

(Rights Talk "*has allowed us to achieve very little up to now. As used by most activists, it has turned us away from the analysis of the capitalist system and therefore of the central struggle of our times.*" [Here's more](#) about the exceptional author. And below, a South African application of his thesis - even applied to socio-economic rights.)

Commentary No. 483, October 15, 2018

## **“Human Rights, Anyone?”**

by Immanuel Wallerstein

It is extremely difficult to find a country or other political structure that has not violated human rights in some way.

Sometimes, the violation involves killing a dissident. Sometimes the action is less severe, but nonetheless has a very negative effect on the life and activities of the victim of the violation.

With rare exceptions, the political structure accused of violating human rights denies that it has done so.

Hard evidence of the violation is difficult to obtain and circulate. In any case, the entity accused of violating human rights tends in most cases to ignore protests, and thus maintains intact the alleged violation.

Some current instances being publicly discussed are: Brazil, Argentina, Venezuela, Colombia, Peru, Nicaragua, the United States, Canada, the United Kingdom, France, the Netherlands, Sweden, Latvia, Poland, Hungary, the Czech Republic, Bulgaria, Turkey, Saudi Arabia, Israel, Palestine, Egypt, Sudan, South Sudan, Kenya, South Africa, Yemen, Iraq, Iran, Pakistan, India, Myanmar, Indonesia, Australia, China, South Korea, North Korea, Japan.

Any country on this list has some defenders who are outraged by the accusation and others who put it at the top of their accusatory list.

This already enormous list does not include entities within so-called sovereign states. Listing them would elongate the list tremendously.

What may we conclude from this totally unclear discussion about human rights? I conclude that we can't use the category of human rights by itself. It can be perhaps useful if we put it in a complex analysis of the situation in any given political entity but it can certainly never stand by itself.

My second conclusion is that the category has allowed us to achieve very little up to now. As used by most activists, it has turned us away from the analysis of the capitalist system and therefore of the central struggle of our times.

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## **Constitutionalism as a barrier to the resolution of widespread community rebellions in South Africa**

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Politikon 41 (3), December 2014, <https://www.tandfonline.com/doi/abs/10.1080/02589346.2014.975931>

### **Abstract**

South Africa's 1996 Constitution is widely lauded as the world's most liberal, yet the document was marred by its context: democratisation alongside the accumulation of excessive corporate power and the adoption of neoliberal public policy. The 1990s transition period generated, in turn, even worse inequality, poverty, unemployment and uneven development than during apartheid. The Constitution thus became a distraction in vital battles by poor and working people, including the first use of its celebrated socio-economic rights for unsuccessful interventions in healthcare (kidney dialysis) (1997), housing (2000) and water (2009). On the one hand, defensive courtroom postures were maintained with the document's help (e.g. anti-eviction injunctions) and occasional offensive victories were registered (e.g. AIDS medicines for pregnant women to halt HIV transmission to babies). But the overall impact was to direct those entering a legal alleyway with great expectations, into a cul-de-sac where satisfactory exit was blocked by property rights. The only way out has been much more explicit direct action, instead of community activists wasting further time, effort, resources and strategic credibility promoting the Constitution.

### **Introduction: The context of concessions**

Does South Africa's Constitution (Republic of South Africa 1996) give the majority of the country's residents a real opportunity to improve their lives? Copies of 'what is commonly regarded as the world's most liberal Constitution' (as even the opposition party argues) (Harris 2010) sit idly in community libraries, including those at risk of being set alight by arsonists as part of the 'service delivery protest' phenomenon. The turn to thousands of protests – mostly peaceful but increasingly violent (with police measuring a rise from 1091 violent protests in 2011-12 to 1882 in

2012-13) – a more effective expression of opportunities for advancement, as comprehended by activists within South Africa's low-income citizenry? According to a rising chorus of criticism, over the last two decades, the Constitution facilitated the most extreme inequality of any major society. Civil society's failure to achieve its ambitions through the 1993 Interim Constitution and 1996 final Constitution are, as a result, generating extremely uncivil behavior.

Ultimately, the Constitution facilitates inequality because it serves as a myth-making, deradicalising meme, with its grounding in property rights typically trumping activist claims to human (socio-economic) rights. The official perspective on human rights was revealed by president Jacob Zuma in the 2014 State of the Nation speech in which he claimed '95 percent of households have access to water' (Zuma 2014), a massive overestimation, amongst other dubious 'good stories to tell.' The very different reality faced by the majority generates frustrated protest and then, with state failure evident, renewed pressure to privatize (Kings 2014). So far, this sort of downward spiral has also prevented the emergence of a coherent programme that might link the local protests together in a broader critique not of 'unconstitutional' state delivery failure but instead, of the neoliberal policies, financing and practices that represent state success in keeping poor people in their place.

To illustrate with just the most vivid example, in mid-2013, grievances over water and sanitation in Khayelitsha township east of Cape Town quickly became highly-publicised protests that caused the city airport's closure (as well as that of the nearby highway and the provincial parliament) when human excrement was thrown by angry community and political activists. That tactic that might be considered 'non-violent civil disobedience' of the creative, militant Satyagraha type that Mahatma Gandhi pioneered in KwaZulu-Natal exactly a century earlier, given the willingness of protesters to face arrest and make their case publicly. Like Gandhi, they won partial gains. But in court disputes in mid-August 2014 (at the time of going to press), it was evident that the Airports Company of South Africa's property rights would trump the rights of expression of

Andile Lili and eight of his comrades. Thousands of his Ses'Khona People's Rights Movement allies' constitutional rights to protest at the court were apparently trampled, in the process, for as the national television news reported, 'police used tear gas, rubber bullets and a water gun to disperse thousands of supporters of the movement when mayhem broke out at the Bellville Regional Court.' Lili complained, 'A pregnant woman was kicked in [the] stomach. A disabled woman from Mitchells Plain was injured and her middle finger was broken. It is because of disruption by police' (SA Broadcasting Corporation 2014).

It was this sort of desperate behavior that the Constitution was meant to prevent, leaving apartheid-era protests behind and drawing the activists into courtrooms where reasonable people could assess whether and how those with power were willing to use it to serve broader interests.

Certainly the October 1996 Explanatory Note confirms high ideals for the document's inclusivity:

that the final Constitution is legitimate, credible and accepted by all

South Africans. To this extent, the process of drafting the Constitution involved many South Africans in the largest public participation programme ... [resulting in] an integration of ideas from ordinary citizens, civil society and political parties... This Constitution therefore represents the collective wisdom of the South African people and has been arrived at by general agreement (Republic of South Africa 1996).

To understand the contradictions embedded in the Constitution and the ongoing grievances of a highly militant citizenry who have refused cooption, this article considers first the context for the document's certification in 1996. Following a reminder of major concessions made by the incoming government because of extreme corporate power and the 'Faustian Pact' strategy of negotiators (Kasrils 2013), the logic of Constitutional property rights is confronted directly. The inability of the founding document to provide meaningful relief can be witnessed in adverse Constitutional Court judgements in fields as diverse as healthcare (Subramoney in 1997), housing (Grootboom in 2000) and water

(Mazibuko in 2009). Of course, the exceptions to the rule – e.g. access to AIDS medicines by pregnant women in 2002 – must be carefully understood, for the victory by the Treatment Action Campaign (TAC) fell within a much broader campaign to decommodify essential medicines and in the process delegitimize the then dominant AIDS denialists (Mbali, 2013).

On balance, this article concludes, it has been a mistake to invest too much in romantic Constitutional fantasies of socio-economic rights. There is a special danger in holding philosophical foundational commitments to such rights (as Roithmayr 2010 shows). One reason is because of the danger of taming (deradicalising) social activists (e.g. well known TAC leaders who evolved from Trotskyist revolutionaries to constitutionalists in the course of their war) (although Madlingozi 2013 offers a balanced perspective). As one of the leading Constitutional rights advocates, Mark Heywood (formerly TAC's main strategist and subsequently a critic of Marxism – Heywood 2014) put it a month after the Marikana massacre, 'The Constitution of South Africa is the most important weapon we have. It is more powerful than Jacob Zuma, but it will only give you power if you organise around the Constitution, if you organise around its rights' (Smallhorne 2012).

Instead, the best approach to understanding political opportunities for socio-economically and politically oppressed South Africans is, I conclude, by establishing how to connect the dots between prolific protesters from communities, social movements and labour, especially as the Congress of South African Trade Unions splinters to the left and the largest union, the metalworkers, seeks a socialist 'United Front'. In part because the most famous precedent, the 1983-1992 United Democratic Front, helped bring down apartheid but was then swallowed by the African National Congress (ANC), the lessons confirming the strength of well-connected (not 'popcorn') grassroots protests have been lost. The core reason for replacing democracy-from-below with elite-pacting-from-above, especially after the February 1990 unbanning of the ANC and other liberation forces, was that the deal-making approach of the prior

four and a half years came above ground at a time protesters and their international allies had reached a plateau. Rather than identifying means of further struggle to change the balance forces, the activists felt they had become a 'tap', to be turned on or off depending upon the negotiators' tempo (Bond 2014).

By the time the Constitution was certified in 1996, the group overseeing the ANC-Cosatu-SACP Alliance was now deemed eminently 'trustworthy' in the eyes of Afrikaners and English-speaking businesses, as well as the 'international community.' As a result, former Water and Intelligence Minister Ronnie Kasrils (2013) confessed, 'the battle for the soul of the ANC got underway and was lost to corporate power and influence... To lose nerve, go belly-up, was neither necessary nor inevitable... My belief is that we could have pressed forward without making the concessions we did.'

Aside from the 1990-94 deal-making and ideological panel-beating associated with 'scenario planning' and the Davos World Economic Forum's influence over Mandela, various other international economic constraints emerged which would confirm the dangers of an excessively neoliberal, property-centric Constitution (Bond 2014). Liberal rights of free expression and association would, in this regard, be trumped by the rights of capital, as shown below in the case of Durban's World Cup Fanfest beach regulations in mid-2010. Even though the property rights argumentation is not dissimilar from those of other Constitutions, even Scandinavian, the critical difference is the social context in which these Constitutions exist. A property rights clause in the most unequal major country in the world, South Africa, is far different in meaning, process and outcome than such a clause in the most equal major society, Sweden's. In the latter, a power balance was achieved in which the convergence of interests between urban workers and rural farmers (the 'red-green' alliance) in the early 20<sup>th</sup> century allowed the repeated victory of social democratic governments, and hence generous social policies that whittled away the power of property by highly redistributive taxation, decommodifying social policy and a social strategy of destratification

which allowed poor, working-class and middle-class citizens the same basic universal welfare access and hence ongoing social support for social democracy (Esping-Andersen 1990).

In South Africa, in contrast, the neoliberal character of liberal Constitution-making reflected the balance of forces at the time, mid-1996. The key architect was the head of the Constitutional Assembly whom Mandela appointed in 1994-96 to reform the November 1993 Interim Constitution, Cyril Ramaphosa. As soon as he had built a consensus on the Constitution, Ramaphosa publicly – and largely successfully – advocated the relaxation of exchange controls, a policy that contributed to South Africa becoming the world's most risky emerging market by the time of the 2008-2009 crash, according to *The Economist*, because vast sums of rich white people's wealth, not to mention the financial headquarters of our largest companies, were soon to vanish offshore. This is the main reason the SA foreign debt was projected to rise to nearly six times larger in 2014 than in 1994. At the same time, Ramaphosa was transitioning from having been National Union of Mineworkers general secretary during the 1980s, to ANC general secretary during the early 1990s, to a business tycoon. His wealth accumulation was linked to the tragedy of the Sam Molohe Bakery bankruptcy and the corrupt empire of Brett Kebble, and he later became a leader of South Africa's McDonalds franchise, Coca Cola, Standard Bank and then Lonmin mining, where he played a catalytic role in the 2012 Marikana massacre (Bond 2014). Personified by the trajectory of the Constitutional Assembly's main leader, it is no surprise that property rights would become sacrosanct in post-apartheid South Africa, notwithstanding damage done in the process to the national economy by excessively rapid liberalization. To illustrate the downside of the Faustian Pact with international capital, starting in 1995 with the financial rand's abolition, successive Reserve Bank governors loosened exchange controls even further (nearly 40 times in the next 15 years), and finance minister Trevor Manuel let the capital flood out when in 1999 he gave permission for the relisting of financial headquarters for most of the largest companies on the London Stock

Exchange. The firms that permanently moved their historic apartheid wealth offshore include Anglo American, DeBeers diamonds, Investec bank, Old Mutual insurance, Didata ICT, SAB Miller breweries (all to London), and Mondi paper (to New York). To illustrate, earlier SA giants like Gencor (later BHP Billiton) had departed, in that case with the dubious help of Derek Keys, who came from Gencor to lead the finance ministry in 1991 and then left in 1994 (to Mandela's disappointment) so as to again lead the firm which he had notoriously aided by approving exchange control relaxation. Of the largest Johannesburg Stock Exchange firms, only a few old Afrikaner corporates kept their primary listing in South Africa, perhaps in part because of their lack of global marketability.

It is here that the core concession made by the ANC during the transition deal was apparent, namely in meeting the desire by white businesses to escape economic stagnation and declining profits. Profits resembled quite a roller coaster: a downward slide from 1960s levels which were amongst the world's highest, to extremely low rates by the 1980s (Nattrass 1989). But by the late 1990s, mainly through disinvesting from South Africa, deregulating business internally, moving funds from production to commerce and financial speculation, and in the process shifting profit/wage ratios from negative to positive, the major Johannesburg and Cape Town conglomerates reversed the downward slide. By 2001 they were achieving profits that were the ninth highest in the industrialised world (Citron and Walton 2002). By 2013, the International Monetary Fund (2013) recorded them as third highest. This would not have been possible had it not been for the profound commitment to property rights, combined with overall dominance of the neoliberal ideology amongst policy-makers and a group of leading politicians.

A succession of finance ministers – Keys (1994), Nedbank chief executive Chris Liebenberg (1994-96) and Manuel (1996-2009) – lowered primary company taxes dramatically, from 48 percent in 1994 to 30 percent in 1999. They also maintained the fiscal deficit below 3 percent of GDP by restricting social spending, notwithstanding the avalanche of



unemployment, until the 2009 world financial meltdown caused the deficit to rise above 7 percent of GDP. With spending constrained, not even a tokenistic set of social grants – leaving South Africa fourth lowest amongst the forty largest economies in social spending – did much more than ameliorate poverty, as the rise in social spending never exceeded more than 4 percent of GDP beyond what apartheid governments spent (Bond 2014). Thus as University of Cape Town economist Haroon Bhorat (2013) reported in the New York Times in July 2013, ‘Using the national poverty line of \$43 per month in current prices, 47 percent of South Africans remain poor. In 1994, this figure was 45.6 percent.’

Looking back to conclude our contextual analysis, it is apparent that the four most critical processes in shifting resources to capital after apartheid ended were 1) the demise of the sanctions-induced laager – and its associated inward-oriented economic policies – so that business elites could escape the saturated South African market; 2) a quickening financialisation process which rewarded holders of assets; 3) the deregulation of a variety of SA industries; and 4) the channeling of the 1970s-80s rise of black militancy in workplaces and communities into corporatist union arrangements and patronage politics (Bond 2014).

These dynamics confirmed the larger problem of choiceless democracy in which the deal to end apartheid on neoliberal terms prevailed: black nationalists won state power, while white people and corporations would remove their capital from the country, but also remain welcome for domicile and the enjoyment of yet more privileges through economic liberalization. In this context, it was seen as permissible by capital and leading politicians for the Constitution to also include empty rhetoric about not only civil and political rights, but also socio-economic rights.

### **Constitutional compromises, persistent dissatisfaction**

Civil and political rights as well as socio-economic rights were subject to sufficient compromise in the 1993 Interim Constitution and 1996 final Constitution (Republic of South Africa 1996) to assure that the kinds of outcomes noted above – worsening inequality – would be hardwired

into post-apartheid political economy. In addition to the strength of the property rights clause,

Although the ANC's traditional demand for one-person, one-vote at national level was achieved, this process never threatened the Constitutional deal. The Interim Constitution permitted a watering down of electoral democracy where it counted most, at local level where elite deals had not been achieved given the more extreme differences between negotiators (more municipalities controlled by Conservative Party whites, confronting more radical black communities than in the national deal-making milieu). As a result, a 1993 Local Government Transition Act was cobbled together hurriedly in the closing minutes of the December 1993 constitutional negotiations, with the objective of preserving municipal-scale privileges for whites and ensuring a much slower process of black power-sharing would result. The Act allowed for greater voting weight accorded to whites in the first local government election. To illustrate, 30 percent of municipal seats were granted to formerly white residential areas, on top of the proportion of their total vote), which along with the extraordinary veto power that white councilors enjoyed, meant that with just a third of the local council seats, they could prevent passage of local budgets and town planning bills. This anti-democratic power combined with the persistence of white bureaucrats at many interfaces with the public, along with the official treatment of working - class coloured and Indian people as whites. There were also intensifying local budget constraints, accompanied by neo - liberal cost recovery principles and municipal privatisation programmes, given that national to local subsidy support was cut by 85 percent during 1990s (Bond 2000).

Although the Interim Constitution was replaced, the ANC managed – using a mix of coercion and consultation – to keep a lid on the boiling municipal political pot. There was always a residual fear that the ANC would gain too much support, and be in a position to change the Constitution in a manner hostile to big business. Consider one of the newspaper reports on the threat of excessive ANC popularity in 1999, which reflected the disciplining power of international finance:

Foreign investors were becoming increasingly anxious yesterday at the prospects of the ANC winning a two-thirds majority in Wednesday's general election, with a major investment fund warning this may have a devastating effect on local financial markets. Mark Mobius, the president of the \$40 billion Templeton Emerging Market Fund, said he would fundamentally alter his investment view of the country if the ANC won 67 percent of the vote... 'If the ANC gains the power to unilaterally amend the Constitution, we will adopt a very conservative and cautious approach to further investment.' (Galli 1999.)

Because the subsequent fifteen years witnessed even more extreme South African vulnerability in relation to global finance, the disciplinary roles of Moody's, Standard & Poors and Fitch ratings agencies became even more powerful (Bond 2013a). In this context, both business elites and the society had grown used to posturing about Constitutional reform. At a 2014 campaign rally, for example, Zuma was quoted as follows: 'We want a huge majority this time because we want to change certain things that couldn't be changed with a small majority so that we move forward because there are certain hurdles. People talk about a constitution they have never seen.' But according to his spokesperson, Zuma 'did not use the word "constitution"' and, specifically, 'he did not say he wants to change the Constitution' (Strydom 2014). The nationalist strategy of 'talk left walk right' (Bond 2006) was invoked many times, indeed, so that while speaking to constituents, the critique of the Constitution's limiting factors (e.g., property rights) were made clear by populist politicians, yet in 18 formal amendments made to it between 1996 and 2013, no challenge to corporate prerogatives was ever attempted. Another reflection of this more durable power relationship in final Constitution was its section 8(4), which states that 'Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.' That clause was contested in the certification process by a civil society coalition in mid-1996, because

The extension of fundamental rights to juristic persons frequently entails simultaneous weakening of, and prejudice to, and even derogation from the fundamental rights of natural persons... The extension to corporations of freedom of political expression, negative free speech rights and rights of privacy [in the United States] has undermined the constitutional rights of natural persons to freedom of expression, freedom of association in organs of civil society, access to information, the rights to life, security of person and a safe environment... What is required, and what the final constitution does not adequately provide, is express recognition of the principle that where the constitutional rights of juristic persons conflict with the constitutional rights of natural persons, the rights of the latter will prevail. (Cited in Weissman 1996.)

Adjudicating the certification process, South Africa's Constitutional Court rejected the appeal in mid-1996, arguing that 'many 'universally accepted fundamental rights' will be fully recognized only if afforded to juristic persons as well as natural persons,' such as free speech rights enjoyed by media 'which are often owned or controlled by juristic persons' (Weissman 1996). As scholars Chris Roederer and Darrel Moellendorf (2004) concluded in their book *Jurisprudence*, that case against corporate rights is an example 'of the law serving to stabilize capitalist property relations' because 'the final Constitution contains no assurance that when the rights of juristic persons conflict with those of natural persons, the rights of the latter shall prevail.' For example, the subordination of real persons' rights to corporate rights was witnessed by this author in July 2010, at the Fifa Fanfest on the Durban beachfront during the World Cup, where attempts to provide an anti-xenophobia leaflet to the crowd were considered 'ambush marketing' against Fifa's financial interests and hence banned, leading to a brief police arrest (Bond 2010).

This experience and the broader implications of Section 8(4) were consistent with South Africa's nonstop push to deregulate business, flexibilise labour markets, and privatise or corporatise state-owned enterprises; even though there are not many cases of outright

privatization, the overall orientation of parastatal agencies to commodification is unmistakable (Bond 2014). Quite similar policy mandates exist in various social sectors as well: the elimination of subsidies, promotion of cost-recovery and user fees, disconnection of basic state services from those who do not pay, means-testing for social programmes, and reliance upon market signals as the basis for local development strategies. Ironically, it was in this context that, in fighting neoliberalism within social policy, many poor people were persuaded to turn to what would ultimately prove to be a frustrating strategy – demanding constitutionally-guaranteed rights beyond ‘first generation’ ones (those in the spheres of civil and political freedoms) as their response to state failure.

### **Use and abuse of the constitution’s socio-economic rights**

Defense of the South African Constitution’s celebrated socio-economic rights clauses became a cottage industry during the 2000s, especially for liberals and social democrats seeking legalistic answers to the deepening social crisis. In response, neoliberal critics bemoaned a new ‘culture of entitlement’ in which the government was expected to solve all social ills (e.g. Madywabe 2005). Former Black Consciousness movement revolutionary leader Mamphela Ramphele (a Managing Director at the World Bank during the early 2000s and later a wealthy venture capitalist) argued forcefully against the rights-based strategy: ‘The whole approach of the post-apartheid government was to deliver free housing, free this, free the other. This has created expectations on the part of citizens, a passive expectation that government will solve problems’ (Green 2009). Yet the courts were only occasional allies of poor South Africans, for they usually worked explicitly within the framework of budgetary limitations and existing public policy, rarely pushing the boundaries on genuine socio-economic progress. The judges’ wariness of supporting social movements requesting even basic civil and political rights was on display on Human Rights Day, 21 March 2004. Just before the grand opening of the Constitutional Court’s new building in central Johannesburg, at the site of the old Fort Prison where Nelson Mandela had been incarcerated,

community activists in the Anti-Privatisation Forum (APF) called a march to demand their rights to water. They were specifically protesting against the installation of pre-paid water meters in Soweto by the French company Suez, which was running the city's outsourced water company. City officials banned the peaceful protest on grounds of potential traffic disturbances – on a Sunday. The police arrested fifty-two activists and bystanders, some simply because they were wearing red shirts, and blocked travel of APF buses into Johannesburg. Neither the judges nor Mbeki – who attended the opening ceremony – uttered a word in the protesters' defence, revealing the true extent of their underlying regard for civil and political rights.

The country's highest court had by then heard three major cases on socio-economic rights. The first, in 1997, led to the death of a man, 41-year old Thiagraj Subramoney, who was denied renal kidney dialysis treatment because the judges deemed it too expensive. Inspired by the Constitution, Subramoney and his lawyers had insisted that 'No one may be refused emergency medical treatment' and that 'Everyone has the right to life.' Chief Justice Arthur Chaskalson replied, 'The obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources.' The day after the ruling, Subramoney's plug was pulled and he died (Constitutional Court 1997). The next high-profile Constitutional Court case on socio-economic rights was over emergency municipal services, in a lawsuit brought by plaintiff Irene Grootboom in her Cape Town ghetto of Wallacedene. Although she won, the outcome was not positive, for the Court decided simply that the 1994 Housing White Paper that was Housing Minister Joe Slovo's last major initiative before he died of cancer in 1995 was unconstitutional for not considering the needs of poor people. That document had as its main priority the 'normalization of the market' for housing in townships. By 2000, when the Grootboom case went to the Constitutional Court, the Slovo policy had left national, provincial and municipal housing

authorities without a mandate and plan to supply emergency housing and associated services.

The Court's decision was, however, merely 'negative', for it slapped down existing policy for failing to meet constitutional standards. But the Court did not have the courage and self-mandate to prescribe the policies and practices that would be considered of minimal acceptability, and one reason is that the Constitution formally discourages policy formulation. As a result, Grootboom and her community remained as destitute as ever, and by 2008, it was tragic yet also logical to read the headline, 'Grootboom dies homeless and penniless,' according the Mail&Guardian: Judge Richard Goldstone, a Constitutional Court judge at the time of the hearing, described the Grootboom judgement as unique, saying it will be remembered as 'the first building block in creating a jurisprudence of socio-economic rights.' Grootboom's victory gave legal muscle to the poorest of the poor and has been studied around the world. Her legal representative at the time, Ismail Jamie, said the Grootboom decision was 'undoubtedly one of the two or three most important judgements the Constitutional Court has made since its inception.' This week Jamie said that Grootboom's death 'and the fact that she died homeless shows how the legal system and civil society failed her. I am sorry that we didn't do enough following-up after judgment was given in her favour. We should've done more. I feel a deep regret today,' he said (Joubert 2008).

The third high-profile case was more encouraging. In 2001 the Treatment Action Campaign insisted that the drug nevirapine be offered to HIV-positive women who were pregnant in order to prevent transmission of the virus to their children. A year earlier, Mbeki spokesperson Parks Mankahlana had explained the state's reluctance in an interview with Science magazine in cost-benefit terms, essentially arguing that refusing to supply nevirapine was logical in terms of saving state resources. The callous nature of his cost-benefit analysis was confirmed by state AIDS policies,

often termed by critics as being basically ‘denialist.’ The result, according to Harvard School of Public Health researchers: ‘More than 330,000 people died prematurely from HIV/AIDS between 2000 and 2005 due to the Mbeki government’s obstruction of life-saving treatment, and at least 35,000 babies were born with HIV infections that could have been prevented’ (Roeder 2009). The word for this scale of death, genocide, was used to describe Mbeki’s policies by the then president of the Medical Research Council Malegapuru Makgoba, by leader of the SA Medical Association Kgosi Letlape, by Pan Africanist Congress health desk secretary Costa Gazi, by leading public intellectual Sipho Seepe, by Young Communist League of SA leader Buti Manamela and by others.

In its mid-2002 judgment, the Constitutional Court criticized the state: ‘The policy of confining nevirapine to research and training sites fails to address the needs of mothers and their newborn children who do not have access to these sites. It fails to distinguish between the evaluation of programmes for reducing mother-to-child transmission and the need to provide access to health care services required by those who do not have access to the sites.’ One of the lawyers on the successful case, Geoff Budlender (2002), observed that this victory ‘was simply the conclusion of a battle that TAC had already won outside the courts, but with the skilful use of the courts as part of a broader struggle.’ The lessons learned from the TAC struggle are vital to further political development in South Africa, with or without constitutional components. But it is in the case of water, in court battles in Durban (2000) and Johannesburg (2009), that the limits of current constitutionalism were tested by an increasingly frustrated layer of civil society.

### **Constitutional water rights hit their ceiling in Durban**

The limits of rights-talk became evident in the fourth of the highest profile socio-economic rights cases, over the right to water. There were two main sites of contestation: Durban (2000) and Johannesburg (2009).



In Durban, activist stalwart Fatima Meer – Mandela’s first authorised biographer – visited the mainly Indian suburb of Chatsworth in 1999, to gather votes for the ruling party ahead of the 2000 municipal election. Along with local charismatic intellectual Ashwin Desai (2002), she very quickly realized that ANC elites were the main opponents of poor and working-class Chatsworth residents, and switched political sides. Her movement, the Concerned Citizens Group (CCG), was the first to begin a Constitutional challenge to water disconnections, but after an initial minor victory (an injunction against disconnections), the defeat of Thulisile Christina Manqele in her fight against Durban Water was illustrative.

In 1999, Manqele became ill, lost her job as a domestic worker, and saw her municipal arrears reach \$1300. The first water disconnection by city authorities was in January 2000. Manqele explained in the documentary film *Plumbing the Rights* (CultureUnplugged 2002), ‘That man came now to close the water. I haven’t got water after that I haven’t got food too, and then I’m thinking one way may be to sell my body there, I’m thinking food again to I’m thinking I can’t got there to prostitute me I’m old. All night I can’t sleep and high blood pressure is high.’ Chatsworth activists then helped Manqele illegally reconnect the pipes, allowing her and seven children to consume more than the 25 liters per person (two flushes of the toilet each) that the city was allegedly supplying free each day. But as community organizer Orlean Naidoo recalled, the water only kicked in once arrears were cleared: ‘What kind of free water service is that? When people can’t afford to pay their daily bill, how are they going to pay off their arrears to get their free water? So that’s just a false hope.’ As Desai (2002) explained,

Thulisile [Manqele] managed to secure water through begging from neighbors. But this source dried up as many of the neighbors had their own water cut off and others were worried that they would not be able to afford the costs of a higher water bill. For a while, Thulisile relied on a leaking pipe and then on collecting rainwater. But the cries of one-year-old Zamani grew more insistent. During Durban’s dry season, Thulisile turned to a still-standing stream about 50 meters from her flat. An independent analysis of the water indicated that it contained high counts of

Coliforms and E-coli, both of which indicate fecal contamination and the presence of human disease-causing agents, making it unfit for human consumption.

The turn to illegality was demonstrated on film by Chatsworth organizer Brandon Pillay, later elected an ANC city councilor: 'There's a copper disc that's placed inside of this pipe and that actually shuts off the water so what we do is we just try to open up this pipe, and on opening this pipe we just remove the disc and then we have water.' Manqele told the filmmaker a few months later, as cholera joined the diarrhea and AIDS pandemics, 'That's why me now I go back there to open the water? I'm scared for the cholera and then I need the water because me my condition – and I'm worried for the children, the suffering of the children, that's why now if I never did that [illegal reconnection] now I'm going to die, I can't stay without water.' The first recourse was the Constitution, for as Desai (2002, Chapter Five) recalls,

Thulisile would have been just another statistic, but her case was brought to the attention of the CCG via the Westcliff Flat Residents Association. It was decided to bring an urgent application to the High Court to get Thulisile's water reconnected. It would serve as a test case for all other indigent people who had had their water cut. The urgent application was granted on Friday, March 8, 2000.

This success raised expectations for a more sustained challenge to the widespread lack of water rights. But Manqele's move to claim her constitutional water rights in the courts was foiled in July 2000, for as Bristol University law professor Bronwen Morgan (2011, p. 139) reported, 'Extensive evidence was brought by the water company about the fact that she had tampered with the network, which was defined as criminal activity' and allegedly, 'the judge's attitude was sharply altered by the evidence of her dealings with moonlight plumbers.' Facing more than 10,000 Durban township residents recently disconnected, the political implications of the case loomed large, and we learn a great deal from the nature of constitutional rights argumentation deployed in the courtroom. According to Desai,

The UniCity's advocate made much of the fact that Manqele had, probably, reconnected her water illegally in the past and thus could not be trusted not to tamper with any device installed to limit her water flow. As a result of her non-payment and her delinquent history, her water is to be disconnected as a 'credit control' mechanism. The judge agreed. One of the escape routes local government uses to evade its 2000 municipal election promises is the fact that people with historic rental, electricity, and water arrears are not entitled to the 6 kiloliter amount until

they settle these arrears. Since the poor all have arrears that they cannot pay, they end up being excluded from the very policy that is meant to be for their benefit. On the other side of town, in the northern and western suburbs, the rich top up their swimming pools with the free 6 kiloliters. Emboldened by the decision, the UniCity began sending out thousands of letters threatening disconnection. The person in charge of this initiative was named Mr. Stalin Joseph.

A member of Manqele's legal team, Heinrich Bohmke, remarked that her case was 'an early warning – for those who would hear it – of the dangers of construing demands for the bare necessities of life in terms subject to constitutional adjudication. The case was lost, the Westcliff Flats Dwellers Association was demobilized while judgment was awaited and, in fact, came to think of itself as a collection of good if victimized citizens.' So human rights law was now useless, Bohmke continues: 'After the loss, survival again meant illegality and abandoning the passive comforts of victimhood. It was only because of the strength, resilience and expedience of people like Christina that the strategy of legalism was disavowed and the organization was rebuilt' (cited in Bond 2011).

Although the court ultimately ruled against Manqele, municipal water authorities shifted tactics, announcing that instead of outright disconnections, 'flow limiters' would be installed, an important distinction, but these too were often removed by local activists. Disgusted with national policy and the legal system, Manqele's legacy was to keep the community movement sufficiently strong to enforce street-level power of water reconnection ever since. For as Desai (2002) concludes, 'the community then took matters into their own hands. They have been illegally reconnecting water and fighting off the city council security men every time they have come to impose law and order since then.'

### **Johannesburg's victory over Sowetans**

Likewise, activists in the Phiri neighbourhood of Soweto insisted upon a social entitlement to an acceptable supply of clean water, amounting to at least 50 liters per person per day and delivered via a metering system based on credit and not pre-payment meters. In October 2009, the Constitutional Court overturned a seminal finding in lower courts that human rights activists had hoped would substantially expand water

access to poor people: *Mazibuko et al v Johannesburg Water* (Constitutional Court 2009). In the first ruling, in 2008, Johannesburg High Court Judge Moroa Tsoka had found that prepayment meters were ‘unconstitutional and unlawful’, and ordered the city to provide each applicant and other residents with a ‘free basic water supply of 50 litres per person per day and the option of a metered supply installed at the cost of the City of Johannesburg.’ Tsoka accused city officials of racism for imposing credit control via prepayment ‘in the historically poor black areas and not the historically rich white areas.’ He noted that meter installation apparently occurred ‘in terms of colour or geographical area.’ It was the first South African case to adjudicate the constitutional right of access to sufficient water, and initially provided a degree of encouragement (Bond and Dugard 2008, Bond 2013b).

Johannesburg’s appeal was also joined by the national water ministry, and was based on the decision by Johannesburg officials, just a few weeks prior to Judge Tsoka’s decision, to retract the ANC promise of universal free basic water service. In the 2000 municipal election campaign, the ANC’s statement had been clear: ‘The ANC-led local government will provide all residents with a free basic amount of water, electricity and other municipal services so as to help the poor. Those who use more than the basic amounts, will pay for the extra they use.’ Initially, Johannesburg Water officials reinterpreted the ‘right to water’ mandate regressively by adopting a relatively steep-rising tariff curve. In this fee structure, all households received 6000 liters per month for free, but were then faced with a much higher second block (i.e., the curve was convex-up), in contrast to a concave-up curve starting with a larger lifeline block, which would have better served the interests of lower-income residents. The dramatic increase in their per-unit charges in the second block meant that for many poor people there was no meaningful difference to their average monthly bills even after the first free 6kl. Moreover, the marginal tariff for industrial/commercial users of water, while higher than residential, actually declined after large-volume consumption was reached (Bond 2002).

What is the impact of these kinds of water price increases on consumption? The 'price elasticity' – the negative impact of a price increase on consumption – for Durban was measured during the doubling of the real (after-inflation) water price from 1997-2004. For rich people, the price hike resulted in less than a 10 percent reduction in use. In contrast, the impact of higher prices was mainly felt by low-income people (the bottom one third of Durban's bill-paying residents, in one study) who recorded a very high 0.55 price elasticity, compared to just 0.10 for the highest-income third of the population. Johannesburg and other cities' data are not available but there is no reason to suspect the figures would be much different, and international evidence also bears out the excessive impact of high prices on poor people's consumption (Bond 2006). Hence, ironically, as the 'right to water' was fulfilled through Free Basic Water, the result of price changes at higher blocks in Durban and Johannesburg was further water deprivation for the poor alongside increasing consumption in the wealthier suburbs – with this in turn creating demand for more bulk water supply projects (including another Lesotho Highlands Water Project dam) which will then have to be paid for by all groups, and which will have major environmental impacts.

Resistance strategies and tactics developed over time. Activists attempted to evolve what was already a popular township survival tactic on diverse fronts – illicitly reconnecting power once it was disconnected by state officials due to nonpayment for example (in 2001, 13 percent of Gauteng's connections were illegal) – to a more general strategy. Thus socialist, but bottom-up, ideological statements of self-empowerment were regularly made by the APF and member organisations such as the Soweto Electricity Crisis Committee. Indeed, within a few months of Johannesburg Water's official commercialization in 2000, the APF had united nearly two dozen community groups across Gauteng, sponsoring periodic mass marches of workers and residents. And the APF was also the core activist group in the Coalition Against Water Privatisation, which supported the Phiri complainants in a court process that lasted from 2003 through 2009.

The Constitutional Court's October 2009 ruling, however, vindicated Johannesburg Water, affirming that the original amount of 25 liters per person per day plus pre-payment meters were 'reasonable and lawful' because self-disconnections were only a 'discontinuation', not a denial of water services: 'The water supply does not cease to exist when a pre-paid meter temporarily stops the supply of water. It is suspended until either the customer purchases further credit or the new month commences with a new monthly basic water supply whereupon the water supply recommences. It is better understood as a temporary suspension in supply, not a discontinuation.' The Coalition Against Water Privatization (2009) was disgusted with the Court's logic, however: 'We have the highest court in the land saying that those poor people with pre-paid water meters must not think that their water supply has discontinued when their taps run dry... Such logic, and even worse that it is wrapped up in legal dressing and has such crucial practical consequences, is nothing less than mind boggling and an insult both to the poor and to the constitutional imperatives of justice and equality.'

One of the most optimistic analysts of socio-economic rights is Sandra Liebenberg (2010, p. 470), who makes a strong case for incremental improvements in South African capitalism via constitutionalism, within the rubric of demanding 'reasonable' realization of rights. However, Liebenberg openly acknowledges that the Mazibuko decision represented 'a retreat from the more robust criteria for reasonableness... [compared to] Grootboom in which the Court held that a reasonable programme "must be capable of facilitating the realization of the right".' As Liebenberg (2010, p. 470) concedes, "The Court in Mazibuko reduces the analytical work [of assessing socio-economic rights]... to almost negligible proportions.' Just as disturbing, she continues, the Mazibuko judgement provisions dealing with a progressive improvement to the quality of access, they 'avoid the substantive dimension of progressive realisation' in favour of a nebulous 'process-oriented meaning.' In other words, Mazibuko dealt what might be considered a death-blow to South African rights-talk, considered even mechanistically and legalistically.

The Mazibuko case was useful nonetheless in revealing the broader limits to the merely constitutional framing of socio-economic rights, one such limitation being the concomitant ‘domestication’ of the politics of need, as Tshepo Madlingozi (2007) put it. By taking militants off the street and putting them into courts where their arguments had to be panel-beat – removing any progressive and quasi-socialist intent, for example – the vain hope was to acquire judges’ approval. Another critical legal scholar, Marius Pieterse (2007), complained that ‘the transformative potential of rights is significantly thwarted by the fact that they are typically formulated, interpreted, and enforced by institutions that are embedded in the political, social, and economic status quo.’ Added Daniel Brand (2005), ‘The law, including adjudication, works in a variety of ways to destroy the societal structures necessary for politics, to close down space for political contestation.’ Brand specifically accuses courts of depolitizing poverty by casting cases ‘as private or familial issues rather than public or political.’

### **The Constitutional exception: Offense by the Treatment Action Campaign**

The private issue of AIDS was the basis of such extreme stigmatization that it is understandable how clever crafting of demands – especially to prevent HIV being passed from pregnant mother to child with the advanced yet relatively inexpensive medicine Nevirapine, given just twice in the birth process – allowed lawyers to claim the sole substantive offensive victory in the Constitutional Court between 1996 and 2014. The AIDS victory in 2002 could not have been achieved without the broader political sensibility won by activists who converted AIDS from a personal health stigma into a social cause that required a commoning of medicines that had earlier been privately consumed, at great cost, by only those with class and race privileges. Because so many lives were lost in the early 2000s, and because the struggle to save subsequent lives of millions of HIV+ South Africans was ultimately victorious, it is worth understanding in detail how a small, beleaguered group of activists with compromised immune systems had such an extraordinary impact on public policy while

also challenging the whole notion of commodified healthcare. The South African government's 1997 Medicines Act had actually made provision for compulsory licensing of patented drugs, and this in turn helped to catalyse the formation in 1998 of a Treatment Action Campaign (TAC) that lobbied for AIDS drugs. In the late 1990s, such AntiRetroviral Medicines (ARVs) were prohibitively expensive for nearly all the five million people who would need them once their blood counts ('CD4') fell below 250.

The main South African affiliates of the companies that held patents filed a 1999 lawsuit against the constitutionality of the Medicines Act, counterproductively entitled 'Pharmaceutical Manufacturers Association of SA v. Nelson Mandela' (a case which even Wall Street Journal editorialists found offensive). It went to court in early 2001, but by April there were also additional TAC solidarity protests world-wide against pharmaceutical corporations in several cities by Medicins sans Frontiers, Oxfam and other TAC solidarity groups. Instead of testing its powerful property rights protections in South Africa's courts, public pressure compelled Big Pharma to withdraw the suit and by late 2001, the Doha Agenda of the World Trade Organisation adopted explicit language permitting violation of Trade Related Intellectual Property Rights for medical emergencies.

It is also true that Big Pharma's reluctance to surrender property rights so as to meet needs in the large but far from lucrative African market coincided with the rise of philanthropic and aid initiatives to provide branded medicines. The Bill and Melinda Gates Foundation's parallel health services in sites like Botswana undermined state health services; it was no coincidence that Gates himself stood more to lose than anyone on the planet in the event intellectual property was threatened (Bond 2003). Given such prevailing power relationships, the South African government did not invoke any compulsory licensing of medicines even after the 2001 lawsuit was withdrawn. Local generics manufacturers Aspen and Adcock Ingram did, however, lower costs substantially through voluntary licensing of the major AIDS drugs. It is in this sense that not only



decommodification, but also deglobalisation of capital was considered vital to expanding access to the ARVs. Similar local licensing arrangements were soon arranged for firms in Kampala, Harare and other sites.

### **Lessons of social unrest for constitutional reform**

The exception of AIDS activists' victory in 2002 proves the rule that only in the rarest case – one crafted so creatively around child rights to healthcare, with a very specific micro-intervention (supply of a two-dose life-saving medicine) – can the South African Constitution accompany a broader repertoire of strategies and tactics. By 2004 a full-fledged victory was rightfully claimed by TAC and the subsequent decade witnessed a rise in life expectancy from 52 to 61 as a result. It was a remarkable testimony to TAC's power, a victory that in turn nearly destroyed the organization as it moved from being a site of oppositional mobilization to an agency whose primary function sometimes seemed to be facilitating state administration of AIDS medicines and not much more, a danger well understood by its activist leaders (Heywood 2013, Dubula 2014).

If a kind of constitutionalism hostile to civil society results in the depoliticisation of poverty, what are the countervailing strategies to politicize basic rights, sufficiently strongly so as to one day force constitutional reform? The organic civil society solutions, both proposed and acted upon, included the transition from rights talk to 'decommodification' and 'commoning', articulating more clearly and politically the collective claim for public goods. This turn can represent a more consistent form of sustained resistance to neoliberalism, one potentially ranging from mass protest to micro-level mutual aid, and may ultimately be one of the best sign-posts of future constitutional reform, as well, even if the South African state responds by attempting to demobilise community groups that had played such an important role in destabilizing apartheid (Meer 1999).

But a new generation of community movements was not willing to be coopted or crushed, as noted above in the case of water. The urban social movements began in Durban when the CCG mobilized in 1999-2000. At

the same time in Soweto, Johannesburg, community activist Trevor Ngwane moved from regional leader of the ANC and Johannesburg City Councilor, to the main face of left opposition (Ngwane 2003). After being fired from the ANC because he opposed water commercialization, he organized the Soweto Electricity Crisis Committee and then the Anti-Privatisation Forum in 2000. In Cape Town, the Anti-Eviction Campaign appeared soon afterwards.

Excessive commodification and subsequent repression drove many of these protests. In contrast, the 'decommodification' strategy and commoning tactics became increasingly universal, not only is the demand for 'lifeline' supplies of water and electricity being made from the urban ghettos like Soweto to the many rural areas which have still not received piped water. The need for free access to antiretroviral medicines, for six million HIV+ South Africans, is also acute. A campaign for a Basic Income Grant was also taken up by churches and trade unions. The Landless People's Movement objected to the failure of a commodified land reform policy designed by the World Bank, and insists upon access to land as a human right. Such demands, based upon the political principle of decommodification (in which a basic lifeline amount is supplied free universally and higher prices – hedonistic-use taxes – are charged on a rising block-tariff basis to encourage redistribution and conservation), are central to campaigns ranging from basic survival through access to health services, to resistance to municipal services privatisation.

This struggle was one of the most inspiring in the context of Mbeki's neoliberal-nationalist years. Elsewhere in South Africa, independent left movements struggled to turn basic needs into human rights, making far-reaching demands (and even occasionally winning important partial victories): the provision of improved health services (which led to endorsement of a National Health Insurance in 2010); an increase in free electricity from the tokenistic 50 kiloWatt hours per household per month, especially given the vast Eskom price increases starting in 2008; thoroughgoing land reform; a prohibition on evictions and the disconnection of services; free education; lifeline (free) access to cellphone

calls and SMSs; and even a 'Basic Income Grant', as advocated by churches and trade unions. The idea in most such campaigns was that services should be provided to all as a human right by a genuinely democratic state, and to the degree that it was feasible, financed through cross-subsidisation by imposition of much higher prices for luxury consumption.

Because the 'commodification of everything' was still under way across Africa however, decommodification could actually form the basis of a unifying agenda for a broad social reform movement, if linked to the demand to 'rescale' many political – economic responsibilities that were handled by embryonic world-state institutions. The decommodification principle was already an enormous threat to the West's imperial interests, as in, for example, the denial of private corporate monopolies based on 'intellectual property'; resistance to biopiracy and the exclusion of genetically modified seeds from African agricultural systems; the renationalisation of industries and utilities (particularly when privatisation strategies systematically failed, as happened across Africa); the recapture of indigenous people's territory via land grabs; and the empowerment of African labour forces against multinational and local corporate exploitation. These are core ideas that could inform a future socialist constitutionalism rooted in societies' ability to resist the rule of property.

To make further progress along these lines, delinking from the most destructive circuits of global capital would also be necessary, combining local decommodification strategies with traditional social movements' calls to close the World Bank, IMF and WTO, and with rejection of the United Nations' neoliberal functions and lubrication of US imperialism. Beyond that, the challenge for Africa's and South Africa's progressive forces, as ever, was to establish the difference between 'reformist reforms' and reforms that advanced a 'non-reformist' agenda. The latter attempts were to win gains that did not strengthen the internal logic of the system, but that instead empowered the system's opponents. Hence, unlike reformist reforms, non-reformist reforms would not have a co-optive

character. Neither would they lessen the momentum of reformers (as did many successful reformist reforms). Rather, they heightened the level of meaningful confrontation by opening up new terrains of struggle. The non-reformist reform strategy would include generous social policies stressing decommodification, exchange controls, and more inward-oriented industrial strategies allowing democratic control of finance and ultimately of production itself. These sorts of reforms would strengthen democratic movements, directly empower producers (especially women) and, over time, open the door to the contestation of capitalism itself. A Constitution drawn out of such struggles for socialist reforms would have an extremely different tenor than the one South Africa adopted in 1996. The commoning strategy is the main one which civil society is using to transcend the limits of South Africa's Constitution as well as the limits of current policies. But another strategy is to change the Constitution itself, much as is being attempted across Africa and the world. As an example, a group of two dozen progressive legal practitioners and academics associated with civil society reform campaigns called themselves the Council for the Advancement of the South African Constitution (Casac), and explained the need for reform: 'Only by being seen to work in favour of all South Africans, rich and poor, and in particular the vulnerable and the marginalised, will the Constitution sustain the support of all the people of South Africa.' (Even these reformers concede that the Constitution no longer commands respect.) Launched in September 2010, Casac's critique reflected the same frustration that the Soweto water campaigners felt, but Casac (2010) suggested, instead, that campaigners need to 'encourage Public Interest Litigation to enable more people to claim their rights under the Constitution, and to develop a progressive, assertive jurisprudence on human rights,' not mentioning the failures to date with that approach.

Another civil society campaign combining liberal and radical social reform values is Right2Know (R2K), which in 2011-13 fought Jacob Zuma's so-called 'Secrecy Bill', a proposed law which penalizes whistleblowers (perhaps to the same scale as US repression), alleging it is

unconstitutional. R2K continued to oppose its lack of provisions for public interest information and for protection of whistle-blowers. By mid-2013, Zuma was compelled to both change the bill prior to signing, and then in September 2013 he revealed that the parliament-approved law still had too many constitutional problems and needed substantial rewriting. In November 2013 he received a modified version of the law from Parliament, attracting more protests from R2K and other critics, and at the time of going to press a year later, had still postponed his signing. Aside from these efforts, reliant upon committed liberal lawyers and sometimes including medium-sized protest movements, the more powerful resistance tendencies in the society, however, are the concrete challenges to constitutional prerogatives of powerful property rights and inadequate socio-economic rights. In light of the extreme turmoil in the society, especially the labour movement, what forces will bring constitutional reformers closer to South Africa's protesting masses?

### **Conclusion: Constitutional reform requires a rupture**

It is, in sum, evident that the South African Constitution provided 'talk left, walk right' language that raised hopes for both civil and political freedoms, as well as for socio-economic rights. In many cases, however, these rights have been violated and the Constitution has not been sufficiently robust to protect victims of post-apartheid repression. Part of the problem, it is argued above, is resistance to the commodification of the society, and the inability of a liberal capitalist Constitution to grapple with the problems thereby caused. The result is a highly contentious constitutionalism, in which the failure of guaranteed rights in the context of neoliberalism generates extremely high levels of social protest. The potential to move the society from excessive commodification to a 'commoning' approach more consistent with Ubuntu African values, runs up against the limits of a western Constitution based upon liberal-individualist conceptions of rights, especially in the socio-economic sphere.

It may well be that, like so many other settings (especially in several northern South American countries), a genuine breakthrough on

freedoms – both political and socio-economic – requires much more intensive social-movement mobilization, and potentially also a political rupture, including a new political party to challenge the existing ruling party. That party, the ANC, appeared to have increasing difficulties in maintaining its internal coherence, in combining nationalism and neoliberalism – for which a tokenistic welfare state (e.g. social grants amounting to merely an additional 3 percent of GDP from 1994-2013, or ‘Free Basic Water’ with strings attached, as shown above) – simply did not suffice to paper over the contradictions. This context generated powerful centrifugal pressures pulling outwards on the ANC, leading to what appears as a near certain fragmentation in the short-to-medium term. According to William Gumede (2013): ‘The tipping point have been reached where the gap between the ANC leadership and the daily grind of ordinary members may have now become such a wide gulf that many ANC members who may have deep affinity with the party may now not be able anymore to identify themselves with both the leaders and the party.’ Who would pull the hardest? The limitations of the popcorn-protest community uprisings were noted above. In contrast, the most visionary major force representing workers during this period was the National Union of Metalworkers of South Africa (Bond 2014, Saul and Bond 2014).

Regardless of what transpires in the halls of political power, in the workplaces, on the streets and inside homes, the foundational ‘shield’ of all South African citizens should, in fact, be a Constitution, a law of the land that ensures systemic oppression is truly a thing of the past. The current Constitution, no matter that it is the ‘world’s most liberal’, does not serve as the shield of poor and working-class people in South Africa, when it comes to basic survival on a matter as simple, even, as their presumed right to water. Genuine constitutional reform is a necessity, but the road to reforms that decisively lower South Africa’s current world-leading levels of inequality and social chaos is a long one, sure to be punctuated by much more intense protest. But if in coming years, a United Front of the left revives through the metalworkers’ leadership,

then civil society could become distracted by constitutionalism and carry out protests that are less incoherent, now that they have coordination and a socialist ideology that assists in delineating the limits to South Africa's liberal political rights and neoliberal property rights.

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