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## The constitutional duties of the people

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# NOW WITHOUT HESITATION

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## The constitutional duties of the people

In the United States we rarely speak of citizens or residents of the country as having enforceable constitutional duties, either towards each other or towards the government. South Africa's constitution, by contrast, explicitly declares that "[a] provision of the Bill of Rights binds a natural ... person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." (Section 8(2).) While this is obviously vague, it's clear enough on the basic point -- that individual people with no connection to the government ("natural persons") may be constitutionally obliged to respect each other's constitutional rights.

In *Residents of Joe Slovo*, Justice Sachs develops the idea that individual people may also have duties to the government. The proposition that evictions needed to be preceded by "engagement" between the government and those it wanted to evict had been advanced in an earlier case, *Occupiers of 51 Olivia Road and Others v. City of Johannesburg and Others*, decided by the Constitutional Court in 2008. There the Court focused on, to use Justice Sachs' phrase, "the interconnectedness of procedure and substance" and reasoned that "'meaningful engagement' between the occupiers and the City" was "a major pre-condition for determining whether an eviction order would be just and equitable" under the applicable statute, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, often referred to as "PIE" and enacted as Act 19 of 1998. (*Residents of Joe Slovo*, par 338). Justice Sachs goes on (at par 407) to recall that the *51 Olivia Road* Court also emphasized "that the process of engagement would work only if both sides acted reasonably and in good faith."

Here, Justice Sachs places these ideas in the framework of a broad conception of the concept of citizenship. He writes that the *Residents of Joe Slovo* case "expands the concept of citizenship beyond traditional notions of electoral rights and claims for diplomatic protection, to include the full substantive benefits and entitlements envisaged by the Constitution for all the people who live in the country and to whom it belongs. At the same time it focuses on the reciprocal duty of citizens to be active, participatory and responsible and to make their own individual and collective contributions towards the realisation of the benefits and entitlements they claim for themselves, not to speak of the well-being of the community as a whole." (Par 408).

What is the constitutional source for this reciprocal duty of citizens? Justice Sachs' judgment offers support for three possible answers to this question.

The first, and most evident, is simply that if the residents will not engage, the government cannot engage with them. Requiring engagement appears to be a central response of the Court to its recognition that cases like this one cannot be resolved by holding one side right and the other wrong. The Court nevertheless must address the disputes that come before it, and it has turned to the engagement of and between the parties as a critical element of finding resolution. Section 172(1)(b) of the Constitution gives courts power, in deciding constitutional matters, to "make any order that is just and equitable," and ordering mutual engagement can be seen as an exercise of this remedial authority. I think, however, that Justice Sachs is offering a response to these cases that goes beyond just an articulation of remedial methods.

The second possible answer is that the residents' tenure on the land -- their constitutionally based right of temporary occupancy -- incorporates a duty to play their part in the government's efforts to address the housing crisis by upgrading the housing in *Joe Slovo*. "By its nature," Justice Sachs writes (in a somewhat different context) at par 387, "the programme imposed a duty on the residents to cooperate." A slightly different argument is that the residents actually agreed to this condition: "Once the residents had embraced the Project, they implicitly undertook the obligation to allow it to work." (Par 386.) There was, of course, nothing like a signed contract to that effect, and I am not certain how fully any given resident actually understood or consciously agreed to the contours of his or her right to reside in *Joe Slovo*, but the idea that a constitutionally-based right comes with constitutionally-based limits makes good sense. On this argument, the duty to engage or to cooperate or to allow the program to work is an implication of the right of access to housing in section 26. It might be said that the right of access to housing binds each resident under section 8(2) "to the extent that ... it is applicable" -- that is, that each resident must contribute to helping achieve the community's right of access to housing. "The achievement of a just and equitable outcome required an appropriate contribution not only from the municipal authorities but from the residents themselves." (Par 407)

The third possibility is that the duty comes from the nature of human dignity. Section 10 of the Constitution declares that "[e]veryone has inherent dignity and the right to have their dignity respected and protected." Justice Sachs writes that the Court has recognized that

governments' "duties extended beyond the development of housing schemes to treating those within their jurisdiction with respect .... Justice and equity require that everyone be treated as an individual bearer of rights entitled to respect for his or her dignity." (Par 406). But the residents themselves "should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency. The tenacity and ingenuity they have shown in making homes out of discarded material, in finding work and sending their children to school, serves as a tribute to their capacity for survival and adaptation.... They had a duty to show the same resourcefulness in seeking a solution as they did in managing to survive in the most challenging circumstances." (Par 407; I've omitted from this passage the sentence from the same paragraph that I quoted in discussing the second possibility, the section 26 roots of this duty, above.) Here it might be said that each resident has a constitutional duty to act with the dignity that section 10 secures. Perhaps section 7(2), which requires that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights," applies to this extent to each citizen as well, again by virtue of section 8(2)).

Does this last argument mean that the constitution imposes on each citizen a duty to protect his or her own dignity (and, perhaps, other qualities)? It isn't immediately clear why a constitution should tell people to protect their own dignity; one might say that people should be free to act without dignity, as they may be free to act without prudence, or without concern for their own safety and health. Those who choose to act in such ways may be unwise or even immoral, but perhaps they are entitled as free citizens to make such choices. But that may not be the ultimate tenor of South African constitutionalism. Whatever the rights of individual citizens acting in isolation, *Residents of Joe Slovo* is concerned with the fate of an entire community, and with a housing program meant to benefit not only the current residents of that community but also former residents who already left to facilitate the government's program, and nonresidents -- living in other difficult circumstances -- who hope for housing in the new homes to be built. In this context, the duty of each resident to act with dignity, by contributing his or her ingenuity and support to the overall enterprise, is not a matter of individual autonomy but of community well-being. Though Justice Sachs does not use the term here, this understanding of the individual as protected by but also responsible to a community seems consonant with the African concept of *ubuntu*, which was explicitly invoked in South Africa's first post-apartheid constitution and can be understood to remain a part of the underlying conception of the constitution now in place.

All that said, the exact dimensions of the citizen's (or, presumably, the noncitizen resident's) duties under sections 10 (dignity) and 26

(housing) remain to be explored in cases to come. Fitting duties and rights together in a way that honors both is no small task, and the constitutional text -- which does not explicitly refer to the duties now being discerned by the justices -- offers little guidance. There will be many issues to debate in future decisions.

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