Capitalism’s Crises


Published by Wits University Press

Heywood, Mark, et al.
Capitalism’s Crises: Class struggles in South Africa and the world.
Project MUSE. muse.jhu.edu/book/50537.
Our constitutional design is emphatically transformative. It is meant to migrate us from a murky and brutish past to an inclusive future animated by values of human decency and solidarity. It contains a binding consensus on, or a blueprint of, what a fully transformed society should look like.

Deputy chief justice, Dikgang Moseneke, 2014

All mass formations have faced fundamental political questions of how to relate to both the opportunities and challenges of the 1994 democratic breakthrough, especially the implications of direct access to, and participation in, the democratic state and all its institutions.

Axed Cosatu general secretary, Zwelinzima Vavi, 2014
ANTI-IDEOLOGY AND THE POLITICS OF RIGHTS

In April 2014, in an editorial in the *Daily Maverick* titled ‘Building Unity to Restore Democratic Rule’, Raymond Suttner, former African National Congress (ANC) and South African Communist Party (SACP) leader, appealed:

> Those who cherish South African democracy need to draw in people from a range of sectors and organisations that may never have acted together in the past. While retaining their autonomous identities, such groups should develop a unifying vision, which binds them. That does not exclude members of the ANC or any other organisation who identify with these goals. It includes trade unions, social movements and NGOs (non-governmental organisations), a range of community organisations, based in urban and rural areas, as well as business, big and small because there can be no wishing away of capital for the foreseeable future.¹

In the context of South Africa’s deepening social crisis, growing levels of inequality, private and public violence, there can be no doubting the importance of Suttner’s appeal. Suttner’s article was written before the May 2014 election in which the ANC was able to claim a sixty-two per cent majority, albeit less than forty per cent of the total number of people eligible to vote. But predictably the ANC’s overwhelming victory did nothing to staunch the political impasse that pervades our society, with the ongoing controversy over the financing of the president’s private homestead at Nkandla, and strikes and service-delivery protests commencing again barely before the ink was dry on the election results. Judging by the levels of protest, South Africa is a country in revolt against the status quo. There is enormous criticism and growing dissent. What is missing in this is an answer to the question about what could be a ‘unifying vision’ for those ‘who cherish South African democracy’. Is it possible to construct and implement a vision that could unify the polyglot classes and movements that Suttner suggests?

This chapter attempts to suggest an outline for an answer to this question. At the outset it points to the ferment in party politics and notes three competing but overlapping visions that have emerged amongst activists on the Left. These are: (i) the political demand for ‘economic freedom’ associated with Julius Malema’s political party, the Economic Freedom Fighters (EFF);
(ii) the demand for socialist alternatives driven by South Africa’s largest trade union, the National Union of Metalworkers of South Africa (Numsa); and (iii) an increasing number of campaigns for ‘social justice’, now the mantra of a growing number of civil-society organisations and social movements.

What unites these movements is the conviction that 21 years of successive ANC governments have failed to narrow inequality. Whilst there have been very important social and democratic reforms (the 17 million people on social grants being the most commonly cited example), these reforms have failed to lift tens of millions out of dire poverty, unemployment and dependence on health and education services that many say are worse than those that existed under apartheid. Fewer and fewer people believe the promises and rhetoric of the ANC leadership to change this situation.

Yet equally significant are the ideological divides between these movements. Therefore, to try to find Suttner’s elusive vision, I begin by looking at the distinguishing features of the EFF, Numsa and the social justice movements; their strengths, shortcomings and contradictions. However, drawing on the experience of the social movement, the Treatment Action Campaign (TAC), I make no bones about my belief that it is the combination of mass mobilisation together with campaigns to realise the human rights in our constitution which holds the best prospect for achieving far-reaching social reform in the short to medium term.

I therefore argue for making the quest for social justice the unifying vision of the Left and for organising militant struggles to win the fundamental rights already enshrined in the bill of rights of the constitution of the Republic of South Africa, 1996. In this context, I question the self-defeating scepticism from the Left about the constitution. I ask what has been the price of the Left having adopted a purist and ideological aloofness from the constitution instead of using it to invigorate and animate struggle. Finally, in this regard I try to draw attention to some of its far-reaching transformative powers and argue that at this watershed point in South African politics the greatest potential for Numsa’s initiative, the United Front, to emerge as a mass movement lies in its leading campaigns for social and political reforms already envisaged in the constitution.
Three visions of radical transformation: Economic freedom, socialism and social justice

In three short years since the massacre of mineworkers at Marikana in August 2012, South Africa’s post-apartheid consensus that the ANC-led Alliance would lead social transformation in South Africa has exploded.

The EFF was launched in August 2013 and less than a year later won over a million votes in the 2014 general election. It has become the expression of a new political phenomenon, rooted in young black people’s anger at exclusion and continued marginalisation from the economy. On another level, it is also an expression of infighting in the ANC, shifting coalitions and fights over the spoils of economic power and easy-to-grab riches. However, even if the EFF seems thin on policy, its antics in and out of parliament have caught the public attention and imagination. It is the new punk on the block.

The idea of ‘economic freedom’ is a powerful one. It is being used to mobilise many young black people who are justifiably angry that they remain marginalised, excluded and disadvantaged. Economic ‘unfreedom’ contrasts with political freedom, which loses its shine if it does nothing to change the social and economic conditions that were the legacy of apartheid.

Calling for measures such as nationalisation of the mines or banks to ensure economic freedom thus sounds radical and revolutionary. But for the purposes of my argument it is important to note that it has a totally different meaning to social justice. In our current context it refers to black people being able to achieve economic equality with white people, something that is necessary to self-advance and to acquire status and riches. This is fair and reasonable but once achieved it also includes the freedom to exploit others. Ironically, it is the economic freedom of the white minority in South Africa, or the one per cent in the world, that deprives the vast majority of real economic and social opportunity. Though it might seem heretical to suggest it, economic freedom is thus at heart a neoliberal concept.

Contiguous with the rise of the EFF has been the political rupture of the Congress of South African Trade Unions (Cosatu), accelerated by the refusal of its largest affiliate, Numsa, to participate any longer in the masquerade of the ANC/SACP/Cosatu ‘Alliance’, leading to its expulsion in November 2014. In the Declaration of its Special National Congress, held in December 2013, Numsa resolved to explore establishing a movement for socialism ‘as the working class
needs a political organisation committed in its policies and actions to the establishment of a socialist South Africa’ (Numsa 2013). In keeping with this resolution, at a conference on socialism in April 2015, Numsa revived the call for ‘socialist alternatives’ to neoliberalism and capitalism. Then, in a meeting of the Central Committee in April 2015, Numsa resolved ‘to forge ahead with the creation of a Marxist–Leninist revolutionary working class party’ (Numsa 2015).

Given that it is only 20-odd years since capitalism ‘triumphed’ over socialism with the fall of the Berlin Wall, the collapse of the Soviet Union (USSR) and its client states in East Europe, it is remarkable how the scales have now shifted against neoliberalism. The pyrrhic victory of old capitalism was used to unleash neoliberalism which now stands accused by tens of millions of people of failing to meet their basic needs, creating gross inequality and jeopardising the future of the planet through environmental destruction (see, for example, Sassen 2014). In the context of what Satgar describes in chapter one of this book as ‘an unprecedented civilisational crisis with multiple systemic dimensions: the systemic crises of capitalist civilisation,’ there can be no question that alternative political and economic systems merit serious investigation and research.

As opposed to economic freedom, ‘socialism’ (however we understand it) is an idea that is much more palatable to, and in tune with, social justice because it is based on solidarity of the poor, the elimination of exploitation, and ultimately, equality.

Yet, as debates about ‘socialist alternatives’ recommence, it is crucial that the Left looks deeply into its own morally and politically compromised soul. It is also important to be objective and evidence-based, rather than to allow the wish to be mother to the thought. For example, capitalism, whilst still characterised by repeated crises, whilst still unable to disentangle itself from the 2008 financial crisis, is far from being on its last legs. With the eyes of vast multinational companies now on Africa and China, there remains ample opportunity for capital to exploit growing markets and new technologies in the years ahead.

The global one per cent leave in their wake ever greater inequality, war, waste and social and environmental degradation, but capitalism itself is nowhere near its last great crisis. Marx’s argument that capitalism would ultimately collapse on its own internal economic contradictions at the same time as creating a more progressive class, the working class, that would usher in a more rational form of economic and social organisation no longer holds.
In addition, the proponents of a socialist alternative to neoliberalism still have a lot of explaining to do. They cannot overlook the history of ‘socialism’ in the twentieth century. Academics and historians may have found explanations for the degeneration of the world’s first socialist government, the former USSR, and other forms of twentieth-century socialism (Williams and Satgar 2013). But for millions (if not billions) of poor and working-class people, socialism remains associated with dictatorship and failed economies. There is both scepticism and fear, and these fears about both its anti-democratic and economic form cannot just be dismissed.

Launching a new struggle for socialism without being clear about what this means and how that struggle must deepen democracy, rather than stifle it, has the potential to divide the poor from what left-pretenders (who have long made their peace with the capitalist class) call their ‘class enemies’ as well as from legions of middle-class people who now have a self-interest in a fairer society and a common interest with the poor. As Kumi Naidoo, the outgoing director of Greenpeace, and others have argued, it is essential that the struggle now be as inclusive as possible such ‘that we break down the silos and centre the debate on a joined-up approach where human rights, human development and human security are seen as the interdependent tenets that they are’ (Naidoo 2010: 20).

The research that Numsa proposes must take into account that many of the great economic and political theorists of socialism, particularly the famed quartet of Marx, Engels, Lenin and Trotsky, lived in a vastly different world, under a qualitatively different stage of capitalism and development. Programmes and plans that were put forward as solutions in the early and mid twentieth century, aiming for example to ‘nationalise the commanding heights of the economy’, need to be reconsidered in the globalised, financialised economy of the twenty-first century. Inviting new scorched-earth policies by those who can literally flick switches to prompt financial crises can help no one.

In addition, socialists must take cognisance of ‘new’ issues which were not at the forefront of nineteenth- and twentieth-century political theory, including the environment, gender equality, and equal employment of women and of people with disabilities. Finally, let’s be honest, Marxism was a western-European notion, an idea that was developed largely without references to other great cultures and civilisations that, at that time, lived outside the boundaries of the world known by Marx and Engels.

Let me not be misunderstood: there is no doubt that there is a need for greater worker and citizen control over ‘finance’ and the conduct of multinational
corporations. However, there needs to be a deeper examination of what instru-
ments and organisations might exist to democratise both the production and
the distribution of the wealth that the working class creates. Amongst other
things, we need a far more sophisticated trade unionism than exists at present.

Finally, in a fashion much less choate than Numsa or EFF, recent years have
seen the revival of campaigns led by social movements and NGOs. Social move-
ments like the TAC, Equal Education (EE) and the Social Justice Coalition have
tied their demands to realising the human rights in the constitution and to the
notion of social justice in particular. They have been criticised from the Left for
‘reformism’ and particularly for using the law and the courts. Yet despite this
criticism, many of these campaigns have been able to mobilise large numbers
of people and, as I illustrate briefly below, win significant social reforms for the
poor.

The Treatment Action Campaign is a case in point
The TAC was formed in late 1998. From the outset its campaign for access
to anti-retrovirals (ARVs) for people living with HIV referred constantly to
ensuring access to affordable medicines as being a duty on the state arising from
section 27, the constitutional right of ‘everyone to have access to health care
services’. In the face of ANC-led AIDS denialism and pharmaceutical company
profiteering (Loff and Heywood 2002), the TAC argued that section 27 created
a duty on government to use its regulatory powers to take ‘reasonable measures’
to regulate the price of essential medicines so as to make them more affordable.
TAC’s methods simultaneously involved demonstration, political education
in communities and mobilisation, building alliances with health workers and
scientists, using the media and using the courts.

In post-apartheid South Africa, TAC reinvented the art of using the court-
room as a forum for political trials of both public and corporate power. For
example, the announcement of TAC’s arrival on the global stage took place
in 2001 as a result of its successful attempt to enter the litigation brought by
39 multinational pharmaceutical companies challenging the South African
government’s amendment of the Medicines Act to allow generic competition,
parallel importation of medicines and the setting up of a pricing committee.
The admission of TAC as an amicus curiae (friend of the court) led the compa-
nies to withdraw their legal action in April 2001 (Heywood 2002), leading to
rapid downward pressure on ARV prices that, in the subsequent decade, made
it possible for about 10 million lives to be saved (Loff and Heywood 2002).
However, the political trial for which TAC is best known was the case against the South African government over access to the ARV Nevirapine. In the late 1990s, clinical trials had convincingly proven that this medicine could reduce the risk of HIV transmission between a pregnant woman and her child by up to fifty per cent. TAC’s two-year political campaign for a policy and plan to use the drug to prevent mother-to-child HIV transmission (PMTCT) culminated in a judgment of the Constitutional Court in July 2002. This combination of law and mobilisation marked a turning point in the national response to the HIV epidemic. Commentators and academics who have subsequently analysed TAC’s campaign often do so superficially, as if it all hung on the court case. They write as if the PMTCT campaign ended with the handing down of the judgment by the court, or as if it were the judgment that delivered the much-sought-after ARV programme. They betray ignorance of legal and non-legal strategies that have continued unrelentingly since then (Heywood 2005). During all this time TAC was also painstakingly building a democratic social movement, working with the communities where its members lived. TAC’s methods involved using personal stories to build empathy and solidarity; engaging in policy debates with the advantage of evidence, and, when necessary, using the courts to raise public awareness of an issue, thereby broadening support (Heywood 2015).

The results of this sustained campaign are indisputable. HIV is almost the only area of public policy where there has been a continual roll-out and improvement of public services (see Heywood 2009). In fact, in the sphere of HIV, TAC has been able to achieve social justice/substantive equality: people with HIV have equal access to ARVs regardless of class or gender. So far, this is the only post-apartheid campaign for rights that has achieved this. According to official statistics, 3 million people receive ARV medicines through public health facilities; life expectancy has increased again to over 60 years; the risk of HIV transmission of a mother to her infant has decreased to fewer than three per cent of pregnancies.

After TAC’s victory in the Constitutional Court in 2002 several other social movements have also linked their campaigns directly to rights in the constitution, although not every campaign has involved a concurrent political mobilisation. This has included issues about housing rights, particularly the right not to be evicted, access to sufficient water and the right to basic education. Significant victories have been won in the courts and on the streets.

In relation to access to housing, a succession of judgments changed the balance of power between property owners and their tenants or people who
occupy or live on the property. Legal action brought by organisations like Socio-Economic Rights Institute of South Africa (SERI) has made it more difficult to arbitrarily evict people, thereby rendering them homeless.

In relation to the right to basic education, campaigns that have either used or threatened to use the courts have brought millions of textbooks as well as furniture to schools and seen the finalisation of binding Minimum Norms and Standards for School Infrastructure. They have also contributed to the eradication of schools built from mud.

These campaigns vindicate the idea of combining social mobilisation and constitutional law as a means to advance social justice (Budlender, Marcus and Ferreira 2014). Could such an approach, broadened to tackle other issues of inequality and injustice linked to public and private accountability, emphasising the importance of democratic participation in all policies, perhaps be the basis for Suttner’s unifying vision?

**Social justice and the transformation of property relations**

Many on the Left would argue not. They caricature social justice as a liberal idea, relatively benign and incapable of challenging property relations, and thus the roots of inequality. Its association with law, its enforcement through the courts as well as the streets, becomes another negative. How well does this argument hold up?

Admittedly, the term ‘social justice’ is often used loosely and imprecisely. It is a political concept that dates back centuries but has come back into vogue in the twenty-first century. Undoubtedly, work needs to be done to agree on what exactly we mean by it. However, groups such as TAC source the power of social justice in the fact that it is referred to as a guiding principle of the constitution. They point out how, according to the constitution’s Preamble, social justice is one of the three pillars upon which we must ‘establish a society’ that can heal the divisions of the past. The other two pillars are ‘democratic values’ and ‘fundamental human rights’.

Unfortunately though, the constitution does not explain what it means by social justice. And, up to this point, neither has the Constitutional Court. That is our job. Nonetheless, in its judgments the Constitutional Court has repeatedly affirmed the centrality of social justice to the duties of government and explored its implications for property relations. For example, in an important 2002 judgment analysing property rights, the Court expressly referred to the fact that individual property rights must be qualified by the mandate that falls
on government to realise social justice. How the government does this is for it to decide, but one thing can be said with certainty: where nationalisation of land, property or industry can be justified for ‘a public purpose or in the public interest’ it is permissible by law as long as it is not done in an arbitrary fashion.

In keeping with this, whenever the Court evokes social justice it is always linked directly to statements about the duty on the state to take concrete measures to realise socio-economic rights, such as access to health care, housing and basic education. In the words of former political prisoner and current Deputy Chief Justice Dikgang Moseneke:

> Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework.5 (my emphasis)

Part of the Left’s fear of being tainted by using the constitution to fight for real transformation appears to be a mistakenly held view that the ‘property clause’ creates an unbreakable right to private property, and thereby negates the value of the constitution as a whole. The feeling is that the property clause diminishes all other rights because it leaves the greatest cause of inequality and exploitation intact and beyond the reach of transformation.

But in answer, listen to the argument of ANC activist, lawyer and later Constitutional Court judge Zak Yacoob. In the 2013 Helen Suzman Memorial Lecture, Yacoob (2013) was at pains to explain how individual freedom and political equality relate to each another. He stressed that substantive equality may require the government ‘to cut back the freedom of some very privileged people to achieve equality in the marginalised sectors of our society’. In his words:

> The law of the jungle, which is about the strong conquering the weak, which is about the rich riding roughshod over the poor, and about the strong taking advantage of the weak, is no longer for us. (Yacoob 2013)
Thus the constitution itself pre-empts criticism that it creates liberal individual freedoms rather than collective rights by tying all the rights in the bill of rights directly to social justice. The problem, however, as Karl Von Holdt (2013: 593) correctly points out, is:

It is unclear how far the Constitution and the institutions it establishes are adequate to facilitate redistribution [because] the ANC in government has hardly tested the possibilities. It has precluded such innovation through conservative policy choices … shaped by internal developments, the pressures and inducements from business, international development institutions and ‘expertise’, and the constraints of global capitalism.

The bottom line is that up to this point, as with land reform, the duties and obligations on private power and how it is exercised in the new democracy have not been properly tested. This is a problem for the Left and not the constitution. Indeed, on the rare occasion when the Constitutional Court has been called upon to unpack the meaning of section 25, it has made its bent clear, stating in the First National Bank case that ‘the protection of property as an individual right is not absolute but subject to societal considerations.’ Similarly, in 2013 in a test case brought by the conservative farmers association Agri South Africa, supported by the right-wing NGO AfriForum who were admitted as an amicus curiae, the Constitutional Court pointed out that it is important

not to over-emphasise private property rights at the expense of the state’s social responsibilities. It must always be remembered that our history does not permit a near-absolute status to be given to individual property rights to the detriment of the equally important duty of the state to ensure that all South Africans partake of the benefits flowing from our mineral and petroleum resources.

The fact that there are not more judgments regulating the exercise of private power has more to do with the fact that activists on the Left have not seen the constitution as being of any assistance to struggles. In the words of academic Sandra Liebenberg (2014: 86) ‘if socio-economic rights are to fulfill their transformative potential, intensive research and advocacy is required into how
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various forms of private power and the rules of law that sanction the exercise of such power, affect people’s social and economic rights.

WHY DOES THE LEFT ESCHEW USE OF THE LAW AND COURTS AS INSTRUMENTS FOR TRANSFORMATION?

In September 2014 during a political discussion between Awethu! and Numsa, Dinga Sikwebu, Numsa’s political education officer, admitted that Numsa had never properly discussed how to use the constitution to advance workers’ demands and rights. ‘It had been on the agenda two years ago,’ he said, ‘but had been superseded by other issues.’ In the second part of this chapter, I point to the transformative power that is latent in the constitution and argue that the South African Left is making an enormous error by not tapping into this power in its quest for equality.

Perhaps the largest cloud that blocks a view of the transformative potential of the constitution remains an ideological one. Many left-wing activists, trade unionists and academics remain suspicious of the law and the courts, seeing them as part of the apparatus of a hostile capitalist state, controlled and manipulated by ‘the class enemy’, and inherently unsympathetic to the poor. For the most part, therefore, the constitution is steered around, and social movements like TAC that use it are sometimes frowned upon or regarded as misguided ‘reformist’ liberals.

Such a quasi-anarchist approach fails to consider that thousands of years have passed since human beings lived entirely outside of legal systems and codified restraints on public and private conduct. Law of some form will necessarily govern human relations for the rest of time. In a capitalist system, where the poor are without power, legal relations are stacked against the poor. But that should not be the end of the story.

Built into the DNA of law is a gene that makes it susceptible to a constant process of evolution. Law as a system of rules and the means for their enforcement is subject to daily, ongoing contestation over its meaning. For 300 years in South Africa, systems of law were imported by the colonisers, both Dutch and British, primarily from Roman Dutch legal traditions. The law was used largely to govern white civilisation and to exploit black labour and land. But today, the evolution of the law is being rapidly propelled forward: centuries of anti-poor law suddenly have to accommodate the pro-poor dictates of the Constitution,
particularly the bill of rights. To ignore the law, or to not consciously contest it, is to vacate the field of battle, allowing its use and meaning to become the propriety of those classes and individuals that are antagonistic to and resist social justice.

We need to grow up. It is understandable how after centuries of oppression under law an anti-law attitude, or a variation on it, prevailed amongst the majority of members of the liberation Alliance, and still does. Black people had been dispossessed by law and for the most part prevented from practising the law as a result of the inferior system of ‘bantu education’ and segregation. With rare exceptions, they were also excluded from protection by the law. Admittedly, the liberation struggle took advantage of a small number of great lawyers and on occasions the enemies’ courtroom was utilised as an advocacy platform for the freedom struggle in trials such as the Rivonia trial. Yet, in a movement that until the early 1990s was focused on the seizure of power, very few activists in exile or at home were schooled to see the potential of law as an instrument that could also curtail undemocratic power and advance human rights.

Compounding this were the political traditions that ANC leaders were exposed to and endorsed during their years in exile. A close ideological affiliation via the SACP with the Stalinist states of the USSR and East Europe did not facilitate consideration of democratic constitutionalism as a vehicle for emancipation. When in 1989 the political logjam in South Africa began to break up, aided by the break-up of the Soviet Union, the liberation movement’s donning of the clothes of the rule of law and democracy was done somewhat opportunistically, in a hurry, and was certainly not widely internalised. This helps explain why, to this day, there remains a scepticism and distrust of the judiciary, which is frequently caricatured by senior leaders of the ANC as a last redoubt of resistance to democracy, when in reality it has the potential to be one of its most potent instruments.9

An alternative tradition? Realising law’s transformative possibility
During the 1980s amongst the ANC’s allies internally (the United Democratic Front [UDF], Cosatu, the End Conscription Campaign [ECC], Black Sash and others) a different view of law began to develop. This was one which took advantage of law to both catalyse political struggle and to cement some of its victories. This process began as efforts were made at deepening the reforms in labour law that followed the 1979 Wiehahn Commission. The UDF and others also began to work with progressive human rights lawyers to use the
law against the law and knock chinks in the armour of apartheid (Davis and Le Roux 2009). As the trade union movement developed ever-greater momentum in the 1980s labour developed its own approach to law. This led to the rise of a dynamic labour law practice amongst unions, progressive labour law firms like Cheadle Thompson and Haysom, the rise of the annual labour law conference and so on. In 1988 the strike by Cosatu against amendments to the Labour Relations Act also developed a powerful consciousness amongst workers about labour rights.

But despite what Satgar describes as Cosatu’s ‘sensibility around labour rights’ and its efforts to use the constitution to deepen these after apartheid, there seems to have been little analysis within Cosatu about the broader possibilities South Africa’s supreme law offered for transformation. Fortunately there was, however, another tradition and approach to the law in existence, although one by no means strong enough to counter the mainstream suspicions of law and the constitution.

As I have already mentioned briefly, throughout the history of apartheid and colonialism there were sporadic instances of the law being used against the law to try to remedy some of the evils inflicted by legalised racism. During the 1950s, the use of law for justice began to assume a more organised, theorised and ongoing shape, partly under the tutelage of leaders such as Nelson Mandela, OR Tambo, Bram Fischer and Joe Slovo. In the 1960s and 1970s the suppression of the ANC and imprisonment of its leaders made this approach redundant. Hence the decision was taken to commence the armed struggle and use the law mainly for defensive purposes in political trials.

However, during the 1970s, on the back of the rising trade union movement and the youth revolt, political law was brought back to life to serve the struggle for liberation (Cameron 2014). Pioneering activists like John Dugard and Arthur Chaskalson established organisations like the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand and the Legal Resources Centre (LRC) and Lawyers for Human Rights. Their aim was to use the law in order to advance the struggle for freedom, particularly through the labour movement and the UDF. During the political negotiations around the constitution, the ANC entrusted individuals from these organisations with significant responsibility and power to guide and advise it on the new shape of law (Spitz and Chaskalson 2000).

By the early 2000s this tradition of human rights law, and the organisations and individual lawyers associated with it, would become the greenhouse for
training social justice movements in the use of constitutional law. Organisations like CALS helped seed new NGOs like the AIDS Law Project (Moyle 2015), TAC and later SERI. Latterly, this approach to law and social mobilisation has also catalysed further social movements such as EE.

At the heart of campaigns led by these organisations is the firm conviction that the constitution provides power to South Africa’s poor. It is a power that is largely overlooked.

The constitution and its critics: Right and Left
On 10 December 1996 when then-President Nelson Mandela signed the new constitution into law, he effected a revolution of sorts. A supreme rights-based constitution marked a complete departure from the form of the rule of law that had existed under the 1961 and 1983 constitutions. Now the constitution rather than parliament or the Executive was supreme.

However, on another level, Mandela’s signature heralded continuity rather than a rupture in the existing power relations. The fierce political uprising against apartheid of the 1980s led to a political and economic crisis that the ruling class sought to head off through a negotiated political settlement. Yet, whilst the constitution fixed in place an entirely new system of government, there was no revolution on the streets. The apartheid regime surrendered political power but the capitalist economic relations – and privilege – that had shored it up remained unchallenged. In the words of Zak Yacoob (2013), the constitution was ‘a negotiated compact … a document of compromise’. It averted a racial civil war.

In recent years, as inequality has deepened and economic transformation been blocked, arguments have been made that this compromise, and particularly the constitution that embodies it, has become the barrier to far-reaching transformation. Ngoako Ramathlodi, minister of minerals and one-time premier of the province of Limpopo, has described it as ‘reactionary’ and as the means by which ‘power was taken out of the legislature and executive to curtail efforts and initiatives aimed at inducing fundamental changes’. Gwede Mantashe, ANC secretary-general, has echoed his sentiments. Similar anti-constitutional rumblings have also been heard from Julius Malema and the EFF.

Critics from within the government and the ANC attack the framework of governance that the constitution entrenches, particularly the role that may be played by the courts, especially the Constitutional Court, in either curtailing or directing executive action that is found to contradict the fundamental precepts
of the bill of rights. They lament that the courts overstep the boundaries of their powers or that jurists who have an anti-transformation or anti-ANC agenda are abusing their powers. In 2013/14 this resentment was especially focused on some of the state institutions supporting constitutional democracy created by chapter nine of the constitution, and thus sometimes known as the ‘Chapter Nine bodies’. For example, in the run-up to the 2014 elections and beyond, the public protector, Advocate Thuli Madonsela, came under sustained assault from the ANC and SACP for her investigation into and report on the corruption at President Zuma’s private homestead in Nkandla, KwaZulu-Natal (Madonsela 2013/14). In a milder fashion, the South African Human Rights Commission (SAHRC) was criticised for its 2014 report on sanitation.12

However, these opinions are predictable. They emanate primarily from people in the ruling ANC who have a vested interest in having their own power unchecked, those who need a scapegoat onto which to transfer their responsibilities for governmental failure or who merely want to remain unaccountable for their actions. But they are not to be dismissed because they are also linked to a growing authoritarianism and measures such as the Protection of State Security Act, that aim to blunt the constitution’s powers.

In the face of enemies like this it is all the more difficult to understand the failure of the Left to appreciate or exploit the power that resides within the constitution. These views range from denunciatory tirades from intellectuals such as Patrick Bond (2014)13 from the University of KwaZulu-Natal’s Centre for Civil Society to the scepticism of Rhodes University-based academic Richard Pithouse (2014).14 Generally, these academics in the Left warn activists against what they call ‘bourgeois legalism’ and their ‘co-option’ into a system that, because we all live under the rule of law, we are all already squarely within. In particular, they hold up the constitution’s ‘property clause’ as evidence that the constitutional compromise has left the spoils of centuries of land theft with the descendants of the thieves.

I have already discussed the ‘property clause’, but it is important to restate here that it does not create a positive ‘right’ to property for existing property holders. Instead, it protects against arbitrary deprivation of property by the state or private powers (something that the history of apartheid and colonialism demonstrates the poor also require) whilst stating plainly that property may be ‘expropriated for a public purpose or in the public interest’.15

For Bond and others, the constitution-making process was nothing more than a neoliberal ploy to derail revolutionary transformation and control shifts
in power so as to keep the poor in thrall. But such arguments overlook the historical facts of the constitution's messy gestation between 1993 and 1996. Undoubtedly, a variety of conservative agendas, agents and elites were closely at work in the making of the constitution. But these agendas had to take account of the huge public expectation that the new legal order would break symbolically and substantively with the past and would speak to the expectations of a free people (see Klug 2000).\textsuperscript{16}

My argument is therefore diametrically opposed to the views of both Left and Right. I argue that none of the provisions of the constitution inhibit deep social transformation, not even the 'property clause'. Instead, as I hope to show below, in theory the constitution provides the poor with a significant degree of power over both government and the private sector. It is a legal instrument that permits South Africans to continue the political/democratic revolution so as to achieve social and economic equality, rather than simply stop with the formal political equality the constitution ushered in on 7 February 1996.

Thus the problem of powerlessness lies not in constitutional restraints but in the fact that, due to its capture by conservative interests, the ANC government has not taken advantage of the power the constitution bestows upon it and any elected government to advance social justice. Finally, compounding this problem is the fact that South Africa's citizens have, for the most part, been left ignorant of the power the constitution offers and the duties it imposes on the governing party (Fish Hodgson 2015) to pursue economic and political policies that advance human rights and narrow inequality.\textsuperscript{17}

On the contrary, therefore, I argue that the constitution has enormous potential to contribute to efforts that aim at social justice, if it is used effectively. Let me now explain why this is so in greater detail.

### The power we neglect at our peril

The constitution is South Africa's supreme law. Put simply, this means that the rights in and obligations created by the constitution trump the powers of the president, parliament, any political party, any religion or custom and the Executive. Where there are disputes about law or conduct that is considered inconsistent with these rights, the Constitutional Court is empowered to make the final determination about the legality of these acts.

If the constitution were narrowly constructed and did not contain an expansive bill of rights, this fact might not be of great importance. However, as Constitutional Court justice Edwin Cameron (2014) points out in his book
Justice: A Personal Account, many aspects of the constitution’s structure and content go far further than constitutions in all other countries of the world. Most significantly, the ‘positive duty on all organs of state to protect and promote the achievement of equality’ and the rights of ‘everyone … to the full and equal enjoyment of all rights and freedoms’, ought to have profound consequences for the transformation of political and economic structures in South Africa.

To try to illustrate my argument, I draw attention now to four particular aspects that make South Africa’s constitution revolutionary. These are:

- its applicability to all private, as well as governmental conduct;
- the justiciability of socio-economic rights and social justice, meaning that disputes between people and the government about issues such as access to health, housing and basic education can be taken to, and decided by, a court of law;
- the power given to the Chapter Nine institutions to ensure accountability and
- the injunctions that it makes regarding good governance.

The constitution governs the conduct of private power and mandates economic transformation

If people in South Africa are to be freed from poverty and inequality and if social justice is to be achieved, then all the historical causes of inequality must be confronted. Or, in the words of Chief Justice Mogoeng Mogoeng in a 2013 judgment examining the meaning and purpose of the Mineral and Petroleum Resources Development Act, there is:

\[
\text{a constitutional imperative to transform our economy with a view to opening up access to land and natural resources to previously disadvantaged people …}^{18}\text{ (emphasis added)}
\]

Apartheid was not just a legal system for white people’s political domination but also a form of capitalism that accrued wealth and assisted economic exploitation in a thousand and one painful ways through the migrant labour system, the creation of landlessness, its support to the gold-mining industry and so on. Consequently, class inequality almost exactly correlates with racial inequality: apartheid gave economic freedom to the white minority and left the majority exploited by or else completely outside the economy.
Yet 21 years after the ANC was elected to government under a new democratic dispensation in 1994, disproportionate economic power still resides with property owners, landowners and those who accumulated wealth in the past. Economic power, largely maintained through private ownership of capital, is frequently and illicitly used as the basis for maintaining political influence, unregulated party political funding being one of the most egregious examples of this. In turn, political influence is used to sustain unequal conditions and permit the continued transfer of wealth or resources created by labour into the hands of a few. Gold and platinum mining are a fine exemplar of this.

However, in respect of economic power the constitution makes it clear that its rules do not only apply to the government. The bill of rights also binds ‘natural and juristic persons 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’. If we decipher the legalese it means simply that companies too are bound by duties to respect and protect fundamental rights. Laws that have already been passed by parliament to give effect to these principles include the Promotion of Equality and Prevention of Unfair Discrimination Act as well as the Prevention of Illegal Evictions Act. More recently, and of course controversially from the perspective of business, is the Promotion and Protection of Investment Bill.

My argument is that had civil society used these and other laws effectively, the constitution could have been an instrument to try to ensure that private conduct aids the constitution’s vision of a society where there is equality, dignity and a progressive move towards social justice. But it has not.

Consequently, whilst we have made much sound and fury about inequality in the last two decades, the concentration of ownership and wealth has enormously intensified. Matters that seek to regulate or restrict corporate power, except when it relates to contractual disputes between companies, have rarely been brought to the courts. Activists have largely failed to monitor corporate lawlessness and profiteering at the expense of fundamental rights. Challenges to the mining, banking, food or financial sector have rarely been heard or evaluated by the courts. However, where they have, the courts have usually supported reasonable measures the government is entitled to – indeed, which it is under a positive duty to take – to narrow inequality. Almost the only area where this has happened has been in relation to access to affordable medicines including, but not limited to, ARVs needed by people living with HIV.

Finally, it is also important to remember that economic power is not the only power requiring transformation. Inequality also exists in gender relations,
particularly with men’s disproportionate power; in discrimination on the grounds of ethnicity, of religion and in relation to certain customary and religious practices. Such discrimination also underlies economic inequality. Overcoming inequality must therefore be understood as a larger, more multi-dimensional task than was imagined.

In this regard there has been some limited progress. For example, there have been a number of successful judgments in cases brought by civil society asserting women’s and spousal rights in relation to property inheritance, including under customary law. As a result of litigation brought mainly by SERI, there is now an extensive body of new law that limits the power that private property owners previously held to evict tenants or occupiers and which requires alternative housing or negotiations to govern final decisions on eviction (Liebenberg 2014).

These tidbits are pointers to a power we could command to far greater effect in the quest for economic transformation.

The constitution requires the government to respect, protect, promote and fulfill a range of socio-economic rights

One of the distinguishing aspects of the constitution is the bill of rights, (contained in its Chapter Two), and the inclusion within it of socio-economic rights, specified as the rights to ‘adequate housing,’ ‘health care services,’ ‘social security and appropriate social assistance,’ ‘sufficient food and water’ and ‘a basic education’.20

At the time of the writing of the constitution there were debates within legal academia as to whether the inclusion of such an extensive set of instructions relating to socio-economic rights was fundamentally undemocratic. Legal activists and academics, such as Dennis Davis, argued that doing so would rob a democratically elected government of its own power to decide between different policy choices, priorities and the allocation of public resources (see Davis 1992; Mureinik 1992).

However, the counter to that argument, then and now, is that the constitution does not prescribe how policy must be made or resources utilised, only that there must be progressive improvement in people’s access to a list of public goods that are non-negotiables in so far as they are now declared to be ‘rights’. Were this constitutional prescript to be obeyed there would be a continuous narrowing of inequality. The economic freedom expected by the sixty-six per cent majority who voted for the ANC in 1994 was precisely in access to health
care, housing, food, education and so on. The inclusion of such economic rights in the constitution, therefore, was actually a means to bind every future government to meeting this expectation and to prevent their non-delivery. It thus crystallised the will of the people into an inviolable legal contract.

Contrary to what some have argued, these rights are more than just a wish-list or set of symbols because each of these rights is justiciable, meaning that if there is a dispute between people and the government about their meaning or the measures government should take to achieve them, this can be resolved by a court.

Further, socio-economic rights are not just set out as a constitutionally recognised list but they are linked to an injunction – a legal instruction – that they should be ‘progressively realised’ by ‘legislative and other measures’ taken by the government ‘within its available resources’. Section 237 of the constitution adds further that ‘all constitutional obligations must be performed diligently and without delay’ (emphasis added).

Consequently, in the words of Zak Yacoob (2013):

it can never be said that any government in this country, whichever political party it is motivated by, if it is to be constitutionally compliant, can ever say that they have the option whether to take the measures to ensure that people who were disadvantaged in the past are taken forward, protected and advanced. Government MUST do so.

In essence, although obviously not framed in this language, the bill of rights should be regarded as a compulsory mandate on any government to implement policies and budgets that advance social justice. I would argue that the National Development Plan (NDP), which was endorsed by the Cabinet in 2013, waters this duty down. It should be carefully assessed as to whether it goes as far as the constitution requires in its plan to transform South Africa, as well as whether the NDP envisages using the full legal armoury of powers to regulate the economy that are provided for in the constitution.21

The constitution is often criticised from the Left for linking rights to ‘available resources’. But it is important to note the existence of a small number of rights which are not qualified in any way, including quality basic education and children’s rights. The Constitutional Court has already stated that the government has a duty to find the resources to make these rights immediately available to all who need them.
Let’s look at education. In recent years there has been *exposé* after *exposé* regarding the poor quality of basic education, as well as mounting evidence of very poor learning and teaching. In the 2014 Annual National Assessments of Grade nine learners, for example, the average result in a mathematics test was ten per cent. However, it has only been in the last few years that social movements like EE as well as human rights organisations like SECTION27 and the LRC have begun to mobilise to create awareness that the government is under a duty to do everything possible to achieve the right to basic education immediately. This is different from rights such as health or housing, which the government is permitted to realise progressively and ‘within its available resources’. Organisations like EE and SECTION27 are trying to catalyse a mass movement for radical and immediate investment in and improvements to school infrastructure so as to improve the quality of schooling.

Shockingly, despite the extremely poor quality of paediatric health-care services, there has been no campaign to demand that there be a definition of the ‘basic health care and social services’ that all children in South Africa are immediately entitled to.

As a starting point at least, the rights listed in the constitution make it clear on which issues citizens can expect the government to take measures to achieve equality. It is incumbent on social justice activists to monitor and challenge the sufficiency of these measures, and to expose and challenge conduct by the private sector that undermines these rights. To a very limited degree, we have seen this happen in relation to housing, basic education and most effectively in relation to access to medicines for HIV. However, there remain huge issues – such as the right to sufficient food and water – on which there has been no progress at all and where campaigns have been weakened by the fact that they do not take advantage of the constitution.

The constitution demands accountability of public officials

I have already made several references to the Chapter Nine institutions: the public protector, Human Rights Commission, Commission on Gender Equality and the auditor general. My argument here is simply that their wide-ranging powers add another string to the people’s bow and can assist in promoting accountability.

But for most of the short life of our democracy these institutions have been ineffective, hamstrung either by timid leadership and/or insufficient budgets. Research has shown that amongst ordinary people there is little awareness of
their existence, never mind their powers. The vital information on issues such as spending by government departments or local municipalities that is gathered and published by the auditor general, is seen as not related to people's lives.

However, under the tenure of Advocate Thuli Madonsela the potential power of these bodies has been very publicly demonstrated. Before Madonsela’s tenure there was little public awareness of the public protector’s office. Its previous incumbent, Lourence Mushwana, kept the institution obscure and largely irrelevant and, when called upon, it is alleged that he used it to cover-up wrongdoings by the ruling party, rather than to unravel them. However, the current public protector’s investigation and recommendations into public spending on the private presidential homestead in Nkandla have considerably raised its profile and so provoked the ire of the ruling faction in the ANC (Madonsela 2013/14).

The problem once again, though, is that these institutions are not understood by the Left as part of the schema for ensuring social justice and transformation that has been created by the constitution. Thus resort to them is generally infrequent, ad hoc and marginal. There has been little critical engagement to test their powers, defend their independence or to demand that parliament provide them with budgets sufficient to carry out their mandates.

Yet another sword has been left in its scabbard.

The constitution describes the ‘basic values and principles’ of lawful government

Finally, in its chapter on Public Administration, the supreme law of South Africa set out the ‘Basic values and principles governing public administration,’ values which it says must apply ‘to every sphere of government; organs of state; and public enterprises.’ It is relevant to quote these in full:

- ‘A high standard of professional ethics must be promoted and maintained
- Efficient, economic and effective use of resources must be promoted
- Public administration must be development-oriented
- Services must be provided impartially, fairly, equitably and without bias
- People’s needs must be responded to, and the public must be encouraged to participate in policy-making
- Public administration must be accountable
- Transparency must be fostered by providing the public with timely, accessible and accurate information
• Good human-resource management and career-development practices, to maximise human potential, must be cultivated
• Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.’ (Constitution s 195)25

I hope that in the sections above I have been able to illustrate the latent power that resides in the constitution. But ultimately, the achievement of social justice will depend on whether the citizenry test this new power or not. For this to happen, two things are necessary.

The first is that there must be popular knowledge of the bill of rights and the power that it places in people’s hands. The second is that there must be a much greater degree of access to legal services. At this point, change is stymied by the fact that neither exists.26

So, despite the constitution’s guarantee to ‘everyone’ of a right ‘to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum’ (Constitution s 34), access to legal services is as blighted by inequality as access to other human rights. Although Legal Aid South Africa has grown into an impressive network of lawyers and justice centres, employing the largest number of attorneys of any organisation in South Africa, it provides legal services primarily in criminal matters.27 When it comes to civil or human rights issues, poor and middle-class people are largely unrepresented, dependent on the Chapter Nine bodies (if they are aware of them) or NGOs providing legal services.

If common purpose could be found to address these two deficits in the democratic project, of a general lack of knowledge of the bill of rights and lack of access to legal services, the results would have a multiplier effect on empowering citizens to have greater control over their lives.

CONCLUSION: TOWARDS A NEW POLITICS OF STRUGGLE FOR RIGHTS AND SOCIAL JUSTICE

In order to conclude this chapter, let me make the following points. The effectiveness of the constitution in bringing about far-reaching economic and
political transformation depends primarily on civil society and political organisation, not on lawyers or even the highest judges. Yet one would have thought that a supreme law that makes such sweeping commitments and binds government so tightly to a duty to fulfil human rights would be regarded as a gift by every stripe of social justice activist. A rich body of social justice law has come into being in the last 19 years and continues to develop rapidly. The text of this jurisprudence, and the opportunities it creates (or doesn’t), requires much deeper consideration by the Left.

My argument is not that all campaigns should be channelled through the courts. Neither am I seeking to encourage an illusion that this powerful piece of paper is self-enacting, self-sufficient or wipes away social contradictions. The courts are but one part of democracy, not democracy itself. They are still peopled mainly by white men, who are as corruptible as politicians and equally capable of making wrong and unjust decisions. The judiciary is susceptible to both threat and favour. As a result, the success of the constitution’s vision of social justice depends entirely on whether people take advantage of it at every level: through exercising rights to freedom of expression and association; through advocacy campaigns for rights via engagements with national, provincial and local government; in the processes of policy formulation; and in order to identify and answer research questions.

South Africa is at a crossroads. The year 2015 finds the ANC in disarray and the vast majority of South Africa’s people still mired in grinding poverty. Whilst the rich consolidate their wealth the poor remain blighted by corruption and failures of service delivery.

Against this backdrop there appear to be promising harbingers of a different future. In December 2014 in Johannesburg, a Preparatory Assembly of the United Front (2014) was organised and hosted by Numsa, and a formal launch is planned for late 2015. But regrettably, the United Front has so far failed to recognise the constitution as an instrument for achieving transformation. It has not yet offered up the type of unifying vision called for by Suttner.

In this chapter I have argued that the vision Suttner and many others call for should be constructed around a deeper understanding of social justice and that the most potent instrument that exists to advance this vision is the constitution. Reluctantly, I predict that without it, deepening inequality and authoritarianism, of one form or another, risks overwhelming the struggle for democracy and equality.
Let us accept that the term ‘social justice’, therefore, refers to a society that is just in the way it distributes resources. It refers to achieving substantive equality between people, regardless of class, race, gender or ethnicity. This is different from the more limited concept of justice which relates to the right of individuals and which forms the basis of much of criminal and civil law. Thus, whilst the bill of rights lists as individual socio-economic rights goods such as health services, housing, sufficient food and water and basic education, they are goods that ‘everyone’ or ‘every citizen’ is entitled to. They are therefore collective rights and the existence of social justice as a lodestar in the constitutional firmament requires of government the just prioritisation and allocation of societal resources, including finances, to ensure that there is equity in access to these rights.

This makes human rights a common good. It also brings the practical meaning of social justice very close to the equalities many people associate with socialism.

The struggle for social justice is therefore a struggle for equality. Without equality in access to health-care services, housing or basic education it is nigh impossible for people to live with dignity and to have autonomy. Inequality also negates their ability to participate as active and informed citizens in our participatory democracy. Thus the wheel comes full circle. Participatory democracy requires an active citizenry, which in turn necessitates social justice because only people whose fundamental rights are respected and fulfilled, who have dignity, can be fully free to participate as informed and empowered citizens in democratic process. Democracy, human rights and social justice thus come to depend upon one another.

It is on this basis that I now argue that the focus of the Left should be on a struggle for social justice, that is, for the full gamut of constitutionally enshrined human rights which, as they are realised, will create a more socially just and politically empowered society. Seizing hold of the power already provided to people by the constitution could and should constitute the ‘unifying vision’ called for by Suttner and many others.
ACKNOWLEDGEMENT

The author would like to acknowledge the following persons for helpful comments on drafts of this chapter: Edwin Cameron, Heinz Klug, Gilbert Marcus and Vishwas Satgar.

NOTES


2 This included serving papers for contempt of court in late 2002 after certain of the provinces, Mpumalanga in particular, only grudgingly implemented the order; going to court to gain access to the implementation plan for the provision of ARVs in late 2003; setting up a new network to monitor implementation, known as the Joint Civil Society Monitoring Forum in 2004; replacing this forum with another one, the Budget Expenditure and Monitoring Forum at the point in 2009 when it became clear that corruption combined with poor budgeting was the main threat to medicines provision; mobilising and bringing legal action around prisoners' rights of access to medicines in 2006; working with the government to re-establish the South Africa National AIDS Council and to develop the 2007–2011 and then 2012–2016 National Strategic Plans on HIV, tuberculosis and sexually transmitted infections.


6 More recently, in a speech given to mark 20 years of democracy, Moseneke (2011) said: 'Let's slaughter a few shibboleths. The Constitution does not protect property it merely protects an owner against arbitrary deprivation. Deprivation that is not arbitrary is permissible. The property clause does not carry the phrase: “willing buyer: willing seller” which is often blamed for an inadequate resolution of the land question. The state's power to expropriate does not depend on the willingness of the land owner. The compensation may be agreed but if not, a court must fix it. The compensation must be just and equitable and not necessarily the market value of the land. Market price is but one of five criteria the Constitution lists for a court to set fair compensation. The property clause is emphatic that the state must take reasonable measures, within available resources, to enable citizens to gain access to land on an equitable basis.’

7 First National Bank of SA Ltd v Commissioner of SARS; 2002 (7) BCLR 702.

8 See https://www.facebook.com/AwethuSocialJustice.
9 For example, in a revealing interview with the Sowetan newspaper, ANC Secretary-General Gwede Mantashe claimed: ‘There are many things happening in the judiciary that will only be seen in 10 years’ time. One of the things that is dangerous: The independence of judiciary and separation of powers must never be translated into hostility, where one of those arms becomes hostile to the other. My view is that there is a great deal of hostility that comes through from the judiciary towards the executive and Parliament, towards the positions taken by the latter two institutions.’ Accessed 8 August 2015, http://www.sowetanlive.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambasts-judges.
10 Vishwas Satgar, comment on first draft of this chapter, December 2014.
12 Within days of its release, the SAHRC (2014) report on the right to access sufficient water and decent sanitation in South Africa was attacked by the minister of water and environmental affairs as ‘outdated, baseless and misleading’.
13 In Bond’s (2014: 462) article he variously describes the constitution as a law that ‘facilitates inequality because it serves as a mythmaking, deradicalising meme, its grounding in property rights typically trumps activist claims to human (socio-economic) rights.’ After a factually inaccurate ‘analysis’ of the use that has been made of the constitution in a small minority of the campaigns that have been brought by progressive civil society, Bond concludes that, ‘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.’ Bond’s ideological antagonism to the constitution leads him to make claims that cannot be supported by facts. For example, he explains the genesis of the profoundly important bill of rights as being ‘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’ after what he quotes ANC leader Ronnie Kasrils as calling a ‘Faustian pact’ had been concluded by the ANC leaders and capital to simultaneously protect property rights (Bond 2014: 463). However, it is important to distinguish between a phantasmal polemic, based on romantic notions of people’s power, and a reasoned and evidenced-based analysis. Peculiarly for an academic, Bond does not appear to have actually studied (or possibly even read) the judgments of the Constitutional Court or the constitution itself; neither has he analysed the actual methods of those social movements that have successfully or unsuccessfully invoked the constitution to achieve change. This would be fine if Bond’s mission was purely to sword-play with straw men, but its tragedy is that it not only overlooks but delegitimises a source of power for the poor. Strangely, he projects blame for growing inequalities and ‘concessions to capital’ onto individuals like current ANC Deputy President Cyril Ramaphosa, ignoring what were in reality extremely powerful class and economic forces, which succeeded precisely because there was no strategy from ‘the Left’ to recognise or
counter them.

Interestingly, in the concluding paragraph of his article, Bond (2014: 480) does recognise the need for a constitution, ‘a law of the land that ensures systemic oppression is truly a thing of the past’. But what he overlooks is that the current constitution does regulate power, and whilst it does give ‘capital’ some rights, it also creates a framework for ongoing contestation and challenging of economic policy, and forms of land and property ownership that can achieve social justice.

14 Pithouse (2014) adopts a more nuanced attitude to the constitution, which he admits he has not studied, mainly criticising an over-reliance on the courts which he tellingly says are ‘not democratic institutions’, overlooking the fact that they are not meant to be.

15 For the full text of section 25 (the property clause), see http://www.gov.za/documents/constitution/chapter-2-bill-rights#25.

16 In the remaking of a country’s legal system it is impossible for either all the benefits or risks of a political and law-making process to be envisaged in advance. However, one enormous benefit of the certification process undertaken by the newly appointed judges of the Constitutional Court, including progressive and activist judges like Arthur Chaskalson, Kate O’Regan, Albie Sachs and Pius Langa, was that it allowed South Africa to import into its new constitution the most modern thinking and understandings of human rights and governance to be had on the planet at that point.

17 Fish Hodgson’s 2015 article cites a study revealing ‘only 46% of people in South Africa have heard of the existence of either the bill of rights or the constitution. Only 10% of people have ever read the Constitution or had it read to them.’


19 A 2015 report by New World Wealth reveals that South Africa has 46 800 millionaires with a net worth of over US$1 million. Their combined wealth amounts to US$184 billion. In the years of the global financial crisis, between 2007 and 2014, the number of millionaires rose from 526 to 639, and the number of billionaires increased by fifty per cent. See S Govender, Rise of the ultra rich reveals a tale of two nations, Sunday Times, 17 May 2015.

20 Socio-economic rights are distinguished from civil and political rights, such as the right to vote, to demonstrate, to form unions, to freedom of expression, which are also contained in the bill of rights. In reality, however, they are inseparable. The ability to enforce socio-economic rights depends heavily on respect for civil and political rights.

21 I believe the NDP falls short of meeting constitutional requirements for far-reaching transformation towards equality (see Heywood 2013).


It is important to note that in an appeal concerning an alleged unfair dismissal where the applicant tried to rely on s 195 of the constitution (the Chirwa case, available at http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2007/23.html&q=Chirwa) the Constitutional Court decided that these principles could not be directly enforced through the courts. Nonetheless, the Court stated that their existence in the constitution means that they create ‘valuable interpretive assistance’ against which courts can assess government conduct.

In 2013 the Foundation for Human Rights interviewed 4200 people and found only forty-six per cent of respondents were aware of the existence of either the constitution or the bill of rights. This figure decreases to thirty-seven per cent in rural areas, forty per cent of farm workers and only twenty-six per cent of refugees/migrants. When interviewees were asked what they did the last time that they felt their rights were violated, sixty-five per cent of people said ‘they did nothing’ (Foundation for Human Rights 2015). Research published in 2014 revealed that in South Africa there is one lawyer per 2176 people, compared to Brazil where there is one lawyer per 326 people (Klaaren 2014).

Legal Aid South Africa is an independent statutory body established by the Legal Aid Act. According to its website (www.legal-aid.co.za), its mission is to ‘provide legal representation at state expense … to those who cannot afford their own legal representation. It does this in an independent and unbiased manner with the intention of enhancing justice and public confidence in the law and administration of justice’.

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