



## Chapter Seven

# Flourishing and Fundamental Rights under the South African Constitution

Our highest and hardest task is to make ourselves people 'upon whom nothing is lost'. ... [A] person armed only with ... general principles and rules ... would, even if she managed to apply them to the concrete case, be insufficiently equipped to act rightly ... It is not just that all by themselves they might get it all wrong; they do not suffice to make the difference between right and wrong. ... Obtuseness is a moral failing; its opposite can be cultivated. ... To respond 'at the right times, with reference to the right objects, towards the right people, with the right aim, and in the right way, is what is appropriate and best ...' [James' writing] allows us to see more deeply into the relationship between the finely tuned perceptions of particulars and a rule governed concern for general obligations; how each, taken by itself, is insufficient for moral accuracy; how the particular, if insufficient, is nonetheless prior; and how a dialogue between the two [characters], prepared by love, can find a common basis for moral judgment. ... James' talk ... of 'getting the tip' shows us what moral exchange and moral learning can be, inside a morality based upon perception. Progress comes not from the teaching of an abstract law but by leading the friend, or child, or loved one – by a word, by a story, by an image – to see some new aspect of the case at hand, to see it as this or that.

Martha Nussbaum

Divided selves are best accommodated by complex equality in domestic society and different versions of self-determination in domestic and international society. ... Even in my normal condition, I hear voices, I play parts, I identify myself in different ways – and so I must aim at a society that makes room for this divided self.

Michael Walzer

## A. Flourishing Roughly Defined

### 1. *Experimentalism for Whom and for What?*

My original commitment to recasting the outré, unmoored metaphysical notion of freedom in terms of the substantially more grounded concepts of problem solving, trial and error, feedback mechanisms and radically determined, heterogeneous selves required a relatively modest conception of a political/constitutional order appropriate for South Africa. To that end, this book has thus far offered an intentionally partial theory best described as experimental constitutionalism. Even that consciously partial constitutional theory would be insufficient if it could not answer the question: experimental constitutionalism for whom and for what? The first half of the answer is relatively obvious: the individuals, groups, associations, communities and sub-publics that constitute present-day South Africa. This chapter responds primarily to the second half of the question: experimentalism for what? The answer, as already canvassed throughout this work, is flourishing.

I return here to the notion that the individual, though fundamentally conditioned by the world, can still use the wide array of critical tools at her disposal to engage in more optimal forms of behaviour (as she understands them now, or reconceives them later). In the preceding pages, experimental constitutionalism has been shown to provide a method for creating institutions and doctrines that expand our ability to participate in a greater assortment of ways of being in the world. This extension of the range of ways of being in the world, the material conditions and immaterial norms that make their exercise possible and the realization of the plethora of ends toward which we direct ourselves (under the two preceding conditions) define flourishing.

Have we any reason to think that South Africa's Final Constitution is similarly committed to human flourishing? We do. The basic law expressly recognizes the right to dignity, a panoply of civil and political rights, a host of collective or community rights and a brace of socio-economic rights that serve the ends of both traditional and revolutionary forms of flourishing.

This chapter's overall goal is to tie the constitutional text, super-ordinate legislation and the Constitutional Court's jurisprudence on dignity, civil rights, community rights and socio-economic rights more tightly to my account of flourishing. If this endeavour succeeds, then flourishing ought to be recognized as an implicit feature of our basic law. Flourishing does not qualify as the remaining foundation for a full-blown theory of constitutionalism. Indeed, it cannot. But then again, that's not my aim. It's simply an important piece, along with experimental constitutionalism, of a larger puzzle.

To make the necessary connections between flourishing and constitutional norms requires one brief detour. In the next full section, I return briefly to the arguments, made in chapters 1, 2, 3 and 4, that selves, as theoretical constructs, are best understood in terms of flourishing. Only then does it make sense to link the concept of flourishing to our Constitutional Court's understanding of dignity, civil rights, community rights and socio-economic rights.

### 2. *Social Democracy and Experimentalism*

As I noted above in Chapter 4, one thing that I have never quite understood is the reluctance of experimental constitutionalists to marry their largely process-driven theorizing to a more substantive view of justice. (Would Dorf and Friedman, for example, have been happy

with a radically different outcome in *Dickerson*?) One of experimentalism's great strengths is reflexivity. That rolling norms might cause us to alter our initial normative framework has never struck me as a particularly compelling reason not to articulate a relatively clear normative baseline.

The most obvious baseline – without spelling out its details in full – would be what philosophers and political scientists tend to call social democracy. Post-war Western Europe has provided many variations on such a model of the state. It's a politics marked by extremely low Gini coefficients, well-regulated markets, flattened hierarchies between owners, managers and workers, and strong commitments to the provision of such public goods as housing, education, food, health care, environmental protection and participation in law-making processes.<sup>1</sup>

The early works in experimental constitutional theory prove even more mystifying when one realizes that the epistemology and political philosophy out of which it has arisen is expressly socially democratic. The exponents' failure to announce such a political programme is equally perplexing given that the objects of study – emergent experimental institutions – would appear to be the objects of a shared commitment to social democracy. Thus far, this book has offered a sample of institutions and processes designed to provide primary goods: we have looked at child welfare agencies, education reform, drug treatment courts, housing and family courts. One possible answer is the wooliness of Dewey's pragmatism, or his refusal to ground it in some form of moral realism. Similarly, a contemporary pragmatic reluctance – read Rorty<sup>2</sup> and Fish<sup>3</sup> – to describe social democratic politics as anything more than contingent may have something to do with this silence. Tushnet contends that a refusal to hold fast to a strong progressive line limits what one can expect from experimental constitutionalism. Experimental constitutionalism, without a stronger normative baseline, might offer no more than a tweaked version of the status quo. The end of the cold war brought about the end of a 20th-century conversation between centrally planned communism and welfare-state capitalism. However, recent events suggest that a new conversation may be in the offing – one between unbridled Ayn Randian capitalism,<sup>4</sup> social democrats attempting to hold the line,<sup>5</sup> a law-and-order model of capitalism in the east,<sup>6</sup> advocates of liberation politics who rightly decry the failure of constitutional democracy to make good on its many promises,<sup>7</sup> crony capitalism from Italy to Japan (to South Africa), mercantilism in China, and theocracies from the Maghreb to the Middle East to Southeast Asia.<sup>8</sup> Experimental constitutionalists surely deserve a place at that table of political discourse. The process of experimentalism in politics invariably makes my betters in this theoretical domain *strong democrats*. Information is pooled between multiple parties, lasting solutions arise when we acknowledge that our peers elsewhere may have alighted upon better means of realizing shared ends, hierarchies are flattened (as we saw in Simon's 'Toyota Jurisprudence') and citizens and workers have relationships that tend to be far more horizontal and equal (and thus socially democratic) than the political and economic arrangements on display in Communist China or Walmart. Its odd, as an acolyte of Michael Dorf and company, to feel a bit like the grouchy old man in Frank Capra's *It's a Wonderful Life*, who says to Jimmy Stewart's character: 'Stop talking her to death and kiss her already!'

### 3. *Two Modern (Covalent) Definitions of Flourishing: Development and Capabilities*

Two contemporary philosophers revived the literature on flourishing and gave birth to two new (often covalent) fields of study: Amartya Sen (development theory) and Martha Nussbaum (the capabilities approach).<sup>9</sup> Their extended collaboration makes development theory and the capabilities approach, when merged, the most powerful response to John Rawls' justice as fairness in the modern, western philosophical canon. (Their extended collaboration does not mean that they have ended their analysis at identical terminus points.)

Sen's classic work 'More than 100 Million Women are Missing' galvanized an entire generation of academics in philosophy, political science, cultural anthropology, sociology, economics and feminist theory by demonstrating how a socio-economic analysis of cultural and political practices in East Asia, South Asia, sub-Saharan Africa and South America could explain why, twenty years ago, the world's human population contained 100 million fewer women than it should.<sup>10</sup> (Our genetic bias favors female births. Yet population studies show a proportion of 108, 000 males to 100, 000 females.) Infanticide, limited education, lack of access to adequate health care, less food and a host of what can be best described as entrenched patriarchal social formations have contributed, Sen shows, to significantly higher mortality rates for women. The numbers speak volumes with respect to the limited space within which women (and other vulnerable groups) have had the space to flourish.

Sen's relationship to classical schools of political philosophy is far too subtle and complicated to be explicated meaningfully here – as is his ongoing pre-occupation with Rawls.<sup>11</sup> However, a précis of his positions may suggest why Sen, of all contemporary theorists, offers an account of dignity, equality and freedom that provides the best fit with our own Constitution's take on these 'three conjoined, reciprocal and covalent values' and my own commitment to flourishing.<sup>12</sup> Sen rejects Rawls' deontologically grounded contention in *A Theory of Justice* that 'there are certain primary goods – civil liberties such as expression, assembly, the franchise – that cannot be compromised in any way'.<sup>13</sup> Sen has even less time for utilitarian frameworks that make the greatest good for the greatest number the measure of justice. In addition to offering the standard criticisms of utilitarianism – the inability to arrive at an acceptable metric for interpersonal comparisons of happiness, the general indifference to radical inequality in the distribution of happiness,<sup>14</sup> and their neglect of rights, freedoms and other non-utility concerns – Sen inveighs against the general inclination amongst economists to measure utility or happiness in terms of wealth (eg, GNP) and wealth in terms of income (per capita). (The world's top ten GDP/PPP countries do not map on to the OECD's quality of-life list of 'happiest' countries – as measured by indices such as health, education, leisure time, basic amenities, housing, the actual exercise of civil and political rights, and life (read job) opportunities.<sup>15</sup>) Neither wealth nor income provides adequate information about the material well-being and the substantive opportunities available to individuals (or groups within the larger community). Both liberals and utilitarians fail to take account of how individual differences – in physical ability or disability, in environment, in social practices, in family structure – create significant asymmetries in the manner in which primary goods and incomes can be exploited.<sup>16</sup>

Sen asks us to take account, in any theory of distributive justice, of how the heterogeneity amongst individuals (both within societies and across societies) shapes the meaning of primary goods and incomes. For example, a primary political good like freedom of assembly will have demonstrably different meanings for a person who is ambulatory and for a person who is not ambulatory, but housebound. Similarly, the utility of an income of R200 000 will have demonstrably different value for a person who is ambulatory and for a person who requires expensive medication for a debilitating illness. At a minimum, says Sen, quoting Adam Smith, our primary concern ought to be with providing individuals with those necessities of life that will, in fact, give them ‘the ability to appear in public without shame’.<sup>17</sup> That, in just a few well-chosen words, sounds very much like South African discourse on the right to and the value of dignity – and arguments over ablution facilities such as enclosed toilets or open pit latrines.

Sen thus shifts our focus to the actual ‘freedom generated by commodities’, and away from ‘commodities seen on their own’, to the actual freedom generated by civil liberties, and away from formal constitutional rights viewed in the abstract.<sup>18</sup> Sen argues that the best measure of equality or freedom or dignity is the ability of individuals to *convert* such primary goods as *income* or *civil liberties* into the capability ‘to choose a life one has reason to value’ – or in simpler terms, the ability to pursue one’s own ends.<sup>19</sup> That’s how I understand flourishing. The virtue of Sen’s approach is that it recognizes (a) the heterogeneity of capacity that people possess by virtue of biology, custom or class; (b) the heterogeneity of critical functions – from nourishment to civic participation – that may be required to live a life one has reason to value; and (c) the heterogeneity of capabilities that people employ to pursue different visions of the good. Because Sen refuses to reduce human flourishing to a single basic unit, he is quite the pluralist when it comes to recognition of the kinds of goods and lives which individuals ought to be free to pursue. Because Sen recognizes that the pursuit of various ways of being in the world requires significant material means, and not just an absence of external constraints, he is committed to a rough form of egalitarianism.

As we saw in Chapter 4, Nussbaum shares Sen’s disdain for reducing moral and political choices to a utilitarian algorithm or a Kantian constructivist’s list of rights and obligations. Similarly, her interest lies in the ability of individuals to *convert* primary goods such as *income* or *civil liberties* into the capability ‘to choose a life one has reason to value’. Nussbaum has been less agnostic than Sen in her willingness to identify a ‘core set’ of primary goods that can be converted into capabilities. In *Women and Human Development*, Nussbaum offers the following Decalogue of primary goods and capabilities that must obtain in order for most individuals to flourish:

1. Life. Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.
2. Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. Bodily Integrity. Being able to move freely from place to place; having one’s bodily boundaries treated as sovereign, ie being able to be secure against assault, including sexual assault, child

- sexual abuse, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. Senses, Imagination and Thought. Being able to use the senses, to imagine, think, and reason – and to do these things in a ‘truly human’ way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training.
  5. Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve in their absence.
  6. Practical Reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life: liberty of conscience.
  7. Affiliation. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship. Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, freedom of association, freedom of assembly and political speech.
  8. Non-Discrimination. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails, at a minimum, protections against discrimination on the basis of race, sex, religion, caste, ethnicity or national origin.
  9. Play. Being able to laugh, to play, to enjoy recreational activities.
  10. Control over one’s Environment. Political Control: Being able to participate effectively in choices that govern one’s life; having the right of political participation, protections of free speech and association. Material Control: Being able to hold property (both land and movable goods), not just formally but in terms of real opportunity; and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others.<sup>20</sup>

Consistent with Sen’s refusal to be normatively reductive, this Decalogue reflects deontological, utilitarian, communitarian and relational commitments (found throughout our own basic law). The difference between Sen and Nussbaum, for those who practice (or write about) constitutional law, is that the Decalogue provides a basis by which to assess whether or not a political community is providing an environment within which individuals can flourish. Nussbaum has recently gone so far as to assess and to critique the US Constitution, Supreme Court precedents and the current Robert’s Court in terms of both the capabilities approach and this list of convertible goods.<sup>21</sup> Nussbaum writes that, in terms of the capabilities approach, the primary purpose of any nation’s constitution should be to ‘secure for all citizens the prerequisites of a life worthy of human dignity – a core of capabilities – in areas of central importance to human life.’<sup>22</sup> Not surprisingly, while the US Constitution and the current US Supreme Court maintain a commitment to certain entitlements consistent with the capabilities approach (CA), the US Constitution and the current Supreme Court come up short in a large number of striking ways:

On the whole, [the American] constitutional tradition has done very well protecting some capabilities – namely, those enumerated in the Bill of Rights – although even here, interpretation has fluctuated between an analysis that focuses on capabilities or substantial freedoms and a more minimalist analysis. The tradition of heightened scrutiny under the Equal Protection Clause and,

on occasion, the recognition of fundamental rights under the Due Process Clause have also led to a focus on substantive opportunities – what people are actually able to do and to be. Equal Protection Clause jurisprudence, like the modern uses of the CA in the areas of gender, race, and disability, has focused on areas affected by traditional discrimination. Our tradition, however, has been far more reluctant than many to offer constitutional protection, through judicial interpretation, to human capabilities in the areas covered by social and economic rights, although a beginning was made in the late 1960s and 1970s. ... This reluctance (which distinguishes the United States from most of the nations of Europe and the developing world) is made more complicated by disputes over institutional competence and the proper scope of judicial action. Sometimes, when courts refuse to protect a given entitlement (refusing, for example, to give education the status of a fundamental right), the reason may be that judges do not believe that the existing constitution is plausibly interpreted to protect a certain entitlement. At other times, judges may simply oppose the recognition of such a right.<sup>23</sup>

My purpose here is not been to identify the flaws in another constitutional order, but to answer the question, ‘Experimentalism for Whom and for What?’ in the manner most congenial to both experimentalism and flourishing in South Africa. Notice one of the first things that the two constructs have in common: reflexivity. As we have seen from previous chapters, and Nussbaum’s epigram at the outset, rolling best practices allow for knowledge about the most effective means to realize an end to flow back to participants for regular readjustment, for better fit. At the same time, the success (or failure) of our means may cause us to reassess the norms we pursue. Drugs users may be seen as threats to themselves, requiring rehabilitation, not incarceration. Undocumented immigrants who cause no harm may come to be viewed as valued members of the community, and not as criminals who must be repatriated to their mother countries.<sup>24</sup> A second commonality is a disentanglement of private ordering where such ordering blocks individuals from securing those basic capabilities necessary for a life worth valuing. A third virtue is that both theories of the human condition are forward and lateral looking. They do not display disdain for the wisdom of our betters. Instead they seek out ‘the progress that comes not from the teaching of an abstract law but by leading the friend, or child, or loved one – by a word, by a story, by an image – to see some new aspect of the case at hand, and thus better ways of doing things.’<sup>25</sup> The learning here is shot through with normativity. An experimental constitutionalist would do well to take away from development theory the realization that a commitment to a ‘core of capabilities’ need not undercut our ability, over time, to alter and to improve who we are – either through experiments, or through relationships with others.

## **B. Flourishing and Selves**

Flourishing is an essential feature of this book’s overall argument for four primary reasons: (1) it provides an understanding of human agency and morality that is not contingent on an outré metaphysics of free will; (2) it takes account of the heterogeneity of ways of being that give life meaning; (3) it fills a gap in experimentalist thought that makes experimental constitutionalism more coherent; and (4) it provides the most compelling account of how core basic law entitlements – such as Nussbaum’s Decalogue – can best be squared with the aspirations of our own constitutional democracy.



This section rehearses Chapter 2's account of selves and Chapter 3's account of the social so that we may more readily connect those two accounts to the ultimate pay-off: a theory of the constitutional that embraces both flourishing and experimentalism. Again: flourishing recognizes the centrality of granting individuals the capabilities 'to choose a life one has reason to value'. Various social endowments may have already made us who we are (or want to be) – a the capabilities approach should ensure that *the meaning that makes us* continues to do so. The densely populated or radically heterogeneous self may already possess the tools for critical self-engagement, for internal friction, and thus change that will better allow for our round pegs to fit into round holes. However, a commitment to the capabilities approach and development theory that undergird flourishing should create the material and immaterial conditions for sustained, constructive and progressive change (as measured by our own selves).

### 1. *The Situated Self*

This self is neither the rational chooser of classical economics nor the autonomous moral agent of classical liberalism or even most egalitarian forms of politics. Each self is best understood, in Dennett's terms, as a centre of narrative gravity (or in Walzer's idiom, a densely populated 'me'). Each such centre unifies a set of dispositional states (and a physical body) that draw down on the practices of the various communities – religious, cultural, linguistic, national, familial, ethnic, economic, sexual, racial, social (and so on) – into which that centre is born. As Heidegger writes:

[That shared practices are constitutive of our being] implies that the world is already given as the common world. It is *not* the case that there are first individual subjects which at any given time have their own world; and that the task of putting them together, by virtue of some sort of arrangement, ... one would have a common world. This is how philosophers imagine things when they ask about the constitution of the intersubjective. We say instead that the first thing that is given is the common world. ... We take pleasure and enjoy ourselves as one takes pleasure, we speak ... about something as one speaks.<sup>26</sup>

This view of the self (and the social) supports a number of pretty straightforward conclusions about the individual in South African constitutional politics.<sup>27</sup>

My account of self, consciousness and freedom, rightly understood, forces us to attend to the *arationality* of our most basic attachments and to think twice before we accord *our* arational attachments preferred status to the arational attachments of *others*.<sup>28</sup> Wittgenstein puts the matter plainly: 'What has to be accepted, the given, is, one could say – forms of life.'<sup>29</sup> Moreover, these theses regarding the self and the the social buttress my general contention that our constitutive attachments or particular ways of being in the world or forms of life possess a rebuttable presumption of legitimacy in our constitutional order. The freedom to be what we already are is freedom properly understood.

### 2. *The Experimental Self*

The recognition of the self as a function of arational, constitutive attachments does not mean that we must give each of these attachments our imprimatur of constitutional approval. As Walzer contends above, within the constraints of these social and natural endowments, we still possess the capacity to make critical assessments. Within the constraints of these



social and natural endowments, we still possess the capacity to make reasoned judgments about right and wrong, good and evil.<sup>30</sup> Indeed, the well-nigh innumerable attachments and dispositions that make up an individual provide each of us, and our society collectively, with the critical leverage necessary for discriminating between more and less valuable forms of behaviour. Sen has put the matter thus:

In some versions of communitarian thinking, it is presumed ... that one's identity with one's community must be the principal or dominant (perhaps even the only significant) identity a person has. This conclusion can be linked to two alternative – related but distinct – lines of reasoning. One line argues that a person does not have access to other community-independent conceptions of identity and to other ways of thinking about identity. Her social background, firmly based in 'community and culture', determines the feasible patterns of reasoning and ethics available to her. The second line of argument does not anchor the conclusion to perceptual constraints, but to the claim that ... communitarian identity will invariably be recognized to be of paramount importance.<sup>31</sup>

Just as I argued in Chapter 1, Sen rightly rejects the acritical, homogenizing communitarian account of the self on two grounds:<sup>32</sup>

First, even though certain cultural attitudes and beliefs may influence the nature of our reasoning, they cannot invariably determine it fully. There are various influences on our reasoning, and we need not lose our ability to consider other ways of reasoning just because we identify with, and have been influenced by membership in, a particular group. ... Second, the so-called cultures need not provide any uniquely defined set of attitudes or beliefs that can shape our reasoning. Indeed, many of these 'cultures' contain considerable internal variations, and different attitudes and beliefs may be entertained within the same broadly defined culture.<sup>33</sup>

If what Sen contends holds true about the capacity of the individual for critical reflection within particular cultures, then the radically heterogeneous or densely populated me who inhabits, contemporaneously, multiple communities will almost certainly possess (at least formally) somewhat greater capacity for critical reflection.

Both Sen and Nussbaum reject the acritical, homogenizing communitarian (as well as the utilitarian rational chooser) account of the self on a third, critical ground:

If we ask what people are actually capable to do and to be, we come much closer to understanding the barriers societies have erected against full justice for women [and other marginal groups]. [We] criticize approaches that measure well-being in [solely] terms of utility [or tradition values] by pointing to the fact that women [and persons in marginal groups] frequently exhibit adaptive preferences, preferences that have adjusted to their second class status. [Utilitarian] frameworks, which ask people what they prefer and how satisfied they are, prove inadequate to confront the most pressing questions of ... justice.<sup>34</sup>

It is this kind of person, the second-class person in society, made up of multiple selves with their varying narratives and dispositions, who truly requires the space created by experimental constitutionalism. For just as experimental constitutionalism is predicated upon the belief that best practices are more likely to surface within institutions and through doctrines designed to promote social experimentation, so too is our experimental self grounded in a belief that an

individual is more likely to alight on a preferred way of being in the world if provided the conditions – material and immaterial – under which to compare, contrast and critique different ways of being in the world.

### 3. *The Radically Heterogeneous Self*

The self understood as situated (or radically given) married to an experimentalist self – one that recognizes the multiple selves that make us up – leads to a self already recognized (albeit obliquely) in our constitutional jurisprudence: the radically heterogeneous self. As Justice Albie Sachs writes in *Fourie*:

South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.<sup>35</sup>

Read correctly, Sachs J recognizes that our differences do not separate us, or merely require tolerance. They form the basis for a profound recognition that individually we are *radically heterogeneous creatures* and that absorbing that challenge leads to richer more varied lives. The radically heterogeneous self demands a commitment to pluralism and its deep and profound appreciation for difference. From this commitment to a roughly egalitarian pluralist democracy, the politics not of the majority but of the individual, we derive a commitment to democratic solidarity. How so? Once we recognise our own difference, and demand its recognition by others, we have no coherent choice but to recognise the difference of others. To put it more pointedly, once we recognise the otherness of others and demand such recognition for ourselves, we are committed to a society in which every member can comfortably live out that difference.

### 4. *The Egalitarian Pluralist Self*

Does democratic solidarity commit us to egalitarian pluralism or some particular political order? Since labels tend to bar understanding, I would simply say, *again*, that this account of the self, the social and the constitutional commits us to a political order in which the space we demand for ourselves is fundamentally equal to the space required by others. If such space for flourishing requires – at this particular historical moment – significant redistribution of wealth, then so be it. But the bottom line, once you embrace a Senian, Nussbaumian, Sachsian, Whitmanian, or Walzerian commitment to democratic solidarity, is that you must be willing to afford others the material conditions in which they can recognise and express their difference. It is only through such a commitment, Sachs tells us, that we can forge a new nation.<sup>36</sup>

### C. Flourishing, Development, Capabilities and Constitutions

My rather modest account of flourishing flows from both conservative strains and revolutionary features found in our Final Constitution and from my accounts of the situated, experimental, radically heterogeneous and egalitarian pluralist selves (found in a situated, experimental, radically heterogeneous and socially democratic polity). These pre-commitments further commit me to the following propositions.

The conservative strain in this account emphasizes the fact that it is only in light of the various practices, forms of life or language games which social groups provide that we become anything that remotely approximates what we understand to be human. We often, incorrectly, speak of the social practices, endowments and associations that make up our lives as if we are largely free to choose them or make them up as we go along. I have suggested why such a notion of choice is not true of us as individuals and is equally untrue of social formations. To acknowledge that there is a 'radical givenness' to our social world and that 'meaning makes us' explains why 'conditioned choice' results in little or no explanatory power being lost when we substitute flourishing for freedom. As Walzer suggests, we ought to call such decisions to reaffirm our conditioned commitments 'freedom simply, without qualification'. We may even wish to follow Walzer at least part of the way when he concludes that such 'freedom' is 'the only "freedom" that free men and women can ever have'.<sup>37</sup>

The revolutionary strain in this account of flourishing recognizes that the social practices from which we derive meaning in our lives constrain our actions and often limit our ability to act in manner that we believe will enhance our own well-being and human flourishing generally. The revolutionary dimension of flourishing requires that issues of access, of coercion, of choice, of voice, of exit must be constantly negotiated in order to ensure that all members of our society have a meaningful opportunity to flourish. A reasonably equal and democratic society must mediate the radical givenness of our social life, on the one hand, and the aspirations of all of us to discriminate between those social forms of life which still fit and those which no longer reflect our (self)conception of flourishing and which continue to reinforce the social hierarchies that turn many of us into second-class citizens.

The constitutional insights to be drawn from the conservative and the revolutionary account of flourishing are much the same as those drawn from the naturalized account of the self in Chapter 2 and the naturalized account of the social in Chapter 3. Flourishing requires us to pay particular attention to the unchosen conditions of flourishing as well as the real space in which conditioned choice obtains. This understanding in no way diminishes our responsibility to engage in case-by-case analysis of rights claims made on behalf of those who inhabit such unchosen worlds. It does, however, sound a cautionary note that ought to be heeded by those who identify freedom – and not flourishing – as the ultimate trump and by those who would treat all such unchosen social associations as suspect and therefore as instruments to advance radically egalitarian (and non-pluralist) ends.

Experimental constitutionalism serves both strains of flourishing. First, all constitutional orders recognize the ineradicable 'private ordering' of social affairs. To that extent, constitutions are inherently conservative documents. (Our own Constitution conserved both the peace and the institutions that enable individuals to flourish while simultaneously

realizing a democracy designed to enable all South Africans to pursue, finally, ‘a life one has reason to value’.) Second, while this account begins with the premise that individual flourishing occurs primarily within the many communities into which an individual is born and within which she remains a member, experimental constitutionalism envisages a heterogeneous society made up innumerable ways of being in the world and a state that does not aim to exhaust the possibilities of individual lives. At a minimum, the experimental state enables individuals and groups to fully realize extant sources of the self. For just as experimental constitutionalism is predicated upon the belief that best practices are more likely to surface within institutions designed to promote social experimentation, so too is our experimental self grounded in a belief that an individual is more likely to alight on a preferred way of being in the world if provided the conditions under which to compare, contrast and critique different ways of being in the world. Put another way, at a minimum, an experimental constitutional state bears the dual responsibility of ruling out ways of being which threaten the core values of our polity – pluralism, dignity, rough equality, the rule of law and democratic participation – and of providing a framework within which competing notions of the good can coexist – if inevitably uncomfortably. To meet these minimal requirements, such a state must ensure that each denizen possesses the most basic material and immaterial entitlements and core of capabilities that would enable that person to flourish.

Does the above amount to a plausible account of flourishing under the South African Constitution? Sen’s developmental politics tends to dominate my discussion of dignity, political rights, collective entitlements and socio-economic rights because his concerns about distributive justice in radically heterogeneous societies fit my own concerns. However, Nussbaum’s Decalogue, and her direct application of the capabilities approach to constitutions, is somewhat more congenial to rights discourse. It is impossible to read Nussbaum’s Decalogue above and not see South African constitutional rights to Life; Freedom and Security of the Person; Equality; Housing; Land; Property; Freedom of Trade, Occupation and Profession; Freedom of Association; Freedom of Religion, Conscience, Thought and Belief; Freedom of Assembly; Freedom of Association; Political Rights; Freedom of Expression; and Socio-Economic Rights to Education, Health, Food, Water and Social Security. This partial list recognizes both the conservative flavour and the revolutionary character of flourishing. Moreover, most of the rights above can service both conservative and revolutionary ends. This confluence of capabilities and fundamental rights sets the stage for an argument which ties flourishing ever more tightly to our South African constitutional project.

## D. Flourishing and Fundamental Rights: Between Conservation and Revolution

### 1. *Dignity and Flourishing*

Trying to map ‘dignity’ on to ‘flourishing’ is fraught with danger. After all, ‘dignity’ is a constitutional grundnorm most readily associated with the deontological and reason-based ethics of Immanuel Kant. Flourishing, on the other hand, is most readily identified with Aristotle and his ethics of practical wisdom. Trying to ensure that these two views sing off the same hymn sheet courts contradiction. That need not be the case. It would

be more surprising if these two schools of thought did not share common features and prescribe common outcomes. As the work of Martha Nussbaum has shown, a neo-Aristotelian philosopher can translate flourishing into the patois of rights discourse in a modern constitutional order. We should recall that Nussbaum has argued that the primary purpose of any nation's constitution should be to 'secure for all citizens the prerequisites of a life worthy of *human dignity* – a core of capabilities – in areas of central importance to human life.'<sup>38</sup> (When a neo-Aristotelian philosopher places Kantian notions of dignity and intrinsic worth at the core of her concerns, we can start to see how two distinct traditions can be made to sing off the same hymn sheet.)

If we are not fully autonomous rational choosers or fully determined arational non-choosers, then what are we? We are creatures with the capacity to flourish. And that is to say, we are creatures endowed with worlds of meaning who possess the capacity for self-actualization and self-governance within those multiple worlds of meaning.

Notice again that freedom – strong metaphysical freedom – does not feature in the aforementioned account. Flourishing is freedom shorn of the latter's unhelpful metaphysical baggage.

As fate would have it, freedom – strong metaphysical freedom – is also not what the Final Constitution requires in order for human beings to flourish. What it requires, the text of the basic law and the Constitutional Court tell us, is, first-off, a commitment to human dignity. The Court has spent the first 17 years of operation spinning out a jurisprudence of dignity that begins with very modest premises, but ultimately bursts into a constellation of definitions and uses substantially richer and more robust.

One question, noted above, is whether dignity and flourishing can function as synonyms, or whether dignity is, in fact, a condition for flourishing. The answer must be the latter. One cannot flourish without first being accorded some minimal level of dignity. The more demanding requirements of our dignity jurisprudence – dignity *qua* self-actualization, dignity *qua* self-governance, dignity *qua* material conditions of existence – reflect three of the most important features of this account of flourishing. The Constitutional Court's commitment to these more maximal accounts of dignity leads me to conclude that a robust constitutional defence of dignity is a precondition for flourishing in an experimental constitutional state.

#### *a. Dignity Defined*

The Constitutional Court has proffered five related, but distinct definitions of dignity.<sup>39</sup> These five definitions draw down on the same basic insight: that all individuals are to be recognized and to be treated as ends in themselves.

##### *i. Dignity as a Condition for Flourishing*

The first two definitions of dignity are primarily negative. That is, they concern the conditions that prevent individuals from flourishing.

aa. *Individual as an end in herself*<sup>40</sup>

In working out the meaning of dignity, the Constitutional Court consciously shadows one iteration of Kant's the categorical imperative:<sup>41</sup> 'Act in such a way that you always treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end.'<sup>42</sup> Stated in Kant's uncompromising terms, such an ethical algorithm might seem impossible to enact.<sup>43</sup> We all know that, even with the best of intentions, many of the myriad interactions we have with our fellow human beings will be almost entirely instrumental. We know that whether we are taking decisions for a family, a classroom of students, a neighbourhood, a town, a province or a nation, some form of a utilitarian calculus – the greatest good for the greatest number – will enter into our considerations. And we know that the relational or communitarian quality of ethics is such that we will often privilege the claims of family, kin, neighbourhood or nation over more universal deontological or utilitarian claims.

How then to understand this injunction in a way that is neither sentimental nor woolly? Consider Oscar Schachter's gloss: 'Respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated *merely* as instruments or objects of the will of others.'<sup>44</sup> Dignity, by this account, sets a floor below which ethical – and legal – behaviour may not fall. Although some relationships will be purely instrumental, no individual person can be treated as a mere instrument over the *entire* domain of her social interactions. This floor supports – as the *Dawood* Court suggests – the Bill of Rights' express prohibitions on slavery, servitude and forced labour.<sup>45</sup> This definition of dignity also bars punishments that either extinguish entirely the humanity of another – say, through the death penalty or through the disproportional reduction of a human being to a mere signal within a large and impersonal system of social control.<sup>46</sup>

bb. *Equal concern and respect*

Under South Africa's Constitution, dignity as an entitlement to equal concern and to equal respect has led to the construction of two different, though not entirely distinct, tests in terms of s 9 (the right to equality): (1) a right to equal treatment which ensures (a) that the law does not irrationally differentiate between classes of person, and (b) that the law does not reflect the 'naked preferences' of government officials; and (2) a right to equal treatment that guarantees that individuals are not subject to unfair discrimination on the basis of largely ascriptive characteristics.<sup>47</sup> Of this demand for equal respect, Justice Ackermann writes:

[A]t the heart of the prohibition of unfair discrimination lies the recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership in particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.<sup>48</sup>

ii. Dignity as Constitutive of Flourishing

While the third and the fourth dimensions of dignity provide political conditions for flourishing, they are, in fact, constitutive of flourishing itself.

aa. *Self-actualization*

An individual's capacity to create meaning generates an entitlement to respect for the unique set of ends that the individual pursues. In *Ferreira v Levin*, Justice Ackermann writes:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.<sup>49</sup>

Dignity, properly understood, secures the space for self-actualisation.<sup>50</sup>

Dignity *qua* self-actualisation, consistent with my view of self and consciousness, describes only a political or an economic status, and not an outré metaphysical state.<sup>51</sup> Justice Ngcobo adopts this materialist and constitutive view in *Affordable Medicines*.<sup>52</sup> In elucidating the appropriate contours of the right to freedom of trade, occupation and profession, he opines:

What is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on *human dignity* as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's *dignity*. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence.<sup>53</sup>

bb. *Self-governance*

Our capacity for self-governance is largely what makes democracy the only acceptable secular form of political organization in modernity. For if we are capable of shaping our own ends as individuals, equal treatment demands that we be able to shape the contours of our community as citizens. At a minimum, it means that we must be able to participate in some of the collective decision-making processes that determine the ends of our community. As Justice Sachs notes in *August v Electoral Commission*:

The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of *dignity* and of personhood. Quite literally, it says that everybody counts.<sup>54</sup>



Dignity *qua* self-governance ought to promote the Court's commitment to representation-reinforcing processes – most notably where our democratic institutions cannot be profitably exploited by vulnerable minorities, historically disadvantaged individuals and other out-groups. While *Prince, Jordan, Robinson* and *De Reuck* sound cautionary notes about the extent to which the Court will extend itself on behalf of non-traditional associations, vocations or professions,<sup>55</sup> more recent cases such as *Fourie* and *Shilubana* suggest that the Court may be willing to walk the 'extra mile' in order to accommodate non-traditional and even revolutionary ways of being in the world.<sup>56</sup>

### iii. Dignity and the Material Conditions for Flourishing

In a series of unfair discrimination and socio-economic rights cases, the Constitutional Court has made it clear that our commitment to dignity does not flow entirely from the inalienable rights of individuals. Whether it has engaged the stigma associated with HIV/AIDS, the urgent need for shelter, the entitlement of all to adequate food and water, or the desperation associated with summary evictions, the Constitutional Court has, over the past several years, repeatedly emphasized the fact that

It is not only the *dignity* of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society *as a whole* is demeaned when state action intensifies rather than mitigates their marginalization.<sup>57</sup>

Dignity is not simply a constellation of negative duties owed by the state to each human subject, or a set of positive entitlements that can be claimed by each member of the polity. Dignity is also that which binds us together as a community of equals – and it occurs only under conditions of mutual recognition. Moreover, such mutual recognition is not merely formal.<sup>58</sup> Justice Mokgoro, writing for the Court in *Kbosa*, notes that the Final Constitution commits us to an understanding of dignity in which

wealthier members of the community view the ... well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.<sup>59</sup>

The Court's account of dignity, which has, heretofore, offered various desiderata for individual moral agency, now appears to describe dignity as a collective good. How then to comprehend dignity as a collective concern? What the Court wishes us to understand is that for dignity to be meaningful in South Africa, the political community as a whole must provide that basket of goods – from the social security at issue in *Kbosa* to such basic civil and political rights as expression and association – which each member of the community requires in order to exercise a fairly basic level of agency. This conception of dignity possesses striking similarities to Amartya Sen's development theory and Martha Nussbaum's capabilities approach.

For Sen, as for our Constitutional Court, the primary concern of the polity is not with wealth maximization. 'Wealth', as Aristotle wrote, 'is evidently not the good we are seeking; for it is merely useful and for the sake of something else.'<sup>60</sup> That something else, as Sen writes, is

[t]he expansion of the ‘capabilities’ of persons to lead the kinds of lives they value – and have reason to value. ... Having freedom to do the things one has reason to value is (1) significant in itself for the person’s overall freedom, and (2) important in fostering the person’s opportunity to have valuable outcomes.<sup>61</sup>

However, Sen’s aims are not limited to fostering the agency of the individual. Individual agents should be understood both as ends in themselves and as the ‘basic building blocks’ of aggregate social development. The ‘greater freedom’ of individuals not only ‘enhances the ability of people to help themselves and ... to influence the world’, it is essential to the development of society as a whole.<sup>62</sup> For Sen, the link between individual capabilities and development is part of a virtuous circle. Enhancement of individual flourishing – by both political and material means – leads to greater social development, which, in turn, further enhances the possibilities for individuals to lead the kinds of lives we have reason to value.<sup>63</sup>

This virtuous circle would appear to be what the Constitutional Court in *Kbosa* has in mind when it ties the well-being of the worst off to the well-being of the wealthy. The enhancement of individual capabilities of the poorest members of our political community enhances the development of South Africa as a whole. Or put slightly differently, the greater the agency of the least well-off members of our society, the greater the agency of all the members of our society. This gloss on *Kbosa* emphasizes not the subjective sense of well-being that the well-off might experience by tying their well-being to that of the poor. Rather it emphasizes an increase in an objective measure of well-being (say, on an OECD *Better Life Index* that measures the quality of life) that flows from the enhancement of the agency of each individual member of our society.

*b. Widening Gyres of Dignity and Flourishing*

We may be able to see, now, how dignity builds upon a simple premise, the refusal to turn away from suffering, and yields, ultimately, a realm of ends. The refusal to turn away marks the very beginning of our moral awareness – the first time we come to understand that others are not mere instruments for the realization of our desires, but beings who are ends in themselves. This moral awakening leads, almost ineluctably, to two further insights: (a) that others are entitled to the same degree of concern and respect that we would demand for ourselves; and (b) that others are entitled to that equal respect and equal concern because they, like us, are possessed of faculties and talents that enable them to pursue ends which give their lives meaning.<sup>64</sup> The ability to give our lives meaning, and to determine the course by which we give our lives meaning, leads to the recognition that we are able to govern our selves. At a minimum, this mutual recognition of our ability to govern our selves supports the more formal political recognition that just as each one of us is capable of and entitled to govern our individual self, so too are we equally capable of legislating on behalf of the broader community of which we each are a member. This mutual recognition of one another as beings capable of ordering the ends both of our own lives and of the larger community underwrites the final insight: that we not only live in a realm of ends, but that if such a realm is to have real meaning, we must be willing to order our community in a manner that enables each individual to realize her status as an end. It is simply not enough to (a) not turn

away from suffering, (b) end discrimination, and (c) grant all citizens the franchise. Once we recognize others as ends we must be committed to the provision of those material means necessary to live as ends. To refuse them such means might render meaningless the more formal guarantees found in the Final Constitution. As the Court notes in *Grootboom*:

The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.<sup>65</sup>

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 – is, perhaps, nowhere more evident than in the Court's sexual orientation case law. The Constitutional Court began slowly, dispatching laws proscribing sodomy as a violation of intimate or private space.<sup>66</sup> The Court goes on to reject laws that impair the ability of same-sex partners to live – private lives – within South Africa.<sup>67</sup> It then abolishes laws that refuse to extend public benefits to the surviving same-sex life partner of a judicial officer.<sup>68</sup> Until finally, the dignity of same-sex partners is understood to be as important a public matter as it is private, and the basic law sanctions heterosexual and homosexual unions alike.<sup>69</sup>

It seems reasonable to ask, at this juncture, whether the Constitutional Court's jurisprudence on sexual orientation reflects a genuine commitment to flourishing or the mere logical extension of Court's liberal commitment to state non-intervention (and the actual pressures of the text). One can accept the truth of the proposition that the Constitutional Court recognizes the link between dignity and the need for individual liberty from state intervention without acceding to the proposition that dignity is *only* about the need for individual liberty from state intervention.

For example, as we saw above, Sen ties his notion of 'development as freedom' to the provision of a basic basket of goods – both real and figurative – that enable human beings to develop those capabilities necessary for each individual to achieve those ends that each has reason to value.<sup>70</sup> Sen contends that dignity and freedom and equality, rightly understood, are meant neither to achieve definitive outcomes nor to prescribe a univocal understanding of the good. What these covalent values do require is a level of *material* support (eg, food) and *immaterial* support (eg, civil liberties) that enable individuals to pursue a meaningful and comprehensive vision of the good – as they understand it.<sup>71</sup> Put another way, these covalent values describe the political and material conditions for individual flourishing – as well as some of the polity's general features.<sup>72</sup> Nussbaum is not content to let matters rest there. Her Decalogue of capabilities is meant to take the fight to constitutional lawyers and legal philosophers. Her list, as she acknowledges, will not secure universal consent. But the use of the capabilities approach to ground constitutional theory alters the terrain of constitutional debate and forces other scholars to show how their preferred list of capabilities would lead to flourishing. By so doing, she secures a degree of acceptance for capabilities as a departure point for future arguments about the content of constitutional norms.

In the pages above, we saw that the Court has moved beyond a minimalist understanding of dignity, and a negative conception of liberty, to something richer and more substantial: flourishing. In *Grootboom*, the Constitutional Court announced: ‘A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on dignity, equality, and freedom.’<sup>73</sup> In *Kbosa v Minister of Social Development*, the Court commits the state to the provision of actual resources, social assistance, to an identifiable class of persons – permanent residents. In so doing, the Court moves well beyond dignity as negative liberty to a vision of dignity in which ‘wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole’.<sup>74</sup>

Dignity *qua* collective responsibility for material agency moves us towards a Sen-like development theory and a Nussbaum-like capabilities approach. Moreover, it does so without being susceptible to the critique of dignity *qua* negative liberty leveled by exponents of substantive equality. Development theory and the capabilities approach each define equal treatment in terms of the provision of differently situated persons with the material and immaterial means that they, in particular, require to pursue some specific vision of the good.<sup>75</sup> For example, Sen argues that since pregnant women need more nutrition than men, any basic food program is obliged to recognize this difference in a basic nutritional package.<sup>76</sup>

Dignity *qua* collective responsibility modeled on a capabilities approach also appears to answer the charge that a commitment to rough equality re-inscribes the disadvantage of those who find themselves in a state of injury. A capabilities approach does not underscore the lack of freedom of our fellow citizens, nor call undue attention to their injury, so much as it demands that we recognize that all of us require a roughly similar basket of goods in order to pursue our preferred way of being in the world.

## 2. *Civil Rights and Flourishing*

As with dignity, political and civil rights make possible both the conservative and the revolutionary dimensions of flourishing. Take ‘Freedom of Assembly’. I have argued that this modest freedom actually allows citizens a space to stand outside the Constitution, and where the Constitution *qua* social contract has been breached, vouchsafes the people a constitutional right to rebellion.<sup>77</sup> Organized labour, landless people, anti-privatisation movements, students, squatters, and advocates for every form of socio-economic good continue to use demonstrations to press their demands for delivery on the Constitution’s promises (at a rate of almost 6, 000 protests per year).

The continued vitality of assembly in the still newish South Africa bespeaks its essential role in any democracy.<sup>78</sup> Assemblies and demonstrations, on the standard account, generate debate and thereby improve our deliberative processes. (Nor is it, frankly, an accurate reflection of post-1994, post-apartheid South Africa.) That they may do. But an emphasis on the ostensibly deliberative nature of our democracy is simply not in keeping with this book’s dominant mode of analysis. What assemblies and demonstrations really force us to do is attend to situations where power – inequality in power, abuse of power – has distorted our capacity to engage in meaningful discourse, and has valorised the interests (and conceptions

of flourishing) of one segment of our polity over another. Arid, academic arguments often miss much of that which makes assemblies, demonstrations, pickets, processions and marches truly dynamic and powerful. That is the nature of the crowd. The crowd draws its power, as Cannetti notes, from its erasure of borders between individuals, the gravitational pull that an expanding, living, moving group has on those around it, and the incipient threat of violence that causes all around to sit up and take notice.<sup>79</sup> Crowd action – loud, noisy, disruptive and sometimes dangerous – ought to be viewed, as Larry Kraemer persuasively argues, as a direct expression of popular sovereignty.<sup>80</sup> By creating space for crowd action, FC s 17 vouchsafes a commitment to a form of democracy in which the will of the people is not always mediated by political parties and the elites that run them. Cannetti's and Kraemer's observations, and my insistence upon a constitutionally recognized right to rebellion, suggest why, in South Africa, assemblies remain a potent tool for revolutionary flourishing.

On the flip-side stands 'Freedom of Association'. Associations serve both conservative strains of flourishing and revolutionary dimensions of flourishing. Because associations are essential for both the creation and the maintenance of identity, we should tread very carefully when we decide which associations merit constitutional solicitude. The conservative dimension protects the existing stores of social capital in various forms of bonding networks.<sup>81</sup> It allows them to determine rules for entry, for membership, for voice, and for exit – so that that they may (largely unencumbered) pursue the ends that give their lives meaning. The revolutionary dimension ensures that out-groups – say Rastafarians – are able to challenge (as sub-publics) the dominant mode in which members of our polity see themselves and others. These counter-republics or sub-publics contain the seeds for growth and the means for change – for individuals and society alike. The revolutionary dimension also allows, as discussed above in Chapters 3 and 4, courts that adopt a remedial equilibration approach to rights analysis to (a) find private conduct anathema to considerations of equality and dignity unconstitutional, (b) require traditional communities and conservative associations, along with the state, to provide their 'second class' members a meaningful (read material) opportunity to exit and to create or to join other sub-publics more likely to facilitate their flourishing, (c) without necessarily dismantling these communities or associations by substantially altering their rules regarding membership, voice and exit.

'Freedom and Security of the Person' may well be described as a prerequisite for flourishing. The Constitutional Court and lower courts have certainly viewed it as such as they have gone about revolutionizing two distinct bodies of law: (a) the common law of delict in the context of state liability for wrongful behaviour; and (b) the state's regulation of abortion. In both *Carmichele v Minister of Safety and Security*<sup>82</sup> and *K v Minister of Safety and Security*,<sup>83</sup> the Constitutional Court found that that the right to dignity and the right to freedom and security of the person imposed positive duties on the state to prevent violations of physical integrity, in particular rape and other forms of sexual abuse. The *Carmichele* Court writes:

In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence.

... Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.<sup>84</sup>

What ties both *Carmichele* and *K* together, and what distinguishes them from other instances in which the state fails to discharge its responsibilities in terms of FC s 12, is the Court's concern with the dignity of women and the systemic violence to which they continue to be subject. The Court recognizes that so long as the law permits women to be treated as objects, and in particular, allows the state itself to indulge in this kind of abuse, women will never be able to flourish fully.<sup>85</sup>

The Final Constitution's concern for the dignity and the security of women takes a very specific form in FC s 12(a). FC s 12(a), unlike its predecessor in the Interim Constitution, embraces a woman's right 'to make decisions concerning reproduction'.<sup>86</sup> Although the Constitutional Court has yet to expressly vindicate the right to an abortion, two High Courts have heard, and rebuffed, challenges to the statutory expression of this right in the Choice on Termination of Pregnancy Act.<sup>87</sup> In *Christian Lawyers II*, Mojaelo J held that FC s 12(2)(a) and (b) guarantees the right of every woman to determine the fate of a pregnancy.<sup>88</sup> Against the backdrop of an extremely patriarchal society, one cannot discuss seriously the capacity of South African women to flourish unless they possess reproductive autonomy.

Our right to privacy draws down on two notions associated with dignity: (a) the entitlement of the individual to be treated as an end in herself, and (b) the right to pursue some semblance of self-actualization. The former dimension of the right to privacy provides a floor below which no form of flourishing is possible. The second dimension constitutes, especially in Western society, a significant feature of flourishing itself: the freedom – especially from state intervention – to be what we want to be and to do what we want to do. Didcott J, writing for a majority in *Case & Curtis*, stated that:

What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the state. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which ... the ... Constitution guarantees that I shall enjoy.<sup>89</sup>

### 3. *Community Rights and Flourishing*

In the heady days following the fall of the Berlin Wall in 1989, it seemed possible that we might be able to have our cake and eat it too. Velvet revolutions in Eastern Europe and South Africa offered evidence that we were all 'social democrats' now. More amazing still, separatist claims were resolved either through partition – as occurred with the neat cleavage of Czechoslovakia into the Czech Republic and Slovakia – or through public referenda in which minority communities concluded that it would be best if they did not withdraw from the polity of which they were currently members – as occurred in both French-speaking Quebec in Canada and in white populations throughout South Africa. The two great strains of political enlightenment thought – the individualism of Locke and the American Revolution and the romanticism of Rousseau and the French Revolution – seemed to have finally played themselves out with the end of the Cold War. We suddenly found our selves free to be 'me' and 'we': the very definition

of flourishing. That is, each individual could freely be her many selves (in an order of priority largely left to the citizen herself), maintain her affiliations with the associations that made such selves possible, and not have to worry that the state would force her to choose one of her identities over all others.

But within five years, from 1989 to 1994, the cheery optimism with which we (global citizens) greeted placards in Prague and Pretoria bearing the words 'Freedom', 'Truth' and 'Justice' morphed into something decidedly more modest.<sup>90</sup> Yugoslavia disintegrated into a war of all against all. In Rwanda, Hutus agreed to beat their machetes into ploughshares only after they had already hacked almost a million Tutsis to death. Something had changed. Or more accurately, we had missed something – in this brief epoch – along the way. Today, too many nations still seemed inclined to use the machinery of the state to eliminate alternative and non-dominant ways of being in the world.

Three hundred and fifty years ago, Locke's *A Letter on Toleration* suggested that we could end civil wars and other kinds of internecine strife by denying the state the right to dictate that its citizens conform their behaviour to a comprehensive (and totalizing) vision of the good and by ensuring that the state accorded religious, cultural and linguistic groups sufficient autonomy to pursue their own preferred way of being in the world. Was he wrong? Again, what had we missed? What he missed is the difference between a politics of respect that issues from claims grounded in individual human dignity and a politics of difference that issues from claims grounded in equal group recognition. And that is exactly the difference between a politics that can accommodate both the right to be 'me' and the right to be 'we' – and one that fails to do both. It may well be that, in many societies, individual liberty, multicultural recognition and nation building are incompatible. Indeed, for a society in transition, multicultural recognition and national identity formation appear to pull in opposite directions. For even if some aspects of individual identity are formed in open dialogue, the set of identities that constitute the individual are still largely shaped and limited by a pre-determined set of scripts. Collective recognition becomes important, in large part, because the body politic has denied the members of some group the ability to form – on an individual and collective basis – a positive identity. In a perfect world, the elimination of group-based barriers to social goods would free individuals to be whatever they wanted to be.

But even in a perfect world, claims for group recognition and flourishing do not dissipate so readily. What about the demand for group recognition – for collective flourishing? In any multicultural society, two different kinds of claims for equal respect and two different senses of identity sit uncomfortably alongside one another. The first emerges from what Charles Taylor calls a politics of equal dignity.<sup>91</sup> This form of politics is predicated on the idea that each individual human being is equally worthy of respect. The second issues from a politics of difference. This form of politics tends to revolve primarily around the claim that every group of people ought to have the right to maintain its own equally respected community. The important distinction between the two is as follows. The first focuses on what is the same in all of us – that we all have lives and hopes and dreams, and that we should all be granted the opportunity and the means to pursue them. The second



focuses on a specific aspect of our identity, our membership in a group. According to this second demand, the body politic ought to nurture or foster that particularity. The power of this second form of liberal politics springs largely from its involuntary character – the sense that we have no capacity to choose this aspect of our identity. It chooses us.<sup>92</sup> One of the problems South Africa faces is that it is difficult, if not impossible, to accommodate both kinds of claim. As Taylor himself notes, while ‘it makes sense to demand as a matter of right that we approach ... certain cultures with a presumption of their value ... it can’t make sense to demand as a matter of right that we come up with a final concluding judgment that their value is great or equal to others’.<sup>93</sup>

But the demand for political recognition of distinct religious, cultural and linguistic communities often amounts to that second demand. Moreover, such recognition often reinforces a narcissism of minor difference that, in turn, provokes anxiety about the extent to which members of other groups secure access to the most important goods in a polity. Such anxiety about a just distribution of goods – and the manner in which group affiliation distorts that distribution – necessarily interferes with national identity formation. The African National Congress (ANC) has, for both historical reasons and for reasons associated with its vision of transformation, refused to lend significant support to group politics. (Whatever their failings may be in execution, Black Economic Empowerment and Broad-Based Black Economic Empowerment initiatives are clearly designed to secure redress for the large-scale disenfranchisement of the majority of South Africans under apartheid. They are largely protected by s 9(2) of the Constitution.) The Constitutional Court is also predisposed towards claims of equal respect grounded in a politics of equal dignity.<sup>94</sup>

Should we, like the ANC, the Constitutional Court and Sen, be group identity sceptics? Sen contends that:

Our shared humanity gets savagely challenged when the manifold divisions in the world are unified into one allegedly dominant system of classification – in terms of religion, or community, or culture, or nation, or civilization (treating each as uniquely powerful in the context of that particular approach to war and peace). The uniquely partitioned world is much more divisive than the universe of plural and diverse categories that shape the world in which we live. It goes not only against the old-fashioned belief that ‘we human beings are all much the same’ ... but also against the less discussed but much more plausible understanding that we are diversely different. The hope of harmony in the contemporary world lies to a great extent in a clearer understanding of the pluralities of human identity, and in the appreciation that they cut across each other and work against a sharp separation along one single hardened line of impenetrable division.<sup>95</sup>

That much seems incontestable. Totalizing views of identity (with their ostensibly comprehensive visions of the good) have led to a hardening of boundaries between groups. The hardening of boundaries has led, in turn, to a hardening of hearts that enables many communities or groups with claims to nationhood to pillage, bomb and plunder other subpublics with increasingly greater abandon. The end of history has receded from view.

The more difficult question for group identity sceptics in South Africa is how to draw down on our constitutive attachments in a manner that both protects the social capital we require to

build the many institutions that make us human and simultaneously prevents specific religious, cultural and linguistic communities from using that social capital to undermine our 'more perfect union'. Here Sen knows that he is in trouble, but can only state the problem thus:

The sense of identity can make an important contribution to the strength and the warmth of our relations with others, such as our neighbours, or members of the same community, or fellow citizens, or followers of the same religion. Our focus on particular identities can enrich our bonds and make us do things for each other and can help us to take us beyond our self-centred lives ... [But] ... [t]he well-integrated community in which residents do absolutely wonderful things for each other with great immediacy and solidarity can be the very same community in which bricks are thrown through the windows of immigrants who move into the region from elsewhere. The adversity of exclusion can be made to go hand in hand with the gifts of inclusion.<sup>96</sup>

Sen's last sentence is telling – '*can* be made to go hand in hand'. Not must, not inevitably, and certainly not ought. But again, Sen's invocation of diverse difference (within individuals, as within nations) and his ringing defence of the freedom to think critically about our multiple identities does not do the hard work – the line drawing and the rule making – that constitutional law requires.<sup>97</sup> Here, at least, is one place where the Constitutional Court's jurisprudence offers us useful guidance as to how the state ought to engage the religious, cultural and linguistic communities that make up the state and how those communities ought to engage one another. In *Fourie*, the Constitutional Court found that while the state could not continue to enforce common-law rules and statutory provisions that prevented same-sex life partners from entering civilly sanctioned marriages, the Final Constitution had nothing immediate to say about religious prohibitions on gay and lesbian marriage and could not be read to require religious officials to consecrate a marriage between members of a same-sex life partnership.<sup>98</sup> The *Fourie* Court writes:

[The amici's] arguments ... underline the fact that in the open and democratic society contemplated by the Constitution ... the religious beliefs held by the great majority of South Africans must be taken seriously. For many believers, their relationship with God or creation is central to all their activities. ... It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. ... For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation. ... Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes ... In the open and democratic society contemplated by the Constitution there must be mutually respectful coexistence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom ... . The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that

at the same time enables government to function in a way that shows equal concern and respect for all.<sup>99</sup>

The *Fourie* Court commits itself to five propositions that are fundamental for flourishing, generally, and for religious, cultural and linguistic community rights, in particular. First, religious, cultural and linguistic communities are a critical source of meaning for the majority of South Africans. Second, religious, cultural and linguistic communities create institutions that support the material, intellectual, ethical and spiritual well-being of many South Africans. Third, religious, cultural and linguistic associations, as part of civil society, play an essential role in mediating the relationship between the state and its citizens. Fourth, while religious, cultural and linguistic associations are entitled to articulate – and make manifest through action – their ‘intensely held world views’, they may not do so in a manner that unfairly discriminates against other members of South African society. Fifth, although the ‘intensely held world views’ and practices of various religious, cultural and linguistic associations must, by necessity, exclude other members of South African society from various kinds of membership and of participation, such exclusion may not necessarily constitute unfair discrimination.

The easy question is whether communities possess the power to exclude members who initially agree to follow the rules of the community, but then subsequently refuse to do so?<sup>100</sup> Of course they do.

The hard question is whether South African society as a whole would be better off if it eliminated those exclusionary practices that not only remove non-compliant individuals, but prevent other individuals – who begin as outsiders – from gaining entrance into the community. The answer to this hard question turns primarily on access to those goods which individuals require in order to flourish. In 21st-century social-democratic states – such as South Africa – there are no hard and fast lines between the public sphere and the private sphere (and the various goods they provide to individuals). The result is that the Final Constitution affords no easy answers about what remains in the private domain and thus subject to some constitutional pre-commitment to non-interference. (Even questions of sexual intimacy, as the *Jordan* Court made clear, are matters of public interest.) Instead, the Final Constitution and super-ordinate legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act are primarily concerned with questions about individual and group access to the kind of goods that enable us to lead lives worth valuing.

Sen, for his part, is sceptical of the value of many forms of exclusionary and discriminatory behaviour practised by some religious, cultural and linguistic communities. The virulence and the ubiquity of such practices led Sartre to remark that the anti-Semitism of European Christianity and Nazi Germany ‘makes the Jew’.<sup>101</sup> (By this, Sartre meant that the dominant and the discriminatory script of Christian Europe denied the Jew the most basic features of humanity: not that Sartre had much sympathy for the Jewish community.) But this critical stance toward the exclusionary practices of many communities does not commit us to the proposition that all of these exclusionary practices are constitutionally infirm. (Nor does it commit us to the proposition, relatively transparent in Sartre’s tepid brief against anti-Semitism, that there is nothing of value left in Judaism once one dispenses with the

discriminatory script of Christian Europe.) As I have argued at length elsewhere,<sup>102</sup> and as Sen recognizes,<sup>103</sup> no form of meaningful human association – marriages, nuclear families, extended families, friendships, burial societies, trade unions, neighbours, neighbourhood security watches, political parties, bowling clubs, political action groups, stokvels, corporations, non-governmental organizations, professional regulatory bodies, charities, guilds, churches, synagogues, mosques, temples, schools, parent teacher committees, school governing bodies, co-op boards, foundations, trusts – is possible without some form of discrimination.<sup>104</sup>

The critical question – as the *Fourie* Court notes – is whether such discrimination rises to the level of an unjustifiable impairment of the dignity, and thus the impairment of the capabilities and the flourishing, of some of our fellow South Africans. Again: *this question turns on access to the kinds of goods that enable us to lead lives that allow us to flourish*. It is easy to conclude that golf clubs that have been the bastion of white male Christian privilege must open their doors to persons of all colours, all sexes and all religions. But what of the large stores of social (and hard) capital that have been invested in such institutions, and what of that capital which continues to offer the possibility of significant returns to the original members (and future members)? What of stokvels that provide access to capital to members of a community – but not to outsiders? What of religious secondary schools that discriminate on the basis of an applicant's willingness to accept a prescribed religiously inflected curriculum and that, at the same time, offer a better education than that generally available in our public schools? It would be foolish to dismantle such institutions solely on the grounds that either some form of exclusion takes place or that some re-inscription of privilege occurs.<sup>105</sup> Almost all meaningful human labour occurs within the context of self-perpetuating social networks of various kinds. We must be alive, as Nancy Rosenblum contends, to the problem of moral and cognitive 'spillover': not all associations possess the same virtues and vices, and to assume that they do leaves us open to charges of transmission-belt sociology (ie, if it's bad there, it must be bad everywhere).<sup>106</sup> Taking a sledgehammer to social institutions that create and maintain large stores of real and figurative capital is a recipe for a very impoverished polity. The hard question thus turns on the extent to which religious, cultural and linguistic communities – or any strong bonding network – can engage in justifiable forms of discrimination in the furtherance of constitutionally legitimate ends and the extent to which the state and other social actors can make equally legitimate claims on the kinds of goods made available in these communal formations that cannot be accessed elsewhere.

This concern about inegalitarian arrangements found within various religious, cultural and linguistic communities is not limited to exclusionary practices. Quite often, or often enough, members of religious or cultural communities will complain that their own community's 'traditional practices', when married to a constitutionally recognized claim of group autonomy, perpetuate systemic discrimination and structural disadvantage. In other words, the rules of entrance and voice and exit of a community may well preclude the flourishing of various extant members of the community – in the main, women. Take, for example, the experience of women within the federally and legally autonomous Pueblo tribe in the United States. Under Pueblo law, Pueblo women – but not Pueblo men – are expelled if they intermarry; only women who intermarry lose residency rights (for themselves and their children), voting

rights, and rights to pass their tribal membership on to their children, along with related welfare benefits that are tied to tribal membership.<sup>107</sup>

Julia Martinez and other women within the Santa Clara Pueblo community challenged these tribal laws as violations of both the federal equal protection clause and the Indian Civil Rights Act. The latter reads as follows: 'No Indian tribe in exercising powers of self-government shall ... deny to any person within its jurisdiction the equal protection of the laws.'<sup>108</sup> What is remarkable about the US Supreme Court's judgment in *Santa Clara Pueblo v Martinez* is that although the Court refused to grant tribal authorities absolute sovereignty over affairs within their jurisdiction, the *Martinez* Court was still willing to grant them sufficient autonomy to deny half of their members the equal protection of the law.<sup>109</sup>

The Constitutional Court has had somewhat greater success in mediating such disputes in a number of challenges to rules of customary law. (However, a sizeable number of South Africans differ on whether these new constitutional norms justifiably displace traditional – read African – forms of life.) In *Bhe v Magistrate, Khayelitsha & Others*, the Court found that the customary law rule of male primogeniture impaired the dignity of, and unfairly discriminated against, the deceased's two female children because the rule and the other impugned provisions prevented the children from inheriting part of the deceased's estate.<sup>110</sup> However, it is the manner in which the *Bhe* Court negotiates two different kinds of claims for equal respect, and two different forms of flourishing, that is most instructive for our current purposes.

The *Bhe* Court begins with the following bromide: customary law provides a comprehensive vision of the good for many South African communities that warrants some level of constitutional solicitude. However, the new-found constitutional respect for traditional practices does not immunize them from constitutional review.<sup>111</sup> Everyone – whether traditional leader or Constitutional Court judge – must locate any putatively valid justification of extant customary law in the provisions of the Final Constitution. Customary law has not, the *Bhe* Court then ruefully observes, evolved to meet either the changing needs of the community or the dictates of the Constitution. It fails African widows because: '(a) ... social conditions frequently do not make living with the heir a realistic or even a tolerable proposition; (b) ... the African woman does not have a right of ownership; and (c) the prerequisite of a good working relationship with the heir for the effectiveness of the widow's right to maintenance', as a general matter, no longer exists.<sup>112</sup> The Court takes care to note that the fault for this arrested development lies outside traditional communities. Ruptures within traditional ways of life – caused by apartheid, the hegemony of western culture and capitalism – have prevented the law's evolution.<sup>113</sup> This aside sets the stage for the delivery of the *Bhe* Court's coup de grace: that 'the official rules of customary law of succession are no longer universally observed'.<sup>114</sup> The trend within traditional communities is toward new norms that 'sustain the surviving family unit' rather than those norms that re-inscribe male primogeniture. By showing that the spirit of succession lies in its commitment to family cohesion, that the traditional family no longer coheres as it once did, and that the 'distorted' rules of customary law are frozen in apartheid-era statute and case law that 'emphasises ... patriarchal features and minimises

its communitarian ones', the *Bhe* Court closes the gap between constitutional imperative and customary obligation.<sup>115</sup> Had customary law been permitted to develop in an 'active and dynamic manner', it would have already reflected the *Bhe* Court's conclusion that 'the exclusion of women from inheritance on the grounds of gender is a clear violation of ... [FC s] 9(3)'.<sup>116</sup> Had customary law not been allowed to ossify, traditional communities would have noted how male primogeniture entrenched 'past patterns of disadvantage among a vulnerable group' and endorsed the *Bhe* Court's re-working of customary understandings of the competence 'to own and administer property' in a manner that vindicates a woman's right to dignity under FC s 10. In this way, the *Bhe* Court is able to assert that traditional communities have conceptions of dignity worth protecting without being obliged to endorse a rule that quite clearly offends the dignity interests of many women and female children within those communities.

These inquiries into both the physical coercion and the non-physical coercion of children and adults by the practices of conservative religious and cultural communities are united by considerations of exit. The Constitutional Court has shown itself to be quite adept at distinguishing circumstances in which neither child nor adult can meaningfully vote with their feet, and thereby flourish, from those instances in which adults willingly remain members of traditional communities in which their rights and privileges may well be subordinate to the rights and the privileges of other members of the community.<sup>117</sup> The Court's ability to distinguish the objective conditions of second-class citizenship from the subjective decisions of equal citizens has blunted critics of religious and cultural communities who attribute 'false consciousness' to any individual or group of individuals, subject to discrimination, who remain within their community's traditional confines.<sup>118</sup>

Finally, I have repeatedly noted how the disentanglement of private ordering through remedial equilibrium offers the Court a broad array of remedies when mediating discriminatory practices and relationships *within* a given community or association. The use of remedial equilibration recognizes that the road from the totalizing, degrading and criminal policies of the apartheid state to the egalitarian pluralist regime anticipated by our Final Constitution is not straight. We will have unadulterated successes. We will experience shameful false starts: our long-standing blindness to the ravages of HIV/AIDS;<sup>119</sup> our willful inability to fashion a new state apparatus prepared to deliver adequate basic services to the majority of its denizens; and an elite currently so inured to the suffering of its fellow citizens that its routine response to the expression of legitimate grievances is the jackboot and the bayonet.<sup>120</sup> Who said it would be easy?

#### 4. *Socio-Economic Rights and Flourishing*

In the Constitutional Court's preferred mode of rights discourse, rights are 'interdependent', 'overlap' and 'interpenetrate' one another. So great is the ostensible coherence of the constitution's objective, normative value order that one may be forgiven for thinking that all rights (and fundamental values) are in play in every constitutional matter.<sup>121</sup> For example, Sachs J writes in *Sidumo* that:

[S]ome guidance can be sought from the manner in which this court has emphasised the intersection and interrelatedness of different protected rights in particular matters, and highlighted the influence of overarching values. Thus, when dealing with capital punishment in *Makwanyane*, the court stressed the overlap and interaction between the rights to life and dignity on the one hand, and the right not to be subjected to cruel, inhuman or degrading punishment on the other; far from being mutually exclusive, each of these protected rights was seen as reinforcing and adding substance to the others. Similarly in the sodomy case, emphasis was put on the interconnection between the rights to equality, dignity and privacy, respectively. A choice between them was not required. *Grootboom* expressly referred to the indivisibility and interrelated character of protected rights, emphasising that the determination of what was reasonable in relation to the right of access to adequate housing had to take account of the right to dignity, and the gender and racial dimensions involved. In *Khosa* the question was whether withdrawal of certain welfare entitlements for permanent residents who were not South African citizens, raised a question of equality (non-discrimination), or of the right of access to social welfare, and whether the rights of the child also featured. Mokgoro J stated: 'In this case we are concerned with these intersecting rights [socio-economic rights and the founding values of human dignity, equality and freedom] which reinforce one another at the point of intersection.'<sup>122</sup>

The decidedly mushy nature of such analysis blocks our understanding of the individual rights themselves. That the Court's mushiness regarding the actual content of specific provisions of a Bill of Rights – whose decidedly conflicting aims are instead magically squared by the alleged existence of some 'objective, normative value order' – is not my quarry here. I want to argue against the grain, and claim that a hierarchy of rights does indeed exist. It begins, as Nussbaum's list does, with 'life' or what I would translate into South African rights discourse as 'health', 'food', 'water', 'social security', 'housing', 'education' and a clean and sustainable 'environment'. More importantly, I am going to deny the proposition articulated by a majority of members of the legal academy that the Constitutional Court's approach to socio-economic rights analysis is to a significant degree responsible for the ongoing denial of the basic goods and capabilities to a significant proportion of South Africans.

It's not that I think the Court's mode of reasoning about such matters is correct. It can often be quite thin, as we shall see in the case analysis in Chapter 8. It's simply hard to conceive of how a Court with no history of socio-economic rights analysis upon which to rely (domestic or foreign), no budget to make good a desired remedy, no independent power to enforce a judgment, and no institutional, political and social support upon which it could safely draw down could have done something utterly different than it has (without courting its own demise).<sup>123</sup> I have suggested above and below how the Court might have engineered more optimal outcomes – through shared constitutional interpretation and participatory bubbles – without appearing overly deferential. But the owl of Minerva flies furthest at dusk, and academic cavils about the Constitutional Court's 'neo-liberal framework' seem more interested with arguing on the side of the angels than pressing down on the problems (both doctrinal and institutional) with which the Court has been beset.<sup>124</sup>

This Court has, from the very beginning, shown itself to be alive to the tragedies with which it is confronted. In *Sobramoney*, the Court wrote:



We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.<sup>125</sup>

The notion that Court has, over time, become desensitized to the conditions of South Africans who continue to live in straitened circumstances is inconsistent with clear developments in our socio-economic rights jurisprudence as we saw in a string of recent meaningful engagement housing judgments (eg, *Joe Slovo I* and *Joe Slovo II, Occupiers of 51 Olivia Road*) and the commitment to equal access to an adequate basic education in our public schools (eg, *Ermelo* and *Juma Masjid*).

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 conditions for flourishing.

## Endnotes

1. Of course, we can now see, post-2008, exactly what happens when individual states move away from their commitments to a strong social democracy. Iceland, which once possessed near end-of-history status, imploded immediately after a decade-long binge of free-market fueled deregulation and a collective indebtedness ten times the annual GNP of \$13 billion. See *Inside Job* (2010). However, with its longstanding egalitarian roots, strong public sector, relative homogeneity and small population, Iceland was able to rewrite its social contract in a manner that would reverse its current course and restore its strong social-democratic moorings. More importantly for this work, we can see what happens when a formal commitment to the creation of a social democracy in South Africa (through our aspirational Constitution) yields to a market-driven desire to secure foreign direct investment and a failure to put the development of historically disadvantaged communities first. As of 2012, South Africa's social compact – a deal done by big business, the ANC and the unions in the 1980s – shows discernible signs of fragmentation. In the short term, those three actors will likely strike a 'new deal' that will temporarily shore up the status quo. However, the failure of post-1994 South Africa to live up to the promise of its social contract, as reflected in the Final Constitution, makes the short-term outlook for South Africa appear 'unsustainable'. The World Bank Group *Economic Update on South Africa: Focus on Inequality of Opportunity* (2012)
2. R Rorty *Contingency, Irony and Solidarity* (1989).
3. S Fish *Doing What Comes Naturally: Change Rhetoric and the Practice of Theory in Literary and Legal Studies* (1989).

4. M Friedman 'The Social Responsibility of Business is to Increase its Profits' *The New York Times Magazine* (September 1970).
5. See, eg, A Sen *The Idea of Justice* (2009); A Sen *Development as Freedom* (1999); J Cohen *Philosophy, Politics, Democracy: Selected Papers* (2009); A Gutmann & D Thompson *Why Deliberative Democracy?* (2004); A Gutmann *Identity in Democracy* (2003); M Nussbaum *Women and Human Development: The Capabilities Approach* (2001); J Habermas *Facts and Norms* (1996); J Rawls *Political Liberalism* (1993); C Larmore *Patterns of Moral Complexity* (1986); B Barber *Strong Democracy* (1984); M Walzer *Spheres of Justice* (1983). Virtually all members of the South African legal academic community engaged in writing monographs on South African constitutional law hew to a fairly strong social democratic line. See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010); K McLean *Constitutional Deference, Courts & Socio-Economic Rights in South Africa* (2009); D Bilchitz *Poverty and Fundamental Rights* (2006); AJ van der Walt *Constitutional Property Law* (2005); D Davis *Democracy and Deliberation* (2000); D Meyerson *Rights Limited* (1997). See, further, T Roux *The Politics of Principle: The First 15 Years of the South African Constitutional Court* (2013).
6. M Mahatir & I Shintaro (eds) *The Voice of Asia: Two Leaders Discuss the Coming Century* (1995) (Mahatir, then Prime Minister of Malaysia, and Shintaro, then governor of Tokyo, argue that a special mix of culture and community, married to capitalism, offer a third way. Of course, they wrote and edited this tract before the Asian financial collapse of 1998.)
7. S Sibanda *Not Yet Uburu: How Constitutional Democracy Has Blocked the Promise of Liberation in South Africa* (PhD, in process, University of the Witwatersrand, 2012.)
8. D Favre *China and Capitalism: A History of Business Enterprise in Modern China* (2006).
9. See M Nussbaum & A Sen (eds) *The Quality of Life* (1993).
10. A Sen 'More Than 100 Million Women are Missing' (1992) 37 *New York Review of Books* 61; A Sen 'More Than 100 Million Women are Missing' (1992) 367 *The Lancet* 185.
11. A Sen *The Idea of Justice* (2009).
12. *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) at para 41.
13. Sen *Development* (supra) at 64.
14. But see P Singer 'Famine, Affluence and Morality' (1972) 1 *Philosophy and Public Affairs* 229 (1972). Singer's radical utilitarian challenge – his test of comparable moral worth – invariably causes individuals previously (intuitively) committed to utilitarianism to fall back on moral arguments that limit their ethical obligations to persons they know or persons within their political community. As I noted in Chapter 2 fn 159, the diverse philosophical approaches of Amartya Sen (development theory), Charles Larmore (moral philosophy) and Patricia Churchland (epistemology) all arrive at roughly the same place: a hybrid of virtually all the major schools of modern ethical and political philosophy. See *Patterns of Moral Complexity* (1986); P Churchland *Braintrust: What Neuroscience Has to Tell Us about Morality* (2011). Each, in their own way, make the case for a non-reductive approach to deontological, utilitarian and communitarian thought. Each school of thought identifies salient features of moral and political dilemmas. We are not wired, physically or socially, in such a manner that one school of thought invariably wins out. Unsatisfying as that might seem, we are, as this book has argued all along, radically heterogeneous creatures. (More interesting, perhaps, is that when you pursue claims through any major ethical school as vigorously as possible, they often conduce to strikingly similar conclusions. Further support for that claim lies beyond the scope of this work.)
15. OECD *The Better Life Index* (2011)(The top 11 Quality of Life countries are: Australia, Canada, Sweden, New Zealand, Norway, Denmark, the United States, Switzerland, Finland, Netherlands and Luxemburg. The United States, Luxemburg, Norway, Switzerland and Australia appear on both the top 11 Quality of Life list and the top 11 GDP/PPP list.)
16. Sen *Development* (supra) at 73.

17. Ibid at 73 quoting Adam Smith *The Wealth of Nations* (1776)(RH Campbell and AS Skinner (eds) (1976) 469–471 (By ‘necessities’, Smith means ‘not only the commodities which are indispensably necessary for the support of life, but whatever the customs of the country renders it indecent for creditable people, even the lowest order, to be without.’)
18. Ibid at 74.
19. Ibid at 75.
20. M Nussbaum *Women and Human Development: The Capabilities Approach* (2000) 78–80; M Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (2006) 76–78. For reflections on Nussbaum’s capabilities approach, see B Giovanola ‘Personhood and Human Richness: Good and Well-Being in the Capability Approach and Beyond’ (2005) 63 *Review of Social Economy* 1 (Offers a defence of flourishing and the Aristotelian concept of *eudaimonia*, and engages the question of whether capabilities theory offers a partial, and thus liberal, account of the good or something closer to a comprehensive Aristotelian account); A Kaufman ‘Capabilities and Freedom’ (2006) 14 *The Journal of Political Philosophy* 289; AM Jaggar ‘Reasoning about Well-Being: Nussbaum’s Methods of Justifying Capabilities’ (2006) 14 *The Journal of Political Philosophy* 301; K Dowling ‘Can Capabilities Reconcile Freedom and Equality?’ (2006) 14 *The Journal of Political Philosophy* 323.
21. M Nussbaum ‘Constitutions and Capabilities: “Perception” against Lofty Formalism’ (2007) 121 *Harvard Law Review* 4.
22. Ibid at 7.
23. Ibid at 57.
24. J Henry ‘US Issues New Deportation Policy’s First Reprieves’ *The New York Times* (23 August 2011) (In a dramatic reversal, policy employs prosecutorial discretion to suspend deportation proceedings for most undocumented immigrants in United States (300, 000 cases) who have committed no crime.)
25. M Nussbaum ‘“Finely Aware and Richly Responsible”: Moral Attention and the Moral Task of Literature’ (1985) 82 *The Journal of Philosophy* 516, 536.
26. M Heidegger *Lectures on the History of the Concept of Time* (1924).
27. As I have already maintained, at the same time this account of the self demonstrates the extent to which associations are constitutive of the self, it dispels the notion that individuals are best understood as ‘rational choosers’ of the ends they seek. The self should be seen as the inheritor and the executor of a rather heterogeneous set of social practices and natural predispositions – of ways of responding to or acting in the world. Despite the dominance of the enlightenment vision of the self as a rational agent, the truth of the matter is that the majority of our responses to the world are *arational*. They are not reflective. They are not critical. They are not chosen. They just are.
28. As I noted in Chapter 3, the constitutive nature of our attachments also forces us to attend to another often overlooked feature of associations. We often speak of the associations that make up our lives as if we were largely free to choose them or make them up as we go along. I have suggested why such a notion of choice is not true of us as individual selves. It is also largely not true of associational life generally. I placed significant emphasis on Michael Walzer’s contention that there is a ‘radical givenness to our associational life’. M Walzer ‘On Involuntary Association’ in A Gutmann (ed) *Freedom of Association* (1998) 64, 67. What he means, in short, is that most of the associations that make up our associational life are involuntary associations. The emphasis on involuntariness in associational life is meant to bracket any conception of freedom which intimates that *any* impediment to free association is a denial of that which is most fundamentally human. It is often the case that not choosing to leave an association, but to stay, is what we truly cherish as freedom. Ibid at 73.
29. L Wittgenstein *Philosophical Investigations* (1953, GEM Anscombe (ed)) Book II xi 226.
30. The emphasis in this section on the arational sources of the self invariably brackets the place of reason in ethical, political and legal thought (or most fields of human inquiry, for that matter). However, (a) bracketing reason and (b) diminishing its efficacy to the vanishing point are two entirely different things. First, the place of instrumental reason and the ability of human beings

to recognize regularities in the world means, at the very least, that we are able to discriminate between better and worse ways of realizing our preferred ends. Second, the more varied forms of life the individual may draw upon, the more tools the individual will have when deciding upon his or her preferred vision of the good. Third, this account is not averse or opposed to the existence of some deep grammar of human reason – married to longstanding social conventions – that commits us to such varied ends as the family, the nation, a religion, a marriage and individual happiness. Some may think it convenient that such a species of naturalism results in a commitment to such imperfectly reconcilable goods as freedom, equality, dignity and democracy. However, putting aside the current dominance of social-democratic thought in the academy, these values have competed with one another for primacy of place for several millennia. How one settles, in a rational manner, the differences between these values is the very meat of ethical and political thought. Fourth, though there may be plenty of instances in which the evidence for our beliefs about the world leaves room for a certain amount of theoretical indeterminacy, I take it as given that most of our beliefs about the world are true and that we, humans, share most of those beliefs. Only under such general conditions of shared understanding does it even begin to make sense to talk about disagreement. See R Rorty ‘Solidarity or Objectivity’ *Objectivity, Relativity & Truth: Philosophical Papers I* (1991) 21, 31. My use of the term ‘arational’ may likewise strike some as deeply counterintuitive. It may seem to sweep into the ambit of the arational, various processes most people are apt to describe as falling within the domain of the rational. The point is the authorship of the processes themselves. We did not, as individuals, or as groups, consciously create most of these processes. As I argued in Chapter 3, they are not the product of any one person’s capacity to reason. In this respect, they are arational. So when I say the ends we pursue ‘just are’ the ends we pursue, I am not denying that there might not be good reasons for our pursuit. I only deny that the ultimate source of these ends is a function of rational, freely willed, individual choice. Again: that does mean we are incapable of critique of current moral, legal and political arrangements, or the improvement of these arrangements by our own lights. See S Pinker *The Better Angels of Our Nature* (2011)(Pinker, employing findings in cognitive science and marrying them to a close reading of history, shows that we, as a species, are far less barbaric than we were several centuries ago (by an order of magnitude), and contends that our innate capacity for empathy and literacy, combined with the growth of such social institutions and artefacts such as good governance, trade and cosmopolitanism, have been the key drivers of human progress (as measured by virtually any matrix).)

31. A Sen *Identity and Violence: The Illusion of Destiny* (2006) 33.
32. See Chapter One-B, endnote 18, for an extended critique of some of the flaws in communitarian thought.
33. Sen *Identity and Violence* (supra) at 34–35. For further argument along these same lines, see my discussion of Michael Walzer’s account of the ineradicability, as well as the virtues, of the divided self in Chapters 2 and 3. See M Walzer *Thick and Thin: Moral Arguments at Home and Abroad* (2002) 85, 99–104.
34. M Nussbaum ‘Capabilities as Fundamental Entitlements: Sen and Social Justice’ (2003) 9 *Feminist Economics* 33.
35. *Fourie* (supra) at paras 60–61.
36. Benjamin Barber articulates a similarly strong conception of democratic politics, but, as an American, is able to locate this solidarity in over two centuries of a largely uninterrupted commitment to a democratic constitutional order (even taking into account limits placed on the franchise and the long-standing disenfranchisement of women and African-Americans). B Barber *Strong Democracy: Participatory Politics for a New Age* (1984). Barber extends the insights of pluralism into democratic theory: ‘Democracy understood as self-government in a social setting is not a terminus for individually held rights and values; it is their starting place. Autonomy is not the condition of democracy, *democracy is the condition of autonomy*. Without participating in the common life that denies them and in the decision making that shapes their social habitat, women and men cannot become individuals. Freedom, justice,

equality and autonomy are all products of common thinking and common living; democracy creates them.' Barber (supra) at xv (emphasis added). As for any difficulties that might face the framing of constitutional rights in terms of democratic solidarity, Barber responds with equal vigour: 'The rights we often affect to hurl impudently into the face of [our democratic] government are rights we enjoy only by virtue of government. The private sphere we guard so jealously from the encroachments of the public sector exists entirely by dint of law, which is the public sector's most significant creation.' Ibid. Barber turns the ostensible 'individualistic, liberal, atomistic' bases for constitutional democracy on its head. Likewise, the Constitution we praise so highly – in South Africa – exists only because virtually all South Africans (or at least their representatives) gave the Interim Constitution their imprimatur of approval. If 87% of the freely elected Constitutional Assembly endorsed the Final Constitution then it seems fair to say, as Barber argues, that our constitutional rights flow from a democratically determined social compact endorsed by a radically heterogeneous South African society and that they retain their force only by virtue of the democracy – and the solidarity of a citizenry – that supports them.

37. Walzer 'On Involuntary Association' (supra) at 73.
38. Nussbaum's Decalogue is both relational and hierarchal. See C Gilligan *In a Different Voice* (1982) (On the centrality of relationships in determining appropriate ethical responses); A Maslow 'A Theory of Human Motivation' (1943) 50 (4) *Psychological Review* 370. Nussbaum's core of capabilities, like Maslow's hierarchy of needs, looks very much like a ladder that climbs toward greater self-actualization, even as it emphasizes the importance of Gilligan-like relationships for human flourishing.
39. See S Woolman 'Dignity' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 36.
40. Justice Ackermann, the Court's original exponent of dignity, grounds the first definition of dignity in two sources: the history of apartheid and the work of Immanuel Kant: '[I]t is permissible and indeed necessary to look at the ills of the past which [the Constitution] seeks to rectify and in this way try to establish what equality and dignity mean ... What lay at the heart of the apartheid pathology was the extensive and sustained attempt to deny to the majority of the South African population the right of self-identification and self-determination ... Who you were, where you could live, what schools and universities you could attend, what you could do and aspire to, and with whom you could form intimate personal relationship was determined for you by the state ... That state did its best to deny to blacks that which is definitional to being human, namely the ability to understand or at least define oneself through one's own powers and to act freely as a moral agent pursuant to such understanding of self-definition. Blacks were treated as means to an end and hardly ever as an end in themselves; an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.' Ackermann (supra) at 540. See also *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Dawood*') at para 35 (O'Regan J writes: 'The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.') For more on Laurie Ackermann's extra-curial thoughts about dignity, see L Ackermann *Human Dignity: Lodestar of Equality in South Africa* (2012); L Ackermann 'The Soul of Dignity: A Reply to Stu Woolman' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008).
41. The categorical imperative ought not to be conflated with the golden rule. Kant actually rejects the golden rule as a maxim for ethical action. See I Kant *Groundwork of the Metaphysics of Morals* (trans and ed AW Wood, 2002) ('*Groundwork*') 46–47. He does so because the golden rule permits our individual inclinations to determine outcomes ('as *you* would have them do onto *you*') and does not require the attempt at moral perfection (through reason) demanded by the procedures associated with the categorical imperative. See TW Pogge 'The Categorical Imperative' in P Guyer (ed) *Critical Essays on Kant's Groundwork of the Metaphysics of Morals* (1998) 189, 191 (For Kant, 'the categorical

- imperative is not a version of the Golden Rule.’) See also J Rawls *Lectures on the History of Moral Philosophy* (2000) (‘Lectures’) 199.
42. Kant *Groundwork* (supra) at 45–46. See also D Meyerson *Rights Limited* (1997) 12 (Refers to this formulation of the categorical imperative as a heuristic device through which we might better understand our own basic law.) See, further, AW Wood ‘Humanity as an End in Itself’ in P Guyer (ed) *Critical Essays on Kant’s Groundwork of the Metaphysics of Morals* (1998) 165, 170 (Defines the term ‘individual as an end in itself’ as ‘an end with absolute worth or (as Kant also says) dignity, something whose value cannot be compared to, traded off against, or compensated for or replaced by any other value’).
  43. Kant did not view this principle as impossible to enact. As Rawls notes, Kant found moral pietism offensive and conceived of the categorical imperative as a ‘mode of reflection that could order and moderate the scrutiny of our motives in a reasonable way’. Rawls *Lectures* (supra) at 149. Perhaps the best way to characterize Kant’s categorical imperative is as a reflective check – albeit a demanding one – on our moral intuitions. A contemporary example of such a reflective check – and one that continues to do a great deal of heavy lifting – is Rawls’ own ‘veil of ignorance’. See J Rawls *A Theory of Justice* (1972). Like the categorical imperative, the veil of ignorance serves as an intuition pump for claims about distributive justice by forcing us to forsake any knowledge of our current position in society before we begin debate on how various social goods are to be allocated. Both intuition pumps are designed to eliminate illicit information that might otherwise skew (or justify) the criteria for the distribution of various goods in favour of those who already satisfy the conditions for the distribution of those goods people tend to value most and which can be rather easily converted into other material and immaterial goods: eg health, wealth, intelligence, strong familial ties, influence, beauty, creativity. See, eg, Pogge (supra) at 206 (‘The categorical imperative is ... a general procedure for constructing morally relevant thought experiments ... [T]he categorical imperative amplifies my conscience by transforming the decision from one of marginal significance into one concerning the world at large, and also isolates my conscience by screening out personal considerations that might affect my choice of maxims but are irrelevant to my decisions about how through legislation to specify a realm of ends.’) For example, when South African law students are asked whether they would be willing to step behind a veil of ignorance (I often use a lottery as an example) and trade their current elite position for one of fifty million other positions in South Africa (subject to the strictures of the veil of ignorance), they invariably drop their resistance to affirmative action and structural reform and withdraw complaints (if they have any) regarding reverse discrimination.
  44. O Schachter ‘Human Dignity as a Normative Concept’ (1983) 77 *American Journal of International Law* 848, 849.
  45. For more on the relationship between dignity and the prohibitions of slavery, servitude and forced labour, see S Woolman ‘Dignity’ (supra) at § 36.4(e). See also S Woolman & M Bishop ‘Slavery, Servitude and Forced Labour’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 64.
  46. For more on the relationship between dignity and sentencing, see S Woolman ‘Dignity’ (supra) at § 36.4(c)(iii) infra, and D Van Zyl Smit ‘Sentencing and Punishment’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49.
  47. See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) (‘Hugo’) at para 41 (‘[T]he purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal respect regardless of their membership in particular groups.’)
  48. LWH Ackermann ‘Equality under the 1996 South African Constitution’ in R Wolfrem (ed) *Gleichheit und Nichtdiskriminierung im Nationalen und Internationalen Menschenrechtsschutz* (2003) 547. See also *Law v Canada (Minister of Employment and Immigration)* [1999] 170 DLR 4th 1 (SCC).
  49. *Ferreira v Levin* 1996 (1) SA 984 (CC), 1996 (4) BCLR 1 (CC) at para 49.



50. The majority in *Ferreira v Levin* rejected Justice Ackermann's view that IC s 11(1) and FC s 12(1) contain a robust, self-standing freedom right. *Ibid* at paras 170–185. The Constitutional Court accepted, subsequently, Justice Ackermann's thesis that dignity is meant to secure the space for self-actualisation (autonomy). See, eg, *Hugo* (supra) at para 41 ('[D]ignity is at the heart of individual rights in a free and democratic society.') See also N Haysom 'Dignity' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 131–132.
51. See D Cornell 'A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity and Reconciliation' (2004) 19 *SA Public Law* 666, 667 ('[I]f we give Kantian dignity its broadest meaning, it is not associated with our actual freedom but with the postulation of ourselves as beings who not only can, but must, confront ... ethical decisions, and in making those decisions ... give value to our world.')
52. *Affordable Medicines Trust & Others v Minister of Health & Others* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC).
53. *Ibid* at para 59 (citation omitted, emphasis added).
54. See *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 17 (emphasis added).
55. *Prince v Law Society* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) ('*Prince*') at para 149 ('[W]here there are [religious] practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the State to walk the extra mile' and to find adequate means – perhaps a carefully constructed exemption – of accommodating the practice at issue); *S v Jordan & Others (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) ('*Jordan*'); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) ('*De Reuck*'); *Volks v Robinson* 2005 (5) BCLR 466 (CC) ('*Volks*'). Cf *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) ('*Fourie*').
56. See *Fourie* (supra) at paras 60–61 (Sachs J) ('Equality ... does not presuppose ... suppression of difference ... Equality ... does not imply ... homogenisation of behaviour ... . [T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a majoritarian norm.')
57. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at para 18 (emphasis added).
58. Concrete, mutual recognition of the other as essential for the recognition of one's own self lies at the core of African philosophical thought and the concept of ubuntu. See D Cornell 'Is There a Difference that Makes a Difference between ubuntu and Dignity?' (2010) 25 *SA Public Law* 382; Y Mokgoro & S Woolman 'Where Dignity Ends and Ubuntu Starts: An Amplification of, and a Tension in, Drucilla Cornell's Thoughts' (2010) 25 *SA Public Law* 400; T Metz 'African Ethics' *International Encyclopaedia of Ethics* (2010); T Metz 'African Moral Theory and Public Governance: Nepotism, Preferential Hiring and Other Partiality' in J Murove (ed) *African Ethics: An Anthology for Comparative and Applied Ethics* (2009) 335.
59. *Kbosa* (supra) at para 74. The Court's language echoes Rawls' description of a Kantian 'realm of ends' in which 'everyone recognizes everyone else as not only honouring their obligation of justice and duties of virtue, but also, as it were, legislating law for their moral commonwealth. For all know of themselves and of the rest that they are reasonable and rational, and that this fact is mutually recognized'. Rawls *Lectures* (supra) at 209. See also S Doctor 'Dignity, Criminal Law and the Bill



- of Rights' (2004) 121 *South African Law Journal* 265, 315 ('Dignity has a communitarian aspect: by requiring respect for others' claims to dignity, vindication of the human dignity of all is better assured, and a community of mutual co-operation and solidarity is fostered.')
60. See Aristotle *Nicomachean Ethics* (trans D Ross 1980) Bk I, § 5, 7.
  61. *A Sen Development as Freedom* (1999) 18.
  62. *Ibid.*
  63. For a more detailed discussion of the relationship between our dignity jurisprudence and Sen's views on capabilities and development, see Woolman 'Dignity' (supra) at § 36.5(a)(ii).
  64. See Laurie WH Ackermann 'The Significance of Human Dignity for Constitutional Jurisprudence' (Lecture, Stellenbosch Law Faculty, 15 August 2005)(manuscript on file with author) § 4 quoting T Dürig 'Der Grundrechtssatz von der Menschenwürde' (1956) 81 *Archiv für öffentliches Recht* 117, 125 ('All humans are human by virtue of their intellectual capacity ("*kraft seine Geistes*") which serves to separate them from the impersonality of nature and enables them to exercise their own judgment, to have self-awareness, to exercise self-determination and to shape themselves and nature.' (Ackermann's translation))
  65. *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)(*Grootboom*) at para 83 (emphasis added).
  66. *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC).
  67. *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)(*NCGLE II*); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC)(*Satchwell I*); *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC)(*Satchwell II*).
  68. *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) (*Satchwell I*); *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC)(*Satchwell II*).
  69. See *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).
  70. See *A Sen Development as Freedom* (1999); *A Sen Inequality Re-examined* (1992); *A Sen The Idea of Justice* (2010).
  71. *Sen Development* (supra) at 75.
  72. One of the defining features of the South African state – as would be the case in any liberal constitutional state – is that the very conditions for individual flourishing – self-governance and self-actualization – are also two of the goods which individuals generally seek.
  73. K van Marle 'No Last Word: Reflections on the Imaginary Domain, Dignity and Intrinsic Worth' (2002) 13 *Stellenbosch Law Review* 299, 306.
  74. *Kbosa* (supra) at para 74.
  75. See D Cornell *Defending Ideals: War, Democracy, and Political Struggles* (2004).
  76. See *Sen Development* (supra) at 189–203.
  77. Six thousand demonstrations take place annually. That 1 000 demonstrations are denied permission to proceed – for few, if any good reasons – is a matter I take up elsewhere. See S Woolman 'My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly and the Constitutional Right to Rebellion in *Garvis v SATAWU (Minister for Safety & Security, Third Party)* 2010 (6) SA 280 (WCC)' (2011) 27 *South African Journal on Human Rights* 346.
  78. See *S v Mamabolo (ETV and others Intervening)* 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC) at para 50 ('That freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by ss 15–19 of the Bill of Rights.' (Emphasis added)) See also *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 8 ('[F]reedom of expression

- [FC s 16] ... freedom of religion, belief and opinion [FC s 15], the right to dignity [FC s 10], as well as the right to freedom of association [FC s 18], the right to vote and to stand for public office [FC s 19] and the right to assembly [FC 17] ... taken together protect the right of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions.')
79. E Cannetti *Crowds and Power* (1962) 22: '[E]ruption ... the sudden transition from a closed into an open crowd ... is a frequent occurrence. ... A crowd quite often seems to overflow from some well-guarded space into the squares and streets of a town where it can move about freely, exposed to everything and attracting everyone. But more important than this external event is the corresponding inner movement: the dissatisfaction with the limitation of the number of participants, the sudden will to attract, the passionate determination to reach all men.' See also *In Re Munhumeso and Others* 1995 (1) SA 551, 557 (ZS), 1995 (2) BCLR 130 (ZS), 1994 (1) ZLR 49 (SC)(Court dryly observes that: 'A procession, which is but an assembly in motion, is by its very nature a highly effective means of communication, and one not provided by other media. It stimulates public attention and discussion of the opinion expressed. The public is brought into direct contact with those expressing the opinion.')
  80. See L Kraemer *The People Themselves: Popular Constitutionalism and Judicial Review* (2005). This book presses a thesis of shared constitutional interpretation – a collective effort that embraces non-political actors. Kraemer's view is that such ecstatic expressions of the will of the people transform constitutional interpretation into an enterprise shared with the people themselves.
  81. See S Woolman 'Freedom of Association' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44. For other views on entrance, voice and exit, see A Hirschman *Exit, Voice and Loyalty* (1970); E Brody 'Entrance, Voice and Exit: The Constitutional Bounds of Freedom of Association' (2002) 35 *University of California Davis Law Review* 821.
  82. 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)('Carmichele').
  83. 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC)('K').
  84. *Carmichele* (supra) at para 62.
  85. See S Woolman 'Security Services' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS3, May 2011) Chapter 23B.
  86. FC s 12(2): 'Everyone has the right to bodily and psychological integrity which includes the right-(a) to make decisions concerning reproduction.' For more on the relationship between FC s 12, FC s 10 and abortion, see M O'Sullivan 'Reproductive Rights' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 37.
  87. Act 92 of 1996.
  88. *Christian Lawyers Association v Minister of Health & Others* (Reproductive Health Alliance as Amicus Curiae) 2005 (1) SA 509, 526 (T), 2004 (10) BCLR 1086, 1103 (T)('Christian Lawyers II'); *Christian Lawyers Association & Others v Minister of Health & Others* 1998 (4) SA 1113 (T), 1998 (11) BCLR 1434 (T)('Christian Lawyers Association I').
  89. *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at para 91 (Privacy protects 'the inner sanctum of a person' that lies within 'the truly personal realm'.) For the leading statement on privacy, see *Bernstein & Others v Bester NO & Others* 1996 (2) SA 751, (CC), 1996 (4) BCLR 449 (CC) at paras 67, 73, 79 (Ackermann J quotes, with approval, the Council of Europe's gloss on the right to privacy: '[The right to privacy] consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information, given or received by the individual confidentially.')
- See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 18 (Right to privacy protects intimate space because such a space is a prerequisite for human dignity, and thus flourishing.)

90. For more on the non-relativist, shared (if necessarily narrow), understanding of such basic political terms as freedom, justice and truth in substantially different contexts, see M Walzer *Thick and Thin: Moral Argument at Home and Abroad* (2002). Walzer claims that we (global citizens) share a minimalist account of justice with those persons marching in Prague and Pretoria, or, more recently, in Cairo and Cape Town. And what is that? Walzer writes: 'What they meant by ... justice ... was simple enough: an end to arbitrary arrests, equal and impartial law enforcement; the abolition of the privileges and prerogatives of the party elite and common, garden variety justice.' *Ibid* at 2.
91. See C Taylor 'The Politics of Recognition' in A Gutmann (ed) *Multiculturalism and the Politics of Recognition* (1996) 1.
92. See M Walzer 'On Involuntary Association' in A Gutmann (ed) *Freedom of Association* (1998) 64, 67.
93. Taylor 'The Politics of Recognition' (supra) at 16.
94. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 28–30 ('[I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society.') See also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41 ('[E]quality means nothing if it does not represent a commitment to each person's equal worth as a human being, regardless of their differences.')
95. A Sen *Identity and Violence: The Illusion of Destiny* (2006) xiv.
96. *Ibid* at 2–3.
97. For a substantially more optimistic view about our capacity to recognize diverse difference, and our ability to sustain political institutions, in heterogeneous societies, through rational discourse, see KA Appiah *Cosmopolitanism: Ethics in a World of Strangers* (2006) 113, 144 ('We do not need, have never needed, settled community, a homogenous system of values. The odds are that, culturally speaking, you already live a cosmopolitan life, enriched by literature, art, and film that comes from many places, and that contains influences from many more. And the marks of cosmopolitanism in [my] Asante village soccer, Muhammed Ali, hip-hop entered [our] lives, as they entered yours, not as work, but as pleasure. ... One distinctly cosmopolitan commitment is to pluralism. Cosmopolitans [therefore] think that there are many values worth living by and that you cannot live by all of them. So we hope and expect that different people and different societies will embody different values. But they have to be values worth living by.')
98. *Minister of Home Affairs v Fourie (Doctors For Life International & Others, Amici Curiae); Lesbian & Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) ('*Fourie*') at paras 90–98. See also *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA), 2005 (3) BCLR 241 (SCA) at paras 36–37 (No religious denomination would be compelled to marry gay or lesbian couples.)
99. *Fourie* (supra) at paras 90–98.
100. S Scheffler *Equality and Tradition: Questions of Value in a Moral and Political Theory* (2010); S Scheffler *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (2001); N Rosenblum *Membership and Morals: The Personal Uses of Pluralism in America* (1998).
101. See JP Sartre *Portrait of the Anti-Semite* (trans E de Mauny 1968) 57 ('The Jew is a man whom other men look upon as a Jew; ... it is the anti-Semite who makes the Jew.')
102. S Woolman 'Freedom of Association' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; S Woolman 'Dignity' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. For more on how to resolve the tension between associational and egalitarian imperatives, see also P Lenta 'Religious Liberty and Cultural Accommodation' (2005) 122 *South African Law Journal* 352 P Lenta 'Taking Diversity Seriously: Religious Associations and Work-Related Discrimination' (2009) 125 (4) *South African Law Journal* 828; S Woolman 'On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta' (2009) 25 *South African Journal on Human Rights* 280. See also S Woolman 'Seek Justice Elsewhere: An Egalitarian Pluralist's Reply to David Bilchitz

- on the Distinction between Differentiation and Domination' (2012) 28 *South African Journal on Human Rights* 273; D Bilchitz 'Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere: A Reply (2012) 28 *South African Journal on Human Rights* 296.
103. Sen (supra) at 151 ('[S]ometimes a classification that is hard to justify may nevertheless be made important by social arrangements. That is what competitive examinations do (the 300th candidate is still something, the 301st is nothing). In other words, the social world constitutes differences by the mere fact of designating them.')
  104. Why defend the parochial, the partial, the provincial? Why defend any community that excludes others by virtue of genealogy, rules, beliefs, traditions or practices? Edmund Burke wrote: '[T]o love the little platoon we belong to is the first principle, (the germ as it were) of public affections. It is the first link in the series by which we proceed towards love of country and to mankind.' E Burke *Reflections on the Revolution in France* (JCD Clark (ed), 2001) 202. Burke thereby connects the parochial with the universal. K Anthony Appiah comes at the problem from a slightly different direction. Appiah defends cosmopolitanism – what he calls universality plus difference – on the grounds that cosmopolitanism is committed to (a) pluralism, the notion that there are different values worth living by, and (b) fallibilism, the notion that our knowledge and our values are imperfect, provisional, subject to revision in the face of new evidence. Appiah (supra) at 144. So, for Appiah, religious, cultural and linguistic communities retain their value when they provide us with values worth living by (as they almost all do to some extent), and when the members of those communities do not insist that there is one right way for human beings to live and do not then insist on imposing that one right way on others so as to truly set them free. Ibid. The members of religious, cultural and linguistic communities must commit themselves as citizens of a republic, or citizens of the world, to some significant degree of value or ethical laissez-faire.
  105. See S Dersso 'The Need for Constitutional Accommodation of Ethno-Cultural Diversity in the Post-Colonial State' (2008) 24 *South African Journal on Human Rights* 565. Dersso argues that the large number of failed states in post-colonial Africa can be traced, in part, to the failure to provide institutional arrangements that can accommodate group-based diversity. South Africa's constitutional order and its commitment to various associational and community rights (and, therefore, the private ordering of substantial amounts of South African social space), Dersso contends, is one of the primary reasons for South Africa's ongoing success as a constitutional democracy.
  106. Rosenblum *Membership and Morals* (supra) at 48–49.
  107. A Gutmann *Identity in Democracy* (2003) 45.
  108. *Martinez v Santa Clara Pueblo* 540 F2d 1039, 1042 (10th Cir 1976).
  109. US 49 (1978). But see *Santa Clara Pueblo v Martinez* 436 US 49, 83 (1978)(Justice White, in dissent, writes: 'The extension of constitutional rights to citizens is *intended* to intrude upon the authority of government.')
  110. *Bbe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)(*'Bbe'*).
  111. See *Bbe* (supra) at paras 42–46 ('[T]he question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution.')
  - See also *Alexkor Ltd & Another v The Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC)(*'Richtersveld'*) at para 51 ('While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution'); *Mabuza v Mbatsha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C)(*'Mabuza'*) at para 32 ('It bears repeating ... that the constitutional validity of ... principles of customary law depend on their consistency with the Constitution and the Bill of Rights.')
  112. See South African Law Reform Commission *The Harmonisation of the Common Law and the Indigenous Law: Succession in Customary Law* Issue Paper 12, Project 90 (April 1998) 6–9. See also TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1997) 126–127.

113. See, eg, *Richtersveld Community & Others v Alexkor Ltd & Another* 2003 (6) SA 104 (SCA), 2003 (6) BCLR 583 (SCA) at paras 85–105.
114. *Bbe* (supra) at para 84.
115. *Ibid* at para 89.
116. *Ibid* at para 83.
117. *Shilubana & Others v Nwamitwa* 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC) (Valoyi traditional authorities may develop customary law in accordance with norms and values of the Constitution so that tenable women may become Hosi – community leaders. Such development outstrips the need for ‘legal certainty’ about succession.)
118. However, many South Africans believe the Constitutional Court to be out of step with the traditional mores of many communities. Thus no matter how objectionable lobolo might appear to me – or Nussbaum or Sen (as a chattel transaction) – many South African men and women identify lobolo with (a) a tightening of communal bonds, and (b) a recognition of the dignity of the woman for whom the lobolo is offered. They view lobolo as designed to preserve the cohesion and stability of the extended family unit and, ultimately, the entire community.
119. E Cameron *Witness to Aids* (2005).
120. This book went to print hot on the heels of the massacre at Marikana. But the inability of our (corrupt and bankrupt) security services to achieve its most basic function – the freedom and security of all South Africans – that made Marikana possible hardly counts as news. S Woolman ‘Security Services’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS3, May 2011) Chapter 23. The murders at Marakana were not only foreseeable, but inevitable. See S Woolman ‘Is Xenophobia the Right Legal Term of Art? A Freudian and Kleinian Response to Loren Landau on the Violence in South African Townships (2011) 11(2) *Stellenbosch Law Review* 285; S Woolman ‘My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly & the Constitutional Right to Rebellion in *Garvis & Others v Satawu (Minister for Safety and Security, Third Party)*’ (2011) 27 *South African Journal on Human Rights* 346. Perhaps, no better example of just how blinkered the South African political and business establishment has been with respect to the breakdown of South Africa’s social contract exists than Chief Justice Mogoeng Mogoeng’s closing remarks to COSATU and SATAWU’s counsel, Advocate Wim Trengove, at the end of oral argument in *SATAWU & COSATU v Garvis & Others* [2012] ZACC 13: ‘If the organizers cannot ensure that no damage to person or to property will occur during a demonstration, then perhaps the demonstrators should stay at home.’ (Notes taken by author during Constitutional Court oral argument in *Garvis*.)
121. For a critique of the notion of ‘an objective, normative value order’, see S Woolman ‘Application’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 31.
122. *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC), 2007 (12) BCLR 1097 (CC).
123. See T Roux ‘Principle and Pragmatism on the Constitutional Court of South Africa’ (2009) 7 *International Journal of Constitutional Law* 106. In addition, the absence of the identification of a minimum core often makes it hard (for all stakeholders) to make sense of what individual rights are actually designed to do. In *Blue Moonlight*, the Constitutional Court has begun to flesh out a minimum core. [2012] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC). *Blue Moonlight*, and three other recent housing judgments, are discussed at some length in Chapter 6.
124. In his blog, *Constitutionally Speaking*, my friend and colleague Pierre De Vos charges that the *Mazibuko* Court was somehow beholden to a ‘neo-liberal framework’. It’s a hefty charge, and Professor De Vos offers no basis for this ad hominem attack on O’Regan J or the rest of the Court.
125. *Soobramoney v Minsiter of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) (*Soobramoney*) at para 8.