

Courage of Principle: Reflections on the 30th Anniversary of the Assassination of Ruth First

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‘While the legislature is the will of the majority, the Court must always remain the conscience of the society’

– Anon.

I INTRODUCTION: RUTH HELOISE FIRST

On Tuesday 17 August 1982, Ruth Heloise First was killed by a letter bomb in her office at the Centre for African Studies at the Eduardo Mondlane University in Maputo. There she was collaborating with a team of Marxist academics to assist the Frelimo government of the recently liberated Mozambique to fashion a new socialist order. Like her 13 *Umkhonto we Sizwe* compatriots,¹ who were murdered by the apartheid army a year earlier at the Matola massacre,² every activist knew that the mad securocrats of Pretoria had assassinated Ruth First. Our gut feeling was well-versed and we did not have to await validation. As day will follow night 15 years later, apartheid state agents Gerry Raven and Craig Williamson grovelled

* Deputy Chief Justice, Constitutional Court of South Africa. The address was first presented on Friday 17 August 2012, Wits Art Museum, University of the Witwatersrand. The Ruth First Committee invited me to be part of a colloquium to mark the 30th anniversary of the assassination of Ruth First. I want to thank the Wits University School of Journalism and, in particular, Professor Anton Harber, who never relented when I claimed that my judicial obligations threatened my possible participation in the colloquium. I was also urged on by reading the preceding memorial lectures delivered by Mr Zwelinzima Vavi and Deputy President Motlanthe. Both paid a thoughtful and evocative tribute to someone as critical to our struggle for liberation as Ruth First.

¹ Umkhonto we Sizwe (‘Spear of the Nation’), or ‘MK’ as it was more commonly known, was launched on 16 December 1961. See: <http://www.anc.org.za/themes.php?t=Umkhonto+we+Sizwe>

² ‘Most of the comrades who were massacred in Matola belonged to what was then known as the Natal Underground Machinery, a unit of our erstwhile People’s Army Umkhonto We Sizwe. They had come to Maputo for consultations with the underground leadership of our movement, the African National Congress. Virtually the entire machinery was wiped out.’ Minister Dlamini – Zuma’s Address, Commemoration of the Matola Raid (14 February 2009), http://www.link2media.co.za/index.php?option=com_content&task=view&id=1027&Itemid=12 (accessed on 3 March 2014).

before the Truth and Reconciliation Commission³ and made the predictable confession of the unspeakable slaying of Ruth First. Both were granted amnesty and, together with their principals, escaped their feet being held to the fire for the dastardly deed that robbed our country of a leader and revolutionary of immeasurable pedigree.

Her life is well documented and needs little padding here. She was born into a family of radical socialists, the daughter of Tilly and Julius First, who helped form the Communist Party of South Africa in the 1920s. Like many Johannesburg girls of her time, she went to Jeppe High School for Girls and later attended the University of the Witwatersrand. At Wits, she became very active in non-racial student politics. After graduation, Ruth First turned to journalism: first as editor of the left-wing newspaper, the *Guardian* and later, the *New Age*. These newspapers changed their names regularly over the next decade as, in the 1950s, the minority state acted against and banned the Communist Party and censored progressive media.

Ruth First wrote profusely despite the adverse and repressive setting. Her investigative and courageous journalism laid bare the evils of post-colonial apartheid and its deleterious effects on the lives of black South Africans. Being an inveterate socialist, she exposed the nature of racialised capitalism and brought into sharp focus the exploitative role assumed by the state in that struggle between labour and capital. She authored some of the finest social and labour journalism well animated by her Marxist disposition and wide internationalism.

When I was barely seven years of age in the 1950s and had just started reading newspapers, I remember reading the serial articles she wrote in the *New Age* on the exploitation of prison labour by Bethal potato farmers. People detained under pass laws were channelled to potato farms where they lived in virtual slavery and had to harvest potatoes out of the ground with their bare and festering fingers. Ruth's journalistic exposé of this human horror jolted many middle class white people out of their racial apathy and triggered the potato boycott of the mid 1950s called by the African National Congress on the heels of the Defiance Campaign of 1952.⁴

Ruth later married Joe Slovo, a fellow communist and activist and an advocate at the Johannesburg Bar. Together they played a leading role in the ever more militant protests in the 1950s. In 1953, both Ruth First and Joe Slovo helped

³ In July 1995 South Africa's new parliament passed a law authorising the formation of the Truth and Reconciliation Commission. The Commission, chaired by Archbishop Desmond Tutu, was appointed in December 1995. The central purpose of the Commission was to promote reconciliation and forgiveness among perpetrators and victims of apartheid by the full disclosure of truth. The Commission was charged with three specific tasks: to discover the causes and nature of human rights violations in South Africa between 1960 and 1994; to identify victims with a view to paying reparations; and to allow amnesty to those who fully disclosed their involvement in politically motivated human rights violations. Available at <http://www.apartheidmuseum.org/truth-and-reconciliation-commission-trc> (accessed on 3 March 2014).

⁴ The Defiance Campaign against Unjust Laws was launched on 26 June 1952 by the ANC together with the South African Indian Congress. More than 8,500 volunteers or 'defiers' were imprisoned for peacefully refusing to obey the apartheid laws. The campaign, which carried into 1953, attracted thousands into political activity. Available at <http://www.anc.org.za/campaigns.php?t=The+Defiance+Campaign> (accessed on 4 March 2014).

found the South African Congress of Democrats, a close ally of the African National Congress (ANC). She had more than a passing connection with the Freedom Charter. She served on its drafting committee. But, as she was banned, she missed its adoption at the Congress of the People in Kliptown, Johannesburg on 25 June 1955.⁵

In December 1956, both Ruth and her husband were arrested and charged with high treason along with 154 other leaders of the Congress Movement. All of accused were acquitted after a treason trial that lasted four years. From 1960, following the state of emergency declared after the Sharpeville shootings,⁶ Ruth First was banned and later arrested several times. While detained in solitary confinement for 90 days, she contemplated suicide.

In March 1964, she left South Africa with her children on an exit permit to join her husband in London. Despite her exile, she remained intensely involved in the anti-apartheid politics. In the 1970s, she resumed writing and authored several books, pamphlets and articles on Africa and in particular on the destabilising role South Africa was playing in the region. She also taught developmental sociology at Durham University in England, a role which stood her in good stead during her later stay in Mozambique.

Ruth First had a towering intellect. She did not suffer fools gladly. She rejected racism outright and sneered at patriarchy. She envisaged a non-racial, non-sexist society – a polity to which our own Constitution aspires. Many of her writings were landmarks in Marxist academic debate. She was sharply critical when the occasion called for it. Some observe that she was impatient with bluster, something which earned her enemies in political debate, even amongst comrades in party circles. But she was not dogmatic. Independence was her watchword.

In 1977, she returned to Africa. She became a professor and research director of the Centre for African Studies at the Eduardo Mondlane University in Maputo, Mozambique. The apartheid regime considered her nearness to our borders sufficiently ominous to cut short her life by a deadly letter bomb.

As I depart from this brief description of the life of Ruth First, it is appropriate that I recall the tribute paid to her by *Umsebenzi*⁷ and the South African Communist Party who properly hailed her as ‘another martyr in this long struggle for liberation.’ The tribute continued:

⁵ The Freedom Charter was the statement of core principles of the South African Congress Alliance, which consisted of the African National Congress and its allies, the South African Indian Congress, the South African Congress of Democrats and the Coloured People’s Congress. It is characterised by its opening demand. Available at <http://www.anc.org.za/show.php?id=72> (accessed on 4 March 2014).

⁶ It was officially announced that 67 Africans were killed and 186 wounded, after the police had opened fire on the crowd. On the same day a riot took place at Langa location near Cape Town, where another crowd of Africans, estimated at 20 000 assembled at police stations to give themselves up for arrest. The police failed to disperse the crowd by baton charges, and the crowd began to throw stones. The police opened fire and 54 people were injured. Available at <http://www.baha.co.za/mmc/gallery/detail/events/sharpeville-massacre-1960---how-it-began> (accessed on 4 March 2014).

⁷ *Umsebenzi* is the Voice of the South African Communist Party and has an electronic version *Umsebenzi Online* which is an exclusively electronic publication of the South African Communist Party. It is published on the first and third Wednesday of every month. Available at <http://www.sacp.org.za/list.php?type=Umsebenzi Online&year=2014> (accessed on 4 March 2014).

Her death had been fashioned in the hearts of those who had long realised that she was a tireless and committed fighter and revolutionary; a writer of consummate skill gifted with a rare incisive vision which combined her craft and energy to actively combat the unspeakably evil South African system.

Comrade Harry Gwala⁸ taught us about Ruth First's commitment to, and sacrifice for, the struggle on Robben Island. His audience included the current President of the Republic and myself. This self-proclaimed Stalinist and master of the revolution paid the following tribute, a revolutionary mantra, to this great woman:

A woman's greatest possession is life. Since it is given to her to live but once, she must so live it that in dying she must be able to say: all my life and all my strength have been dedicated to the finest cause in the world and that is the liberation of mankind.⁹

Enough about the revolution and its poetry. The agonising questions I have chosen to ask are as follows. In what way should the heroic life of Ruth First inspire my role as a judge in a post-conflict society? How should my actions, as judge and a citizen, navigate the tension between radically transforming society and acknowledging the constraints inherent in a society in transition? I propose to explore these question within the over-arching framework of what Ruth First might have called 'courage of principle'.

II THE COLLECTIVE VISION

It seems to me that people who are bent on changing their world require courage of principle. Courage of principle implies three fundamental and inter-connected patterns of behaviour. The first is vision. The second requires concrete steps to pursue and realise the vision. The third is the preparedness to pay the price for a rigorous pursuit of the vision.

The starting point of individual or collective change must be a vision. A vision must be formulated and articulated. It is that internally coherent statement of principles that imagines idealised or desirable social, political or cultural outcomes. In the context of a political or revolutionary movement, a vision may consist of only minimum demands or rise to the level of ideology suitably supplemented by strategy and tactics. At different times in our long struggle, we have seen the movement of the people stake the claim for freedom, equality and democracy. One of the earliest articulations of these values occurred in 1912 with the formation of the African National Congress. Thereafter, they were consistently followed in a variety of charters such as the Atlantic Charter,¹⁰ the Freedom Charter,¹¹ the Ten

⁸ Harry Themba Gwala joined the SACP in 1942 and two years later the ANC. Available at <http://www.sacp.org.za/main.php?ID=1567> (accessed on 4 March 2014).

⁹ These powerful words have stayed with, and guided me. I have, however, substituted female pronouns for the original male pronouns.

¹⁰ In December 1942, the ANC conference held in Bloemfontein approved the formation of a youth wing and adopted the 'Atlantic Charter from the Standpoint of Africans within the Union of South Africa' and Bill of Rights documents. Available at <http://www.sahistory.org.za/topic/african-national-congress-timeline-1940-1949> (accessed on 4 September 2014).

¹¹ See above note 5.

Point Programme of the Unity Movement,¹² the Africanist Manifesto¹³ and the socialist humanism of the black consciousness movement.

Thus a vision is that lodestar that lights the way to a just society. We have seen how Ruth First was consumed by the high notions of a non-racial non-sexist equal society. Her entire activism sought to banish underdevelopment, the uneven spread of means of production and distribution, and the resultant human indignity imposed on working people and the poor both at home and in the rest of the world.

For me, as a judge, the most recent and coherent articulation of our collective convictions arising from our revolution must be the high principles of our Constitution. I am not interested in debates about whether the Constitution is perfect, whether it reflects a sufficiently progressive bargain; or whether it promises the best social order we deserve given our history. Such debates are helpful so long as we remind ourselves that our collective vision has been settled by democratic principle. The unanimous representatives of the people installed it as our first law and joint ideal of a just society. Through their representatives, the people may change it. They have done so 15 times thus far. Amending the Constitution is the prerogative of the people who created it, provided the requisite majority is present and the formalities of the Constitution are followed.

In the same vein, when parliament enacts a law that is consistent with the Constitution, as a judge, I am duty-bound to give effect to it. Thus, our vision of a just society is a dynamic one; open to constant but necessary revision. It is subservient to the democratic ethos provided it takes the form of valid laws and executive policy. Our Constitution never was, and is not, cast in stone. Yet it goes without saying that it should never be changed to pander to narrow sectarian interests.

It seems to me that as a judge, I must hold dear and cherish the collective vision of the people I am required to serve. I must know and understand the high principles that animate the Constitution. Reading these two commitments together, I must dedicate myself without reservation to the migration of our society from its dim past to a just social order. In so doing, fidelity to the Constitution as supreme law and to other laws of our country is indispensable. As a judge, I owe a duty to the rest of our people to police its compliance. So the two commitments reinforce one another: I recall the long and heroic struggles against past injustice; with the full recognition of the Constitution's mission to afford a better life to all. In other words, it behoves us to remember how we came to where we are and what animates the democratic project in the pursuit of a just society.

We cannot deepen democracy and realise social justice without certain bare minimums. Put bluntly, we cannot defeat the triple burden of unemployment,

¹² This 10-point programme called for freedom of speech, press, meetings and association in the framework of one person, one vote, and the enforcement of socio-economic rights under the leadership of the working class. Available at <http://www.sahistory.org.za/archive/draft-declaration-unity-including-10-point-programme-state%2%ADment-approved-continuation-commit> (accessed on 4 March 2014).

¹³ It was accepted in 1959 by the Pan African Congress. Available at <http://www.pac.org.za/manifesto> (accessed on 4 March 2014).

poverty and disease without certain constitutional desiderata. We need the rule of law and not mob rule.¹⁴ All public power must be sourced in law.¹⁵ The exercise of public power, and indeed of private power where it serves the same purpose as public power, must be rational, it must pursue a public good or a legitimate government purpose.¹⁶ In other words, public power, including fiscal and budgetary competences, may not be deployed to pursue ulterior or other expedient purposes. For instance, appointments in the public space must be done in accordance with the law, rationally, lawfully and not in pursuit of mere hegemony or patronage.¹⁷ The people so appointed, objectively speaking, ought to be sufficiently competent to pursue to public task with which they are entrusted.¹⁸ This is a commonsensical utilitarian requirement. If public officials are incompetent to give effect to their public duties or are incapable of effective and honest use of public resources, then our shared vision of a good society will come to nought. We cannot compromise on the competence and the integrity of those who are duty-bound to enable our society move to a better space.

The Constitution enjoins us to observe good governance within an effective state. It insists that the business of government and indeed of all organs of state must be transparent, accountable and responsive.¹⁹ These values cannot now dissipate under the madness of incumbency.

These stringent requirements apply equally to judges. All law binds the governors and the governed. In my personal and judicial life, I may not act unlawfully or inimical to the vision of our people as concretised in law and valid policies. Besides being impartial, I must be efficient, diligent and effective as I perform my judicial function in an open court. The principle of open justice requires nothing less. It behoves me to be transparent, accountable and responsive.

¹⁴ See *Garnas v S.A.T.A.W.U (Minister for Safety & Security, Third Party)* [2012] ZACC 13, 2013 (1) SA 83 (CC); *Garnas v S.A.T.A.W.U (Minister for Safety & Security, Third Party)* 2010 (6) SA 280 (WCC). But see S Woolman ‘My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly and the Constitutional Right to Rebellion in *Garnis v S.A.T.A.W.U (Minister for Safety & Security, Third Party)* 2010 (6) SA 280 (WCC)’ (2011) 27 *South African Journal on Human Rights* 450.

¹⁵ *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

¹⁶ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458. See, further, F Michelman ‘The Rule of Law, Legality and Constitutional Supremacy’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 11; D Dyzenhaus ‘The Past and the Future of the Rule of Law in South Africa’ (2007) 124 *South African Law Journal* 734.

¹⁷ Public Protector *Against the Rules: Report of the Public Protector in terms of Section 182(1) of the Constitution of the Republic of South Africa, 1996 and Section 8(1) of the Public Protector Act, 1994 on an Investigation into Complaints and Allegations of Maladministration, Improper and Unlawful Conduct by the Department of Public Works and the South African Police Service relating to the Leasing of Office Accommodation in Pretoria* (2011) Report Number 33 of 2010/2011. Available at www.info.gov.za/view/DownloadFileAction?id=142293 (accessed on 6 May 2011). See, generally, S Woolman ‘Security Services’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 3, May 2011) Chapter 23B.

¹⁸ Auditor-General *Report on a Performance Audit of Service Delivery at Police Stations and 10111 Call Centres at the South African Police Service 2007–2008* (March 2009) 2. Available at <http://www.agsa.co.za/audit-reports/SAR.aspx> (accessed on 10 April 2011).

¹⁹ *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC).

I must explain and lay bare my reasoning for all to assess, criticise and, one hopes, support.

I welcome the public debate that ensues on the merits of the reasoning and outcome of my judgments. I am a citizen no higher or lower than any other. And yet it is singularly unhelpful to suggest that because one differs with a judgment or outcome, the judge concerned is serving an ulterior goal or political party. Judges are accountable to all our people and to no political or ideological tendency. I am proud to say that virtually all my judicial sisters and brothers take seriously this obligation and live by it. In some instances, judges get the facts or the law wrong. That tells us nothing about their judicial probity. Our democratic system, like most in the world, readily acknowledges judicial fallibility and arrests that risk by creating a hierarchy of courts with appellate responsibility.

A few jurisdictions on our African continent have increasingly undermined this requirement of an open and accountable judicial function – much to their utter detriment. Judges have stopped explaining themselves publicly. Arbitrariness and judicial dishonesty invariably take root.

The commitment to an open and accountable judicial function is a powerful touchstone. The Constitutional Court recently received a judicial commission delegation from our sister country Kenya. The delegation related how their judiciary faltered so as to make it necessary to require all judges to resign in the interest of a fresh start. The delegation sought our counsel and judicial experience thus far.²⁰

For us, the lesson to be drawn from the Kenyan experience must protect the integrity and the effectiveness of all of our democratic institutions. Narrow, sectarian gambits to make any public institution compliant, or even merely pliable, ultimately redounds to the disadvantage of our people. These institutions have to survive inter-generational and political party changes as we continue to pursue our collective good.

III CONCRETE STEPS TO MAKE THE VISION REAL

I suggested earlier that a vision of the ideal must be married to concrete and credible steps designed to make the ideal real. That holds true for the judicial function. Courage of principle requires judges to do what is to be done within the remit of responsibilities. So: Just as social activists must take practical steps to realise our collective vision, judges must take practical steps at the same time as they show absolute fidelity to the law.

Judicial power flows from the Constitution. Our Constitution vests in judges wide and vast decision-making powers. It is no exaggeration to state that the people have installed the judiciary as the ultimate guardians of the Constitution. In this sense, the judiciary is an integral part of the transition and the achievement of the wide variety of social and economic goods and ends to which our Constitution aspires.

²⁰ Our esteemed retired colleague, Justice Emeritus Albie Sachs serves on a panel assisting Kenya in the selection fresh judges in accordance with their new Constitution.

At its barest, the judicial function is not anything more than an instrument to prosecute and to advance these cherished values. Its primary duty is to ensure that laws, hopefully just laws that flow from a Constitution devised to uphold our common convictions, are honoured. In that sense, the rule of law is more than a fetish of lawyers, it is an integral part of the democratic process. Laws are made by the people through their democratically elected representatives. In their purest form, they are meant to represent the hopes, and diminish the anxieties, of the people. Fear is one of the greatest threats to our young republic. Judges must squarely address the deepest fears of our society, and simultaneously nurse the best out of all of us.

On this view, judges are vital agents. However, contrary to the vision of judicial maximalists, our role is modestly utilitarian. Modestly utilitarian. This turn of phrase captures the contextual method at the heart of modern jurisprudence and, properly understood, should debunk some of the mystery around the judicial function.

The judicial function necessarily mediates conflict. But the mediation does not occur through the application of arid principles. Judges enforce the standards that we have imposed upon ourselves in pursuit of a collective vision of the good made manifest in the Constitution. To do so, judges must be embedded in the crucial struggles of the society that they serve. They must be alive to the history, social context and contradictions of the society within which we live. When all public and private functionaries are performing their duties with integrity and sincerity within the boundaries of their competencies, judges must refuse to trespass into those terrains. They must stand back and cheer and applaud as society flourishes.

Judging must be performed with strict observance of the basic law's division of powers. Parliament must make the laws, and compose budgetary allocations, that provide for the appropriate redress of our divided and unequal past. The executive formulates policies that give true effect to the law, manages implementation of the budget and carries out the public services necessary for the development of all members of our society. It is, therefore, self-evident that courts are relevant only in the event of 'system failure'. Our role is not proactive, but reactive. It arises only when a breach of a vital right or interest is alleged and only when other forms of mediation have failed.²¹ We don't choose cases; they choose us. We have neither the purse, nor the sword and yet, we are entrusted with vast policing duties. This scheme that apportions public power is foundational to democratic

²¹ Even then, courts should, where possible, endeavour to push parties to meaningfully engage one another in the pursuit of the best possible outcome. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC); *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others* [2009] ZACC 31, 2010 (2) BCLR 99 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2011] ZACC 8. That said, as guardians of the Constitution, judges must never lose the courage of their principles, even in cases that through up polycentric problems. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC). See also D Bilchitz *Poverty and Fundamental Rights* (2006); S Liebenberg *Adjudicating Socio-Economic Rights under a Transformative Constitution* (2010).

projects. Courts must bolster rather than diminish democratic control. They must be wary not to intrude into the terrain of the legislature, the executive and other state institutions. They must do that only in the clearest of cases, and only when the Constitution permits the intrusion.

That however, does not reflect wholesale deference to other state actors. Our Constitution is pro-poor. It takes cognisance of the vulnerability of all too many denizens of our society. It engages directly a past that has entrenched vacuous but real divisions along race, gender, class, religion, conscience and belief, culture, language, origin and sexual orientation. Like Ruth First, our Constitution seeks to achieve a caring, sharing and empathetic society. It rejects the notion of mere political might being right and seeks to restrain and control all public and private powers within the constraints of an over-arching basic law.

In many senses, our courts have been remarkable. Shortly after our transition, equality and discrimination cases proliferated. In a series of notable cases, courts have refused to tolerate inequality and discrimination.²² They have struck down scores of laws that undermined appropriate respect for diversity,²³ or that harbour antiquated prejudices. Amidst many rumblings, courts would not tolerate for example homophobia or gender inequality inspired by religious or cultural patriarchy.²⁴ They have fashioned a conception of substantive equality that travels well beyond liberal notions of formal equality.²⁵ We have insisted that laws and policy must provide for adequate protection of children,²⁶ root out systemic patterns of sexual violence,²⁷ enable people with disability, and offer appropriate succour for permanent residents, refugees and migrants.²⁸

Courts have, time without count, required the executive to give effect to socio-economic claims of the poor, the vulnerable and those living on the margins of existence. We have required government to provide appropriate access to health

²² *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4, 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* [2002] ZACC 20, 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC); *Daniels v Campbell and Others* [2004] ZACC 14, 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC); *Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17, 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) (15 October 2004); *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC); *Langemaat v Minister of Safety & Security and others* 1998 (3) SA 312 (T), [1998] 2 All SA 259 (T).

²³ *MEC for Education, KwaZulu-Natal, & Others v Pillay* [2007] ZACC 21, 2008 (1) SA 474 (CC).

²⁴ *National Coalition for Gay & Lesbian Equality & Another v Minister of Justice* [1998] ZACC 15, 1999 (1) SA 6 (CC), 1998 (2) SACR 556 (CC), 1998 (12) BCLR 1517 (CC); *National Coalition for Gay & Lesbian Equality & Another v Minister of Home Affairs* [1999] ZACC 17, 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC); *Shilubana & Others v Nwamitwa* [2008] ZACC 9, 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC).

²⁵ For more on the South African conception of substantive equality, see C Albertyn & B Goldblatt 'Equality' in S Woolman & M Bishop Constitutional Law of South Africa (2nd Edition, OS, 2007) Chapter 35.

²⁶ *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC)

²⁷ *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC); *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC).

²⁸ *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC); *Kiliko & Others v Minister of Home Affairs & Others* 2006 (4) SA 114 (C).

care.²⁹ As a result, our jurisdiction now possesses a robust public treatment regime for HIV/Aids patients. We have reminded the executive of its duty to provide access to housing.³⁰ Courts have been slow to evict homeless people and we have insisted that government must find alternative accommodation should eviction ensue.³¹ Courts have insisted that drinkable water be made available to all members of society.³² We have protected learners from being subjected to a medium of instruction they do not want.³³ We have required that learners be furnished with study material.³⁴ We have mediated differences around rampant eviction of homeless, urban and rural occupiers who are said to be unlawful. Courts have required the social grants to reach all including migrants; and that they are paid promptly, particularly in the rural neighbourhoods.³⁵

Our courts have developed a proud jurisprudence on justice in the workplace.³⁶ That is a consequence of the vital choices our founding mothers and fathers have made on workers' rights, the recognition and formation of trade unions and employers organisations, the resultant collective bargaining and fair labour practices. Properly so, courts have refused to sacrifice workplace justice on the back of claims or promises of economic growth that a so called open labour market will ostensibly bring to us. That is decidedly not a matter upon which judges may free-wheel. Just labour laws are integral to an equal and just society where the dignity of all, and all working people, is well shielded.

We have been properly pre-occupied with the right to free expression, a right that embraces a free press, the ability to impart and to receive information, and the capacity to use satire as a robust form of political criticism.³⁷ Our judgments point to the intrinsic worth of free expression and the many public and private blessings of a free, open and agonistic society. And yet, our judgments have also warned that free expression has limits, particularly when it encroaches on dignity and privacy.³⁸ However, when public interest is in issue, other and perhaps more

²⁹ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) [2002] ZACC 15, 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC).

³⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

³¹ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC).

³² *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28, 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC).

³³ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC).

³⁴ *Section 27 & Others v Minister of Education & Another* [2012] ZAGPPHC 114, 2013 (2) SA 40 (GNP), 2013 (2) BCLR 237 (GNP).

³⁵ *Khosa and Others v Minister of Social Development and Others, Mablaule and Another v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC).

³⁶ *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* [2002] ZACC 27, 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC); *South African Police Services v Nkambule & Others* [2013] ZALCPE 11.

³⁷ *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* [2005] ZACC 7, 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC).

³⁸ *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

pressing considerations come to the fore. That balance is not generic. It can be properly struck only on a case by case basis.³⁹

Unfortunately, very few cases on land restitution or expropriation or acquisition for public use have reached our Court. One would have expected that a matter so pressing as land use, occupation or ownership would pre-dominate the list of disputes. It may be that the property and restitutionary provisions in s 25 of the Constitution on land have been underworked.⁴⁰

Courts have intervened where valid allegations have been made about wrongful procurement of goods and services by government.⁴¹ When spheres of the state contract for goods and services, they must do so within a system that is fair, equitable, transparent, competitive and cost effective. To that end, Parliament is enjoined to legislate in order to delineate an appropriate procurement policy. Of course, the Constitution was alive to the fact that our government would serve as a vital cog in the achievement of a more equal society; and it is thus anxious to ensure that proper modes of public procurement reverse long-term patterns of underdevelopment and social inequality. In the same breath, our constitutional arrangements are properly inimical and intolerant of public or private corruption. Courts can only deal with prosecutions that come before them; and these matters may be fewer than what they should be. Where the prosecuting authorities have ventured into courts, the record shows that my judicial sisters and brothers have not wavered.

Competition law has found a discernable niche in our judicial system.⁴² This is admirable. In the past, our economy has permitted very little or real competition in the market because of structural and behavioural anti-competitiveness. Some of our manufacturing and retail business have been found by our courts to have engaged in collusive practices including price fixing. The Competition Commission and its tribunals have done much enviable work to remedy or to reduce commercial injustices to consumers that flow from collusive pricing.⁴³

Do I have regrets about the judicial function over the last score of years? The answer is yes. The judicial function can only be reactive and is often limited to a specific case and its peculiar set of facts. The decisions cited above have done their part to advance the achievement of a better life for all. And yet the impact of judicial precedent is often minute in comparison to the tools of social transformation placed in the hands of the legislature, the executive and civil society.

³⁹ On the virtues of deciding cases on a case by case basis, see C Sunstein *One Case at a Time* (1996); C Sunstein 'Leaving Things Undecided' (1996) 110 *Harvard Law Review* 4; C Sunstein *Why Nudging?* (2013).

⁴⁰ But see *Alexkor Ltd & Another v The Richtersveld Community & Others* [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC).

⁴¹ *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21, 2011 (1) SA 327 (CC), 2011 (2) BCLR 207 (CC).

⁴² *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 (Commission imposed unprecedented R 1 000 000 000 penalty on Pioneer for collusive price fixing, with respect to bread and flour, that invariably harmed the most vulnerable consumers.)

⁴³ *Competition Commission v Engen Petroleum Ltd* [2012] ZACT 14.

Judges cannot be much more than referees.⁴⁴ They hope to keep the players on the straight and narrow so that all have genuine equality of opportunity. Even so, a rather large gap exists between formal opportunity and lived reality. Thus my regret stems from the continued chasm between our Constitution's collective promise to one another and the lived reality of the majority of our people. About that, judges cannot do much more. We must keep the faith and ensure that other state actors practise the faith. We must ensure compliance with the promise in the hope that it will accrue to the benefit of all our people.

Perhaps the second and greatest sadness I shoulder is that the vast majority of citizens enjoy rather limited levels of access to courts that might hear their grievances. The lack of access to courts, and therefore to justice, reinscribes obvious patterns of gender, class and racial discrimination. Who can afford to litigate matters up to apex courts like the Supreme Court of Appeal and the Constitutional Court? Meaningful and consistent access to justice has become unaffordable for the poor and the middle class.

In this context, much of our jurisprudence flows from the innovative and caring intervention of public interest lawyers and their organisations and various organs of civil society. We owe them an immense debt of gratitude. They have taken on many trend-setting cases that have brought respite to the poor and vulnerable. Otherwise, our jurisprudence would have been skewed in favour of powerful commercial interests in a society already deeply divided and unequal. Legal Aid South Africa does a splendid job of increasing access to courts. Much innovation and resources have to be devised urgently to make justice more accessible. On this score alone, Ruth First would have wondered what her and our struggle was about.

That then brings me to my third judicial sadness. One of my conventional obligations as a judge is to make prison visits. I would want to do that in any event as one who grew up in a prison. Ruth First would have wanted to do that having been arrested and detained so long and so often. Like me, she would not have been amused. Our prisons are full, very full of young men and young women well beyond their occupancy levels. In a recent tour of one of our largest prisons in Gauteng, I witnessed the frightening overcrowding of spaces dedicated to prisoners awaiting trial. Three to four people appeared to have little choice but to share a bed meant for one. The authorities told me that the average wait for a final trial is approximately two years. Yet the intake of additional people awaiting trial occurs daily. Whilst the Department responsible for correctional centres may be doing its best in the trying circumstances, courts must, in collaboration with other institutions, devise an effective case load management system that will honour and not diminish the constitutional guarantee to a fair and speedy trial. It seems particularly apposite at this juncture for judges (myself included) to remind themselves regularly that 'while the legislature is the will of the majority the Court must always remain the conscience of the society'.

⁴⁴ See S Woolman 'Humility, Michelman's Method and the Constitutional Court: Rereading the *First Certification Judgment* and Reaffirming the Distinction between Law and Politics' (2013) 24 *Stellenbosch Law Review* 242.

IV THE WILLINGNESS TO BEAR THE CONSEQUENCES

I suggested at the beginning that the inevitable consequence of courage wedded to principle must be a willingness to bear the consequences. Ruth First paid that ultimate price. Sadly, she will not be the last. Rulers, even in well-intentioned and well-ordered societies, may forget their own history and resort to unlawful killings, sexual violence, torture, discrimination and cronyism to prop up their hegemony.

We have established a new, admirable and justifiably proud multi-party and multi-racial democracy: a nation that has, to a reasonable degree, broken with its brutal, repressive past and cottoned on to the virtues of recognising the intrinsic, equal worth of every member of this society. Some cynics might be inclined to say that this new South Africa has done no more than pick low hanging fruit and that our fairly progressive constitutional jurisprudence is an inevitable function of a progressive constitutional text. But such glib analysis denies the courage, the principled choices, the contributions and the extraordinary sacrifices of so many South Africans in bringing about our relatively peaceful revolution. In this relatively peaceful and ongoing revolution, our courts have played an exemplary role.

However, a kernel of truth lies with the cynics' canards. We, the people of South Africa, have only just begun the radical reformation required by our Constitution. Judges, cossetted as we can seem to be, cannot now back off from our duty to educate and to train the young, and to transmit to them the values that enabled our long and heroic struggle to succeed. Judges must keep our Constitution's 'collective vision' in sight: our eyes on a prize that lies on a distant horizon. Judges must gather up the courage to speak out against the ills that still beset this great land, and, more importantly, must create the space for others to speak out as well. We, all of us, must require our public functionaries to pursue, in truth, a better life for all. In this day and age, the price we pay for social activism is small indeed. It can hardly be said to compare with Ruth First's willingness to pay the supreme price. Indeed, Ruth First's exemplary and extraordinary commitment to the creation of a just, fair and equal social order should provide us with the necessary resolution to call it right in the most difficult of circumstances. If Ruth First is to be our guide, then our collective vision of the right and the good cannot really be open for debate. Its transparency, simplicity, clarity and lucidity is well settled by the long, virtuous struggle for emancipation, and by the text of a Constitution whose premises and promises have been universally accepted and democratically decreed. Ruth First would only ask that we continue the struggle, with the courage of principle.