupiers as "invaders". This, it said, "detracts from the[ir] humanity ..., is emotive and judgmental and comes close to criminalising" them.[87]

82. On a continent and in a world in which difference has all too often led to destruction and bloodshed, perhaps the Court's most persistent theme has been to assert the inclusive moral citizenship of constitutional rights.

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[81] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (6 June 1995), para 88 (judgment of Chaskalson P).
[82] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC) at para 62.
[83] See *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); *F v Minister of Safety and Security* [2011] ZACC 37 (judgment of 15 December 2011).
[84] *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12; 2004 (4) SA 125 (CC), paras 25-27.
[85] *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* [1997] ZACC 16; 1998 (1) SA 745 (CC).
[86] *Khosa v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC) (4 March 2004).
[87] *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* [2011] ZACC 36 (7 December 2011) (as yet unreported), at para 3; *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd* [2011] ZACC 35 (7 December 2011) (as yet unreported), at para 4.

83. Its most vivid jurisprudence here has been in response to litigation by gay and lesbian activist groups. In a series of far-going decisions, the Court has spelt out the meaning of constitutional equality and protection from discrimination for gays and lesbians.[88] Its judgments culminated at the end of 2005 in an order that gave the legislature one year to enact legislation that afforded full equality in marriage.[89]
84. It is rightly pointed out that hate-filled attitudes and discrimination against gays and lesbians are still rife in South Africa.
85. Lesbians in particular are sometimes targeted in violent attacks.[90] Lesbians living in townships are especially vulnerable, for horrific rapes and murders have occurred there.[91]
86. The question that arises is this. What does it mean when a marginalised group, which for long centuries[92] has suffered persecution and violence and oppression, is invested with full constitutional protection and equal rights?
87. It does not mean everything, for by themselves rights consist only in words. They cannot be eaten, and they afford no shield against hatred and ignorance.
88. But it also does not mean nothing.
89. Lesbians and gays, like many others, continue to suffer injustice and oppression in South Africa. The path to non-discrimination and full inclusiveness still stretches long ahead.

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[88] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC); *J v Director General: Department of Home Affairs* 2003 (5) SA 621 (CC).

[89] *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC) (1 December 2005), leading to the Civil Union Act, 17 of 2006. The majority judgment of Sachs J in *Fourie* refused the applicants immediate relief, instead giving the legislature one year to devise a remedy. O'Regan J in dissent stated that there was no principled warrant for postponing the applicants' entitlement to relief.

[90] See Human Rights Watch Report, "'We'll Show You You're a Woman' – Violence and Discrimination against Black Lesbians and Transgender Men in South Africa", 6 December 2011, available at http://www.hrw.org/node/103284/section/1 (accessed 13 January 2012). Poignant individual instances include Zoliswa Nkonyana (see Human Rights Watch "South Africa: Murder Highlights Violence Against Lesbians" Culture of Fear Undermines Constitutional Protections, March 2006, available at http://www.hrw.org/news/2006/03/01/south-africa-murder-highlights-violence-against-lesbians (accessed 13 January 2012)); Sizakele Sigasa and Salome Masooa (see Baldwin Ndaba "'Hate Crime' Against Lesbians slated" IOL News, 13 July 2007, available at http://www.iol.co.za/news/south-africa/hate-crime-against-lesbians-slated-1.361821 (accessed 13 January 2012); and Eudy Simelane (see A Kelly, "Raped and Killed for being a Lesbian: South Africa ignores 'corrective' attacks", *The Guardian*, 12 March 2009, available at http://www.guardian.co.uk/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa (accessed 13 January 2012)).

[91] On 4 May 2011, the Department of Justice set up a task team to examine violence against lesbians: see "Task Team is Set up to Attend to LGBTI Issues and Corrective Rape", available at http://www.justice.gov.za/m_statements/2011/20110504_lbgti-taskteam.html (accessed 13 January 2012).

[92] See Louis Crompton, *Homosexuality and Civilization* (2003).

90. But much has been achieved. For nearly eighteen years gays and lesbians have enjoyed status as full moral citizens of South Africa, in a continent that elsewhere still treats same-sex orientation with brutal and often murderous repression.
91. Not only have legal burdens been abolished, but inclusive protections have been enacted incorporating lesbian and gay people into all aspects of constitutionalism.[93]
92. This stretches beyond South Africa's borders, for internationally the Republic has sponsored innovative initiatives to oppose sexual orientation-based violence.[94]
93. And, within the country, there is I think fairly wide public acceptance that gay and lesbian equality is integral to constitutionalism.
94. This was strikingly asserted a few years ago, when Mr Jacob Zuma, then a presidential aspirant, appeared to make derogatory comments about gays and lesbians after the Constitutional Court's marriage ruling. One of his key allies, the then-leader of the ANC Youth League, Mr Fikile Mbalula, demanded that he apologise. This was necessary, he said, because –

> "Gay rights are human rights and that is what makes our Constitution the most progressive in the world."[95]

95. And Mr Zuma did apologise.[96] He issued a statement apologising "unreservedly for the pain and anger" his statements may have caused,[97] and

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[93] The positive side of the rights "balance sheet" is justly summarised in "Speech by Deputy Minister for Justice and Constitutional Development, Mr Andries Nel, MP, on the occasion official opening of the first Working Session of the National Task Team On LGBTI Crime-Related Issues: 24 October 2011", available at http://www.justice.gov.za/m_speeches/2011/20111024_dm_lgbti.html (accessed 13 January 2012).

[94] In June 2011, South Africa and Brazil sponsored a resolution adopted by the United Nations Human Rights Council on human rights violations based on sexual orientation and gender identity (L9/rev1). The resolution was "the first UN resolution ever to bring specific focus to human rights violations based on sexual orientation and gender identity" – see "Historic decision: Council passes first-ever resolution on sexual orientation & gender identity", available at http://www.ishr.ch/council/428-council-not-in-feed/1098-human-rights-council-adopts-landmark-resolution-on-lgbt-rights (accessed 13 January 2012).

[95] See "ANCYL distances itself from Zuma gay-bashing" *Independent online* 28 September 2006, available at http://www.iol.co.za/news/politics/ancyl-distances-itself-from-zuma-gay-bashing-1.295445?ot=inmsa.ArticlePrintPageLayout.ot (accessed 13 January 2012). Mr Mbalula's statement of 26 September 2006 is quoted at http://www.southafrica.to/people/Quotes/JacobZuma.htm (accessed 13 January 2012).

[96] See http://news.bbc.co.uk/2/hi/5389378.stm (accessed 13 January 2012.)

[97] On the significance of the apology, see "Gay groups doubt sincerity of Zuma's apology", *Independent Online* 29 September 2006, available at http://www.iol.co.za/news/politics/gay-groups-doubt-sincerity-of-zuma-s-apology-1.295641 (accessed 13 January 2012), and "HRC to hear if Zuma apology was good enough", *Independent Online* 3 October 2006, available at http://www.iol.co.za/news/politics/hrc-to-hear-if-zuma-apology-was-good-enough-1.295988 (accessed 18 January 2012).

affirming his commitment to constitutional protection for sexual orientation.[98]

96. This was quite extraordinary. It illustrated the social power of rights-talk, for what was at issue was an idea – the notion that gays and lesbians are entitled to full moral citizenship, under a Constitution worth preserving, and to whose benefits they are equally entitled.

97. That idea prevailed, and its triumph secured a victory for constitutionalism itself.

98. Let me be precise about what I am saying. It is that even when their realisation is only partial, law and legal rights confer civic dignity, a perception of personhood, and a sense of moral agency on their beneficiaries.[99]

99. Despite grinding poverty, and continuing dispossession and discrimination, the sense of moral citizenship and civic dignity is widely disseminated among all South Africans.

100. This internalised sense of constitutional agency is one of the major beneficial products of constitutionalism.

101. In short, what the Constitution has conferred on all South Africa's inhabitants is a sense of themselves as bearers of constitutional rights, rather than just legal subjects.

102. This is not the same as the material substance of equal legal protection and benefit. It is something different, but also precious.

103. Indeed, in a world that too often mocks the dignity of humans, and undermines their social agency, it is in itself a significant achievement.

Conclusion

104. I have come to my ending. In some ways, what I have propounded is not only modest, but obvious: that law and legal rights can be human goods.

105. And mostly they are. More than 35 years ago, the English historian Edward Thompson – one of the finest prose writers of the last century – famously shocked the left by asserting that the rule of law is "a cultural

[98] Mr Zuma is reported to have said that the "Constitution clearly states that nobody should be discriminated against on many grounds, including sexual orientation, and I uphold and abide by the Constitution of our land. Our lesbian and gay compatriots are protected by the Constitution and I respect their rights in my capacity as an individual citizen and as a member and one of the leaders of the ANC": see "Mixed reaction to Zuma apology", *Mail and Guardian* 28 September 2006, available at http://mg.co.za/article/2006-09-28-mixed-reaction-to-zuma-apology (accessed 18 January 2012).

[99] Michael Ignatieff rightly says that "the very purpose of rights language is to protect and enhance individual agency" – *Human Rights as Politics and Idolatry* (2001) page 18.

achievement of universal significance", and that it constitutes "an unqualified human good".[100]

106. But it is equally obvious that the law, while almost always better than no law at all, can be used as much for great evil as it can be used for good.

107. My own country's history, where apartheid was enforced through minutely attended legal regulation, shows how pernicious ends can be attained through law.

108. Today, in Iran and China, thousands are executed under colour of law. Many millions of others in our world suffer oppression and persecution under law.

109. But as with so many of his insights, Thompson saw something profound and important. It is that the law offers a framework for our better functioning as humans.

110. The modest successes of constitutionalism in South Africa are the more remarkable if one considers how, without law, chaos, bloodshed and dictatorship seemed inevitable – but that, with the law, we have achieved the small beginnings of a state of human dignity.

111. Law cannot ensure that men (and they are mostly men) will not subordinate the instruments of government for evil, nor can it guarantee that they will not use them for illicit wealth accumulation. It cannot stop corruption.[101] It cannot engender human trust and affection and reliance.

112. But, what the law and legal rights can do, when invoked with creativity and integrity, is to play a humanising, expansive and inspiring role in human society.

113. The law can create the conditions for human flourishing.

114. Through legal agency, even if applied imperfectly,[102] material benefits can accrue to human lives. Legal rights can change social practice, by altering discourse.

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[100] E P Thompson, *Whigs and Hunter: The Origin of the Black Act* (New York, 1975), pages 265-266.

[101] See the remarks of Deputy President Kgalema Motlanthe in his Ruth First Memorial Lecture, reported in "Motlanthe: corruption depends on your conscience", *Independent Online* 18 August 2011, available at http://www.iol.co.za/capeargus/motlanthe-corruption-depends-on-your-conscience-1.1120415 (accessed 18 January 2012) (stating that fighting corruption is not a matter of laws or for government alone, but requires individual honesty and commitment). See too the address of COSATU General Secretary, Zwelinzima Vavi, to the National Anti-Corruption Forum Summit, Sandton, 8 December 2011, available at http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71616/page71690?oid=270857&sn=Detail&pid=71690 (accessed 20 January 2012).

[102] Jonathan Lewis, "The Constitutional Court of South Africa" (2009) *Law Quarterly Review* 440-467 strongly criticizes the Court's decisions and methods.

115. And, most deeply, when applied with a seemly blend of ambition and caution, of hope and humility, the law can lay the foundation for moral agency and civic dignity.

116. To deny these possibilities in the law is to take a too miserly, too cautious, and too crabbed a view of its potential – and of what we, as lawyers and as judges, can do.

117. The law cannot offer transcendence from human toil and limitation. But it can offer us the chance to be better than ourselves. And that is surely something worth celebrating.