

Garnsey, E. 'Framing Human Dignity: visual jurisprudence at South Africa's Constitutional Court', *The Australian Journal of Human Rights* Vol. 22/2 (Dec 2016) 81-102.

Framing human dignity: visual jurisprudence at South Africa's Constitutional Court

*Eliza Garnsey**

Abstract: The Constitutional Court of South Africa is a unique space by international comparison because it houses a large visual art collection developed by and for the court. The purpose of this article is to look at the connections between human dignity and art at the Constitutional Court. Is the performance of dignity in the art collection a utopian ideal, achievable objective, or unrealised potential? I argue that the art collection is a kind of visual jurisprudence which responds to, but also comprises, conceptions of human dignity as a right, a value and a touchstone of democracy — conceptions that are closely entwined with South Africa's human rights governance, but that manifest in very different ways. At the same time that human dignity becomes realised by the spatial transformation of the site of the court, it remains in the art collection something that must ever be worked towards. This article arises out of six months of participant observation fieldwork at the Constitutional Court, conducting 54 semi-structured interviews with people involved in the collection.

Keywords: visual jurisprudence; dignity; art; Constitutional Court; South Africa; utopia.

Introduction

All human beings are born free and equal in dignity and rights.

— *Article 1, Universal Declaration of Human Rights*

[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ... these rights derive from the inherent dignity of the human person.

— *International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, United Nations*

Everyone has inherent dignity and the right to have their dignity respected and protected.

— *Article 10, South African Bill of Rights*

Inside the Constitutional Court in Johannesburg hangs *Humanity* (figure 1). In this tapestry by Joseph Ndlovu, eight figures are woven together; huddled, with closed eyes, their faces merge, their arms embrace in waves of thread. In 1994, Constitutional Court Judges Albie Sachs and Yvonne Mokgoro commissioned the tapestry with the intention that it would reflect 'the humanity and social interdependence that underlay the [South African] Bill of Rights' (Law-Viljoen and Law-Viljoen 2008, 19). Twenty years later — a little faded by exposure to time and light — *Humanity* still hangs at the court, capturing a moment in South Africa's transition from apartheid to constitutional democracy, where the recognition of humanity bore the promise of a future shaped by rights and dignity.

[figure 1 goes approximately here]

Figure 1: Joseph Ndlovu, *Humanity*, 1994, fibre, 181.4 x 150.5cm. Photograph courtesy of the Constitutional Court.

The Constitutional Court is not only distinctive architecturally, including integrated artworks in the fabric of the building, it is also a unique space by international comparison because it houses a large visual art collection developed by and for the court — the core theme of which is respect for human dignity: ‘At the core of the Bill of Rights and of the artistic endeavour represented in the Court is respect for human dignity. It is this that unites art and justice’ (Law-Viljoen and Law-Viljoen 2008, 30). The purpose of this article is to look at the connections between human dignity and art at the Constitutional Court. The aim is to investigate whether the intentional space of human dignity at the court is disconnected from the aesthetics of the art collection. Is the performance of dignity in the art collection a utopian ideal, achievable objective, or unrealised potential?

The art collection — as I argue throughout this article — is a kind of visual jurisprudence which responds to, but also comprises, conceptions of human dignity as a right, a value and a touchstone of democracy — conceptions that are closely entwined with South Africa’s human rights governance, but that manifest in very different ways. At the same time that human dignity becomes realised by the spatial transformation of the site of the court, it remains in the art collection something that must ever be worked towards. In the artworks and the art collection, the journey to human dignity is envisaged as ongoing — it remains ungraspable — connecting with the idea of utopia as a process raised by Rachel Hughes in this special issue. In this way, the court is simultaneously a utopian ‘good place’ — a site constituting human dignity — and a utopian ‘no place’, a prospect yet to be realised — a sight of human dignity. This tension is important in calibrating an idea of human dignity within a transitioning human rights discourse in South Africa.

This article arises out of six months of participant observation fieldwork at the Constitutional Court, researching the art collection and conducting semi-structured interviews with people involved in the collection, including former and current judges, members of the art committee, the collection’s curators, law clerks, artists, court staff, and visitors to the court.¹ Nearly all of the 54 people interviewed spoke about the art collection as being connected to human dignity, humanity, *ubuntu* (humanness) and human understanding. These terms were often used interchangeably.

The first section of the article briefly explores the concept of human dignity as it manifests as a value, a right, and a touchstone of democracy, focusing on the political trajectory that underlies the promise of human dignity in South Africa. The second section introduces the Constitutional Court as a key institution in the ‘new’ South Africa. Built on the site of former notorious prisons, the court is both physically and symbolically significant, being tangibly connected to the past from which it steers the nation’s constitutional future. This spatial transformation makes it a site of human dignity, where human dignity is intentionally realised — as well as being actively shaped through the dignity jurisprudence emerging from the court (an idea I briefly point towards in the article). The third section introduces the court’s art collection as a new kind of visual jurisprudence through which it is possible to understand how the art collection shapes, and has the potential to intervene in, the conception of human dignity emanating from the court. The artworks play a role in framing human dignity as still

¹ Interviews were conducted between June and November 2014 in South Africa.

to be realised; an ongoing utopia ‘out there’. This unfurling concept sits in tension with the site of the court as an extant place of human dignity. In the fourth section I analyse three artworks — *History* by Dumile Feni, *The Man Who Sang and the Woman Who Kept Silent* by Judith Mason, and *Twenty six punishment cells and lavatory, Number Four, Hillbrow, Johannesburg, 32 December 1999* by David Goldblatt — in order to examine how these works conceptualise human dignity.² As sights of human dignity, the artworks respond to, but also comprise, ideas of human dignity that are closely entwined with South Africa’s human rights commitments.

Human dignity in South Africa’s human rights discourse

The United Nations General Assembly adopted the Universal Declaration of Human Rights (UNDHR) in 1948; South Africa abstained from this adoption (United Nations nd; South African History Archive nd). That same year, the South African National Party — the architects of apartheid — came into power. Between 1948 and 1994, the segregation of ‘whites’ and ‘non-whites’ was institutionalised in South Africa. The apartheid government systematically violated the human rights enshrined in the UNDHR, denying the ‘non-white’ population equal opportunities and subjecting them to violent physical oppression, including imprisonment, torture, killing and forced resettlement.

Speaking from the dock during the Rivonia Trial in 1964, Nelson Mandela emphasised the fight against the lack of human dignity in South Africa:

... we fight against two features which are the hallmarks of African life in South Africa and which are entrenched by legislation, which we seek to have repealed. These features are poverty and lack of human dignity. [Mandela 1964]

Thirty years later, in 1994, human dignity became a hallmark of South Africa for a different reason when the interim Constitution — containing the first iteration of the country’s Bill of Rights — stated that ‘[e]very person shall have the right to respect for and protection of his or her dignity’. In the same year, Mandela re-affirmed this right:

[W]e shall build the society in which all South Africans, both black and white, will be able to walk tall, without any fear in their hearts, assured of their inalienable right to human dignity ... [Mandela 1994]

The right to human dignity became entrenched in a vision of the nation reinvented.

The first line of the final 1996 Constitution emphasises human dignity as a founding value of the state: ‘The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of

² It is important to note at this point that the court’s art collection inhabits a paradox between inviting different voices to be expressed and selecting which voices are heard, or in practice seen. On the one hand, the collection was formed primarily by donations — from artists, collectors and patrons. The idea that the ‘collection collected itself’ was often stated in interviews as a way in which the art collection inhabits a democratic energy of the immediate post-apartheid period. Those with the ability — financial, artistic — to donate gave artworks to the court, the majority of which were accepted in the early stages of the collection’s development. This open practice of collecting means that the court’s art collection is diverse and eclectic. On the other hand, the evolving curatorial policy of the collection focuses on the artworks being connected to human dignity — in later years, this policy has been more closely followed than at other times. In practice, this means that some donations are not accepted on the basis that the artwork does not fit with ideas of human dignity or the funding is not available to care for the artwork; participation is thus limited. While this paradox is not unusual in art collections and adheres to the curatorial rigour and business case required to sustain and responsibly manage large art collections — particularly ones as unique as that of the court, which have to maintain impartiality — it is worth noting upfront in the context of a discussion of human dignity where equal access to opportunity and participation, as well as the shielding against visual/vocal dominance, is at stake.

human rights and freedoms ...'. Human dignity takes prime position in this trinity of values. The Constitution also mandates that human dignity is respected, protected and promoted in the detention of prisoners, in the interpretation and deliverance of the law, in the development and support of state institutions, and in the commitment sworn by Ministers and their deputies. The final Bill of Rights — Chapter 2 of the 1996 Constitution — enshrines human dignity further, implanting it as a value that belongs to all people in South Africa, regardless of citizenship: 'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'. The new Constitution broke with the past conception of human dignity (or lack thereof) under apartheid as something that the state could violate and deny. Instead, it affirms human dignity as what former Constitutional Court Judge Kate O'Regan describes as 'the touchstone of the new political order':

Apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution. [Wolff 2014, 105]

In short, the South African Constitution is founded on the value of human dignity, but it also promotes the governance of human dignity.

Human dignity has gained social and political recognition and meaning through its journey in South Africa. It is seen as an individual right, as a collective value of democracy, and as a touchstone of political order. This begs the question: What exactly is meant by human dignity as a right, value, and touchstone? The concept of human dignity encapsulates big ideas 'that gain definition through specific historical and cultural narratives' (Wolff 2014, 107). It is a concept that lacks one meaning but evokes a plethora of feeling and remains a significant idea that cuts across human rights regimes and international norm calibration. Mark Lagon and Anthony Arend trace the essence of human dignity through various schools of thought — including Judeo-Christian, Kantian and secular universalism — to arrive at a working definition of human dignity based on agency and recognition:

Human dignity is the fundamental agency of human beings to apply their gifts to thrive. As such, it requires social recognition of each person's inherent value and claim to equal access to opportunity. To be meaningful, human dignity must be institutionalized in practice and governance. [Lagon and Arend 2014, 16]

That is — as in its trajectory in South Africa — human dignity encompasses three things: it is right to agency; it is a recognition of value; and it is a benchmark of governance and institutional order. While human rights discourse has managed to penetrate state sovereignty in order to foster recognition of the rights of individuals and provide support to this end, Lagon and Arend argue that human dignity is in fact both the premise behind human rights — all human beings are worth something and therefore they all have rights to be possessed and protected — and the product of human rights: 'if human rights are to have meaning beyond norm elaboration ... and are to be enjoyed in practice, the test of impact is whether they actually yield the agency and social recognition that constitute human dignity' (Lagon and Arend 2014, 322). This conception of human dignity as both the premise and the practice of human rights is doubly important in thinking about the aim of this article, at the heart of which is concerned with whether the connections between human dignity and art at the court go beyond aspirational promises.

Human dignity occupies an important discursive space in the law of South Africa — a space that, it should be noted, may be recognised in principle in the Constitution, but does not automatically manifest in the everyday reality of the country's occupants. As Chief Justice Mogoeng Mogoeng states:

It doesn't matter how progressive the Constitution is. It cannot, just because it is operative, touch me, in my house to the point where I automatically begin to understand how my white brothers and sisters think and what I need to do to relate to them better. Some practical steps must be taken and we, as a nation, must also be encouraged to take them so that ... [t]he 'ubuntu' or that spirit of sharing of humanity, of oneness, that the 1993 constitution provided for ... [can] permeate across society. [Cohen 2014, 132]

The concept of human dignity shares some common ground (and some tension) with the concept of ubuntu.³ The word ubuntu translates from the Nguni Bantu languages roughly as 'humanness'. As a philosophy, ubuntu is an ethic of communal existence, which means 'I realise my humanity only when I realise yours' or, put another way, 'a person is a person through other people' (Wolff 2014, 106). The idea of ubuntu draws on the understanding that people's individual agencies are inherently connected and realised through others. That is, personal humanity is affirmed and afforded by the humanity of others; it is reciprocal and mutually enjoyed, 'it is a lived system of norms' (Bennett 2011, 49). Ubuntu draws a connection with human dignity, they are both predicated on the social recognition of human value. Conversely, if that recognition is denied, lost or taken away, then ubuntu and human dignity are similarly undermined: 'In failing to respect the humanity of others we actually undermine humanity in ourselves' (Rosen 2012, 157). While the final 1996 Constitution made no express mention of ubuntu — even though the preceding interim Constitution did⁴ — the Constitutional Court 'regularly emphasise[s] the overlap between ubuntu, rights articulated in the Constitution, and emerging international legal norms' (Himonga, Taylor and Pope 2013, 7). During interviews with judges, law clerks and staff at the court, ubuntu was often used interchangeably with human dignity — a slippage indicative of how ubuntu, like human dignity, is embedded in the human rights governance enacted by the court.

A site of human dignity

South Africa's Constitution is characterised by a spirit of transition and transformation (Langa DP in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* Case No CCT 1/00, 2000, 18). The Constitutional Court has been foundational to the state's ongoing transition in three ways. First, the court has played a key role in the symbolic transition of a nation moving to constitutional democracy. Established at the point of transition in 1994, the court became a symbol of a new justice system, one intended to safeguard human rights. In 2013, the symbolism of the court was elevated when it became the highest court of appeal in South Africa, having previously been considered the highest court for matters relating only to the Constitution (Government Gazette 2013).

Second, the court's rulings have been vital to the institutional transformation of human rights in South Africa. Between 1995 and 2013, the court heard over 160 cases in which 'the constitutionality of legislation was directly challenged as human rights violations ... [and it] declared legislation unconstitutional in 100 instances' (Le Roux 2013, 171). In its first case, the court ruled the death penalty to be unconstitutional because it was incompatible with the Constitution's commitment to human rights (*State v Makwanyane*, 1995). In 2000, the court ruled that the state must provide access to housing, stating that '[h]uman dignity, freedom and equality are denied to those without food, clothing or shelter' (*Government of the*

³ The intention in this article is not to assert that ubuntu and human dignity can simply be assimilated. They derive from different traditions and at times are in tension. Rather, the intention here is to point out some connections between the two, particularly as they manifest at the court. For an overview of ubuntu as a moral theory, see Metz 2011.

⁴ The interim Constitution was the first official document to use the term ubuntu: see Bennett 2011; Cornell 2012.

Republic of South Africa v Grootboom, 2000) — a declaration that underscores the importance of human dignity as a right in the court’s decisions. In 2002, when deliberating on the right to health care (specifically, the right to access HIV/AIDS treatment), the court stated that ‘[n]o one should be condemned to a life below the basic level of dignified human existence’ (*Minister of Health v Treatment Action Campaign*, 2002, 22). In 2005, the court ruled in favour of marriage equality, finding the narrow definition of marriage in common law to violate the human rights of same-sex couples (*Minister of Home Affairs v Fourie*, 2005; *Lesbian and Gay Equality Project v Minister of Home Affairs*, 2005). These rulings epitomise the dignity jurisprudence emerging from the court; enabling human dignity underscores the constitutional project, at least in its initial phase.⁵ Interestingly, the court also chooses to visually define itself by these rulings through a billboard (figure 3) that hangs prominently in its art gallery. This visual announcement fosters an appearance of jurisprudence grounded in dignity.

Third, the court has been central to the physical transformation of infamous prison sites. The court was built on the site of several former notorious prisons (Number Four, the Women’s Jail, and the Old Fort) where ‘[v]irtually every important political leader in South African history from Mahatma Gandhi to Nelson Mandela as well as scores of ordinary South Africans caught in the web of colonial and apartheid repression’ were once imprisoned — ‘The old stonewalls tell a century’s worth of stories of an iniquitous political system, a brutal penal institution, and the resilience of generations of prisoners’ (Segal 2006, i). Former prison buildings and cells surround the court, while elements of the former buildings form part of it. For instance, the stairwell of the trial block confronts visitors as they enter the court building; still showing the original graffiti. The court complex reused around 150,000 bricks from the former prison buildings. This is particularly evident in the main court chamber, where the exposed recycled bricks serve as a visual reminder — and a metaphor that is regularly offered by people working at the court — that South Africa’s constitutional freedom is built with the bricks that once imprisoned the nation.

The new space of the court is actively involved in shaping a different meaning for this former penal site. The building of the court has physically transformed the site of human dignity — what was once a place that violated human rights is now a place that protects them:

... symbolic of the constitutional project of creating a bridge between a terrible past and a brighter future. It is not a bridge that can simply be crossed once, leaving the past behind. It is a bridge that must be crossed again and again in the constant search for justice in our young democracy. The Prison in the Court and the Court in the Prison is a constant reminder of this fact. [Justice Pius Langa in Perry 2014]

The bricks in the new building force together what was (the prison) and what is (the court) in order to capture what can be — the realisation of human dignity in this space.⁶ This spatial transformation resonates with the court being a utopia ‘somewhere’; a place in which human dignity becomes realised by the intentional transformation of the physical space from a prison site lacking in human dignity, to a site of justice realising — ruling on — and containing human dignity. It is not a conquering of space, but a meeting of two histories contained in space (Massey 2005, 4).

⁵ While an in-depth discussion of the dignity jurisprudence of the court is outside the scope of this article, for an overview of the dignity jurisprudence emerging from the court, see Cornell, Woolman and Fuller 2013.

⁶ Cooper (2013) argues that utopias are about bringing together what is and what could be. To this I add a third perspective, ‘what was’. Utopias are not only about a contrast to the present, they can also be a desire to move away from the past.

There is an element of over-determination to this site of human dignity. The transformation of the space — and the institution of the court — was a deliberate move away from the past; at the same time, it remains a considered contrast against that past by being deeply embedded in memorialising it (Le Roux, 2007). It is a utopia of human dignity underscored by an explicit intention to demonstrate how that dignity is enacted through transformation — an important characteristic of utopias (Sargent 2010; Levitas 2003). The symbolic, institutional, and physical transformations by the court, in the court, and of the court position it as a site constituting human dignity — a utopia realised through an extant space.

The visual jurisprudence of human dignity

In such close proximity to the provision of justice enacted by the court, the art collection inhabits a unique position in which the assumptions of human dignity and what it means to uphold human rights can be probed. Artworks — and the art collection as a whole — are complex sights of gathering that have the potential to intervene in the past, the present and the future (Benjamin 1999, 462; Bell, 2011); they embody an inherent subjectivity that is part of their dynamic complexity and potential. Unlike the physical site of the court, which positions human dignity as an intentional utopia somewhere — a place — the art collection captures discursive sights of human dignity in the process of becoming; forever an unfolding journey to a utopia ‘out there’ — a direction. This contrast between the court and the art collection bears relationship to what Barnita Bagchi calls in this special issue the dual impulse of human rights: ‘a strong drive to articulate a desired set of norms, while knowing that their actualisation may always be partly elusive’. The art collection does not represent a utopia, or imagine a utopia as is so often theorised in the realm of art. Rather, the art collection is a kind of visual jurisprudence that frames and re-frames the conceptions of human dignity emanating from the court; in doing so, the collection frames human dignity as a utopia still to be achieved, not an ideal image to be followed.

Areas of legal scholarship which examine the visual most often take one of two approaches. The first approach is by exploring problems associated with legal visibility — that is, how some images encourage belief through an appearance of being authentic. For example, an eye witness ‘may assert that the photograph corresponds to her memory without realizing that, even as she speaks, her memory is being sculpted by the photograph’ (Feigenson 2014, 2). The second approach is by examining images of and about law — that is, how images represent the law and how images can be used to understand the law. For example, images of capital punishment in colonial Australia served to represent and communicate a principle of law at the time — that the crime of murder would be punished by death. From a historical perspective, these images can also be used to explore how this principle was applied differently due to racial discrimination (Manderson 2012).

In post-apartheid South Africa, constitutional scholarship has undergone an aesthetic turn that expands the second approach to the visual in law: using aesthetic examples not only to represent but also to interrogate the law, to recast ‘rights discourse in a critical light, and to expose its fundamental assumptions’ (Le Roux 2006a, 108). This scholarship explores individual artworks and literary works as illustrations and analogies of the law, and also uses them to enliven debate and comment on the law’s shortcomings. For example, Judith Mason’s *The Man Who Sang and the Woman Who Kept Silent* (analysed further below) has been discussed as a symbol of the new constitutional order — a symbol of how memory instantiates responsibility (Le Roux 2006b, 400). It has also been used as an example through which to question and critique the formalism of this constitutional order (van Marle, De Villiers, and Beukes 2012).

Both approaches to the visual in law — encouraging belief, and representing and interrogating what the law means — share the idea that visuality has the potential to engender understanding either when used as evidence to support an argument and prove responsibility, or when used to communicate the nature of law. Understanding, then, is created by the probity of visuals in some contexts (such as evidence in the courtroom) and by the application of visuals to other contexts (such as metaphors to elucidate legal arguments).

However, these burgeoning areas of legal scholarship make little to no reference to the concept of visual jurisprudence. The term ‘visual jurisprudence’ is a relatively recent one, conceived of as the ‘array of visual evidence and visual argument’ used *inside* the courtroom (Sherwin 2012, 12). The concept is used to examine the proliferation of visual media — particularly screen imagery — in the law, exploring what it means for visuals to be seen as credible. This connects back to the problem of legal visuality (the first approach to visuals in law discussed above). Scholarship on visual jurisprudence also advocates visual-literacy training for lawyers, judges and jurors so that visuals are better understood and utilised in procedures of law (Sherwin 2011). This conception of visual jurisprudence is largely a pragmatic response to an increasingly optic age, arising from the premise that visuals are more widely becoming part of legal decision-making processes and therefore people involved in those processes need to be visually literate.

The idea of visual jurisprudence that I propose differs in two distinct ways from the purely visual as evidence or argument. First, I take as my starting point the inherent subjectivity of the world of visual art, which embodies a dynamic complexity and potential. In the context of the court, the presence of the art collection and the integration of art into the fabric of the building are a unique instance of a large body of artworks being closely connected to, and blended with, the value and practice of justice (two tenets of jurisprudence). This is a clear departure from the aesthetic turn in post-apartheid constitutional scholarship that uses single artworks to represent or illustrate claims about the law. In this scholarship, artworks still remain on the periphery of justice as examples through which to understand the law, rather than as constituent parts of its value and practice. The art collection of the court is central in forming the bodies of aesthetic knowledge that (a) shape how justice is understood (value) and (b) shape the appearance of justice in South Africa (practice).

Taking the court’s art as the specific starting point leads me to the second distinction, that visual jurisprudence is not restricted to what happens — or what is seen — inside the courtroom. My argument is that visual jurisprudence is as much about a way of conceiving justice as it is about its procedural provision. In other words, visual jurisprudence revolves around how visuality affects the thinking of law not only by engendering belief and understanding inside the courtroom or in legal scholarship, but also by engaging the moral imagination — ‘the capacity to imagine something rooted in the challenges of the real world’ — *outside* the courtroom (Lederach 2004, 29). This is not only bound to legal space, but it is also an orientation towards a philosophy of the visual in law.

Sights of human dignity

Outside the main entrance to the Constitutional Court sits a large bronze sculpture made up of four figures. The largest of the figures rests on all fours in an animal-like position, bit between teeth. This man is strapped to a cart, pulling the other figures along. On the cart crouches another figure, on which two other figures — a woman indicated by her bare chest and a man implied by his bowler hat — sit. At first encounter, this sculpture, entitled *History*, by Dumile Feni (figure 2) resonates ‘with the history of servitude that marked the dehumanizing institution of apartheid’ (Cameron and Sachs 2014). The sculpture appears as a

visual metaphor for the subjugated majority whose labour supports the governing minority; the man is yoked to the cart, dragging its occupants. *History* provokes questions about the relationships between the figures and the relationship of the sculpture to the court. Why would the court have a sculpture that references oppression outside its main entrance?

[figure 2 goes approximately here]

Figure 2: Dumile Feni, *History*, 2003, bronze. Photography by Akona Kenqu.

All the figures share similar abstracted and exaggerated features; they appear to be of the same ‘racial’ origin. This complicates the initial reading of the artwork as a slave–master dynamic, especially in the context of South Africa where oppression has historically been divided along racial lines. *History* — as it looms large in its current state outside the court — was cast from a small maquette Feni made in 1987, shortly before he died in 1991. According to Sachs (to whom Feni gave the maquette), the artist intended the sculpture to illustrate ‘how throughout history some people had given their bodies and souls to pull others along’ (Law-Viljoen and Law-Viljoen 2008, 193). On tours, the curator extends this explanation to provide an interpretation of the artwork as a characterisation of universal human relationships, a sentiment echoed by the court:

[T]he man drawing the cart is the only figure who is large and strong enough to accomplish this task ... the four figures carry each other in a way that reflects the dependence, the interconnectedness, and the tension that have always characterized human relationships. [Cameron and Sachs 2014]

At first look, *History* resembles the history of oppression in South Africa. At second look, the sculpture can be interpreted as how throughout history humans have carried one another. A third look at *History* reveals how it communicates multiple ideas about human relationships. Human participation is a central concern of the artwork, but not one that can necessarily be pinned down. *History* captures a certain complexity of human relationships — each figure within the artwork plays a role through which their value is visually recognised. However, this value is complicated by the implications of power that underscore the image of subjugation and labour. The recognition of human value remains circumscribed by the inherent intricacies and dynamics of human relationships; individual and collective human agencies are in tension.

Located in a place that was formerly hidden from view (a site of incarceration) the sculpture becomes a monument to the past, while carving out a more accessible present — on a site that has been transformed into the keeper of human dignity. Being located outside the main entrance to the court means that *History* inhabits a space that acts as a pedestrian thoroughfare between the inner-city suburbs of Braamfontein and Hillbrow. Children on their way to and from school pass by the sculpture, rubbing the tactile bronze surface or climbing on the figures. The sculpture becomes an object of play, open to interaction — an uncommon situation in the security and management of most major art collections. Although conceptually ambiguous, the sculpture is physically accessible.

History is a monumental reminder to the ongoing journey to achieve human dignity. At the same time that it provokes questions about the value of human dignity, it challenges the right to human dignity. While the interpretation of the artwork is not as straightforwardly optimistic as the official reading provided by the court suggests, the sculpture does probe

what it means for humans to coexist.⁷ *History* confronts the viewer to think more deeply about the balances of power and structures of dominance that have underscored, and continue to underscore, human relationships — especially in South Africa, where the dominance of the ‘haves’ over the ‘have nots’ remains poignant. This challenge speaks to the very heart of the ability of the court to uphold human dignity in the face of ongoing structural injustices that inhibit the equalising right to human dignity stipulated by the Constitution.

Inside the main art gallery section of the court building hangs Judith Mason’s *The Man Who Sang and the Woman Who Kept Silent* (figure 3), also known as *The Blue Dress*. The three-part installation commemorates the deaths of Phila Ndwandwe and Harold Sefola, who were murdered during the struggle against apartheid. Suspended from the double-height ceiling is a blue dress, sewn from segments of plastic bags, on which Mason has written:

Sister, a plastic bag may not be the whole armour of God, but you were wrestling with flesh and blood, and against powers, against the rulers of darkness, against spiritual wickedness in sordid places. Your weapons were your silence and a piece of rubbish. Finding that bag and wearing it until you were disinterred is such a frugal, commonsensical, house-wifely thing to do, an ordinary act ... At some level you shamed your captors, and they did not compound their abuse of you by stripping you a second time. Yet they killed you. We only know your story because a sniggering man remembered how brave you were. Memorials to your courage are everywhere; they blow about in the streets and drift on the tide and cling to thorn-bushes. This dress is made from some of them. *Hambe kahle. Umkhonto* [Go well, Spear of the Nation].

Mason wrote this epitaph to Ndwandwe — a member of *Umkhonto we Sizwe* (Spear of the Nation) who disappeared in 1988 — after hearing testimony from the perpetrators of her death at the Truth and Reconciliation Commission. She recalls hearing how Ndwandwe was shot by security police after being kept naked for weeks ‘in an attempt to make her inform on her comrades’. Mason describes that Ndwandwe ‘preserved her dignity by making panties out of a blue plastic bag. This garment was found wrapped around her pelvis when she was exhumed’ (Judith Mason in Sachs 2009, vii). The artwork functions as a kind of symbolic reparation — memorialising Ndwandwe’s story and returning a sense of visual dignity which her death denied — at the same time the artwork becomes a way for the artist to process her own indirect involvement as a beneficiary of the apartheid system.

[figure 3 go approximately here]

Figure 3: Installation view of Judith Mason, *The Man Who Sang and the Woman Who Kept Silent* (triptych), 1998, mixed media/oil on canvas, various dimensions. Also depicted in the image is the billboard of the Court’s landmark cases. Photography by Akona Kenqu.

In *The Blue Dress*, the blue plastic bag becomes a sign of dignity, a sign emphasising the value of individual human dignity in the face of collective indignity. This same idea is also reflected in the painting about Sefola, who before being electrocuted by the security police sang *Nkosi Sikelel’ iAfrika* (God Bless Africa) — which is now South Africa’s national anthem. Sefola’s act of resistance — singing in the face of death — shares similar overtones

⁷ It should be noted that the curator or a tour guide often leads viewers through the art collection. The curatorial interpretation of artworks plays an important role in setting-up viewers for an experience at the court. However, the subjective nature of artworks means that these official readings can be ‘flipped’; viewers have different interpretations and this is part of the dynamic potential of having art at the court. The utopian charge in fact lies in the critique of artworks; they are not straightforward visions of human dignity; they are interventions in conceptions of what human dignity means and entails, understood differently through individual interpretations.

to Ndwandwe's resistance in remaining silent. Sefola upheld his human dignity through voice; Ndwandwe upheld hers through silence. Mason imparts these stories through a visual memorial in which she emphasises the role of individual people against the collective regime of apartheid — symbolised in part in the paintings where the candles shine brightly against the hyenas lurking in the background. The value of individual human dignity is preserved through these acts of resistance and in the commemoration of these acts.

Ndwandwe's and Sefola's stories are discursive memories for the people who work at the court. In particular, several judges spoke about *The Blue Dress* epitomising human dignity and the type of injustices the court is trying to protect against; an artwork living in the judicial consciousness of the court.⁸ This idea is particularly pertinent in considering *The Blue Dress* as a kind of visual jurisprudence. While the value of human dignity is preserved in the artwork, *The Blue Dress* lives on in judicial consciousness as something that must be prevented (Ndwandwe's and Sefola's murders should never be repeated). It also remains a vision of human dignity (resistance against tyranny) that should be strived towards. The artwork inhabits a tension of human dignity being achieved and needing to be achieved again — inspiring the moral imagination towards human dignity, in a process that warns against its lack and encourages its presence.

At the entrance to the Number Four museum — around 50 metres from the court — is a quote from Mandela, writ large, which says:

It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones — and South Africa treated its African citizens like animals.

Inside the museum, 26 isolation cells still exist in their original state and location; their stiflingly small walls bear the marks and graffiti of former inmates. These cells are physical reminders of the brutality of the apartheid regime, where South Africa treated its 'citizens like animals'. Standing outside the cells, the court's library tower and logo are visually prominent; looming large, a tree of justice casting its shadow on the prison. The site of the court is a constant reminder of the violations of human rights that it now protects; a site of utopia in which what was (the apartheid past) collides with what is (constitutional democracy) to imagine what could be (a future shaped by human dignity). While this collision intentionally happens on site, it remains unsettling in the sights of the art collection.

The isolation cells have a prominent presence within the court. Hanging in the corridor the judges and their clerks use to enter the court chamber is David Goldblatt's photographic work entitled *Twenty-six punishment cells and lavatory. Number Four, Hillbrow, Johannesburg. 31 December 1999* (figure 4). In this work, a photograph of each isolation cell is sandwiched together, so that the work forms one long, horizontal image, over three metres in length — the artwork is longer than the longest wall of an individual isolation cell. Every time a person traverses this corridor, they are confronted with the grid-like repetition of these bleak cells. This is even more poignant considering that some of the judges who currently serve or have served on the bench of the Constitutional Court were at one time incarcerated, also in isolation cells.

[figure 4 goes approximately here]

⁸ Four of the six judges interviewed referred to *The Blue Dress*. 'Judicial consciousness' was a recurring phrase used by the judges during interviews.

Figure 4: Installation view of David Goldblatt, *Twenty-six punishment cells and lavatory. Number Four, Hillbrow, Johannesburg. 31 December 1999*, photographic print on cotton paper. Photography by Akona Kenqu.

The denial of human dignity through the incarceration of people in terrible conditions was a hallmark of the apartheid regime — a mechanism of fear and control used to suffocate a nation. The scale of past abuse is emphasised by the repetitive images of the cells in Goldblatt's work, which functions as both a reminder of this past and a warning not to repeat it. As a touchstone of South Africa's new constitutional democracy, human dignity is emphasised in Goldblatt's work by its antithesis, what it is not. Human dignity is not the inhuman treatment of a nation's 'lowest citizens', and in practice it cannot be a touchstone if it is not institutionalised in governance. By documenting the desolate inhumanity of the isolation cells, Goldblatt's photographs implicitly urge the viewer not to lose sight of the touchstone of human dignity. That this image is located at the private judicial entrance to the court chamber serves as a well-crafted reminder of this touchstone (as negative liberty) for the people who protect it the most. The art collection shifts from judicial consciousness to judicial confrontation.

Each artwork offers a perspective of human dignity and probes the notion of what human dignity as the promise of human rights means and entails in the context of the Constitutional Court. The artworks and the art collection — like the Constitution itself — are signs that the promise of human dignity is underway in South Africa, but these signs alone do not represent the fulfilment of this right, value and touchstone. Rather, the artworks point to the past so that the future may be shaped along more dignified lines. While the artworks are curated in a such a way as to elicit reflections on human dignity — the sculpture outside the entrance, the ghostly dress hanging in the gallery, the images of cells confronting the judges — their inherent subjective complexity makes it more difficult for a human dignity narrative to be over-determined. This is in contrast to the site of the court, where the space is actively transformed to constitute human dignity. The sights of human dignity in the art collection position it as ongoing and relational — a utopia 'out there' in the process of being grasped.

Conclusion

South Africa's Constitution is a forward-looking document that enshrines the promise of human rights, particularly human dignity as its founding value. The Constitutional Court seeks to uphold and protect these rights in present-day South Africa. By contrast, the art collection looks backward in order to move human dignity forward; it is a way of knowing human dignity differently. In particular, the three artworks by Feni, Mason and Goldblatt raise the idea that the visual jurisprudence of human dignity lies in the responsibility of those who are doing the looking. Reciprocity is important in recognising and questioning what it means to uphold human dignity against the ramifications of apartheid and historical injustice. Far from being utopian ideals of what human dignity should be, the artworks serve as reminders of past violations of human dignity, underscored by a norm of non-repetition. In doing so, the art collection positions human dignity as a process — a utopia still 'out there'. This sits in contrast with the site of the court, where its spatial transformation constitutes a utopia somewhere — an intentional realisation of human dignity in time and space. These tensions are important in understanding what human dignity means and entails in South African human rights discourse.

References

South African cases

Government of the Republic of South Africa v Grootboom (2000) CCT11/00

Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd (2000) Case No CCT 1/00

Lesbian and Gay Equality Project v Minister of Home Affairs (2005) CCT10/05

Minister of Health v Treatment Action Campaign (2002) CCT8/02

Minister of Home Affairs v Fourie (2005) CCT60/04

State v Makwanyane (1995) CCT3/94

South African legislation

Constitution (1996)

Interim Constitution (1994)

International legal materials

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

International Covenant on Economic, Cultural and Social Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)

Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948)

Other references

Bell V (2011) 'Contemporary Art and Transitional Justice in Northern Ireland: The Consolation of Form' *Journal of Visual Culture*, 10(3) 324-353

Benjamin W (1999), *The Arcades Project* Harvard University Press

Bennett T W (2011) 'Ubuntu: an African equity' 14 *PER: Potchefstroomse Elektroniese Regsblad* 29-61

Cameron E and Albie Sachs (2014) 'Celebrating Transition: Apartheid to Democracy' *World Policy Blog* World Policy Institute

Cohen D F (2014) 'A Constitution at a crossroads: a conversation with the Chief Justice of the Constitutional Court of South Africa' 12(2) *Northwestern University Journal of International Human Rights* 132-51

Cooper D (2013) *Everyday Utopias: The Conceptual Life of Promising Spaces* Duke University Press

Cornell D (2012) *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* Fordham University Press

Cornell D, Woolman S and Fuller S (2013) *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials* Fordham University Press

Feigenson N (2014) 'The visual in law: some problems for legal theory' 10(1) *Law, Culture and the Humanities* 13-23

- Government Gazette (2013) [Online] Available: www.justice.gov.za/legislation/acts/2013-010.pdf [accessed March 2015]
- Himonga C, Taylor M and Pope A (2013) 'Reflections on judicial views of Ubuntu' 16(5) *PER: Potchefstroomse Elektroniese Regsblad* 1–61
- Lagon M P and Arend A C (2014) *Human Dignity and the Future of Global Institutions* Georgetown University Press
- Law-Viljoen B and Law-Viljoen B (2008) *Art and Justice: The Art of the Constitutional Court of South Africa* David Krut, Johannesburg
- Le Roux W (2006a) 'The aesthetic turn in the post-apartheid constitutional rights discourse' *Journal of South African Law* 101–20
- Le Roux W (2006b) 'Directory provisions, section 39 (2) of the Constitution and the ontology of statutory law' 21 *SA Publikereg (SA Public Law)* 382–401
- Le Roux W (2007) 'War Memorials, the Architecture of the Constitutional Court Building and Countermonumental Constitutionalism', in Karin Van Marle and Wessel Le Roux (eds.), *Law, Memory, and the Legacy of Apartheid: Ten Years after Azapo V. President of South Africa* PULP 65-92.
- Le Roux W (2013) 'Descriptive overview of the South African Constitution and Constitutional Court' in O Vilhena, U Baxi and F Viljoen(eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* Pretoria University Law Press, Johannesburg pp 135–75
- Lederach, J P (2004) *The Moral Imagination: The Art and Soul of Building Peace* Oxford, Oxford University Press
- Levitas R (2003), 'Introduction: the elusive idea of utopia', *History of the Human sciences*, 16 (1), 1-10
- Mandela N (1964) *Nelson Mandela's statement from the dock at the opening of the defence case in the Rivonia Trial* [Online] Available: www.anc.org.za/show.php?id=3430 [accessed March 2015]
- Mandela N (1994) *Statement of Nelson Mandela at his Inauguration as President* [Online] Available: www.anc.org.za/show.php?id=3132 [accessed March 2015]
- Manderson D (2012) 'The law of the image and the image of the law: colonial representations of the rule of law' 57 *New York Law School Law Review* 153–68
- Massey, D (2005) *For Space* Sage
- Metz T (2011) 'Ubuntu as a moral theory and human rights in South Africa' 11 *African Human Rights Law Journal* 532–59
- Perry, M (2014) 'The Role of the Courts under the South African Constitution: An Australian Comparison', Available: www.fedcourt.gov.au/publications/judges-speeches/justice-perry/perry-j-20140221 [accessed January 2015].
- Rosen M (2012) *Dignity: Its History and Meaning* Harvard University Press
- Sachs, A (2009) *The Strange Alchemy of Life and Law*. Oxford, Oxford University Press
- Sargent L T (2010), *Utopianism: a very short introduction* Oxford University Press
- Segal L (2006) *Number Four: The Making of Constitution Hill* Johannesburg, Penguin

Sherwin, R K (2011) *Visualizing Law in the Age of the Digital Baroque: Arabesques and Entanglements* Oxford, Routledge

Sherwin, R K (2012) 'Visual Jurisprudence' *New York Law School Law Review*, 57(11) 11-39

South African History Archive (nd) *The Birth of the Bill of Rights* [Online] Available: www.saha.org.za/billofrights/the_birth_of_the_bill_of_rights.htm [accessed March 2015]

United Nations (nd) *History of the Document* [Online] Available: www.un.org/en/sections/universal-declaration/history-document/ [accessed March 2015]

van Marle K, De Villiers I and Beukes E (2012) 27 'Memory, space and gender: reimagining the law' *Southern African Public Law* 559–74

Wolff S (2014) 'Human dignity and freedom of speech in the post apartheid state' 13 *Macquarie Law Journal* 99–127

* PhD Candidate, Department of Politics and International Studies, University of Cambridge. Email: esg35@cam.ac.uk.

I would like to thank my doctoral supervisor, Dr Duncan Bell, the editors of this journal, and the two anonymous reviewers for their invaluable comments and guidance. Many thanks to Dr Benjamin Authers and participants in the 'Utopias of Human Rights' workshop at the Australian National University for their engagement with this article. Many thanks also to the reviewers and editorial team of the Centre of Governance and Human Rights Working Paper series at the University of Cambridge. This work was kindly supported by the Cambridge Political Economy Society Trust; the Centre of Governance and Human Rights at the University of Cambridge and the Centre for Human Rights and the Institute for International and Comparative Law in Africa at the University of Pretoria, through a grant from the David and Elaine Potter Foundation; the Department of Politics and International Studies at the University of Cambridge; Queens' College Cambridge; and the Smuts Memorial Fund, managed by the University of Cambridge in memory of Jan Christiaan Smuts.