DOMAINS OF FREEDOM

Justice, Citizenship and Social Change in South Africa

Foreword by Achille Mbembe | Afterword by Gillian Hart

Editors: Thembela Kepe | Melissa Levin | Bettina von Lieres

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Foreword

This book is a powerful and subtle reappraisal of the current South African moment. This moment of ambiguity and irresolution refers to complex, versatile and diverse empirical situations that various contributors to this volume capture with clarity, dexterity and analytical precision.

Like many other places in the global South, South Africa is an exceptional laboratory for scholars keen to study large-scale processes of transformation of one form of the social into another. In this instance, Kepe, Levin, Von Lieres and the co-authors have turned their backs on linear and dualistic modes of thinking. Instead, they have adopted a non-teleological geometry, one which privileges twists, folds, turns and oscillations rather than fixed coordinates of forces. The result is an impressive tapestry, an open-ended landscape and a mosaic of multiple possible futures.

Indeed, South Africa is not about to become yet another 'African failed state'. But nor is the country moving decisively towards what, in the eyes of many of its own citizens, it could become. In some instances, it is in a 'stationary state'. But images of stagnation are largely deceptive. Above and below the surface a variety of micro- and macro-struggles are unfolding. New social protagonists have emerged whose myriad styles of mobilisation and praxis urgently call for description, interpretation and theorisation.

The exploitation of labour is still a crude fact of life. For its operations, South African capital still relies on racial subsidies. Yet, the nature and the extent of the racial wage is itself changing if only as a consequence of the expansion of a so-called black middle class. As the liberation myth keeps eroding, the symbolic dividends that used to accrue from it are drying up. New faultlines (ethno-regional, generational, class- or gender-based) are emerging and a crisis of legitimacy is looming.

A number of these faultlines are cultural too. Take, for instance, the gradual awakening to the fact that South Africa is but 'an ordinary country' (Neville Alexander). In the consciousness of a place that has for so long defined itself in the language of exceptionalism, this represents a significant mental watershed.

Such too is the understanding that what was hailed in the late 1990s and early 2000s as 'the South African miracle' may now be properly characterised as a stalemate. One of the main tensions in South African politics and culture today is the realisation that there is something unresolved in the constitutional democratic settlement that suspended the 'revolution' (if indeed revolution there was) or 'the struggle' in 1994, but did not radically erase apartheid from the social, economic and mental landscape. This settlement led neither to final victory, nor to crippling defeat for any of the protagonists in the historical drama. Rather, South Africa entered a historical interval. It is still caught in this interval between

an intractable present and an irrecoverable past, between things that are no longer and things that are not yet. This is the stalemate many would now like to bring to a decisive end.

In the eyes of many, a radical transformation of the poor working class is the ultimate measurement of such a change. They are increasingly wondering what can democracy possibly mean for the majority in a context of precarity and existential frailty triggered by poverty and injury? They are asking how sustainable is a democracy of property-less citizens – people who do not own much except their body, and who cannot pay taxes but depend, for their daily sustenance, on state grants? These questions acquire increasing urgency at a time when new ways of measurement of time and value are largely determined, here as elsewhere in today's world, by the brutal encounter with financial capital and novel technologies that result in indebtedness, entrapment and expulsion. The histories of financial capital are multiple, interconnected to be sure, but also splintered, depending on particular historical trajectories. In this regard and as this book suggests, what is particularly striking about the current South African moment is the way in which post-apartheid logics of inclusion go hand in hand with an implacable, brutal sorting of who matters – and should be counted – and who must be relegated to the edge of the new social order.

A lot of this re-crystallisation of time is happening around something we should call the operations of consumption. The creativity of capital manifests itself through its capacity to bring an ever-increasing number of types to work under it – directly or indirectly – while keeping others at arm's length. As is increasingly apparent, capitalism today in South Africa has no objective interest in extending the realm of exploitation across the entirety of the social sphere. This is pretty much evident in the emergence of a massive, subaltern, non-working class, not lumpen at all, but wageless, almost unemployable, yet deeply involved, on a daily basis, in the painful labour of 'making it from today to tomorrow' (Arjun Appadurai) and deploying for this purpose vast amounts of corporeal, physical, psychic and affective energies.

Indeed, in various parts of the world, one of the most brutal effects of neo-liberalism is the generalisation and radicalisation of a condition of temporariness. As Arjun Appadurai has shown, much of the social energy of the poor and their personal creativity are devoted to turning an excess of social time into the production of the conditions to make it from today to tomorrow. This 'labour' (material, physical and affective) involves a constant struggle against the constant corrosion of the present, both by change and by uncertainty. Such is the case especially at those edges of our world where the struggle against the constant corrosion of the present is tightly tied to the work of producing one's own humanity in the face of powerful dehumanising and at times abstract and invisible forces.

In South Africa, the present age of capital has ushered in unprecedented circuits of deprivation and, with it, an unprecedented and polyvalent wave of militancy at a time when the South African society is moving from a *society of control* to

a *society of consumption*. This shift has been the main post-apartheid event. Yesterday, control was mostly about tracking, modulating brutality, separating people from one another while still making possible certain connections and denying others (disjunctive inclusion). Today, it is about recreating environments of enclosure as a way of fending off instability and uncertainty.

It is the conflation of the form and substance of democracy and citizenship with the rule of consumption that is at the origins of the crisis in present-day South African politics and culture. The shift from a society of control to a society of consumption is happening in a context of acute privation for the majority of the people. It is also a context characterised by an acute sense of the fragility of ownership and the temporariness of things. This sense of precarious ownership also has a deep psychic dimension and is what lies at the core of the crisis of the political and *the crisis of culture* South Africa is going through in this phase of its history.

Furthermore, the shift from a society of control to a society of consumption has exacerbated the old contradictions at the heart of South Africa's history at least since the wars of dispossession of the nineteenth century. Such is particularly the case of the contradiction between the rule of the people and the rule of property – one that distinguishes to a certain extent South Africa's historical trajectory and that of other African nations.

The post-apartheid free-floating mode of control or domination thrives on the nostalgia for the kinds of *environments of enclosure* that ensured predictability if not permanence and security during the years of racial rule. The new regime of free-floating control draws on the systemic and unequal redistribution of the means of violence initiated during apartheid. South Africa has matured not only as a nation in which the majority of the citizens are property-less in a society of consumption, but also into a nation of privately armed citizens, a police force in military garb and affect, hundreds of private security firms, a people that is increasingly fragmented.

This mode of redistribution of the means of violence undermines community, fosters a society of atomistic individuals isolated before power, separated from one another by fear, mistrust and suspicion, and prone to mobilise under the banner of either a mob or a militia rather than a community. South Africa's crisis of culture, its worship of financial capital and consumption, and its use of violence to mediate the relationships between putatively free and equal citizens are indeed what determines the subtitle of this book, Justice, Citizenship and Social Change in South Africa.

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Johannesburg
2 August 2016

Acknowledgements

Abbreviations and acronyms

AMCU	Associated Mineworkers and Construction Union
ANCWL	ANC Women's League
ARV	antiretroviral
BAWUSA	Bawsi Agricultural Workers' Union of South Africa
B-BBEE	broad-based black economic empowerment
BEE	black economic empowerment
BNG	breaking new ground
BRICS	Brazil, Russia, India, China, and South Africa
CCMA	Commission for Conciliation, Mediation and Arbitration
CESCR	Economic, Social and Cultural Rights
CLaRA	Communal Land Rights Act 11 of 2004
CLC	Community Law Centre
CODESA	Convention for a Democratic South Africa
CoRMSA	Consortium for Refugees and Migrants in South Africa
Cosatu	Congress of South African Trade Unions
CPA	Communal Property Association
DLA	Department of Land Affairs
DRC	Democratic Republic of the Congo
DRDLR	Department of Rural Development and Land Reform
EFF	Economic Freedom Front
FAWU	Food and Allied Workers Union
FEDUSA	Federation of Unions of South Africa
GDP	gross domestic product
GEAR	Growth, Employment and Redistribution
GNI	gross national income
HDI	Human Development Index
IDT	Independent Development Trust
IMC	Inter-Ministerial Committee

LRAD	Land Redistribution for Agricultural Development
LRC	Legal Resources Centre
MTCT	mother-to-child transmission
NACTU	National Council of Trade Unions
NDP	National Development Plan
NEC	National Executive Committee
NHF	National Housing Forum
NHI	National Health Insurance
NOW	Natal Organisation of Women
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
PAC	Pan Africanist Congress
PHP	People's Housing Process
PLAS	Proactive Land Acquisition Strategy
PPP	purchasing power parity
RDP	Reconstruction and Development Programme
RECAP	Recapitalization and Development Programme
RLRAA	Restitution of Land Rights Amendment Act
RROs	Refugee Reception Offices
SACP	South African Communist Party
SADC	Southern African Development Community
SAMP	Southern African Migration Programme
SAPA	South African Press Association
SERI	Socio-Economic Rights Institute of South Africa
SLAG	Settlement/Land Acquisition Grants
TAC	Treatment Action Campaign
TRC	Truth and Reconciliation Commission of South Africa
UDHR	Universal Declaration of Human Rights

Introduction

Melissa Levin | *Thembela Kepe* | *Bettina von Lieres*

... it is freedom, only freedom which can quench our thirst ...
(Serote 1982)

Writer and activist Mongane Wally Serote's poem 'No More Strangers' describes the June 16 uprisings and foreshadows the mass mobilisation of the 1980s, which ended with the unbanning of liberation organisations and the freeing of political prisoners. The poem served as both a warning to the apartheid state and as an inspiration for the struggle to end it. Freedom, in this poem, is presented not only as a philosophical ideal, but as a material object defining South Africa's collective horizon. It is the attainment of 'freedom, only freedom' that is the acceptable outcome for 'a people with a long history of resistance ...'

This book sets out to reflect on the heterogeneous nature of freedom in post-apartheid South Africa. Looking across a wide range of social issues, from economic policy, land reform, gender politics and healthcare access to trade union mobilisation, heritage discourses, rights debates, citizen participation and migration policies, we argue that the South African transition should not be understood as either a catastrophic failure or as an overwhelming success. Rather, it is best analysed as a combination of both gains and setbacks examined against wider structural and agency-induced processes of social change.

The policy of apartheid officially ended in the midst of a global moment that signalled a profound rupture from the politics that animated the twentieth century and, for South Africa, offered the opportunity for vast social change: the collapse of authoritarianism and the ascent of the market orthodoxies of twenty-first-century economics. The collapse of the Soviet Union, the apparent triumph of neoliberalism and the rise of democracy globally all provided a fertile global context for the official end of apartheid. Many have read the South African transition as paradigmatic of the complex and often contradictory promises of this global political and economic juncture.

Much has been written on South Africa's transition in the run-up to the 20th anniversary of South Africa's first democratic elections. Recent work has focused on thinking through, philosophically, what freedom means (see Barnard 2014; Hamilton 2011, 2014), rethinking and recharacterising notions of the 'transition' (Habib 2013; Hart 2014; Pillay et al 2014; Saul & Bond 2014) and considering the policy changes that have occurred over

20 years (see Jeeves & Cuthbertson 2008; Maserumule & Phago 2014; Pillay et al 2014). Many of these analyses recognise that political democracy in South Africa is limited by widespread economic inequality. In the absence of significant changes in the economic life chances of the majority of South Africans, democracy is elusive, narrowly available as a regular formal political franchise and experienced as a set of abstracted rights that fail to resonate in the daily lives of most citizens.

South Africa's post-apartheid society is still celebrated (see Ngcaweni 2014) or written off (see Malala 2015 and Johnson 2015) in absolutist terms — either as the embodiment of widespread justice or as deep-seated injustice, as complete freedom or all-encompassing oppression, or as flourishing democracy or narrow authoritarianism. In this book, by contrast, we argue that it is best understood as a series of partially constructed failures and successes. Aiming to move beyond simple binaries of triumph or disaster, our book traces the dynamics of social change through nuanced and detailed analysis. We argue that South Africa's post-apartheid decades, in large measure, speak to the deep complexities and non-linear trajectories of building egalitarian societies more globally. Above all they speak to the challenges of social change in highly unequal societies. In this book we relate larger questions of justice and citizenship to close empirical scrutiny in order to push back against many voices in public debates in South Africa whose judgements come preordained from ideological and partisan positions.

Key objectives of this book are to provide reflections that foreground the non-linear practices through which justice, citizenship and wider social change occur. Our decision to focus on justice and citizenship reflects what we believe are the 'stand-out' normative concerns in debates on social change in South Africa. Both justice and citizenship speak directly to the challenges of addressing widespread economic inequality and deep social exclusion. Together, the chapters in this book examine the rich, uneven and incomplete trajectories of social change across a wide range of sectors and issues. It is our hope that this book plays a small, yet critical role, in contributing to debates on the deep complexities involved in ensuring meaningful and emancipatory social change.

This book also seeks to acknowledge the enormous expectations placed on the shoulders of the South African revolution to produce an alternative politics to neoliberalism. Our task has not been to lament its inability to do so, nor to suggest that it is a betrayal that it has not. This responsibility belongs to us all. What we are interested in is understanding the multiplicity and complexity of spaces, practices and processes in and through which social change unfolds, and the extent to which power

(democratic and undemocratic, colonial, postcolonial and anti-colonial) is produced and reproduced. We know that freedom is always circumscribed and facilitated by both local political choices and contemporary global conditions. In this book we consider the complex processes through which alternate possibilities emerge, and the ways in which old and new political communities are imagined and emancipatory solidarities built. In this sense, this book is not a collection of hope or despair. Rather, it attempts to read the present historically, critically and politically, and to offer insights into the ongoing and often messy struggles for freedom.

South Africa's transition narratives

Mainstream views on post-apartheid social change tend to focus on three types of narratives: first, the post-apartheid order as the preservation of colonial and apartheid rule through elite compromise (Fraser 2007; Ntsebeza 2005); secondly, the rise of the party-state under ANC dominance and with it pathologies of power monopolisation in which the state controls the resources for the poor, especially through patronage, corruption and the exercise of undemocratic state power in society (Lodge 2014); and, thirdly, entrenched structural patterns of neoliberal inequality as a result of the ways in which globalisation of capital and the decentring of global production have generated new demands of commodification and competitiveness (Bond 2014).

In our view, all three sets of explanations tend to provide reductionist frameworks in explaining the post-apartheid political order. The neocolonial argument tends to reduce all state practices to expressions of historical forms of rule without adequately examining new forms of state power, and emerging forms of inequality and marginalisation. The party-state approach takes as a fixed starting point an immutable relation between party and state without sufficiently examining how new state (and society) actors are shaping state and party relations. The neoliberal critique tends to read all governance and civil-society practices solely from the viewpoint of transformations in the global economy, without acknowledging that many inequalities can be attributed to state interventions, policies and practices. In reality, South Africa's new political order has been shaped by a set of complex dynamics that cut across all three approaches.

The chapters in our book speak to all three narratives. They take from each one important insights about barriers to and possibilities for social change. We take from the neoliberalism, neocolonial and state-party critiques the argument that possibilities for social change are circumscribed by the dramatic persistence of structural inequality, colonial forms of political rule and undemocratic state power. We recognise that in addition to old

exclusions, new forms of marginalisation and inequality emerge on a daily basis. For South Africa, democratisation without equitable redistributive mechanisms has meant that the gross inequalities produced by centuries of colonialism and decades of apartheid have become normalised within a global context of inequality. Democratisation and decolonisation (in the substantive sense of institutional and economic restructuring) have not occurred simultaneously. At the same time, we recognise the ways in which popular politics from below is shaping possibilities to challenge entrenched inequalities and state power. The recent rise of extra-partisan, local and popular struggles speak to possibilities for social change. Although these should not be overstated, neither should they be ignored. New practices of mobilisation and claim-making embody new challenges to old forms of power. They also produce new public emancipatory discourses on social change and the meanings of 'freedom'. New and old discourses and practices of freedom continue to shape each other as the struggles against deep inequalities continue. But how do we give meaning to the idea of freedom as old and new forms of power contest each other? The next section considers the deeper meaning of freedom.

Freedom and equality

Since 1994 commentaries on the nature of post-apartheid 'freedom' and social change have been marked by empirical falsities or absurd claims, wishful thinking or painful, and sometimes fruitless, searches for full facts and truth. In part these responses are shaped by the incongruencies of the idea of freedom itself. The idea of freedom has been deployed by diverse political actors in an effort to pursue and produce often fundamentally different sets of interests. There is little, necessarily, in common, for example, between the quest for market freedom and the mission to establish a world in which people are free to achieve their human potential. The term 'freedom' is employed in the service of groups in South Africa as disparate as the Freedom Front (a right-wing Afrikaner political party), the Economic Freedom Fighters (a left-wing group that ostensibly seeks to restructure the economy in the interests of the majority) and the Free Market Foundation (a think tank that celebrates the so-called virtues of unfettered capitalist markets).

In South Africa the ruling party's understanding of freedom found its articulation in the Freedom Charter, the 1955 'people's' document that became an aspiration for a post-apartheid polity. The Freedom Charter presents a broad vision of what freedom means: political, economic and cultural transformation(s) that would create conditions for all to achieve a better life. The charter broadened ideas of belonging and inclusion,

implied a more socialised economy and regarded access to basic needs as a fundamental feature of freedom. To a large extent, South Africa's 1996 Constitution embraces these ideals. It set out to associate political freedom with social and economic equality, a complex relation about which there is little agreement.

In political theory, liberty and political freedoms (articulated as 'democracy') have often been juxtaposed with equality and freedom from poverty. The extent to which political freedom can be enjoyed, the arguments proceed, requires the limitation or even absence of economic equality. The wider global debates concerning capitalism and socialism in the twentieth century have pivoted on the balance between liberty and equality. Von Hayek's liberalism insisted that the socialist project would launch humanity on 'the road to serfdom' (Von Hayek 1944). In ideological opposition, Norberto Bobbio argues that in the economic sphere, liberty and equality can only resolve themselves as negations of the other. He contends that 'a liberal laissez-faire society is inevitably inegalitarian and an egalitarian society is inevitably illiberal' (Bobbio 1990:32).

But this has not stopped scholars and activists from attempting to at least approximately balance, if not reconcile, the two. Rawls's seminal text, *A Theory of Justice* (Rawls 1999) contemplates the associations between liberty and equality by positing notions of distributive justice. Noam Chomsky (1997) contends that 'freedom without opportunity is a devil's gift', insisting on the connections between political and economic freedom. Lawrence Hamilton (2014) expands on this idea of a deeper, more interconnected freedom. According to Hamilton, 'freedom is power', or freedom can only be understood as power. Hamilton draws from the (often overlooked) intellectual contribution of the late Nelson Mandela. Mandela theorised freedom as 'indivisible' and as procedural. It is indivisible in multiple ways: first, he argues that both the oppressed and the oppressors dwell in a state of 'unfreedom' from which they need to be liberated: 'When I walked out of prison, that was my mission, to liberate the oppressed and the oppressor both' (Mandela 2013); secondly, that it is impossible for one to be free when others are not (which is a formulation at the heart of Mandela's African nationalism and internationalism): 'the chains on all of my people were the chains on me' and 'our freedom is incomplete without the freedom of the Palestinians' (Mandela 1997); and, thirdly, that political freedom cannot be achieved without baskets of opportunities to live a free life: '... to be free is not merely to cast off one's chains but to live in a way that respects and enhances the freedom of others.' In this third formulation, Mandela invokes the idea that freedom cannot be objectified; it is not an item to be acquired. Rather, it is a state of being and becoming, a condition and a possibility

that require constant work. In much the same way that Derrida (1997) thinks about democracy as a process and objective, as 'democracy to come', Mandela similarly understood freedom — always and necessarily — both as an achievement and an aspiration.

In 1994 South Africans achieved the opportunity to expand their rights. The liberation movement dubbed this moment a 'democratic breakthrough' and the coming years would demand defending and deepening the gains achieved. It was understood that the basic formulation of the right to pursue rights is significantly limited in the absence of a more robust engagement with the institutional, social and material injustices of apartheid. Indeed, since the Morogoro Conference in 1969, the ANC had evolved an emancipatory project that pivoted on building non-racialism, non-sexism and democracy as both principles and strategic objectives of struggle. Liberation, in this sense, is both process and product of struggle. Considering the colonial apartheid state was profoundly racist, sexist and undemocratic, its transformation would require a significant undoing, a fundamental rupturing of its cultural, economic and social practices.

O'Sullivan (2011) argues that, from a critical-theory point of view, democracy should be seen as an unfinished process that is limited by inequality, corruption and many other structural constraints. At the same time, she argues, democracy must lead to the realisation of justice, which, in turn, creates a conducive environment for freedom, as well as more inclusive democracy. In other words, real freedom relies on justice being done. In some way, this view is in line with what Amartya Sen (2000) argues in his book *Development as Freedom* — that in the absence of fair and achievable conditions for people to meet their own needs in life, there is no freedom to talk about.

In this book we examine diverse social processes and struggles for freedom in relation to wider questions of justice, citizenship and social change. We argue that it is through justice, citizenship and social change that we can gain a better understanding of the complexities of freedom as a space of interconnection, contestation and incompleteness. We provide no overarching, neatly packaged frameworks in our quest to understand the status of deeper forms of freedom in South Africa. We recognise the non-linearity of social change and we are comfortable with highlighting tensions and unanswered questions. We now turn to a more detailed consideration of justice and citizenship.

Justice and social change in South Africa

For most of the twentieth century, through to the present century, save for a minority of people, there has been a consensus that colonialism and apartheid were unjust systems, maintained through unjust and discriminatory laws and practices (O'Regan 2014) that determined who enjoyed what benefits, based on notions of 'race'. It therefore makes sense that in the struggle against apartheid, as well as in the post-apartheid government's agenda, justice was, and is, a central feature. In fact, within political rhetoric, during and after apartheid, freedom and justice went hand in hand (Boesak 1987; Van Rooy & Drejerska 2014). However, as some scholars remind us — for example, Gibson (2009) and Movik (2014) — the concept of justice in post-apartheid South Africa is elusive and often carelessly deployed in political rhetoric. Indeed, they argue, conceptions of justice are multiple and at times even contradictory. In this plethora of conceptions of justice, we identify three notions that we believe are relevant to understanding South Africa during colonialism and apartheid, during the transition from apartheid and during the post-apartheid dispensation: these are procedural, redistributive and recognition-seeking forms of justice. These three conceptions are not mutually exclusive. They interconnect and relate to separate issues in people's lives.

First, procedural justice is arguably a crucial aspect of political change in South Africa. The focus of procedural justice is application of the law according to prescribed principles or due process (Jary & Jary 1995; Robertson 2004). It is essentially about fairness and transparency of the process by which decisions are made about allocation of resources, as well as resolution of disputes. Given that apartheid was maintained through unjust legislation, including a judiciary that implemented the unjust laws (O'Regan 2014), this aspect of justice had to be addressed as a matter of urgency during the post-apartheid dispensation. Strides that have been made to improve procedural justice since the official end of apartheid are noticeable by the degree in which the poor and the formerly marginalised are now able to navigate and use the courts to their benefit, as well as have reasonable chances of receiving fair hearings (O'Regan 2014; Van As 2005). Some of the chapters in the book, such as those by Beyers and Fay, and Forman and Singh, show how access to a fair legal process has become the means and the end for securing land and healthcare justice.

Secondly, in political rhetoric and to the common person, justice is often confined to fairness in the distribution of rewards, opportunities and burdens in a given society (Jary & Jary 1995; Rawls 1999; Robertson 2004). This conception encompasses what is normally referred to as distributive justice, also commonly referred to as social justice. John Rawls's famous framework of justice as fairness (Rawls 1999) is in fact instrumental in

many contemporary notions of distributive justice. In many contemporary debates about justice, Rawls's theory of justice is often applied without modification, or is modified or even critiqued, as a starting point. Rawls argues for a view of justice as what is the right thing to do. One of his key contributions is the principle of difference, in which he argues that social and economic inequalities can be justifiable as long as they are arranged so that they are of greatest benefit to the most disadvantaged group in a society (Smith 2005). In other words, he did not see equality as a prerequisite for justice. Rather he saw equity as crucial. In short, Rawls sees justice as needing to unfold in three stages, in a particular order: the first is to secure equal basic liberties; then it is to secure fair equality of opportunity; and, finally, economic inequalities are to be arranged to the greatest benefit of the most disadvantaged group.

Apartheid as a policy ensured that distributive justice, as conceived by Rawls (1999), did not exist. Therefore, from the first signs of the official end of apartheid in the early 1990s, in addition to peaceful political settlement, negotiations and strategies arguably focused on how distributive justice would unfold. Even though there is no clarity on what social or distributive justice actually mean in practice (Knight 2014; O'Regan 2014), the country's Constitution aims to 'establish a society based on democratic values, social justice and fundamental human rights'. Along with what is contained in the Constitution, post-apartheid policies and legislation relating to crucial issues such as land, poverty, health, water, housing and education — among many others — were primarily developed to deal with redistributive justice. The Reconstruction and Development Programme (RDP) (ANC 1994:15), a key programme of action for the ANC government in waiting before 1994, and which was later adopted as a defining post-apartheid government policy for addressing distributive injustice of the past, focused on meeting basic human needs. Smith (2005) convincingly argues that the RDP had a Rawlsian ring to it, for its commitment to improve the quality of life of all South Africans, particularly the most poor and marginalised. Although the RDP arguably made its most visible impact in the provision of free and affordable housing for the poor (leading to the still used reference of 'RDP' to refer to free state-issued houses), the programme as it stood on paper collapsed in less than three years after its implementation. By 1996 it had been replaced by a market- and investor-friendly programme, Growth, Employment and Redistribution (GEAR).

However, it is now common knowledge that the continuing poverty and inequalities experienced by the majority of the country's people are an indictment of the post-apartheid government's attempts at achieving the justice ideal (Bula 2005). Along with many others, Mbembe (2008) has

argued that the end of apartheid has not translated into redistributive justice, as the majority of black people continue to live in poverty, with only limited control over their own labour and lives (also see Magwaza & Mthimkhulu 2007). In fact, implicit in many of the chapters of this book is the criticism of the state for abandoning the RDP, which went along with reducing or cutting state funding in many areas (Smith 2005). Ongoing protests and unrests against the state in regard to goods and services that people feel they deserve (Tsheola 2012) — such as basic amenities like water and electricity, and affordable education and fair wages — are another indication of the failed implementation of distributive justice.

There is a strong argument that justice frameworks of post-apartheid South Africa do not sufficiently engage with the country's struggle to regain lost humanity that resulted from apartheid. Subreenduth (2013), along with others, such as Atuahene (2007), appropriately believe that apartheid had a dehumanising effect on black African people in the country, and that any model of post-apartheid justice should necessarily try to deal with this. In fact, Atuahene (2007) asserts that injustices such as apartheid's land dispossession of black people was a form of social death, and that any material redress as a post-apartheid effort, will not be enough on its own. What does it mean then to be made human or to be reawakened from social death for black South Africans? Subreenduth (2013) believes that a good starting point is to ask simple questions that relate to apartheid's treatment of Africans as waste and as being seen as disposable, thus making recognition as humans one of the key struggles against apartheid. Subreenduth (2013) believes these questions should be asked:

> *Who remains disposable, or nonhuman, in postapartheid (deracialised) South African society, and what means do citizens have for redressing this? How does race figure in the regaining of humanity? What is the relationship between race and class with regard to racism and rehumanization?*   (Subreenduth 2013:583)

While we believe that our book deals with procedural, distributive and recognition-oriented forms of justice as crucial aspects of achieving freedom (O'Sullivan 2011), most of the chapters make it very clear that distributive justice is a major and immediate concern for the majority of the people. However, as discussed above, in the context of post-apartheid citizenship and social change, distributive, procedural and recognition-focused forms of justice can, and often should, work hand in hand.

Citizenship and social change

A crucial 'domain' of freedom in South Africa is the contest over substantive, as opposed to procedural, citizenship. The first democratic elections and the 1996 Constitution extended formal rights and formal democratic institutions. Today, however, the South African trajectory of social and political transformation is being forged largely outside of formal democratic institutions, which are entrenched but unable to address the challenge of inequality and exclusion. In contrast to other middle-income countries in the global South (eg Brazil), participatory governance in South Africa has failed to deliver on its early promises of inclusion, co-governance and equality. In post-apartheid South Africa the 'participatory turn' (ie the extension of formal participatory governance) failed to recognise the growth of new forms of marginalisation that often accompany democratisation processes in highly unequal societies. In such societies, democratisation is not only achieved through well-designed formal institutions. The most promising spaces of democratic contestation are often informal and lie outside of formal institutions. A plethora of new coalitions of civil-society actors and movements are building new claim-making capacities to demand social, political and economic inclusion. Many of these struggles are local, community-based and geared at better service delivery. Recently, however, a new set of society-wide coalitions have emerged that are highlighting and challenging the state's role in reproducing inequality. These recent struggles for a more substantive citizenship are a significant marker of freedom and social change in South Africa: they represent a society-wide call for a new political contract between state and society, a contract aimed at securing deeper forms of social inclusion and equality, and a more democratic exercise of state power in society itself.

In contrast to prevalent views on popular citizenship struggles that either negate their emancipatory potential in the light of neoliberal globalisation or overstate their democratic outcomes on state–society relations, this book recognises both the limits and possibilities of new popular sites of democratic contestation. We acknowledge that these sites represent complex spaces and practices of freedom: they are increasingly extra-partisan and challenge the ruling party's domination of state power. As such, they represent a break from the rise of the party-state under the rule of the ANC. They also call for more democratic state–society relations and for a more democratic role for state power in society. However, they are often embedded in complex dynamics of political representation, coalition building and strategic positioning. The variation in practices shapes their democratic outcomes. Together, the chapters on citizenship trace the uneven and complex trajectories of new popular struggles and the complex

way in which they are shaping the exercise of state power. They speak to the unevenness and incompleteness of democratic deepening.

In this book we recognise the importance of citizen struggles for not only redistribution, but also for recognition (see Atuahene 2007). Atuahene's insights about models of redress (eg post-apartheid justice), which only focus on material repossession, and as a result are not sufficient for a deeper freedom that combines both redistribution and recognition, are reminiscent of Ralph Ellison's iconic *Invisible Man* (Ellison 1952), which narrates the story of an unnamed black man's existential ambiguity in the US. His existence is ambiguous, in that he is an ever-present symbol of Otherness, whereas his being, his subjectivity, is invisible, unseen and ever negated. Ellison's invisible man writes his autobiography, a genre that is the ultimate act of naming, and of asserting a presence and a historicity in the world. But he remains unnamed throughout the novel. This contradiction lies at the heart of Ellison's perspective of the black man as an invisible presence in Western modernity. This idea is echoed by Fanon as he theorises the position of black people in their encounter with Europe as persons 'sealed into that crushing objecthood' (Fanon 1991). In that 'crushing objecthood', their very presence renders them invisible. The colonised are visible only as a marker, a signifier of a host of historical readings that serve to render their interiority, their very personhood, invisible.

But what does this mean for the post-apartheid state? In this collection, we consider the interplay between visibility and invisibility in struggles for inclusive citizenship. In many instances, the formalisation of mechanisms produced to enhance popular participation or decrease the economic vulnerability of black people remains trapped in a vocabulary that is not accessible to the excluded. Indeed, in many instances, we have found that the formal conduits through which democracy is exercised tend to enhance the position of those who are already empowered, those who already have the means to participate. This is evident in the creation of an elaborate welfare regime that sustains the enrichment of a few; or where citizenship is claimed outside of formal institutions, on the margins of a political system unable to redress exclusions; or the attempts at creating a common historical narrative that inadvertently naturalises the position of the powerful by objectifying commemorative practices as heritage; or the attempts at land redistribution that regard land as a commodity only, rather than as sets of social relations and practices bound to ideas of social being. In that way, binaries of dominance and subordination are retained. But there is also evidence where new institutions, rather than transformed ones, are active agents in the emergence of a narrative that centres on the rights of the poor and elucidates their claims. In particular, the Constitutional Court has taken

seriously its role as representing 'the nation', in scripting its vocabulary and identifying its freedoms.

In this book the notion of freedom, at least in part, is understood as the construction of citizenship practices, ie as civic mobilisation practices aimed at empowering marginalised, excluded and invisible people, so that they can formulate new political claims for redistribution, recognition and visibility, and to act on these in contexts where the state is unresponsive to their demands. Freedom-as-citizenship speaks to the construction of political agency aimed at engaging state power and building civic agency in the spaces between state and society. It often involves localised forms of civic mobilisation through which marginalised communities and people act to claim new rights and to create new public spaces for participation, rejecting the continued silencing mechanisms of post-apartheid institutionalisation. Citizen action as freedom speaks to those moments in which ordinary people mobilise to confront the state not only as individuals, but as rights-demanding citizens with public claims as they reclaim public space. These new forms of civic action are by no means straightforward and their efficacy is never guaranteed. They encounter state power and are often profoundly shaped by these encounters.

Freedom is therefore an ongoing process through which the potentials of people and the horizons of social transformations are unevenly advanced and expanded. Like Derrida's 'democracy-to-come', freedom-to-come in the post-apartheid context both acknowledges the significant shifts that have occurred in the polity since the early 1990s and recognises the still considerable obstacles to freedom. These paradoxes of change are vividly articulated in chapters like Buhlungu's assessment of the trade-union movement and Magubane's explanation of the contradictory place of women in South Africa.

Serote's poem cited at the beginning of this Introduction situates 'the people' at the centre of the struggle for freedom against apartheid. Many chapters in this book point to the ways in which new practices of pushing the boundaries of formal institutions and enlarging the domains of freedom are emerging in everyday struggles (see Webb on farm-workers' struggles and Ibhawoh on the vernacularisation of rights discourses). It becomes clear through this book that freedom must be read as an interaction between procedural and distributional transformations. And, significantly, freedom must be understood as an ongoing active endeavour through which the voices of the oppressed and marginalised become audible and they, the people themselves, become visible in their full humanity.

Overview of chapters

The book is divided into three sections that correspond to the themes of justice, freedom and citizenship.

While agreeing with other analysts that the land redistribution aspect of South Africa's land reform is probably one that can result in historical shifts relating to colonial and apartheid land inequalities, Thembela Kepe and Ruth Hall argue that deeper analysis of how this policy is unfolding is crucial. In analysing the latest incarnation of land redistribution, after several that have failed dismally, Kepe and Hall contend that the large amount of cash spent by the state to purchase large amounts of land for black beneficiaries distorts the real questions that need to be asked about land reform. In their view, the latest land redistribution scheme, the Proactive Land Acquisition Strategy (PLAS) (2009 to present), which involves the state identifying and buying land for beneficiaries that it identifies, and remains the landowner, has further obscured the class agenda of land reform, widened the discretionary powers of the state and enabled new patterns of accumulation. They conclude that the PLAS presents an opportunity to interrogate the role of the state, and ask whether or not the justice ideal contained in initial post-apartheid land policy documents has been adequately fulfilled. In the end, they argue, this could lead to better understandings of what freedoms or 'unfreedoms' exist in one of the most important land reform policies in the post-apartheid era.

Christiaan Beyers and Derick Fay argue that land reform in South Africa is currently characterised by a process of 'juridification' (the increasing scope of law in modern society), in the dual contexts of a neoliberalising state and the persistent dichotomy of citizens and subjects. In particular, the chapter analyses how discontented land claimants who have disparate aims, and seek alternative grounds and venues for their claims, turn to litigation in the wake of nominally settled land-restitution claims. It does this by exploring the emergent incongruence between the claimant communities, the project of restitution and the new legal entities that spearhead this project in the name of the 'community'. It concludes that the legal entities created in the restitution process have become the political and legal targets of discontented claimants, thus deflecting dissent from the shortcomings of the state and private sector, on whom development-oriented land-claim settlement agreements depend for material success. The authors contend that the challenge for grounded analysis is to identify the forms that juridification takes, and the overall political and social directions of change.

For Antoinette Handley, a political-economy analysis of the past 20 years in South Africa reveals the problematic of a welfarist dispensation that alleviates poverty while at the same time exacerbating inequality. While the rich in South Africa have been getting richer, the poor have been marginally

sustained by the state (when non-income measures are introduced to the analysis). Handley pointedly asks, '*Cui bono?*' — or who has benefited from freedom? If freedom is understood as an always expanding possibility to achieve human potential, as having a vote, but also much more than that, then Handley's analysis suggests that freedom remains elusive for most South Africans. However, in answering the question *cui bono?*, Handley does not slip into an easy determination of culprits and causality, but rather suggests a more nuanced response that recognises the possibilities and challenges inherent in creating better sets of political-economy outcomes.

Marie Huchzermeyer and Aly Karam's chapter examines the complex development of South Africa's housing policy from 1994 to 2014. In a detailed and meticulous overview of multiple shifts in national housing policy and fluctuations in delivery, they show how housing policy implementation has remained a major challenge for the state and its citizens. The authors highlight the significant participation of the private sector in housing delivery and policy formulation. They argue that although we need to acknowledge the value of selected pro-poor policy shifts, such as the recent focus on the upgrading of informal settlements, the state's approach to housing policy since 1994 has not sufficiently recognised the role citizens can play in its formulation and implementation.

Melissa Levin argues that the effort to democratise institutions that focus on a reconciliatory imperative that avoids decolonisation has meant that democracy serves to reinforce already existing patterns of power. In the absence of a combined process of decolonisation and democratisation, democracy is emptied of its potential to produce freedom for all. Efforts at nation-building are never neutral. The vision of who 'we' are in relation to others, and our values and cultural identities, are deeply political. An analysis of Freedom Park and its relationship with the Voortrekker Monument reveals an attempt to inscribe a narrative of social cohesion that is dependent on the silencing of a colonial past, with significant implications for advancing freedom.

Sakhela Buhlungu's chapter places workers' unions at the centre of the political transition in South Africa over the last 20 years. This centrality endowed the union movement with the potential to direct and advance the course of transformation in the context of a free country. In tracing the history of the union movement just before and during the birth of the post-apartheid state, he shows how they were well positioned politically owing to their credentials of being good organisers, having strong leadership and being close to the working masses. These credentials, which earned the union movement an invitation to help shape post-apartheid South Africa, meant a victory for the unions. However, Buhlungu believes that the victory

was paradoxical, in the sense that the union movement's respected status, which resulted in many of the leaders leaving to join government, while others were elevated into senior, high-paying positions within the unions, meant that the very credentials that had earned them the 'victory' were compromised, resulting in fractures, instability and uncertainty within the union movement. In drawing examples from the current instability and frictions with the union federation, the Congress of South African Trade Unions (Cosatu), Buhlungu argues that the role of the unions in South Africa's political transition should be contextualised by this paradox of their 'victory' at the dawn of the post-apartheid state, a paradox that renders freedom incomplete at best.

The paradox of visibility and obscurity, so suggestive of the advancement of freedom, is starkly revealed in the transformations towards gender equality in South Africa. Zine Magubane unpacks the contradiction between enhanced visibility of women in positions of power since 1994, which makes South Africa a leader in gender equity in representative structures, and the reality of an untransformed environment of abuse and the silencing of a transformative politics for equality by those representatives. Magubane identifies the contradiction as evolving from the institutionalisation of patriarchy within the ranks of the ANC, and specifically the silencing of voices that are regarded as 'divisive' in the organisation — like feminism or the struggle for the emancipation of women. Formal freedoms are thus hindered by institutional practices that render them untranslatable in everyday life.

Lisa Forman and Jerome Amir Singh consider the possibilities for health inequalities to be reduced in the post-colony, with an enforceable right to access healthcare entrenched in the post-apartheid Constitution. This right evolves from the perspective of the liberation movement, namely that access to healthcare is a basic right and is therefore a central marker of evolving freedoms. As it is cemented as an aspirational right within the Constitution means that, regardless of budgetary constraints or transformed political circumstances, access to equitable healthcare remains central to South Africa. Transforming the constitutional right into a lived reality, or for an enforced right to advance to a point of remedying historical inequalities, demands a political commitment to, and effective leadership for, achieving equity in healthcare and other social services. The existence of this enforceable right, however, situates the promise of freedom's advancement on a firm edifice.

In her chapter, Bettina von Lieres argues that the politics of citizenship illustrates the uneven trajectories of political and economic inclusion since 1994. Understanding the notion of citizenship both as 'struggle' and 'regime', she locates the politics of citizenship against the failure of the

state's participatory governance programme, the extension of neoliberal forms of economic governance, the increasing importance of informal intermediatory actors and the ruling party's discourses on democracy. The growing diffusion of undemocratic state power and the proliferation of alternative informal actors mean that citizens and their actions increasingly matter for the deepening of inclusion and equality in South Africa. Von Lieres argues, however, that the focus on citizen action takes our attention away from the crucial problem of democratising state power as a precondition for overcoming inequality and achieving justice.

Chris Webb's chapter uses the concept of insurgent citizenship to explore how poor communities engage in violent forms of protest as a way of calling on the state to address their concerns. Using the case study of violent strikes in farm workers' communities that took place in the Western Cape province between September 2012 and January 2013, he analyses the disjuncture between the lofty promises of full citizenship brought by the end of apartheid, and the realities of everyday poverty and indignity suffered by the majority of citizens. He shows that workers are developing new forms of collective action and organisation in the face of employer intransigence and state brutality. He argues that the struggles of farm workers are not only about better wages, but are also about contestations of unequal post-apartheid citizenship. He makes two important conclusions. The first is that the challenge facing trade unions is to empower farm workers to claim their citizenship rights while recognising that rural poverty is the outcome of a historical process of super-exploitation and dispossession. Secondly, the farm worker question cannot be resolved without confronting the absence of a genuine agrarian reform that places poverty alleviation and job creation at its centre.

Bonny Ibhawoh's contribution considers the manner in which notions of universality in respect of human-rights paradigms are vernacularised in South Africa. This means that human-rights approaches are afforded local resonance and, in turn, contribute to universalising normative rights standards. Ibhawoh considers two cases where ubuntu is applied to elaborate restorative transitional justice as well as socio-economic rights claims. His chapter urges an understanding of human rights in the intersection between 'universalist norms and local values', rather than a binarian opposition between the universal and the particular that undergirds cultural relativist discourse. Ibhawoh's analysis offers insights into why some institutions operate to unlock the potential of the oppressed and loudly proclaim alternative ways of being in the world.

Anver Saloojee's chapter argues that the recent wave of community protests around service delivery and labour conditions in the mines must be

understood against the wider question of the developmental state in post-apartheid South Africa. He argues that in the post-Mbeki period, the ANC has failed to build the developmental state in relation to reducing inequality, combatting corruption, improving service delivery and preventing elite control of state institutions, such as the police. Saloojee argues that community protests over service delivery and the Marikana massacre reflect both the independent rise of grass-roots citizen agency and the failures of the Zuma-led 'developmental' state. New social protests represent the exercise of both formal and substantive democratic citizenship. Saloojee's chapter makes the argument that post-2008 party political dynamics within the ANC have significantly reshaped and undermined earlier pro-poor visions of the developmental state and, with it, the ANC's claim to represent a revolutionary populist movement.

The chapter by Belinda Dodson and Jonathan Crush examines the politics of immigration since 1994. They draw the background of migration patterns and trends, outline the immigration policy context and trajectory since 1994 and address the issue of xenophobia. Through a careful analysis of shifts in immigration policy, the authors show how African immigrants in particular have become the target of negative public sentiment in the form of xenophobia. They argue that, under Zuma, there has been a marked silence on both immigration in general and xenophobia in particular. This suggests a continuation or even hardening of anti-immigrant attitudes and with it exclusive citizenship on the part of the state. The post-apartheid state's failure to deliver more equality and inclusion has led not only to popular protests against the state, but also to hostility against its non-citizens. The authors argue that the state's policies on immigration and the accompanying contradictory narratives of inclusion and exclusion speak to types of nationalism and political subjectivity that emerged from the liberation struggle.

The three sections of the book (Justice, Freedom and Citizenship) are preceded by introductions and reflections from accomplished scholars Sharlene Mollett, Dickson Eyoh and Jacqueline Solway, whose value in this book is not only derived from their experience of following the history of political transition in countries that emerged from colonialism — they also bring provocative questions and theoretical insights to debates about these issues for consideration in South Africa and beyond. Without posing these questions and interrogating the concepts that we so often hide behind, this volume would have fallen short of its goal of contributing to understandings of freedom, justice and citizenship. These questions and the cases discussed in this volume provide a platform for continued dialogue, as well as material for comparative analysis in the next few decades of post-apartheid

South Africa. Although we cannot claim to have covered all essential cases that we could have, we believe we have provided enough examples that allow us and the readers to think critically about freedom, justice and citizenship.

References

ANC. African National Congress. 1994. *The Reconstruction and Development Programme*. Johannesburg: Umanyano Publications.

Atuahene B. 2007. From reparation to restoration: Moving beyond restoring property rights to restoring political and economic visibility. *SMU Law Review*, 60(4):1419–1470.

Barnard R. 2014. *The Cambridge Companion to Nelson Mandela*. New York: Cambridge University Press.

Bobbio N. 1990. *Liberalism and Democracy*. London: Verso.

Boesak AA. 1987. *If this is Treason, I am Guilty*. Trenton: Africa World Press.

Bond P. 2014 (2000). *Elite Transition: From Apartheid to Neoliberalism in South Africa*. London: Pluto Press.

Bula PL. 2005. Justice and reconciliation in post-apartheid South Africa: A South African woman's perspective. *International Review of Missions*, 94(372):103–116.

Chomsky N. 1997. Market democracy in a neoliberal order: Doctrines and reality. Available: www.chomsky.info/articles/199711--.htm. (Accessed 11 November 2014).

Derrida J. 1997. *The Politics of Friendship* (translated by George Collins). London, New York: Verso.

Ellison R. 1952. *Invisible Man*. New York: Random.

Fanon F. 1991 (1952). *Black Skin, White Masks*. London: Pluto Press.

Fraser A. 2007. Land reform in South Africa and the colonial present. *Social and Cultural Geography*, 8(6):835–851.

Freedom Charter. Available: http://www.anc.org.za/show.php?id=72. (Accessed 28 March 2015).

Gibson JL. 2009. *Overcoming Historical Injustices: Land Reconciliation in South Africa*. Cambridge: Cambridge University Press.

Habib A. 2013. *South Africa's Suspended Revolution: Hopes and Prospects*. Athens, OH: Ohio University Press.

Hamilton L. 2011. Collective unfreedom in South Africa. *Contemporary Politics*, 17(4):355–372.

Hamilton L. 2014. *Are South Africans Free?* London, New York: Bloomsbury.

Hart G. 2014. *Rethinking the South African Crisis: Nationalism, Populism, Hegemony*. Athens, London: University of Georgia Press.

Jary D & Jary J. 1995. Justice. In *Collins Dictionary of Sociology*. Glasgow: HarperCollins.

Jeeves A & Cuthbertson G. 2008. *Fragile Freedom: South African Democracy 1994–2004*. Pretoria: Unisa and Leiden: Brill.

Johnson RW. 2015. *How Long Will South Africa Survive? The Looming Crisis*. Johannesburg and Cape Town: Jonathan Ball.

Knight K. 2014. Theories of distributive justice and post-apartheid South Africa. *Politikon*, 41(1):23–38.

Lodge T. 2014. Neo-patrimonial politics in the ANC. *African Affairs*, 113(450):1–23.

Magwaza N & Mthimkhulu N. 2007. For South Africa's poor economic justice remains a dream. *Agenda*, 72:123–125.

Malala J. 2015. *We have now begun our descent: How to stop South Africa losing its way*. Johannesburg and Cape Town: Jonathan Ball.

Mandela N. 1997. On Palestine – Address by Nelson Mandela at the International Day of Solidarity with the Palestinian People. Available: http://disinfo.com/2013/12/1997-address-nelson-mandela-international-day-solidarity-palestinian-people-plus-5-videos/. (Accessed: 13 April 2016).

Mandela N. 2013. *Long Walk to Freedom: The Autobiography of Nelson Mandela*. London: Little, Brown.

Maserumule MH & Phago K. 2014. Special issue on twenty years of democracy in South Africa. *Journal of Public Administration* 49(1).

Mbembe A. 2008. Passages to freedom: The politics of racial reconciliation in South Africa. *Public Culture*, 20(1):5–18.

Movik S. 2014. A fair share? Perceptions of justice in South Africa's water allocation reform policy. *Geoforum*, 54:187–195.

Ngcaweni B. (ed.). 2014. *Liberation Diaries: Reflections on 20 Years of Democracy*. Johannesburg: Jacana Media.

Ntsebeza L. 2005. *Democracy Compromised: Chiefs and the Politics of Land in South Africa*. Leiden: Brill.

O'Regan K. 2014. Justice and memory: South Africa's Constitutional Court. *Dædalus, the Journal of the American Academy of Arts & Sciences*, 143(3):168–178.

O'Sullivan S. 2011. Towards democratic justice? Land reform in South Africa. *Irish Journal of Public Policy*, 3(2):1–15.

Pillay D, Khadiagala GM, Naidoo P & Southall R. (eds). (2014). *New South African Review 4: A Fragile Democracy: Twenty Years On*. Johannesburg: Wits University Press.

Rawls J. 1999 (1971). *A Theory of Justice*. Revised ed. Oxford: Oxford University Press.

Robertson D. 2004. Justice. In *The Routledge Dictionary of Politics*. London: Routledge.

Saul JS & Bond P. 2014 *South Africa – The Present as History: From Mrs Ples to Mandela and Marikana*. London: James Currey.

Sen A. 2000. *Development as Freedom*. New York: Anchor Books.

Serote MW. 1982. *Selected Poems*. Johannesburg: Ad Donker.

Smith DM. 2005. On the (im)possibility of social justice in South Africa. *Transformation*, 58:45–65.

Subreenduth S. 2013. Theorizing social justice ambiguities in an era of neoliberalism: The case of post-apartheid South Africa. *Educational Theory*, 63(6):581–599.

Tsheola J. 2012. Theorising a democratic developmental state: Issues of public service delivery planning and violent protests in South Africa. *Journal of Public Administration*, 47(1):161–179.

Van As H. 2005. Legal aid in South Africa: Making justice a reality. *Journal of African Law*, 49(1):54–72.

Van Rooy B & Drejerska K. 2014. Metaphors in the Freedom Day addresses of South African presidents (1995–2012). *Language Matters*, 45(2):165–183.

Von Hayek F. 1944. *The Road to Serfdom*. Chicago: University of Chicago Press.

Legislation

Constitution of the Republic of South Africa, 1996. Available: http://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1. (Accessed 28 March 2015).

JUSTICE
FREEDOM
CITIZENSHIP

JUSTICE: Overview

Sharlene Mollett

The emancipatory goals illuminated in *Domains of Freedom: Justice, Citizenship and Social Change in South Africa* stubbornly remain unfulfilled for most South Africans. Instead, such rights are stunted by the enduring politics of marginalisation, and the historical and spatial continuities of colonialism and apartheid. And these transition struggles in South Africa are not altogether unfamiliar in other parts of the world, particularly among the African and black diaspora.

Indeed, 2015 marked the start of the United Nations International Decade for People of African Descent (2015–2024). Long overdue, the 'Decade', as proclaimed by the UN General Assembly, unveils an international acknowledgement that 'people of African Descent represent a distinct group whose human rights must be promoted and protected' (UN 2015). Based in part on the Durban Declaration and Programme of Action, and the Convention for the Elimination of All forms of Racial Discrimination, the Decade aims to disclose the way slavery, the transatlantic slave trade and its contemporary legacies represent 'crimes against humanity' (UN 2015). Although redress for the past is a main theme of the Decade, the UN also looks to foster a future path where '[a]ll people of African descent shall enjoy all human rights and fundamental freedoms in accordance with international law and standards in conditions of equality without any discrimination' (UN 2015).

Although I do not purport to be an Africanist, as a cultural geographer interested in the racialised politics of land in Latin America, however, I want to briefly reflect on one of the key themes in *Domains of Freedom*, namely justice. In so doing, I consider how the struggles for democracy in South Africa are linked to the lives of people of African descent all over the world. As I reflect on the global significance of the International Decade for People of African Descent in this commentary, I offer measured enthusiasm regarding the Decade. Like with the struggles in South Africa, the largest challenge will be to eliminate racist thinking and anti-black development imaginaries, and their concomitant legal and institutional blueprints among state and non-state actors.

The Decade has three main areas of focus: recognition, justice and development. These themes present a holistic and interwoven agenda for the purpose of improved access to institutional justice and the enjoyment of rights for equal treatment 'before the law' (UN 2015). Of course, it cannot be

overstated that such protections are necessary and require at the very least legal sanction and enforcement. People of African descent have endured centuries of struggle for both life and livelihoods in a development landscape that simultaneously relies upon their dispossession, pauperisation and 'premature death'. These are the salient consequences of centuries of misrecognition, whereby black people are continually imagined as less than human (Gilmore 2002; Mollett 2016). Such dominant representations presuppose that African descendants occupy atavistic, animalistic, primitive and anachronistic bodies, knowledges and spaces (McClintock 1995).

Time and place

Such long-standing misrecognition fuels racism and will require political endurance to seal its undoing. Accordingly, the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, maintains that the goals for the Decade include working to eradicate racism because

> [r]acial discrimination ... has deep roots grown in colonialism and slavery and nourished daily with fear, poverty and violence, roots that aggressively infiltrate every aspect of life from access to food and education to physical integrity, to participation in decisions that fundamentally affect one's life ...   (Telesur.net 2015).

Hence, justice, recognition and development are contingent on the histories and geographies that frame them. A universal call for human rights is always enmeshed in global webs of human relations and local politics of place. Therefore, political responsibility for the promotion and protection of human rights for people of African descent will require changes in how we, as global citizens, and not just states, value people of African descent across the globe. For too long, black bodies, knowledges, spaces, communities and identities (to name a few) have been consistently subjugated, dominated, degraded and subjected to numerous harms, including police brutality, military violence, environmental degradation, starvation, torture, forced sterilisation, lack of legal recourse in conflicts, rape and exploitation. Such experiences are exacerbated by the fact that people of African descent are disproportionately represented among the poorest of the poor. This consistent production of underdevelopment and vulnerability within black communities is structurally linked, as the UN purports, to a history of transatlantic slavery. However, it is the enduring dehumanisation of people of African descent in the present era that needs to be dismantled. Undoing this dehumanisation means that protecting the human rights of African descendants must include — and not just discursively — the recognition that black people are in fact human beings.

History tells us that such a commitment is key to the success of any development policy. The Decade arrives at the end of two UN Decades for Indigenous Peoples (1995–2004 and 2005–2014). These platforms accomplished major policy changes in the introduction of the UN Convention on the Right of Indigenous Peoples and widespread recognition of indigenous territorial demarcation and titling. Despite these multimillion-dollar development initiatives, in Latin America, indigenous communities remain vulnerable to state marginalisation, military violence, land displacement and neglect. And despite 20 years of development policy aimed at indigenous development, indigenous people remain disproportionately more likely to suffer from extreme poverty than non-indigenous people.

Similar economic circumstances exist for communities of African descendants. African descendants are forced to resist such trials as land displacement, unfair labour practices, poor access to education, lack of food and water security, and have to stand up for the right to live peacefully. But, unlike indigenous peoples, the constitutional reforms that opened major protections and rights over the last 20 years do not exist for African descendants (with few exceptions). Furthermore, in Latin America, African descendant populations are consistently displaced from ancestral lands as mainstream development models make space for tourism, biofuels and foreign-owned real estate. At the same time, the US war on drugs has fuelled increased state surveillance and violence towards black and indigenous communities in rainforest regions, as their homelands are currently targeted by the global drug trade, through no fault of their own. And, in North America, African American and African Canadian men and their communities are disproportionately the recipients of police brutality and unfair detention — practices perpetuated in part through the racialised activities of stop and frisk (in the US) and carding (in Toronto, Canada). Finally, let us not forget, the migrant crises in the summer of 2015 brought not only Syrians to European shores, but also many seeking refuge from Eritrea, Ethiopia and other sub-Saharan African countries.

Where justice begins

The success of the UN Decade will require collective state mobilisation and reform that reorientates and reworks how state, elite and dominant classes value black people. In addition to the sorts of values espoused by global campaigns such as Black Lives Matter, we need multiple campaigns that call for 'special rights' protections for African descendants. Indeed, in the context of development polices, justice requires that the well-being of African descendants occupy a privileged positioning in development policy. However, centring black well-being does not operate like white privilege, which

assumes that all others must be sacrificed and neglected, and expected to cope with their misery while fighting for the scraps that remain after elite white pillage. Rather, centring black well-being through the international Decade and concomitant policies could mark new development thinking, whereby the specific development needs of black communities are met with sufficient funding, political will and African descendant control in decision-making.

Justice for African descendants may inadvertently shape justice for other communities living within or close to Afro-descendant populations (ie indigenous peoples). Although the specific details will be shaped by the spatial contingencies, justice will be possible only when improved conditions have structural meanings for African descendants. Related to this, structural change requires the end of 'systematic misrecognition' (Gilroy 2015) — an end to the discursive justifications for the pillage of black culture, property, lives and futures. Justice for African descendant communities demands protection against a world accustomed to leaving such injustices unquestioned.

References

Gilmore R. 2002. Fatal couplings of power and difference: Notes on racism and geography. *The Professional Geographer*, 54(1):15–24.

Gilroy P. 2015. Offshore humanism. 2015 Antipode RGS-IBG Lecture, University of Exeter. Available: http://antipodefoundation.org/2015/12/10/paul-gilroy-offshore-humanism/. (Accessed 21 December 2015).

McClintock A. 1995. *Imperial Leather: Race, Gender and Sexuality in the Colonial Conquest*. New York: Routledge.

Mollett S. 2016. The power to plunder: Rethinking land grabbing in Latin America. *Antipode*, 48(2):412–432.

Telesur.net. 2015. Latin American Afro-descendants still face discrimination, says UN, 8 December 2015. Available: http://www.telesurtv.net/english/news/Latin-Americas-Afro-Descendants-Still-Face-Discrimination-Says-U.N.-20151208-0002.html. (Accessed 21 December 2015).

UN. United Nations. 2015. 2015–2024 International Decade for People of African Descent. Available: http://www.un.org/en/events/africandescentdecade/. (Accessed 21 December 2015).

Chapter 1

LAND, POLITICS AND POLICY CHANGE IN SOUTH AFRICA: WHAT QUESTIONS FOR LAND REDISTRIBUTION POLICY AND PRACTICE?

Thembela Kepe | *Ruth Hall*

Land, including all its multiple meanings that encompass its importance as a natural resource, sense of identity, and power and territory (Fisher 2016; Kepe et al 2008; Li 2014), was central to colonial conquest and apartheid, as well as to the general struggle against these forces in South Africa. Atuahene (2007) has argued that in South Africa, racially motivated land injustice, particularly as a result of dispossession during colonial conquest and apartheid, not only alienated people from a physical resource that they need for their livelihood, but also destroyed a relationship that the victims had with society. She argues that the destruction of this relationship as a result of violent loss of land resulted in some kind of social death and 'invisibility'. Therefore, along with many others (eg Andrews 2006; Hendricks et al 2013; Walker et al 2010), Atuahene (2007) believes that in dealing with colonial and apartheid land injustices, the state has to go far beyond a simple restoration of property: it needs to work at restoring people's dignity and trust, and their relationship with land and with each other. This is a huge task, and there are no illusions that it would be easy to accomplish. Indeed, at least on paper, these were some of the principles guiding post-apartheid land reform (DLA 1997), which emphasised justice, reconciliation, economic growth and improved livelihoods for all, among other things.

Land reform has ostensibly been a key priority of the South African government since apartheid and is currently one of its top six priority areas. The land reform programme began in 1994, along with numerous other policies of redress introduced by the post-apartheid government. But, with land reform there was a vision that it would spark economic growth and promote equity through a combined agrarian and industrial strategy (Cousins 2013). The three mechanisms deployed to fulfil these goals have been land restitution — to restore land rights to victims of racially motivated dispossession, which happened after 1913; the reform of land tenure — to secure and protect customary and informal land rights that were left vulnerable by apartheid; and land redistribution — to fulfil broader societal land needs, particularly those of the landless, labour tenants, farm workers and emerging farmers (DLA 1997). Despite the widely acknowledged centrality of land in South Africa's post-apartheid project of redress to achieve a better

life for all, land reform has failed to meet key objectives embodied in the Constitution and the original land policy documents, eg the White Paper on South African Land Policy (DLA 1997) (Cousins 2013; Gibson 2009; Walker et al 2010). Land redistribution has arguably been the most visible failure in the land reform mandate. Less than 10% of the land has been redistributed since 1994 (*Umhlaba Wethu* 2011; Walker 2013), despite the state's promise to redistribute 30% of commercial agricultural land within the first five years of the post-apartheid dispensation (DLA 1997).

In this chapter we are interested in understanding how land redistribution has unfolded since its inception in 1994, as well as what questions need to be asked about it as part of evaluating the broader mandate of land reform, with justice and a better life for all as necessary outcomes. Our reflections are based on a preliminary scoping research exercise that we conducted in 2013 and 2014 with land reform beneficiaries in the Eastern Cape. We begin by providing a brief overview of the different incarnations of land redistribution over the last 20 years. The next section presents a brief review of debates about land reform, justice and the role of the state, as a way of understanding South Africa's success or failure in dealing with the emotional issue of land, freedom and justice. We follow this with a brief sample of thematic issues that we observed as constituting challenges in the current land redistribution strategy. Next, based on the challenges we identified in the field, we propose key questions that can help scholars and other analysts to reflect on the nature of land reform in South Africa, and whether or how it meets its broader goals of achieving justice and a better life for all.

Land redistribution in South Africa

The first incarnation of land redistribution in South Africa offered Settlement/Land Acquisition Grants (SLAG) (from 1995 to 2000) to households on the basis of a means test, to provide modest-sized plots of land to the poor for settlement and for various livelihood purposes (Lahiff 2007). However, the small grants on offer, which were set at R15 000 per household, resulted in large group projects, producing overcrowding on farmland, and there was limited evidence of poverty reduction (Hall 2009). These households, whose combined maximum monthly income had to be below R1 500 to qualify, could not make the financial investments in agricultural production as individuals, leading to the scheme's ineffectiveness. Additionally, these large group projects were handicapped by the state, as they did not receive post-transfer support for infrastructure, technical support, agricultural training or market access (Cousins 2013).

This programme was reconfigured in 2000 with the introduction of the second incarnation, the Land Redistribution for Agricultural Development (LRAD) programme (2000–2010), which was explicitly intended to enable the emergence of a class of black commercial farmers, though this objective was later modified to address several land needs and constituencies, ranging from the landless, farm workers, women, emerging entrepreneurs and established commercial farmers (Hall 2009). Although LRAD offered larger grants — from R20 000 to R100 000 — to those with their own capital or loans to invest, and placing a limit on the numbers of participants per project, it put most land offered on the market out of reach of the poor, replicated problems of under-utilisation of redistributed farmland and introduced new problems of over-indebtedness. Although LRAD resulted in an increase in the number of land redistribution projects, it fell far short of the pace needed to meet the target of redistributing 30% of the agricultural land by 2014 (Lahiff 2008).

The most recent incarnation of land reform is the Proactive Land Acquisition Strategy (PLAS). This was piloted from 2006, and from 2011 confirmed as the state's official redistribution programme. The PLAS places state land purchase at the centre of redistribution, with farms being bought by the state and made available on a leasehold basis to beneficiaries. This programme was explained as a way to address many of the failings of the previous two programmes, in particular the reliance on land-purchase grants, and the sinking of capital into property, which was blamed for limited investment in farming.

Although politicians and government officials insist that land reform policy has been consistent, and that only the mechanisms have changed, we argue that the thinking underpinning the programme — what it is for, what rights people should get and who should benefit — have undergone profound changes (see Table 1.1).

Table 1.1: Summary of post-apartheid land redistribution strategies

Redistribution programme	Land acquisition	Land tenure	Class agenda	Land use
SLAG (1995–2000)	Market-based purchase	Transfer of title	Means-tested (ie pro-poor)	Multiple livelihoods
LRAD (2000–2010)	Market-based purchase	Transfer of title	Not means-tested (unclear)	Agriculture only
PLAS (2006 to present)	Market-based purchase	No transfer of title	Not means-tested (unclear)	Agriculture only

The next section puts the land redistribution policy, practice and some of the challenges facing South Africa's land reform into context. Using the literature, we show why our focus on the case of the PLAS, and the questions that emerge from it, matter in the broader project of bringing about justice in South Africa's land reform programme.

Class dynamics, neoliberalism and justice in South Africa's land reform

When South Africa's land reforms began in the 1990s, it was during the time when the World Bank was beginning to encourage sub-Saharan Africa and Asia to bring land reform back to the centre stage of development thinking, after interest in this issue had waned during the 1970s and 1980s (Binswanger et al 1995; Borras 2003; Byres 2004; Deininger 2003; Van den Brink et al 2006). The World Bank's position has been described variously as 'market-assisted land reform', 'market-based land reform' and 'market-led agrarian reform'. The market-assisted land reform literature contains a complex mix of progressive arguments in favour of redistributive land reform, which emphasise the need for the transfer of assets and wealth to the poor, and conservative formulae for how this should be pursued, which focus on the need to minimise state intervention in land markets and remove market 'distortions' (World Bank 1994a, 1994b) — a stance that has been critiqued as 'neo-classical neo-populism' (Byres 2004).

Since redistributive reforms pit the interests of the landed directly against those of the landless, the emergence of a consensual model of market-assisted land reform in the early 1990s was a departure from previous land reforms, which explicitly sought to transform social relations between landowning and landless classes, as shown in comparative and historical analysis (eg Borras et al 2008). Yet South Africa's peculiar hybrid of land reform, which was both market-dependent (ie without recourse to expropriation) and state-mediated (ie through onerous bureaucratic control), sheds new light on this international discourse, which has tended to view the state versus the market as a spectrum rather than focusing on how, and in whose interests, this hybrid model combines the two (Hall 2009; Lahiff 2007).

Shifting intergroup dynamics and class formation

The principal beneficiaries in market-assisted land reform schemes have tended to be the elite among local peasantries, and even urban middle classes who want to diversify their livelihoods with access to land in the countryside. Elements of both have been documented in South Africa (Keswell et al 2009; May et al 2009), as well as reverse rentals and reliance on

joint ventures with agribusinesses (Lahiff et al 2012). Based on a review of three countries, Borras (2003) observed the rise of an 'agrarian bourgeoisie'. Contrary to the claims of the model, in Brazil, Colombia and South Africa, land prices have been higher than in state-led programmes and overpricing is evident or suspected; no land taxes have been imposed; there is little or no evidence of increased investment or access to credit; farm planning prior to purchase has been poor; and the resulting pace of development has been slow and uncertain (Borras 2003:387–388). On the basis of these findings, Borras (2003:386–390) challenged the model's assumptions that willing buyers and willing sellers can negotiate freely in a context of asymmetric power relations; that landowners will not attempt to overprice land; and that decentralisation ensures accountability — all of which have been questioned also on the basis of the South African experience (Hall 2009; Lahiff 2007).

The international debate concerning the theoretical coherence and empirical outcomes of market-assisted land reform has extended beyond the mechanisms for the acquisition of land and the selection of beneficiaries. Increasingly central to the debate is the nature of social differentiation that is produced in agrarian transformations that combine elements of redistribution with integration, often on adverse terms, into corporate value chains (Hickey & Du Toit 2007). Therefore, questions regarding land reform need to attend not only to the mechanisms of reform, but also to how land reform is part of a process of agrarian and even macroeconomic change, and the class dynamics that this implies. This unfolding debate therefore forms a highly contested context for policy discourse on the parameters of land reform in South Africa.

The neoliberal state and redistributive justice

From the early 1990s, when the World Bank insisted that South Africa's land reform would combine principles of 'equity' and 'efficiency', opposing interests and visions have been evident in these competing discourses. Equity concerns relating to substantive or social justice are arguably the main motivation behind land reform (Gibson 2009). But there are also questions of procedural justice in terms of the application of law and policy by means of transparent processes and according to prescribed principles (Jary & Jary 1995). Drawing on David Schlosberg's work (2004), Kepe et al (2011) argue that the neoliberal character of South African land reform, which treats land as a commodity — functionally and discursively disembedded from sociopolitical histories of dispossession — has limited the land reform process to a shallow distributive model of justice. A more expansive version of substantive and procedural justice requires attention to be paid to underlying institutional conditions, combining redistribution, as well as recognition and participation, in order to confront 'property-induced invisibility'

(Atuahene 2007) and the illegitimacy of existing land distribution programmes (Gibson 2009). Bohlin (2010), for example, shows how perceptions of 'justice' through land reform are not only contingent on material redress, but also vary by generation, whereby younger people are less likely to consider the transfer of land or other means of compensation as constituting adequate redress for past dispossession.

Our ongoing research on land redistribution, particularly the PLAS, is therefore centrally concerned with the character of redistributive justice within neoliberal state politics, and within globalised commodity markets. We therefore attend to the previous and ongoing debates about state versus market roles in land redistribution, as well as the question of the character of the state itself, its own interests and class agenda, and, within policy and political constraints, its conceptions of justice. Part of our interest is therefore in the shifting character of state–society interactions in current agrarian reform and rural development more broadly (Akram-Lodhi et al 2007), animated, as it is, by globalised markets, regional integration, consolidation, and converging state and agribusiness projects.

Proactive Land Acquisition Strategy in practice

According to the PLAS implementation framework, published in May 2006 (DLA 2006), the strategy is meant to target black people (encompassing Africans, coloured people and Indians), particularly those who live in communal areas — or in urban areas but who have the necessary farming skills — and people living under insecure tenure rights, such as former farm workers. Although the state envisaged the PLAS as pro-poor, it was also meant to cater for emergent and commercial black farmers. Most importantly, the new strategy was seen as one that would 'accelerate the land redistribution process', which the previous two programmes had been unable to achieve (DLA 2006:4).

In terms of contributing to some of the original principles of land reform, justice and a better life for all, the PLAS is meant to target land of 'high agricultural potential' and contribute to 'a higher path of growth, employment and equity by 2014' (DRDLR 2010:1). These formulations and plans prompted us to do a pilot study in Cacadu District of the Eastern Cape, to observe how the PLAS is unfolding in practice, given its original goals. In July 2013, with a follow-up in July 2014, we used a combination of purposive, convenience and quota sampling techniques (Denscombe 2010; Scheyvens & Storey 2003) to conduct interviews at, and make observations on, 11 PLAS farms in the district. We focused only on those who were willing to participate in the study, but took care to include in the study a variety of land uses and beneficiary categories. The list of beneficiaries and

contact information were obtained from the provincial Department of Rural Development and Land Reform in East London. Additionally, the provincial Portfolio Committee on Agriculture indicated interest in our pilot study.

Our preliminary findings from the pilot study reveal, among other things, four key challenges facing the PLAS. First, there was no real production taking place on most of the farms — the exceptions being three that were managed and operated by strategic partners (producing citrus and chicory) and, to a smaller extent, two others that were managed by middle-class beneficiary trust members who had external sources of income. These last two focused on livestock and dairy production. The rest of the farms were derelict and environmentally degraded, and they had not had any significant agricultural production for several years. This raised questions about the state's goal of targeting high-value land to boost agricultural production and contribute to economic growth. The rationale for buying that land was therefore unclear.

Secondly, none of the PLAS land reform beneficiaries had current leases or any documentation that gave them secure rights to the land they were occupying. In most of the cases the beneficiaries had expired care-takership agreements that had not been renewed in several years. Given the absence of secure rights to the land, beneficiaries were unable to receive production support from other government departments, and were unable to secure loans from financial institutions should they wish to.

Thirdly, one of the very few ways that the beneficiaries could receive production support from the state was through the Recapitalization and Development Programme (RECAP). This programme was launched in 2010 to provide struggling land reform projects with technical and financial support from government. However, in order to qualify for RECAP support, beneficiaries have to have a business plan, and either a mentor or a strategic partner. In all our cases these potential mentors or strategic partners were white farmers and some of them had either already left the farming business, or had abandoned — for financial reasons — the particular enterprise that they were mentoring the beneficiaries on. In the case of the three strategic partnerships that existed among our 11 farm participants, the beneficiaries claimed that they felt like farm workers, as opposed to partners or land reform beneficiaries. This raised serious questions about justice, reconciliation, equity and dignity — all of which are implied in the goals of land reform in South Africa.

Lastly, the most vulnerable beneficiaries were the former farm workers, who remained on the farms after the state had purchased them from their former employers. Having become unemployed, and with no production taking place on the farms, as well as the fact that they were restricted in the

initiatives they were permitted to engage in (including hunting, which is forbidden), by virtue of not owning the land these former farm workers had to rely on relatives in towns, or scraped together a living by means of food gardens and selling off their remaining livestock. In some cases the former farm workers even lacked basic necessities, such as water and sanitation, but could not receive infrastructural support from government agencies or non-government organisations because the land was owned by the Department of Rural Development and Land Reform.

Although we are confident that the observations we made in the pilot study are a fair representation of what is happening in these cases, we cannot vouch as to whether they are representative of general trends around the country concerning land redistribution under the PLAS. In view of the lack of any other studies (as far as we are aware) of tenure and land use under the PLAS leasing scheme, we have begun a study on the same issues that extends our case studies to new sites in the Eastern Cape.

What questions for land redistribution?

The preliminary findings based on our study on the implementation of the PLAS, and the disjuncture between the policy and practice of land redistribution, require a coordinated set of questions about what needs to be known about the latest land redistribution strategy. This provides a way of understanding land inequalities in South Africa, and whether addressing them has been an overall success or failure.

We believe there are three major information gaps that can help the public to assess the performance of land redistribution, and these are questions informing our continuing research on this issue. First, there is a need to investigate the state's strategies and practices with regard to land acquisition, the selection of beneficiaries and support for farmers post-settlement. This involves understanding the ways in which the current land-buying practices of the state are different from, or a continuation of, the market-based willing buyer, willing seller approach, which has faced criticism. As for the beneficiaries, we believe one needs to ask how their needs are matched with properties offered for sale or which have already been chosen by the state — whether this process is demand- or supply-driven, and who is being targeted and prioritised in the process. In particular, how do factors other than race, (eg age, gender, prior farming experience, wealth status and political affiliation) contribute to decisions on which beneficiaries will be selected for what land? We also ask what land-use practices are being promoted by the state, and what post-settlement support is provided by whom and to which beneficiaries.

Secondly, there is a need to critically assess the impact of the PLAS on the farmers who are beneficiaries of the scheme. Most particularly, this involves assessing the extent to which the land reform beneficiaries perceive their land tenure status as being secure, given that the state does not transfer the land title to the beneficiaries. We also need to ask how the PLAS has affected the people in the countryside and processes of class formation or rural stratification.

Thirdly, one needs to understand how government actors and the beneficiaries see the PLAS in terms of the overall goal of land reform, which includes redressing historical land injustices and achieving a better life. In seeking to answer this question, there is a need to learn how land justice is understood both by state actors and by the beneficiaries of the scheme, and whether the implementation of the PLAS has implications for confidence in the state and for solutions deemed just by these parties. We acknowledge that these questions may not necessarily cover every questionable aspect of land redistribution, but we are confident that they are crucial and can lead to insights that can be generalised widely.

This research agenda seeks to address a gap in research on land and agrarian transformation in South Africa. Although a large body of literature has emerged covering the earlier phases of land redistribution (Ntsebeza & Hall 2007), and the wider market-based approach (Lahiff 2007), the profound changes brought about as the state became the central actor in market-based land reform since 2011 have received almost no attention in terms of research. And the redirection of all national land redistribution budgets (approximately R3.5 billion a year) to state land purchase and associated recapitalisation has not been subjected to scrutiny or scholarly analysis. At the time of writing this chapter, no official reviews had been commissioned, and no independent research had been published on South Africa's latest land redistribution model.

Although this chapter has not presented extensive empirical findings on research on land redistribution, we believe it serves as a useful platform for thinking critically about land reform and its position in South Africa's transition from apartheid to a just South Africa. What we have presented here, including a synopsis of the findings of the pilot study and the set of questions for analysing land redistribution, particularly the PLAS, as well as our ongoing detailed research on this subject, should contribute to intellectual debates concerning the roles of state, market and community in land reform and rural development. This work hopes to engage with debates concerning processes of class formation in the countryside, notably the emergence of state–elite alliances for accumulation, in a post-deregulation and post-liberalisation era. This calls for fresh analytical thinking that moves beyond polarities of

state-versus market-driven development, and focuses instead on contingent state–elite alliances that may entrench the status quo while espousing narratives of pro-poor development and agrarian reform. In this way, we seek to contribute to international debates that address the role of the state under neoliberalism, and the implications for redistributive justice, especially in a racially divided and highly unequal society such as South Africa.

Ncapayi (2005) has argued, and perhaps rightly so, that many people in rural South Africa equate land hunger with poverty, hence many have organised under the banner of landlessness. Hendricks et al (2013) add that, in the case of South Africa, landlessness and poverty coincide with blackness. Globally, land activists who fight for restoration of historical rights for the dispossessed people underscore the historical relationship between land dispossession and political conquest. They question the meaning of freedom for those who lack basic means of survival, and whose land and dignity have not been restored (Moyo & Yeros 2005). As Amartya Sen (2000) has argued, freedom should be seen as both the means to and the purpose of development. Therefore, continuing land injustice in South Africa should be seen as having a direct relationship with not only land as a productive and economic resource, but also with land as a sense of identity and nationhood, which are central to the very existence and survival of citizens (Kepe et al 2008). This is why Mbembe (2008:15) concludes that to achieve the ideal of justice that is desired by many, 'South Africa must dismantle the barriers that were erected against full justice and attend to distributional inequalities'.

In the current land redistribution initiatives in South Africa, there is little evidence that the barriers that Mbembe refers to are being addressed. Hence, we believe that we should seek to understand the challenge of redressing centuries of colonial and decades of apartheid legacies, and that the time is right to critically debate the trajectory of post-apartheid policies of redress, such as land reform.

References

Akram-Lodhi H, Borras SM Jr & Kay C. (eds). 2007. *Land, Poverty and Livelihoods in an Era of Globalization*. London and New York: Routledge.

Andrews M. 2006. Struggling for a life in dignity. In L Ntsebeza & and R Hall. (eds). *The Land Question in South Africa: The Challenge of Transformation and Reconciliation.* Cape Town: HSRC Press.

Atuahene B. 2007. From reparation to restoration: Moving beyond restoring property rights to restoring political and economic visibility. *SMU Law Review*, 60(4):1419–1470.

Binswanger HP, Deininger K & Feder G. 1995. Power, distortions, revolt and reform in agricultural land relation. In J Berhman & T Srinivasan. (eds). *Handbook of Development Economics.* Vol. 3. Amsterdam: Elsevier: 2659–2772.

Bohlin A. 2010. Choosing cash over land in Kalk Bay and Knysna: The time factor in urban land claims. In C Walker, A Bohlin, R Hall & T Kepe. (eds). *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa.* Athens, Ohio: Ohio University Press.

Borras SM Jr. 2003. Questioning market-led agrarian reform: Experiences from Brazil, Colombia and South Africa. *Journal of Agrarian Change* 3(3):367–394.

Borras SM Jr., Kay C & Lahiff E. (eds). 2008. *Market-led Agrarian Reform: Critical Perspectives on Neoliberal Land Policies and the Rural Poor.* London and New York: Routledge.

Byres TJ. 2004. Neo-classical neo-populism 25 years on: Déjà vu and déjà passé. Towards a critique. *Journal of Agrarian Change*, 4(1/2).

Cousins B. 2013. Land reform and agriculture uncoupled: The political economy of rural reform in post-apartheid South Africa. In B Hebinck & B Cousins. (eds). *In the Shadow of Policy: Everyday Practices in South African Land and Agrarian Reform.* Johannesburg: Wits University Press.

Deininger K. 2003. *Land Policies for Growth and Poverty Reduction: A World Bank Policy Research Report.* Washington, DC: World Bank; Oxford: Oxford University Press.

Denscombe M. 2010. *The Good Research Guide for Small-scale Social Research Projects.* 4th ed. Berkshire: Open University Press.

DLA. Department of Land Affairs. 1997. White Paper on South African Land Policy. Available: http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperland reform.pdf. (Accessed 6 March 2016).

DLA. Department of Land Affairs. 2006. The Implementation Framework for the Proactive Land Acquisition Strategy: 2006–2014. Pretoria: Department of Land Affairs.

DRDLR. Department of Rural Development and Land Reform. 2010. Proactive Land Acquisition Strategy (PLAS) Factsheet. Pretoria: Department of Rural Development and Land Reform.

Fisher D. 2016. The speculative temporalities of landholding: Past, present, and future. Unpublished MA thesis, Department of Geography, University of Toronto.

Gibson JL. 2009. *Overcoming Historical Injustices: Land Reconciliation in South Africa.* Cambridge: Cambridge University Press.

Hall R. 2009. *Another Countryside? Policy Options for Land and Agrarian Reform in South Africa.* University of the Western Cape, Institute for Poverty, Land and Agrarian Studies.

Hendricks F, Ntsebeza L & Helliker K. (eds). 2013. *The Promise of Land: Undoing a Century of Dispossession in South Africa.* Johannesburg: Jacana Media.

Hickey S & Du Toit A. 2007. Adverse incorporation, social exclusion and chronic poverty. *Chronic Poverty Research Centre Working Paper No. 81*. Manchester: Institute for Development Policy Management.

Jary D & Jary J. 1995. Justice. In *Collins Dictionary of Sociology*. Glasgow: Harper-Collins.

Kepe T, Hall R & Cousins B. 2008. 'Land'. In N Shepherd & S Robins. (eds). *The New South African Key Words*. Johannesburg: Jacana Media.

Kepe T, Lewison E, Ramasra, R & Butt S. 2011. The elusive 'fair deal' in South Africa's land reform. *Forum for Development Studies*, 38(3):371–378.

Keswell M, Carter MR & Deininger K. 2009. Poverty and land ownership in South Africa. Unpublished paper, University of Cape Town, University of Stellenbosch, University of Wisconsin-Madison, World Bank.

Lahiff E. 2007. 'Willing buyer, willing seller': South Africa's failed experiment in market-led agrarian reform. *Third World Quarterly*, 28(8):1577–1597.

Lahiff E. 2008. Land reform in South Africa: A status report 2008. Institute for Poverty, Land and Agrarian Studies, University of the Western Cape.

Lahiff E, Davis N & Manenzhe T. 2012. *Joint Ventures in Agriculture: Lessons from Land Reform Projects in South Africa*. London: International Institute for Environment and Development.

Li TM. 2014. What is land? Assembling a resource for global investment. *Transactions of the Institute of British Geographers*, 39(4):589–602.

May J, Keswell M, Bjåstad E and Van den Brink R. 2009. Monitoring and evaluating the quality of life of land reform beneficiaries and the impact of land transfers: 2005/2006. Report prepared for the Department of Land Affairs.

Mbembe A. 2008. Passages to freedom: The politics of racial reconciliation in South Africa. *Public Culture*, 20(1):5–18.

Moyo S & Yeros P. (eds). 2005. *Reclaiming the Land: The Resurgence of Rural Movements in Africa, Asia and Latin America*. London: Zed Press.

Ncapayi F. 2005. Land need in South Africa. Who needs land for what? MPhil thesis, University of the Western Cape, South Africa.

Ntsebeza L & Hall R. (eds). 2007. *The Land Question in South Africa – The Challenge of Transformation and Redistribution*. Cape Town: HSRC Press.

Scheyvens R & Storey D. (eds). 2003. *Development Fieldwork: A Practical Guide*. Thousand Oaks: Sage Publications.

Schlosberg D. 2004. Reconceiving environmental justice: Global movements and political theories. *Environmental Politics*, 13(3):517–540.

Sen A. 2000. *Development as Freedom*. New York: Anchor Books.

Umhlaba Wethu. 2011. A bulletin tracking land reform in South Africa. Institute for Poverty, Land and Agrarian Studies, University of the Western Cape, issue 13.

Van den Brink R, Thomas G, Binswanger H, Bruce J & Byamugisha F. 2006. *Consensus, Confusion, and Controversy: Selected Land Reform Issues in Sub-Saharan Africa. World Bank Working Paper No. 71*. Washington, DC: World Bank.

Walker C. 2013. The distribution of land in South Africa: An overview. PLAS Land Reform Fact Check No.1, 1–2.

Walker C, Bohlin A, Hall R & Kepe T. (eds). 2010. *Land, Memory, Reconstruction, and Justice: Perspectives on Land Claims in South Africa*. Athens, Ohio: Ohio University Press and Durban: UKZN Press.

World Bank. 1994a. *Options for land reform and rural restructuring: A summary*. In LAPC. *Proceedings of the Land Redistribution Options Conference*, 12–15 October 1993. Johannesburg: LAPC, 219–224.

World Bank. 1994b. *South African Agriculture: Structure, Performance and Options for the Future*. Washington, DC: World Bank.

Chapter 2

LAW AND POLITICAL CONFLICT IN SOUTH AFRICAN LAND REFORM

Christiaan Beyers | *Derick Fay*

This chapter examines three areas of legal struggle: the Communal Land Rights Act 11 of 2004 (CLaRA), the Restitution of Land Rights Amendment Act 15 of 2014 (RLRAA) and localised claimant litigation. The objective is to consider the relationship between law, justice and political conflict in South African land reform some two decades after democracy. We argue that the use of law in land reform has led to unanticipated forms of disempowerment and depoliticisation, as well as new forms of activism, in the dual contexts of a neoliberalising state and the persistent dichotomy of citizens and subjects (see Mamdani 1996). These resultant forms reflect a general shift in the nature of the politics of land reform from its initial pursuit of justice through policy deliberation, towards increasingly localised, interest-driven engagements between stakeholders through legal conflicts, which may empower existing class and bureaucratic elites, rather than the intended beneficiaries. We see land reform as shaped by processes of 'juridification' — a concept that refers in broad terms to the increasing scope of law in modern society (Habermas 1987:359). The challenge for grounded analysis is to identify the particular forms that juridification takes, and the overall political and social directions of change.

South Africa's constitution-making process left key questions open: it did not clarify the role of traditional authorities in government (Klug 2000) and, while making broad commitments to land restitution and land-tenure reform, it left the specific legal vehicles to future legislative action. Since then, legislation in these areas has unfolded unevenly: the Restitution of Land Rights Act was passed in 1994, followed by the Communal Property Associations Act 28 of 1996, which aimed partly to create new legal vehicles for land-restitution claimants to take ownership. Broader tenure reform, in contrast, became caught up in debates over the role of traditional authorities. The CLaRA sought to provide security of tenure to dispossessed rural people, but proposed to do so through transfer of land to so-called traditional councils under the rule of chiefs. It was passed only in 2004, and was subsequently ruled unconstitutional in 2010. In the meantime, related legislation and aggressive lobbying have enhanced the legal and practical position of traditional authorities.

The most recent development in land reform is the RLRAA, promulgated on 30 June 2014, which reopens and expands the scope of the claims process. It does so at a time when the state is struggling to adequately deal with existing demands for land: more than a third of all claims lodged by the first deadline of 31 December 1998 have yet to be finalised.[1] The RLRAA has been criticised as motivated by electoral politics, as it may pave the way for large-scale land transfers to traditional authorities, who are endeavouring to launch massive claims on behalf of their constituents. In this sense, the bill follows directly from the CLaRA. In urban areas, on the other hand, the RLRAA will precipitate scores of new individual rights claims, greatly straining state capacity. And it is likely that this will lead to a series of conflicts between new claimants and previous claimants still awaiting full settlement, who will insist on priority standing.

The many claims that have been 'settled' but not 'finalised' are also frequently the objects of legal struggles among claimants and other stakeholders, partly because of the tremendously complicated and drawn-out planning and development processes. These delays have contributed to frustrations expressed through legal struggles, most strikingly in cases of litigation by dissenting claimant groups against the legal entity that was created to represent them.

This chapter begins by linking the issues described here to broader questions about juridification and its impacts on the form and content of political struggles, in the dual contexts of neoliberalisation and the persistence of a citizen–subject dichotomy (Mamdani 1996), arguing that the expansion of law may not necessarily entail increased justice for those dispossessed under apartheid. The chapter then provides an overview of the three aforementioned areas of struggle — the CLaRA, the RLRAA and among claimants.

Juridification and land reform

Land reform in South Africa has been characterised by the expansion and development of the law, which is part of the general construction of a post-apartheid constitutional and legal order, and consistent with the proliferation of new constitutions in the late-twentieth-century 'critical juncture' (see the

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1   Although only 8 471 restitution claims (DRDLR 2014) out of 79 696 claims lodged by December 1998 remain to be settled, more than 20 000 claims have been nominally 'settled' but not finalised, including many rural community claims, each consisting of thousands of households. The Programme for Land and Agrarian Studies estimates that at the current pace it will take at the minimum another 15 years to resolve these (Cousins et al 2014:3).

Introduction to this book).[2] At the same time, the intersection of law and land reform presents a number of apparent paradoxes. To give a few examples, an already-overburdened state is passing new laws without the administrative capacity or resources to implement them; new land laws appear to be increasing the scope for administrative discretion rather than regulation (see Claassens 2014b; Weinberg 2013); national laws that fulfil constitutional mandates simultaneously exclude large areas of the country from the constitutional order (Claassens & Cousins 2008); and the creation of legal subjects and property-owning citizens through land restitution frequently decreases or redirects the possibility for them to challenge state policies and practices (Beyers & Fay 2015).

When we use the notion of juridification to make sense of these legal struggles in South African land reform, we draw upon Blichner & Molander's (2008) review of the concept. They make clear that juridification is a polyvalent term, used to describe an often interrelated array of processes involving the increasing scope and importance of law. The relations between these processes are often indeterminate and reversible.

In particular, we highlight several forms of juridification: the formalisation and elaboration of constitutive norms (including defining the limits and scope of administrative discretion within the law); the differentiation of the law, through the creation of new categories of law, new areas of regulation and the multiplication of cases to which law is applied; the ways people increasingly turn to the law in conflicts — through appeals to the judiciary and the legal profession, and strategic litigation; changes in the effective power (as opposed to the formal authority) of the legal profession; and the tendency of people to 'think of themselves and others as legal subjects' (Blichner & Molander 2008:39). We see these playing out in different ways in the various struggles that we describe, with often contradictory consequences for public participation and citizenship.

We are particularly interested in the intersections of juridification with two other sets of issues: first, the neoliberalisation of the South African state that has accompanied the transition from apartheid; and, secondly, the 'citizen/subject' dichotomy identified forcefully by Mamdani (1996) and still manifest in tenacious apartheid geographies.[3] We seek to understand how changes in the law reflect pressures to downsize and decentralise administration, and how they may reproduce or undermine the 'bifurcated state'.

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2   On this point, see also Comaroff & Comaroff (2006); Eckert et al (2012).

3   Although some emergent social formations do not conform to this pattern, such as the politicisation of farm workers covered by Webb in Chapter 10 of this volume, we argue that the dichotomy is increasingly salient, given recent developments in legislation and policy proposals regarding land reform and traditional authorities.

Juridification, we argue, is not an intrinsically politicising or depoliticising process; rather, it enables particular kinds of political action and limits others. Therefore, the CLaRA and the RLRAA can be seen as instrumental uses of the law aimed at securing political influence or control (see, for example, Beall et al 2005; Claassens 2014b), simultaneously furthering the project of national transformation through land reform. Likewise, NGOs, human-rights lawyers, claimant groups and other local actors often seek to repoliticise the law, challenging the legislative process and seeking legal rulings with implications beyond particular cases.

Legal actions between non-state parties also generate more indirect effects that contribute to state power, in line with the argument that a turn to law atomises political struggles.[4] Across the South African restitution landscape, we see legal actions within claimant 'communities', which often run along lines of dissent that were suppressed or restrained in the initial claim. Such local conflicts distract from failures of delivery, and often channel dissent in ways that enable the state to extend its control and reinforce its legitimacy as arbitrator of conflict. In aggregate, we argue, their unintended outcome is to effect a qualitative shift from a demand-driven model of governance to one where the state is able to pick winners and losers, and thus establish a network of patronage with regional and local elites.

Although such legal struggles could ultimately be destabilising, they may also be advantageous for a neoliberalising state as it retreats from its traditional role of directing and managing economic development towards providing an institutional framework for predominantly non-state actors. In the face of limited budgets, administrators need to choose between prospective claimants. Shortfalls in state capacity have been intensified as a result of high staff turnover in state agencies and growing reliance on consultants, because of a host of challenges associated with the institutional reorganisation of the Department of Land Affairs into the Department of Rural Development and Land Reform (DRDLR), and continuing problems with document and case management. All of these issues have created discontinuities in the tracking of particular cases. We argue that this gap between what the state promises and what it delivers is not necessarily counterproductive for the state because the effect of the expansion of law — including the resulting widened base for making demands on the state — is to reconstitute and fragment the polity into a multitude of fields of legal struggle.

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4   For many observers, the movement of political struggles into the judicial system is a process to be regretted; as issues move out of the public sphere and into the hands of lawyers, courts and judges, it confines 'the transformative potential of political agitation ... to [singular] "legal cases"' (Zenker 2012:5; see Comaroff & Comaroff 2006:26–30).

Localised lawfare, in turn, enables powerful actors — commercial interests, traditional authorities and private landowners, among others — to intercede or take sides in local struggles, often taking advantage of the gaps left by the neoliberal state. Juridification therefore creates the basis for new forms of political control. If 'justice in transitional times' (De Grieff 2012) was concerned with establishing the rule of law and a 'culture of rights', two decades after democracy the law is paradoxically both extending its reach and increasingly enabling forms of community politics that entrench forms of social exclusion and illiberal forms of authority in the struggle over power and resources.

The Communal Land Rights Act 11 of 2004

Juridification might be expected to entail the expansion of universal law to include those who were subjects, as it were, in the previous regime. Ostensibly, the CLaRA developed the law to fulfil constitutional mandates aimed at granting or restoring rights over property to those who were dispossessed or marginalised under apartheid. In practice, however, we argue that recent developments in the juridification of land reform actually contribute to the reconfiguration of the colonial- and apartheid-era bifurcated state.

Section 25(6) of the 1996 Constitution mandated the provision of legally secure land tenure to those whose tenure was legally insecure 'as a result of past racially discriminatory laws or practices'. What this meant in practice has been the subject of an extended struggle on the part of rural communities, land activists and traditional authorities, over successive proposals for tenure reform, culminating in the Constitutional Court striking down the CLaRA in May 2010.

The controversy over the CLaRA reflects long-standing ambiguities about the relationship between traditional authorities and the state. While colonial and segregation-era policies aimed to undermine chiefs, the apartheid regime aimed to incorporate them in the state by means of the Bantu Authorities Act of 1951 and the subsequent 'homeland' policy. In the early 1990s, many observers questioned their future in an ANC-led government. Two decades later, however, the ANC's efforts to secure rural voters combined with active lobbying by chiefs (primarily through the Congress of Traditional Leaders of South Africa, Contralesa) have enabled traditional authorities to bring their interests to bear upon state policies for rural areas and the emergent overarching legal edifice governing their jurisdiction (see Ntsebeza 2005:268–272).

For a decade after the political transition, while the status of traditional leaders was unclear and in flux (Klug 2000; Oomen 2005), land tenure reform legislation made some advances. The Communal Property Associations (CPA)

Act 28 of 1996 allowed for the creation of CPAs as ownership structures for communities receiving land under land reform, with regulations promoting democratic control and preventing gender discrimination. Some CPAs would include traditional authorities among their members; others explicitly aimed to exclude them. Alongside the CPA Act, the Department of Land Affairs developed a Land Rights Bill in the late 1990s with no special provisions for traditional authorities, instead aiming to institute a process to recognise and register existing land rights (Cousins 2007:285–286).

In the meantime, other state agencies were more accommodating of traditional authorities and aimed to restrict the scope of the new laws. In 1999 the Department of Constitutional Development produced a report referring to 'the "problem" of ... CPAs undermining chiefly authority [and recommending] that CPAs should not be allowed within the former bantustans and that future legislation should provide for chiefs to obtain the title deeds of "tribal" land' (Claassens 2014a:766). The political mobilisation of traditional authorities gained steam around 1999 in anticipation of redemarcation of local government, a process that ultimately largely preserved the apartheid-era territories of chiefs (Ramutsindela 2007). The Traditional Leadership and Governance Framework Act 41 of 2003 went on to recognise 'traditional councils' as part of local government.[5]

The CLaRA went a step further: in a last-minute change, the bill submitted to Parliament in October 2003 replaced limits on the representation of traditional authorities with provisions that would allow for traditional councils to allocate and administer land (Ntsebeza 2005). In subsequent public hearings, land NGOs were instrumental in organising nearly universal opposition to the proposed measures. Of the 34 parties who testified at the hearings, 31 were opposed, with most representing rural communities (Cousins 2004:6). Parliament effectively ignored opposition testimony. The bill passed unanimously in February 2004, two months before national elections and without provincial consultation, and was signed into law in July 2004 (Claassens 2005:5).

Despite this, the CLaRA never came into effect. In March 2006, four communities, Kalkfontein, Makuleke, Makgobistad and Dixie, supported by the Legal Resources Centre (LRC) and Webber Wentzel Bowens (a private law firm), launched a court challenge to the CLaRA (see Claassens & Cousins 2008). In October 2009 the High Court delivered the first ruling on

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5   According to sections 3 and 28 of the Traditional Leadership and Governance Framework Act, the councils would be subject to a transitional provision requiring at least one-third of the members to be women and 40% to be democratically elected.

the CLaRA case, deeming 16 sections of the CLaRA unconstitutional.[6] The Constitutional Court ruled in May 2010 that the CLaRA was unconstitutional on procedural grounds, but did not rule on the substantive grounds.[7]

How are we to assess the CLaRA decision in relation to our questions regarding juridification? On one hand, the CLaRA can be interpreted as an instrumental attempt to win elections while reducing the scope of universalistic law, as it would partially remove communal areas from state jurisdiction while simultaneously bolstering ANC support.[8] Whereas pre-CLaRA tenure policy aimed to 'build a unitary non-racial system of land rights' (DLA 1997:60) that could encompass the communal areas, we see under the CLaRA the effort to dismantle CPAs and to move communal, and often restituted, land out of the realm of universal land law. This is less a retreat from law than a substantive extension of law: a battery of new legislation now defines the realm within which traditional authority holds sway. Although this is a broad continuation of apartheid- and colonial-era indirect rule, it is now facilitated under the pretext of transformation, as land reform legislation establishes parameters for the jurisdictions of traditional authorities over communal land and customary law, and for the state, through a set of laws that manage collaboration between state and chiefly elites, while foreclosing the political options for their subjects.

The court challenge to the CLaRA, on the other hand, appears as an extension of the uses of the law against the apartheid state. Zenker's analysis of the experiences of the Kalkfontein community, one of the communities behind the constitutional challenge, views their victory in the CLaRA as a continuation of the successful use of law as 'politics by other means' in the apartheid era, when alternative political routes were scarce (Zenker 2012). In that analysis, the conduct of politics through law is not necessarily disempowering or depoliticising. Instead, a move that enhances the power

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6   Judgment in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (11678/2006) [2009] ZAGPPHC 127; 2010 (8) BCLR 838 (GNP) (30 October 2009), unreported, sec. 67(ii). In particular, Judge Ledwaba found the provision that traditional councils could serve as land administration committees unconstitutional because some existing traditional councils were not democratically elected and may violate gender-equality provisions of the Constitution. Section 39 was also deemed unconstitutional, which would have allowed for the application of the CLaRA to land held under CPAs and other legal structures created through land reform (as in the Makuleke case).

7   *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010), sec. 109–110.

8   Critical observers noted that the CLaRA seemed to have worked as an electoral tactic: 'The ANC was correct in its calculations, winning control of KZN provincial government for the first time in 2004' (Beall et al 2005:764).

of the court simultaneously effects changes that were unfeasible through more conventional political means.

In terms of the broader impact of juridification on the politics of land, we are more cautious in our assessment. The constitutional challenge was necessary because of the ineffectiveness of more conventional political input into the legislative process: the public-participation process was effectively ignored and provincial consultation was bypassed, so it took a turn to the courts to find political traction against the Act. Although the constitutional challenge may have blocked the CLaRA, there are few signs that this has led to substantive shifts in tenure policy. Indeed, there have been recent indications that the DRDLR aims to revisit tenure policy along similar lines, as its 'wagon-wheel' policy envisages traditional councils as the overarching title holders for land in communal areas (DRDLR 2013).

Where the CLaRA victory may prove more significant is in establishing the principle (through the Constitutional Court's ruling) that legislation pertaining to the domain of traditional authorities requires provincial approval. Provincial input following public hearings in the provinces was key to the effective defeat of the controversial Traditional Courts Bill in February 2014 (Alliance for Rural Democracy 2014; Select Committee on Security and Constitutional Development 2014). As the DRDLR's new tenure policies move into bill form, the requirement for provincial consultation and approval is likely to open up room for criticism that was not available in the CLaRA process.

Beyond the passage into law of the CLaRA and the subsequent challenge, however, the protracted court struggle has had other consequences. Although the constitutional challenge might be read as increasing the power of the judiciary, in practice, the delays have allowed for the exercise of administrative discretion in land reform. Under conditions of inadequate resources, officials in the DRDLR have had to be selective about where to focus their time and budgets. The struggle over the CLaRA provided a justification for delays in the registration of CPAs in other restitution cases, as officials hesitated to formalise a legal entity that might be disbanded if the CLaRA were implemented, and apparently allowed chiefs to influence their decisions. Weinberg provides a compilation of evidence that the DRDLR has operated with a

> de facto *policy … to discourage the formation of CPAs and freeze the transfer of title deeds to CPAs, in light of objections by some traditional leaders who believe themselves to be the rightful owners of all land in the former Bantustans.* (Weinberg 2013:33)

Weinberg identifies dozens of CPAs that had not yet received land title and/ or development funding, some more than a decade after settlement. These policies appear to have continued in practice after the CLaRA decision. Claassens (2014a:770) cites an affidavit in the Cata restitution case, signed in June 2012, in which a senior official of the DRDLR indicated that 'the minister had issued instructions that no state land should be transferred to CPAs, as discussions concerning the implementation of [the CLaRA] "are still continuing" ' (Claassens 2014a:770).

As these accounts suggest, the law is a limited constraint against administrative actions. The delay in transferring land and finalising claims during the years of legal struggle over the CLaRA has allowed the consolidation and extension of state power through networks of local and regional elites. Over the same period, Contralesa mobilised its membership in these struggles, condemning the CLaRA and CPAs, and encouraging its members to oppose them. Tackling these emerging power imbalances becomes very difficult and dissenters are forced to turn to legal struggle outside of the legislative process, relying on high-level legal expertise.

The Restitution of Land Rights Amendment Act 15 of 2014

The RLRAA might appear to be a simple extension of the restitution process, giving access to claimants who may not have been able to file claims before the earlier deadline. On a sympathetic reading, it endeavours to create the basis for ongoing and programmatic redress of historically marginalised communities. In practice, though, its impact is likely to be consistent with the institutionalisation of a more deeply bifurcated state. In rural areas officials and politicians explicitly targeted traditional authorities, who, in turn, have embraced the possibility of new claims with enthusiasm, and rationalised these prospective claims in ethnic terms. In urban areas, on the other hand, new groups of claimants are being constituted and civil actors mobilised to seize the political opportunity to assert themselves within a civic sphere marked by growing socio-economic inequality.

Rural-community claims

Media coverage and political statements about the RLRAA while the bill was under consideration emphasised the way it might create new possibilities for the use of law, often actively encouraging traditional authorities to file land claims. At the opening of the National House of Traditional Leaders in Parliament in February 2014, President Jacob Zuma deviated from his prepared speech, calling on traditional leaders to 'put together your resources

to look at this law, to look at the claims on behalf of your people' (Makinana 2014). The legislature in North West province went so far in its negotiating mandate on the bill to assert that 'the Bill should ... protect, support and build the capacity of traditional leaderships' (cited in Mogale & Thipe 2014). In this respect, the RLRAA appears as an instrumental electoral use of the law. As Claassens comments, 'the restitution bill, like [the CLaRA] ten years ago, holds out the pre-election promise of land ownership to traditional leaders to encourage them to "deliver the rural vote"' (Claassens 2014b).

Within a few weeks of the passage of the Act into law, traditional authorities in KwaZulu-Natal and the Eastern Cape announced their intentions to pursue massive claims, going back well before the 1913 cut-off. Following a provincial government workshop on the RLRAA in July 2014, the Zulu king, Goodwill Zwelithini, announced plans to claim 'a massive tract of urban and rural land including Durban, parts of the Eastern Cape, Mpumalanga and the Free State', combining claims from across the province in a single claim (Harper 2014). The claim would be planned by the Ingonyama Trust, and extend to 'all the land in the province that did not belong to the trust' (Ntuli 2014). How this might affect the 1 900 unsettled claims in the province is uncertain (Ntuli 2014). Meanwhile, in the Eastern Cape, the AmaRharhabe Royal Council announced a plan to file a claim extending from the western side of the Great Kei River to encompass much of the Western Cape.

What are we to make of these planned massive claims? Opposition MPs and the KZN Agricultural Union questioned the feasibility or advisability of Zwelethini's claim (Harper 2014). Zama Memela of the Eastern Cape Land Claims Commission likewise expressed concerns that the Rharhabe claim would not succeed. Indeed, it is hard to see how claims on this scale could meet the standards imposed on previous rounds of claimants.

Their significance may be less in their consequences for actual land ownership than in the way they speak to the repositioning of traditional leaders as legal subjects in the restitution process. This process is represented less as a measure to address apartheid-era histories of forced removals than to fashion realms for traditional authorities. The Rharhabe claim is telling in this respect. The Rharhabe status as a 'kingdom' had been rejected by the Nhlapo Commission on Traditional Leadership in 2010 (Nini 2014). Memela's comment on the proposed claim that 'this amended law is not to determine the boundaries of royals' (cited in Nini 2014) suggests that the restitution process was being used as an intended recourse to the Rharhabe's rejection by the Nhlapo Commission. All of this invokes a political imaginary — one that has arguably been promoted by the state — in which the powers of the chiefs would be restored, whether through the CLaRA, the

Traditional Courts Bill or restitution. This is ironically framed as an act of decolonisation, whereby the chiefdom would once again exercise the moral authority needed for social cohesion in the countryside, thereby eliding the historical distortion of this institution under colonialism and apartheid. As many of these large territorial claims overlap, there is the possibility of reviving dormant ethnic rivalries and spurring on conflicts with serious political repercussions (Claassens 2014c).

Urban rights claims

The RLRAA is also set to dramatically affect urban areas. And yet, as with the initial Restitution of Land Rights Act 22 of 1994, there has been little consideration of the legislation's urban impact. New claims will greatly exacerbate existing shortfalls in capacity in land restitution. As of 11 August 2014, most of the claims had been lodged in the Western Cape and Gauteng, the two most urbanised provinces (Gobodo 2014). Urban claims are predominantly made by individuals and, despite being fairly well documented in comparison to rural claims, they require much more time and resources to investigate, process and settle. Rural community claims nonetheless consist of greater numbers of potential end beneficiaries. The Commission on the Restitution of Land Rights therefore faced much criticism in the past over its prioritisation of urban claims over rural ones. The near completion of urban claims was supposed to allow the DRDLR to focus on rural areas.

What impact will the RLRAA have on particular urban claims? There is little commentary on this yet. However, as the largest and most complex outstanding urban claim, District Six might serve as a significant test case, given the number of potential new claimants and their impact. After the bill was first announced by the president, a new group called the District Six Working Committee was formed in April 2013 to mobilise more former District Six residents to submit claims, and soon lined up more than 1 000 prospective claimants (Nicholson 2013). For the most part, the District Six Working Committee appears to be working collaboratively with registered claimants and other official stakeholders. However, they have also called for all planning and construction to cease until their claims are settled and they are incorporated on equitable terms (Adams 2013). These demands will undoubtedly be resisted by existing claimants, who will insist on having their claims settled first, and on not having the value of these claims diminished. If this pattern holds elsewhere, the apparent policy vacuum around the projected disproportionate number of urban claims could have far-reaching implications for the viability and legitimacy of the land reform programme as a whole.

Whereas the first round of claims was characterised by a politicised process of mobilising claimants and building group solidarity, the present phase appears likely to be guided by a more thoroughly bureaucratised process. After nearly two decades of land restitution with marginal gains in many cases, there is often a sense of fatigue, disillusionment and resignation in communities that had been forcibly removed. Although new claimants are bringing energy into the claims process, this is unlikely to last as they are drawn deeper into its mechanisms. Early signs suggest that new claims may fragment (expanded) claimant groups, and therefore provide a rationale for further technocratic intervention. As we argue below, conflict between claimants provides opportunities for local government, as well as other political interests and business, to develop patronage ties with competing claimant groups.

Between law and its administration

Both in rural and urban areas, the RLRAA will more generally alter the way in which citizens engage with the state. The RLRAA entails a shift from a politics based on a normative commitment to meeting the demands that correspond to citizens' constitutional rights, to a more pragmatic politics based on establishing privileged relationships with certain groups of citizens over others. These groups will be given preference on the basis of their strategic political interest to government. If, as many critics of the RLRAA have pointed out, the flood of new claims resulting from this new legislation exceeds state capacity far beyond present levels, the resulting discrepancy will also be an opportunity for government officials to exercise greater discretion over which cases they select to prioritise for state redress.

Juridification here involves two aspects: first, the expansion of new formal legislation, policy and regulation, and, secondly, the substantive administrative application of the law in many different arenas. The RLRAA extends the scope of the Restitution of Land Rights Act while facilitating expanded administrative discretion in respect of the Act and related policies. The exercise of such discretion usually involves selective application of the law, or at least subsequent rationalisation in legal terms. Given the multitude of legal instruments that apply to any practical problem, and the range of competing interests that might be brought to bear, there is a wide margin for interpretation on questions such as who the primary target groups for state redress are, what the appropriate vehicle is for their legal representation, what fair claims settlement should consist of in light of demands by other public groups, what the correct procedures are for determining this and for transferring and developing land, and how and by whom these interventions should be carried out.

A comparative perspective on land claims may be illuminating. In other situations where the number of land claims far exceeds the ability and willingness of the state and courts to deal with them, such as Canada and Australia, the point is no longer about concluding claims settlement for once and for all. Rather, we witness the creation of a new form of governance where the state establishes itself as a paternalistic benefactor that magnanimously 'gives' plots of land, resources or constituencies at any given time to those wronged in colonial times. However, this giving is done in a piecemeal way, depending on the political salience of demand by particular groups and the strategic interest of the government of the day.[9]

South African land reform may also be moving in this general direction, but in a way that relies on the continued institutionalisation of the bifurcated state. The RLRAA proves to be useful to this end in appearing to extend the transitional moment for a ruling party, enhancing its standing as the continuing bearer of the liberation struggle at a time when its popular support is weakening. The RLRAA simultaneously enables the consolidation and reproduction of state power through a combination of legal-bureaucratic and traditional forms of authority. There are, however, considerable risks for the feasibility of such a dual structure, particularly in terms of the state's ability to manage conflicts that might arise as a result of restoking competing 'tribal' identities and territorial claims, on the one hand, and giving rise to further imbalances in the demands of urban and rural claims, on the other.

The juridification of dissent

The political effects of the legislation covered thus far are manifold. On the one hand, the CLaRA and the RLRAA have turned highly political questions — such as the nature of the institutions that represent people in their demand for land, and the role of traditional authorities in managing the distribution and use of land — into legal problems that can be managed through a performative legislative process in which critical voices are heard but not taken into account. Where the RLRAA has the effect of multiplying rights-based claims, dissent is itself juridified and diverted into ultimately depoliticised intra-claimant legal struggles (discussed at more length below).

There is also a juridification of protest. The LRC initiated a challenge to the RLRAA on behalf of the Land Access Movement of South Africa, the Association for Rural Advancement and the Nkuzi Development Association

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9   See, for example, Morphy (2009) and Nadasdy (2009). In contexts where restitution is a responsibility of local government, like in Romania, the opportunities for patron–client relations are further magnified (Dorondel 2009; Verdery 2003).

at the Constitutional Court in February 2016.[10] The LRC aims to argue that the Act was passed without adequate consultation with parties affected — as was the case with the CLaRA — in contravention of constitutional requirements for meaningful public participation (Legal Resources Centre 2014; *Land Access Management*). The practice of politics here depends on the legal profession, as lawyers at the LRC interpret norms applying, in particular local cases, and translate these into the legal basis for concerted challenges to imposed legal regulations (see Eckert et al 2012:11–14). Moreover, their strategy is aimed not only at addressing particular laws, but at reopening the process through which law is made. The LRC pursues legal action strategically where political engagement has been restricted and the court can offer an opening because of its potential independence from the aims of the current government.

As we have argued in reference to the CLaRA, this strategy runs the risk that a long court case will provide justification for further delays and discretion in handling existing claims. Nevertheless, in the absence of more concerted political pressure and a legislative process that responds to popular participation, lawsuits may be the most practicable means of changing the law itself, and therefore provide a vital way of challenging the direction of state policy and legislation.

Litigation among land claimants

As we noted above, the RLRAA is likely to set off a host of new internecine claimant conflicts, adding to the many already under way. The outcome of these conflicts will be determined locally and they will present opportunities for local actors thus far excluded from the restitution process to come into the fray. They will also present opportunities for political players, particularly those local actors aligned with the national government, to attempt to gain more influence over the existing property regimes. More insidiously, intra-claimant conflicts are likely to be expressed in increased litigation, thus contributing to the juridification of dissent, and in general extending neoliberal forms of indirect control.

We have analysed litigation among land claimants at length elsewhere (Beyers & Fay 2015). Land restitution requires claimants to form new legal entities (typically CPAs and/or trusts) in order to take ownership of land. In this respect, it is a process of legal subject formation (see Blichner & Molander 2008; Eckert et al 2012), training claimants in the use of the law, and channelling community politics into a legal form. In numerous urban

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10   *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others.* CCT 40/15.

and rural cases, discontented claimants have then targeted these legal entities. Although such conflicts reflect the contingencies of particular claims, there are nevertheless common patterns and consequences. They usually come at a point late in the claim or during the post-settlement process, when the initial community of claimants, who had gathered together under the banner of the land claim, may be fracturing, often reflecting longer-term differences that had been deferred or suppressed so they could collectively file the claim. Legal entities frequently become the focus of claimants' frustrations with the protracted, complex and highly technical processes of restitution and post-settlement development. These struggles occur within complex and evolving regulatory frameworks involving law dealing not only with land reform, but also with urban and/or rural development, frequently leading to delays and unexpected complications in the process of transferring and developing restituted land.

In some cases, these lawsuits hinge on claims of corruption or failure to adequately represent the claimants (Barry 2010; Sambumbu 2010:127–128). In others, they appear as the consequence of creating legal entities that reflect claimant groups with diverse economic and social interests, and with major disagreements about how the restituted land should be divided and/or used (Beyers 2010, 2012; Fay 2013). In rural claims, lawsuits against new legal entities have also provided another vehicle for discontented traditional authorities to challenge CPAs, often invoking the terms of the CLaRA. At Dwesa-Cwebe, for example, a local headman was a member of the new trust, which had brought a lawsuit against the existing land trust, with support from another headman. In so doing, they aimed to remove from office trustees who had previously provided testimony against the passage of the CLaRA into law.

These lawsuits also reflect our third point above regarding the indirect politics of the CLaRA. Delays in the registration of CPAs have contributed to protracted post-settlement development processes and have frequently undermined the effectiveness of community leaders. Here again, the juridification of land reform allows other things to happen in the meantime: 'buying time' does not just forestall the inevitable; it also alters the outcome. So, while claimants and prospective beneficiaries wait for their land, many give up and opt out, or opt for lesser forms of settlement. Stakeholder negotiations often continue in the interim, allowing more powerful actors — such as chiefs, local and regional government, parastatal institutions and private-sector partners — to wield their resources and influence.

Finally, these struggles limit the political expression of discontent, requiring expertise that gives systematic advantage to those with access to legal advice and resources. They frequently disadvantage existing community leaders, whose only access to legal counsel may be through the

lawyers who shepherded them through the claims process. State actors may shift their attention away from disharmonious and contested legal entities, preferring to engage with a single structure representing the community. As the agency of grass-roots actors is thus restricted, sustained and concerted extra-legal political action becomes more difficult.

The analysis presented in this chapter suggests that recent legislative changes in land reform and legal struggles between claimants need to be understood in light of the pressures of neoliberalisation and the continuing strategic value — for the state, traditional authorities and other elite groups — of re-entrenching the citizen–subject divide. By passing the RLRAA, the state has expanded the law, requiring an overburdened administration to exercise discretion in responding to claims. This does not merely result in an increased shortfall between state delivery and popular demand, but also contributes to a wider process of juridification that enables the productive management of resulting dissent. Legislation allows for the rationalisation of particularistic administrative practices in a way that reconstitutes the basis for political control. Indeed, the very process of creating new legislation, however contested, can be productive for the state. The CLaRA relieved the state of the burden of administering land in communal areas, nominally fulfilling a constitutional mandate while in reality recreating a dualistic legal order. Even as it was challenged successfully, the CLaRA likewise enabled the DRDLR to selectively delay or exclude particular claimants by undermining CPAs and grass-roots political organisations in general.

As protracted restitution and post-settlement processes dragged on, claimants increasingly turned to the law, focusing their attention from the state to one another. Here we see how law does not simply depoliticise dissent. More precisely, it limits the scope of its impact and reduces it to so many local struggles. These expressions are often more about particularistic identities and interests than a critique of structural marginalisation. This suits the neoliberalising state's downloading of service provision to communities and enables its politics of selective engagement with a deeply differentiated citizenry.

As South Africa moves into its third decade of post-apartheid demo-cracy, the project of land reform remains largely incomplete. Land reform is also developing in ways that arguably undermine the constitutional vision of justice. If post-apartheid land reform was to achieve more substantive forms of equality alongside other civil and political rights, the ever expanding body of law that serves to realise this objective has unfolded in the context of political decisions, policies and forms of legal administration that serve more partial ends. Indeed, the notion in the immediate post-transition period that emancipation for those deprived of land rights could be realised

through law is increasingly in question. The state relies less on a notion of restoring lost rights and full citizenship, and increasingly uses a selective approach to transformation to maintain and reproduce its political power. As under apartheid, law continues to advance politics by other means. However, in a post-apartheid and neoliberal era, it works by generating a re-bifurcated populace and a discretionary administration that ultimately serve to entrench both direct and indirect state control in the context of its receding commitments to economic development and social welfare.

References

Adams T. 2013. Busses for D6 march. *Voice of the Cape*, 20 November 2013.

Alliance for Rural Democracy. 2014. The traditional courts bill is dead! Media statement, 21 February 2014.

Barry M. 2010. Land restitution and communal property associations: The Elandskloof case. *Land Use Policy*, 28:139–150.

Beall J, Mkhize S & Vawda S. 2005. Emergent democracy and 'resurgent' tradition: Institutions, chieftaincy and transition in KwaZulu-Natal. *Journal of Southern African Studies*, 31(4):755–771.

Beyers C. 2010. Acrimonious stakeholder politics. In C Walker, A Bohlin, R Hall & T Kepe. (eds). *Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa*. Athens, Ohio: Ohio University Press.

Beyers C. 2012. Land restitution in Port Elizabeth: Anatomy of a relative success. *Journal of Southern African Studies*, 38(4):827–845.

Beyers C & Fay D. 2015. After restitution: Community, litigation and neoliberalism in South African land reform. *African Affairs*, 114(456):432–454.

Blichner LC & Molander A. 2008. Mapping juridification. *European Law Journal*, 14(1):30–54.

Claassens A. 2005. *The Communal Land Rights Act and Women: Does the Act Remedy or Entrench Discrimination and the Distortion of the Customary*. Bellville: Programme for Land and Agrarian Studies, School of Government, University of the Western Cape.

Claassens A. 2014a. Denying ownership and equal citizenship: Continuities in the state's use of law and 'custom', 1913–2013. *Journal of Southern African Studies*, 40(4):761–779.

Claassens A. 2014b. Haste over land rights bill not just in aid of buying votes. *Business Day*, 10 April 2014. Available: http://www.customcontested.co.za/haste-land-rights-bill-just-aid-buying-votes/. (Accessed 11 July 2014).

Claassens A. 2014c. Land claims could blow up in Zuma's face. *Mail & Guardian*, 8 August 2014.

Claassens A & Cousins B. 2008. *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act*. Cape Town: UCT Press.

Comaroff J & Comaroff JL. 2006. Law and disorder in the postcolony: An introduction. In J Comaroff & JL Comaroff. (eds). *Law and Disorder in the Postcolony*. Chicago: University of Chicago Press.

Cousins B. 2004. The continuing controversy over the Communal Land Rights Bill of 2002. *ESR Review*, 5(4):6–10.

Cousins B. 2007. More than socially embedded: The distinctive character of communal tenure regimes in South Africa and its implications for land policy. *Journal of Agrarian Change*, 7(3):281–315.

Cousins B, Hall R, Isaacs M & Paradza G. 2014. Submission to Public Hearings on the Restitution of Land Rights Amendment Bill 2013, 29 January 2014. Available: http://pmg.org.za/files/140129plaas.pdf. (Accessed 7 March 2016).

De Grieff P. 2012. Theorizing transitional justice. In L Williams, R Nagy & J Elster. (eds). *NOMOS LI: Transitional justice*. New York: New York University Press.

DLA. Department of Land Affairs. 1997. White Paper on South African Land Policy. Available: http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf. (Accessed 6 March 2016).

Dorondel S. 2009. 'They should be killed': Forest restitution, ethnic groups, and patronage in postsocialist Romania. In D Fay & D James. (eds). *The Rights and Wrongs of Land Restitution: 'Restoring What Was Ours'*. London: Routledge-Cavendish.

DRDLR. Department of Rural Development and Land Reform. 2013. Communal Land Tenure Policy (August 2013), distributed at Land Reform Policy Workshop held by the DRDLR, Stellenbosch. Available: http://www.customcontested.co.za/wp-content/uploads/2013/11/06-AUG-2013-Communal-Land-Tenure-Policy-v2.pdf. (Accessed 15 July 2014).

DRDLR. Department of Rural Development and Land Reform. 2014. Statement by the Minister of Rural Development and Land Reform, Gugile Nkwinti, at a media briefing on the reopening of the land claims process, 1 July 2014.

Eckert BD, Strümpell C & Biner ZÖ. 2012. *Law Against the State: Ethnographic Forays into Law's Transformations*. Cambridge: Cambridge University Press.

Fay D. 2013. Neoliberal conservation and the potential for lawfare: New legal entities and the political ecology of litigation at Dwesa-Cwebe, South Africa. *Geoforum*, 4:170–181.

Gobodo N. 2014. Briefing on the reopening of lodgement of land claims to the Portfolio Committee on Rural Development and Land Reform, 20 August 2014.

Habermas J. 1987. *Theory of Communicative Action Volume Two: Lifeworld and System: A Critique of Functionalist Reason*. Translated by TA McCarthy. Boston, Mass.: Beacon Press.

Harper P. 2014. King Goodwill wants his kingdom back. *City Press*, 6 July 2014. Available: http://www.citypress.co.za/news/king-goodwill-wants-kingdom-back/. (Accessed 11 July 2014).

Klug H. 2000. *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*. Cambridge: Cambridge University Press.

Legal Resources Centre. 2014. Letter to the Office of the President re: Minerals and Petroleum Resources Amendment Bill B15B-2013 and Restitution of Land Rights Amendment Bill B35B-2013.

Makinana A. 2014. No one will be left out of land claims process, says Zuma. *Mail & Guardian*, 27 February 2014.

Mamdani M. 1996. *Citizen and Subject: Contemporary Africa and the Legacy of late Colonialism*. Princeton: Princeton University Press.

Mogale C & Thipe T. 2014. Inefficiency of land restitution process leaves many gloomy. Available: http://www.customcontested.co.za/inefficiency-land-restitution-process-leaves-many-gloomy/. (Accessed 23 March 2015).

Morphy F. 2009. Enacting sovereignty in a colonized space: The Yolngu of Blue Mud Bay meet the native title process. In D Fay & D James. (eds). *The Rights and Wrongs of Land Restitution: 'Restoring What Was Ours'*. London: Routledge-Cavendish.

Nadasdy P. 2009. The antithesis of restitution? A note on the dynamics of land negotiations in the Yukon, Canada. In D Fay & D James. (eds). *The Rights and Wrongs of Land Restitution: 'Restoring What Was Ours'*. London: Routledge-Cavendish .

Nicholson Z. 2013. District Six group to fight for inclusion. *Cape Times*, 6 May 2013.

Nini A. 2014. Kingdom to file massive land claim. *Daily Dispatch*, 11 July 2014.

Ntsebeza L. 2005. *Democracy Compromised: Chiefs and the Politics of the Land in South Africa*. Leiden: Brill.

Ntuli N. 2014. King wants Zulu land back. IOL News, 7 July 2014. Available: http://www.iol.co.za/news/politics/king-wants-zulu-land-back-1.1715260. (Accessed 11 July 2014).

Oomen B. 2005. *Chiefs in South Africa: Law, Power & Culture in the Post-apartheid Era*. London: James Currey.

Ramutsindela M. 2007. Resilient geographies: Land, boundaries and the consolidation of the former bantustans in post-1994 South Africa. *The Geographical Journal*, 173(1):43–55.

Sambumbu S. 2010. Social history, public history and the politics of memory in re-making 'Ndabeni"s pasts. Unpublished MA thesis. University of the Western Cape, Cape Town.

Select Committee on Security and Constitutional Development. 2014. The Traditional Courts Bill: Summary of the process to date, 5 February 2014. Available: http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2013/TCB_SCSummaryProcess_04022014.pdf. (Accessed 7 September 2014).

Verdery K. 2003. *The Vanishing Hectare: Property and Value in Postsocialist Transylvania*. Ithaca: Cornell University Press.

Weinberg T. 2013. Overcoming the legacy of the Land Act requires a government that is less paternalistic, more accountable to rural people. *Journal of the Helen Suzman Foundation*, 70 (October):33.

Zenker O. 2012. The juridification of political protest and the politicisation of legalism in South African land restitution. In J Eckert, B Donahoe, C Strümpell & ZÖ Biner. (eds). *Law Against the State: Ethnographic Forays into Law's Transformations*. Cambridge: Cambridge University Press.

Legislation

Communal Land Rights Act 11 of 2004. Available: http://www.ruraldevelopment. gov.za/phocadownload/Acts/communal%20land%20rights%20act%2011%20 of%202004.pdf. (Accessed 7 September 2014).

Communal Property Associations Act 28 of 1996. Available: http://www.justice.gov. za/lcc/docs/1996-028.pdf. (Accessed 7 September 2014).

Constitution of the Republic of South Africa, 1996. Available: http://www.gov.za/ documents/constitution/constitution-republic-south-africa-1996-1. (Accessed 28 March 2015).

Restitution of Land Rights Act 22 of 1994. Available: http://www.justice.gov.za/lcc/ docs/1994-022.pdf. (Accessed 7 September 2014).

Restitution of Land Rights Amendment Act 15 of 2014. Available: http://www. ruraldevelopment.gov.za/legislation-and-policies/file/2697-restitution-of-land-rights-amendment-act-15-of-2014. (Accessed 7 September 2014).

Traditional Leadership and Governance Framework Act 41 of 2003. Available: http:// www.saflii.org/za/legis/consol_act/tlagfa2003431/. (Accessed 7 September 2014).

Cases cited

Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others. CCT 40/15. Available: http://www.constitutionalcourt.org.za/site/Casedocs/CCT40-15/Summary/CCT%2040-15%20-%20LAMOSA%20v%20Chairperson%20of%20NCOP%20(Pre-hearing%20media%20summary).pdf. (Accessed 7 March 2016).

Tongoane and Others v National Minister for Agriculture and Land Affairs and Others (11678/2006) [2009] ZAGPPHC 127; 2010 (8) BCLR 838 (GNP) (30 October 2009). Available: http://www.saflii.org/za/cases/ZAGPPHC/2009/127.html. (Accessed 7 September 2014).

Tongoane and Others v National Minister for Agriculture and Land Affairs and Others (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010). Available: http://www.saflii.org/za/cases/ZACC/2010/10. html. (Accessed 7 September 2014).

Chapter 3

CUI BONO? A POLITICAL-ECONOMY ASSESSMENT OF 20 YEARS OF SOUTH AFRICAN FREEDOM

Antoinette Handley

> *Studies of state and development tend, with depressing predictability, to conclude ... that the rich are benefiting and the poor are getting screwed ... This is not exactly a surprising finding, of course ... But what if politics is really not about expressing indignation or denouncing the powerful? What if it is, instead, about getting what you want? ... And this is really quite a different question.*   James Ferguson (2011:399)

Cui bono? (literally, who stands to gain? Or who benefits?) is the classic political-economy question (see Blyth 2009:2). It is also the classic whodunnit question, famously posed by Sherlock Holmes as he surveyed a murder scene, seeking clues as to who had committed the crime. In the latter sense, it is clear that the question is far from neutral, and it even approaches an accusation. It is grounded in the assumption that once you understand who has benefited from an action then you might have a sense of who committed the crime. In other words, there might be a causal relationship between a given set of outcomes and the key agents who benefited from those outcomes.

It is tempting to apply this technique to an analysis of the South African political economy, 20 years into the country's democratic era, and to argue that just as there are clearly identifiable groups who benefited disproportionately from the post-apartheid dispensation, those same groups might therefore be key suspects (aka 'agents of change' or 'causal drivers') as we seek to understand how this new order was wrought. As Ferguson (2011) implies above, the appeal of this approach is obvious: first, it accords with the view that the political economy is deliberately structured in such a way that a privileged elite benefit, while the poor 'are getting screwed'. As with a crime scene in Victorian London, similarly perhaps with the new South Africa, one can look to those who have benefited and you may have some idea of whom to blame.

This chapter argues that although this points us towards some important answers, it does not provide the entire explanation. Although it may be appropriate to start with indignation and denunciation, Ferguson suggests that we need to move beyond that and to ask a different question to get to what we want, namely how do we begin to craft a different kind of political economy altogether? There are winners and losers in the new South Africa. But who to blame for this is less clear, and how to fix it perhaps harder still.

This chapter considers what, in a political-economy sense, has transpired in the 20 years since the 1994 advent of multiparty democracy. Using Sen's (1999) notion of 'development as freedom', what freedoms have been generated and for whom? And in this, how do we weigh the impact of political transformations against larger structural continuities? In short, what have the distributional outcomes of 20 years of democracy in South Africa been, and, specifically, what has happened to key indicators of social welfare, including poverty and inequality? A modernisation-type analysis would predict that democracy would have brought a more accountable state, one that is better able to alleviate poverty, reduce inequality and generate growth. By contrast, a Fanonian view predicts a darker set of outcomes, where new elites step into the structures and habits of the former rulers. Alas, the world is a messier place than either view predicts, as revealed by the decidedly mixed empirical outcomes reviewed here.

Before proceeding, a disclaimer: any examination of what has happened to distribution broadly speaking and poverty in particular depends a great deal on how one defines and measures these concepts. (Charles Meth (2006:384–390) reminds us that what we conclude depends on where one draws the poverty line — and indeed whether one employs a 'poverty line'-type measure at all. For a more critical view, see Du Toit 2011). Which set of data or surveys one relies upon also shapes the conclusions reached (see Bhorat & Kanbur 2006:2–3). Once one gets into the details, it can be much harder to make definite judgements about distributional outcomes than the casual observer might expect. Nonetheless, judgements are called for and despite qualifications, caveats and quibbles, most observers of the South African political economy agree on certain broad conclusions: that two key ways of conceiving of both poverty and inequality have, for much of the last two decades, moved in opposite directions.

Allow me to explain: poverty may be perceived purely in terms of the amount of money an individual or household has access to. This is commonly referred to as an income measure of poverty (ie a measure of the amount of money being received and spent by individuals or households). This figure however misses much about the lives of the poor. Analysts therefore often refer also to non-income measures of poverty. This is a measure, by contrast, of the access an individual or household has to a broader basket of goods, including services, public goods and the basic necessities of life, such as shelter, healthcare, transport, adequate nutrition, education and so on.
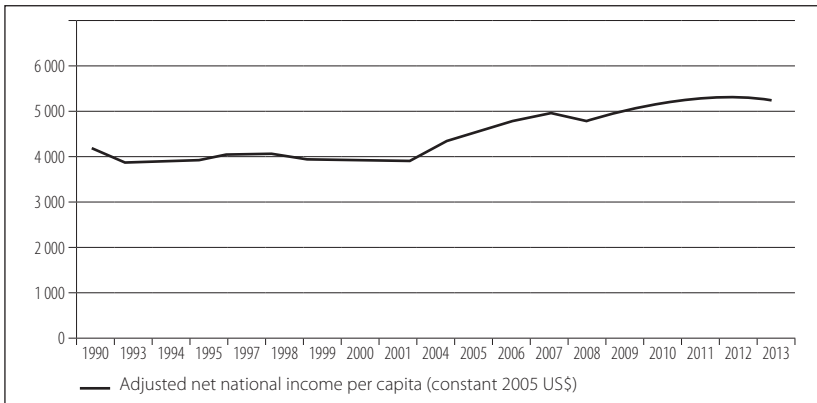
These two measures of poverty have, for a good deal of the last two decades in South Africa, moved in contrasting directions.[1]
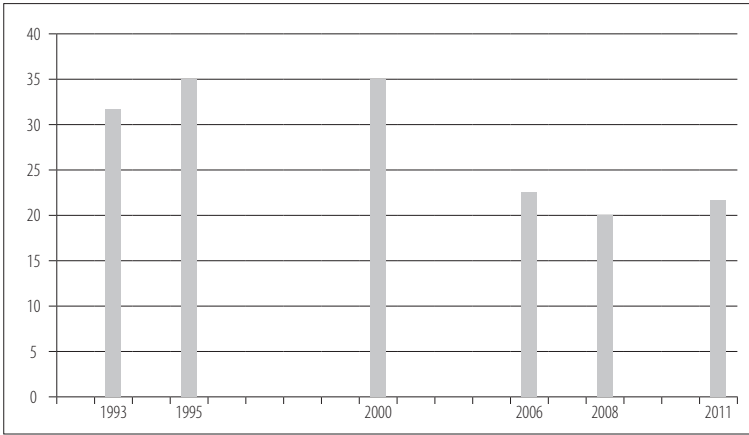
Figure 3.1: Poverty headcount ratio at $1.90 a day (2011 PPP) (% of population)
Source: World Bank, World Data Bank: World Development Indicators.
**Note:** Data not available for all years.

Figure 3.2: Per capita income in South Africa
Source: World Bank, World Data Bank: World Development Indicators.

On the one hand, levels of income poverty worsened in the first decade of democracy and then seemed to improve (see Figures 3.1 and 3.2). This improvement can be seen in the decline in the number of people living on less than $2 a day; the improvement is even more dramatic for those living on less than $1.25 a day. Nonetheless, large numbers of people continue

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1   A closely analogous argument may be made for inequality, which can also be measured in income and non-income terms.

to live in extremely poor conditions, especially given that South Africa is defined as a middle-income country. (South Africa's poor are considerably worse off than the poor of most comparable middle-income countries.) Overall, then, the assessment of what has happened to income poverty at the 20-year mark is mixed.
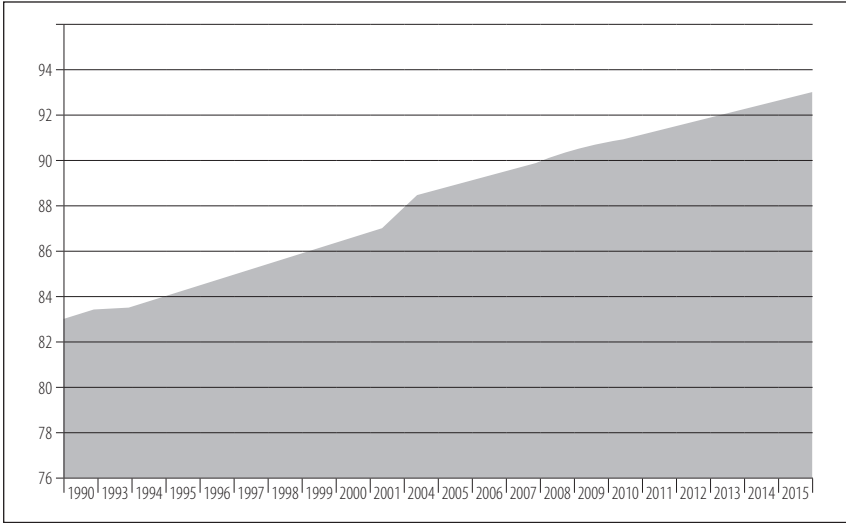
Figure 3.3: Improved water source (% of population with access to safe water)
Source: World Bank, World Data Bank: World Development Indicators.
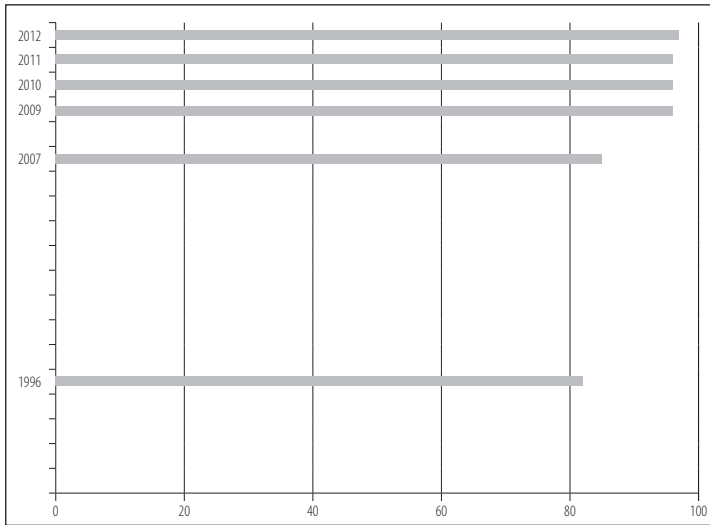
Figure 3.4: Literacy rate, adult total (% of people ages 15 and above)
Source: World Bank, World Data Bank: World Development Indicators.
Note: Data not available for all years.

A less equivocal, more encouraging picture emerges if we examine non-income measures of poverty, which have mostly improved (ie these measures have declined). Figures 3.3 and 3.4 give some sense of the improvements in access to select services. Health outcomes are one important exception here: life expectancy, for example, has dropped to 56 years (measured by the World Bank's World Development Indicators) — but this would seem to be almost entirely a result of the exceptional impact of HIV/AIDS on South Africa's overall disease burden (see Figure 3.5). The more general picture is that poor South Africans have experienced a real improvement in access to a range of public goods.
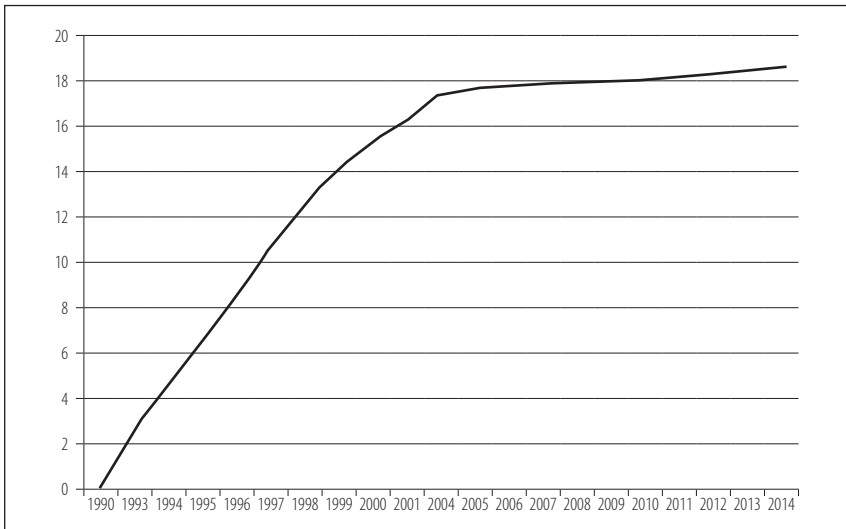
Figure 3.5: HIV prevalence, total (% of population, ages 15–49)
Source: World Bank, World Data Bank: World Development Indicators.

These apparently contradictory tendencies have occurred against a very particular backdrop of, first, relatively modest growth in the overall economy post-1994 and, second, a significant and concerted redirection of government spending in favour of social spending (Aaron 2011:161). In terms of gross domestic product (GDP) growth, the country's overall performance has unquestionably been healthier post-1994 than previously. This is not saying much, however, given the severely depressed nature of the South African economy for a good deal of the 1980s and early 1990s. The modest uptick in growth that occurred post-1994 may well have been, at least in part, due to the stability and improvements in business confidence that followed the country's successful political transition but it was also the beneficiary of favourable international conditions, including

the commodities boom, which cheered the fortunes of many developing countries. Overall economic growth between 1995 and 2010 averaged 3.3% per annum (Office of National Development and Planning, undated:7). Economic growth is depicted in Figure 3.6; growth is even less impressive when considered in conjunction with the population growth rate.
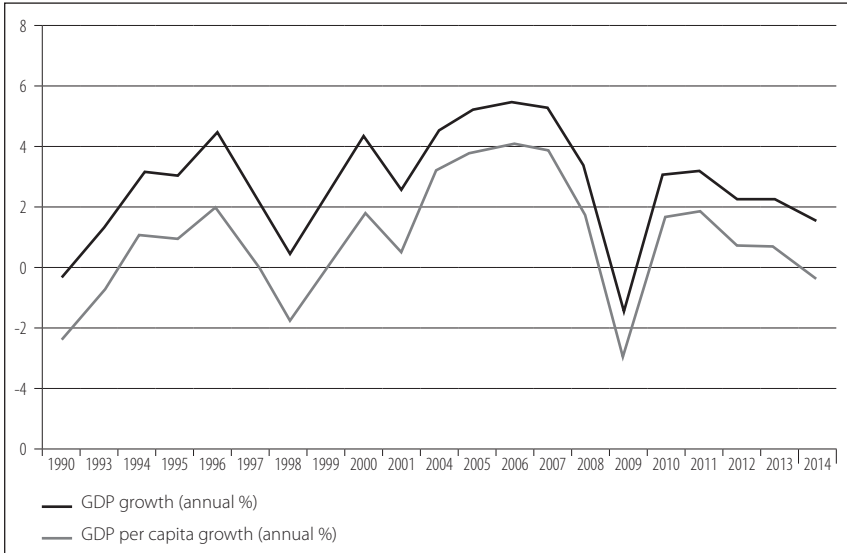
Figure 3.6: South Africa's economic growth
Source: World Bank, World Data Bank: World Development Indicators.

At the same time, there seems to have been a discernible and quite concerted redirection of government spending under the new ANC government to favour the poor, and meanwhile the government has achieved significant successes in cutting the deficit. This has been described as an 'exemplary' record in economic management (Harber 2014:21), 'remarkable' (Aaron 2011:136) and a 'resounding success [for fiscal policy]' (Shapiro & Tebeau 2011:11). The tragedy is that this effort has not produced better results (see Sandbrook (2014:162–165), for a discussion of similar efforts with different outcomes in Brazil). For the most part, white South Africans continue to do well, flourishing in the economic security that their disproportionate access to skills and hence lucrative employment brings them. Some black South Africans — especially those who one way or another have been able to access a better-quality education and thus acquire those key skills — are likewise doing very well. Very large numbers of South Africans, however, continue to struggle with poverty and unemployment, and the poor continue to be disproportionately black African and female, and concentrated in certain regions and areas.

What has the government done?

It will surprise many to learn that there was a degree of redistribution in government spending and broad economic policies already by the late apartheid era (see Chapter 2 in Seekings and Nattrass 2006; on taxes, see Lieberman 2003). Most readers will be more familiar with the chronology of major economic policy initiatives and shifts undertaken post-1994. These may be summarised as follows: shortly after coming to office in 1994, the new government adopted the Reconstruction and Development Programme (RDP), an ambitious proposal for addressing the historical and racialised inequalities in government social spending across a multiplicity of policy areas. It was not clear, however, how these initiatives would be paid for, where the bureaucratic capacity to administer such a challenging programme would come from and which needs would be prioritised. Within relatively short order, the RDP was supplanted as the most important piece of government policy on the economy, first by the macroeconomic strategy Growth, Employment and Redistribution (GEAR) and then by various others, including the Accelerated and Shared Growth Initiative for South Africa, and the National Development Plan (NDP) (Seekings & Nattrass 2015:80–105).

These developments initially shifted the focus of broader economic policy to achieving an overall cut in the level of government indebtedness and reassuring the markets that the government had no radical intentions, in the hope of facilitating growth and investment in the economy. In short, the ANC government, to the surprise of many, adopted a relatively sober, even conservative, approach to overall macroeconomic management, with one important exception: sharply increased funding of the social wage.[2] This increase was achieved, even during a period of overall reduction in government spending, by a redirection of that spending. Having made impressive cuts to the deficit early on, by the 2000s the government could afford to loosen government spending. While general government consumption expenditure as a percentage of GDP has risen modestly, the country's total debt service, as a share of gross national income (GNI), has not changed much (World Bank, World Development Indicators). This has resulted in 'important movements in access to public services and in social indicators ... The post-1994 era is notable for the rapid reallocation of resources through the fiscus from rich, White households to poor, African households' (Bhorat & Kanbur 2006:6). The African Development Bank

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2   The social wage comprises both direct social-welfare payments (ie pensions, child-support grants, and disability grants), and government spending on a range of public services, including electricity, water, transport, housing subsidies and health benefits.

characterises the access of the South African population to services overall as 'fair' (ADB 2009). Seekings (2011:38) describes a 'dramatic improvement in access to water, electricity and housing', and increased spending on social assistance during Thabo Mbeki's two presidential terms.

What we have, then, are two apparently contradictory trends. First, there has been a significant increase in the share of government spending going to social welfare (especially to education, healthcare, housing and social-security grants) but, secondly, this has occurred in conjunction with a decrease in the overall level of deficit spending and government indebtedness (facilitated by the redirection of government spending — for example, away from the military and administration — and by some significant improvements in tax collection).[3]

This is impressive enough on its own, but the increased social spending also seems to have been relatively redistributionist. There was a discernible increase in spending on black Africans (and a decline in spending on other groups). There was also increased allocation to rural areas (both black African and rural households are typically poorer in South Africa) (Bhorat & Kanbur 2006:7). Bhorat & Kanbur (2006:8) therefore declare both 'absolute and relative pro-poor growth in access to services and assets, when measured against per capita household expenditure'. Van der Berg (2009:2) identifies 'a large and significant shift of social spending from the affluent to the more disadvantaged members of society' and social spending that is 'relatively well targeted to poor people'.[4] Seekings (2011:37) finds that 'about 60% of social assistance expenditure went to households in the poorest income quintile'. Again, this is well and good but we should push our enquiry further: has this increase in social spending on poorer households actually produced the desired outcomes in terms of reduced poverty and inequality?

Distributional and welfare outcomes

Education

According to figures published by the South African government, South African teachers are among the highest paid in the world in purchasing power parity (PPP) terms (NPC 2011:14). This is not, however, reflected in world-class educational outcomes. Indeed, the country's education system

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3   Military expenditure, for example, has dropped, both as a percentage of GDP and as a
     share of government spending (World Bank, World Development Indicators).
4   Van der Berg (2009:8) finds that 'social spending per capita grew in real terms by 21% from
     1995 to 2000 and a further 40% in 2000-2006'.

has continued to produce weaker results than might be expected — even worse than in other places with equivalent or lower socio-economic profiles (for example, poor learners in South Africa perform more poorly in tests than poor learners elsewhere in Africa) (NPC 2011:15).

The reasons for these disappointing outcomes are disputed, but a broad body of opinion sees ongoing problems as rooted in poor teacher performance and low quality of school leadership (NPC 2011:15). Much of the increased spending on education was allocated to deracialising teacher salaries (which effectively meant raising the salaries of African teachers in particular to match the higher salaries formerly earned only by white teachers). This has not automatically translated into better teaching or better conditions in the classroom. In fact, as Seekings & Nattrass (2006:359) argue, 'in the short term at least, the major beneficiaries of increased educational spending were teachers (who are not poor), not the students sitting in their classes'. By way of illustration, almost 20% of teachers are absent from schools on Mondays and Fridays; at month end this figure climbs to one-third. This is particularly damaging for those students at formerly black African rural schools, which continue to be among the weakest-performing institutions. There are on average three and a half hours of teaching a day in predominantly black African schools, as opposed to the more standard six and a half hours at former white schools (NPC 2011:15).

These figures suggest the persistence of race as a key determinant of the likelihood of a student graduating from high school with the skills and grades necessary to succeed in tertiary education (NPC 2011:16). They also provide a very clear illustration of the *cui bono* argument — namely that particular constituencies close to the state have benefited most significantly post-1994 and may be shaping policy choices in a way that militate against a more significant transformation of welfare outcomes. Critics here argue that the teachers' union has effectively held education policy and spending hostage, with devastating results for learners.

Education outcomes are closely tied to the country's unemployment patterns, discussed in the next section.

Unemployment

South Africa is often inaccurately described as having experienced 'jobless growth' since 1994. It is not that there has been no increase in the absolute number of jobs — there has been. Instead, the problem is that the number of new jobs has not matched the increase in the size of the labour force (Bhorat & Kanbur 2006:3). 'Unemployment,' Herbst & Mills (2015:9) tell us, 'has actually risen from the 31.5% recorded in 1994 to almost 36% in 2014' — and it has risen (albeit unevenly) for all races and for both sexes.

This more recent record should be put in the broader historical context of decades of economic stagnation and dismal employment growth before 1994. During the period 1970 to 1994 overall employment grew by 17.6% while the population doubled. Crucially, black African employment was 'static in absolute terms' (NPC 2011:10). New jobs have therefore been created in the new South Africa (especially from 1995 to 2008) — but not enough of them to make a difference. The result is one of the highest unemployment rates in the world (Hoogeveen & Ozler 2006:59), and one that disproportionately affects black Africans (see Figure 3.7) and those living in rural areas (and the former homeland areas in particular). Rates of unemployment in the black community are five times greater than in the white community (ADB 2009). In addition, the younger the person, the less likely he or she is to have a job, especially one in the formal sector. In South Africa unemployment is disproportionately a youth phenomenon, and is especially pronounced among the black African youth.
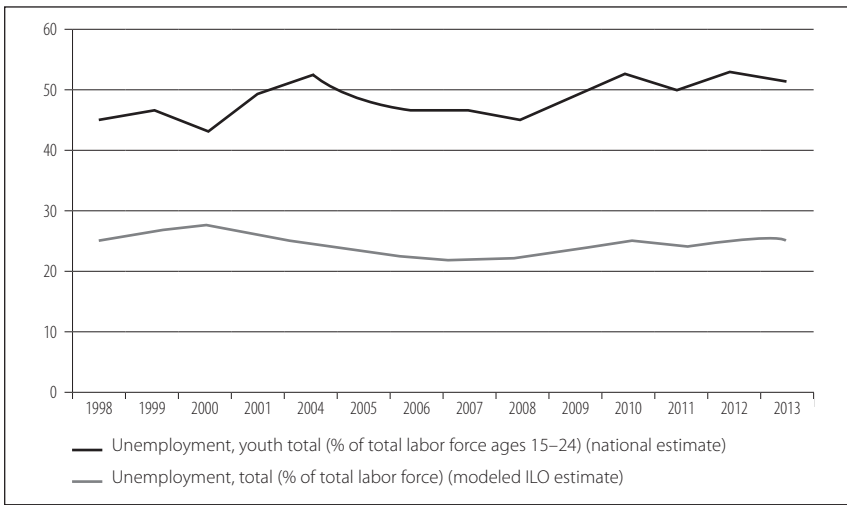
Figure 3.7: **South African unemployment rates**
Source: World Bank, World Data Bank: World Development Indicators.

The horrible irony is that these high rates of unemployment occur in an economy that struggles to find enough highly skilled workers to fill the available positions. There is a profound mismatch between the level of skills required in the job market and the results of the country's educational system.

Poverty

There is disagreement about what has happened to poverty levels in South Africa post-apartheid. As implied above, much of this stems from different

definitions of the word. However, part of the problem is also that that there has not been a single or consistent set of trends with regard to poverty over the last 20 years. The first post-apartheid decade certainly seemed to be characterised by an increase in income poverty. Writing in 2005, Bhorat & Kanbur (2006:4), for example, argued that there was 'overwhelming' evidence that income poverty nationally had increased on average in the decade after apartheid. Writing some six years later, Seekings (2011:21) argued that the country's first three governments (ie up to 2006) had 'only modest success' but that subsequently income poverty did seem to have fallen. And over the more recent period, early indications are that overall levels of income poverty may have finally have begun to show some real declines (Seekings & Nattrass 2015:37–43).

Part of the complexity is also that there are different trends with respect to absolute and relative indicators, with important results for overall inequality. Bhorat et al (2009:30, 2) find that in the country's first decade as a democracy, the economy experienced absolute pro-poor growth (meaning that the income of the poor increased). However, it did not experience relative pro-poor growth (ie the income of the poor did not rise faster than the income of those better off: on the contrary, the income of the ultra-poor was the lowest of all, whereas that of the higher deciles rose much faster, thus exacerbating inequality).

What is less disputed is that income poverty in South Africa continues to be higher than is acceptable, as well as racialised in at least some respects. Between 1995 and 2000, for example, 'absolute income relative poverty levels amongst African-headed households increased, while for non-African households it either remained stagnant or declined' (Bhorat & Kanbur 2006:4). As Zuern (2011:55) reminds us, 95% of the poorest quintile of South Africans are black. Although all incomes seem to have increased on average over the past 20 years, 'white individuals ... experienced the largest increases in their real income' (Bhorat et al 2009:5). This is consistent with what I discuss below about the uneven distribution of skills across the country's population and the highly unequal opportunities available to those who possess and those who lack crucial labour-market skills.

It is important, then, to enquire a little deeper into these figures. Chillingly, for the poorest 40% of the population, the contribution of wage income and remittances to overall household income fell, to be replaced, if at all, by social grants (NPC 2011:9). This signifies that worsening income poverty seems to be connected directly to what is going on in the labour markets and, in particular, to high levels of unemployment. Government policy is doing much to mitigate those negative developments, but the underlying driver is to be found in the broader economy. A similar set of dynamics is at work if we look at inequality outcomes.

Inequality

There is mixed news here too. First, inequality per se has not dramatically declined. Indeed, if anything, it seems to have increased[5] (see Figures 3.8 and 3.9). The country's Gini coefficient numbers worsened recently as the share of the economy owned by the top 20% has increased and that owned by the bottom 20% has shrunk. Between 1995 and 2015, the share of income received by the top 20% hovered almost unmoved at around 70% of total wealth, while the share enjoyed by the top 10% of the population increased (Herbst & Mills 2015:12; see also Figure 3.8). The contribution of wages and growing income inequalities in wages is pertinent here, especially the yawning gap between the 50th and the 90th percentile of wage earners (Bhorat et al 2009:22). So too is the distinction between those in waged labour and those not: 'Under apartheid, opportunities were defined by race,' Herbst & Mills (2015) explain. However, 'Two decades on, wealth and levels of inequality are defined by the employment status of South Africans' (Herbst & Mills 2015:183). Depressingly, a review of more recent developments suggests that 'South Africa is now the most consistently unequal society in the world' (Bhorat et al 2009:8).
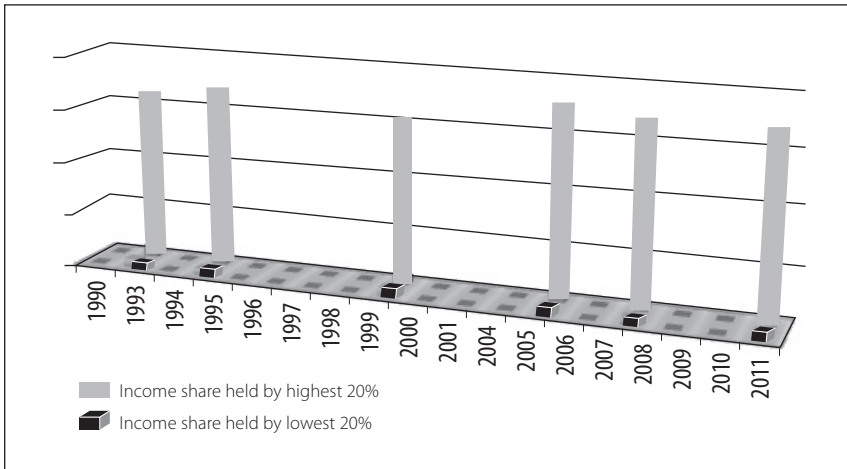
Figure 3.8: Income share for the richest and poorest South Africans
Source: World Bank, World Data Bank: World Development Indicators.
Note: Data not available for all years.

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5   This is not unprecedented. Zuern (2011:10) notes that the return of democracy to Latin America was also accompanied by an increase in inequality.

As with poverty however, there has also been some dispute about whether and how the nature of the country's inequality has shifted. After the first decade or so of democracy, a dominant account suggested some 'deracialisation' of the country's notoriously racialised economic inequality: 'the proportion of black people in the top 20% of income earners has risen from about half to well over two-thirds between 1995 and 2009' (NPC 2011:7). The early evidence seemed to show that although inter-racial inequality was declining, there had been an increase in income inequality *within* racial groups. In particular, the dominant factor seemed to be the new impact of a small number of high-earning black Africans: '... the overall driver of income inequality in post-apartheid South Africa continues to be the rising inequality amongst African households' (Bhorat & Kanbur 2006:5; Hoogeveen & Ozler 2006:74). These shifts were directly attributed to the labour market, and in particular to the 'fast-changing racial composition of higher-earning occupations ... especially in the public sector' (Seekings & Nattrass 2006:344). This is therefore an account that again points to the impact of a rising black elite and middle class. Moreover, it sits easily with the critique that policymaking in the new South Africa was being driven to serve the interests of this small constituency, rather than the broader public good (for analysis along these lines, see, for example, Marais 2001).
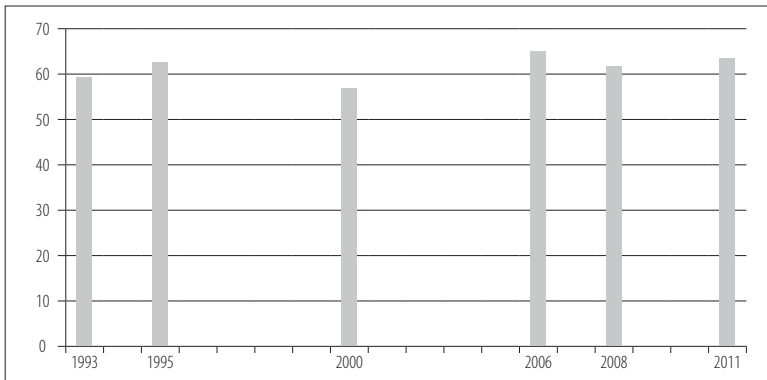
Figure 3.9: South Africa's Gini scores (World Bank estimate)
Source: World Bank, World Data Bank: World Development Indicators.
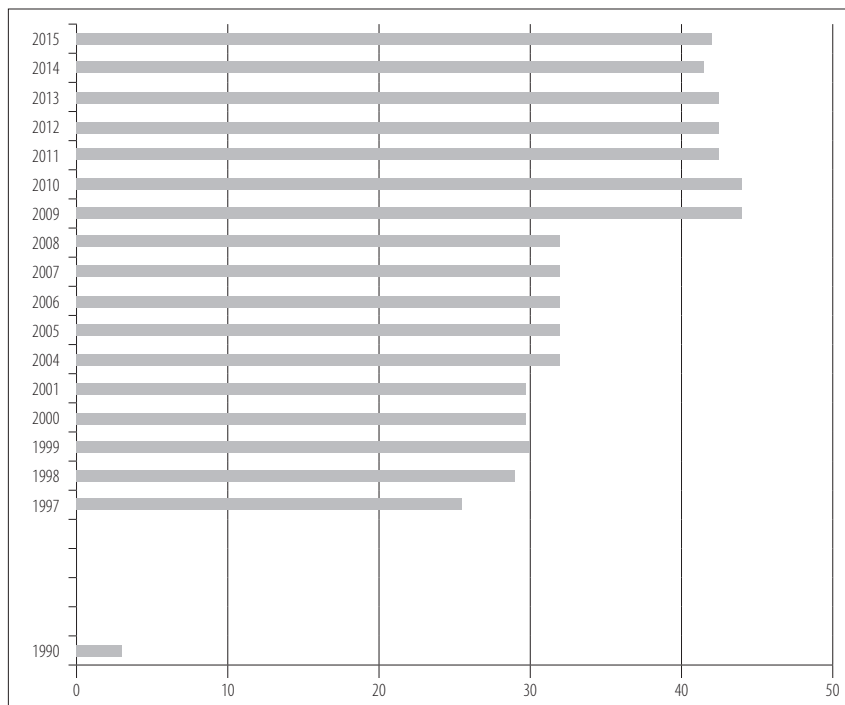Note: Data not available for all years.

More recently, however, this analysis has been questioned. Evidence of declining within-group inequality emerged from census data or Incomes Expenditure Studies data. By contrast, the Theil index produces contrary results, suggesting instead that between-groups inequality has not shrunk but has actually grown (Bhorat et al 2009:10–11). As Bhorat et al (2009:11)

point out, this 'suggests that the past view that the rise in income inequality has been mostly caused by the growing African affluence relative to the increasing unemployment within the African population has to be reconsidered'.

Beyond this one issue, however, there is a great deal of agreement. Most analysts agree, for example, that significant variations in political economy outcomes persist for different groups/categories of people. Poverty, for example, is still racialised to a significant degree: the majority of low-income households are still black and the very poorest income decile is almost exclusively black. This is consistent with the evidence that although incomes on average have improved, they have not improved equally for all. In 1995 the median per capita expenditure for black Africans was R333 per month; for white people it was R3 443 per month. By 2008 the median expenditure per capita for black Africans had increased to R454 per month, but had increased even more for white people to R5 668 (NPC 2011:9). So, although the upper end of the income spectrum may have been somewhat 'deracialised' (meaning that there is now a significant African presence in the top income earner category), at the lower end poverty remains overwhelmingly a black African phenomenon (NPC 2011:26).

These unevennesses in welfare outcomes also manifest themselves along gender lines. Overall, women continue to earn less than men and poverty rates are higher among female-headed households (NPC 2011:9). Bhorat et al (2009:36) suggest that this may be because women continue to be disproportionally employed in low-skilled (and hence very poorly paying) kinds of work. Even compared to men in similar work, however, women earn less than men. There may be some exceptions in the ranks of elite women where the gender wage gap seems to be shrinking (Bhorat et al 2009:36). Certainly, the political representation of women in elected office, regardless of level, has increased sharply during the era of democracy (see Figure 3.10). The African Development Bank, for example, notes that 45% of the representatives in the National Assembly are women, and that the enrolment of girls in primary and secondary school is comparable to that of boys (ADB 2009:2).

Figure 3.10: Proportion of seats held by women in the National Assembly (Parliament) (%)
Source: World Bank, World Data Bank: World Development Indicators.
Note: Data not available for all years.

Finally, unevennesses also manifest themselves spatially, across provinces and within them, in the gap between rural and urban areas. This seems to be driven not only by very different opportunities for work and wages, but also by inconsistency in the provision of public services. The diagnostic report of the NPC (2011) notes 'enormous variations in the ability of provinces and municipalities to deliver [public] services effectively'. Overall,

> urban municipalities tend to perform better than those in rural areas and especially those located in the former homelands. Provincial and local governments are therefore least able to deliver services in the poorest and historically most marginal areas where those services are most needed. This ... leads to a strong sense of injustice in society.   (NPC 2011:24)

It is striking that, as a share of the total number of poor, the proportion of rural poor is declining. This does not mean, however, that poverty is being effectively tackled in the countryside. What it reflects instead is the twin processes of deagrarianisation and accelerating urban migration (including

movement from the poorer to the richer provinces) as people seek to escape their poverty (Bhorat & Kanbur 2006:4; Seekings & Nattrass 2006). This view is supported by evidence that inequality has increased more sharply in urban areas than in rural areas. Indeed, Bhorat et al (2009) describe rising urban inequality as 'a significant shaper' of overall income inequality:

> Limited employment and income generating opportunities force migrants to migrate from rural areas to urban areas or from poorer to relatively better-off provinces. Most migrants have little formal skills and once in urban areas are restricted to low paying jobs or are compelled to work in the insecure informal sector.   (Bhorat et al 2009:13)

Once again, it seems that what is crucial to welfare outcomes is whether or not the poor are able to access employment opportunities, and what kind (and, in particular, whether or not they have the skills to secure work that will pay them a reasonable wage).

Having said all of that, while income inequality appears to have increased across the board, there is some evidence that non-income inequality decreased 'significantly', at least between 1993 and 2005 (Bhorat et al 2009:23). Improved access to public services seems to be the key driver here, again playing a crucial role in preventing large numbers of households from slipping under. And there is strong evidence, if one compares the Gini coefficient with and without the impact of grant income, that the country's social wage has actually contributed to lowering South Africa's appalling inequality levels (Bhorat et al 2009:47; see also Seekings & Nattrass 2015:24). Indeed, as Bhorat et al (2009) go on to demonstrate, in the absence of those grants, the very poorest South Africans, far from experiencing growth in their income, would have slipped backwards (Bhorat et al 2009:50, 1).

Overall, however, Van der Berg (2009: 23) concludes that 'social spending has often not had the desired results in terms of social outcomes' and this may be because of those larger forces emanating from the labour market and from severe wage income inequality. Wage income is of course merely one of a number of sources of income for households; other sources of income may include self-employment, state grants, income from capital and private pensions. Nevertheless, wage income is generally the largest single source of income and has accordingly contributed the most to the growing income inequality as 'highly skilled workers are rewarded with high wages, while lower and unskilled workers are either poorly paid or unable to find employment' (Bhorat et al 2009:18). Moreover, Borat et al (2009:20) find that the contribution of wage inequality to income inequality grew in the decade after 1995.

What can we conclude about the relationship between government programmes and their political-economy outcomes?

The relationship between government efforts and key outcomes

An almost infinite number of variables may affect a country's broad economic outcomes. For South Africa, not least among these were the profound impact of the country's HIV/AIDS epidemic (South Africa is currently the country with the largest number of HIV-positive citizens in the world) and the fallout from the 1998 global financial crisis. Nonetheless, it seems reasonable to conclude that government actions have been powerful in shaping political-economy outcomes. This appears to be especially true with respect to the mitigating impact of the social wage (even if this impact has been to stave off disaster rather than to fundamentally transform the lives and prospects of the very poor).

Charles Meth (2006), for example, argues that government policy has assisted a large number of people in absolute poverty (at the very bottom of the pile) but has been much less effective as you consider the strata above this (those who are still poor but not the poorest of the poor). That is to say, there have been much smaller declines in the poverty rate as one shifts the poverty line upwards:

> the most striking [result] … is the huge number of people lifted out of absolute poverty by the two cash grants for which verifiable data are readily available [state old-age pension and the child support grant]. Next in line in order of size of impact, are health and housing. Although individually, the other components of the social wage do not have much of an effect on the numbers in poverty, taken together, they do contribute to the achievement of the substantial impact the social wage has …   (Meth 2006:432–433)

When it comes to health outcomes, the government's own planning commission concedes that while 'in general terms, health financing in South Africa is progressive, … healthcare access and outcomes are not progressive' (NPC 2011:20). These results have, at least partly, to do with the country's two-tier healthcare system (a high-quality private system for the middle class and elite, and an overstretched public system for the rest). The impact of HIV/AIDS has also been particularly deleterious for health outcomes. The pandemic has 'completely changed the nature of the disease burden in South Africa' and the total number of deaths has increased sharply since the mid-1990s, doubling between 1998 and 2008 (NPC 2011:20). Consequently (and as with the education sector), despite government spending a good deal of money here, South Africa's health outcomes remain poor by world standards.

Health outcomes therefore provide a good illustration of a broader dynamic with respect to government policy and broader economic outcomes in terms of how unevennesses in public service provision (re)produce inequality in social-welfare outcomes. The ability of government to deliver public services effectively continues to be a challenge, not only in health, but also in many other sectors. And, as government itself concedes, 'the effects of poor service delivery are concentrated on the poor and especially on women' (NPC 2011:22).

Overall, however, when we consider what has changed and what has not in terms of poverty and social-welfare outcomes, as Bhorat & Kanbur (2006:6) argue, it is 'changes in the labour market [that] remain possibly the key transmission mechanism for understanding the shifts in income poverty and inequality'. At work here is not only the very small number of jobs available for those lacking in skills, but also the sharply unequal levels of remuneration payable to skilled and unskilled workers. In other words, although government-provided welfare, social services and redistribution are of course important, it is ultimately 'jobs, stupid' that count.

What is critical to understand here is the overall structure of the economy and how this feeds directly into the persistence of extremely high unemployment. Charles Meth (2006:435) nicely summarises the three major variables that affect the unemployment rate: the rate of growth of the potential workforce (and of the population more broadly); the workplace participation rate (ie what percentage of the population chooses to enter the labour market); and the rate of growth of unemployment. As Meth goes on to point out, government of course does not enjoy direct or immediate control over any of these — and especially not the third.[6] In other words, there are broader structural phenomena at work that greatly exceed the capacity of targeted government interventions to balance them out, and much less to resolve them, in the short term.

These structural phenomena are long-standing and have been key characteristics of the country's economy since the 1970s. At least in part, this has to do with the economy progressively moving away from primary and secondary sectors to be rooted increasingly in the tertiary sector with its demand for a much more skilled labour force (Bhorat et al 2009:21). Even as the capacity of the economy to employ large numbers of unskilled workers has shrunk dramatically, the labour market is demanding an ever increasing share of skilled and semi-skilled labour. Yet the country's education system

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6   Public works programmes, for example, can absorb temporarily only a very small fraction of the unemployed but beyond the civil service that is about as much as government can do directly here, and even the largest of such programmes are not likely to make much of a dent in the country's significant employment backlog.

is dismally failing to produce these skills. It is important to understand the structural significance of the resultant skills deficit in South Africa: there is a chronic undersupply of skilled labour (so that qualified personnel here can attract premium salaries and remuneration) sitting cheek by jowl with a gross and growing oversupply of unskilled labour.

In this sense, the country's broader economic crisis and the severe constraints on its ability to shift welfare and distributional outcomes are closely linked to the ongoing difficulties of effectively transforming not only the post-apartheid education system but also what Seekings & Nattrass (2006) refer to as the country's overall 'distributional regime'.[7] Yes, there is recent evidence of some limited new growth of graduate unemployment because South Africa is graduating too many students with the wrong kinds of tertiary qualifications (Bhorat & Kanbur 2006:6), but that is not the major dynamic at work. Overwhelmingly, the problem is a profound mismatch between the economy and an education and social system that is producing large numbers of job seekers with very low skills, and for whom there is an ever shrinking number of jobs.

Equally, the problem does not seem to be that government is not sufficiently prioritising social-welfare outcomes or critical public goods, like education. On the contrary, government is routinely spending over 5% of GDP and close to 20% of overall government spending on the education sector alone (World Bank, World Development Indicators). If you examine a series of annual budgets, it is evident that the South African government has increased its expenditure here markedly — but, as argued above, most of these funds have gone to increasing teacher salaries and have thus far produced very little by way of dramatically improved outcomes for students. As Seekings and Nattrass (2015:24) remind us, 'the distributional consequences of these public services were far less pro-poor in practice than they seemed at first'.

Furthermore, these outcomes seem to have a good deal to do with the nature of the South African economy and the kind of growth that the country has experienced over the last 20 years. Bhorat & Kanbur (2006:12–13) characterise this economic growth as follows:

> *South Africa's economic growth post 1994, while being positive, has induced a significant maldistribution of income. The latter has been large enough to erode any income benefits to the poor and ultimately*

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7   The authors describe this as 'encompassing the combination of economic, labour-market, and industrial policies that affect the economic growth path ... as policies that redistribute more directly by means of the provision of public welfare and the benefits in kind of other forms of government spending'. (Seekings & Nattrass 2006:341)

yielded an increase in national poverty levels. Hence, despite a growth in per capita expenditure between 1995 and 2000, this growth has not been sufficiently high to offset the accompanying rise in inequality. Put differently, most of the gains in income through economic growth in the post-apartheid period in the form of reduced poverty levels have been dissipated through increased income inequality.

Speculations and conclusions

A version of the *cui bono* argument that I outlined at the start is often articulated in South African policy debates. It proceeds more or less as follows: if you want to understand why the new South Africa has not seen dramatically better improvements in the lot of the poor and a more emphatic decline in the incidence of inequality, you need only look to the role of certain politically powerful constituencies close to the state, who have manipulated policymaking to directly favour their own interests, rather than those of the poor more broadly. The education sector arguably provides a vivid example of this: while teachers have secured remarkably stable and relatively well-rewarded employment, the system is failing millions of students who emerge onto the labour market woefully ill-equipped to secure anything similar for themselves. Analogous arguments are made about the role of the new black middle class and elite, pointing, for example, to the benefits that policies like broad-based black economic empowerment offer a small number of well-placed individuals, while doing little to attend to the plight of ordinary South Africans.[8] Put another way: simply look to those constituencies who have benefited from the new South Africa, and you will have a causal explanation for the country's political-economy outcomes.

There is some truth to these critiques. We can legitimately point fingers at the 'semiprivileged position of politically powerful African groups' — such as unionised teachers (Seekings & Nattrass 2006:366). However, on its own, this line of analysis can take on a conspiratorial cast, entailing at its worst an excessively negative view of the country's new black governing class as entirely rapacious and self-serving. It also omits a great deal, including the quiet persistence of white economic privilege, secured for the last two decades no longer by the legislative or ideological structures of formal apartheid, but by access to economically critical skills and human capital. It glosses over what the new government *has* achieved, especially the genuinely

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8   See Desai et al (2011:3) for a version of this argument: 'That the poor remain as large a group as ever, while a selfish new elite runs rampant, seems an intractable feature of post-liberation South Africa.'

quite impressive reorientation of large chunks of the South African fiscus. It may also ignore the uncomfortable reality that not all of these outcomes will have easy or immediate traction in terms of shaping government policy.

To acknowledge this is not to let government off the hook. Many governments face difficult circumstances in which they have to govern. Nor is it to argue that service-delivery failures or, euphemistically put, 'unnevennesses' in the provision of public goods are not immensely consequential (even devastating) for the poorest of the poor. They are. And the South African government has an urgent duty to attend to these considerations. How it should do so is much less clear.

If we are to address the challenge from Ferguson (2011), which opens this chapter, we must begin to construct a new kind of political economy better suited to producing the outcomes that we want. The problem is the profound mismatch between the country's current dominant political institutions, the overall growth trajectory of the economy and what is most likely to address the needs of the poor.

Ferguson (2015) suggests that we begin by recognising that the nature of the economy has changed, perhaps irrevocably, and not simply for South Africa. Those jobs, he seems to say, are gone and they are never coming back. He points instead to the liberatory possibilities of reconceptualising social-welfare programmes and cash payments, of reframing these not as a safety net intended to catch those in the temporary indisposition of unemployment, but instead as a 'rightful share', a permanent entitlement to what their beneficiaries need to sustain themselves (Ferguson 2015). There is much of value in this argument.

As Jesmond Blumenfeld (2014:19) has argued, however, 'without growth, the alternative — ever widening social welfare payments funded by the "better off" — is also not sustainable in the longer term'. Ultimately, it is the health and vitality of the economy writ large and the kind of jobs and growth that it can produce that will most decisively influence the fortunes of the country's poor. For while the overall tenor of government social interventions have been pro-poor, growth in South Africa has not been. The country's key decision-makers need, collectively and systematically, to begin to craft a different growth trajectory for the economy, one that privileges a different set of interests and priorities — such as broader job creation. This is not likely to sit well with those powerful constituencies that benefit from the status quo. Hence the difficulty of the task.

In the end, it is clear that we would do well to lift our gaze beyond the smoking gun, to look beyond into at least the middle distance if we seek a full explanation. In particular, we need to understand the important role played by otherwise invisible villains — like labour markets — in very

deeply shaping the prospects for poor households. The reality is that there are also larger, structural forces at work that may be harder to discern and, frankly, harder to address.

References

Aaron J. 2011. Macroeconomic policy and its governance after apartheid. In I Shapiro & K Tebeau. (eds). *After Apartheid: Reinventing South Africa?* Charlottesville: University of Virginia Press.

ADP. African Development Bank. 2009. Republic of South Africa. Results-based Country Strategy Paper, 2008–2012. Tunisia: African Development Bank.

Bhorat H & Kanbur R. 2006. Introduction: Poverty and well-being in post-apartheid South Africa. In H Bhorat & R Kanbur. (eds). *Poverty and Policy in Post-apartheid South Africa*. Cape Town: HSRC Press.

Bhorat H, Van Der Westhuizen C & Jacobs T. 2009. *Income and non-income inequality in post-apartheid South Africa: What are the drivers and possible policy interventions?* University of Cape Town, Development Policy Research Unit Working Paper 09/138.

Blumenfeld J. 2014. Two decades on: In search of growth. *Focus*, 16(20).

Blyth M. 2009. Introduction. In M Blyth. (ed.). *Routledge Handbook of International Political Economy: International Political Economy as a Global Conversation.* Abingdon and New York: Routledge.

Desai A, Maharaj B & Bond P. 2011. Introduction: Poverty eradication as holy grail. In B Maharaj, A Desai & P Bond. (eds). *Zuma's Own Goal: Losing South Africa's 'War on Poverty'*. Trenton, NJ: Africa World Press.

Du Toit A. 2011. The proper subject for poverty research is inequality. In B Maharaj, A Desai & P Bond. (eds). *Zuma's Own Goal: Losing South Africa's 'War on Poverty'*. Trenton, NJ: Africa World Press.

Ferguson J. 2011. Rethinking poverty and assistance in Southern Africa. In B Maharaj, A Desai & P Bond. (eds). *Zuma's Own Goal: Losing South Africa's 'War on Poverty'*. Trenton, NJ: Africa World Press.

Ferguson J. 2015. *Give a Man a Fish*. Durham, NC: Duke University Press.

Harber J. 2014. South Africa: *Plus ça change*. *Focus*, 21(4).

Herbst J & Mills G. 2015. *How South Africa Works and Must Do Better*. Johannesburg: Pan Macmillan.

Hoogeveen JG & Ozler B. 2006. Poverty and inequality in post-apartheid South Africa: 1995–2000. In H Bhorat & R Kanbur. (eds). *Poverty and Policy in Post-apartheid South Africa*. Cape Town: HSRC Press.

Lieberman E. 2003. *Race and Regionalism in the Politics of Taxation in Brazil and South Africa*. Cambridge: Cambridge University Press.

Marais H. 2001. *South Africa: Limits to Change: The Political Economy of Transition*. London: Zed Books.

Meth C. 2006. Half-measure revisited: The ANC's unemployment and poverty reduction goals. In H Bhorat & R Kanbur. (eds). *Poverty and Policy in Post-apartheid South Africa*. Cape Town: HSRC Press.

NPC. National Planning Commission. 2011. Diagnostic overview. Pretoria: The Presidency, Republic of South Africa.

Office of National Development and Planning. Undated. First National Development Plan 1966–1970. Lusaka: Republic of Zambia.

Sandbrook R. 2014. *Reinventing the Left in the Global South: The Politics of the Possible*. Cambridge: Cambridge University Press.

Seekings J. 2011. Poverty and inequality in South Africa, 1994–2007. In I Shapiro & K Tebeau. (eds). *After Apartheid: Reinventing South Africa?* Charlottesville: University of Virginia Press.

Seekings J & Nattrass N. 2006. *Class, Race and Inequality in South Africa*. Scottsville: University of KwaZulu-Natal Press.

Seekings J & Nattrass N. 2015. *Policy, Politics and Poverty in South Africa*. Basingstoke: Palgrave Macmillan.

Sen A. 1999. *Development as Freedom*. New York: Anchor Books.

Shapiro I & Tebeau K. 2011. Introduction. In I Shapiro & K Tebeau. (eds). *After Apartheid: Reinventing South Africa?* Charlottesville: University of Virginia Press.

Van der Berg S. 2009. *Fiscal incidence of social spending in South Africa, 2006: A report to National Treasury*: University of Stellenbosch.

World Bank, World Data Bank: World Development Indicators. Available: http://databank.worldbank.org/data/reports.aspx?source=world-development-indicators. (Accessed: 23 November 2015).

Zuern E. 2011. *The Politics of Necessity: Community Organizing and Democracy in South Africa*. Madison, WI: University of Wisconsin Press.

Chapter 4

SOUTH AFRICAN HOUSING POLICY OVER TWO DECADES: 1994–2014

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In the two decades from 1994 to 2014, the South African government received repeated praise and recognition for its housing policy, particularly from UN-Habitat (the UN Human Settlements Programme). South Africa's national Housing Department, in 2010 renamed the Department of Human Settlements, is applauded for a decisive commitment to addressing the housing backlog, which saw substantial institutional development and refinement of an extensive housing-subsidy system. However, as in other policy areas under transition, there were also failures that contribute to the complex non-linear trajectory mentioned in the opening paragraphs of this book. Implementation of the housing policy ignored many important nuances and provisions in the policy framework, persistently favouring one subsidy mechanism (for fully subsidised free-standing houses intended for freehold titling), rolling this out in a one-size-fits-all manner with severe consequences for the sustainability of towns and cities, as well as for freedoms and opportunities for those inhabiting them.

This chapter reviews South African housing policy and its shifts and challenges over the past 20 years (see Figure 4.1). With the five-year span of political terms and the symbolic importance of the culmination of the first and the second decade of democratic ANC-led government, there are two distinct decades in South African politics. Each decade ended with a government-led review and introspection.

In the case of housing policy, the first decade (1994–2004) closed off opportunities for active citizen involvement in solving the housing problem, favouring instead a strong delivery role by the state, though one that was heavily reliant on private-sector developers. However, this decade led to an opening for policy adjustment. To some extent, this was triggered by a landmark socio-economic rights ruling in the Constitutional Court in 2000, which required housing policymakers to return to the drawing board. The court had found that the dominant focus (despite diversification of housing delivery mechanisms on paper) on a long-term plan to deliver large numbers of uniform housing units meant that the immediate needs of those living in informal settlements or in other desperate conditions were not being addressed. The conclusion of local-government restructuring in the course of this decade also saw demands for devolution of the housing function to local-government level and the transfer of the role of subsidised housing

project assembly or initiation from the private sector to local government. It was hoped that this would result in better integrated projects — human settlements, rather than merely housing.

The second decade began with the adoption in September 2004 of a five-year plan — titled the Comprehensive Plan for the Development of Sustainable Human Settlements, prefaced 'Breaking new ground' (BNG) (DoH 2004a). This sought to introduce ways in which the state could move beyond the delivery of standardised housing to better respond to actual demand, whether in the form of emergency interventions or informal-settlement upgrading, with a central role afforded to community participation. BNG therefore signalled a widening in the national Housing Department's mandate to facilitate 'human settlements' and an intention to depart from the delivery of dormitory housing developments on cheap tracts of land on the urban periphery. Although not without its critics, and largely unimplemented in its five-year term, BNG has outlived this period and is treated as policy reference alongside national initiatives, such as the 2010 presidential delivery agreements and the 2012 National Development Plan. Its alignment with policy in other spheres of government, its implementation, and in particular its ability to address the housing backlog in a responsive manner, remain a challenge at the start of the fifth term of ANC-led government.
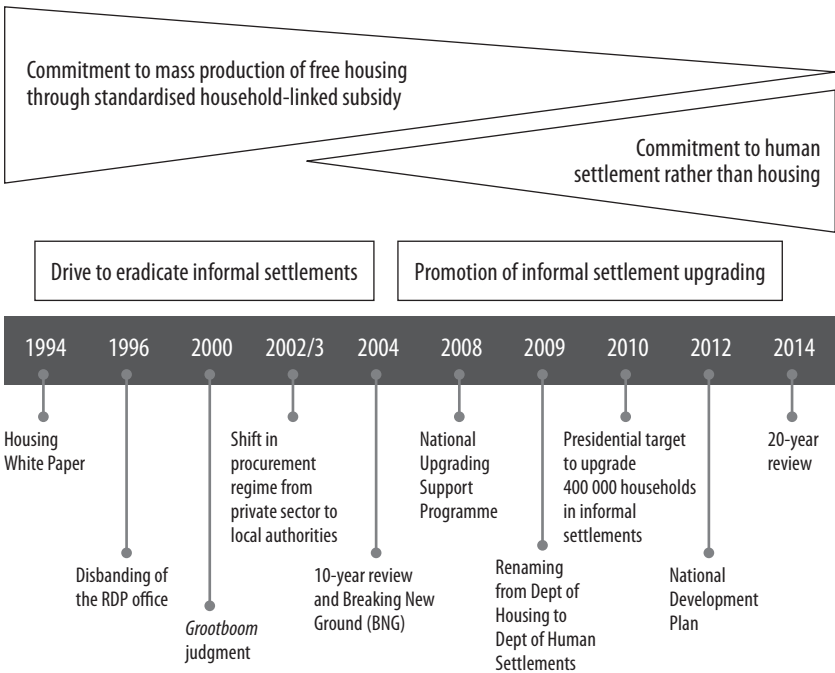
Figure 4.1: Timeline of South African housing-policy changes

A challenging start to a new policy: Setting enduring themes

Intense efforts in the first months of the new democratically elected government in 1994 were dedicated to institutional restructuring. As Gardner (1996) points out, many housing departments, ministries and housing funds existed alongside one another, catering for different groups separated under apartheid. Gardner further lists four provincial and six 'homeland' authorities, and 'over 60 national and regional state corporate institutions ... involved in housing delivery and facilitation' (Gardner 1996:87). This institutional maze was transformed into a single ministry with a single, all-inclusive policy. Roles in relation to nine new provincial departments were clarified, and a single subsidy system created.

In addition to the complex institutional machinery of apartheid, the new government also inherited a seemingly insurmountable housing challenge. The assessment on which the ANC Alliance based its Reconstruction and Development Programme (RDP) in the run-up to the 1994 elections was one of a housing and basic services crisis: 'The urban housing backlog in 1990 was conservatively estimated at 1.3 million units. Including hostels and rural areas, the backlog rises to approximately three million units. To this should be added an estimated 200 000 new households each year' (ANC 1994:22, also cited in Tomlinson 1998).[1]

To tackle this backlog, the RDP found that '[at] minimum, one million low-cost houses should be constructed over five years' in urban and rural areas (ANC 1994:22). The RDP called for 'coherent national policy'; a 'single national housing department'; a substantial budgetary allocation; a 'national housing bank and national home loan guarantee fund'; a 'right to housing' with an emphasis on 'the rights of people living in informal settlements'; a 'mass housing programme' providing 'a wide range of housing types' and 'tenure options' with close accessibility to 'economic opportunities and to health, educational, social amenities and transport infrastructure'; 'beneficiary control'; and a role for communities, civil society and the private sector (ANC 1994:22–28). Notions of rights, emancipation through direct participation, the maximisation of urban opportunities as well as a substantial commitment to material redress normatively framed the way urban citizenship was to be given meaning in the RDP.

However, South Africa's housing policy has its roots not directly in the ANC's RDP, but in the 1992–1994 National Housing Forum (NHF) negotiations, where many of the decisions over institutional restructuring

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1   The RDP noted with concern a lack of data on the rural housing situation (ANC 1994:22).

were made. These negotiations brought together representatives of a range of stakeholders and constituencies, including private sector think tanks and lobby groups alongside unbanned political parties, trade unions and civic organisations, NGOs and certain government departments. It is widely recognised that the NHF's deliberations and outcome were dominated by the position articulately put forward by the private sector and its think tank the Urban Foundation, as well as by the apartheid-government-funded Independent Development Trust (IDT), which was created and modelled on the Urban Foundation's recommendations and delivered around 100 000 fully subsidised serviced sites before the first democratic elections in 1994 (Bond 2000; Huchzermeyer 2001; Tomlinson 2006). The NHF understood its work to have come to an end soon after the elections with the Botshabelo Accord[2] in October 1994 and the White Paper on Housing towards the end of that year. This opened 'the way for massive housing delivery' (Rubenstein & Shubane 1996:265) under the 'National Housing Subsidy Scheme which [was] cast in essentially the same mould as the earlier IDT subsidy scheme' for sites and services (Wilkinson 1998:225).

The White Paper on Housing intended housing beneficiaries to make a 'personal investment', in the form of loans or savings, to complement the government subsidy (Tomlinson 1999:292). To this end, the then Association of Mortgage Lenders and the Department of Housing signed a record of understanding (resulting from the Botshabelo Conference and Accord), committing government to stabilise the housing sector, by ensuring an end to the boycotting of bond payments, committing banks to extend loans to a larger pool of low-income earners and linking this to the government subsidy (Porteous & Naicker 2003; Tomlinson 1999). However, in Bond's (2000:140) analysis the Department of Housing's position was based on a flawed interpretation of the mortgage payment boycotts — these were legitimately directed 'against shoddy developers and the bankers that failed to bring them to the table to negotiate repairs', and were not intended to destabilise the new government, as framed by the new Minister of Housing at Botshabelo. Essentially, the agreements made at Botshabelo 'reduced community power' by coercing civic representatives into 'harmony' (Bond 2000:140–141). Banks, in turn, were not held to account in terms of loan and savings instruments for poorer households. Housing delivery instead proceeded without contributions in the form of loans or savings, relying

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2   The newly elected government held a summit with the private sector (banks and housing developers), and representatives of civil society to agree to key principles and undertakings. These built on the NHF negotiations and formed the basis of post-apartheid housing policy.

on the government subsidy alone. By 1999 only 5.8% of subsidies had been linked to credit (Porteous & Naicker 2003:194).

The misreading of community dissatisfaction, further community disempowerment, and the adoption of 'blunt' responses are themes that run through both post-apartheid decades of state housing intervention (Huchzermeyer 2011; NPC 2012). With the famous line in the preamble of the Housing White Paper, 'The time for policy debates is now past — the time for delivery has arrived' (DoH 1994, s 1), it was not considered legitimate in the following years to openly criticise or challenge the state in its approach to housing. Although by early 1996 there was doubt that the policy would deliver and stakeholders felt it should be reviewed, overriding concerns were that any change would delay delivery. This left the stakeholders willing to proceed, if reluctantly so (Tomlinson 1998).

Individually owned, minimally sized, free-standing housing units on 300 m^2 plots in large projects on the urban peripheries dominated early housing delivery. The units were funded through the 'project-linked capital subsidy', a supply-side subsidy made available to developers tasked with identifying land and assembling projects. Completed units were allocated to households qualifying on the basis of household income below a certain amount (R1 500 in 1994)[3] and criteria such as the existence of dependants and the household not having previously benefited from the subsidy system. The wait-listing system remained fraught throughout the two decades (CLC & SERI 2013). In effect, the project-linked subsidy was primarily used to relocate households from informal settlements, as opposed to allocating housing to those who had been on the waiting list the longest. This tendency increased in the years after 2000 when the ANC-led government embarked on a political campaign to 'eradicate informal settlements', mistakenly justifying this on the basis of a UN Millennium Development Goal slogan, 'Cities without slums' (Huchzermeyer 2011).

The project-linked subsidy was the only subsidy mechanism operational as of 1994. Community participation in these projects was limited to ensuring smooth implementation of predetermined and inflexible development components. An 'individual subsidy' for the purchase of existing properties, an 'institutional subsidy' for the construction of 'rental and co-operative housing' and a 'policy for the upgrading of hostels' were added in 1995 (Huchzermeyer 2001:312). A 'People's Housing Process' (PHP) subsidy

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3   Subsidy bands entitled households earning slightly more to partial subsidisation of these houses. See Shisaka (2011).

for 'community-based construction of top structures'[4] followed only in 1998 (Huchzermeyer 2001:312), with mixed results.

Housing delivery in the first decade lagged behind the state's target, with a particularly low output in the initial years (we discuss fluctuations in delivery in more detail below). Disappointment in the early implementation of the new housing policy was apparent after two years, especially on the part of those who were active stakeholders in the NHF (Rust & Rubenstein 1996; Tomlinson 1998). Commentators found that 'South Africa's poorest people still live in far-flung, poorly serviced townships, isolated from meaningful economic opportunities, deprived of basic social amenities and further impoverished and disadvantaged by the absence of affordable, safe and comprehensive public transport' (Rubenstein & Shubane 1996:267). Explanations for these issues at the time were 'fragmentation, incoherence and inequality' both institutionally and spatially (Rubenstein & Shubane 1996:267). The focus on the delivery of housing to 'previously disadvantaged communities' had led to 'sidelining [of] other issues such as the role of housing provision in addressing apartheid's legacy of socially and spatially divided cities which had also informed the drafting of the RDP' (Wilkinson 1998:224). This remained a criticism of post-apartheid housing delivery throughout both decades (see, for example, Sihlongonyane & Karam 2003), and is highlighted as a key challenge by the National Planning Commission's 2012 National Development Plan 2030 (NPC 2012).

Two years into the first term of ANC-led government was not only a time for concern over the direction of post-apartheid housing delivery. The year 1996 also saw the much criticised closure by the ANC government of its RDP Office in the Presidency (with its key function of coordination) and abandonment of approaches under the RDP, such as support for the so-called RDP forums as participatory mechanisms in all communities, which had been promoted by the Mass Democratic Movement in the late apartheid years (Huchzermeyer 2001). This limited degree of active citizen participation is a problem that has lingered on, and in 2012 — in the context of rising civil dissatisfaction — it also featured as a central concern in the National Development Plan (NPC 2012). Housing-rights litigation from 2004 onwards led to judgments that persistently required the state to engage meaningfully with those affected by housing interventions, but these judgments have not succeeded in changing an entrenched institutional approach since 1996 of top-down state intervention in housing, with participation merely as a formality (Huchzermeyer 2011). Closure of the

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4   'Top structure' refers to the house, separate from its stand and infrastructure.

RDP Office in 1996 also 'undermined urban spatial policy — and urban policy more generally — as responsibilities were divided between various departments, without any strong centre' (Todes 2006:57). This, too, has proven difficult to change (NPC 2012). Ironically, the houses funded through the project-linked subsidy, while meeting few of the principles in the RDP of 1994, came to be known as RDP houses — a popular label invoking the promise of free housing delivery. The term gradually crept into official terminology, later juxtaposed by the 'BNG house' — in reference to the larger, better-quality subsidised house after 2004 (Adebayo 2011:11).

Absence of a state commitment to the delivery of rental housing came to the fore in the late 1990s through research as well as concerns raised by unions. The Rental Housing Act 50 of 1999 (s 2) requires government to 'encourage investment in urban and rural areas that are in need of revitalisation and resuscitation' (see also Pottie 2003:442). A Presidential Job Summit held in 1998 led to an agreement for a pilot project for 15 000 units per year in well-integrated housing projects with a high percentage of rental units and links to job creation. The Job Summit Housing Projects were spread across South Africa (Porteous & Naicker 2003; Pottie 2003; Tomlinson 2001). However, there were concerns that the delivery of rental housing was more expensive and complicated than subsidised units for ownership and given that it was targeted to the 'not-so-poor', there were 'questions of equity in resource allocation' (Porteous & Naicker 2003:219). In the context of an inadequate private-sector provision of rental housing, state responsibility in relation to slightly better-off households (those in the so-called 'gap market' with incomes too high to qualify for RDP housing and too low to qualify for mortgage funding) remains a theme in policy debates.

Impetus for policy change

The first legitimate trigger for change in housing policy and implementation was one of justice. At the time when the RDP was abandoned and shortcomings in the housing policy becoming evident, South Africa concluded its constitutional negotiations and adopted the new Constitution of the Republic of South Africa, 1996 (replacing an interim Constitution of 1993). In its Bill of Rights, this included 'the right to have access to adequate housing' (s 26(1)). Whereas the RDP's wording under 'right to housing' was that '[o]ne of the RDP's first priorities is to provide for the homeless' (ANC 1994:23), the 1996 Constitution is cautious on the state's obligation, foreclosing homeless people's immediate claims for an adequate house: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right' (s 26(2)). Nevertheless, the constitutional right to housing protects

existing homes, whether formal or informal: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions' (s 26(3)).

The state's obligation in progressively realising the right to housing, particularly in relation to the homeless or those living in intolerable conditions, began to be clarified by the Constitutional Court in 2000, in *Government of the Republic of South Africa and Others v Grootboom and Others*. This case concerned a demand for temporary shelter and basic services for 390 adults and 510 children (represented by Irene Grootboom) who had been evicted by the Cape Town municipality from land that they had occupied out of desperate need. In his judgment, Justice Yacoob said:

> *The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognize that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focused on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.*[5]

The *Grootboom* judgment did not result in a significant alteration to the national housing policy or subsidy scheme. However, along with the findings of the democratic government's review of its first decade, it informed two of the new programmes introduced under the BNG document, which was adopted at the start of the second decade in 2004, along with a 'Grootboom allocation' in the national housing budget (Langford & Kahanovitz 2010). These were the department's National Programme: Housing Assistance for Emergency Circumstances (DoH 2004b)[6] and National Programme: Upgrading of Informal Settlements (DoH 2004c). Both programmes were centrally concerned with poverty and vulnerability, exempting beneficiaries from the housing-subsidy qualification criteria, but their uptake was slow and contested (Huchzermeyer 2011; Kahanovitz 2008). Both programmes were rewritten and incorporated under 'incremental programmes' after the formulation of the new National Housing Code of 2009 (DHS 2009).

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5   *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

6   The National Programme: Housing Assistance for Emergency Circumstances (DoH 2004b) provides a review of the *Grootboom* judgment in its introductory overview.

A second, weaker trigger for change in housing policy and implementation stemmed from in-depth evaluation. By the early 2000s, 'a considerable body of research and commentary on the housing programme' had been produced by consultants and researchers at universities and various research institutions (Charlton & Kihato 2006:260). The national Department of Housing sought to harness research findings towards policy review, commissioning additional reviews of the impacts and perceptions of the first decade of housing delivery. Emerging themes or concepts from the research were 'housing as an asset', and related to this the quality of houses and of the settlements in which they are located; 'integrated development', linking houses to transport and social amenities; and the overarching framework of 'sustainable human settlements' (Charlton & Kihato 2006:260). However, in Charlton & Kihato's (2006) analysis, these notions were not adequately incorporated into the much awaited policy review. Khan's (2010) account of the run-up to the adoption of the BNG programme in 2004 points to influences and considerations other than research, with forerunners of BNG in several shelved policy drafts and strategies since 1999. The BNG document itself highlights the need to align housing policy with shifts in the wider policy environment (DoH 2004a:7).

Breaking New Ground and its mixed reception

Five months into the ANC-led government's third term, Cabinet approved the Comprehensive Plan for the Development of Sustainable Human Settlements (as mentioned, prefaced as BNG). BNG sought to provide a better response to demand, thus departing from the delivery of a uniform product — the RDP house. It also sought to entice the private sector back into partnership with the government by removing bottlenecks and introducing a subsidy for bank-financed housing for the gap market. It sought to improve the linkage of fully subsidised housing to the housing market by reducing the eight-year prohibition on the sale of subsidised housing to five years.

BNG gave local government the 'lead role in negotiating the location of housing supply to facilitate spatial restructuring', while also referring to various spatial initiatives at the level of national government (DoH 2004a:10). Municipalities were to become the 'primary implementing agencies' (DoH 2004a:15). BNG announced a commitment to developing new funding mechanisms for the provision of social and economic amenities to be provided with housing, departing from the 'housing-only approach' of the first decade (DoH 2004a:15). In addition to the already mentioned programmes for emergency housing and upgrading of informal

settlements,[7] BNG sought to introduce particular plans for 'stimulating the residential property market'; 'spatial restructuring and sustainable human settlements'; 'social (medium density) housing'; 'rural housing'; 'institutional reform and capacity building'; 'housing subsidy funding system reforms'; and 'housing and job creation'.

Criticisms of BNG centre on the absence of a 'clear direction with respect to the difficult political issues of land ownership, the land market' and property rights, and an inadequate relationship with poverty alleviation (Charlton & Kihato 2006:259). Another associated issue is inadequate support for self-help. In Adebayo's (2011:4) analysis, the BNG regressed by further limiting choice and reducing 'self-help energies'. She raises concern over the government's 'apparent reversion to the role of provider in its implementation, as well as exaggerated political messages that frame the government as provider of housing' (Adebayo 2011:13).

BNG as a whole received little promotion from the national Department of Housing. The document neither appeared on the department's website nor was it disseminated to housing departments at provincial- and local-government level. It was ignored in the first years following its adoption (Huchzermeyer 2011:230). The troubled N2 Gateway project in Cape Town, initially identified as a pilot under the Upgrading of Informal Settlements Programme, became the lead pilot of BNG and the main reference point to BNG (Huchzermeyer 2011; Khan 2010). It was also closely linked to the political campaign for the eradication of informal settlements by 2014. Eradication came to mean the removal of informal settlements, and at best their replacement with formal housing, which was often unaffordable to the informal-settlement residents, as exemplified by the N2 Gateway Project (Huchzermeyer 2011). Embarrassment surrounding the failures of the N2 Gateway Project led to a complete silence descending on this project at the beginning of the fourth political term in 2009 (the year in which the Department of Housing was renamed Human Settlements). Later, the incoming Minister of Housing in 2014 voiced an intention to focus on mega-projects, and announced plans to revive the N2 Gateway as a lead pilot project (Sisulu 2014).

In the context of a politics of eradication, which intensified in the course of the five-year political term starting in 2004, the Upgrading of Informal Settlements Programme, which sets out to minimise disruption to people's lives and requires relocation only as a last resort, remained on the shelf despite formal inclusion into the Housing Code. It wasn't until 2008 that an

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7   These were generally welcomed – see Huchzermeyer & Karam (2006).

NGO initiative resulted in the first application under this programme, which was for the Hangberg informal settlement, in Cape Town. At the same time, Cities Alliance agreed to fund the first years of a National Upgrading Support Programme, later incorporated into the national Department of Human Settlements (Huchzermeyer 2011). It was not BNG, but a presidential initiative in 2010 to commit national departments to delivery agreements that led to the promotion and gradual implementation of the Upgrading of Informal Settlements Programme. Outcome eight set the target to improve the lives of 400 000 households through informal settlement upgrading by 2014. Alongside the Housing Development Agency, the National Upgrading Support Programme was tasked with providing support and building capacity to implement informal-settlement upgrading (Huchzermeyer 2011).

Towards the end of the second decade, informal settlement upgrading had become a central mandate of the Department of Human Settlements, underlined by outcome eight and the National Development Plan. The National Treasury (2013:732), in its 2013 report on national expenditure, sets performance indicators for the Department of Human Settlements. These relate to the accreditation of municipalities to perform housing functions; technical assistance to municipalities for the upgrading of informal settlements; new housing units completed; new serviced sites completed; new households upgraded in informal settlements; land prepared for development of human settlements; affordable housing loans granted and extended; and rural settlements provided with sanitation. The National Treasury (2013:733) also refers to a 'green paper for human settlements' being drafted 'to support the National Development Plan's vision'.

Looking back: Reviewing fluctuations in housing delivery

With the ANC-led government's promise in 1994 of redress to South Africans disadvantaged by apartheid, in particular the promise of 1 million houses in its first five-year term, housing delivery in post-apartheid South Africa has been target-driven. As a result, annual progress against the delivery target is monitored and delivery achievements are widely publicised by the national department. As shown in Figure 4.2, based on the department's figures, delivery has fluctuated over the two decades since 1994. As of 2002, serviced sites, without top structures, began contributing substantially to the number of units delivered, although the bulk of the output has always remained sites with top structures. Together, serviced sites and top structures are referred to as 'housing opportunities', acknowledging that even where top structures are provided, these are starter houses for

beneficiaries to improve over time. The delivery of serviced sites and top structures has followed the same trends in numbers, suggesting similar bottlenecks or delivery obstacles. What the data does not show is how the later, subsidised addition of top structures (ie conversion from serviced site to site with top structure) is counted.
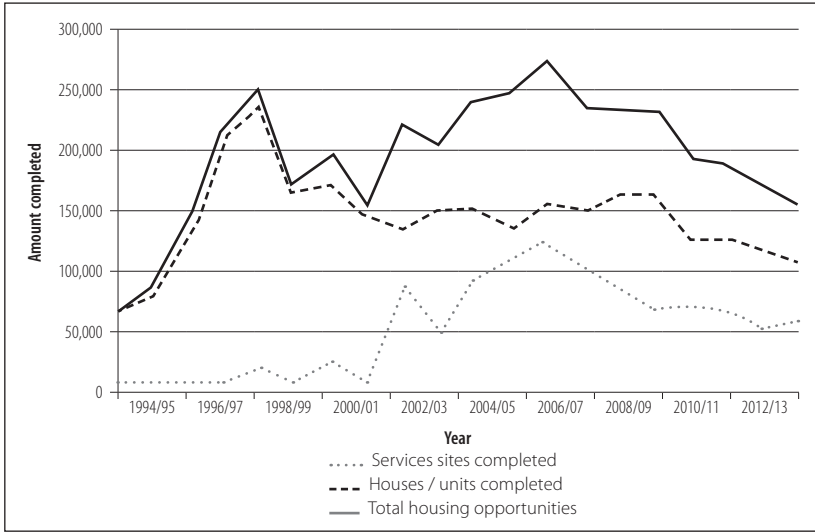
Figure 4.2: Serviced sites and housing units completed
Source: Adapted from DHS (2014).

The highest peak of delivery of combined housing opportunities (ie serviced sites and sites with top structures) occurred in 2006/07. Serviced sites contributed to this substantially, 2006/07 being the peak year in their delivery. Meanwhile, sites with top structures peaked in 1998/99, with the figure of over 235 000 units a year never being replicated since (see Table 4.1). The initial target of 1 million houses was met after seven years (not five), with a small contribution of serviced sites without top structures. However, the second million followed in five years. Of this second million, serviced sites made up 30%. The third million was achieved four years later, again with a 30% contribution from serviced sites. This was followed by a slowdown, which the incoming Minster of Housing in the ANC's fifth term of government has raised concerns about and seeks to reverse through a target of delivering 1.5 million houses within her five-year term, which ends in 2019 (Sisulu 2014).

Table 4.1: Annual numbers of serviced sites and housing units completed between 1994 and 2014, indicating delivery peaks

Year	Serviced sites completed	Houses/units completed	Total housing opportunities	Cumulative housing opportunities completed
1994/95	0	60 820	60 820	60 820
1995/96	0	74 409	74 409	135 229
1996/97	0	129 193	129 193	264 422
1997/98	0	209 000	209 000	473 422
1998/99	12 756	235 635	248 391	721 813
1999/2000	0	161 572	161 572	883 385
2000/01	19 711	170 932	190 643	1 074 028
2001/02	0	143 281	143 281	1 217 309
2002/03	82 286	131 784	214 070	1 431 379
2003/04	42 842	150 773	193 615	1 624 994
2004/05	87 284	148 253	235 537	1 860 531
2005/06	109 666	134 023	243 689	2 104 220
2006/07	117 845	153 374	271 219	2 375 439
2007/08	82 298	146 465	228 763	2 604 202
2008/09	68 469	160 403	228 872	2 833 074
2009/10	64 362	161 854	226 216	3 059 290
2010/11	63 546	121 879	185 425	3 244 715
2011/12	58 587	120 610	179 197	3 423 912
2012/13	45 698	115 079	160 777	3 584 689
2013/14	48 193	105 936	154 129	3 738 818
Total	**903 543**	**2 835 275**	**3 738 818**	

Source: Adapted from DHS (2014).

The official figures presented in Figure 4.2 and Table 4.1 have not been independently verified and should be read with caution, as indicative rather than entirely conclusive. As noted in the BNG document in 2004, monitoring and evaluation were not robust in the first decade: 'Limitations in the ability of the Department of Housing and the National and Provincial

Treasuries to reconcile monitoring of monies spent against products delivered mean that there is not sufficient confidence in monitoring information' (DoH 2004a:27). BNG sought to reverse this through new systems and procedures for the monitoring of subsidy expenditure, improved monitoring of lending trends, land utilisation, quality of houses, performance of housing institutions and by tying municipalities into monitoring obligations (DoH 2004a). With an envisaged shift in BNG of responsibilities to municipalities to be accredited for housing functions, the department was to take on primarily a 'policy formulation, monitoring and facilitation' role (DoH 2004a:22). In 2013 the department reported ongoing shortcomings in monitoring of projects and allocation of funds, particularly related to sharing of responsibilities for housing delivery between different spheres of government (DHS 2013:19). Monitoring of course is required not only against numbers, but against the more complex BNG goal of achieving sustainable human settlements. Though already employing on-the-ground verification for delivery numbers, the department again committed to improving its overall monitoring functions (DHS 2013:44).

Budgetary allocations to housing delivery from the Treasury mirror the fluctuations in housing delivery, with an increase up to 1997/98, a decline to the period of 2001 to 2003 (Pottie 2003:435) and an increase again from 2004 to 2007 (Magoro & Brynard 2010:6). Budgetary allocations, in turn, mirror the capacity to deliver and are therefore responses to complex dynamics within the sector. For a brief analysis of these dynamics, we draw on published housing policy literature, which has, to some extent, fed recommendations into official reviews. The literature relates the decline in housing delivery to the policy changes, particularly where these changes proved to be inadequate responses to shortcomings that had come to light.

Local government restructuring taking place from 1994, and only fully completed with the local government elections in 2000, meant that this sphere of government played little role in the initial housing delivery, and the delivery machinery was distant from the reality on the ground. The Housing Act 107 of 1997 'sought to rectify the situation' by devolving the responsibility for housing, and requiring 'all spheres of government to give priority to the needs of the poor ... and to consult meaningfully with individuals and communities' (Pottie 2003:441). Furthermore, housing delivery was to ensure affordability, sustainability, and options in housing and tenure (Pottie 2003:441). However, responsibilities remained 'blurred between the provinces and local authorities', and these challenges continue well after the adoption of BNG in 2004, which required an even 'more sophisticated institutional response on the part of local government' (Tomlinson 2011:420).

Back in 1998 it had been announced that a new 'procurement regime' was to see capacitated local authorities as 'developers of low-income housing projects with effect from April 2002' (Charlton & Kihato 2006:263). This is understood as an active shift away from the heavy reliance on the private sector, as negotiated in the NHF (Charlton & Kihato 2006:264). This shift, justified partly because of perceptions of inadequate performance by the private sector, and the spatial dislocation of housing projects, coincided with a withdrawal of large contractors from housing. Their unease was the result of new procedures, such as compliance with environmental management legislation, and financial risk related to delays in township establishment and transfer of title deeds (Charlton & Kihato 2006). At the same time, political expectations for better-quality units sat at odds with the increase in construction costs but an absence of inflationary adjustments in the housing subsidy (Charlton & Kihato 2006). A combination of these factors explains the first major downturn in delivery after 1998/99.

In 2000 a new preferential procurement system saw small, inexperienced emerging contractors winning tenders, but they were 'unable to satisfy the requirements of project management' (Magoro & Brynard 2010:13). This shift also saw a 'loss of economy and efficiency in procurement' and a paralysis in implementation (Magoro & Brynard 2010:11), suggesting that this contributed to slow delivery just after 2000. Although delivery did increase after 2003, the output could have been higher. The Presidency and the Treasury raised concerns over under-expenditure of housing budgets, related to 'stalled housing projects' (Khan 2010:223). Although this could explain the delivery dip in 2003/04, Khan (2010) notes that over the 600 000 units in stalled projects still appeared in the official listing of 'subsidies approved' or housing units 'completed or under construction'.

Another factor that is understood to have slowed housing delivery was the introduction in 2002 of a mandatory beneficiary contribution for subsidised housing, in the form of a cash contribution or, alternatively, sweat equity (the contribution of labour) through participation in PHP (or aided self-help) projects (Carey 2009; Khan 2010:200; Tomlinson 2006:92). Although justified as a response to the lack of a sense of ownership displayed by beneficiaries of fully subsidised houses, the amount of R2 479 was calculated as the deficit between the subsidy amount at the time and the cost of building to the minimum standard of the National Home Builders' Registration Council (Shisaka 2011:11). Once the mandatory payment was introduced, difficulties of finding qualifying households for RDP housing units resulted in 'provinces and local authorities … redefining normal developer driven projects as PHP projects' (Carey 2009:3).

Through this practice, which became known as 'managed PHP', beneficiaries were exempted from the cash contribution, sweat-equity contributions were handled flexibly or as optional and 'developers could be enticed back into housing projects' (Carey 2009:3). This sparked concern. A first amendment in 2003 was to provide a savings mechanism for households to save towards the R2 479 and allowed the amount to be paid any time before transfer of the title deed. A second amendment in 2005 exempted households earning less than R1 500 (Shisaka 2011). As with the income qualification criteria,[8] the cash contribution was not adjusted annually to inflation. NGO advocacy ultimately led to the introduction of an Enhanced People's Housing Process under Incremental Interventions as part of the 2009 Housing Code (DHS 2009).

Housing policy in South Africa is a complex field with socio-spatial, economic, political, legal, institutional and technical dimensions, and a rich literature accumulated over the past two decades. The initial policy was negotiated under strong influence from the private sector with an initial leading role for developers. Active citizenship was poorly accommodated in the early policy iteration, and injustice towards those in most desperate need triggered the first return to the drawing board. While continued sidelining of citizen voice has become evident in so-called 'service delivery' protests (see the chapter by Anver Saloojee in this book), the relationship between the private sector and government has continued to receive attention in housing policy. This relationship shifted as a result of a range of dynamics, including changing intergovernmental roles and capacities, and is reflected in the output. The delivery of new housing projects still relies heavily on participation by private-sector contractors.

In this chapter, we have not engaged in depth with the complex terrain of housing finance, advances or bottlenecks in unlocking bank finance, or with the social-housing sector that has sought to deliver housing under alternative forms of tenure (eg rental, rent-to-buy or cooperative ownership) through not-for-profit housing associations. With increasing pressure to restructure and densify South African urban areas, social-housing initiatives will have an important role to play. However, the strongest national priority appears to be the upgrading of informal settlements. This has seen a substantial shift in the second decade of the ANC government from a repressive eradication drive to an approach that supports the implementation of upgrading. The

8   Only once, through BNG in 2004, the initial R1 500/month income qualification criterion for fully subsidised housing was amended to R3 500, with a collapse of the other income bands that had qualified beneficiaries to a part subsidy (DoH 2004a:8).

other important housing-related imperative as we progress into the next decade is spatial restructuring in a way that maximises urban opportunities through redistributive housing investment.

References

Adebayo P. 2011. Post-apartheid housing policy and a somewhat altered state role: does incremental housing still have a place in South Africa? *The Built and Human Environment Review*, 4:3–16 (special issue 2).

ANC. 1994. *The Reconstruction and Development Programme. A Policy Framework.* Johannesburg: ANC. Also available at: https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02126.htm. (Accessed 1 November 2014).

Bond P. 2000. *Elite Transition: From Apartheid to Neoliberalism in South Africa.* Pietermaritzburg: University of Natal Press; London: Pluto Press.

Carey S. 2009. *Success at a Price: How NGO Advocacy led to Changes in South Africa's People's Housing Process.* Johannesburg: Planact; Toronto: Rooftops Canada/Abri International; Cape Town: Good Governance Learning Network.

Charlton S & Kihato C. 2006. Reaching the poor? An analysis of the influences on the evolution of South Africa's housing programme. In U Pillay, R Tomlinson & J du Toit. (eds). *Democracy and Delivery: Urban Policy in South Africa*. Cape Town: HSRC Press.

CLC & SERI. Community Law Centre and Socio-economic Rights Institute. 2013. *'Jumping the Queue', Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa.* University of the Western Cape, Community Law Centre (CLC); Johannesburg: Socio-Economic Rights Institute of South Africa (SERI).

DHS. Department of Human Settlements. 2009. The National Housing Code, Part 3: Incremental interventions. Pretoria: Department of Human Settlements.

DHS. Department of Human Settlements. 2013. *Annual report 2012–2013.* Pretoria: Department of Human Settlements. Available: http://db3sqepoi5n3s.cloudfront.net/files/131010dhsrep_0.pdf. (Accessed 28 August 2014).

DHS. Department of Human Settlements. 2014. Delivery of Serviced Sites and Houses/Units from the HSDG since 1994 (20 years) ver. 29052014. Pretoria: Department of Human Settlements. Available: http://www.dhs.gov.za/sites/default/files/documents/statistics/20%20Year%20delivery%20Sites%20%26%20Houses%20HSDG%20finalised%20ver.%2029052014.pdf. (Accessed 26 August 2014).

DoH. Department of Housing. 1994. White Paper: A new housing policy and strategy for South Africa. Pretoria: Department of Housing. Available: http://www.sapi.org.za/sites/default/files/document-library/Housing%20White%20Paper.pdf. (Accessed 24 August 2014).

DoH. Department of Housing. 2004a. 'Breaking New Ground': Comprehensive plan for the development of sustainable human settlements. Pretoria: Department of Housing.

DoH. Department of Housing. 2004b. National Programme: Housing Assistance for Emergency Circumstances. National Housing Code, Chapter 12. Pretoria: Department of Housing.

DoH. Department of Housing. 2004c. National Programme: Upgrading of Informal Settlements. National Housing Code, Chapter 13. Pretoria: Department of Housing.

Gardner D. 1996. Roles, institutional frameworks and statutory funds for housing in South Africa. In K Rust & S Rubenstein. (eds). *A Mandate to Build: Developing Consensus Around a National Housing Policy in South Africa*. Johannesburg: Ravan Press.

Huchzermeyer M. 2001. Housing for the poor? Negotiated housing policy in South Africa. *Habitat International*, 25:303–331.

Huchzermeyer M. 2011. *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa*. Cape Town: UCT Press.

Huchzermeyer M & Karam A. (eds). 2006. *Informal Settlements: A Perpetual Challenge?* Cape Town: UCT Press.

Kahanovitz S. 2008. Concerns with the handling of Chapter 12 of the Housing Code. Presentation at the Roundtable Discussion on Informal Settlements, School of Architecture and Planning, University of the Witwatersrand, Johannesburg, 11 June 2008.

Khan F. 2010. Critical perspectives on post-apartheid housing praxis through the developmental statecraft looking glass. Dissertation presented for the degree of PhD in Public Management and Planning, Stellenbosch University.

Langford M & Kahanovitz S. 2010. Just tick the boxes? Judicial enforcement in South Africa. Available: www.escr-net.org/.../Langford_and_Kahanovitz_-_South_Africa_0.pdf. (Accessed 24 August 2014).

Magoro M & Brynard P. 2010. Difficulties associated with the implementation of the preferential procurement policy in conjunction with a low-cost housing programme: A South African contextualization. *Politeia*, 29(3):4–23.

National Treasury. 2013. Estimates of National Expenditure. Abridged version. Pretoria: National Treasury.

NPC. National Planning Commission. 2012. National Development Plan 2030. Pretoria: National Planning Commission.

Porteous D. & Naicker K. 2003. South African housing finance: The old is dead – is the new ready to be born? In F Khan & P Thring. (eds). *Housing Policy and Practice in Post-Apartheid South Africa*. Johannesburg: Heinemann.

Pottie D. 2003. Challenges to local government in low-income housing delivery. In F Khan & P Thring. (eds). *Housing Policy and Practice in Post-Apartheid South Africa*. Johannesburg: Heinemann.

Rubenstein S & Shubane K. 1996. Conclusion: A mandate to build. In K Rust & S Rubenstein. (eds). *A Mandate to Build: Developing Consensus Around a National Housing Policy in South Africa*. Johannesburg: Ravan Press.

Rust K & Rubenstein S. (eds). 1996. *A Mandate to Build: Developing Consensus Around a National Housing Policy in South Africa*. Johannesburg: Ravan Press.

Shisaka. 2011. Timeline analysis – Housing subsidy assets: Exploring the performance of government subsidised housing in South Africa. A research initiative sponsored by the FinMark Trust, Urban LandMark, the National Department of Human Settlements, Western Cape Department of Human Settlements, the South African Cities Network. Johannesburg: Shisaka Development Management Services.

Sihlongonyane MF & Karam A. 2003. The impact of the national housing Capital Subsidy Scheme on the apartheid city: The case of Johannesburg. In the proceedings of the National Planning History Conference, 15–16 May 2003, Bloemfontein.

Sisulu L. 2014. Speech by LN Sisulu, Minister of Human Settlements, on the occasion of the budget vote of the Ministry of Human Settlements, 15 July 2014, Cape Town, Parliament.

Todes A. 2006. Urban spatial policy. In U Pillay, R Tomlinson & J du Toit. (eds). *Democracy and Delivery: Urban Policy in South Africa*. Cape Town: HSRC Press.

Tomlinson M. 1998. South Africa's new housing policy: An assessment of the first two years, 1994–6. *International Journal of Urban and Regional Research*, 22(1):137–146.

Tomlinson M. 1999. South Africa's housing policy: Lessons from four years of the new Housing Subsidy Scheme. *Third World Planning Review*, 21(3):283–295.

Tomlinson M. 2001. New housing delivery model: The Presidential Job Summit Housing Pilot Project. *Housing Finance International*, 16(2):24–29.

Tomlinson M. 2006. From 'quantity' to 'quality': Restructuring South Africa's housing policy ten years after. *International Development Planning Review*, 28(1):85–104.

Tomlinson M. 2011. Managing the risk in housing delivery: Local government in South Africa. *Habitat International*, 35:419–425.

Wilkinson P. 1998. Housing policy in South Africa. *Habitat International*, 22(3): 215–229.

Legislation

Constitution of the Republic of South Africa, 1996. Available: http://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1. (Accessed 24 August 2014).

Housing Act 107 of 1997. Available: https://www.westerncape.gov.za/text/2004/10/act107of1997.pdf. (Accessed 24 August 2014).

Rental Housing Act 50 of 1999. Available: http://www.acts.co.za/rental-housing-act-1999/index.html?rental_housing_act.php. (Accessed 24 August 2014).

Cases cited

Government of the Republic of South Africa and Others v Grootboom and Others [2000] (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169. Available: http://www.saflii.org/za/cases/ZACC/2000/19.html. (Accessed 13 July 2014).

JUSTICE
FREEDOM
CITIZENSHIP

FREEDOM: Overview

Dickson Eyoh

At a time when colonialism seemed consigned to the dustbin of history, when memories of the casual brutality with which colonial overlords governed their dark-skinned subjects appeared to have faded to the point where invocation of the legacies as part explanation of the woes of African postcolonial states raised eyebrows in some quarters, apartheid South Africa was a flabbergasting aberration.

The rising drumbeat of anti-apartheid opposition from the 1970s communicated to the world the monstrosity of the system and the evilness of the state that superintended it. The stream of lurid images of confrontations between ordinary people and security apparatus of the state made it difficult to comprehend why any sane person would question the justness of resistance to apartheid, or seek, for geostrategic convenience or other excuses, to postpone its inevitable death. As is typical of anticolonial nationalisms, the resistance was grounded in an understanding of the interconnectedness of socio-economic, political and cultural subjugation. Political liberty was one, albeit foundational, dimension of freedom; freedom, as an emancipatory project, called for the dismantling of intertwined structures of colonial oppression.

Anticolonial nationalisms have always found expansive definitions of freedom as the foundation of valuable lives and conditions of its possibility seductive. Such definitions postpone for later serious questions of the extent to which the heterogeneity of societies generates legitimate differences among citizens as to what constitutes a 'valuable life', and how extant socio-economic, political and cultural hierarchies form bridges and hurdles to the capacities of individuals and social groups to harness the freedoms that will enable them to realise their full human potential. This conundrum is the pivot of contested judgements of the connections between patterns of societal transformation and the fate of freedom in postcolonial transitions. It is the case with the animated debates on the gains and limitations of the promises and prospects of freedom in post-apartheid South Africa, which is hardly surprising because the transition from apartheid is quintessentially a postcolonial transition.

A fair portion of South Africans (political elites, public intellectuals, traditional leaders, subalterns etc) remain attached, with varying steadfastness, to the notion that theirs is an exceptional society. The many reasons adduced in support of this self-valuation (most prominently,

that their country has the highest level of economic development on the continent and, less so, that the hideous imprints on contemporary social arrangements of peculiarities of its colonial past) do mark South Africa in some ways as different but in no way exceptional. All societies are exceptional, in the prosaic sense that they share fundamental characteristics with but are in discernible ways different from other societies. South African exceptionalism, as a noted African scholar once remarked, easily morphs into a prejudice — a prejudice against societies located north of the Limpopo in the real/black/sub-Saharan Africa, which are the mirror of differences used to brand South Africa as exceptional. To insist that the transition from apartheid is a postcolonial transition is deliberate as it is most unoriginal. The point is not to feign a lack of surprise about the trajectory of post-apartheid society or diminish hope that the future may yet spring surprises, both pleasant and ugly, in the eternal struggle to expand domains of freedom. It is to iterate that South African exceptionalism does favour an aversion to comparative historical perspective, which is necessary for more sober and textured analysis of the evolving terrain of struggle for a freer and more just society.

Evaluation by leftist (nationalist) intellectuals of the experiences of African states north of the Limpopo the decade after decolonisation was mostly a mourning of the betrayal of the dreams of independence. Whatever the merits of the anger, the lament conflated the struggle for political independence with social revolution. It rested on a simple-minded binary of good (ie masses) versus bad (ie comprador elite) and on a narrative of postcolonial social change, as directed by the aspirations of a new black elite that was deploying state power to advance its class interests at the expense of downtrodden masses that were the principal agents of hard-won political independence. By the 1990s, as the ubiquitous crisis of African postcolonial states and failure of development became the centre of attention, powerful critiques of the totalising proclivities of nationalist discourses encouraged more nuanced analysis of the shifting constellation of social forces that shaped postcolonial trajectories, making the present disorderly and the future unpredictable.

The tone and substance of discussion of the direction of post-apartheid society has been evolving. For conservative white opinion, apartheid set the boundary between civilisation and barbarism for a white European nation precariously perched on the bottom tip of the Dark Continent. The advent of democracy and majority rule triggered the inexorable reversion into barbarism about which they had never tired of warning the civilised world. The initial salvo of progressive intellectual evaluation of post-apartheid society was, in ways very much akin to the orientation of their kin north

of the Limpopo decades earlier, anguished and turned on its own binary. It was overwhelmingly preoccupied with the shortcomings of the ANC government and seemingly unimpressed by the deep significance of the attainment of political freedom by the vast majority previously denied the basic rights of citizenship, and of the amelioration, no matter how slight, of the dire material conditions of the poor through enhanced social welfare and extension of basic services by a state burdened, like any other, with competing demands and finite resources. In its anguished narrative, the new (black) political elite, in a haste to join the white capitalist class, jettisoned the Freedom Charter's promise of collective emancipation and heartily or sheepishly embraced a regressive neoliberal agenda.

Together with the others in this book, the essays in this section attest to a new posture in progressive scholarship on post-apartheid society — a posture that signals a 'new realism' (to borrow a characterisation of the orientation of post-1980s Africanist discourse) in interrogation of the course of freedom in the post-apartheid era. Their starting point is a readiness to distinguish between the world of our aspirations and the world of everyday lived realities, between the 'world we dream of' and the 'world as it exists', with all its beauty and ugliness. The lesson of these essays is that there never is a clear road map to anyone's desirable society nor a category of political actors with the strategic acumen who, given command of a historically constituted state, can effortlessly guide the journey to a freer and more just society. As Melissa Levin shows us in Chapter 5, defining the identity of the post-apartheid nation — that is, attempting to nurture a sense of collective belonging — entails mediating conflicting memories of the past that are geared to rival positions on how to advance justice and equality. The state, whose mission it is to shape the identity of the post-apartheid nation, is the guarantor of equal rights of all citizens. At the same time, since the overwhelming majority of poor people are black, it is compelled to use 'race' as a factor in efforts to redress inherited injustices, which is imperative to expanding the scope of freedom for long-marginalised groups. Indeed, as the essays on the travails of the labour movement and the ANC Women's League, and the struggle to substantialise second-generation rights to healthcare indicate, the uneven direction of change and the prospects of freedom in post-apartheid South Africa, as in all societies, will continue to be defined by the complicated and often unanticipated ways in which collective and individual ambitions collide and are played out in varied and overlapping institutional arenas in a world in constant motion, if not chaos.

Politically engaged scholarship must always be open to surprises and work with analytic frames that recognise the significance of contingency in the ordering of social relations and political processes.

Chapter 5

FREEDOM PARK AND THE VOORTREKKER MONUMENT: COMMEMORATIVE PRACTICES BETWEEN RECONCILIATION AND DECOLONISATION

Melissa Levin

> *Tshware thebe e tiye wa Rasenate. O ya bona fatshe lenole ya ya* (Hold onto your shield, son of Rasenate. The land of your birth is under siege).[1]

The documentary *Disgraced Monuments*[2] tells the story of the seismic ideological shifts of the late twentieth century by considering what becomes of the monuments that once proudly served, in this case, the Communist regime of the USSR. For Russian art critic Victor Misiano, interviewed in the documentary, 'All successful revolutions end with statues coming down.' This is a compelling idea, in that the dismantling of monuments to the prior regime is a powerful symbol of that regime's destruction and the effort to begin afresh. However, according to the documentary, the removal of statues 'may represent not the beginning of a new era, but the repetition of a familiar pattern'. In this sense, to borrow from Marx, the compulsion to repeat history manifests itself as farce. The documentary adds another layer to the relationship of the new to the old when an interviewee, architect Andrei Rodionov, suggests that far from signalling a revolutionary impulse, pulling down monuments elides the real task of transformation from one system to another. 'It is easier to struggle with monuments,' Rodionov contends, 'than with concrete reality.'

However, sometimes the relationship between monuments and material realities is more complex. Sometimes, the immovability of monuments is intimately tied to entrenched social hierarchies, the existence of each reinforcing and even reproducing the other. The South African case is instructive in this regard. This case suggests that there is a close bond between the naturalised presence of colonial monuments across the country and the naturalisation of the colonial legacy, most notably in the ubiquity of black poverty.

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1   General Mokoanyane, as quoted by Dr SE Pheko during the South African Parliamentary debate commemorating the centenary of the so-called South African War (Hansard 1999).

2   This documentary film was produced in the early 1990s. It explores the relationship between monuments, power and regime change in twentieth-century Russia using archival footage and stakeholder interviews.

At the same time as the USSR collapsed, along with its extensive population of now 'disgraced monuments', South Africa was transforming itself from an apartheid polity to a decolonised and democratic one. But, unlike the Soviet case, two decades after its official demise, apartheid's presence remains ubiquitous across South Africa. It is visible in the still racialised gulf between rich and poor, in the spatial geography that still segregates the country, and in the statues of colonial heroes and monuments to colonisation that still stand tall and proud across the land.

Central to the transformative agenda of the new state is the undoing of this legacy and eliminating persistent social divisions. However, although the reversal of historical injustices discursively informs all statist policy, the reckoning with history as a site of struggle and transformation is, at worst, neglected and, at best, aspires to an insubstantial version of reconciliation that retains unequal social relations within the context of theoretical equality. This view runs contrary to the perspective posited by Stephen Ellis in an op-ed for the *Mail & Guardian* (Ellis 2014). In it he suggests that the ANC 'suppresses real history to boost its claim to legitimacy'. Ellis quotes Orwell to begin: 'He who controls the past controls the future. He who controls the present controls the past.' He references Orwell because of his insights into the 'methods of totalitarian governments'. The idea that the ANC performs the method of authoritarian narrativisation of the past is widely articulated in academia generally (see Baines 2009; Labuschagne 2010; Mare 2007; Marschall 2010).

Stephen Ellis and other academics present their perspective as a counter-narrative for South Africa. However, a closer consideration of the unfolding terrain of memorial practices suggests that theirs is the dominant narrative to which the ANC has an increasingly muted response. That narrative suggests that the ANC has cultivated a dominant and domineering commemorative complex that needs unravelling in order to salvage democracy, in order that 'real' history is narrated. This may be a deliberate strategy to retain discursive power for a minority in the country or it may be a knee-jerk response to an over-determined post-independence trajectory of African nation-statehood. But, whatever the reasons for this sentiment, it masks the untransformed character of commemorative strategies that tend to gesture towards a notion of 'social cohesion' denuded of the historically more radical content of ANC aspirations.

According to modernist theories of nationalism, constructions of the past play a central role in building national sentiment and the idea of nationalised solidarity. A version of the national past that binds people together in a common identity is vital to imagining a nation and inventing its traditions and character (Anderson 1991; Gellner 1983, 1996;

Hobsbawm & Ranger 1983; Smith, 1986, 1996). Although this process of national invention is a universal characteristic of modernity, it rests on the articulation of sets of deeply specific national imaginings in profoundly particular historical moments (see Goswami 2002). Because of this combined objective/subjective character of nationalism, elaborating the mechanisms and processes for producing narratives of the past reveals the multiple domains of power operative in the present.

A critical analysis of the terrain of memorialisation in South Africa would suggest a much more nuanced and often messy engagement with power, and the attempt to mould and fix the nation in respect of its cultural identity than implied by the assumptions that it is a hegemon with authoritative capacities that imposes a narrative. The idea that the ANC has authoritarian command over the past neglects the fissures in the party/organisation itself, the politics of the so-called transition and after, as well as a global political economy that regards the past as a domain of heritage that may articulate a country's 'comparative advantage' in a marketised milieu. Indeed, the transformation of the symbolic landscape in South Africa reflects what Bogumil Jewsiewicki (2010:55) terms a 'post-revolutionary era'. This moment is about both the dominance of a particular set of conjunctural forces and a new politics in the making that attempts to facilitate the naturalisation of this dominance. In this sense, symbolic landscapes and commemorative strategies are deeply ideological: the meaning that is attached to elevated events of the past justify or disrupt political and social claims in the present. Some of these factors in respect of a battle of ideas will be discussed in this chapter by paying attention to the relationship between Freedom Park and the Voortrekker Monument.

The ANC's (1992) 'Ready to Govern' document was a blueprint for a liberation movement on the cusp of attaining state power. It was a document drafted to calm the nerves of an international dispensation concerned with the capacity of what the Reaganite and Thatcherite regimes deemed a terrorist organisation to govern a sophisticated capitalist economy. It was also a document that aimed to assure its supporters that the ANC would not capitulate to the imperatives of bourgeois governance at the expense of the people. The document commits itself to private property, while at the same time suggesting land appropriation in the public interest. It talks about public ownership of mineral wealth while insisting that the generation of such wealth be negotiated between the state, workers and employers. Memory, in this document, is agile in its capacity to appeal equally to all sections of the South African populace. It promotes the idea of replacing symbols of apartheid with symbols of national unity while committing itself to 'non-sectarian' state-funded cultural institutions.

In this sense, memory is no longer taken for granted as a weapon in the continuing struggle for freedom and equality in South Africa. The idea of memory as a weapon was promoted by the ANC during its exile by its section for Arts and Culture. Memory was used in the service of unity, for the elevation of African identity in particular and South African identity more generally over the apartheid designations of static and calcified ethnicities. Indeed, the ANC's founding fathers sought to build a movement that unified Africans in opposition to the 'demon of tribalism' (Seme 1906). Underground and in exile, the ANC, through its Arts and Culture department, took this mission quite seriously. For example, at the start of its programming on Radio Freedom, which was broadcast from Lusaka, the various anticolonial fighters from the past were drawn into a praise song that linked the ANC to this continuous struggle for South African freedom. The centenary of the battle of Isandlwana in 1979 was commemorated by the ANC in exile with, among others, the performance of a play written by Mandla Langa. The play is called *Marumo* (meaning 'shield' or 'bullets' in Setswana). The naming of the play was therefore a deliberate attempt to 'nationalise' Isandlwana and transform it from a battle between Zulu and British soldiers into a battle that has meaning for all South Africans — one that illustrates the heroism of Africans (and not just Zulu people) in the fight against colonialism. Isandlwana today is no longer part of the commemorative landscape, but does form part of the trail of heritage in KwaZulu-Natal.

Unity remains an objective for nationalists, but unity during the transition came to mean 'unity in diversity', which acknowledged and brought back different 'cultures' that were to be afforded equal voice under the new dispensation. The detribalisation effort of the ANC since its founding has been all but dispensed with, but without their resorting to the conceptual approach of apartheid, which elevated static and calcified cultures inscribed with racialised dominance and subordination. Rather, the international vocabulary *du jour* was embraced and has reimagined the polity as multicultural, positing static and calcified cultures that are equal one to the other and deprived of the impulse towards power.

The 1994 ANC National Cultural Policy (ANC 1994) sustains the stance of multiculturalism and localisation of public memory, and begins to advance some practical ideas about the memorial context. As far as public memory is concerned, the ANC policy suggests that local meaning and context are paramount in the evolution of a memorial landscape and should hence be denationalised. The nation-state would advance the commemoration of those struggles that apply to the nation as a whole. In this regard, Heroes' Acre would be established, where heroes would be buried. In addition, 'Existing memorials will be re-assessed to ensure

that they foster reconstruction and reconciliation. A national memorial commemorating the liberation struggle will be erected' (ANC 1994:2).

Existing memorials, in the main, have remained intact, presiding over some of the most important power centres in the country. Louis Botha rides proudly at the front gates of Parliament, 'Soldier, Farmer, Statesman'. At the flank is Jan Smuts and across the street from his statue is Jan Hofmeyr. The National Library gardens are home to Queen Victoria. And those gardens are actually the Company's Garden, the 'company' being the Dutch East India Company, which began the process of colonisation in the south of Africa. The garden has been stripped of history, though, except for its name. Today there is no sense of the symbolic import of the magnificent garden as lovers, young and old, stroll by, kids play and homeless sleep. Perhaps that is the greatest revenge the living can have on history. Or perhaps it is history's revenge — to decontextualise, and naturalise, like foliage in a garden, the predicament that social formations find themselves in.

The new government did not build a Heroes' Acre, however. Rather, within five years of the 1994 ANC Culture Policy document, Thabo Mbeki had conceptualised a vision for the elaboration of a park, a living monument to South African's freedom: Freedom Park. This project is one of the crowning icons in the national legacy infrastructure produced by the 'new' South African state.

Freedom/Reconciliation Park

South Africa's legacy projects are aimed at erecting monuments that are more reflective of South Africans as a whole, that 'democratise' the past by ensuring an inclusive ownership of its memory, and 'nationalise' it by encouraging a broad and all-embracing narrative frame that is demographically representative. That frame has reread the past as an Andersonian exercise in 'reassuring fratricide' (Anderson 1991:201) and its logical culmination in the reconciliation of adversarial siblings. Perhaps the grandest of these projects has been Freedom Park, which emerged from a call by the Truth and Reconciliation Commission (TRC 2003) for a memorial space that could unite South Africans and help heal the wounds of the past. It is conceptualised in contrast to the ANC's earlier desire for a Heroes' Acre, a monument to those who lived and died for freedom. Heroes' Acres have tended to elevate the role of armed insurrection, of the uniformed and disciplined armed insurgent with the inevitable unreconstructed phallic symbolism of automatic weapons and towering monuments to male liberation heroes. The venues in Namibia and Zimbabwe come to mind here. It is this image that Mudimbe and Jewsiewicki (1993) contend is the approach to history making of postcolonial African states.

Sabine Marschall (2010) suggests that the South African version of commemorative practices follows this same logic. She speaks about the teleological 'struggle' narrative that is at the core of heritage architecture and memorial sites in the postcolony:

> *... today, the school history curriculum, the media and the heritage sector entrench the popular notion of 'the Struggle', a teleological narrative, implying coherence and unity, a more or less concerted effort towards liberation, led by the ANC and supported by its armed wing ... In this context, the memory of some victims is more opportune than others, and the process of memorialization is accompanied by significant silences, the forgetting of uncomfortable memories, and the hierarchical ordering of victims, which continues to divide survivors and communities to the present day.* (Marschall 2010:14–15)

This is not evidenced in the processes and outcomes of the Freedom Park experience, and is also challenged by scholars such as Sifiso Ndlovu (1998:53) when he states:

> *What has become apparent is that the ANC has shifted its position, as it no longer uses these commemorations to emphasize resistance put up by black societies during the apartheid years. Their focus now is on national reconciliation and nation-building.*

The processes for producing Freedom Park and its outcome partly confirm Ndlovu's perspective about a shift in the ANC's position. However, it remains unclear that this repositioning has been driven from uniform decisions taken by the ANC at a national level. They are often rather about a decided lack of interest in (re)producing history, the predilections of individuals at the helm of particular organisations at particular times and the character of power relations that defined South Africa's transition.

Freedom Park, in contrast to the image of a phallocentric Heroes' Acre, represents a different kind of memorialism. Its key features, a Garden of Remembrance and the //hapo or Freedom Park Museum, are more subtle and potentially inclusive arenas for contemplating the past. //hapo, the Khoi word for 'dream', is a museum that structures a national narrative in seven episodes, beginning 3.5 million years ago. In keeping with nationalisms everywhere, the museum asserts the existence of South Africa before its establishment as a territorialised and nationalised entity and, in so doing, assumes or takes for granted its existence. The new nation is fashioned in relation to Benedict Anderson's classic genealogical inversion where the originary present becomes antecedent to the past (Anderson 1991:205). The nation is thus read retrospectively. Freedom Day (27 April 1994) marks the birth of the new South

Africa, and prior history, and indeed, in respect of Freedom Park, pre-history, become commemorated as markers of national continuity. They become the inheritors or descendants of this later historical moment and are thus thoroughly transformed by it, even to the point of historicising pre-history.

The Garden of Remembrance includes the S'khumbuto Sanctuary, Isivivane and Uitspanplek. The sanctuary commemorates those who died in the various conflicts on behalf of or in the place now known as South Africa. The 697-metre-long Wall of Names is in this area. Decisions about who is and is not included on this wall illustrate an aspiration to a project of 'reconciliation' that, in terms of battles over history and its meaning, may be regarded as a problematic substitute for decolonisation and the freedom implied in this process. Contrary to this view is a burgeoning scholarship that argues that the Freedom Park narrates a victor's history and does not adequately consider the political task of reconciliation. To illustrate this notion, Labuschagne (2010:113) suggests that the ANC has 'a highly charged political agenda' that seeks a 're-creation of history'. In an act of his own historical revisionism, Labuschagne (2010:114) invokes the colonial idea of 'black tribes' of South Africa (in antagonism with the deliberate agenda of the liberation formations). In addition, he questions the colonial character of the apartheid state by referring to statues commemorating Afrikaner heroes as '"colonial" statues' (Labuschagne 2010:120). Mare (2007:10) echoes this perspective, suggesting that Freedom Park skews towards 'the ANC's twisted version of recent history'.

A more subtle engagement with the battle for history, as it relates to monuments and memorials, emerges through the work of Gary Baines. Baines has written productively and prolifically on the discursive battles that persist regarding South Africa's Border War and liberation struggle (see Baines 2009, 2013, 2014). His analyses carefully untangle the interests that are in contention as different groups vie for a place in South Africa's post-apartheid polity. But, like most studies on commemorative practices where scholars tend towards a reification of an already-existing community of people, Baines elevates South African 'nationness' to a given quantity. He compellingly argues that 'every war is fought twice: militarily and then discursively' (Baines 2013:188). He goes on to claim that 'the war of words or discursive struggle tends to be particularly acrimonious following civil wars' (Baines 2013:188). Baines therefore immediately establishes his contention that South Africa's battle was 'civil' rather than a battle between multiple contending forces (such as colonial and anti-colonial), who may or may not regard themselves in national terms. Anderson (1991) refers to this semantic choice as deliberate for nationalists who seek to articulate a 'reassuring fratricide' that works to produce the idea of a deep historical nationness

even, or especially, in its historical absence. Anderson cites the misnomer of the American Civil War as an indicator of this phenomenon. In his use of the idea of the so-called Border Wars or liberation struggle as 'civil war', Baines establishes the character of South Africa's major twentieth-century battles as expressions of the fractures of a single community of people. His analysis then serves, among other things, the productive enterprise of nationalising the polity. This is accomplished through naturalising its continual and historical existence.

In relation to these wars, Baines examines the debates that ensued after Freedom Park's trustees omitted the names of fallen South African Defence Force soldiers from its Wall of Names. According to Baines (2013:188), this debate 'exemplifies the functioning of memory politics in transitional societies'. Baines argues that South Africa's memorial complex has been 'divisive', suggesting that the TRC led to many believing that it had 'vindicated the conduct of the liberation armies at the expense of the security forces' (Baines 2013:190). Counter-memorials that have been erected in response to Freedom Park offer evidence of this post-apartheid fracture.

Baines proceeds by laying the blame for the schism at the feet of the new dispensation. He describes the outcome of a workshop that included delegates from various state departments and Afrikaner organisations as 'apparently [doing] little to resolve the differences of opinion and the issue became polarized and racialized' (Baines 2013:198). He quotes a newspaper report from the meeting to the effect that it was 'split between those intent on reconciliation and others dead against displaying oppressors' names in the same place as those of freedom fighters' (Baines 2013:198). Baines therefore suggests that Afrikaners were attempting to insert themselves in to the rainbow narrative of South Africa, while the new dispensation lacks such magnanimity to permit this.

Explicit in Baines' argument is the contention that the representatives of the new state have an obligation to not only take seriously, but accommodate the perspectives of Afrikaner groups. In the absence of such accommodation, commemorative practices that are sanctioned by the state at best reinforce the idea that there are 'two mutually exclusive versions of South Africa's past' (Baines 2013:198).

For Baines, the contestations over Freedom Park are evidence of the 'irreconcilable memory regimes' that inhere in the current polity (Baines 2013:199). In addition, he contends that the criteria for inclusion are not clear and there is 'slippage' (Baines 2013:203) between those regarded as heroes of the struggle (for example, Solomon Mahlangu) and the victims of apartheid (such as the massacred of Sharpeville).

But this 'slippage', or confusion, is not analysed further. There are multiple political battles that are being fought within the ANC itself, as well

as among the numerous liberation formations that have existed in South Africa's history. To assume that the primary focus of nation-building is the black–white schism is to embrace the dominant local and global narrative of the character of the South Africa nation.

Freedom Park makes explicit its claims to a unified African heritage that is timeless and available as a resource for postcolonial identity formation. In much the same way as Mandla Langa's play had nationalised Isandlwana, Freedom Park attempts to nationalise multiple languages and various pre-colonial institutions, such as *lekgotla* (a traditional assembly or meeting), into a unified identity. However, in the anti-apartheid struggle, unity was forged as a challenge to the governing strategies of colonialism that sought to 'divide and rule' subjugated peoples. In this instance, however, that which is African is presented as timeless and essential, deriving from a spiritual authenticity, rather than a material claim. This positioning has much to do with the vision of the second CEO of Freedom Park, Wally Serote.

In addition to the importance of specific personalities in defining the contours of Freedom Park, the place has also emerged from a series of position papers and frameworks that have been driven primarily by the state, and in particular by the Department of Arts, Culture, Science and Technology, as well as by panels of 'experts' (Freedom Park Trust 2003). In this sense, the process is more bureaucratised than politicised, and located in the domain of international best practice, as opposed to local politics. For many in the National Executive Committee (NEC) of the ANC, what was expected to be a memorial to freedom, has instead become a tribute to reconciliation. This is evidenced in two ways in particular: the debates about the Wall of Remembrance and, in some respects tied to that, the relationship between Freedom Park and the Voortrekker Monument.

Serote (2009) contends that when identifying names for the Wall of Names, the only Afrikaner name there was 'Braam Fischer'. The board of the Freedom Park Trust then deliberately went searching for other Afrikaner heroes and found generals De Wet and De la Rey, both formidable characters in the evolution of battle strategies against the British and in the fomentation of Afrikaner nationalism. In this way, the memorial ceases to be one that honours only the heroes of the anti-apartheid struggle. It defers to inclusivity rather than to the kind of victor's history many scholars (mentioned above) accuse the ANC of propagating. The inclination to inclusivity and reconciliation as being primary features of the approach to the past weakens the historical claim to coloniality and the present need to extricate the polity from colonial social relations rather than simply the expansion of *de jure* civil rights. The complication in the call, by Afrikaner social movements, reiterated by Baines, Labuschagne and

Mare, that all those who fell in South Africa's wars, including those fighting on the side of the apartheid state, should appear on the Wall of Names, flattens the historical fight in South Africa into 'two contending memorial perspectives' with equal validity. But the fight to subjugate people and the struggle for emancipation are not the same. Making claims to equivalence is as normative and political as making the opposite claims. Partly, this position is a remnant of the TRC, which aligned, problematically, the perpetrators of apartheid with its antagonists.[3]

In practical terms, this perspective of reconciliation, lacking in a perspective of decolonisation, caused significant headaches for some leaders in the ANC. Indeed, when the debate about SADF casualties on the Wall of Remembrance opened up, the then Secretary General of the ANC, Kgalema Motlanthe, was fielding calls and visits from families of dead askaris claiming that their children too deserved to be honoured and inscribed on the wall (Motlanthe 2009). When reports came to the ANC NEC about Freedom Park, members recalled some complaints that the country should be building a monument to freedom, and not to reconciliation. Some on the NEC derisively dubbed the project 'Reconciliation Park' (Netshitendzhe 2010). The conversation about the memorial at the national level of the ANC did not occupy much time. Many other concerns took precedence.[4]

One of the ways in which Serote sought to further reconciliation during his tenure as CEO of Freedom Park was to appeal to amalgamate Freedom Park and the Voortrekker Monument into a single precinct. Freedom Park is strategically and deliberately located on Salvokop, the hillock overlooking Pretoria, which stands opposite, and perhaps for a moment, in opposition to, the edifice to colonial settlement, the Voortrekker Monument.[5] But the board of the Voortrekker Monument rejected the idea of a unified memorial complex. The board has ultimate decision-making capacity because between 1991 and 1993,[6] the National Assembly amended the Monuments Act, which essentially and effectively privatised the colonial apartheid memorial landscape. In an effort to make them safe from the inevitability of black rule, monuments and memorial sites were handed over to community-based

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3   For an excellent discussion about this, see Mamdani (2002).

4   Personal interviews with Kgalema Motlanthe, Mongane Serote, Brigitte Mabandla, Joel Netshitendzhe, Saki Macozoma and Pallo Jordan all confirm this. I have not been able to access NEC minutes.

5   Sabine Marschall identifies numerous instances where new memorials explicitly engage with the old memorial that remains standing.

6   In 1991, Parliament moved to create greater autonomy to the Monuments' Council and in 1993 had transferred monuments to a section 21, not for profit, company.

organisations to govern. The state continued to fund them at the same time as they began establishing alternative funding mechanisms. This has meant that, in the words of Wally Serote, 'an empire of memorials dedicated to Afrikaners' (Serote 2009) continues to mark South Africa's landscape.

From memorials of conquest to national heritage

The Voortrekker Monument is one among many Afrikaner symbols that remains unmoved since the end of apartheid. Apartheid's fall was not symbolically evident through the simultaneous collapse of its key commemorative sites and edifices. Albert Grundlingh (2001) suggests, though, that its symbolic import has indeed collapsed. In his view, the monument no longer acts as a key site for the mobilisation of Afrikaner nationalism but, instead, has been transformed into a 'heritage' site, another depoliticised tourist attraction. Grundlingh highlights the dehistoricising effects of the heritage industry in its commodification of history and simplification of politics. Memorials and monuments 'seek to freeze ideas, sentiments, and ideologies in time and space' (Murray, 2013:85). But changing contexts change the meaning of the memorial (Grundlingh 2001; Murray 2013; Young 1992, 1994). The meaning attached to memorials and monuments are never static over time but are reinterpreted in relation to changing presents. But what Murray and Grundlingh should more explicitly grapple with is the way in which the relationship between monuments and historical moments are forged. The analysis, for now, suggests that the meaning of monuments reflect the changes of the current dispensation. However, the relationship could be viewed as more of a refraction (in Stuart Hall's sense) (Hall 2013). In other words, the monuments engage with the new reality and its continued presence affects this new reality as much as it is affected by it. This is evident in the rhetoric and actions of some state officials and institutions.

The National Heritage Council is one among many new institutions and transformed old institutions that in a direct way deal with the country's past. Its CEO, Sonwabile Mancotywa, has argued for integrating apartheid into the framework of South Africa's heritage. In an article, 'Apartheid is also our heritage', Mancotywa argues for the retention of apartheid-era statues and memorials as a reminder of the past:

> *The National Heritage Council ... is of the view that all statues that embody our apartheid past, ghastly as it was, should remain where they are. Their sight does indeed invoke unpleasant memories amongst Black people. But, removing such statues from our public space smacks of an attempt to erase the apartheid chapter out of our*

history. This would be disingenuous. It would demand of us to pretend that apartheid never happened. Such pretence would never bring us any consolation. Memories of apartheid are irrepressible even in the absence of apartheid monuments. One does need a Verwoerdian statue to be reminded of apartheid. Everything around us is a reminder of our apartheid past, from the continuing residential segregation to income inequalities and the sheer poverty of black people. All these have their origin in the racial policies of apartheid. (Mancotywa 2009)

Mancotywa suggests that the perpetual presence of these monuments and statues helps us ensure that we never forget apartheid and that it never again occurs on our soil. However, meaning is not essential or intrinsic to any monument or statue. Meaning shifts over time according to interpretive frameworks that dialogue with the artifice and its historical context. The monuments' existence outside a municipal office or outside the Parliament buildings do not, on their own, remind us of apartheid. Neither does the existence of black poverty. They can be reminders in being made to remind us. That involves an active and consistent interpretive framework within which people read the reality. Indeed, the visit by Deputy Minister of Arts and Culture Paul Mashatile to the Voortrekker Monument in 2009 was presented as a reconciliation opportunity. It was promoted as a sign of the multicultural pluralism of the 'new' South Africa. Under the heading 'Acknowledging Afrikaner culture as part of our diverse heritage', Mashatile states:

As part of recognizing South Africa's diverse cultural heritage and in particular the Afrikaner Heritage, and giving practical meaning to our long held belief that South Africa belongs to all who live in it; black and white, last week I visited the Voortrekker Monument in Pretoria. The Voortrekker Monument is a national icon for Afrikaners in South Africa. On December 16, the anniversary of the battle at the Blood River, Afrikaners from all over the country stream to the Voortrekker Monument to commemorate what is to them the most important event in the history of South Africa. The Monument is supposed to be a reminder of the courage, determination and persistence of the Voortrekkers. The visit demonstrated our government's commitment to promote reconciliation and build a truly united South Africa, where the cultural heritage of all who live in it is acknowledged. (Mashatile 2009)

Mashatile's message serves to depoliticise events of the past and drains the monument of its deeply colonial residue. For him, the monument no longer stands as a sign of repression and of the incursion into South Africa of those

who became known as internal colonisers. The ground for the Voortrekker Monument was turned in 1938 and the first stone laid to mark the centenary of the sojourn of the Great Trek from the Cape to the interior of what was to become South Africa. Through this trek, the identity of Afrikaners was forged at the time and in memory. Along the way, the Voortrekkers collided with the numerous social formations that populated these lands, subjugated them and stole their land. The monument, however, served to narrate a story of bravery, of Afrikaner suffering and of destiny. It was opened officially on 16 December 1949 — the year after the National Party, the party of apartheid, came to power. On Monument Hill the newly elected prime minister declared the triumph of Christianity over the backwardness of the black population, underlined the imperatives of racial purity and presented the monument as a symbol of the Afrikaners' heavenly right to rule this savage land. On 16 December 2012, now the public holiday of reconciliation, President Zuma cut a ribbon opening the road between Freedom Park and the Voortrekker Monument.

Sabine Marschall has produced compelling work that considers the ways in which new monuments dialogue with old ones. The conversation between Freedom Park and the Voortrekker Monument, however, results less in a critique of settler colonialism than in its forgetting. This perhaps reflects the signal contradiction within ANC liberation movement ideas of colonialism of a special type,[7] which ultimately 'nativises' the coloniser and thus erodes the historical claims of the colonised.

This rapprochement or dialogue between the new and the old registers a significant departure from the imaginings of freedom fighters in the pre-1994 period. According to Autry (2012:153), activists had contemplated three proposals regarding the future of the Voortrekker Monument: '(1) demolition and abandonment of the site; (2) recycling bricks to build houses for the poor; and (3) refashioning the memorial into a public urinal for the black population.' Quite obviously, not all these were serious considerations. However, they indicate an irreverence for the object of colonial conquest and the desire to reject its politics in the act of physical removal. This appetite for demolition was not realised. In its stead is a nationalist appropriation of the monument as a cultural object, and, according to Mancotywa and Mashatile, an object of 'heritage'[8] that reminds us of multiculturalism rather than colonisation and conquest. The notion of heritage acts to strip the critical faculties of

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7   Colonialism of a special type characterises South African colonialism as a peculiar variant of settler colonialism, in that the settlers evolve a new and particular national identity that is tied to the territory that the coloniser and colonised share. As such, they sever ties with the colonial metropole.

8   For a more extensive conversation of the 'heritage industry', see Hewison (1987).

historicisation and instead objectifies the past. The majority of people of South Africa did not fight for apartheid; they fought against it. In other words, in the present it is not 'heritage' that ought to be embraced, but a legacy that ought to be eradicated. The uncontested prominence of the Voortrekker Monument thus serves as a forgetting, as a kind of historical erasure.

The rather large distance between these two perspectives of the ANC regarding the Voortrekker Monument in a relatively short space in time is perplexing. Those at the helm of cultural work in the late 1980s and early 1990s in the ANC find it confusing, too, as their voices became marginalised in the rush to political power (Badsha 2009; Jordan 2010; Langa 2009).

Certainly a combination of an exogenous and endogenous balance of forces, the imperatives of achieving political power and economic change, and the need to find a place in the new nation for all who resided in South Africa informed the choices made by African nationalists. The cultural terrain was simply not foregrounded as an important enough domain for intervention and conflict. For former minister of Arts and Culture Pallo Jordan, 'history would resolve itself' and was not worth battling in such an emotional terrain. Joel Netshitendzhe contended that the ANC at the moment of democracy was consumed with what it regarded as the more important domain of political economy (Jordan 2010; Netshitendzhe 2010). Indeed, the very ministries that are responsible for cultivating the identity of the nation — Home Affairs, and Arts and Culture — were led by the ethnonationalist Inkatha Freedom Party in the Government of National Unity[9] and the subsequent government. These ministries were responsible for identifying new public holidays as well as forging the legislative environment for new cultural policy. Both ministries were directed by the ideals of reconciliation, social cohesion and 'unity in diversity', which became a new state motto (Jordan 2010; Mabandla 2012).

Far from grand ANC hegemonic narratives, we saw a transformation of memory as a weapon to memory, and heritage as both an expression of commodification as well as of nation-building. Essentially, memorialisation or commemorative strategies are interpretive strategies. They give meaning to events of the past that can help make sense of both the past and the

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9　The Government of National Unity was a negotiated arrangement of the interim South African Constitution, which stipulated that each party winning 20 seats or more in the national election would gain at least one position in Cabinet. Both the National Party and the Inkatha Freedom Party won the requisite number of seats and hence were included with the majority party, the ANC, in the GNU. President Mandela included other representatives of smaller parties into the government too. The GNU ended after the final Constitution was enacted in 1997.

present, and what is possible in the future. In this sense, memorialisation is a deeply ideological exercise, and is neither passive nor devoid of politics. Memory as heritage serves the purposes of a shallow reconciliation, at the expense of more radical historical claims, and memorial complexes become venues for tourism rather than redress.

It is in this sense that I try to make the argument that two decades of memorial practices have attempted first and foremost to serve a reconciliatory purpose — both in the important way of not circumscribing claims to historical truth, but also in the neoliberal way that circumvents decolonisation in the sense of a more fundamental transformative project. Said (1989:207) asserted that 'to be colonised was a fate with lasting, indeed grotesquely unfair results, especially after national independence has been achieved ... Around the colonised there has grown a whole vocabulary of phrases, each in its own way reinforcing the dreadful secondariness of people ...' This reinforcement of 'the dreadful secondariness of people' is expressed in the sacrifice of the ethically imperative decolonial process on the altar of an insubstantial reconciliatory practice — a sacrifice that does the relatively easy work of extracting concessions from the formerly colonised.

The student-led protests against the symbols of colonialism and their continued material significance in the present suggest that South Africa's battles over the past and the cultural identity of the nation are far from settled.

References

ANC. 1992. Ready to govern: ANC policy guidelines for a democratic South Africa. Available: http://www.anc.org.za/show.php?id=227. (Accessed 27 April 2015).

ANC. 1994. National Cultural Policy. Available: http://www.anc.org.za/show.php?id=269. (Accessed 27 April 2015).

Anderson B. 1991. *Imagined Communities: Reflections on the Origins and Spread of Nationalism*. New York: Verso

Autry RK. 2012. The monumental reconstruction of memory in South Africa: The Voortrekker Monument. *Theory, Culture and Society*, 29(6):146–164.

Badsha O. 2009. Personal interview. November 2009, Cape Town.

Baines G. 2009. Site of struggle: the Freedom Park fracas and the divisive legacy of South Africa's Border War/Liberation Struggle. *Social Dynamics*, 35(2):330–344.

Baines G. 2013. The Freedom Park fracas and the divisive legacy of South Africa's 'Border War'/liberation struggle. In H Sapire & C Saunders. *Southern African Liberation Struggles: New Local, Regional and Global Perspectives*. Cape Town: UCT Press.

Baines G. 2014. *South Africa's 'Border War': Contested Narratives and Conflicting Memories*. London: Bloomsbury.

Callinicos L. 2000. Position paper: Freedom Park. Pretoria: Department of Arts, Culture, Science and Technology.

Ellis S. 2014. The ANC suppresses real history to boost its claim to legitimacy. *Mail & Guardian*, 2 January 2014. Available: http://mg.co.za/article/2014-01-02-anc-suppresses-real-history-to-boost-its-claim-to-legitimacy. (Accessed 27 April 2015).

Freedom Park Trust. 2003. Freedom Park conceptual framework. Pretoria: Freedom Park Trust.

Gellner E. 1983. *Nations and Nationalism*. Oxford: Blackwell.

Gellner E. 1996. Do nations have navels? *Nations and Nationalism*, 2(3):366–370.

Goswami M. 2002. Rethinking the modular nation form: Toward a sociohistorical conception of nationalism. *Comparative Studies in Society and History*, 44(4):770–799.

Grundlingh A. 2001. A cultural conundrum? Old monuments and new regimes. *Radical History Review*, 81:94–112.

Hall S. 2013. The work of representation. In S Hall, J Evans & S Nixon. *Representation: Cultural Representations and Signifying Practices*. London: Sage and Open University.

Hansard. 1999. Anglo-Boer/South African War and the lessons learnt from it – Subject for discussion, 16–18 November, No. 6. Cape Town: Government Printer.

Hewison R. 1987. *The Heritage Industry: Britain in a Climate of Decline*. London: Methuen.

Hobsbawm E & Ranger T. (eds). 1983. *The Invention of Tradition*. Cambridge: Cambridge University Press.

Jewsiewicki B. 2010. Historical memory and representation of new nations in Africa. In M Diawara, B Lategan & J Rusen. *Historical Memory in Africa: Dealing with the Past, Reaching for the Future in an Intercultural Context*. New York and Oxford: Berghahn Books.

Jordan P. 2010. Personal interview. November 2010, Cape Town.

Labuschagne P. 2010. Monument(al) meaning making in the 'new' South Africa: Freedom Park as a symbol of a new identity and freedom? *South African Journal of Art History*, 25(2):112–124.

Langa M. Personal interview. October 2009, Johannesburg.

Lewis M & Mulvey L. 1993. *Disgraced Monuments*. Monumental Pictures for Channel 4.

Mabandla B. 2012. Personal interview. April 2012, Johannesburg.

Macozoma S. 2010. Personal interview. November 2010, Johannesburg.

Mamdani M. 2002. Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC). *Diacritics*. 32(3/4):32–59.

Mancotywa S. 2009. Apartheid is part of our national heritage. Available: http://thoughtleader.co.za/readerblog/2009/09/23/heritage/. (Accessed 29 January 2016).

Mare EA. 2007. Monumental complexity: Searching for meaning in a selection of South African monuments. *South African Journal of Art History*, 22(2):36–48.

Marschall S. 2010. *Landscape of Memory: Commemorative Monuments, Memorials and Public Statuary in Post-apartheid South Africa*. Leiden and Boston: Brill.

Mashatile P. 2009. Facebook page, 23 September 2009. Available: https://www.facebook.com/paul.mashatile/notes?lst=595795087%3A1651757225%3A1457310225. (Accessed 29 January 2016).

Motlanthe K. 2009. Personal interview. November 2009, Pretoria.

Mudimbe VY & Jewsiewicki B. 1993. Africans' memories and contemporary history of Africa. *History and Theory*, 32(4):1–11.

Murray MJ. 2013. *Commemorating and Forgetting: Challenges for the New South Africa*. Minneapolis and London: University of Minnesota Press.

Ndlovu S. 1998. *The Soweto Uprisings: Counter-memories of June 1976*. Johannesburg: Ravan Press.

Netshitendzhe J. 2010. Personal interview. November 2010.

Said E. 1989. Representing the colonized: Anthropology's interlocutors. *Critical Inquiry*, 15(2):205–225.

Seme P. 1906. The regeneration of Africa. Speech at Columbia University, New York. Available: http://www.sahistory.org.za/archive/regeneration-africa-speech-pixley-seme-5-april-1906. (Accessed 27 April 2015).

Serote M. 2009. Personal interview. November 2009, Pretoria.

Smith AD. 1986. *The Ethnic Origin of Nations*. Oxford: Blackwell.

Smith AD. 1996. Memory and modernity: reflections on Ernest Gellner's theory of nationalism. *Nations and Nationalism*, 2(3):371–388.

TRC. Truth and Reconciliation Commission. 2003. *Truth and Reconciliation Commission of South Africa report*, Vol. 6.

Young JE. 1992. The counter-monument: Memory against itself in Germany today. *Critical Inquiry*, 18(2):267–296.

Young JE. 1994. *Texture of Memory: Holocaust Memorials and Meaning*. New Haven: Yale University Press.

Chapter 6

THE PARADOX OF TRADE UNION ACTION IN POST-APARTHEID SOUTH AFRICA

Sakhela Buhlungu

The Congress of South African Trade Unions (Cosatu), the largest umbrella union formation in South African history, was formed in December 1985 amid the great revolutionary ferment generated by the anti-apartheid movement across the length and breadth of the country. It is no exaggeration to say that by the end of the 1980s the resurgent union movement, including Cosatu, had become a crucial component of the struggle against white minority rule. It is no wonder, then, that scores of union activists were catapulted into important political and administrative positions in the new state, including positions in local municipal councils, provincial legislatures, Parliament and Cabinet, as well as positions in the civil service and state corporations. Many others carved new career niches in private corporations and as policy consultants (see, for example, Buhlungu 1994).

However, the influence and power of the trade unions have always been a double-edged sword and constitutes part of the paradox of trade union action that I discuss in the rest of this chapter.[1] The expulsion of Cosatu's largest affiliate, the National Union of Metalworkers (Numsa) in 2014 and the ignominious dismissal of the federation's charismatic general secretary, Zwelinzima Vavi, in 2015 provide probably the most dramatic illustration of the paradox.[2] This paradox coincides more or less with the first 21 years of the country's democracy, and my discussion in this chapter attempts to tease out some of the key developments in this period, drawing extensively from research I conducted then.[3]

'It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness ...'. Little did Charles Dickens know that the opening lines to his classic novel set in pre-revolutionary Paris and London would be so apt for understanding union strategy and action in South Africa at the turn of the twenty-first century. During this time the

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1   I have used the concept of a paradox of victory elsewhere. See Buhlungu (2001).

2   The official statement giving the reasons for Vavi's dismissal makes a direct link between the dismissal and Numsa's expulsion. See Losi (2015).

3   This research includes a four-phase longitudinal survey started in 1994, master's and doctoral research, articles and book publications of various kinds, and teaching and student supervision.

unions have experienced growing organisational strength, influence and countless victories. Indeed Cosatu has been part of the ruling political alliance, while the other federations and unions have enjoyed easy access to state institutions, Members of Parliament and ministers. But these have been hard times for unions and their members too. Who can forget the deleterious effects of global restructuring — workplace restructuring to achieve flexibility and informalisation, labour broking, acceleration of technological innovation, growing unemployment, deregulation and free trade? Add to this the segmentation of the workforce and the erosion of solidarity resulting from processes of upward social mobility of union members and leaders.

The best of times

In discussing developments in the unions over the last two decades, one cannot avoid locating such discussion in the context of the larger political landscape, including the changing nature of political activism. In March 1994, as politicians from the apartheid regime and the anti-apartheid movement raced against time to tie the final loose ends of the political settlement in preparation for the election in April, I took a round research trip to the main centres of the country. Based in Johannesburg at the time, I chose to start in Cape Town, speaking to trade unionists across the spectrum. The questions I was raising with them were: 'Okay, it is election time now, what are you going to do? What do you want to achieve out of this? How are you going to play this one? Are you going to get involved in elections?'[4] I spoke to scores of unionists, many of whom have since disappeared into the broader landscape of politics, the economy and all sorts of other strange places over the last 20 years.

I then moved on to Port Elizabeth, East London, Durban and Johannesburg. One should bear in mind that the labour movement I am talking about was at that time a very youthful one. The president of Cosatu, Elijah Barayi, was regarded as an old man, but he was only 51, and others, such as then Cosatu general secretary, Jay Naidoo, were generally much younger, mostly in their 30s. So it was a very youthful movement at the time, led by many people who were starting off in life. That context is very important.

Another important thing is the fact that unions were generally short of money. The limited amounts of funding available to unions came from membership dues, paid by mostly unskilled and semi-skilled workers. But

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4   The findings of the research were captured most succinctly in Buhlungu (1994).

unions also received money in the form of foreign donations by unions and fraternal organisations in other countries. Trade union bodies across the world, such as the Canadian Labour Congress, played an important role, as did the anti-apartheid movement in several parts of the world. But this money added up to little — enough to cover only very basic organisational costs, the payment of modest salaries for full-time officials and small allowances to many unemployed volunteers. The thing that kept the union machinery going was the sheer enthusiasm and youthful exuberance of thousands of union activists, many of them in their 20s, all stirred by the hope that, one day, they would reach the promised land. The altruism that animated activism in other organisations of the anti-apartheid movement also drove union activists.

Over the last 20 years the South African trade union movement has defied easy characterisation. Many have argued that this is a movement that has sold out, that is institutionalised and bureaucratised. Some have used the notion of business unionism as a shorthand label to make the same point. And those who make this argument have abundant evidence and examples to validate their assertions. The centralising and undemocratic impulse is very strong and it keeps getting stronger. But a more theoretically interesting and fruitful characterisation is one that identifies not one, but two contradictory impulses and political processes within the contemporary trade union movement. To capture this I have come up with the notion of a paradox. Briefly, this is a paradox of the victory that was achieved not only by the unions, but also by the broad democratic movement.

One dimension of this paradox captures what Dickens meant by 'the best of times'. This concerns the triumphalist celebration of union successes in the post-apartheid period. This celebration highlights the fact that the union movement entered the democratic transition in a position of strength and succeeded in further inserting itself very successfully and very effectively inside the forces driving the transition. Nothing symbolises this insertion and influence better than the image of Cyril Ramaphosa, then general secretary of the National Union of Mineworkers (NUM), ushering Nelson Mandela into freedom on the day of the ANC leader's release from prison on 11 February 1990. Furthermore, the infrastructure to receive Mandela and other ANC leaders was provided mainly by the unions, down to the big banner at the first Mandela rally at the FNB stadium, near Soweto. The influence was buttressed by close personal ties between leaders of some of the unions and those of the ANC, often going back to the years of underground mobilisation.

The union movement had another advantage that made it a natural ally for the liberation movements: over the years, it had produced very dense

layers of leadership who came to play a vital role in driving the transition. Very importantly, these union leaders were close to the rank and file, and were steeped in the ethos of democratic mobilisation, including leadership accountability, the training of leadership and the building of democratic organisational structures. The unions' experience of building sustainable shop-floor structures gave them the experience that the ANC was lacking at the time. In a nutshell, many of the union leaders had credibility among their own members, and in communities and political movements. In addition, many of them had growing international connections.

It was a privilege for me to have worked for the unions until 1992, when I left to work with a colleague to start *The Shopsteward*, Cosatu's magazine for shop stewards and other union leaders.[5] Working for *The Shopsteward* and for the *South African Labour Bulletin* enabled me to capture and document some of the developments in the unions, including some of the key moments and issues surrounding leading personalities. I witnessed and reported on intense debates about unions and politics, and the so-called 'two hats debates' about whether or not union leaders should simultaneously hold leadership positions in political movements and parties. I observed union engagement with the CODESA (Convention for a Democratic South Africa) negotiations in Kempton Park, their leading role in the 'rolling mass action' following the assassination of Chris Hani in April 1993, and their involvement in voter education and electoral campaigning in support of political movements. I attended and reported on the Cosatu special national congress in September 1993, at which Naidoo and 19 other leaders were released to join the ANC's list for the April 1994 parliamentary elections. It was at that special congress that Mandela, caught up in the optimism of the moment about the great possibilities that lay ahead, uttered his famous exhortation to the worker delegates: 'If the ANC government does not deliver, you must do to it what you did to the National Party government.'

By the time of the 1994 elections, scores of unionists had been roped into leadership roles in the ANC, the South African Communist Party (SACP) and the South African National Civic Organisation. In 1990 many top union leaders, such as Sidney Mufamadi, Chris Dlamini, Alec Erwin, Moses Mayekiso, and others were co-opted to serve in interim leadership structures of the ANC and the SACP. Hundreds of others were enlisted to serve as leaders at provincial and local branches of these organisations.

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5   Fiona Dove (the magazine's editor) and I (a writer) were the founding staff of *The Shopsteward* in April 1992. The magazine was produced by Umanyano Publications for Cosatu. I left the magazine at the end of 1993 to join the Sociology of Work Unit at the University of the Witwatersrand.

The same pattern occurred to a more limited degree in the Pan Africanist Congress and the Black Consciousness movement organisations. Then, in 1991, Mufamadi, the assistant general secretary of Cosatu, and Ramaphosa were elected to the ANC's leadership structures, as National Executive Committee member and secretary general, respectively. In that year the ANC, Cosatu and the SACP announced the formalisation of the relationship into what has since become the tripartite alliance.

The 1994 election sealed the victory for the union-supported ANC, which received 62% of the vote. All the 20 Cosatu leaders got elected and several of them were appointed into senior positions as committee chairpersons, while Erwin was appointed deputy minister, and Naidoo as minister responsible for the implementation of the union-inspired Reconstruction and Development Programme (RDP). Now it was time for the good times to roll in, and roll in they did! The ANC had already embraced the RDP, as initiated by the unions, and used it as the bedrock of its 'A better life for all' electoral campaign. Mandela's appointment of Naidoo as a steward-in-chief of the RDP in the new order was a stroke of genius to reassure the unions that they were a central component of the ruling alliance. There followed a bouquet of labour-law reforms aimed at reordering the labour market landscape by institutionalising tripartism, workplace democracy, employment equity, skills development, and compliance with the Constitution of the Republic of South Africa, 1996, and with international conventions.

That intervening period just before the election in 1994 also entailed another important development. During that period an ethos and standards were set, including the meaning of accountability, what constitutes good behaviour for leadership and so forth. Also at that time the two-hats debate grappled with the issue of whether leaders should have overlapping positions in the union and the party. The broad consensus within the unions was that it was not a good idea for union leaders to hold top positions in political parties. The point is that the period between 1990 and 1994 set the bar against which we can assess the record of unions and their leaders over the last two decades.

The worst of times

The flip side of the paradox is a set of developments that began emerging much earlier. In my 1994 round trip, I observed and noticed some problems and contradictions within the unions, many of them related to contestation over power among members, between members and leaders, and among leaders. In 1994, when the elections took place, Cosatu deployed its leadership into the ANC electoral campaign effort. Hundreds of organisers and leading shop stewards left their offices and positions to do door-to-door

and workplace-to-workplace campaigning. To a large extent, traditional union activities and concerns — ie grievances, disciplinary cases, aspects of collective bargaining and negotiations on union rights — were scaled down and in some cases, put on hold. Many unions succeeded in negotiating union access to workplaces for purposes of voter education, an achievement that had no precedent in the country's history.

Following the April 1994 elections, some union activists found it difficult to come back and reconnect to the movement that they had spent years building. They got carried away by the euphoria of the political victory and were distracted by seeing their colleagues and comrades move on to mainstream politics after the elections. The involvement of unionists in the politics of the tripartite alliance, particularly around the elections, and the deployment of some to national and provincial legislative bodies set the pattern and triggered the leadership haemorrhage from the unions that has continued ever since.

The second aspect of the flip side of the paradox is that, over time, unions also got sucked into formalism and legalism. The establishment of the consultative National Economic Development and Labour Council heralded the era of tripartism in labour relations, whereby labour, capital and the state were expected to build consensus and embrace co-decision-making. The passing by the democratic Parliament of the Labour Relations Act in 1995 was the strongest signal that labour relations were to be based on equality and fairness instead of discrimination and exploitation, and that orderly collective bargaining and co-determination would replace management despotism and union 'ungovernability'. The new age of proceduralism and tripartism set in motion a process of institutionalisation in which union leaders spent hours and days sitting in meetings and negotiations. Over time this has helped widen the gap between union leaders and rank-and-file union members.

The third aspect of the flip side, which emerged early on, was individualism. Over the years the ethos of collectivism, altruism, self-sacrifice, and thinking about the big picture and solidarity began to fracture. This individualism accelerated with time and led many union activists to realise that they had more value in the wider labour market and the union entry on their CV had more value out there in the marketplace. They felt that they could go into Parliament, into management or into human resources. They could become supervisors: if they were shop stewards, they could move across to management. Of course, individualism was not confined to the union movement; it was fuelled by deracialisation of society and the attendant processes of upward social mobility for some, particularly those such as union leaders, who stood out among their communities and constituencies.

The paradox examined

This paradox means that there are processes happening at the same time, namely, a trend that has been helping to enhance the power and influence of unions, on the one hand, and one that has had a debilitating effect on unions, on the other. It is therefore a movement that is strong and weak at the same time. It is this kind of contradiction that makes it extremely difficult to say definitively that the unions are irredeemably weak and have sold out. At the same time, it makes it difficult to continue to talk glibly about a strong union movement. Over the last 20 years, I have been trying to identify and work with these two sides of the paradox.

For the casual observer of the South African trade unions, Cosatu is synonymous with the movement and very little is known about the other unions and federations. The reality, however, is that the union landscape is much more complex than that. For the last 20 years, the strongest sections of the movement can be categorised into three groups. The first one is the large movement, represented by a large federation, Cosatu, and its affiliates, most of whom are the largest in the industries or sectors they organise. Their coverage is very good, as they have ample resources, a big influence and are close to the ruling party. Their coverage is also national: it is organised in every region of the country.

The second group comprises intermediate or medium-sized unions affiliated to medium-sized federations — the Federation of Unions of South Africa (FEDUSA), the National Council of Trade Unions (NACTU) and the Confederation of South African Workers' Unions. These organisations do not have the advantage of abundant resources nor do they have significant industrial or political leverage or influence. On several occasions Cosatu has organised highly successful general strikes despite the non-participation of these federations and their unions. Politically, they are non-aligned and many of their members belong to different political parties, including the ANC. Although many of their unions started off as industrial unions, they are now, to all intents and purposes, general unions that organise fringe sectors and workplaces. Although their coverage is in some cases national, they do not have a presence across all sectors and regions.

The third group is made up of small unions, some of which are based in only single towns, workplaces or regions. Many of these emerged as breakaways or splinters formed by disgruntled ex-officials of the larger unions. These minor unions come and go all the time, are very weak, have no political influence to speak of and never embark on any noticeable collective action.

These categories are important for understanding the complexity of the union landscape, particularly now that Cosatu is showing signs of fragmentation. There are indications that the fissures experienced by the big federation could erode its power and influence as members defect to unions affiliated to the smaller FEDUSA and NACTU. A case in point is the NUM, which was the largest trade union in the country, with about 320 000 members until it started haemorrhaging between 120 000 and 150 000 members around the time of the Marikana massacre in 2012. These workers, most of them in the platinum belt region near Rustenburg, joined a splinter union, the Associated Mineworkers and Construction Union (AMCU). AMCU was established in 2001 by expelled former NUM branch chairperson Joseph Mathunjwa, but remained small and obscure until the implosion of NUM's support in the Rustenburg copper belt region. In 2014 AMCU affiliated to NACTU.

The 2014 decision by Cosatu's Central Executive Committee to expel the National Union of Metalworkers of South Africa (NUMSA) and the dismissal of Vavi have raised the prospect of a splinter federation comprising NUMSA, several other disgruntled Cosatu affiliates and splinter factions from the remaining unions. Should this materialise, it will fundamentally alter the union landscape and usher in a new cycle of union mobilisation that is different from what we witnessed in the first 20 years of democracy. Vavi's ejection and NUMSA's expulsion emanated directly from internal power struggles within the tripartite alliance and the ANC. Whereas Vavi and the metalworkers were part of the political faction (the so-called Polokwane faction) that brought Jacob Zuma to power, and campaigned for the purging of Thabo Mbeki and his supporters in all alliance formations, the new divisions signal the fragmentation of the faction because of disagreements over policy matters and the distribution of patronage benefits.

Trade unions and the democratic transformation

In South Africa, as in other countries where there has been a history of colonial rule, unions have played three separate but related roles in the struggle for liberation and independence. The first and most immediate was resisting economic exploitation, particularly with reference to wages and working conditions. Every autobiographical or biographical piece of writing by or about people who were workers or unionists makes reference to the indignities and day-to-day humiliation of people on the shop floor

by management.[6] The unions' most demonstrable successes have been exposing the system of cheap labour, fighting for incremental improvements to wages and working conditions, and seeking to restore the dignity of workers by combating forms of discrimination based on race, gender and other differences.

The second role of union mobilisation is quite separate but related to the first: the role of unions as agents of political reform. This is a quest that springs from the political and politicised nature of workplace relations in a colonial context. In this case, political reform encompasses a desire for the abolition of despotic managerial practices, and to the achievement of political liberation and democracy in society. Under colonialism and apartheid, workplace relations were a microcosm of the broader social structure where white power and domination were pervasive. Hence, black trade unions often straddled the conventional divide between a trade union, on the one hand, and a political movement, on the other.[7] Therefore, the political representation role has been there from the start, which explains why Cosatu today still aligns itself with the ANC.

The third role of unions is to promote economic and social reconstruction. The first dilemma that confronted trade unions in the immediate post-liberation period was how they would ensure that their members benefited from independence. Similarly, the South African labour unions were seized with this issue because they realised that it was not sufficient to be strong on the shop floor and to have political representation if these did not translate into economic development, jobs, improvement of living conditions and reconstruction generally. Their view was that workers in the unions came from fractured communities that had been destroyed by oppressive political systems. It was these concerns that motivated Cosatu to initiate discussions for the RDP, which they later presented for adoption by the ANC in the lead-up to the 1994 election campaign. In the end, the RDP became the ANC's election manifesto.

How successful have the South African unions been in performing these various roles? On the whole, the unions have recorded admirable successes in all three areas. Indeed, Cosatu was held up by many at home and abroad

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6   There is a body of writing by or about unions and unionists from the 1970s onwards. These include biographies by Petrus Tom, Emma Mashinini and Frances Baard; autobiographies on Moses Mayekiso, Jabu Ndlovu and Mandlenkosi Makhoba; and several union histories covering the Chemical Workers' Industrial Union, National Education, Health and Allied Workers' Union, NUMSA, NUM, South African Commercial and Allied Workers' Union, South African Railways and Harbours' Workers' Union.

7   See, for example, Bonner (1978) and Bradford (1987).

as an exemplar of how to achieve gains for workers. Although their strategy of using both the streets and the boardroom, including representation in state institutions and party political structures, had its critics, the federation managed to remain a powerful voice beyond traditional shop-floor and collective-bargaining issues.

An additional achievement was in the area of combating racism and other indignities suffered daily by workers on the shop floor. Humiliation and the daily assault on workers' dignity were part and parcel of maintaining the cheap-labour system dating back to the days of slavery, chattel slavery and even modern forms of wage labour. A well-known example is the single-sex compound system, where black male workers were kept in military-style barracks run by despotic compound managers. Another example dates back to the early twentieth century when the Durban City Council required newly arrived black workers to be stripped naked and dipped in disinfectant, as the council believed that they brought disease and filth. From the 1980s onwards unions succeeded in pushing back the frontiers of racism and despotism, and successfully introduced a 'rule of law' in the workplace, which ensured that all workers were treated as normal human beings. Workers in the most despised sector, mining, benefited hugely in this respect.

Another major success of the unions was developing leaders who ultimately played a role beyond the unions.[8] Research that we have done over the last 10 years or so on mining and mining communities in South Africa has taken me to mining areas in Welkom, Carletonville, Rustenburg and Klerksdorp. One thing that struck me about these towns is that about half, sometimes more, of the local-government leaders, such as councillors and mayors, are former or current mine workers doing these jobs on a part-time basis. They were previously not seen as people worthy of playing leadership roles in their communities but, over time, through trade unionism, they became key leaders. That is one of the seminal contributions of the unions. Had it not been for the unions, some of the leaders in these towns would probably have been brought in from outside.

Enter globalisation

Unlike most colonised countries, which achieved independence in the age of developmentalism and the welfare state, South Africa achieved its democracy at the height of neoliberal globalisation and large-scale work

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8   See, for example, Buhlungu (2000:54–58).

restructuring. These conjunctural factors had direct consequences for trade union organisations. Work restructuring had many dimensions, all of them oriented towards cost reduction and flexible organisation of work. In addition to the introduction of new technology, restructuring produced flexible forms of work, including casualisation, outsourcing, multitasking and labour brokering. The effects of these changes were felt more quickly in some sectors than in others, but by the turn of the twenty-first century all workplaces in all sectors, private and public, had gone through major forms of restructuring, resulting in thousands of jobs lost.

Employers, represented by numerous agencies and groups, lobbied hard to obtain the support of the state and sections of society for these forms of flexibility. In 1996 one of these groups, the South African Foundation, issued what read like a manifesto of the combative section of the business community. The strident response made by the three large union federations (Cosatu, NACTU and the Federation of South African Labour[9]) was not sufficient to help unions win the debate, nor did it stop the shift by the government towards liberalisation of the economy, as signalled by the GEAR macroeconomic strategy of 1996. Indeed, the adoption of GEAR led to the abandonment of the RDP and the eventual closure of Naidoo's ministry. Although no thorough audit of GEAR's negative effects has been undertaken to date, it is safe to say that the anticipated state-welfarist edge of the new democratic government had been blunted, if not outrightly obliterated (although James Ferguson argues in *Give a Man a Fish* (Ferguson 2015) that South Africa's social-grant system is an example of a new kind of distributive politics). What followed was a decade of contestation, in which unions, particularly Cosatu, and the government engaged in acrimonious trading of accusations and counter-accusations. But the unions always stopped short of declaring open war against the government. Indeed, Cosatu continued to pledge loyalty to the ruling ANC and its alliance, and continued to devote large amounts of resources to boost the party's election campaigns in all the elections from 1999 onwards.

Therefore, global economic restructuring compounded the difficulties experienced by trade unions, and added to their organisational and political woes.

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9   The Federation of South African Labour is a predecessor of the present FEDUSA.

Victims of their own successes

In an extraordinary display of triumphalism and self-congratulation, the Cosatu general secretary's report to the federation's 2009 national congress stated:

> *We will not speak of the political investment we have made since we stood up against the encroaching dictatorship and Zanufication of the ANC in the late 1990s and until the triumph of 2007 in Polokwane, where our ideological foes met their Waterloo. When the historians write honestly about the contributions the workers' movement made in this period we are certain they will speak in glowing terms about Cosatu.*　(Cosatu 2009:65)

Nevertheless, tied to these successes are equally weighty problems. First, the unprecedented membership growth of some unions comes at a price because it makes them complex organisations with competing imperatives of wanting to be democratic, on the one hand, and the quest for efficient organisation, on the other. Over the last two decades the pursuit of organisational efficiency predominated, resulting in an accelerated trend towards centralisation of decision-making and power, and the dilution of democratic practice. These challenges are intensified by the spread of membership and workplaces over vast geographical areas. Therefore, for a union with members across the country the practice of democracy is not only difficult, but also extremely expensive because of the costs involved in bringing worker representatives together. In this context full-time officials, particularly those at regional and national levels, accumulate inordinately large amounts of power, making decisions without reference to members. All unions have experienced these changes to varying degrees.

Secondly, the bigger unions have over time become even more dominant as they organise the overwhelming majority of workers in their sectors to a point where they become monopolies. In the mining sector, the NUM is a classic case of a union that had become a monopoly and had gone on to impose a single-party political position on its members. Although the strike at Marikana was triggered by a wage dispute involving rock-drill operators, the heavy-handed action of the union, management and the police had everything to do with the fact that Lonmin and other platinum workers in the region had dared to challenge a trade union monopoly underwritten by management, the ruling tripartite alliance and the state. The Marikana workers were therefore sacrificed by that alliance because they had dared to challenge the monopoly by walking out of the NUM. That's a key point. Instead of the union acting as a broad church for all political views and embracing all political currents, it had become one church, with one voice, reading from one Bible and led by one priest. It had become extremely

intolerant of any other views. In this sense, its political orientation trumps its responsibilities of representing mine workers and its political allegiances undermine its capacity to serve its membership.

Thirdly, over the last two decades there has been a marked shift from the adversarial relations between union leaders and employers to a point where, in many instances, unions had become very close to and cosy with management. This is again relevant to Marikana. The NUM had become close to platinum employers, and when the union was challenged about this, its leaders colluded with management and advocated drastic action against mine workers who decided to break away to join AMCU. Cosy relations between union leaders and management are not confined to mining but are to be found in different forms and in various sectors.

An effect of the deracialisation of society as a result of the efforts of unions and other liberation movements has been to open up unprecedented opportunities for upward mobility among black people in general. Union members in workplaces and union leaders — those who are in elected positions, as well as those in full-time employment by the unions — are potential beneficiaries of these changes. Indeed, thousands of unionists have benefited from these opportunities, resulting in most of them leaving their shop-floor or union positions for better-paying ones elsewhere.

In South African trade unionism the shop steward's role is generally a part-time one. A person gets elected among fellow workers and continues to work, as normal, on the shop floor, but in his or her capacity as a shop steward he or she occasionally meets with management. What happened, especially in mining, in the 1990s and early 2000s, was that the NUM approached management and asked to have a third of their shop stewards to be contracted as full-time union operatives working in union offices on the mines. Lonmin was one of the first employers to sign an agreement with the union on this, and it meant that full-time shop stewards were taken off their regular positions. A significant aspect of this agreement was that the full-time shop steward would be paid on a different scale, benchmarked against entry-level human-resource personnel rates. A shop steward I interviewed had been elevated in this way from being a miner working underground. From his modest miner's pay of R3 000 a month, his earnings suddenly rose to the princely sum of R12 000. Another facet of the agreement was that, if not re-elected when their term expired the full-time shop stewards should not be worse off. In other words, if they were not re-elected, management must find another position for them at the equivalent or higher salary level. To make sure they are not worse off, they must be trained while they are performing their full-time shop steward's role, so that when their time is up they will not be found wanting in terms of work skills.

Although, from a distance, the example of full-time shop stewards may appear to be a necessary and uncontroversial change, it is also extraordinarily contentious and is one of the issues that has contributed to the strife in the mining industry, particularly over the last 10 years. It has caused a great deal of conflict within the union and within communities, even to the extent of murder accusations being made against unsuccessful contenders for these positions. This is because the people who are elevated to these positions get a feel for the good life, flying around the country, driving hired cars and staying in hotels. At election times, factions square up, each canvassing for their candidates. In Rustenburg there have been court cases involving people accused of plotting to physically eliminate competitors during union elections.

Another issue is that the unusually close relations between the ruling party and the unions and, by extension, between government and the unions, have compounded things for the unions. Although it may serve unions well to have easy access to the leadership of the ruling party and government institutions, as well as to ministers and the president, this close relationship can also complicate matters for unions. This was best illustrated by reactions in the aftermath of the Marikana massacre when the NUM, Cosatu, the SACP, the ANC, President Zuma and several cabinet ministers tried to outdo one another in condemning the Marikana workers, branding them as 'criminals', 'thugs', 'vigilantes' and 'backward barbarians'.

Finally, many unions have broken the old cycle of the financial woes that beset them during their formative years. They now have regular revenue streams, the most significant being money from membership subscriptions. These dues are set as a percentage of a worker's monthly wage (usually 1%), and are deducted automatically from his or her pay and transferred to the union. Such has been the financial health of some unions that they have managed to establish investment companies that operate according to capitalist principles of seeking maximum return on investment. Many unions also own property and are therefore no longer subject to the vagaries of fluctuations in the office rental market.

Unions do continue to be dogged by financial problems of a different kind. These include conflicts of interest involving union investment companies; corruption among union leaders awarding deals to service providers jostling for the lucrative union benefits market (eg pension funds, provident funds, medical schemes and funeral schemes); corruption involving union leaders in boards of benefit funds, state corporations and investment company boards; and numerous other deals often concluded under the rubric of black economic empowerment. Examples of conflicts of interest over the past years have been Cosatu's investment arm, Kopano Ke Matla, bidding to buy Aventura, a state resort chain that was being privatised,

and the South African Railway and Harbour Workers' Union opting to stand down from the bid selection panel, so that its company, SARHWU Investment Company, could bid for SunAir, a former Bophuthatswana airline that was being privatised. Then there was the Cosatu national official who accepted a bribe in the form of a new Audi worth over R300 000 in return for awarding an administration contract to a company in the pension and provident-fund business. In more recent years corruption has become more brazen. Leading union officials — presidents, deputy presidents and general secretaries — have been implicated in multimillion-rand scandals.

What about the workers?

I have used examples mainly from the mining sector to illustrate my arguments, but these trends are replicated across various sectors, including the municipal sector, the public service and manufacturing. As union leaders became increasingly passionate about politics, investment opportunities and upward mobility for themselves and their friends, the daily bread-and-butter work of trade unions got increasingly neglected. Attending to the needs of their members — for example, taking up cases of dismissals, addressing worker grievances and developing sophisticated collective-bargaining strategies were neglected. There have been instances of dismissed workers whose cases were not followed up or defended.

A little-known fact about South African trade unionism is that the country has never had a tradition of strike funds. For a country with such militant workers and a high frequency of strike action, it is perplexing why unions have not established strike funds and why the reliance on raw militancy and self-sacrifice remains the mode of conducting strikes. This means that workers who are on strike lose out on their wages for the duration of the strike. This is one of the reasons why there are often violent tensions between those who decide to strike and those who break the strike, particularly when the conflict becomes protracted and acrimonious. (Even more controversial is the fact that union officials continue drawing their salaries during strikes. There has never been a debate on this issue of solidarity by full-time union employees — whether they should forfeit their salaries for the duration of the action.) This sort of violent tension began in the 1980s, particularly in 1985 in the context of a call by the then exiled ANC president, Oliver Tambo, to 'make the country ungovernable and make apartheid unworkable'. It's a phrase many generations of workers and activists grew up with and it was easy — people simply withdrew their consent and made it extremely difficult for institutions to function normally. In the democratic context ungovernability encourages disruption of institutions and if you are a striking worker it also means you do not allow anyone to go to work. Strike breakers become fair

game. Over the last 20 years ungovernability returned with a vengeance. No one knows how to deal with it and no one has confronted it as a mode of conducting collective action.

Writing about changes in the outlook and political orientation of trade union leaders in the USA in the first three and half decades of the twentieth century, sociologist C Wright Mills ([1948] 2001) referred to union leaders as the 'new men of power'. These leaders had become distanced from their members both in terms of lifestyle and outlook to the extent that they were no longer distinguishable from the other 'men of power' — politicians, business people and military elites. They felt at home socialising with these elites and modelled their lifestyles on them too. In many respects, several union leaders in South Africa mirror the new men of power that Mills identified. For example, just as the Marikana massacre was looming, the National Executive Committee of the NUM decided to raise the salary of their general secretary, Frans Baleni. At the time, his salary was R37 000 a month — already comparatively high for union general secretaries. It was increased by R40 000 a month, which took it up in one fell swoop to a total annual package of R1.4 million. At that time, an unskilled mine worker earned about R3 000 a month. Journalists confronted Baleni, pointing out the irony of being the highest-paid union official representing workers in one of the lowest-paying industries. His response was astonishing: after explaining that it was a decision of the union's Executive Committee, and not his, he then argued that the increase was reasonable because it was within the salary rates that the market was paying people of his level of seniority. He was evidently benchmarking himself with other 'men of power'.

Three turning points

In conclusion, there are three stories that represent what I term 'turning points', which illustrate succinctly the current state of the trade union movement in South Africa today.

The first story is one of worker discontent and I use South Africa's platinum mining as an example, but the story is a metaphor for something bigger and more profound than just one sector. The worker discontent in platinum mining built up over a long time and eventually led to the Marikana massacre. Understandably, for many people Marikana has become the focal point because of the traumatic nature of the incident — the first massacre by the police in post-apartheid South Africa. But once we get over the shock of the bloodletting by the police sent in by the democratic government, it is important to focus on the real issues that gave rise to Marikana. The fundamental issue was worker discontent about the measly wages paid to rock-drill operators and the union's (NUM) failure to represent the workers.

Marikana happened because of a simultaneous sense of grievance by workers against two parties, Lonmin and the union, which were perceived to have a sweetheart relationship and a shared disdain for the workers. As the stand-off intensified, it became increasingly difficult to separate the workers' anger against Lonmin management from their rebellion against the union. The problem is that they were breaking away from the political monopoly I referred to earlier, the tripartite alliance, in which the NUM was Cosatu's biggest affiliate. Although it is correct to say that the workers were brave to grab the bull by the horns, I do not think they understood fully the forces ranged against them. On top of that, alliance leaders had very good relations with employers in platinum. Cyril Ramaphosa, current deputy president of the ANC and the country, was a director of Lonmin at the time.[10] In addition, that alliance was backed by the full might of the state. So, when the workers marched, the alliance disowned them, the NUM disowned them, the government disowned them and management disowned them. The workers were virtually sacrificed by their union, management, the alliance and the state. That's what Marikana was about. Part of the reason they were sacrificed is captured superbly by the documentary *Miners Shot Down*, and the narrative that was used to sacrifice them was that the workers were backward, barbaric, traditional and superstitious.

One would have thought the biggest massacre in post-apartheid South Africa would have elicited a major reaction from Cosatu, but they never protested the killing of workers. The federation did not make any submission to the Farlam Commission appointed to investigate the massacre, nor does the commission's report make reference to the federation (Marikana Commission of Inquiry 2015). Instead the federation, together with NUM, launched a 'Hands off NUM' campaign aimed at demonising AMCU and wooing the dissident workers back. Of course the campaign was a complete flop and NUM continued to lose more members after Marikana. The Minister of Labour condemned the Lonmin workers; the president condemned the workers; the Minister of Police condemned the workers; and the Minister of Intelligence condemned the workers. The eruption of worker discontent and the tragic events of Marikana clearly represent a turning point in post-apartheid South Africa's labour relations.

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10   Ramaphosa's role in the events leading up to the Marikana massacre, particularly the way he used his political connection to top ANC and government leaders, came under the spotlight during the public hearings held by the Farlam Commission. Advocate Dali Mpofu, representing some of the bereaved families, drew attention to email correspondence which, he argued, proved that Ramaphosa had called for police action against the mine workers.

The second turning point is about divisions within the federation and the palace coup that led to the suspension and final dismissal of Vavi as general secretary. It is the divisions and fractures in the federation that resulted in Vavi's suspension and dismissal. At the National Congress in 2012 there had been attempts to topple Vavi as punishment for his outspoken opposition to the government's failure to embrace alternatives to neoliberalism and for his strident calls for the government to clamp down on corrupt officials and politicians. Although these early efforts failed, Vavi's adversaries eventually found an excuse — his intimate indiscretion at the federation's headquarters with a young woman whom he had employed as an assistant without following proper procedures. The Central Executive Committee suspended him, an unprecedented move in Cosatu and in South African union movement circles generally. Following a successful court challenge, Vavi went back to work in late 2014 but was eventually dismissed in early 2015.

For many, Vavi was a strong union leader, a moral icon destined to be the next president of the country. Although he made some costly errors of judgement, his fall from grace was more the result of a palace coup, not only orchestrated within the broader alliance incorporating the ANC and the SACP. Vavi's criticisms of Zuma and corruption in the government made him increasingly unpopular, and eventually he was punished for it.[11] His biggest error, however, was to overestimate his influence and power in the federation and the alliance, and his failure to read the balance of power.

The third turning point is the collapse of the organisational fibre of the unions. I would like to make reference to an unprecedented court challenge that pitted a union against its own members.[12] On 9 November 2013 the Constitutional Court handed down judgment in a case involving two workers, both members of Cosatu's Food and Allied Workers Union (FAWU), who had been dismissed by Nestlé, a multinational company. The case started when the two were dismissed by Nestlé in 2002. The union then took the matter to the national statutory dispute-resolution body, the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA said they could not resolve the issue and proceeded to issue a certificate of non-resolution, which authorised the workers and the union

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11   It is important to remember that when Zuma was fired as deputy president of the country by President Mbeki in 2005, Vavi was probably the one person who helped turn the tide in Zuma's favour. Zuma was in a vulnerable position but Vavi marshalled Cosatu and its membership, and challenged Mbeki, and Zuma was reinstated. However, Vavi's alliance with Zuma unravelled when he started criticising corruption and Zuma.

12   *Food and Allied Workers Union v Lungi Rosemary Ngcobo N.O. and Michael Mkhize* (CCT 50/13) [2013] ZACC 36.

to take the matter to the Labour Court if they wished. The union sat on the case and failed to follow up. Meanwhile union officials kept reassuring the workers that their case was in hand and that they would hear soon about the outcome from the Labour Court. After a year of reassurances the workers learnt that their case was actually stale because the deadline for referring it to the Labour Court had long passed. The workers engaged a lawyer and sued the union at the High Court for failure to take their case forward. The High Court found in favour of the workers and informed them that had the union taken the case to the Labour Court, they would have been reinstated.

FAWU appealed the case to the Supreme Court of Appeal, effectively petitioning against its own workers by arguing that the union had done all it could to defend them. The Supreme Court of Appeal found against the union, thus confirming the earlier finding of the High Court. The union appealed again, this time to the Constitutional Court, and the Constitutional Court once again found in favour of the workers. FAWU maintained its position to the end, going so far as to tell the Constitutional Court: 'We have no obligation to represent these workers. After all, they don't pay us to be legal experts, they pay us to be generalists.'

The workers were awarded compensation in lieu of reinstatement and the union had to pay the legal costs. By then one of the workers had died two years earlier. The case was a terrible indictment not only of FAWU, but of all unions in post-apartheid South Africa. Many workers lose cases in similar fashion but never have the legal or financial support to pursue them like these Nestlé workers did.

These three turning points signal irrevocable change in trade unionism in South Africa, in terms of the servicing of workers on the shop floor, the relationships between workers and union leadership and divisions that cannot be healed easily. However, we should remind ourselves of the paradox that I presented at the beginning of this chapter: there are forces and processes that continue to provide strength to South African trade unions at the same time as there are forces that divide and weaken the unions. In ending the discussion on the state of trade unionism during the two decades of democracy, we can echo Dickens and say, 'It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness ...'.

References

Bonner P. 1978. The decline and fall of the ICU – A case of self-destruction? In E Webster (ed.). *Essays in Southern African Labour History*. Johannesburg: Ravan Press.

Bradford H. 1987. *A Taste of Freedom: The ICU in Rural Africa, 1924–1930*. New Haven and London: Yale University Press.

Buhlungu S. 1994. Cosatu and the elections. *South African Labour Bulletin*, 18(2):7–17.

Buhlungu S. 1994. The big brain drain: Union officials in the 1990s. *South African Labour Bulletin*, 18(3):26–32.

Buhlungu S. 2000. My union experience is the best certificate in my lifetime: Interview with Nelson Ndinisa. *South African Labour Bulletin*, 24(4):54–58.

Buhlungu S. 2001. The paradox of victory: South Africa's union movement in crisis. *New Labor Forum*, 8:67–76.

Buhlungu S. 2010. *A Paradox of Victory: Unions and the Democratic Transformation of South Africa*. Scottsville: UKZN Press.

Cosatu. 2009. Political report to the 10th Cosatu National Congress. Johannesburg: Cosatu, 65.

Desai R & Khanna A. 2014. *Miners Shot Down: South Africa Will Never be the Same Again*, a film by Rehad Desai. Available: www.minersshotdown.co.za. (Accessed 6 April 2016).

Ferguson J. 2015. *Give a Man a Fish: Reflections on the New Politics of Distribution*. Durham, NC: Duke University Press.

Losi Z. 2015. Why was comrade Zwelinzima Vavi expelled by Cosatu? Available: http://www.cosatu.org.za/show.php?ID=10236#sthash.uQjXlpOO.dpuf. (Accessed 7 October 2015).

Marikana Commission of Inquiry. 2015. Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin mine in Marikana, in the North West Province, 31 March 2015. Available: http://www.gov.za/sites/www.gov.za/files/marikana-report-1.pdf. (Accessed 7 October 2015).

Mills CW. 2001 (1948). *The New Men of Power: America's Labor Leaders*. Urbana and Chicago: University of Illinois Press.

Von Holdt K. 2003. *Transition from Below: Forging Trade Unionism and Workplace Changes in South Africa*. Scottsville: University of Natal Press.

Legislation

Labour Relations Act 66 of 1995.

Cases cited

Food and Allied Workers Union v Lungi Rosemary Ngcobo N.O. and Michael Mkhize (CCT 50/13) [2013] ZACC 36. Available: http://www.saflii.org/za/cases/ZACC/2013/36.html. (Accessed 7 October 2015).

Chapter 7

THE POLITICS OF WOMEN AND GENDER IN THE ANC: REFLECTING BACK ON 20 YEARS

Zine Magubane

The transformation of the gender make-up of the South African Parliament was one of the most remarkable achievements of the South African transition. South Africa moved from 141st place on the list of countries with women in Parliament to 7th as 106 women proudly took their places on opening day in May 1994. And increased representation was not the only victory. Activists made gender equality a central issue in the democratic debate and achieved significant advances in women's 'descriptive and substantive representation' (Waylen 2007:541). The Constitution integrated gender equity 'in a way that few constitutions in the world had managed to achieve' (Govender 2007:137). Gender-responsive laws, policies and budgets were adopted. Pregs Govender, a well-known gender activist, who chaired the Women's National Coalition (a massive research campaign to draft a Women's Charter) was elected to Parliament in 1994. At the time she spoke of her earnest desire to 'go into the existing power structure and transform it' (Govender 2007:141). She sought 'not just to vote women into positions of power but to change the priorities of the institutions themselves' (Govender 2007:150).

Twenty years later, the reports coming out of South Africa are mixed at best. Many gender activists are, in fact, quite critical. Frene Ginwala lamented the 'regression in the last 20 years in the gender equality movement in politics' (Evans 2014:9). She despaired that the Women's Charter, adopted in 1994 and delivered to Parliament in 1997, had been 'forgotten' (Evans 2014:29). Gender activist Lisa Vetten criticised the government's decision to merge the Department of Women, Children and People with Disabilities with the Department of Social Development. The latter has no capacity to monitor what government departments are doing in terms of gender equality and women's rights. The move, therefore, represented a 'worrying degrading of the political relevance of political equality' (Pillay 2014a). Shireen Hassim, likewise, noted how the Commission for Gender Equity, designed to be a mechanism for accountability, independent of party politics, and the Presidency's Office on the Status of Women, which had overall responsibility for ensuring gender equality across all government departments and programmes, were both casualties of the 'politics of patronage' (Hassim 2014a:22).

A sharp decline in the numbers of women representatives occurred in 2014. In the eight provinces where it governs, the ANC appointed just one female premier, a 50% decline from 2009. ANC Deputy Secretary General Jessie Duarte told reporters that the outcome was 'strange and not acceptable' (Pillay 2014a). Political commentator Sisonke Msimang saw the failure of the ANC Women's League (ANCWL) to respond as a 'testament to its weakness. The old women's league would have been hyper-vigilant about this sort of thing' (Pillay 2014a). The ANCWL is itself in shambles in some parts of the country. An audit done in 2014 showed the league in the Western Cape and the Eastern Cape does not have the required number of members. When the ANC returned from exile they decided to retain the branch as the basic unit of organisation for decision-making and choosing leadership. It was imagined that the local ANC branches would hold local government accountable. Although that has not turned out to be the case, the collapse of league branches is still worrying given the avowed commitment of the ANC to 'battling patriarchy from the branch up' (Evans 2013:14).

Several years ago an editorial in the *Mail & Guardian* decried the 'serious dearth of new female leadership in the country' (Pillay 2010:12). There is considerable cause for concern as to where this new leadership will come from, since the only way a woman in the ANC can ascend to power, it seems, is by working through existing structures. Power and change, ANCWL President Angie Motshekga explained, is achieved by 'going to the branches [to] motivate for it. You have to work within the organization' (Evans 2013:11).

Gender and the politics of loyalty

What went wrong? Some clues can be found in the political dynamics that led Govender to resign from Parliament in 2001. She was the sole ANC MP to vote against an expensive arms deal that allocated a large part of the budget to purchase advanced weapons. She felt the money would be better spent on programmes to aid the poor. 'My decision to vote against the arms deal came after a long period of seven to eight years during which I worked to change policies and helped establish institutions which would implement the political promise which we made in 1994,' she explained. 'I felt that the arms deal was betraying that promise' (Villa-Vicencio & Soko 2012:267). Govender was told, in no uncertain terms, that her failure to toe the party line would not be tolerated. She and her fellow MPs, President Thabo Mbeki informed her, 'were elected by the ANC and gained and lost [their] positions as chairs of committees through the ANC' (Govender 2007:121).

The emphasis that the ANC has traditionally placed on loyalty has had particularly gendered effects. It is directly related to the 'gap between law and

lived reality' that exists for South African women (Amnesty International 2013:39). Susan Nkomo, project leader of the Women in Research initiative at Unisa, provided an interesting analysis of why this gap between law and lived reality for South African women not only persists, but appears to be worsening. She observed that although proportional representation allows more women to be in government structures, 'leadership can become disconnected from vulnerable constituencies of women as women in power do not have to be accountable to women when their guarantee of leadership very often rests on a man appointing them or political patronage' (Nkomo 2013:5).

The coexistence of high levels of female penetration into the upper echelons of government with the persistence and escalation of gender-based violence, poverty and inequality would appear to be an insoluble paradox. That is, until we take seriously the question of institutional culture and context. Since 1943 (31 years after the ANC was established) until today the emphasis by women in the ANC has first and foremost been on *inclusion*. The 2 May 1990 ANC Statement on the Emancipation of Women declared that 'highest priority must be given to finding the means to facilitate women's participation in the struggle and within all the political, administrative, and military sectors of the ANC from the grassroots through to the NEC' (ANC 1990:22). The main focus came to be on ensuring that women would be enabled to 'participate fully in the decision and policy-making organs of our country' (ANC 1990:21).

An important, but by no means singular, goal of those persons (largely women) who were striving for gender justice within the ANC was to become more firmly integrated and to achieve higher levels of representation in the liberation struggle. Practically speaking, this meant that women should come to play active roles in the 'seizure of power' the shorthand that encapsulated the strategy and tactics adopted by the ANC in exile. The total seizure of power meant

> *the incorporation of the masses into the ongoing struggles and the timely use of arms by the ANC [to] raise the sights and broaden the vision of the masses beyond the perspective of mere reforms, to conceive of their struggle not merely as an amelioration of oppressive conditions but as ultimately a question of political power.*   (Magubane 1987:209)

How, then, did the ANC envisage incorporating women into the strategy of total seizure? The 1981 speech that OR Tambo delivered at the ANC Women's Conference in Luanda, Angola, suggests that increasing women's representation at all levels, with a particular concentration on placing at least a few women in leadership positions, were the ANC's primary goals.

'Stop pretending that women in our movement have the same opportunities as men,' Tambo admonished male delegates. Women, on the other hand, were told to: 'assume their proper role, outside of the kitchen, among the fighting ranks of [the] movement and at its command posts'. Most tellingly for the argument I advance below, Tambo declared that the Women's Section of the ANC was 'not an end in itself'. Rather, it was a 'weapon of struggle, to be correctly used, against all forms and levels of oppression and inequality in the interests of a victorious struggle of our people' (ANC 1984:2).

The ANC declared 1984 South Africa's Year of the Women — the goals of which were to 'further enhance the participation of our women in the struggle and thus expand the liberation forces' (ANC 1984:1). In the intervening period between the Year of the Women and the Malibongwe Conference of 1990,[1] movement leaders became more aware 'of the importance of addressing gender oppression specifically and developing non-sexist policies for a future South Africa' (Singh 1990:23). Members of the Women's Section actively rebelled against being treated simply as another sector to be mobilised. When the ANC released the landmark policy statement on the emancipation of women in 1990, there was, according to feminist lawyer Cathi Albertyn, 'a substantial shift in the ANC position on women. It was the first official acceptance of the independent nature of women's liberation' (Albertyn 1994:49).

Women's liberation and national liberation

With the benefit of hindsight, we can assess what this shift did and did not entail. Clearly, the acceptance of the idea that women's liberation was an autonomous aspect of national liberation was key. As was the way in which gender equality came to be defined as a central component of national liberation, thus making the achievement of full democracy contingent on the complete elimination of gender oppression.

The decade between the Luanda conference and the release of the ANC statement also witnessed an important debate about whether or not discussions about gender equality and feminist issues were divisive. For much of its history, politics in the ANC was marked by the fact that 'fear of creating divisions in the liberation struggle' meant that efforts to mount a serious challenge to patriarchal domination were severely compromised (Horn 1991:37). As Barbara Masekela, who served on the ANC NEC in the 1990s, explained in a 1991 interview, the term 'feminist' 'was not regarded

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1   The first conference in South Africa to bring together internal women activists, exiles and women from other countries.

as a positive expression. To be feminist ... was at some point viewed as very divisive' (Masekela 1991:14). The view that feminism was a divisive force was 'common in the anti-apartheid movement' (Russell 1991:343). When gender activists shifted popular understanding within the movement from seeing gender advocacy as divisive to seeing it as absolutely necessary to the full achievement of democracy, a major victory was won. What was not achieved, however, was a shift in understanding around the very notion of 'party loyalty'. Activists mounted a convincing argument that they should not be accused of being divisive. However, they didn't challenge the notion of divisiveness itself. Demonstrating that a commitment to gender inclusivity was not at odds with party loyalty or commitment remained central. Hence, they continued to emphasise that women were 'the best cadres because they do lots of work' (Russell 1991:131).

The ANCWL post-1994

The behaviour of the ANCWL post-1994 indicates that the top leadership isn't interested in contesting this image. In her 2014 Helen Joseph Memorial Lecture, Shireen Hassim (2014b) analysed how, in the contest for leadership at Polokwane, the league threw its weight behind a particular faction without any regard to the implications of their choice on the future of gender equity or equality. It was widely rumoured that Mbeki and his supporters wanted a woman to succeed him as president of the country in 2009. But the ANCWL supported Zuma: 'The league had a strategic choice facing it, and yet again, it stumbled by backing a candidate on the grounds of party power rather than on the extent to which he (or she) would support the league's avowed core values' (Runji 2014:14).

Some have gone so far as to say that the ANC has 'snuffed out the potential of female politicians' and that 'on the whole the ruling party's women have diminished in power' (Haffajee 2008a:4). Although access to positions within the ruling party is important, many women in government positions are reluctant to openly challenge the ANC. 'Everywhere you see this sublimation of strong women to party imperatives even though it might not be the best thing for its grass-roots support base,' published the *Mail & Guardian* in an editorial (Haffajee 2008a:16). In 2014 Parliament's newly inaugurated presiding officers — speaker Baleka Mbete and National Council of Provinces chairperson Thandi Modise (both well-known gender activists during the anti-apartheid period) — were accused of 'creating personal fiefdoms' by bringing in the 'party faithful' to what should be non-partisan offices (Makinana 2014:1).

In his book *What Went Wrong: South Africa on the Brink of Failed Statehood*, Alex Boraine, one of the architects of the Truth and

Reconciliation Commission, stresses that the ANC's emphasis on party loyalty was an understandable response to the conditions it faced in exile. The organisation was under siege, security forces had infiltrated, and an atmosphere of distrust and paranoia reigned. As a result, the leadership became 'extremely authoritarian and intolerant of dissent ... [U]nwilling and unable to listen to the criticisms and complaints which came from the rank and file' (Boraine 2014:26). An example of this authoritarianism can be seen in a story Govender recalled many years later. While working underground she experienced many problems with her commissar. Later she found out that he had asked permission to have her 'eliminated' because she was 'insubordinate' (Govender 2007:181).

Gender activists were strongly affected by this aspect of ANC culture. Rhoda Kadalie spoke forcefully about tensions between the different generations:

> *The old women still believe that the men run the show together with a few important females. They don't think that what the younger women are fighting for is as important as the national struggle. I feel that the message often comes from the top that we should subdue our feminist or gender struggle.* (Russell 1991:342).

Although criticising the culture of party loyalty and hierarchy was clearly part of the overall challenge to the patriarchal culture of the ANC, it would have been nearly impossible during the turbulent decades of the 1980s and 1990s for that critique to take centre stage. Indeed, more than a few of the women who made it into top leadership positions in the ANC shared the 'abrasive leadership style', which, according to Govender, was the dominant mode in the ANC (Govender 2007:130). Feminist writer Sisonke Msimang agrees that even highly respected leaders, some of whom were outspoken feminists, played their role in creating the ANC's culture of defensiveness. The unwavering loyalty of ANC members, which may have been absolutely necessary for a besieged organisation during apartheid, has been lethal for post-apartheid democracy. Says Msimang (2013:14): 'The insistence on loyalty before integrity has had a devastating impact on the way that the party operates.'

The ANCWL's overall focus on increasing women's participation and representation in leadership positions, and getting the message across that gender liberation was a central component of national liberation made near perfect sense at the time. However, the conditions under which the ANCWL re-established itself in the country and the emphasis on ensuring women's participation in decision-making structures effectively relegated the question of overall ANC culture to the back burner. The

immediate pressing issue was, of course, the marginalisation of women in the negotiations process. Brigitte Mabandla, the only female member of the ANC Constitutional Committee, summed up the situation well when she noted: 'The majority in the commissions [like] CODESA is all men. ... As they converge to a Constituent Assembly it will be the men' (Mabandla 1993:38). Hence, immediate attention had to be given to issues such as the fact that when the Constitutional Committee was set up and the Constitutional Guidelines were drafted, the NEC appointed an all-male committee. Affirmative action in post-apartheid governing structures was yet another matter of pressing concern, as was the question of drafting a Women's Charter. When the ANCWL made the move to re-establish itself in the country, the authoritarian culture of the ANC in exile went largely unchecked.

The ANCWL was relaunched in August 1990 as an autonomous organisation linked to the ANC. Ela Ramgobin, a member of both the Natal Indian Congress and the Natal Organisation of Women (NOW) felt 'the unbanning of the ANC and the coming return of the exiles has posed many difficult and exciting questions for internal political organisations. The most important was how are internal organisations going to relate to ANC structures[?]' (Ramgobin 1990:21). According to Govender, a NOW member who eventually chaired the Women's National Coalition, the answer to that question was 'not very well'. 'When internal women's organizations like NOW dissolved, their experience with the League was not sisterly; many described the encounter as a bruising process,' she explained (Govender 2007:123). Pat Horn, a long-time ANC activist, described the unification process as filled with tension:

> Some of the UDF-affiliated women's organisations had consequently decided to disband in favor of putting energy into strengthening the structures of the ANC Women's League. But this was also not a smooth process and was accompanied by many localized conflicts. (Horn 1991:84)

Tellingly, a NOW activist expressed the view that women in the organisation felt they would be 'betraying the ANC if they stayed independent' (Connell, 1998:157). Thenjiwe Mtintso, an MK soldier and SACP member, agreed. 'When we came into the country, in one way we demobilized these women who had been active in their own right because we had this focus, a serious focus, on rebuilding the ANC' (Connell 1998:158). Important values, like non-racialism, were compromised by this action. Returning exiles did not appreciate how hard these organisations had worked to build alliances across class and race. We may now be witnessing the long-term effects of this

demobilisation. Hassim makes the point that the ANCWL has always relied upon energy from outside of the organisation to push it towards a more radical posture. From the time of the historic anti-pass protest in 1955 to the formation of the Women's National Coalition in 1994, the league has 'had to step outside the movement to make a significant impact' (Hassim 2014a:17).

Therefore, it was established from the beginning that gender advocacy and gender equality could occur so long as the imperatives of party loyalty were not challenged. The potential silencing effects of this were noted early on. However, nothing was really done to address it. Despite the heady gains that were achieved — eg the progressive Constitution, the high percentage of women in the first Parliament, and the range of institutions created by the new government to represent and defend women's interests and extend women's political participation — 20 years later we can see that the extent to which these positive achievements have translated into substantive changes in the lives of everyday women has been profoundly affected by ANC institutional culture.

Govender made the important point that gender equity was not simply about representation or laws. It also encompassed challenging what she called 'big man' politics: 'We need to ensure that the critics of government policy feel sufficiently comfortable to contribute to debate and participate in the decision-making process (Villa-Vicencio & Soko 2012:267). According to Boraine, the big-man politics that Govender describes runs rampant within the ANC. The ingrained culture of power and a spirit of 'party loyalty at all costs', which developed during the period it operated in exile, have become dysfunctional for the working of a democratic state:

> The ANC was in exile for 30 years. During that period the conditions under which its people lived and worked and the challenges they faced, cultivated a certain climate, which was not abandoned upon their return to South Africa in 1990. Plagued as the ANC was with informers and differences of opinion regarding strategy, loyalty to the party was paramount. (Boraine 2014:8)

Having XY chromosomes clearly does not inoculate anyone from the disease of big-man politics. Ginwala noted: 'Women can be as good as men and they can be as bad as men' when faced with the decision of weighing personal gain and upward mobility within party structures against waging the fight for gender equality (Evans 2013:28). Hassim notes that when the ANCWL moved inside the state they became gatekeepers, 'ensuring that reliable ANC women were appointed to parliamentary committees, government department, and parastatals. Appointments were driven by party loyalty and political mobility rather than by a track record of gender activism' (Hassim 2014a:21).

There were always reservations among outspoken and declared feminists as to the capacity of the ANCWL to carry out a feminist agenda. Ginwala once famously said: 'I don't think the ANC Women's League *can* liberate women. To assume that it can is ignoring political reality' (Beall 1990:14). Ginwala never joined the ANCWL and told the *Mail & Guardian* that she most likely never would, citing the league's statement that South Africa was not ready for a woman president as 'outrageous' and 'unacceptable' (Evans 2014:8).

Although the ANCWL has never been reticent about its commitment to the goal of mobilising women into the ANC, they have disappointed many women with the narrowness of their focus and what looks to many like blind party loyalty. In the wake of their defence of Jacob Zuma in his rape trial, they were derided for being 'husks' of their former selves and 'kangas wound around the axis of ANC president Jacob Zuma's ambitions' (Haffajee 2008a:11). In May 2013 the league reiterated its resolve to release its 'immense election machinery to ensure the ANC maintains its overwhelming majority' (*Mail & Guardian* 2013:1). Jessie Duarte explained to a group of journalists how ANC support was strongest among women aged 18 to 65 and that this group would be a key constituency to help sweep the ANC to victory, particularly given the fact that 'men don't register for elections as much as women' (Mataboge 2013:4). In a move that has become typical for the ANCWL, the struggle was not about how to attain real political power that would become the basis for gender transformation or mobilising the female majority to sway policy or leadership. Rather, it was about possibly securing some positions of power in return for 'the league's utility to this or that faction's agenda' (Runji 2014:8).

Later that year the ANCWL reaffirmed that they would not 'break rank with the ANC' nor would they 'put gender transformation imperatives above the ANC's needs' by supporting a bid for a female president (Evans 2013:2). Comments made by former spokesperson Troy Martens seem to indicate that avoiding the label of 'divisiveness' at all costs continues:

> It must not be misinterpreted that the ANCWL does not want a woman president at the helm of the ANC. This is not the case. However, the league is a strategic political organization, with a deep understanding of the organization we form part of. We are supporting comrade Jacob Zuma for president, comrade Kgalema Motlanthe for deputy president and comrade Gwede Mantashe for secretary general to promote continuity and unify our organization. We say the time is not right currently, not because we don't have the capable leaders, and we believe South African society is maturing to a point where being led by a woman is acceptable, however the

women's league currently needs to assist in healing and unifying the organization and we believe at this point continuity will assist in achieving this goal, rather than bringing another candidate to the fore and creating further rifts in our organization.   (Evans 2013:13)

In 2014 the ANCWL shifted its position. Bathabile Dlamini, Minister of Social Development and an ANC National Working Committee member, announced that the league was prepared to discuss a resolution at its national congress in October to support a woman candidate to take over as president of the ANC in 2017 and of the country in 2019. Some possible contenders for the role are Baleka Mbete, who currently holds the position of Speaker of the National Assembly, Nkosazana Dlamini-Zuma, chair of the African Union Commission, Angie Motshekga, the Minister of Basic Education and the league's current president, and the Minister of Water Affairs and Sanitation, Nomvula Mokonyane.

Said Dlamini: 'You have many capable leaders within the ANC ... you have women premiers and ministers. We have many women who have excelled in their work' (Letsoalo, Makinana & Pillay 2014:6). Dlamini's comments make clear the extent to which the past 20 years have witnessed a shift whereby feminism in the ANC has come to mean securing positions in government, despite the fact that as women have become 'more politically visible, the limits of representation have become paradoxically more apparent' (Hassim 2014a:27). Getting gender on the agenda is, of course, a matter of representation. However, there must also be political will and the appropriate institutional support. Placing women in positions of power is not enough to ensure that economic policies, laws and social institutions evolve in gender-sensitive and progressive ways.

Gender and the politics of Parliament

Govender's time in Parliament certainly shows this. When she was an MP, Govender's leadership was marked by her commitment to examining all decisions, from budgets to firearms policy, from a gendered perspective. This put her in the perilous position of being an ANC Member of Parliament who might question or even oppose ANC policy. When she spoke up in the hearings of the Finance Committee to oppose measures like privatisation or gun control, she often found herself 'on the wrong side of powerful people in the party hierarchy' (Govender 2007:158). Early on she found herself in conflict with Essop Pahad, whom Mbeki had appointed with responsibility for the offices on the Status of Women, the Rights of the Child and the Status of the Disabled. When she declined to take the podium and defend GEAR at the National Assembly, Pahad gave her a thorough dressing-down. She

said: 'He exploded so loudly that MPs on the back bench heard him shout, "You are being politically irresponsible", before he stormed off' (Govender 2007:174).

Govender's final and most dramatic act of insubordination came with her decision to oppose major capital spending on military hardware, new systems, submarines and ocean-going vessels — the so-called arms deal. Govender resigned after being the only MP to vote against it. She recalled her bitter disappointment at the assistant secretary general of the ANC, Thenjiwe Mtintso, who was a feminist, communist, former leader of the armed wing, and chair of South Africa's first gender commission, when she fell in line with the majority — even though it was known how vulnerable arms deals were to corruption, how empty the promises made by arms companies to create jobs were, and how much money was being diverted from land, housing, water and job creation to pay for this advanced weaponry. Govender described how Mtintso 'looked ill' and 'did not pretend to understand the rationale behind the decision' (Govender 2007:203). Mtintso and other members of the NEC were coming to realise that, increasingly, crucial decisions were being made outside the NEC, the highest decision-making body of the ANC.

The final nail in the coffin came when a senior government official, whom Govender considered an old friend and comrade, lambasted her publicly, yelling 'How dare you stab the organization which nurtured you all these years? How dare you betray our organization' (Govender 2007:209). Govender was sure that her former friend was no longer prepared to challenge the ANC leadership, even on issues she knew were wrong. This sad state of affairs would come to be repeated again and again over the years with scandals like 'Oilgate', whereby R11 million of taxpayer funds were diverted to the ANC ahead of the 2004 election, and 'Travel-gate', where 40 MPs were found to have illegally taken R18 million in travel vouchers for personal use. An editorial writer for the *Mail & Guardian* asked the question, 'Where were Cosatu or the South African Communist Party, or large parts of organised civil society for that matter, when the arms-deal scandal was emerging in the late 1990s?' (Calland 2011:6) We can very well ask the same question of the ANCWL or the feminist constituency within the ANC.

To be clear, by no means did the ANC invent corruption or the politics of influence and intimidation. Govender described arriving in Parliament in 1994 only to discover that business groups regularly wined and dined apartheid MPs, treating them to overseas vacations and lavish gifts in exchange for favourable legislation:

There was no code of conduct whereby MPs had to declare gifts; no conflict of interest was registered; and corruption was not investigated or charged. This is just the way things were done. Business assumed that after 1994 it would continue to operate as it had done in the past. (Govender 2007:153)

Govender had assumed that the ANC would transform this institutional culture. However, things turned out to be 'not so simple' (Govender 2007:154).

Ginwala also traced the lack of national integrity that currently exists back to the apartheid regime's corruption. 'The country was managed by a society of brothers who furthered their objectives through strategies devised in secret,' she told a gathering of the Council for the Advancement of the South African Constitution in February 2011 (Calland 2011:9). 'To achieve their objectives they placed their brother members in positions of influence and power — in the army, the police, parastatals, and intelligence circles' (Calland 2011:9). She, like Govender, felt that when the ANC entered Parliament they underestimated how difficult it would be to root out this institutional culture. In a 2014 interview with the *City Press*, she recalled how she and her fellow MPs had assumed that they were starting Parliament with a 'blank sheet' (*City Press* 2014:16). There was, in Ginwala's words, a high degree of 'naivety in the 1990s about the capacity of the new political order to withstand the pressures of greed and avarice' (Calland 2011:8).

Gender and the politics of corruption

At the ANC's 2012 Mangaung conference the party decided to establish an integrity committee to deal with corruption. Tackling the political side of the equation is a much needed first step. Critics have noted that South Africa has the institutional basis for tackling corruption. However, political factions within the ANC have subjected these institutions to interference. Therefore, few people feel that the current institutions are 'fit for the purpose in the political rather than the legal sense' (Calland 2011:16). Hence, the NEC is also looking to the integrity committee to reintroduce 'the values of the liberation struggle' (Naidoo 2013:9).

Some have suggested that there is a rift between women in government and feminists in civil society. The source of this rift stems from the fact that feminists in civil society often feel unheard and get the strong impression that the issues that they raise are never given priority by people in power. For example, when the Communal Land Rights Act 11 of 2004 was struck down in May 2010, the minister assured the court that new, constitutionally sound legislation would replace it. There has been no progress thus far.

Access to land in rural areas still depends on local power politics among traditional leaders and in traditional structures. Rural women in particular are not a constituency that parliamentarians feel they have to listen to — they have very little political currency to trade. Govender makes the point that gender equality will never be achieved, no matter how many progressive laws are passed and how forward-thinking the Constitution may be, unless an atmosphere is created in which 'the critics of government policy feel sufficiently comfortable to contribute to debate and participate in the decision-making process' (Villa-Vicencio & Soko 2012:267).

All the recent talk about a woman president may indicate that gender parity has finally been achieved in one arena — that of big-man politics. 'South Africa is ready for a woman president,' Zuma told reporters on the eve of Women's Day during a state visit by the Chilean president, who happens to be a woman (Mbatha 2014:2). 'I think if there was a suitable female candidate in the ANC for presidency, the ANC will enthusiastically vote for her. The ANC will again give leadership on the matter, maybe sooner than you think' (Munusamy 2014:8). Neither Zuma nor the ANC has spoken about a possible woman president as being a transformative political figure who would introduce radically different, gender-sensitive policies. Rather, it is clear that choosing a woman is seen as a strategic political move — a way to outsmart the competition. In 2008 Mbeki thought he could simultaneously 'achieve the dual ambition of anointing his own successor (Foreign Minister Nkosazana Dlamini-Zuma) ensuring his legacy as a feminist' (Haffajee 2008b:13). Instead, he 'went down as the man who used gender advancement to enshrine sycophancy' (Haffajee 2008b:13). Rather than contesting the notion of gender and the politics of equality being made into political footballs, the league fell in line behind the idea that 'overt support for gender equality was [a] proxy indicator of support for Thabo Mbeki and opposition to Jacob Zuma' (Runji 2014:12). They neither made a move to offer an alternative nor contested the legitimacy of factional fighting.

It appears that similar tendencies are at play yet again as Zuma's supporters have earmarked Dlamini-Zuma as preferable to Cyril Ramaphosa, whom they 'do not trust' (Letsoalo 2014:3). An article in the *Daily Maverick* made the point that

> *if there are constituencies in the ANC that have reservations about Ramaphosa, their best option would be to back a woman candidate. It would look like an empowering move rather than a sabotage of his political career. They could argue that the ANC should take a lead role to encourage more women political leadership on the continent by electing a woman as its leader.*   (Munusamy 2014:24)

Notably, the ANCWL has been a follower, rather than a leader in this initiative. They have not shown themselves to be 'queen makers' (Munusamy 2014:10). In August 2014 Sisi Tolashe, ANCWL secretary, claimed that the league 'sometimes influences the policy of the ANC without being loud about it' (Pillay 2014b:11). It appears that they should perhaps seek to raise their voices above a murmur in the future. Zuma's announcement that there are, indeed, 'capable' women leaders suggests that whoever that leader is will be chosen by centres of power close to him, and that the league will be dictated to, rather than drive the appointment.

We cannot forget that in 2012 ANCWL provincial secretary in Mpumalanga, Clara Ndlovu, said a woman president was not a possibility in the near future because we 'do not have capable leaders' (Munusamy 2014:12). In 2013 the league's president, Motshekga, said the fight for a female president was a 'losing battle' (Munusamy 2014:13). Furthermore, it appears that the female leader chosen will not be evaluated on her skills at empowering poor and disenfranchised women. Bathabile Dlamini indicated that the focus should be on drawing 'professionals and businesswomen' into the ANCWL ranks. 'Ordinary women have always been the pillar within the organization,' she told a group of reporters (Letsoalo, Makinana & Pillay 2014:10). In other words, 'ordinary women' can be counted on to lend their support but do not need to be considered as constituencies that deserve to be supported. Nor will the needs of the poor be allowed to come before or trump those of the wealthy and powerful. Now, as in the past, we will see the ANCWL support candidates who 'do little to represent the interests of the most marginalized and vulnerable members of society' (Runji, 2014:9).

In the 1980s ANC NEC member Joe Nhlanhla complained that 'women have become women first then ANC' (ANCWL: A history as complex and varied as the women themselves 2014:9). It appears that ANC women spent the three decades striving to prove that was not the case. The time has come for the ANC to recognise that a party of 'yes men' and 'yes women' will ultimately be their own undoing. Party loyalty is important, but cannot be the singular and overriding goal. There are powerful feminist voices in South African civil society, and the ANC must recognise that these voices don't simply need to be 'heard', but that they must be allowed to challenge the core tenets of the organisation and galvanise it to reach new and better heights. Some of the legacies that the ANC claims to be the most proud of — like non-racialism, for instance — lived and breathed in those independent, feminist civil-society organisations. The potential still exists for that energy to be harnessed not simply to build up whatever party is in power, but also to make sure that whoever rules does so at the behest of and in the name of the people.

References

Albertyn C. 1994. Women and the transition to democracy in South Africa. In F Kaganas & C Murray. (eds). *Gender and the New South African Legal Order*. Cape Town: Juta.

Amnesty International. 2013. *Making Love a Crime: Criminalization of Same-sex Conduct in sub-Saharan Africa*. London: Amnesty International Publications.

ANC. 1984. South Africa's Year of the Women (pamphlet).

ANC. 1990. Statement to the National Executive Committee of the African National Congress on the emancipation of women in South Africa. *Agenda*, 8:22.

ANCWL: A history as complex and varied as the women themselves. 2014. Available: http://readingfanon.blogspot.com/2014/06/anc-womens-league-history-as-complex.html. (Accessed 30 March 2015).

Beall J. 1990. Picking up the gauntlet: Women discuss the ANC statement. *Agenda*, 8:5–18.

Boraine A. 2014. *What Went Wrong: South Africa on the Brink of Failed Statehood*. New York: NYU Press.

Calland R. Point of no return. *Mail & Guardian*, 1 February 2011. Available: http://mg.co.za/article/2011-02-01-point-of-no-return/. (Accessed 30 March 2015).

City Press, 25 August 2014. Behind the icon – Frene Ginwala: The speaker of truth to power. Available: http://www.citypress.co.za/politics/behind-icon-frene-ginwala-speaker-truth-power/. (Accessed 3 October 2014).

Connell D. 1998. Strategies for change: Women & politics in Eritrea & South Africa. *Review of African Political Economy*, 7:189–206.

Evans S. What would it take for the ANCWL to choose a woman president? *Mail & Guardian*, 8 October 2013. Available: http://mg.co.za/article/2013-10-08-00-what-would-the-anc-womens-league-need-for-a-woman-president/. (Accessed 29 March 2015).

Evans S. Speaker for the silent majority. *Mail & Guardian*, 29 August 2014. Available: http://mg.co.za/article/2014-08-28-speaker-for-the-silent-majority/. (Accessed 29 March 2015).

Govender P. 2007. *Love and Courage: A Story of Insubordination*. Johannesburg: Jacana Media.

Haffajee F. 2008a. Blind women's bluff. *Mail & Guardian*, 11 August 2008. Available: http://mg.co.za/article/2008-08-11-blind-womens-bluff/. (Accessed 29 March 2014).

Haffajee F. 2008b. Where are our Palins? *Mail & Guardian*, 18 September 2008. Available: http://mg.co.za/article/2008-09-18-where-are-our-palins/. (Accessed 29 March 2015).

Hassim S. 2014a. All the wives become ANC gatekeepers. *Mail & Guardian*, 4 September 2014. Available: http://mg.co.za/article/2014-09-04-all-the-wives-become-anc-gatekeepers/. (Accessed 29 March 2015).

Hassim S. 2014b. 8th Annual Helen Joseph Memorial Lecture, 18 August 2014. Available: http://www.uj.ac.za/EN/Faculties/humanities/departments/Research-Centres/csda/Documents/Can%20the20ANCWL%20save%20itself%20 from%20itself%202.pdf/. (Accessed 24 November 2014).

Horn P. 1991. Conference on women and gender in Southern Africa. *Transformation*, 15:83–86.

Letsoalo M. 2014. Zuma: South Africa ready for a woman president. *Mail & Guardian*, 6 May 2014. Available: http://mg.co.za/article/2014-05-06-zuma-sa-ready-for-a-woman-president/. (Accessed 30 March 2015).

Letsoalo M, Makinana A & Pillay V. 2014. Women's League eyes the presidency. *Mail Guardian*, 1 August 2014. Available: http://mg.co.za/article/2014-08-01-womens-league-eyes-the-presidency/. (Accessed 2 March 2015).

Mabandla B. 1993. Interview. 13 January 1993. Available: http://www.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02426/05lv02550.htm/. (Accessed 30 March 2015).

Magubane B. 1987. *From Soweto to Uitenhage: The Political Economy of the South African Revolution*. Trenton: Africa World Press.

Mail & Guardian, 27 May 2013. ANCWL to boost ANC with its 'immense election machinery'. Available: http://mg.co.za/article/2013-05-27-ancwl-to-boost-anc-with-its-immense-election-machinery/. (Accessed 29 March 2015).

Makinana A. 2014. Parliament's new heads appoint ANC discards. *Mail & Guardian*, 5 September 2014. Available: http://mg.co.za/article/2014-09-04-parliaments-new-heads-appoint-anc-discards/. (Accessed 29 March 2015).

Masekela B. 1991. Interview. 18 September 1991. Available: http://www.nelsonmandela.org/omalley/index.php/site/q/03lv00017/04lv00344/05lv0051 1/06lv00602.htm. (Accessed 29 March 2015).

Mataboge M. 2013. Elections 2014: ANC is strongest among women, says Duarte. *Mail & Guardian*, 26 August 2013. Available: http://mg.co.za/article/2013 -08-26-elections-2014-anc-is-strongest-among-women-says-duarte/. (Accessed 29 March 2015).

Mbatha A. 2014. South Africa ready to have first woman president, Zuma says. *Bloomberg*, 8 August 2014. Available: http://www.bloomberg.com/news/2014-08-08/south-africa-ready-to-have-first-woman-president-zuma-says.html/. (Accessed 30 March 2015).

Msimang S. 2013. A long walk to Nkandla. *Daily Maverick*, 5 December 2013. Available: http://www.dailymaverick.co.za/opinionista/2013-12-05-a-long-walk-to-nkandla/#.VBbO_155ri4/. (Accessed 29 March 2015).

Munusamy R. 2014. Scent of a woman: Could South Africa have a female president next? *Daily Maverick*, 6 August 2014. Available: http://www.dailymaverick.co.za/article/2014-08-06-scent-of-a-woman-could-south-africa-have-a-female-president-next/#.VBba6F55ri4/. (Accessed 30 March 2015).

Naidoo N. 2013. SA has lost its values – Frene Ginwala. *The Witness*, 18 November 2013. Available: http://www.news24.com/SouthAfrica/News/SA-has-lost-its-values-Frene-Ginwala-20131118. (Accessed 30 March 2015).

Nkomo S. 2013. Women and land dialogue & launch. Agenda, 9 September 2013. Available: http://www.agenda.org.za/women-and-land-dialogue-launch/. (Accessed 28 March 2015)

Pillay V. 2010. Where are South Africa's young lionesses? *Mail & Guardian*, 7 June 2010. Available: http://mg.co.za/article/2010-06-07-where-are-south-africas-young-lionesses/. (Accessed 29 March 2015).

Pillay V. 2014a. Provinces deal ANC's gender parity a blow. *Mail & Guardian*, 23 May 2014. Available: http://mg.co.za/article/2014-05-22-provinces-deal-ancs-gender-parity-a-blow/. (Accessed 29 March 2015).

Pillay V. 2014b. ANCWL branches in shambles. *Mail & Guardian*, 5 August 2014. Available: http://mg.co.za/article/2014-08-05-anc-womens-league-branches-in-shambles. (Accessed 30 March 2015).

Ramgobin E. 1990. The ANC Women's League returns. *Agenda*, 7:21–24.

Runji N. 2014. Women's league a pawn in internal ANC power play. *Dispatch Live*, 22 August 2014. Available: http://www.dispatchlive.co.za/opinion/womens-league-a-pawn-in-internal-anc-power-play/. (Accessed 29 March 2014).

Russell D. 1991. *Lives of Courage: Women for a New South Africa*. Boston: Basic Books.

Singh M. 1990. Malibongwe conference. *Agenda*, 6:23–25.

Villa-Vicencio C & Soko M. (eds). 2012. *Conversations in Transition: Leading South African Voices*. Cape Town: David Philip.

Waylen G. 2007. Women's mobilization and gender outcomes in transitions to democracy: The case of South Africa. *Comparative Political Studies*, 40:521–546.

Legislation

Communal Land Rights Act 11 of 2004. Available: http://www.ruraldevelopment.gov.za/phocadownload/Acts/communal%20land%20rights%20act%2011%20of%202004.pdf. (Accessed 29 March 2014).

Chapter 8

THE ROLE OF RIGHTS AND LITIGATION IN ASSURING MORE EQUITABLE ACCESS TO HEALTHCARE IN SOUTH AFRICA[1]

Lisa Forman | *Jerome Amir Singh*

South Africa is a unique exemplar of the justiciability of health rights and their potential to reduce health inequalities. An enforceable right to access healthcare services was entrenched within South Africa's post-apartheid Constitution, and the country's highest courts have enforced this right, most notably over access to antenatal HIV/AIDS drugs. At the same time, South Africa's two-tier healthcare system is highly inequitable, divided into a well-resourced private system meeting the needs of a wealthy minority and an under-resourced public system meeting the health needs of the country's poor majority.

This chapter explores the extent to which the constitutional health right has helped reduce these disparities. More specifically, and in line with the language of international human-rights law, it asks to what extent the right has contributed to improving the availability, accessibility, acceptability and quality of healthcare within and between the public and private health sectors. This latter metric is known as the AAAQ analytical framework for measuring the realisation of article 12 of the International Covenant on Economic, Social and Cultural Rights proposed by the UN Committee on Economic, Social and Cultural Rights (CESCR) in General Comment 14 (CESCR 2000).

The chapter explores these questions in the following way. First, it describes South Africa's healthcare systems. Secondly, it outlines the legal entrenchment and scope of the constitutional right to access healthcare services, and the impact of this right on subsidiary legislation. Thirdly, it discusses litigation over this and other health-related rights in the country's highest courts, focusing on several primary cases at the Constitutional Court. Finally, it analyses the efficacy of this litigation in reducing the gross inequalities in healthcare access within and between the country's healthcare systems.

South Africa's healthcare systems

Healthcare in South Africa is provided in both the public and private sectors, with significant disparities in financial and human resources. The following section explores these systems by first describing the inequities of apartheid-era healthcare and subsequent government policy that has sought to resolve these inequities in the context of the broader challenge of achieving socioeconomic transformation. Secondly, it describes the current state of the public and private healthcare systems, the minimum levels of care defined in each, as well as methods of healthcare financing in each sector. Thirdly, it outlines the efficacy of efforts to achieve equity in both health and the healthcare sector.

Apartheid-era healthcare and post-apartheid transformation

In 1994, South Africa made the transition from apartheid to a constitutional democracy premised on the realisation of human rights and transformation of the inequities of the apartheid years. The ANC government inherited a two-tier healthcare system, with a public sector financed through general taxation serving the majority of the population and a private sector funded primarily through medical-aid schemes for the largely white minority (Schneider et al 2007:290). Governance of these systems was highly chaotic, with poorly managed resource generation (Schneider et al 2007:290).

The apartheid-era public healthcare system was highly inequitable, characterised by highly fragmented service delivery, insufficient rural facilities, and highly limited access to healthcare services for women, children and farm workers (SAHRC 2000). It was racially fragmented into 14 separate operating authorities, including 10 Bantustan health departments, three 'own affairs' health departments and a national Department of Health (Schneider et al 2007:290).

The public system disproportionately favoured urban tertiary hospital care over primary care. For example, in 1994 academic and other tertiary level hospitals received 44% of total healthcare expenditure, with only 11% of this expenditure directed to primary healthcare (Schneider et al 2007:291, citing McIntyre et al 1995 and Coovadia et al 2009:828). In contrast, the apartheid-era private system, which primarily provided tertiary care, received most of the resources (56% of total healthcare expenditure) while servicing only 23% of the population, who had access to health insurance (called medical aid in the country) on the basis of their ability to pay (Coovadia et al 2009; Schneider et al 2007:291, citing McIntyre et al 1995). The private sector also employed the vast majority of healthcare workers, with more than 85% of

dentists and pharmacists and more than 60% of all doctors, psychologists, physiotherapists and other allied health professionals in the private sector (Schneider et al 2007:291, citing McIntyre et al 1995).

The government's commitment to transforming the inequities within and between the public and private healthcare sectors has formed a substantial part of national health policy since 1994. This ambition formed part of the ANC government's broader policy imperative of transforming the broader socio-economic inequalities resulting from apartheid-era rule.[2] This principled commitment was formalised as government policy in the 1994 Reconstruction and Development Programme (RDP), adopted as an 'integrated coherent socioeconomic policy framework' (ANC 1994), which aimed to build the country through key programmes to meet basic needs, including access to electricity, water, telecommunications, transport, health, education and training (Marais 1998:80). The goals for the health sector advanced in the RDP were to achieve 'a complete transformation of the national health care delivery system and all relevant institutions' (ANC 1994).

In 1997 the government issued a White Paper for the Transformation of the Health System in South Africa, which proposed increasing access to primary healthcare, creating a unified national system, developing a district health system, ensuring the availability of safe, good-quality essential drugs in healthcare facilities and rationalising health financing through budget reprioritisation (DoH 1997). Although the White Paper proposed implementation at the three levels of health administration (ie national, provincial and local), it envisioned health districts as the major locus of implementation, where there would be an emphasis on the primary healthcare approach (Forman et al 2004:13). A comprehensive package of primary healthcare interventions would be universally accessible, with particular emphasis placed on reaching the 'poor, the under-served, the aged, women and children, who are amongst the most vulnerable' (DoH 1997). The primary healthcare approach emphasised maternal, child and women's health services, focusing particularly on the rural and urban poor, and on farm workers (Forman et al 2004).

The challenge of achieving equity was made considerably more difficult by the country's high levels of inequality, poverty and unemployment.

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2   The word 'transformation' can be found in almost all ANC documents, many speeches of the ANC and government leaders, and most policy documents of the new democratic government. In government usage, transformation embraced a broad range of social, legal and political changes, including democratisation and governance, transformation of the state machinery, economic transformation and meeting social needs. See Houston & Muthien (2000:37, 40).

Despite being a middle-income developing country with a gross domestic product (GDP) comparable to far higher income countries,[3] South Africa has one of the most unequal distributions of wealth in the world. Moreover, inequality in South Africa has worsened over the past decade, with the Gini coefficient increasing from 0.65 in the late 1990s to 0.72 in 2005/06. (On the Gini index, 0 reflects perfect equality, and 1 perfect inequality) (Ataguba & Akazili 2010:74; see also Sanders & Chopra 2006:73). The poorest 10% of South Africa's population receive approximately 0.1% of total income, while the top 10% receive approximately 51% (Stats SA 2008).

In 1998 poverty levels were approximately 40%, unemployment levels were roughly the same, and many households experienced limited access to education, healthcare, electricity, and clean water (May 1998). Varying estimates suggest that levels of poverty and unemployment have worsened since then. The current rate of unemployment is either 25%, under the narrow definition that includes only those actively seeking work, or 37%, under the broader definition that includes all who are not employed and are seeking work, as well as those discouraged from seeking work (Ardington et al 2005; Coovadia et al 2009:823; Klasen & Woolard 2009; Sanders & Chopra 2006). These declines have occurred in spite of South Africa's growing role as an economic power within the subcontinent. Despite the growth since 1994 of an affluent black middle-class segment, poverty is still mostly concentrated among black South Africans (Armstrong et al 2008; Steyn & Schneider 2011). These conditions pose tremendous challenges to achieving transformation of the healthcare sector and health equity more broadly, given the disproportionate influence of social conditions (rather than medical care) on population health (see, for example, WHO 2008).

Healthcare in South Africa: The public and private systems

The immediate focus of health sector transformation was to create a unified public-health system, and in 1994 and 1995 the government integrated the 14 departments of health into a single central ministry and nine provincial departments of health (Schneider et al 2007:295). The National Department

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3   For example, in 2011, South Africa's rank on the UN Development Programme's Human Development Index (HDI) was 123, while its gross national income (GNI) per capita was US$9 469. In contrast, Serbia, which is ranked at 59 on the HDI, had a GNI per capita of US$10 236, and Croatia, which is ranked 49 on the HDI, had a GNI per capita of US$15 729. See UNDP (2011:127–128).

of Health is responsible for determining overall national health policy and issuing guidelines for its implementation. The director general of the National Department of Health is responsible for promoting adherence to norms and standards on the provision of healthcare services.[4] The nine provincial departments of health are responsible for developing provincial policy in relation to national policy and the imperatives of public-health delivery. They provide and manage health services at all levels. The provincial departments are also responsible for coordinating the funding and financial management of district health authorities (GCIS 2009:288). Local government is responsible for rendering preventative and promotive healthcare, and environmental health services (including supply of safe and adequate drinking water, sewage disposal, and refuse removal). Many local governments provide additional primary healthcare services (GCIS 2009:294), reflecting the fact that local government boundaries are largely coterminous and contiguous with the demarcation of health regions and districts in all provinces (DoH 2011).

The country's public healthcare system has three tiers of hospitals: tertiary, regional and district. The primary healthcare system (which is principally nurse-driven in clinics) includes district hospital and community health centres. NGOs at various levels play a crucial role in healthcare and cooperate with the government's priority programmes (GCIS 2009:294).

By 2008 approximately 82% of the general population of almost 50 million were dependent on the public healthcare sector (Day & Gray 2008:239, 249), and within that population about 86% were black.[5] Poverty among black South Africans remains dramatically higher than poverty among whites (54.8% as opposed to 0.4%) (Armstrong et al 2008:22). These demographics indicate that the public healthcare system caters primarily to a poor black majority and, conversely, that poverty (and a consequent lack of employment-related health insurance) determines dependence on the public rather than private healthcare sector.

The private healthcare system comprises general practitioners, specialists and private hospitals, which are unevenly distributed nationally. In 2008, 70% of private hospitals were in three of the country's nine provinces — 38% of them in Gauteng province alone (Coovadia et al

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4   These responsibilities are specified in relation to specific areas, including nutritional intervention, environmental conditions that constitute a health hazard, the use of human tissue, blood and blood products and gametes, sterilisation and termination of pregnancy, genetic services, and any other matter than affects the health status of people in more than one province. See National Health Act 61 of 2003, 21(2)(b)i–viii.

5   The rest of the public-sector-dependent population are coloured (3 425 000), Indian (781 000) and white (1 447 000) (Day & Gray 2008:250).

2009:829). Private hospitals and specialists are the primary drivers of private healthcare spending (35% and 21% of private medical schemes' expenditure, respectively) (Coovadia et al 2009:827).

The private healthcare system continues to receive the majority of human and financial resources (60% of total healthcare funding and 70% of the country's healthcare personnel), while meeting the needs of less than 20% of the population (Ntuli et al 2003). A further 21% of the population access private healthcare on an out-of-pocket basis, primarily for primary-level care (Coovadia et al 2009:826). Since 1994 the spending gap between the public and private systems has widened (Schneider et al 2007:296) while the population being served by the private system has remained relatively static at around 8 million people (Council for Medical Schemes 2012). This static enrolment can be accounted for by the lack of affordability of medical-aid-scheme coverage (Harrison 2010:24). Private healthcare is primarily regulated and delivered by 105 medical-aid schemes (of which only 30 were 'open schemes' — meaning they are accessible to anyone, not only those who are employed) (Council for Medical Schemes 2012; GCIS 2009:294). The inequities within the private healthcare sector have prompted considerable government policy and regulation of medical-aid schemes, including, most significantly, the proposed introduction of a National Health Insurance Fund.

Despite comparatively high levels of healthcare spending within the sub-Saharan region, since 2000/01, the healthcare sector share of the South African budget has declined from 11.5% to 8.75% in 2010/11 (Ataguba & Akazili 2010:76). This falls short of the 15% commitment made by African heads of state in the 2001 Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases.[6] Health spending itself has been erratic: an initial period of increased expenditure from 1995/96 to 1997/98 was followed by stagnation and restrictions from 1998/99 to 2000/01 (Schneider et al 2007:297). This resulted in several major tertiary healthcare centres being shut down in the late 1990s (Bond 2004:83–84). These regressions in healthcare expenditure resulted from the government's adoption in 1996 of the neoliberal Growth, Employment and Redistribution (GEAR) strategy, which emphasised privatisation, deregulation, rationalisation of the public sector and strict economic stringency in social spending (ANC 1994:163–165). GEAR effectively replaced the RDP, leading to a curtailment in spending on social welfare.

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6   See OAU (2001, paras 30, 31). It is worth noting that no country in the world spends 15% of its gross domestic product (GDP) on healthcare, including the US. In this regard, from the perspective of GDP percentages, South Africa spends more than G7 countries, like Japan, the UK, Italy and other developed countries, like Austria, Spain, Luxembourg and New Zealand.

Health spending increased again after 2001 given economic growth, large conditional grants for HIV/AIDS, and efforts to revitalise public hospitals (Schneider et al 2007:297). However, these increases have not kept pace with inflation, population increases, increased demands on the public sector (including an estimated 6.5 million new users since 1996), and the high (and incompletely compensated) cost that the impact of HIV/AIDS is exacting from the public system (Blecher & Thomas 2004:269; McIntyre 2004). Moreover, significant geographical inequities continue to mark public healthcare-sector spending (Schneider et al 2007:297), despite the fact that the National Treasury allocates funds for healthcare to provinces using equity-based formulae (AIDS Law Project 2010/2011; Alm & Martinez-Vazquez 2009; Parsons et al 2010:107).

Although the GEAR-related spending restrictions of the 1990s relaxed in the 2000s, GEAR — and its operational presence in the Public Finance Management Act 1 of 1999 — are viewed as having an enduring impact on healthcare services, establishing cost containment as the de facto driver of everyday practice in the health system. Staying within budget remains the key preoccupation of managers, and this implicitly relegates equity and other dimensions of institutional change to secondary goals (Schneider et al 2007:297).

Progress in transforming health and healthcare

The government has made considerable gains in relation to health and health-sector transformation since 1994 (Marten et al 2014:2168). In this time, 1 345 new clinics have been built (representing almost 40% of primary healthcare facilities) (Coovadia et al 2009:828; Reagon et al 2004:ix), and immunisation rates of children increased from 63% in 1998 to 72% in 2002, greatly reducing measles and improving progress in eradicating poliomyelitis (Coovadia et al 2009:828). The government's free primary healthcare policy was extended in 1996 from pregnant and lactating mothers, and children under six to cover primary healthcare services for everyone in the public health system without cost (GCIS 2004:54). The government issued essential drug lists and standard treatment guidelines for primary and tertiary healthcare, which improved the availability of key drugs in the public sector (Coovadia et al 2009:828). A comprehensive suite of legislation legalised abortion, controlled tobacco use, and regulated the health professions, occupational health and safety, and the private health sector (Schneider et al 2007:296).[7]

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7   For more on this legislation, see Forman et al (2004).

The government has allocated public resources more equitably between provinces as well, with per capita spending gaps declining from a fivefold difference in 1992/93 to a twofold difference in 2005/06 (Coovadia et al 2009:828). A hospital revitalisation programme across the country has replaced equipment and facilities, and constructed 11 district and regional hospitals, and three new academic complexes (Harrison 2010:18). From a human-resources perspective, conditions in the public sector have marginally improved in the last decade. Between 2001 and 2007, the number of specialists in the public sector increased by 4% (from 3 619 in 2001 to 3 765 in 2007); the number of public-sector medical specialists rose from 8.9 per 100 000 population in 2003 to 9.2 per 100 000 population in 2006; and the current national public-sector specialist deficit stands at 2 590 (Bateman 2010:17).

These measures have not, however, managed to overcome serious and persistent deficiencies in the public healthcare sector, including highly uneven performance within and between provinces (Schneider et al 2007:305), limited access to critical services, such as antenatal care (available at only 50% of primary healthcare facilities) (Day et al 2004:339, 342–345) and persistent inequities in healthcare access (SAHRC 2004:15). Approximately 30% of medical practitioners, 60% of nurses and 15.5% of pharmacists are employed in the public health sector and yet they serve approximately 85% of South Africa's population (HEARD 2009).

The poor availability of healthcare workers, particularly in geographical areas with high poverty, has emerged as a major obstacle to improving access to healthcare (Schneider et al 2007). The crisis is particularly dire in rural areas, which receive less than 3% of the total number of medical graduates each year (HEARD 2009). Between 1996 and 2003, the availability of doctors and nurses within provincial health structures declined by 24% and 16%, respectively (Schneider et al 2007:298). By 2008 there was a 35.7% vacancy rate among medical practitioners and professional nurses within the public healthcare system,[8] caused by a growing population dependent on the public healthcare system, the extraordinary additional disease burden created by HIV/AIDS, the decreased training of nurses and increased migration of healthcare workers (Schneider et al 2007:298–299).

A significant proportion of doctors have migrated into the private sector, with the total percentage of doctors working in that sector rising from 40% in 1980 to 79% in 2007 (Coovadia et al 2009:830). Moreover, the inequitable distribution of financial and human resources between public and private healthcare systems persists (Schneider et al 2007:290). By the

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8   The vacancy rate is determined by the number of existing health-sector posts that are vacant. See HEARD (2009).

end of 2009, overall, there was a shortage of 80 000 health professionals in the public sector (HEARD 2009). This is despite government efforts, which include recruiting foreign medical practitioners and raising the salaries of health personnel (HEARD 2009).

There has been similarly uneven progress in relation to health outcomes. South Africa experiences a 'quadruple burden of disease' — one that is experienced only in the southern African region. The quadruple burden comprises communicable disease (especially HIV/AIDS), non-communicable disease (including cardiovascular diseases associated with lifestyle factors), maternal, neonatal and child deaths, and deaths from violence and injury (Bradshaw et al 2004; Coovadia et al 2009). These factors account for the major causes of death in South Africa, with HIV/AIDS by far the single largest cause of death (at 29.8% of all deaths) (Bradshaw et al 2004). Despite its middle-income status, South Africa has health outcomes worse than many low-income countries, and is one of only 12 countries where child mortality increased since the Millennium Development Goal baselines were set up in 1990 (Coovadia et al 2009:817–818). There are also significant disparities in health between and within provinces, as well as between men and women (Coovadia et al 2009:824–825).

All major health indicators have demonstrated regressive outcomes. For example, life expectancy at birth fell from 52 years in 1997 to 43 in 2007 (Harrison 2010:6); infant mortality and maternal mortality rates increased from 1998 to 2003 (SAHRC 2004:25). The primary factor in this deterioration is the virtually unchecked growth of the nation's HIV/AIDS pandemic, the largest in the world. From 1.8 million people infected in 1996, infection rates soared to an estimated 5.24 million in 2010 — around 10.5% of the population (Stats SA 2010:6).[9] AIDS has become the single biggest cause of death, with 250 000 people dying in 2008 (Stats SA 2009), and an estimated 1.2 million deaths from HIV/AIDS to date (Dorrington et al 2004). The public healthcare system has buckled under the impact of the HIV/AIDS epidemic and the overwhelming illness and death it has caused. It is notable, however, that since the introduction of a national mother-to-child transmission (MTCT) prevention programme and a national antiretroviral (ARV) programme, infant mortality has fallen and life expectancy at birth has increased.

Government's failure to advance towards greater equity in health outcomes and the health sector result from what Hoosen Coovadia and colleagues argue is 'a notable lack of progress in implementing the core

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9   The historical figure comes from DoH (2004).

health policies developed by the ANC, and some disastrous policy choices' (Coovadia et al 2009:832). The Mbeki government's controversial AIDS policies, which denied access to any forms of ARV treatment, are widely viewed as a tremendous governance failure, and as having contributed to the internal ousting of Mbeki in 2009 by Jacob Zuma, the current ANC and national president (Gumede 2007; Mangcu 2008). These governance failures were the target of the successful health rights litigation brought in 2002 and discussed in the next section.

Legal entrenchment of the right to access healthcare services

In South Africa, health rights are primarily protected in the Bill of Rights, which is Chapter 2 of the Constitution of the Republic of South Africa (the Constitution). The Constitution was adopted as a direct response to the violations and deprivations of apartheid. It adopts a model of constitutional supremacy, with all law and conduct inconsistent with the Constitution held to be invalid (ss 1*(c)* & 2). Human rights are at the apex of governance, with the Bill of Rights, a 'cornerstone of democracy' (s 7(1)), applying to all law (including the common law) and binding the legislature, executive, judiciary and all organs of state (s 8(1) & (3)). The Constitution's most prevalent commitment is to create an open and democratic state based on equality, dignity and freedom (ss 1*(a)*, 7(1), 36(1) & 39(1)*(a)*) — a system of government that is antithetical to the violations of the apartheid state. In addition, the Constitution aspires to 'improve the quality of life of all citizens and free the potential of each person' (Preamble). In line with these objectives, the Constitution entrenches a range of justiciable social and economic rights, including rights to food, healthcare, water, social security, housing and education, and children's rights to basic social amenities (ss 27, 28 & 29).

The Constitution entrenches a number of health-related rights, including the right to bodily integrity in section 12, children's rights to basic healthcare services in section 28(1)*(c)* and prisoners' rights to adequate medical treatment in section 35(2)*(e)*.[10] The universal health right is contained in section 27, which also entrenches rights to water, food and social security. This section states:

> 1.   (a) *Everyone has the right to have access to healthcare services, including reproductive healthcare;*
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>   ...

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10   There is also a right to an environment that is not harmful to health or well-being in s 24*(a)* of the Constitution.

> 2.   *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*
>
> 3.   *No one may be refused emergency medical treatment.*

This focus on the provision of healthcare is a markedly narrower formulation than is the international human right to the highest attainable standard of health, which arguably incorporates broader public health responsibilities.[11] While section 27 focuses on healthcare access alone, the government's public-health responsibilities are arguably influenced by its duties under the Constitution's broader range of socio-economic rights to water and housing (which are themselves social determinants of health). However, this inferred responsibility aside, the Constitution makes no explicit provision for the government's broader public-health responsibilities. Nor is the scope of the narrower right to access healthcare services explicit from the wording of section 27, which provides little indication of what is encompassed within the entitlement to healthcare services, or of the extent to which resource limitations and progressive realisation could permissibly limit the state's duty to ensure access. Some guidance on the state's obligations is provided by the Constitutional mandate that the state must respect, protect, promote and fulfil the rights in the Bill of Rights (s 7(2). Drawn from international human-rights law, this typology implies a range of positive and negative duties with respect to each right.[12] Nonetheless, the Constitution does not define the precise content of these duties and the task of interpretation falls to the government as well as the judiciary.

Legislation based on section 27

The South African government has passed a number of laws designed to realise the constitutional right to access healthcare services, as well as to redress inequities within and between the public and private healthcare system. The three most important of these are the National Health Act 61 of 2003, the Medical Schemes Act 131 of 1998 and a proposed National Health Insurance (NHI) system.

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11   See, for example, UNGA (1948, art 25); UNGA (1966a art 12.1); UNGA (1966b, art 5*(e)*iv); UNGA (1980, arts 11.1 f & 12); UNGA (1989, art 24.1); UNGA (2007).

12   The duty to respect imposes a negative obligation to desist from interfering with people's enjoyment of rights; the duty to protect requires the state to prevent third-party interference with people's rights; and the duty to promote and fulfil describes the state's positive obligation to realise access. The notion of a typology of rights is widely acknowledged to have been developed by Henry Shue. See Shue (1980). It is applied in the context of health in General Comment 14.

In 2005, the government issued the long-awaited National Health Act, which seeks to establish a national health system encompassing both the public and private healthcare systems, and provide 'in an equitable manner the population of the Republic with the best possible health services that available resources can afford' (National Health Act, s 2*(a)*(i–ii)). The Preamble of the Act explicitly references a number of constitutional provisions, including the government's duty under section 27(2) of the Constitution to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right of the people of South Africa to have access to healthcare services, including reproductive healthcare (Preamble).

The objects of the National Health Act are explicitly framed in section 2*(c)* of the Act in relation to the constitutional health right, and include protecting, respecting, promoting and fulfilling the rights of:

(i) *the people of South Africa to the progressive realisation of the constitutional right of access to healthcare including reproductive healthcare;*

(ii) *the people of South Africa to an environment that is not harmful to their health or well-being;*

(iii) *children to basic nutrition and basic healthcare services contemplated in section 28(l)*(c) *of the Constitution; and*

(iv) *vulnerable groups such as women, children, older persons and persons with disabilities.*

The Medical Schemes Act 131 of 1998 was passed with considerable equity ambitions, including prohibiting risk rating and member exclusions based on age, gender and health status, and introducing a prescribed set of minimum healthcare benefits (Forman et al 2004). While the Medical Schemes Act makes no explicit reference to section 27 of the Constitution, one of its primary objectives was to ensure equity of access to medical-scheme membership and cross-subsidisation between the elderly and young, and between low and high earners (Pearmain 2000:184). The Act introduced key equity-seeking elements into the private health sector, including prohibiting unfair discrimination by medical schemes on the basis of race, gender, marital status, ethnic or social origin, sexual orientation, pregnancy, disability and state of health, and by introducing the already mentioned prescribed minimum benefit (ss 24(2)*(e)* & 67(1)*(g)*).

In 2005 the Department of Health collaborated with private-sector stakeholders to publish a Draft Charter on the Private and Public Health Sectors in the Republic of South Africa. The charter's purpose is to promote

access, equity and quality in health services within and between the public and private sectors (Harrison 2010:25), and to bring ownership of the private health sector into black economic empowerment (BEE) processes.[13] BEE is a policy designed to enhance the economic participation of black people in the South African economy.[14] As Schneider et al (2007:297) suggest, '[t]he emergence of health sector BEE may signal a new policy era in which private sector interests are defended rather than controlled or regulated'.

A proposed NHI system constitutes the most significant legislative effort to address the inequities between the public and private health sectors. The ANC had been considering an NHI system through various committees and working groups since at least 1994 (GN 657:12–15). In February 2011, the Inter-Ministerial Committee (IMC) on NHI approved the proposed NHI policy (*Buanews* 2011), which the Department of Health released as a comprehensive policy document in a Green Paper in August 2011 (a preliminary indication of government thinking on a policy issue subject to public commentary) (DoH 2011). In December 2015, the Minister of Health followed this up with a White Paper on NHI, which took account of over 150 public submissions on the Green Paper as well as a broader consultation process (DoH 2015). The minister also initiated six work streams that will provide technical support to finalise the NHI implentation plan (Van Vuren 2015).

The government articulates the primary objective of the NHI as being to 'eliminate the current tiered system where those with the greatest need have the least access and have poor health outcomes' (GN 657, para 50). The NHI system aims to 'ensure that everyone has access to appropriate, efficient and quality health services' (GN 657, para 1). The principles of the NHI system are explicitly human-rights oriented, and include the right to access in section 27 of the Constitution; social solidarity; effectiveness; appropriateness; equity; affordability; and efficiency (GN 657, para 52).

The policy document is explicit regarding the constitutional motivation for the system: articulating reform of healthcare as an important step towards realising the constitutional health right, with a key aspect that 'access to health services must be free at the point of use and that people benefit according to their health profile' (GN 657, para 52*(a)*). Notably, many of the other

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13   The policy was adopted in 2007 in order to 'deracialise' the South African economy and create a black middle class. The policy has had two phases: a first period, from 1994 to 2002, typified by the empowerment of a few individuals, often with long-standing connections to the ANC, and a second phase coinciding with the passing of the 2003 Broad-Based Black Economic Empowerment Bill (B-BBEE) in light of criticism of the narrow focus of empowerment. See Law (2010:313, 314).

14   See, for example, dti (n.d.).

key principles closely resemble the AAAQ framework mentioned earlier, explicitly articulating affordability and appropriateness. The aim of the new system is to ensure that 'all members of the population will be entitled to a comprehensive package of health services at all levels of care namely: primary, secondary, tertiary and quaternary with guaranteed continuity of healthcare benefits' (GN 657, para 69). The NHI policy document is unclear on its principle funding mechanism, indicating that while pooled funds are from a combination of sources, including the fiscus, employers and individuals, the precise combination will be the subject of continuing technical work (GN 657, para 114). Nonetheless, a contribution to the NHI will become mandatory, and it is anticipated that the current medical-aid system will transform into a top-up model (GN 657, paras 125 &126). The Department of Health's White Paper revised earlier time frames for implementation over three phases: a first phase to be completed during 2017, a second phase beginning in 2021 and a final phase in 2025 (Van Vuren 2015).

Litigation regarding the constitutional right to access healthcare services

Since the Constitution came into force in 1996, the constitutional health right has been the focus of three decisions before the Constitutional Court.[15] This section focuses primarily on the first of these, as well as the *Grootboom* case on housing, which is relevant to the interpretation of section 27.

The first case, on section 27, reached the Constitutional Court in 1998. In *Soobramoney v Minister of Health, (KwaZulu-Natal)*[16] Soobramoney approached the Constitutional Court after being refused renal dialysis by a state hospital that rationed treatment for patients with chronic renal failure unless they were also eligible for a kidney transplant. The Constitutional Court dismissed Soobramoney's claim, finding that the provincial hospital's failure to provide renal dialysis facilities for everyone with chronic renal failure was not in breach of the state's obligations under section 27 of the Constitution.

Although Justice Chaskalson acknowledged the deplorable conditions and great poverty in which millions of South Africans lived, he argued that limited resources and the extent of demand meant that 'an unqualified

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15   This chapter focuses only on the Constitutional Court cases. There have, however, been other decided cases where the constitutional health right was only indirectly relevant. Several others never went to judgment. For a discussion of these and other cases related to socio-economic rights in South Africa, see Berger (2008).

16   *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

obligation to meet these needs would not presently be capable of being fulfilled', and that both the state's obligations and the corresponding rights themselves were 'limited by reason of the lack of resources' (*Soobramoney*, para 11). The court considered that permitting claims for dialysis and similarly expensive treatments could prejudice all other health needs (*Soobramoney*, para 28) and indeed the government's ability to meet broader social and economic needs (*Soobramoney*, para 31). While the court denied Soobramoney's claim, it indicated that 'a court would be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters' (*Soobramoney*, para 29). This statement seemed to indicate the court's willingness to intervene where rationality and good faith were lacking.

In the 2001 case of *Government of the Republic of South Africa and Others v Grootboom and Others*,[17] the Constitutional Court heard claims from people living in an informal squatter settlement at Wallacedene in the Western Cape, who had been forcibly evicted by the state from land earmarked for low-cost housing. The claimants sued the government for housing, citing the right of access to adequate housing in section 26 of the Constitution, and children's right to shelter in section 28(1)*(c)*. In *Grootboom*, the Constitutional Court established the standard of reasonableness to assess state compliance with its socio-economic rights obligations. The court's judgment extensively interprets the limitations clause in section 26 of the Constitution, which is identical to that in section 27, providing extensive guidance on the progressive realisation of socio-economic rights.

In a decision delivered by Justice Yacoob, the court indicated that while reasonableness was determined on a case-by-case basis, given great poverty and the constitutional commitment to equality, dignity and freedom, the state's primary obligation was to act reasonably to provide the basic necessities of life to those who lack them (*Grootboom*, paras 24 & 44). The court indicated that reasonableness required comprehensive programmes, and that excluding a significant segment of society would be unreasonable, as would excluding the needs of the poor, given their reliance on the state for the basic necessities of life (*Grootboom*, paras 35 & 40–44). In seeking to ensure that the basic necessities of life were provided to all, the state had to focus in particular on the needs of the most vulnerable, especially the poor, and those experiencing urgent and desperate needs (*Grootboom*, paras 35 & 43).

The court interpreted 'progressive realization' in line with international law to require the state to take steps to realise the rights as expeditiously

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17   *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

and effectively as possible, and that any deliberately retrogressive measures would need full justification in light of all the rights in the Constitution and available resources.[18] While progressive realisation recognises that full realisation of everyone's right to access healthcare services is not always immediately possible, the Constitution's goal was that 'the basic needs of all in society be effectively met' and this requires that 'the state must take steps to achieve this goal' (*Grootboom*, para 45). Therefore, 'accessibility should be progressively facilitated', with legal, administrative, operational and financial hurdles examined, and, where possible, lowered over time (*Grootboom*, para 45). Nonetheless, the court recognised that the state could not be required to do more than available resources permit, and that while resources would determine the content and pace of realisation, the government should give adequate budgetary support to social rights, and plan and monitor efforts to meet all needs (*Grootboom*, paras 32 & 68). The court found that national housing policy fell short of the government's constitutional duties, and declared that section 26 required a comprehensive programme to realise the right of access to adequate housing, including reasonable measures to provide relief to those with no access to land, no roof over their heads and living in intolerable conditions or crisis situations.

While the *Grootboom* decision was widely viewed as illustrating the feasibility of enforcing social rights, the court's adoption of the reasonableness standard (together with its rejection of the minimum core concept) was criticised as creating an administrative model that simply required sensible priority setting rather than creating an individual right to particular services (Bilchitz 2002:1; Sunstein 1999:123). In light of the earlier *Soobramoney* decision and the broader inequities of the country's healthcare system, it remained unclear whether the Constitution's socio-economic rights offered individuals approaching the courts any hope for alleviating deprivation (Fitzpatrick & Slye 2003:669).

The Constitutional Court's most important decision on section 27 came in 2002 with *Minister of Health and Others v Treatment Action Campaign and Others (No 1)*.[19] The case took place amid a tremendous social battle over the government's refusal to provide any form of ARV treatment for HIV/AIDS within the public sector. This refusal drew from Mbeki's support for 'AIDS denialism', a view that disputes that HIV causes AIDS and views ARV drugs as toxic agents that are themselves the real cause of AIDS-related death (Cameron 2003:525; Cohen 2001; Harvey 2000).

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18 See CESCR (1990, para 9), cited with approval in *Grootboom* (para 45).

19 *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075.

Social contestation over the government's resolute refusal to provide treatment coalesced around its delays and active obstruction of public-sector use of Nevirapine, an ARV drug with growing efficacy in preventing MTCT of AIDS (Guay et al 1999:795; Moodley 2000). Boehringer Ingelheim, the manufacturer and patent holder, had offered the drug to the government at no cost for five years. Despite government refusals, the expansion of a national MTCT programme was well supported among the media, public and medical communities, motivated by national legal and political advocacy, and growing protests among healthcare workers that government policy interfered with their ethical duties towards patients (*The Mercury* 2002; Abdool Karim et al 2002:992).

In August 2001, a group of NGOs and public-sector doctors led by the Treatment Action Campaign (TAC) instituted successful legal action in the High Court against the minister of health and provincial health departments. The TAC argued that the state's delays and refusal to make Nevirapine available in the public sector breached section 27, as well as children's right to basic health services. The government appealed the case to the Constitutional Court, defending the reasonableness of its approach from the perspective of cost and efficacy.

The Constitutional Court found state policy to be unreasonable and held that excluding the drug in question in public healthcare facilities pending study results unreasonably denied a potentially life-saving drug to children born to mostly indigent mothers, dependent on the state for their healthcare (*Treatment Action Campaign*, para 79). The court focused on the grave suffering and limited survival prospects of these children, and stressed that the case was concerned with newborn babies whose lives might be saved by the administration of simple and cheap intervention, the safety and efficacy of which had been established, and which the government itself was providing in pilot sites in every province (*Treatment Action Campaign*, paras 71 & 72).

The court applied several aspects of the *Grootboom* decision to section 27 and the provision of MTCT, holding that programmes must not ignore urgent needs nor exclude significant segments of society (*Treatment Action Campaign*, para 68, quoting *Grootboom*, paras 43 & 44), and that state policy in this case affected poor people who could not afford to pay for medical services (*Treatment Action Campaign*, para 70, referencing *Grootboom*, paras 35–37). In this case, the court held that

> [children's] needs are 'most urgent' and their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are 'most in peril' as a result of

> *the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to Nevirapine.* (*Treatment Action Campaign*, para 78).

The state's obligation was therefore to ensure that children were able to access basic healthcare services contemplated in section 28, particularly since this case concerned

> *children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main part dependent upon the state to make healthcare services available to them.* (*Treatment Action Campaign*, para 79)

The court found that government policy failed to meet constitutional standards because it excluded those who could reasonably be included where such treatment was medically required (*Treatment Action Campaign*, para 125). The court not only declared the government's responsibility to devise and implement a comprehensive MTCT programme within available resources, but also ordered it to remove, without delay, restrictions on the drug and make it available in the public sector, provide for training of counsellors, and take reasonable measures to extend testing and counselling facilities throughout the public health sector.

One other section 27-related case has come before the court since the *Treatment Action Campaign* decision, which illustrates the important role played by section 27 in the court's approach to balancing private economic interests against public health needs. In the 2005 case of *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*,[20] several pharmacy chains challenged the government's legislative efforts to create a national pricing system for medicines, which included a pricing committee, a single exit price for all medicines, and a fixed dispensing fee for pharmacists and dispensers of medicines. The Constitutional Court held unanimously that the Medicines and Related Substances Control Act 101 of 1965 permitted regulations to provide for price controls, including setting a single exit price for drugs into the health system (*New Clicks*, paras 13 & 14). While the court split 6-5 against the constitutionality of the dispensing fee, it nonetheless upheld the constitutionality of the regulations, holding that given the important constitutional purpose served by the pricing system of making medicines more accessible and affordable, the appropriate remedy

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20 *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) [2005] ZACC 14; 2006 (8) BCLR 872 (CC); 2006 (2) SA 311 (CC).

would be to preserve as much of the scheme as possible (*New Clicks*, paras 14–16). It proposed instead to improve the regulations by removing certain words or phrases and adding in others (*New Clicks*, para 14).

The court repeatedly validated the importance of the purpose of the Medicines Act in enabling the government to fulfil its constitutional obligations under section 27 of the Constitution (*New Clicks*, paras 16, 84, 314, 514, 519 & 650). The judges could find no equivalence between the pharmacists' interests and the public's health needs. Justice Ngcobo held that while 'the interests of the pharmacists is a factor to be taken into consideration ... they must yield to the interests of the general public' (*New Clicks*, para 519). The court also made several dicta regarding section 27 that add new substantive content beyond the constitutional framework of reasonableness elaborated in the *Grootboom* and *Treatment Action Campaign* decisions. For example, in several places the judgment confirmed that the right to healthcare services includes the right to access affordable medicines, which places a range of obligations on the state in relation to assuring affordability (see, for example, *New Clicks*, paras 514 & 704). In particular, Justice Sachs held that 'preventing excessive profit-taking from the manufacturing distribution and sale of medicines is more than an option for government. It is a constitutional obligation flowing from its duties under section 27(2).'[21] Justice Moseneke reiterated this sentiment saying that '[p]rohibitive pricing of medicine ... would in effect equate to a denial of the right of access to healthcare' (*New Clicks*, para 706).[22]

Assessing the impact of the litigation on health equity

The *Treatment Action Campaign* decision — the first case where the constitutional right to healthcare services was successfully enforced against the government — would appear, prima facie, to have contributed to greater health equity for people with HIV/AIDS. Here the court enforced section 27 against an unwilling government, breaking the back of its intransigence on a deeply divisive social and political issue. The decision effectively

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21   Sachs further contended that the impact of inaccessible medicines on the poor in particular suggested state duties to take 'special measures to assist those who are the most vulnerable to disease and, simultaneously the most lacking in resources'. (*New Clicks*, paras 659 & 651).

22   *New Clicks* (para 706). Moseneke distinguished between availability and affordability of medicines, in that availability points to continued supply of medicines to ensure ready access, whereas affordability is an incident of access to essential drugs. Implicit in the requirement of affordable medicines is a pricing regime that does not render medicines out of the reach of most users and thereby frustrate access to quality healthcare.

ensured that neither irrational science nor murky, unstated rationales could continue to motivate government policy on MTCT of AIDS (Forman 2008:661). Together with other pressures, this case powerfully influenced how the government subsequently formulated its AIDS treatment policies.

The Constitutional Court's order in *Treatment Action Campaign* motivated government to establish a national MTCT programme, and by 2009, MTCT interventions were available in 95% of public facilities (Stats SA 2010). This programme is likely to have contributed to declines in child mortality rates (which had increased from 50 per 1 000 live births in 1994 to 60 in 2005) (Harrison 2010:6). The *Treatment Action Campaign* decision and its outcomes also laid the groundwork for a national AIDS treatment programme, announced in 2003 (DoH 2003). The national ARV programme increased its coverage from 133 000 people in 2005 (7% of people in need) to 920 000 people in 2009 (38%) (Mooney & Gilson 2009:858, 859), a figure roughly consistent with access rates to ARVs throughout low- and middle-income countries.

The government planned to increase coverage to 15 million by 2015, after having surpassed their 2011 goal of 1.4 million people by 400 000 (DoH 2009; Health and Development Africa 2012). Although the government had not achieved this target by 2015, they had at least doubled the number of people accessing ARV to 3.1 million (Health-E News 2015). Most significantly, national increases in life expectancy at birth (from 43 years in 2007 to 62.5 years in 2015) are attributed to the roll-out of ARV medicines (Stats SA 2015:5). The *Treatment Action Campaign* decision therefore illustrates the considerable power of an entrenched constitutional health right to effect changes in government policies.

Although it does not secure an entitlement to healthcare on demand, the *Treatment Action Campaign* decision does illustrate how a successful claim under the constitutional healthcare right may secure, for example, a critical health service for poor women and their infants. The court's elaboration of a reasonableness standard provides further guidance to the government in realising the right to access healthcare services. Applied to health, the reasonableness standard appears to legislate greater equity in health by requiring the government to devise and implement comprehensive health policies to meet basic health needs, and to take particular account of the poor and vulnerable, and of urgent and desperate needs. This is a powerful guarantee of accountable and responsive healthcare decision-making, and the right and the reasonableness standard therefore appear to have served an important democratic function.

Democracy was further served by the way the constitutional right and the Constitutional Court decision conferred a powerful social claim on

poor and vulnerable people unfairly excluded from the benefits of public healthcare. *Treatment Action Campaign* therefore illustrates how enforcing health rights can guide health policy, empower citizens to challenge healthcare decision-making (itself an important democratic and civic outcome), and enable the judiciary to hold the executive and legislature to constitutional standards of health equity.

Nonetheless, the court's emphasis on state duties to take reasonable measures to meet basic health needs (evident arguably in *Soobramoney* as well as *Treatment Action Campaign*) underscores that the right does not in fact confer an individual entitlement to healthcare services. Certainly, it could be argued that the court's identification of state duties to take reasonable measures to meet basic health needs implies a corresponding individual entitlement to basic healthcare services (roughly consistent with primary or essential healthcare). This is certainly the implicit position taken in *Treatment Action Campaign*, as well as in the *New Clicks* decision, which explicitly articulates a duty to provide access to affordable medicines under section 27. Although these cases may create these entitlements, it is equally apparent from the court's decisions (and especially its rejection of the international law concept of the minimum core) that state duties regarding these rights remain limited by progressive realisation within resources.

Although *Treatment Action Campaign* illustrates that claims to this limited entitlement to basic healthcare services can be successful, the court's more recent rejection of a claim for greater access to water illustrates that there is no inherent guarantee of securing even basic needs in section 27 of the Constitution. In *Mazibuko and Others v City of Johannesburg and Others*,[23] the Constitutional Court addressed for the first time section 27(1) *(b)*'s provision that everyone has the right to have access to sufficient water.

The case concerned the lawfulness of a city project to address severe water losses and non-payment in Soweto by installing prepaid meters to charge for water use exceeding 6 kilolitres per household (equating to an average of 25 litres per person daily based on the assumption of eight people per household). Mrs Mazibuko and four other Soweto residents challenged the sufficiency of 6 kilolitres and the lawfulness of installing prepaid meters. The Constitutional Court held that the government's duty was to take reasonable measures to progressively realise this right, and that the pertinent question was whether the city's policy was reasonable. The court argued that implicit in the concept of progressive realisation is that it will take time before everyone has access to sufficient water. Although the court affirmed the democratic value of litigation

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23   *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

on social and economic rights in achieving accountability, it concluded that it was inappropriate for it (and not the government) to quantify the content of sufficient water under this right. The court therefore concluded that the policy was reasonable despite recognising that 100 000 city households still lacked access to the most basic water supply.

This case raises real concerns about the court's willingness to enforce socio-economic rights enshrined in the Constitution in any meaningful way against government policy. It certainly lends credence to critiques that the court's approach to constitutional socio-economic rights creates an entitlement to nothing more than an administrative entitlement to accountability, which does not guide state efforts to assure progressive realisation and does not serve the key populations intended to be the beneficiaries of such rights.[24] The contrast between the *Mazibuko* and *Treatment Action Campaign* outcomes may suggest that the Constitution's socio-economic rights may only yield equitable outcomes in cases of extreme legislative non-compliance. The implication is that *Treatment Action Campaign* is to some extent a best-case scenario for health-equity outcomes under South African litigation, and not simply because the case was successful but because the healthcare service in question was required to deal with a grave pandemic with severe impacts on public health. The sheer severity of the health risk posed by the pandemic and the potential life-saving nature of the decision for millions of people significantly ratcheted up the stakes for the court and the equity impacts of its decision. This may suggest that *Treatment Action Campaign* perhaps illustrates only the potential for similarly grave cases to achieve similarly equitable outcomes.

The equality potential of the right to access basic needs is further undercut by implementation problems. After the *Grootboom* decision, the government's formulation and implementation of housing policy was troublingly slow. A year after the decision, there had been little tangible change in housing policy to cater for people in desperate and crisis situations (Pillay 2000:13). The picture was considerably different in *Treatment Action Campaign*, perhaps because of the power of domestic treatment advocates who used the media effectively to highlight implementation delays, and who instituted contempt of court proceedings against a provincial premier for not implementing the decision (Heywood 2003:7). The disparities in outcomes between the cases seem to suggest that social mobilisation is necessary to ensure the implementation of the court's decisions.

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24   See, for example, Liebenberg (2002:159); Roux (2002:41, 46). See also Bilchitz (2002:1); Pieterse (2004:882).

The Constitutional Court's interpretation of the right to bodily integrity in *Mankayi v AngloGold Ashanti Ltd*[25] is likely to catalyse and spur health-and-safety reforms in the mining industry, which historically has arguably neglected the health and safety of mine workers. In so doing the *Mankayi* decision will, in the long run, facilitate health equity in the occupational context.

The South African experience illustrates how an entrenched constitutional right to healthcare can advance health equity well beyond litigation. This effect is evident in the formative role of the constitutional right in motivating a range of legislation and policy in South Africa to achieve greater equity within and between the private sector and the public sector, including the Medical Schemes Act 131 of 1998 and the National Health Act 61 of 2003, and the proposed NHI system.

The entrenchment of the constitutional right has therefore made the national pursuit of universal access to healthcare a constitutional obligation. This may serve to insulate this pursuit from the vagaries of political goodwill and historical circumstances that undermine national commitments to health equity only affixed in policy or subsidiary legislation (as the abandonment of the RDP policy illustrates) (Forman 2005:711). An entrenched constitutional commitment to equitable healthcare provides a far more enduring guarantee, particularly given the way that the South African government's broader macroeconomic choices (through a reduction in health spending) have restricted the achievement of health equity.

However, these legislative outcomes are hardly likely to have been achieved by the entrenchment of a constitutional health right without a corresponding political commitment to achieving equitable outcomes in health and other sectors. In South Africa this commitment was a core component of the ANC's historical platforms and government policies. The impact of the constitutional health right was therefore aided by the fact that it resonates with existing policy imperatives. It may therefore be less likely that a constitutional health right could influence government policy in the same way if that right did not resonate with core social and/or political values. This contingent outcome may mean litigation is the primary legal mechanism that individuals within countries with health rights can use to advance health equity, although this too requires a judiciary willing to enforce it effectively.

In South Africa the constitutional health right, whether through litigation or legislation, has nonetheless had limited impact in remedying disparities between the public and private healthcare sectors or in

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25   *Mankayi v AngloGold Ashanti Ltd* (CCT 40/10) [2011] ZACC 3; 2011 (5) BCLR 453 (CC); 2011 (3) SA 237 (CC); [2011] 6 BLLR 527 (CC); (2011) 32 ILJ 545 (CC) (3 March 2011).

significantly improving access to healthcare within the public sector outside of HIV/AIDS. This outcome may simply reinforce the notion that a health right, however effectively enforced, cannot substitute effective leadership at all levels of healthcare. In this light, the new NHI system reflects the most important effort yet to address the country's health inequities, and it is notably rooted in human-rights and social-justice objectives. To this extent, its success will provide somewhat of a litmus test of the extent to which a constitutional health right contributes to the achievement of health equity in a riven and inequitable country.

References

Abdool Karim S, Abdool Karim Q, Adhikari M, Cassol S, Chersich M, Cooper P, Coovadia A et al. 2002. Vertical HIV transmission in South Africa: Translating research into policy and practice. *The Lancet*, 359(9311):992–993.

AIDS Law Project. 2010. 2010/2011 Provincial health budgets. Available: http://www.section27.org.za/wp-content/uploads/2010/05/Provincial-Budget-Analysis-BEMF-Meeting-2010-May-21.pdf. (Accessed 28 March 2015).

Alm J & Martinez-Vazquez J. 2009. South Africa's provincial equitable share: An assessment of issues and proposals for reform. *International Studies Program, Georgia State University, Working Paper* 09–04, March 2009. Available: http://aysps.gsu.edu/isp/files/ispwp0904.pdf. (Accessed 28 March 2015).

ANC. 1994. The Reconstruction and Development Programme: A Policy Framework. Johannesburg: African National Congress. Available: http://www.polity.org.za/polity/govdocs/rdp/rdp.html. (Accessed 28 March 2015).

Ardington C, Lam D, Leibbrandt M & Welch M. 2005. The sensitivity of estimates of post-apartheid changes in South African poverty and inequality to key data imputations. *CSSR Working Paper* No. 106). Cape Town: Centre for Social Science Research, University of Cape Town. Available: http://cssr.uct.ac.za/sites/cssr.uct.ac.za/files/pubs/wp106.pdf. (Accessed 28 March 2015).

Armstrong P, Lekeswa B & Siebrits K. 2008. Poverty in South Africa: A profile based on recent household surveys. Stellenbosch University. Available: http://www.ekon.sun.ac.za/wpapers/2008/wp042008/wp-04–2008.pdf. (Accessed 28 March 2015).

Ataguba JE & Akazili A. 2010. Healthcare financing in South Africa: Moving towards universal coverage. *Continuing Medical Education*, 28(2):74–78.

Bateman C. 2010. Academic health complexes bleeding in 'no man's land'. *African Medical Journal*, 100(1):17–19.

Berger J. 2008. Litigating for social justice in post-apartheid South Africa: A focus on health and education. In V Gauri & DM Brinks. (eds). *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*. Cambridge: Cambridge University Press. 38–99.

Bilchitz D. 2002. Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence. *South African Journal of Human Rights*, 19(1):1–26.

Blecher M & Thomas S. 2004. Health Care Financing. In P Ijumba, C Day & A Ntuli. (eds). *South African Health Review 2003/04.* Durban: Health Systems Trust.

Bond P. 2004. *Talk Left Walk Right: South Africa's Frustrated Global Reforms*. Michigan: University of Michigan Press.

Bradshaw D, Nannan N, Laubscher R, Groenewald P, Joubert J, Nojilani B, Norman R, Pieterse D & Schneider M. 2004. *South African National Burden of Disease Study 2000: Estimates of Provincial Mortality*. Cape Town: South African Medical Research Council. Available: http://www.mrc.ac.za/bod/estimates.htm. (Accessed 28 March 2015).

Buanews, 15 February 2011. IMC approves proposed NHI policy. Available: http://allafrica.com/stories/201102160036.html. (Accessed 28 March 2015).

Cameron E. 2003. AIDS denial and holocaust denial – AIDS, justice and the courts in South Africa. *South African Law Journal*, 120(3):525–539.

CESCR. United Nations Committee on Economic, Social and Cultural Rights. 1990. General comment no. 3: The nature of state party obligations, UN Doc. HRI\GEN\1\Rev.1. Available: http://www1.umn.edu/humanrts/gencomm/epcomm3.htm. (Accessed 28 March 2015).

CESCR. United Nations Committee on Economic, Social and Cultural Rights. 2000. General comment no.14: The right to the highest attainable standard of health, UN Doc. E/C.12/2004/4. Geneva: UN. Available: http://www.unhchr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En. (Accessed 28 March 2015).

Cohen M. 2001. Mbeki questions HIV testing. The Associated Press, 24 April 2001.

Coovadia H, Jewkes R, Barron P, Sanders D & McIntyre D. 2009. The health and health system of South Africa: Historical roots of current public health challenges. *The Lancet*, 347(9692):817–834.

Council for Medical Schemes. 2012. Who we are. Available: http://www.medical-schemes.com/Content.aspx?28. (Accessed 28 March 2015).

Day C & Gray A. 2008. Health and related indicators. In P Barron & J Roma-Reardon. (eds). *South African Health Review 2008.* Durban: Health Systems Trust.

DoH. National Department of Health. 1997. White Paper for the Transformation of the Health System in South Africa. Available: http://www.gov.za/documents/transformation-health-system-white-paper. (Accessed 28 March 2015).

DoH. Department of Health. 2003. Operational plan for comprehensive HIV and AIDS care, management and treatment for South Africa. Available: http://www.hsph.harvard.edu/population/aids/southafrica.aids.03.pdf. (Accessed 28 March 2015).

DoH. Department of Health. 2004. *National HIV and Syphilis Antenatal Sero-Prevalence Survey in South Africa 2004.* Pretoria: South African Government Information. Available: http://www.doh.gov.za/docs/reports/2004/hiv-syphilis.pdf. (Accessed 28 March 2015).

DoH. Department of Health. 2009. Annual report 2008/09. Available: http://www.doh.gov.za/docs/reports/annual/2009/section1a.pdf. (Accessed 28 March 2015).

DoH. Department of Health. 2011. The district health system in South Africa: Progress made and next steps. Cape Town: Western Cape Governemnt. Available: https://www.westerncape.gov.za/text/2003/district_health_system_ sa.pdf. (Accessed 28 March 2015).

DoH. National Department of Health. 2015. National Health Insurance for South Africa: Towards Universal Health Coverage. 10 December 2015. Available: http://www.health-e.org.za/wp-content/uploads/2015/12/National-Health-Insurance-for-South-Africa-White-Paper.pdf. (Accessed 23 March 2016).

Dorrington RE, Bradshaw D, Johnson L & Budlender D. 2004. The demographic impact of HIV/AIDS in South Africa: national indicators for 2004. Cape Town: Centre for Actuarial Research and South African Medical Research Council. Available: http://www.mrc.ac.za/bod/demographic.pdf. (Accessed 28 March 2015).

dti. Department of Trade and Industry. n.d. Broad-Based Black Economic Empowerment. Available: ttp://www.dti.gov.za/economic_empowerment/bee. jsp. (Accessed 28 March 2015).

Fitzpatrick J & Slye RC. 2003. *Republic of South Africa v. Grootboom/Minister of Health v. Treatment Action Campaign. American Journal of Internationl Law*, 97(3):669–680.

Flood C & Gross A. 2014. (eds). The Right to Health at the Public/Private Divide: A Global Comparative Study. Cambridge University Press.

Forman L. 2005. Ensuring reasonable health: Health rights, the judiciary and South African HIV/AIDS policy. *Journal of Law and Medical Ethics*, 33(4):711–724.

Forman L. 2008. Justice and justiciability: Evaluating right to health jurisprudence in South Africa. *Journal of Medicine & Law*, 27:661–683.

Forman L, Pillay Y & Salt L. 2004. A review of nearly a decade of health legislation, 1994–2003. In P Ijumba, C Day & A Ntuli. (eds). *South African Health Review 2003/04.* Durban: Health Systems Trust. 13–28.

GCIS. South African Government Communication and Information System. 2004. *South Africa Yearbook 2004/05.* Pretoria: Communications, Republic of South Africa. Available: http://www.gcis.gov.za/content/resource-centre/sa-info/ yearbook/2004-05. (Accessed 28 March 2015).

GCIS. South African Government Communication and Information System. 2009. *South Africa Yearbook 2009/10.* Pretoria: Communications, Republic of South Africa. Available: http://www.gcis.gov.za/content/resource-centre/sa-info/ yearbook/2009-10. (Accessed 28 March 2015).

Guay LA, Musoke P, Fleming T, Bagenda D, Allen M, Nakabiito C, Sherman J et al. 1999. Intrapartum and neonatal single-dose Nevirapine compared with Zidovudine for prevention of mother-to-child transmission of HIV-1 in Kampala, Uganda: HIVNET 012 randomised trial. *The Lancet*, 345(9181):795–802.

Gumede WM. 2007. *Thabo Mbeki and the Battle for the Soul of the ANC*. London: Zed Books.

Harrison D. 2010. An overview of health and healthcare in South Africa 1994–2010: Priorities, progress and prospects for new gains: A discussion document commissioned by the Henry J Kaiser Family Foundation to help inform the national health leaders' retreat, Muldersdrift, January 2010. Available: http://www.doh.gov.za/docs/reports/2010/overview1994–2010.pdf. (Accessed 28 March 2015).

Harvey M. 2000. How can a virus cause a syndrome? asks Mbeki. IClinic Online, 21 September 2000. Available: http://www.aegis.org/DisplayContent/?SectionID=370502. (Accessed 28 March 2015).

Health and Development Africa (Pty) Ltd. 2012. *Global Aids Response Progress Report 2012*. Pretoria: National Department of Health and Research. Available: http://www.unaids.org/sites/default/files/country/documents/ce_ZA_Narrative_Report.pdf. (Accessed 20 March 2016).

Health-E News. Fact sheet: South Africa's HIV programme by numbers, 16 July 2015. Available: http://www.health-e.org.za/2015/07/16/fact-sheet-south-africas-hiv-programme-by-numbers/. (Accessed 23 March 2016).

HEARD. Health Economics and HIV & AIDS Research Division. 2009. Human resources for health in South Africa: A needs and gaps analysis of HRH in South Africa. Durban: HEARD. Available: http://www.heard.org.za/downloads/human-resources-for-health–a-needs-and-gaps-analysis-of-hrh-in-south-africa.pdf. (Accessed 28 March 2015).

Heywood M. 2003. Contempt or compliance? The TAC case after the Constitutional Court judgment. *ESR Review*, 4(1).

Houston G & Muthien YG. 2000. South Africa: A transformative state? In YG Muthlen, MM Khosa & BM Magubane. (eds). *Democracy & Governance Review: Mandela's Legacy 1994–1999*. Pretoria: HSRC Press: 37–78.

Klasen S & Woolard I. 2009. Surviving unemployment without state support: Unemployment and household formation in South Africa. *Journal of African Economics*, 18(1):1–51.

Law K. 2010. 'The Wild West world of BEE': Black Economic Empowerment reviewed. *Safundi: The Journal of South African and American Studies*, 11(3):313–323.

Liebenberg S. 2002. South Africa's evolving jurisprudence on socio-economic rights. *Law Democracy & Development*, 6:159–191.

Mangcu X. 2008. *To the brink: The state of democracy in South Africa*. Durban: UKZN Press.

Marais H. 1998. South Africa: Limits to change – The political economy of transformation. London: Zed Books.

Marten S, McIntyre D, Travassos, Shishkin S, Lodge W, Reddy S, Vega J. An assessment of progress towards universal health coverage in Brazil, Russia, India, China, and South Africa (BRICS). *The Lancet*, 384(9960):2164–2171.

May J. 1998. Poverty and inequality in South Africa: Report prepared by the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality. Pretoria: Government of South Africa. Available: http://www.polity.org.za/polity/govdocs/reports/poverty.html. (Accessed 28 March 2015).

McIntyre D. 2004. The Nature and state of healthcare financing and delivery in South Africa: Obstacles to realizing the right to healthcare. Available: http://www.tac. org.za/Documents/healthsystem/context.ppt. (Accessed 28 March 2015).

McIntyre D, Bloom G, Doherty J & Brijlal P. 1995. *Health Sector Expenditure and Finance in South Africa*. Washingon: World Bank.

The Mercury, 6 December 2002. Government should provide anti-retrovirals.

Moodley D. 2000. 'The SAINT trial: Nevirapine (NVP) versus Zidovudine (ZDV) + Lamivudine (3TC) in prevention of peripartum transmission, abstract no. LbOr2. XIII International AIDS Conference, Durban, South Africa, 9–14 July 2000.

Mooney G & Gilson L. 2009. The economic situation in South Africa and health inequities. *The Lancet*, 347(9693):858–859.

NHI to be passed in 2012: Motsoaledi. *Times Live*, 22 February 2011. Available: http://www.timeslive.co.za/local/article928089.ece/NHI-to-be-passed-in-2012–Motsoaledi. (Accessed 28 March 2015).

Ntuli A, Ijumba P, McCoy D, Padarath A & Berthiaume L. 2003. HIV/AIDS and health sector responses in South Africa – Treatment access and equity: Balancing the act. *Equinet Discussion Paper No. 7*, September 2003. Durban: Health Systems Trust. Available: http://www.hst.org.za/sites/default/files/equinet7.pdf. (Accessed 28 March 2015).

OAU. Organisation of African Unity. 2001. Abuja Declaration on HIV/AIDS, Tuberculosis, and Other Related Infectious Diseases, OAU Doc. OAU/SPS/ABUJA/3. Geneva: UN. Available: http://www.un.org/ga/aids/pdf/abuja_declaration.pdf. (Accessed 28 March 2015).

Parsons AN, Mathole T & Sanders D. 2010. The impact of global health initiatives on access to antiretroviral therapy in South Africa. In S Fonn & A Padarath. (eds). *South African Health Review 2010*. Durban: Health Systems Trust. 107–110.

Pearmain D. 2000. The Impact of changes to the Medical Schemes Act. In A Ntuli. (ed.). *South African Health Review 2000*. Durban: Health Systems Trust.

Pieterse M. 2004. Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience. *Human Rights Quarterly*, 26(4):882–905.

Pillay K. 2002. Implementing *Grootboom*: Supervision needed. *ESR Review 13*, 3(1).

Reagon G, Irlam J & Levin J. 2004. The National Primary Healthcare Facilities Survey 2003. Durban: Health Systems Trust. Available: http://www.hst.org.za/sites/default/files/phc_survey04.pdf. (Accessed 28 March 2015).

Roux T. 2002. Understanding *Grootboom* – A response to Cass R. Sunstein. *Constitutional Forum*, 12(1):41–51.

SAHRC. South African Human Rights Commission. 2000. Healthcare and healthcare services for children. In *3rd Economic & Social Rights Report Series.* Available: http://www.sahrc.org.za/home/21/files/Reports/3rd%20ER%20report%20chapter_5.pdf. (Accessed 28 March 2015).

SAHRC. South African Human Rights Commission. 2004. The right to healthcare. In *5th Economic and Social Rights Report Series 2002/2003.* Available: http://www.sahrc.org.za/home/21/files/Reports/5th_esr_health.pdf. (Accessed 28 March 2015).

Sanders D & Chopra M. 2006. Key challenges to achieving health in an inequitable society: The case of South Africa. *American Journal of Public Health*, 96(1):73–78.

Schneider H, Barron P & Fonn S. 2007. The promise and the practice of transformation in South Africa's health system. In S Buhlungu, J Daniel & R Southall. (eds). *State of the Nation: South Africa 2007*. Cape Town: HSRC Press. 289–311.

Shue H. 1980. *Basic Rights, Subsistence, Affluence and US Foreign Policy*. Princeton: Princeton University Press.

Stats SA. Statistics South Africa. 2008. Income and expenditure of households 2005/2006: Analysis of results. Available: http://beta2.statssa.gov.za/publications/Report-01-00-01/Report-01-00-012005.pdf. (Accessed 28 March 2015).

Stats SA. Statistics South Africa. 2009. Mid year population estimates 2009: Statistical release P0302. Pretoria: Statistics South Africa. Available: http://www.statssa.gov.za/publications/P0302/P03022009.pdf. (Accessed 28 March 2015).

Stats SA. Statistics South Africa. 2010. Mid Year Population Estimates: Statistical Release P0302. Pretoria: Statistics South Africa. Available: http://www.statssa.gov.za/publications/P0302/P03022010.pdf. (Accessed 28 March 2015).

Stats SA. Statistics South Africa. 2015. Mid Year Population Estimates: Statistical Release P0302. Pretoria: Statistics South Africa. Available: https://www.statssa.gov.za/publications/P0302/P03022015.pdf. (Accessed 20 March 2016).

Steyn K & Schneider M. 2011. Overview on poverty in South Africa. In D Bradshaw & K Steyn. (eds). Poverty and chronic diseases in South Africa: Technical report. Cape Town: South African Medical Research Council. Available: http://www.mrc.ac.za/bod/povertyfinal.pdf. (Accessed 28 March 2015).

Sunstein CR. 1999. Social and economic rights? Lessons from South Africa. *Constitutional Forum*, 11(1):123–132.

UNDP. United Nations Development Programme. 2011. Sustainability and equity: A better future for all, Human Development Report 2011. Geneva: UN. Available: http://hdr.undp.org/en/content/human-development-report-2011. (Accessed 28 March 2015).

UNGA. United Nations General Assembly. 1948. Universal Declaration of Human Rights, UN Doc. A/810. Geneva: UN.

UNGA. United Nations General Assembly. 1966a. International Covenant on Economic, Social, and Cultural Rights, 993 UNTS 3. Geneva: UN.

UNGA. United Nations General Assembly. 1966b. International Convention on the Elimination of Racial Discrimination, 660 UNTS 195. Geneva: UN.

UNGA. United Nations General Assembly. 1980. Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13. Geneva: UN.

UNGA. United Nations General Assembly. 1989. International Convention on the Rights of the Child, 1577 UNTS 3. Geneva: UN.

UNGA. United Nations General Assembly. 2007. Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106. Geneva: UN.

Van Vuren M. 2015. National Health Insurance for South Africa. *Life Sciences Bulletin*. Available: http://www.fasken.com/en/national-health-insurance-rsa/. (Accessed 28 March 2015).

WHO. World Health Organization. 2008. Commission on Social Determinants of Health. Closing the gap in a generation: Health equity through action on the social determinants of health: Final report of the Commission on Social Determinants of Health. Geneva: WHO. Available: http://www.who.int/social_determinants/thecommission/finalreport/en/. (Accessed 28 March 2015).

Legislation

Constitution of the Republic of South Africa, 1996. Available: http://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1. (Accessed 28 March 2015).

GN 657. Government Notice 657 of 12 August 2011. National Health Act, 2003: Policy on National Health Insurance. *Government Gazette* No. 34523. Available: http://www.mediscor.net/docs/National%20Gazette%20No%2034523%20 of%2012-August-2011,%20Volume%20554.pdf. (Accessed 28 March 2015).

Medical Schemes Act 131 of 1998. Available: http://www1.chr.up.ac.za/undp/domestic/docs/legislation_52.pdf. (Accessed 28 March 2015).

Medicines and Related Substances Control Act 101 of 1965. Available: http://www.hpcsa.co.za/Uploads/editor/UserFiles/downloads/legislations/acts/medicines_and_related_sub_act_101_of_1965.pdf. (Accessed 28 March 2015).

National Health Act 61 of 2003. Available: http://www.gov.za/documents/national-health-act. (Accessed 28 March 2015).

Public Finance Management Act 1 of 1999. Available: http://www.treasury.gov.za/legislation/PFMA/act.pdf. (Accessed 28 March 2015).

Cases cited

Government of the Republic of South Africa and Others v Grootboom and Others [2000] (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169. Available: http://www.saflii.org/za/cases/ZACC/2000/19.html. (Accessed 13 July 2014).

Mankayi v AngloGold Ashanti Ltd (CCT 40/10) [2011] ZACC 3; 2011 (5) BCLR 453 (CC); 2011 (3) SA 237 (CC); [2011] 6 BLLR 527 (CC); (2011) 32 ILJ 545 (CC) (3 March 2011). Available: http://www.saflii.org/za/cases/ZACC/2011/3.html. (Accessed 13 July 2014).

Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC). Available: http://www.saflii.org/za/cases/ZACC/2009/28.html. (Accessed 13 July 2014).

Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (CCT 59/2004) [2005] ZACC 14; 2006 (8) BCLR 872 (CC); 2006 (2) SA 311 (CC). Available: http://www.saflii.org/za/cases/ZACC/2005/14.html. (Accessed 13 July 2014).

Minister of Health and Others v Treatment Action Campaign and Others (No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075. Available: http://www.saflii.org/za/cases/ZACC/2002/16.html. (Accessed 13 July 2014).

Soobramoney v Minister of Health, KwaZulu-Natal [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC). Available: http://www.saflii.org/za/cases/ZACC/1997/17.html. (Accessed 13 July 2014).

JUSTICE

FREEDOM

CITIZENSHIP

CITIZENSHIP: Overview

Jacqueline Solway

What do exercising freedom and citizenship mean for the majority who were marginalised, excluded and impoverished under the colonial apartheid state and still are to a large extent today? All the chapters in this section point to paradoxes and uncertainties, to partial gains and partial losses for most South Africans. Democratic citizenship is always contested, uneven, ongoing and in process, everywhere. In South Africa the exercise of citizenship confronts particular challenges that display both the exceptionality of the country as well as similarities to the postcolonial experiences of other African states.

The winds of change came late to South Africa. For most of Africa, independence in the 1960s coincided with the height of modernisation and growth, when there was great optimism. States, regarded as the engines of development, were accorded a significant degree of autonomy in pursuing development goals. By 1994 when South Africa achieved independence and democratisation, the world had changed (as it always does, of course). South Africa achieved independence with very high expectations but in less optimistic and, indeed, in sober times and circumstances. Neoliberal hegemony, diminished state control and capacity, reinforced by fiscal austerity programmes on the continent and, by the end of the Cold War, deindustrialisation and expanding unemployment all shaped the state's options in pursuing development strategies. The new South Africa emerged in the midst of the HIV/AIDS epidemic, which only worsened. Moreover, it emerged from the context of one of the most unequal societies in the world, with an elaborate scaffolding of entrenched hierarchical and racialised structures.

Despite the exceptional circumstances of South Africa's 1994 transformation and decolonisation, there are important continuities between the early and late periods of decolonisation in Africa. As elsewhere in Africa, the achievement of democratic governance continues to face obstacles common but not necessarily unique to the continent. Over 30 years ago, in a sensitive account, Crawford Young (1982) discussed the particular difficulties confronting postcolonial African states in attaining democracy and modern citizenship. He identified the modern democratic state as comprising both an ideology bearing the values of liberal citizenship derived from the French Revolution and a set of institutions through which power is exercised. The latter does not always easily enable the former (liberal citizenship) to flourish due to the state's inheritance of colonial state structures and practices, characterised as hard, aloof and distant. The

colonial state was an entity created to dominate, and not to build an engaged, participatory citizenry — other than a small, elite stratum, many of whom became postcolonial leaders. Therefore, whereas liberal ideology presents the possibility of full citizenship, realising its potential is difficult. To simplify, before 1994, the black majority in South Africa did not enjoy the status of citizenship; they were ruled as subjects without the vote or significant means of legal redress, and they were ruled through intermediaries (Mamdani 1996). As Beyers and Fay demonstrate in Chapter 2 of this book, the legacy of intermediaries, traditional authorities in this case, remains significant: they have the capacity not only to confound the exercise of democratic citizenship predicated on the liberal individual subject, but also to entrench forms of non-democratic subjectivity and practice.

Political protests were one of the few means available to the majority to exercise political action during the apartheid era. These were often met with the repressive police forces of the hard colonial state. Many of the chapters reveal that protest remains one of the more viable ways by which 'new' citizens exercise their political voice in the absence of more effective methods by which to engage. Protests demonstrate both the limits and the possibilities of citizenship on the part of those whose political inclusivity continues to be uncertain. That some are still met with brute police force, as in the case of the Marikana massacre, reveals that the hard, remote nature of the colonial state has not withered entirely, and continuity exists both with the past and with other countries on the continent. It is the model South Africa inherited and its intransigence is apparent. Yet many scholarly works also suggest that popular protest offers a means for further organisation and more effective forms of political action. They are pushing the boundaries and, in instances such as the Treatment Action Campaign (TAC) have launched successful legal cases that have led to real change at local, national and global levels.

'Lawfare' (Comaroff & Comaroff 2006), as enacted in South Africa, has numerous political outcomes. It depoliticises by containing and restricting deep structural inequalities within juridical discourse, legal challenges and specific legal cases. Consequently, it may address immediate and crucial concerns but its transformative capacity is limited. However, what lawfare does reveal, and importantly so, is an independent judiciary able to make decisions that might be at odds with the executive branch. But, significantly, it also reveals a level of trust on the part of citizens to seek redress and justice in an orderly way, without violence and without fear of retribution. That people seek redress through a legal rational framework is itself a testament to a degree of citizen identification and trust in the state despite the ambiguous outcomes and sometimes perverse consequences of legal settlements.

Liberal democracy includes among its core values equality of citizenship and individual rights predicated on the juridical abstract citizen. To the extent that liberalism succeeds, it provides an ethos of possibility, of choice, of new direction. Whether this is a false, inflated or unrealisable promise, liberalism at its best inspires people to imagine and seek new opportunities, and to embrace a sense of optimism. Equally, liberalism has the capacity to promote cynicism and to depoliticise as much as it politicises. Liberalism contains its own conundrums, paradoxes and contradictions (Solway 2011).

The varied challenges encountered in realising liberal democratic citizenship and the incredibly high stakes faced by the people of South Africa are presented in all of their complexities in these chapters.

References

Comaroff J & Comaroff JL. 2006. Law and disorder in the postcolony: An introduction. In J Comaroff & JL Comaroff. (eds). *Law and Disorder in the Postcolony*. Chicago: University of Chicago Press.

Mamdani M. 1996. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Princeton: Princeton University Press.

Solway J. 2011. 'Culture fatigue': The state and minority rights in Botswana. *Indiana Journal of Global and Legal Studies*, 18(1):211–240.

Young C. 1982. Patterns of social conflict: State, class and ethnicity. *Daedalus*, 111(2):71–98.

Chapter 9

THE POLITICS OF CITIZENSHIP IN SOUTH AFRICA

Bettina von Lieres

Since 1994 the term 'citizenship' has been used by scholars and activists to refer to a wide array of democratic features in South Africa — membership of the state; the legalisation of new individual and collective rights; civil-society-based struggles for greater political and economic inclusion (Fleisch & Robins 2014; Friedman & Mottiar 2005; Meth 2010; Miraftab & Wills 2005; Von Holdt et al 2011; Von Lieres & Robins 2008); and a new politics of popular representation (Piper & Bénit-Gbaffou 2014). Such wide-ranging uses of the idea of 'citizenship' speak powerfully to citizenship's emancipatory ideals: rights, inclusion, justice, equality and democracy. These democratic aspirations, however, do not explain the *politics* of citizenship, ie the struggles between society and state over the distribution of political and economic public goods.

In this chapter, I align myself with the critical approaches to citizenship studies that focus on the complex political processes, practices and struggles in and through which democratic citizenship is only sometimes enacted, but always negotiated and fought over (Isin & Nyers 2015). The attainment of inclusive forms of citizenship is never simply the inevitable and immediate consequence of formal institutions. Laws and institutions produce formal membership of polities, but they do not automatically build democratic citizenship. Everyday experiences of rights often disprove their formal promises.

Following Isin & Nyers (2015), I define citizenship as an intermediatory political practice that mediates 'rights between the subject of politics and the polity to which these subjects belong' (Isin & Nyers 2015:1). Isin and Nyers' view citizenship as a set of processes through which something is enacted, created and 'rendered relatively durable and stable but still contestable, surprising, inventive' (Isin & Nyers 2015:1). They focus our attention away from the state as the sole source of authority for recognising rights. They use the term political 'subject' as opposed to 'citizen', as not all political subjects or actors have the designation of 'citizens'. They also include legal and illegal, official and unofficial forms of belonging. Subjects are plural, as they can be individual or collective (Isin & Nyers 2015).

I differ from Isin and Nyers, however, over the extent to which we can afford to focus our attention away from the state when we consider the politics of citizenship in societies in which the exercise of democratic state

power is weak. When states do not act democratically in society, 'citizenship' becomes as much about securing inclusive and egalitarian forms of state power as it is about negotiating power in alternative non-state polities. Isin and Nyers's definition, however, astutely asks us to focus on the struggles through which political subjects emerge as claim-makers in the public sphere, both within society and in relation to the state. It does not take for granted their inclusion into public arenas, nor does it take for granted the fact of inclusive public spheres. Assumptions about pre-given public identities and spaces are often at the heart of mainstream liberal democratic versions of citizenship, which focus our attention on how people *engage* in the public sphere, as opposed to how they *access* it in the first place. Liberal democratic versions of citizenship tend to assume few formal or symbolic borders that enable or disable one's participation in political community. They relentlessly advocate citizenship as inclusion and consistently fail to consider the deeply constitutive effects of exclusion. They also glibly assume that states generally act democratically in society itself. Liberal democracy's decontextualised prescriptions for an ideal society have little to say about how to overcome deep-rooted inequalities or how to counter the reproduction of marginalisation that occurs in deeply exclusionary societies.

In this chapter I define citizenship as both 'struggle' and 'regime'. Citizenship understood as 'struggle' refers to the political practices in and through which excluded groups attempt to develop their claim-making capacities for greater public visibility. It is about how people constitute themselves as political subjects with democratic claims in relation to the polities to which they belong. The politics of citizenship is about where and how this mediation occurs. Following Guillaume (2015), I argue that citizenship must be understood, however, not only as 'struggle', but also as 'regime'. Citizenship as 'regime' allows us to consider the wider structural and historical processes from which to engage the politics of citizenship. Guillaume asks us to think about 'regimes' of citizenship, understood as citizenship's interconnections 'with complex historical processes (such as modernity, secularism, (post)-colonialism, or state formation)' (Guillaume 2015:154). Regimes of citizenship differ according to the context, but what they have in common is an understanding of citizenship as a series of dynamic and interwoven relations between wider structural and historical processes, and the resistances aimed at reshaping them. In this chapter I consider the intersections between citizenship, neoliberal governance, the ruling party's understanding of democracy and state-led practices of participatory governance in South Africa. Tracking these complex 'regimes' of citizenship, and the struggles within them, allows us to understand citizenship as both empowerment and domination. I argue that the politics

of citizenship in South Africa is located between popular struggles for greater visibility and the regimes of citizenship that provide its formal and symbolic boundaries.

In the first section of this chapter, I situate the politics of citizenship against South Africa's ruling party's wider macroeconomic policies, participatory-governance practices and its discourses on democracy. I also locate the politics of citizenship against the (global) shift of neoliberal governance away from the state to civil society, which is increasingly viewed as the source of democratic deepening, in the sense that it provides a counterbalance to state and market. The growing diffusion of state power and the proliferation of alternative actors and sources of power mean that citizens and their actions have, by necessity, become more important for outcomes associated with equality and justice, but, alarmingly, at the same time more isolated from the kind of state power necessary to achieve these. The outsourcing of political and economic redistributive responsibilities to civil society has resulted in the increasing importance of civil-society institutions and their predominantly informal political representatives, often at the expense of democratic forms of state-led programmes and institutions. Deepening democracy requires democratic power from both society and state. I show how the early promise of inclusive democracy in South Africa (and with it democratic citizenship) was quickly undermined by the partial and bipartisan nature of actual state institutional rule. The transition from the apartheid state to the new democratic one produced limited effective vertical or horizontal accountability mechanisms as a result of the government's failure to successfully institutionalise participatory governance. The failure of participatory governance has gone hand in hand with the persistence of state political discourses that couch legitimate political action in very narrow party-affiliated terms. The formal and symbolic boundaries created by these regimes of citizenship have limited wider political and economic inclusion, as they have generated new acts and spaces for defiance and protest.

In the second section I look at emerging struggles for citizenship in an attempt to understand how these interact with the regimes of citizenship discussed in the first section. I argue that new political subjectivities and struggles for inclusive citizenship largely define themselves outside of formal state institutions and through highly localised processes of horizontal identification and mobilisation. These localised non-state spaces of political representation (eg community groups and local associations) have emerged as the only viable political arenas for the enactment of citizens' rights in reaction to an unresponsive state unable to provide effective services, such as healthcare, water and housing. Although many of these local actors

and spaces for active citizenship have had some successes in mobilising communities, they have, on the whole, not been effective is forcing the state to play a democratic role in society. I argue that the enduring contest over access to public goods has positioned informal practices of protest, mobilisation and leadership (often linked to violence and de-linked from state institutions) as inevitable, but insufficient and deeply complex spaces for citizenship. As the new institutions of state and society failed to provide greater opportunities for social and economic inclusion, citizenship has become increasingly imbued with new normative claims for justice, redistribution and equality. These normative shifts in understandings of citizenship have produced new strategies for citizen mobilisation, which have emphasised new alliances and solidarity networks around substantive economic and social claims. Although some of these movements have been effective in making the state more responsive to citizens' demands (eg the 2015 student movements), others have failed to secure even short-term social and economic gains.

It is unclear to what extent these struggles for citizenship can redefine the formal and symbolic boundaries established by the ruling party and its undemocratic exercise of state power. Today 'citizenship' speaks primarily to marginalised communities' ongoing and unmet demands for freedom, justice and inclusion. As struggles for citizenship continue, there is an increasing disconnect between state and society, and a growing correlation between citizen action and violence. I conclude with the argument that whereas citizenship was initially understood as the confirmation, institutionalisation and actual enactment of new inclusive legal rights in relation to state and society, it now speaks more directly to the failure of the legal and political realm to secure meaningful rights and inclusion, and to the failure of the state to acknowledge the rights of citizens. As a result, citizenship has become, above all, a discourse and ongoing practice of (unmet) emancipation from the wider condition of marginalisation. It remains to be seen to what extent new struggles for citizenship can transform the nature of state power in society. The politics of citizenship in South Africa is a forceful reminder that democracy is always a deeply contested, incomplete terrain of struggle for the entrenchment of real rights and social inclusion. Above all, the politics of citizenship signifies the deep incompleteness and non-linearity of citizenship itself, and especially the persistent coexistence of democracy and marginalisation.

Regimes of citizenship

The post-apartheid political order was ushered in with South Africa's first non-racial elections of 1994. Shortly followed by the Constitution of the Republic of South Africa, 1996, a single state was created with most of the institutions typical of a liberal democracy, including constitutional sovereignty, a Bill of Rights, regular free and fair elections, and a weak form of federalism. In addition, the Constitution provided for an independent judiciary and a number of formal checks and balances on executive power. For many, South Africa's new liberal democratic polity was immediately associated with democratic citizenship, understood as universal membership of the state and a new legal status for all people. It quickly became clear, however, that citizenship as 'legal status', with its static, institutional and formal understanding, was an unproductive site from which to engage the meaning of citizenship in post-apartheid South Africa. The gap between formal and real rights became evident almost immediately after the first democratic elections. Many groups of people, despite their new formal status, remained disadvantaged and marginalised early on in post-apartheid South Africa. They suffered from a lack of political and economic recognition despite their new formal status.

In 1994 the government set an ambitious economic agenda in the form of the Reconstruction and Development Programme (RDP). The RDP seemed to point to interventionist government, a mixed economy and some movement towards social democracy (Jeeves 2004: 510), but by 1996 the RDP had been abandoned in favour of the Growth, Employment and Redistribution Programme (GEAR). GEAR involved the adoption of neoliberal macroeconomic principles, and redistribution took a back seat. Since the adoption of GEAR, economic growth has remained below needed levels and unemployment is catastrophically high.

Since 1999 the ANC has pursued a politics that has involved being pragmatic about the model of economic development by embracing a conservative, inflation-targeting, fiscal discipline and investment-led growth, while accommodating the demands for social justice in terms of an expanded programme of basic service delivery and welfare provision (Piper et al 2012:4). This approach has yielded moderate economic growth of between 3% and 5% since 1996, and a substantial extension of services. Although access to these services has been seen to improve the lives of poor people, the most dramatic change in the political economy was the emergence of a substantial black middle class, mostly through the deracialisation of the state. The trend towards market provision of key public goods has had the consequence of bifurcating citizenship in South Africa, with the middle class increasingly able to purchase their 'goods' through

the market (eg healthcare, education, security and transport), while the vast majority of working, unemployed and poor people continue to rely on the state for these goods. Class has become a new formal and symbolic boundary limiting the extension of inclusive citizenship.

From 2004 onwards, increasingly neoliberal macroeconomic policies have gone hand in hand with a marked failure on the part of the government to institutionalise participatory governance. The ANC share of the national vote grew from 63% in 1994 to 66% in 2009, peaking at 70% in 2004. Over the same period it went from winning six provinces to winning all nine, losing just the Western Cape in 2009, and winning 200 of the 283 municipal councils in 2011 (Southall & Daniel 2009). This dominance, combined with its history as the leading force in the national liberation movement, led the ANC to continue to regard itself, and to be widely regarded as, the legitimate voice of the 'people' and marginalised communities. In addition, the proportional representation closed-party list system at national and provincial level meant that voters continued to choose a party, which then chose the representatives. This continued to entrench politicians' accountability to their parties rather than to the electorate. The consequence of this combination of factors was a degree of behaviour among the ruling party similar to a one-party regime, where the boundaries between state and party became increasingly blurred, and accountability tended to run upwards rather than downwards. Similar trends continued to exist at local level despite elements of a constituency-based electoral system because local elections became increasingly 'nationalised' (Piper et al 2012). The ANC-led government continued to assume a close and representative relationship with civil society, underestimating the importance of building independent citizen institutions. The ANC remained in a tripartite alliance with the South African Communist Party (SACP) and, more importantly, with the Congress of South African Trade Unions (Cosatu), which is the largest civil-society organisation in South Africa, reinforcing a national hegemony that continued to make oppositional agitation extremely difficult.

Faced with increasing criticism that it was ignoring poor communities' demands for better services, the government embarked on an ambitious programme to install participatory governance with an emphasis on community participation and public involvement in decision-making (Friedman 2006). However, a consensus quickly emerged that despite public commitments and legislative acts, these new participatory institutions failed from the start. Commentators have argued that they were designed in such a way that they were largely consultative in nature, separated from local-government institutions and actual local state power. They were dominated by political party infighting, and quickly became political

arenas for party disputes and clientelistic transactions (Piper & Deacon 2008). Friedman (2006) has argued that these early efforts at participatory institutions did not enhance participatory governance. Not only were they biased towards groups who were already organised (eg formal community associations and organisations), but they were also intrinsically hostile to effective participation by the poor, who most needed access to government decisions. The government did not view these institutions as opportunities to understand popular demands. Instead it continued to misread 'the needs of the poor' (Friedman 2006:14) by failing to institutionalise effective representation for marginalised communities. Instead of widening the possibilities for inclusive citizenship, attempts to institutionalise participatory governance have narrowed public spaces for co-decision-making between state and society. Participatory governance, or rather the failure of it, has produced new formal boundaries restricting citizen participation and, with it, inclusive citizenship.

Citizenship has also been limited and bounded by the ruling party's own understanding of political subjectivity, or what it means to be a citizen. The government's early economic programme, the RDP, went hand in hand with ANC-led discourses of 'national unity' and widespread public preoccupation with issues of rights, diversity, inclusion and the structural inequalities of apartheid. Whereas the language of rights resonated widely, the term 'citizenship' itself hardly featured in early public discourses on the meanings of post-apartheid democracy. In part, this had to do with the ways in which the ruling party, the ANC, understood the relationship between state and civil society. From 1994 onwards, the practice of politics was rendered centrifugal through the electoral dominance of the former liberation movement, the ANC. Prominent leaders in the party saw little difference between state and society (and hence between state and citizens) because, in their view, the new democratic state was inherently the legitimate representative of the people. The belief that the state always and necessarily acted in the interests of citizens (ie the notion of 'state-as-citizen') was as widely defended by ANC leaders as it was criticised by civil-society leaders (often not aligned to the ANC), who asserted the importance of distinguishing between state, civil society and citizens (Von Lieres & Robins 2008).

The ANC's conceptual conflation of state and society not only shaped public discourses on democracy, but also had profound consequences for the nature of political institutions. Despite historical (and immediate post-1994) public commitments to participatory democracy and citizen power, the ANC-led state failed, from early on, to prioritise and build effective local-government institutions capable of representing citizens and of mediating their relationship with the state. Under the authoritarian apartheid state,

institutional opportunities for citizens to oversee the state had been actively discouraged. By contrast, the anti-apartheid movement, led by the United Democratic Front and aligned with the ANC, had loudly emphasised 'people's power', community participation and grass-roots mobilisation — all ideas associated with citizen-led participatory governance. The immediate post-1994 years saw the government display active enthusiasm for participatory governance, especially by those who argued for the importance of contesting the apartheid state's local control over public authorities. The ANC's public rhetoric was that formal mechanisms of participatory governance had to become an important feature of post-apartheid society (Friedman 2006). Through the National Economic Development and Labour Council, the government encouraged local-community participation in local government through school governing bodies, community policing forums and ward committees. Reams of legislation were passed to encourage local governments to help strengthen these citizen institutions.

However, the ANC's commitment to citizen-led participatory institutions never went beyond rhetoric and normative utterances. The government failed to develop effective models and policies that addressed the challenges of inclusive institutional design and implementation. In the initial post-apartheid period from 1994 to 1999, the ANC-led government primarily focused on deracialising political institutions, instead of making sure that they were also participatory, citizen-led and capable of implementing public programmes for service delivery at the community level. The failure to institutionalise citizen participation from 1994 to 1999 can therefore be traced back to the ANC's own assumptions about its representative authority and legitimacy — it saw itself as the state of the people and, as such, underestimated the crucial importance of independent citizen institutions. The government simply assumed that the new political institutions would by nature be democratic institutions without taking into account that democracy is dependent on institutionalising the right to participate in decision-making between elections and on democratic understandings of the political and autonomous role of citizens.

Struggles for citizenship

The failure of participatory governance and of the ANC-led government to take seriously the changing needs of the poor became all the more visible when new social movements began to push for national policy changes and state responsiveness. Chief among these was the Treatment Action Campaign (TAC). The TAC was established on 10 December 1998 when a group of about 15 people protested on the steps of St Georges Cathedral in Cape Town to demand medical treatment for people living with the virus

that causes AIDS. Over the next 10 years, the TAC developed into one of South Africa's most effective post-apartheid social movements, mobilising citizens in several arenas — the courts, the streets, the media and global forums. It succeeded in winning important reforms in national policy on access to treatment and, alongside this, greater state responsiveness to citizens' demands (Von Lieres & Robins 2008).

The TAC significantly shaped the identity of civil society in South Africa through a dual strategy, which involved strengthening grass-roots resistance and, simultaneously, building engagements and collaborations with powerful political actors, including the state. On the one hand, the TAC succeeded in building a strong grass-roots organisation with the capacity for multiple forms of citizen action from below, including spontaneous acts of civil disobedience and mass protests, as well as organised literacy and education campaigns. On the other hand, the TAC partnered with numerous interest groups, including professional and/or international organisations to enhance campaigning on specific issues. For example, the TAC joined with professional medical associations and, in one case at least, with the Department of Health, to advocate the removal of drug-patent rights for HIV/AIDS sufferers in South Africa. The TAC also built alliances with sympathetic organisations in civil society, including churches and unions. It also engaged with organisations aligned with the ANC: Cosatu and the SACP (Piper et al 2012). The coalition built by the TAC involved complex and highly developed mobilising structures, which linked national reformers to local and faith-based groups, the media and repositories of expertise (Piper et al 2012).

By bringing together practices of grass-roots resistance and political collaborations with powerful interest groups, the TAC acted as an important mediator between political actors with access to medical knowledge and state/political networks, and the vast majority of the organisation's working and poor membership who do not. The TAC is an example of a new social movement that constructed its own possibilities for citizen action in multiple spaces in civil society. The strength of the TAC as a social movement lay in its capacity to mobilise the poor in a variety of contexts, from once-off campaigns to more formal policy engagements. Its campaigns legitimised diverse forms of citizen action in civil society, not only in the eyes of ordinary citizens, but also in the eyes of sections of the state. The TAC's interventions in these multiple spaces allowed ordinary citizens to engage in a rights-based, grass-roots activism, which, linked to the TAC's work in more formal policy arenas, has significantly shaped the identity of South Africa's civil society as an arena for both formal and informal social mobilisation and citizen action.

The failure of participatory institutions from 1999 to 2004 and the rise of the TAC at the same time were significant for the politics of citizenship in post-apartheid South Africa for a number of reasons. First, they both indicated the growing lack of vertical institutionalised democratic relations between citizens and the ANC-led state. The social contract between state and society was never institutionalised through effective participatory institutions for citizens and a strong political culture demanding state–society relations of accountability. Secondly, the rise of the TAC firmly situated the struggle for democratic citizenship and rights within civil society, and not within state power and political institutions. Although the TAC's successes have contributed to building an expanded public sphere, they also entrenched the idea that democratic citizenship is built primarily through horizontal relations in civil society. Understanding citizenship as engaging state power receded during this period.

As the weaknesses of state institutions became increasingly apparent from 2004 onwards, new alliances around socio-economic rights were initiated by new social movements campaigning for land and housing rights. In addition, mobilisations aimed at achieving economic rights began to emerge across South Africa in local communities. Since 2004 South Africa has experienced a massive increase in militant local-community political protests, with a dramatic upsurge in 2009. And these have become increasingly violent since 2010 (Von Holdt et al 2011). Some commentators have called these 'rebellions of the poor' (Alexander 2010:27). Von Holdt et al (2011) have argued that these service-delivery protests speak first and foremost to rapid changes in class formation in South Africa — the growth of new elites alongside large underclasses of unemployed people or precariously employed people. These class differences generate a politics of bifurcated or differentiated citizenship, ie class-based differences determine access to economic and political resources or otherwise. The protests are indicative of fierce tensions and struggles over social, political and economic inclusion and exclusion — in the absence of a state that is responsive to the demands of its citizens (Von Holdt et al 2011). They speak directly to the complex intertwining of governance, citizenship and marginalisation in South Africa. Some of the struggles have resulted in certain service-delivery gains for communities (Von Holdt et al 2011). Others, however, have reproduced exclusion through the extension of protest and violence aimed at the state to violence that targets immigrants, leading to increased social fragmentation and corrosion in many communities. Van Holdt et al (2011) also point out that a new class of informal community leaders, unelected in formal political arenas, has emerged as community protests have spread.

The rise of service-delivery protests across South Africa is evidence of a number of different dimensions in the politics of citizenship. First, citizenship is often an inherently 'layered' practice that may involve participation in, and resistance to, a wide range of political institutions and societal spaces. In the context of a largely unresponsive state, citizenship practices are often about multiple, diverse and often contradictory mobilising efforts for 'the right to have rights', and the right to participate in new and multiple public spaces. In the scramble for livelihoods and security, poor people tend to adopt diverse strategies and draw on multiple political identities, discourses, social relationships and political practices to navigate daily life.

Secondly, sometimes these diverse strategies create new frontiers for citizenship. Service-delivery protests in South Africa have shown how struggles for inclusion can produce new inclusions, but also new exclusions that further raise the barriers against achieving democratic citizenship.

Thirdly, as the politics of citizenship moves more and more into society itself, as opposed to occupying the nexus between state and society, a new class of representative emerges — those who claim legitimacy and representativeness, but who are not institutionally recognised by formal political authority. Often, these new types of political leaders speak for marginalised groups who would otherwise have no power. This new class of 'mediators' reflects a lack of democratic relations between state and citizens, and often serves as the main conduit through which engagement between marginalised groups and the state happens. Sometimes these mediators act in ways that deepen inclusive citizenship, but at other times they reinforce exclusionary relations (Von Lieres & Piper 2014).

In South Africa the politics of citizenship speaks to the deep intertwining of democracy and marginalisation. Since 1994 struggles for democratic citizenship have been shaped by the uneven trajectories of political and economic exclusion, and by the failure of the ANC-led state to institutionalise participatory governance. The growing diffusion and outsourcing of state power and responsibilities into society and markets mean that the politics of citizenship gets played out in largely non-state and extra-institutional arenas, in which poor people have no direct access to the state. The politics of democratic citizenship is both enabled and disabled by its interconnections with historical processes of state–society formation in South Africa. The ongoing absence of democratic state power in society means that citizenship increasingly requires 'mediation', ie third-party actors whose representative and coordinating roles become important for collective action. In South Africa, as in other countries, direct engagement with elected representatives or state officials is often difficult or non-existent. The enduring contest over public visibility and access to public goods in civil society makes forms of

mediation crucial for democratic citizenship, as marginalised communities rely on various kinds of intermediaries to access their rights from, through or despite the state. The representative actions of informal mediators often have both inclusionary and exclusionary effects, and produce and reproduce new frontiers and regimes of citizenship. The politics of mediated citizenship speaks to the failure of rights-based democratic governance, the absence of democratic state power in society and the ruling party's limited and undemocratic understanding of what it means to be a 'citizen' — namely a democratic political being with deeply legitimate claims to public visibility and economic equality.

References

Alexander P. 2010. Rebellion of the poor: South Africa's service delivery protests – a preliminary analysis. *Review of African Political Economy*, 37(123):25–40.

Fleisch B & Robins S. 2014. Mediating active citizenship and social mobility in working class schools: The case of equal education in Khayelitsha, Cape Town. In B von Lieres & L Piper. (eds). *Mediated Citizenship: The Informal Politics of Speaking for Citizens in the Global South*. Basingstoke: Palgrave Macmillan. 128–145.

Friedman S. 2006. Participatory governance and citizen action in post-apartheid South Africa. Decent Work Programme, International Institute for Labour Studies, Geneva, Discussion Paper No. 164.

Friedman S & Mottiar S. 2005. A rewarding engagement? The Treatment Action Campaign and the politics of HIV/AIDS. *Politics and Society*, 33(4):511–565.

Guillaume X. 2015. Regimes of citizenship. In E Isin & P Nyers. (eds). *Routledge Handbook of Global Citizenship Studies*. Oxon and New York: Routledge. 150–158.

Isin E & Nyers P. 2015. Introduction: Globalising citizenship studies. In E Isin & P Nyers. (eds). *Routledge Handbook of Global Citizenship Studies*. Oxon and New York: Routledge.

Jeeves A. 2004. Assessing a decade of democracy in southern Africa. *Canadian Journal of African Studies*, 38(3):505–520.

Meth P. 2010. Unsettling insurgency: Reflections on women's insurgent practices in South Africa. *Planning Theory and Practice*, 11(2):241–263.

Miraftab F & Wills S. 2005. Insurgency and spaces of active citizenship: The story of the Western Cape anti-eviction campaign in South Africa. *Journal of Planning Education and Research*, 25:200–217.

Piper L. 2006. Beyond neo-liberalism; beyond the ANC: South African politics as 'progressive-governance'. In T Marcus, & A Hofmaenner. (eds). *Shifting the Boundaries of Knowledge: A View on Social Sciences, Law and Humanities in South Africa*. Pietermaritzburg: UKZN Press.

Piper L & Deacon R. 2008. Party politics, elite accountability and public participation: Ward committee politics in the Msunduzi Municipality. *Transformation*, 66/67:61–82.

Piper L, Bafo K & Von Lieres B. 2012. Opening policy space in the dominant party: The Treatment Action Campaign, HIV/AIDS, and the reinvention of the ANC in South Africa. Unpublished research report.

Piper L & Bénit-Gbaffou C. 2014. Mediation and the contradictions of representing the urban poor in South Africa: The case of SANCO leaders in Imizamo Yethu in Cape Town, South Africa. In B von Lieres & L Piper. (eds). *Mediated Citizenship: The Informal Politics of Speaking for Citizens in the Global South*. Basingstoke: Palgrave Macmillan. 25–42.

Southall R & Daniel J. (eds). 2009. *Zunami! The 2009 South African Elections*. Pretoria: Jacana Media.

Von Holdt K, Langa M, Malopo S, Mogapi N, Ngubeni K, Dlamini J & Kirsten A. 2011. *The smoke that calls: Insurgent citizenship and the struggle for a place in the new South Africa*. Centre for the Study of Violence and Society, Work and Development Institute. Available: http://www.swopinstitute.org.za/node/286. (Accessed 1 September 2015).

Von Lieres B & Robins S. 2008. Democracy and citizenship. In N Shepherd and S Robins. (eds). *New South African Keywords*. Ohio: Ohio University Press and Johannesburg: Jacana Media. 47–57.

Von Lieres B & Piper L. 2014. Introduction: The crucial role of mediators in relations between states and citizens. In B von Lieres & L Piper. (eds). *Mediated Citizenship: The Informal Politics of Speaking for Citizens in the Global South*. Basingstoke: Palgrave Macmillan. 1–42.

Legislation

Constitution of the Republic of South Africa, 1996. Available: http://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1. (Accessed 28 March 2015).

Chapter 10

FIRE IN THE VINEYARDS: FARM WORKERS AND AGRARIAN CHANGE IN POST-APARTHEID SOUTH AFRICA[1]

Christopher Webb

Between September 2012 and January 2013 farm workers in South Africa's Western Cape province embarked on an extended strike wave, which eventually saw the minimum wage for agricultural workers increase by 52% countrywide. The country's trade union federation Cosatu described the strike as a victory for some of the lowest-paid workers in the country, although in the wake of the increase workers have faced ongoing layoffs, intimidation and evictions (CSAAWU 2014). Details of the strike reveal the uneven nature of agrarian change in the post-apartheid period and the fragmented process of rural class formation. The role of Cosatu in the strike, along with other, independent unions, illustrates the challenges trade unions face in organising the country's most vulnerable workers. South Africa's rural areas remain victim to grinding poverty and inequality inherited from centuries of dispossession, underdevelopment and violent labour regimes. And yet these human landscapes, isolated and violent as they are, are not without their own forms of agency as rural dwellers seek to advance the rights extended to them over the past 20 years.

The farm-worker strikes represent an important conjuncture in post-apartheid labour and agrarian politics for several reasons. First, although agriculture contributes less than 3% to overall GDP, it remains an important employer in rural areas and crucial to the livelihoods of the rural poor, particularly in the Western Cape, where the majority of the country's agricultural workforce are located (Stats SA 2013b). As such, the increase to the minimum wage will go a significant way in stabilising the livelihoods of the rural poor. Secondly, while farm workers have engaged in isolated labour actions before, there has never been a mobilisation of farm workers on this scale. Agriculture has long had a reputation as a holdout of apartheid-era *baasskap*[2] labour relations, in which farm workers are seen as victims of paternalism. The strike challenges these long-held assumptions

2   From the Afrikaans for 'white mastery'.

and suggests that although paternalism still exists, it has been significantly weakened. This brings us to the strike's third notable feature, which is its close association with other forms of social protest that have increased markedly in South Africa in recent years. These struggles blur the boundaries between sites of production and reproduction as they respond to a profound crisis of livelihoods within households and communities brought about by stagnant wages and widespread unemployment.

Based on qualitative interviews and direct observation conducted in the rural Western Cape from May to September 2012 and ongoing communication with rural activists and trade unions on the ground, this chapter situates the strike within the changing political economy of South African agriculture. Employer restructuring, state economic and labour policies, and sporadic trade union organising have contributed to a fragmented process of rural class formation that has given rise to a subclass of precariously employed rural workers. It was these workers who were at the forefront of this strike, and who join ranks with the millions of South Africans employed in contingent jobs, fixed-term contracts and informal occupations (Ceruti 2010).

In the absence of institutional forms of representation, marginalised workers and poor communities engage with employers and the state at multiple sites and at varying scales. In this particular instance, workers were able to call attention to their plight and advance their demands not through formal channels but through acts of 'insurgent citizenship' that often involve highly militant and violent forms of protest (Von Holdt et al 2011). In this, the strikes have much in common with what Alexander (2010) has described as the 'rebellion of the poor', in which marginalised communities across the country have demanded state action on unemployment, housing shortages and inadequate services. These new modes of subaltern mobilisation speak directly to the uneven and contested nature of citizenship in South Africa, and the ways in which the democratic transition provided both opportunities and limitations for advancing political as well as economic rights.

The trajectory of the 2012–2013 farm-worker strike

Erupting soon after the Marikana massacre[3] and in the midst of a strike wave across the platinum belt, the farm-worker strike reached critical mass in the

3   On 16 August 2012, the South African Police Service opened fire on a group of striking mine workers in the Marikana area near Rustenburg, South Africa. Thirty-four people were killed and at least 78 wounded. It was the deadliest use of force by the South African police since the Sharpeville massacre under the apartheid government in 1960.

rural town of De Doorns, in the Hex River Valley, an agricultural area that produces table grapes. Although the valley saw the fiercest clashes with police and the largest worker mobilisations, worker actions also occurred in the rural towns of Wolseley, Bonnievale, Robertson, Ceres and Ashton. By the end of the strike, it was reported that 16 rural towns had seen strike action, three workers had been killed and many more had been injured. Workers had torched sections of vineyards, burnt packing sheds, erected roadblocks on national highways and clashed violently with police forces. The strike occurred over a five-month period with three waves of worker action.

The first wave began on 27 August 2012 when 300 predominantly female farm workers on Keurboschkloof grape farm just outside of De Doorns went on a wildcat strike. According to one of the workers: 'One day the farm changes owner and he lowered our money. He said to us, "You are all working for R75 a day." That's why we are here fighting today!' While wages were at the heart of the strike, other issues included the fact that only 18 of the workers were permanent, and some had been employed as temporary workers for more than 14 years.[4] Pickets outside the farm gate continued throughout September, and the union was eventually able to negotiate a contract for the workers in late January 2013.

It was reported that the strike at Keurboschkloof was the catalyst for the first strike wave in De Doorns (Knoetze 2012a). The strikes began in earnest in early November when workers from the valley's informal settlements — many of whom work seasonally on the valley's grape farms — blocked the N1 highway between Touws River and De Doorns, and burnt a section of vineyards. Farm workers in Wellington, Robertson, Ashton and Bonnievale downed tools days later, as the loose-knit Coalition of Farm Worker Unions (which at various points included Cosatu, Sikhula Sonke, the Commercial Stevedoring, Agricultural and Allied Workers Unions, the Surplus People's Project and Mawubuye) called for an extension of the strike (SABC 2012a). Farmers in De Doorns responded by hiring private security companies to guard their property. The commercial farmer's association, Agri Western Cape, told farmers: 'Go back to your homes and prepare to defend yourselves, your farms, your property and your families' (Knoetze 2012b).

At this stage workers called on Cosatu, as well as another union, the Bawsi Agricultural Workers' Union of South Africa (BAWUSA), to intervene in negotiations on their behalf as farmers were unwilling to negotiate with the worker committees established in the months before the strike. In an official statement, Cosatu's Western Cape secretary, Tony Ehrenreich, claimed that

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4   Interview with farm workers at Keurboschkloof Farm, 27 August 2012.

Cosatu had become involved in the strike at the invitation of workers in an attempt to 'avoid a Marikana situation' on the farms (Cosatu 2012a). Following the first round of negotiations in November, Cosatu called for a two-week strike suspension to allow for negotiations for an increase in the workers' minimum wage. These renewed negotiations proved unsuccessful, and the Coalition of Farmworker Unions announced the second wave of the strike on 4 December, with Cosatu also calling for a national strike of farm workers — something that failed to materialise because of low levels of unionisation among farm workers in the rest of the country.

Bizarrely, on the same day that farm workers gathered across the province to resume the strike, Cosatu declared the strike to be over, stating that on 4 December 2012 AgriSA (a national commercial farmers' association) had 'put forward an agreement that ends the strike' (Cosatu 2012b). The crux of the agreement was that workers would return to work and begin negotiations towards a R150 daily minimum wage on a farm-by-farm basis. Ehrenreich stated that workers should join unions to undertake negotiations, although Cosatu did not put forward a strategy for organising these workers or protecting them against employer reprisals. Consequently, farm-by-farm negotiations failed given low levels of unionisation and farmers' unwillingness to recognise worker committees. Anger at Cosatu's decision to suspend the strike was evident, as farm workers criticised the federation for failing to consult with workers (Knoetze 2012c).

The third wave of the strike began in earnest in early January 2013, with De Doorns again finding itself at the epicentre of the strike action. On 9 January over 50 workers were arrested in De Doorns as thousands of strikers barricaded the N1 highway and clashed violently with police. Meanwhile, BAWUSA's general secretary, Nosey Pieterse, took the strike to other small towns throughout the Western Cape, holding rallies in informal settlements in Avian Park and Touws River where farmers were allegedly sourcing scab labour (Felix 2013a). Amid calls for the resumption of negotiations, Ehrenreich said workers would continue striking, and that 'Cosatu will not call off the strike as it has done on previous occasions when things threatened to get out of control' (Barnes 2013). Which is precisely what Cosatu did the following week.

On 16 January Cosatu suspended the strike for a third time, stating that workers had to return to work to earn money for food and to protect commercial agriculture from further losses (Davis 2013). The federation claimed they had reached a deal with farmers in the Clanwilliam area for a R105 minimum wage, which could be used as a model for negotiations in other areas. It was later revealed that the deal had not been approved by AgriSA or the majority of Clanwilliam's farmers (Fogel 2013a).

The suspension fell on deaf ears as workers in De Doorns maintained protests all week. Some unions reported 'feelings of fear and isolation' among workers and confusion that Cosatu was acting without consulting workers (CSAAWU 2013). An already fragmented strike fractured even further, with some workers in De Doorns and Robertson maintaining strike action while others returned to the farms. By late January 2013 unions reported pressure from worker committees to resolve the strike because of lack of wages and increasing intimidation and threats (TCOE 2013). On 4 February the labour minister announced a R36 increase to the sectoral minimum wage for farm workers, raising the daily wage to R105.

It is important to first point out the incredible toll the strike took on farm workers and their families. In a report from an informal settlement in the Hex River Valley, Benjamin Fogel (2013a) describes the night-time raids by police:

> *Rabelang Noteoli (31) was hospitalized on January 10, after several police entered his home and allegedly shot him in the stomach with a rubber bullet while he was sleeping. According to a local, Mowabsi Kondile, the police first fired rubber bullets into the door of the dwelling next door, before kicking it down and discovering a terrified woman in her bed. They then withdrew and entered Rabelang's dwelling, where they shot him.* (Fogel 2013a)

As one labour commentator pointed out, while the state was ostensibly engaged in negotiations with farm-worker representatives to resolve the strike, it reinforced police units in De Doorns and deployed tactical response teams to undermine the strike (Hattingh 2013).

It was apparent throughout the strike that AgriSA was woefully out of touch with the poverty experienced by rural workers. According to the Coalition of Farm Worker Unions, commercial farmers and AgriSA remained intransigent, and refused to engage with farm-worker committees: 'This is an indication of the power relations and lack of transformation in the countryside. For many farmers "apartheid is alive"' (TCOE 2013).

During the second wave of the strike, Agri Western Cape CEO Carl Opperman claimed that the situation of farm workers was not as dire as portrayed, and that most farmers provided their workers with adequate wages and benefits (SABC 2012b). A widely referenced study by Ben Stanwix (2013) also reported that agricultural wages in the Western Cape were the highest in the country. Although Stanwix's report was used by Western Cape premier Helen Zille and commercial farmers to defend the integrity of Western Cape farmers, they ignored his findings that farms were rarely visited by labour department officials and noncompliance with minimum-wage legislation was

widespread. A 2011 report by the same research unit found that minimum-wage violation is as high as 55% in the agricultural sector (Bhorat et al 2011). Moreover, while some farmers in the Western Cape may have been complying with the existing minimum-wage legislation, the median wage for farm workers is so low that it provides no escape from poverty.

The effect of the strike on farmers' hiring practices is unclear, but it is likely to be highly uneven across regions and subsectors. Around 900 farmers have lodged applications with the Department of Labour for temporary exemption from paying the new minimum wage, suggesting that small and medium-size producers could be driven out of the commercial sector (SAPA 2013). This is likely to increase the consolidation of farm ownership, a phenomenon that has been pronounced in the post-apartheid period (Hall 2009). The dramatic job losses predicted before the minimum-wage increase also did not materialise, with labour force surveys indicating a 3.5% contraction in agricultural employment between the first and second quarter of 2013 (Stat SA 2013b, 2013c). Although major job losses have not been reflected in government statistics, they have been widely reported by unions and rural NGOs (TCOE 2013). In the wake of the wage increase some farmers have urged increasing mechanisation and outsourcing in an attempt to boost agricultural profits while warning that the ongoing shedding of labour is likely to exacerbate rural poverty (Coleman 2013).

The role of Cosatu in this strike suggests a troubling relationship between the country's largest labour federation and struggles that emerge at the community level. Referring to the actions taken by some of the farm workers in De Doorns, Ehrenreich stated: 'When workers take action without direction and guidance, that is when the danger comes about … they don't understand the parameters of the law and all the other stuff' (in Hattingh 2013). For Ehrenreich, the farm workers were not organised and therefore lacked a political voice through which to communicate with employers and the state. However, although workers may have struggled to negotiate directly with farmers, it is untrue that they were unorganised. Two accounts of organisation among worker committees in De Doorns suggest that the strikes had been organised independently of any trade unions for some time. According to Hattingh (2013), worker committees emerged in early November 2012 among casual and seasonal workers in the De Doorns informal settlements. This strike committee put forward a demand for a minimum wage of R150 a day, as well as paid maternity leave, an end to labour brokers, an end to piecework, rent-free housing, a moratorium on evictions and an end to police brutality. The entry of BAWUSA and Cosatu into the strike led to a shift of power away from the strike committees and towards Ehrenreich and Pieterse. Neither of these union organisations

attempted to incorporate the worker committees into the negotiation process, and the committees were not strong enough to resist directives coming from established political figures like Ehrenreich.

In his analysis of the formation and dynamics of the worker committees, Wesso (2013) suggests that worker committees had existed for some time among groups of seasonal workers living in informal settlements. In De Doorns these worker committees became formalised over the last three years, and comprised predominantly migrant workers from the Eastern Cape, although they also included permanent workers and the unemployed. Committees had been raising funds informally for some time, and membership was based on residency, with all those living in informal settlements invited to meetings. According to Wesso, the committees saw themselves as disgruntled ANC supporters opposed to racist farmers and the Democratic Alliance provincial government. When their attempted negotiations with commercial farmers failed, they called on Ehrenreich, as well as local ANC councillors, to represent them. This resulted in a process of absorption and co-optation, which decreased the power of workers committees, and led to an influx of farm workers into unions. Wesso (2013) claims that farm workers joined unions en masse during the strike — yet there is little evidence to suggest this is the case. BAWUSA claims the strike has increased its membership to 10 000 and the Food and Allied Workers Union (FAWU) claims to have around 2 500 workers in De Doorns, although neither union has produced proof to support these figures (Fogel 2013b).

Although wages have increased, there is much that remains unchanged in the rural Western Cape. Reports of farm-worker abuse and reprisals against those involved in the strike are widespread.[5] In some areas farm workers staged mass meetings denouncing Cosatu and BAWUSA for misrepresenting workers during the strike and blaming the violence on seasonal workers.[6] Farmers reported using 25 to 50% less seasonal labour in the 2013 harvest, with some claiming they were struggling to meet increased labour costs (Knoetze 2013). If past labour statistics tell us anything, it is that the trend towards smaller, skilled workforces on commercial farms is likely to continue.

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5   In July 2013 a farmer in the Overberg region was accused of a brutal assault on a 19-year-old farm worker, which left him blind and epileptic. Although this case is particularly shocking, reports of violence against farm workers are commonplace. See Felix (2013b).

6   Nearly 1 000 farm workers gathered in Wellington to reject representation by BAWUSA and Cosatu, and called for an independent farm workers' forum. Workers also blamed the strike violence on seasonal workers. See Erasmus (2013).

Farm workers and the dynamics of agrarian change

For many farm workers, the post-apartheid period has brought limited benefits despite a host of legislation that, at least on paper, protects their labour and tenure rights. As Seekings and Nattrass (2005) argue, post-apartheid policies that were intended to be pro-poor and protect farm workers have inadvertently resulted in evictions from commercial farms and high rates of unemployment among unskilled rural workers. After 1994 the state introduced new labour laws intended to protect farm workers. At the same time it enacted tenure security legislation aimed at preventing the eviction of farm-worker families. However, slow economic growth combined with the push towards flexibility in the labour market under a neoliberal macroeconomic framework significantly weakened the regulatory aims of the new legislation. Formal employment shrank, while casual, informal and temporary work became more prevalent (Clarke 2004; Theron & Godfrey 2000; Von Holdt & Webster 2005). Between 1994 and 2003, around 940 000 farm dwellers were evicted from commercial farms, during which time around double that number moved off farms — the result of a combination of eviction and voluntary migration (Wegerif et al 2005).

The ANC's adoption of a neoliberal macroeconomic strategy in the 1990s led to the liberalisation of finance and trade, the deregulation of agricultural markets and the dismantling of single-channel marketing systems (Williams et al 1998). The South African Marketing Act, which had been the centrepiece of state agricultural policy since 1937, was abolished by the ANC in 1996. The same year, the state committed itself to altering import protections in accordance with the requirements of the Uruguay Round of the World Trade Organization. From having been one of the most heavily subsidised and regulated sectors, South African agriculture became one of the least protected sectors of the economy. Farmers, who had previously been safeguarded by a highly interventionist state that helped them secure cheap labour, as well as subsidise inputs, lost their privileged position. The wine and fruit industry entered a state of flux as monopoly export agents and regulatory boards were dismantled. The rapid expansion of private export agents intensified competition between producers and exporters as they attempted to gain a foothold in overseas markets at the same time as large supermarket buyers began to dominate the industry (Kritzinger et al 2004). These changes had dramatic downstream impacts on workers.

State intervention during the apartheid era led to high rates of agricultural growth, and by 1970 farm employment had peaked (Vink & Kirsten 2000). By the 1980s the picture had changed significantly, however, as the country entered a prolonged economic crisis and the mechanisation

of agriculture decreased demand for labour (Marcus 1989). Job losses were steep during this period, with 114 000 regular jobs lost in agriculture between 1988 and 1996 (Kritzinger et al 2004:22). Since the 1980s there has been a marked decline in total agricultural employment across the country, and farmers have significantly downsized their labour force in recent years (Du Toit & Ally 2004; Greenberg 2012; Kritzinger et al 2004; Van der Burg 2008). In 1988 agriculture employed some 1.22 million people nationally, which dropped to 914 473 in 1996, and was down to 656 000 in 2012.[7] Investments in agricultural machinery increased by 15.5% between 2011 and 2013, suggesting that commercial farmers are increasingly reliant on skilled, permanent workers (Liebenberg & Kirsten 2013).

In the Western Cape the restructuring of agricultural labour has been noted for some time. A 2003 survey of wine, fruit and vegetable farms in six major agricultural districts in the Western Cape found that almost 60% of farms had reduced the size of their permanent labour force in the previous three years (Du Toit & Ally 2004). Researchers found that most permanent jobs were not being replaced through mechanisation, but rather through the shift towards casualised and externalised labour often performed by women or migrant workers. The survey found a significant shift toward externalisation, with 53% of farms indicating that they were making use of labour brokers, which are often not captured by official labour statistics. The scale of labour brokerage in agriculture is notoriously difficult to measure, but by all accounts it is extensive, particularly in export horticulture (Theron 2011).

Findings from Du Toit & Ally's (2004) survey corroborate evidence from similar studies of labour casualisation and externalisation in the deciduous and citrus fruit export sectors (Barrientos & Kritzinger 2003; Kritzinger et al 2004; Mather & Greenberg 2003; Van der Burg 2008). These studies indicate that employment in global value chains is increasingly insecure as workers employed by third-party contractors often fall outside the ambit of existing labour legislation (Theron & Godfrey 2000). This intensification of vulnerability and insecurity has also resulted in a feminisation of precarious employment, with women being more likely to be employed seasonally or casually on farms (Van der Burg 2008). Ewert and Du Toit (2005:315) have described the restructuring of agricultural labour in the Western Cape as indicative of a double divide 'between wine makers who are able to profit from the opportunities offered by international expansion and those who are not, and secondly, between "core" workers and those

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7   Data compiled from Stats SA, October Household Survey (1988); Quarterly Labour Force Survey (1996); and Quarterly Labour Force Survey (2012).

thrown out by casualization and externalization'. On the one hand, farmers have moved away from cheap and expendable labour by improving wages and investing in training and education for their permanent workforce. On the other hand, there is a growing peripheral workforce of seasonal, casual and contract workers — a 'rural lumpenproletariat, often residing in rural, peri-urban or metropolitan shantytowns' (Ewert & Du Toit 2005:317).

The precariousness of rural livelihoods has been compounded by the fact that few trade unions have actively attempted to organise farm workers. Both on- and off-farm workers have been poorly served by trade unions, and recent trends towards more flexible labour arrangements have created new challenges for organising. Out of the 254 registered trade unions in South Africa, an estimated 15 are engaged in the agricultural sector (NALEDI 2011). Although there is no accurate data for farm workers in the Western Cape, estimates of union density range between 3% and 11% (Human Rights Watch 2011). The challenges of organising farm workers are significant, and most trade unions have failed to develop organising strategies that take into account the particularities of rural labour relations. As White (2010) has noted, the rights-based approach advanced by most trade unions has eroded paternalistic structures, often with adverse effects for workers. The formalisation of labour relations has not been translated into improved working or living conditions on farms, even as it has encouraged farm workers to speak out about labour abuses.

That paternalism presents such significant obstacles to trade unions is indicative of the fact that most unions have focused their organising efforts on permanent farm workers residing on farms. A Cosatu-commissioned report on the obstacles to union organising on farms notes that most unions are employing a model of organising that is entirely inappropriate for the agricultural sector (NALEDI 2011). Rather, the focus of organisation needs to shift from, 'the ranks of the permanent, full-time, on-farm and mostly male workers, and a greater priority has to be placed upon organising the African and female workers who are so much more predominant in the seasonal and externalised labour force' (Ewert & Du Toit 2005:329). By restricting their organising work to permanent farm workers, trade unions are inadvertently furthering the divide between permanent and seasonal workers.

The process of class formation under way in rural South African agriculture is producing both new categories of agrarian labour and divisions between existing categories. The dramatic expansion of export markets for wine and fruit, the introduction of global labelling practices and the expansion of labour rights for farm workers after 1994 have provided some opportunities for workers to claim their rights as full citizens. At the same time, a new underclass of temporary, seasonal and unemployed workers

often residing in rural informal settlements has been created to meet the flexible labour requirements of agrarian capital. On the whole, trade unions have paid scant attention to organising farm workers and even less to those temporary, seasonal and migrant workers. The trajectory of the strike paints a clear picture of the divisions that exist between trade unions and farm workers, and the limited political opportunities available for farm workers to express their grievances.

Insurgent citizenship and the rebellion of the rural poor

The process of class formation in South Africa's agricultural sector mirrors the changes under way in other sectors of the economy where workplace restructuring has intensified unemployment, and subsequently household insecurity. The post-apartheid labour market has been defined by increasing unemployment, casualisation and the growth of informal-sector activities. Stagnant employment levels and a rapidly growing population have resulted in increasing unemployment — from 4.2 million in 1995 to 4.6 million in 2012, although when one factors in 'discouraged work seekers', this number rises to 7 million (Bhorat & Kanbur 2006; Stats SA 2013b). Increases in the number of unemployed have been accompanied by the growth of underemployment, with firms restructuring their operations to allow for more flexible production regimes (Theron 2004). About a third of South Africans are now employed in contingent jobs, fixed-term contracts and informal occupations, most of which pay less that R2 500 per month (Ceruti 2010).

This process has, in turn, given rise to unstable forms of citizenship as struggles erupt over 'inclusion and exclusion, between elites and subalterns and between subaltern classes themselves' (Von Holdt et al 2011:6). Recent years have seen a rise in the number of community protests aimed at meeting immediate demands for jobs and services, and at the same time struggles that have placed blame for unemployment and poverty at the feet of foreign, primarily African, migrants. In the case of farm workers, the absence of the kinds of structures or institutions that allow for direct negotiations with their employers means that workers have had little option but to engage in forms of protest that would demand an immediate response from employers and the state. These 'insurgent acts' draw from a repertoire of protest actions with their roots in the anti-apartheid struggles of the 1980s, and have included actions such as blockading highways, torching vineyards, and clashing violently with police. It should be noted that while De Doorns experienced xenophobic violence in 2008, foreign migrants were not targeted in this wave of strikes.

The concept of insurgent citizenship is derived from James Holston's (2009) work on global urbanisation and the creation of peripheral spaces characterised by glaring poverty and inequality. According to Holston, insurgent citizenship arises from the contradictory processes of peripheral urbanisation and democratisation, as marginalised citizens and non-citizens contest their exclusion and demand democratic forms of citizenship. The clashes that frequently occur in these peripheral spaces (between residents and local authorities, for example) are not merely 'idiosyncratic or instrumental protest or violence', but clashes of citizenship (Holston 2009:246). These clashes are not only aimed at securing the material means of daily survival, although this is crucial, but they are also about the right to lead a dignified life. For Holston, as for Lefebvre (2000), the struggle for dignity and basic everyday resources is a reproductive one, waged by organised movements of poor citizens over the very conditions of daily life. In these particular strikes, for example, worker demands were not only confined to the productive sphere (ie improved wages and working conditions), but also extended to the reproductive sphere (ie housing, childcare and maternity leave).

In the South African context, researchers studying post-apartheid service-delivery protests and xenophobic violence have used the concept of insurgent citizenship to describe how poor communities engage in violent forms of protest in order call on the state to address their concerns. For Von Holdt et al (2011), the persistence of poverty, inequality and unemployment in the post-apartheid period has given rise to unstable forms of social citizenship, in which violence is often employed to assert citizenship rights in the absence of institutional or representative channels. In other words, by blockading highways, torching vineyards and clashing repeatedly with the police, farm workers are asserting their citizenship rights in a public sphere that otherwise ignores them.

In his analysis of community protests since 2004, Alexander (2010) describes the explosion of community protest following the election of current president Jacob Zuma as a 'rebellion of the poor', which includes actions such as

> *mass meetings, drafting of memoranda, petitions, toyi-toying, processions, stay-aways, elections boycotts, blockading of roads, construction of barricades, burning of tyres, looting, destruction of buildings, chasing unpopular individuals out of townships, confrontations with police, and forced resignations of elected officials.* (Alexander 2010:26)

The protests, he suggests, reflect a disappointment in the fruits of democracy and the inequality sustained by neoliberal policies. This so-called rebellion

of the poor has increased dramatically under Zuma. From 2009 to 2012 the South African Police Service reported an average of 2.9 incidents of unrest per day, an increase of over 40% recorded for 2004 to 2009 (Alexander 2012). Police reports suggest that for the 2007–2010 period the most common reasons for protests were demands for increased wages and service-delivery concerns. For Alexander, these protests differ from workplace struggles because they are focused on reproductive concerns (for example, housing shortages and inadequate services), and because they occur within the peripheral township. Yet the farm-worker strikes disrupt this distinction between the realm of production and reproduction, or workplace and household. Although many of the farm strikes did occur within farms, others involved blockading roads, construction of barricades, burning tyres and looting shops in rural towns. These were not only tactics that bore similarities with community protests, but they were also demands for dignity and an end to abuse, and the right to material well-being. In the context of generalised precariousness, it is difficult to make a clear distinction between productive and reproductive struggles. As Callebert (2012) has argued, the livelihoods of poor households are diversified, and not determined solely by access to wage labour.

The farm strikes were fundamentally about a crisis of social reproduction faced by rural households, particularly those who work seasonally or casually on commercial farms. Access to waged labour in agriculture remains the most important factor affecting the poverty status of rural households, yet vast numbers of workers in this sector earn low wages that do not shield them from poverty. Although wage levels for permanent farm workers have improved since 2002 thanks to sectoral determination (Bhorat et al 2012), the median monthly earnings for agricultural-sector employees remains low at R1 213 (Stats SA 2010).

Low wages and a lack of alternative forms of employment in rural areas have given rise to food insecurity in these communities. In their study of farm workers in the Breede River Valley region of the Western Cape, researchers found that 72% of respondents had experienced food insecurity in the past year, which peaked when they were unable to find employment on commercial farms (Andrews et al 2009). The same study reported a strong desire among respondents for access to land to grow food to smoothe out the fluctuations in food security, and yet the ANC has chosen to abandon its vision of small-scale agrarian reform in favour of support for black commercial farmers. Hart and Sitas (2004) have argued that land reform should be disarticulated from agriculture and framed around rural livelihood imperatives. This would allow unions to see land reform as part of a broader social wage package, which, along with improved wages, could

significantly reduce rural poverty. Yet the urgent need for agrarian reform is confronted by the absence of a national movement and the inability of most trade unions to engage with rural dwellers.

It would be inaccurate to say that 20 years of democracy have failed to bring any substantive changes to the lives of farm workers. Yet when one drives past the white farm owner driving truckloads of day labourers back to a rural slum, it is difficult not to recognise certain continuities. The farm strikes are indicative of an uneven historical process, wherein the language of human rights and transformation (now often found on the labels of wine bottles) coexists with labour relations that remain marked by insecurity, poverty and violence. It is little surprise that labour struggles continue to exist in the two sectors that were foundational to primitive accumulation and colonial violence across the continent: agriculture and mining. In both sectors workplace insecurity, low wages and temporary contracts continue to be the order of the day. Yet, as struggles in these sectors also suggest, there is an increasing willingness by workers to confront these structures of power and exploitation through direct action.

By ignoring the independent farm worker committees, Cosatu squandered an opportunity to build a democratic form of trade unionism that addressed the complex needs of rural dwellers. Unfortunately, Cosatu's role in this strike is indicative of a far more widespread problem — the growing divide between union leadership and rank-and-file members. Nowhere is this more apparent than in the ongoing defection of thousands of members from the once mighty NUM in the wake of the Marikana massacre. Here the statement made by Ehrenreich during the strike, to the effect that they were trying to prevent a 'Marikana situation' on farms, is revealing. Ehrenreich was not referring to a massacre — even though there was a great deal of police brutality — but rather to the emergence of a mobilised workers' movement outside the control of Cosatu, the tripartite alliance and the ANC. As the distance between officials and the rank and file grows, and as workers inevitably become dissatisfied with the crumbs they are offered from the ANC table, these 'Marikana moments' will almost certainly multiply. How trade unions choose to respond to these moments will reveal whether they are still a force driving democratic and economic transformation or merely firefighters for the ANC.

The farm strikes reveal much about the differentiated and spatially uneven nature of post-apartheid citizenship. In rural areas a limited number of black farmers have benefited from the state's land reform programme, while a growing number are rendered surplus to the requirements of these very operations. Stripped of their livelihoods, without access to land or representation, their ability to claim any form of citizenship rights is limited.

To date, trade unions have made few inroads among rural populations. The decline of formal wage employment, or the absence of it for millions, should, however, force unions to grapple with the diverse factors that render everyday life precarious in both rural and urban areas.

The farm-worker question cannot be resolved without confronting the broader agrarian question that places justice alongside development in an attempt to construct a more equitable and sustainable rural economy.

References

Alexander P. 2010. Rebellion of the poor: South Africa's service delivery protests – a preliminary analysis. *Review of African Political Economy*, 37(123):25–40.

Alexander P. 2012. Protests and police statistics in South Africa: Some commentary. Alternative Information & Development Centre. Available: http://www.amandla.org.za/general-downloads/protests-and-police-statistics/category/1-files?download=98%3Aprotests-and-police-statistics. (Accessed 6 July 2014).

Andrews M, Zamchiya P & Hall R. 2009. Piloting alternatives in the Breede River winelands. Another countryside? Policy options for land and agrarian reform in South Africa. Institute for Poverty, Land and Agrarian Studies, University of the Western Cape: 165–189.

Barnes C. 2013. Labour minister's silence must end – Zille. *IOL News.* Available: http://www.iol.co.za/news/crime-courts/labour-minister-s-silence-must-end-zille-1.1450006#.UoUx_5SY4lY. (Accessed 5 January 2014).

Barrientos S & Kritzinger A. 2003. Squaring the circle: Global production and the informalization of work in South African fruit exports. *Journal of International Development*, 16(1):81–92.

Bhorat H & Kanbur R. 2006. Introduction: Poverty and well-being in post-apartheid South Africa. In H Bhorat & R Kanbur. (eds). *Poverty and Policy in Post-apartheid South Africa*. Pretoria: HSRC Press.

Bhorat H, Kanbur R & Mayet N. 2011. Minimum wage violation in South Africa. Development Policy Research Unit, University of Cape Town.

Bhorat H, Kanbur R & Stanwix B. 2012. Estimating the impact of minimum wages on employment, wages and non-wage benefits: The case of agriculture in South Africa. Development Policy Research Unit, University of Cape Town.

Callebert R. 2012. Rethinking the underclass: Future directions in southern African Labor history. *International Labor and Working-Class History*, 82:136–142.

Ceruti C. 2010. One class or two? The labour reserve and 'surplus population' in Marx and contemporary Soweto. *South African Review of Sociology*, 41(2):77–103.

Clarke M. 2004. Ten years of labour market reform in South Africa: Real gains for workers? *Canadian Journal of African Studies*, 38(3):558–574.

Coleman A. 2013. Agricultural mechanization for economic survival. *Farmer's Weekly*. Available: http://www.farmersweekly.co.za/article.aspx?id=37395&h=Agricultural-mechanisation-for-economic-survival. (Accessed 23 February 2014).

Cosatu. 2012a. Farm worker strike suspended for 2 weeks – Cosatu W Cape. Available: http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page 71654?oid=340310&sn=Detail&pid=71616. (Accessed 2 March 2014).

Cosatu. 2012b. The strike by farm-workers across the Western Cape and nationally has come to an end! Available: http://www.cosatu.org.za/show.php?ID=6769#sthash.wUamFkd4.dpuf. (Accessed 12 January 2014).

CSAAWU. Commercial, Stevedoring, Agricultural and Allied Workers Union. 2014. Labour Court judgment threatens the livelihoods of farmworkers and the existence of CSAAWU – A spear and shield of farm workers. Press statement, 17 June 2014.

Davis R. 2013. Farm worker strike may be over – but everyone's a loser. *Daily Maverick*, 23 January 2013. Available: http://www.dailymaverick.co.za/article/2013-01-23-farmworkers-strike-may-be-over-but-everyones-a-loser. (Accessed 19 February 2014).

Du Toit A & Ally F. 2004. The externalization and casualization of farm labour in the Western Cape. Institute for Poverty, Land and Agrarian Studies, University of the Western Cape/Centre for Rural Legal Studies. Available: http://www.plaas.org.za/sites/default/files/publications-pdf/PLAAS_RR16_DuToit.pdf. (Accessed 12 April 2012).

Erasmus D. 2013. Western Cape farm workers reject unions. *Farmer's Weekly*, 27 January 2013. Available: http://www.farmersweekly.co.za/news.aspx?id=34676&h=Western-Cape-farm-workers-reject-unions. (Accessed 19 February 2014).

Ewert J & Hamann J. 1996. Labour organisation in Western Cape agriculture: An ethnic corporatism? *The Journal of Peasant Studies*, 23(2–3):146–165.

Ewert J & Du Toit A. 2005. A deepening divide in the countryside: Restructuring and rural livelihoods in the South African wine industry. *Journal of Southern African Studies*, 31(2):315–332.

Felix J. 2013a. Strike until wage demands are met. *IOL News*. Available: http://www.iol.co.za/news/politics/strike-until-wage-demands-are-met-1.1455425#.UpeUaWSY4lZ. (Accessed 19 February 2014).

Felix J. 2013b. Farmer accused of brutal assault on farm worker. *IOL News.* Available: http://www.iol.co.za/news/crime-courts/farmer-accused-of-brutal-assault-on-worker-1.1550255#.UqSGNWRDvCk. (Accessed 3 March 2014).

Fogel B. 2013a. De Doorns: Police action breeds hostility. *Mail & Guardian*, 18 January 2013. Available: http://mg.co.za/article/2013-01-18-00-de-doorns-police-action-breeds-hostility. (Accessed 5 January 2014).

Fogel B. 2013b. Tensions remain following dismissals of workers in De Doorns. Ground Up. Available: http://groundup.org.za/content/tensions-remain-following-dismissals-workers-de-doorns. (Accessed 5 January 2014).

Greenberg S. 2012. Women workers in wine and deciduous fruit global value chains. Women on Farms Project. Available: http://www.wfp.org.za/pdf/womenworkers_in_value_chain_coverpage_stephen_greenberg_200.pdf. (Accessed 30 October 2012).

Hall R. 2009. Dynamics in the commercial farming sector. In R Hall. (ed.). *Another Countryside? Policy Options for Land and Agrarian Reform in South Africa*. University of the Western Cape. 121–131.

Hart GP & Sitas A. 2004. Beyond the urban–rural divide: Linking land, labour, and livelihoods. *Transformation: Critical Perspectives on Southern Africa*, 56(1):31–38.

Hattingh S. 2013. Reaping what you sow: Reflections on the Western Cape farm workers' strike. *Monthly Review E-Zine*. Available: http://mrzine.monthlyreview.org/2013/hattingh210213.html. (Accessed 24 September 2014).

Holston J. 2009. Insurgent citizenship in an era of global urban peripheries. *City & Society*, 21(2):245–267.

Human Rights Watch. 2011. Ripe with abuse: Human rights conditions in South Africa's fruit and wine industries. New York: Human Rights Watch. Available: http://www.hrw.org/sites/default/files/reports/safarm0811webwcover.pdf. (Accessed 10 January 2012).

Knoetze D. 2012a. R150 a day or we stay away. *IOL News*. Available: http://www.iol.co.za/news/south-africa/western-cape/r150-a-day-or-we-stay-away-1.1434456#.UoUcvZSY4lY. (Accessed 15 March 2014).

Knoetze D. 2012b. Western Cape farmers fear more mayhem. *IOL News*. Available: http://www.iol.co.za/news/south-africa/western-cape/western-cape-farmers-fear-more-mayhem-1.1429848#.UpeOMmSY4lZ. (Accessed 19 February 2013).

Knoetze D. 2012c. Mixed reaction to end of strike. *IOL News*. Available: http://www.iol.co.za/news/south-africa/western-cape/mixed-reaction-to-end-of-strike-1.1436409#.UoU0eZSY4lY. (Accessed 19 February 2014).

Knoetze D. 2013. State should buy farms says FAWU. *IOL News*. Available: http://www.iol.co.za/news/south-africa/western-cape/state-should-buy-farms-says-fawu-1.1605335. (Accessed 13 February 2014).

Kritzinger A, Barrientos S & Rossouw H. 2004. Global production and flexible employment in South African horticulture: Experiences of contract workers in fruit exports. *Sociologia Ruralis*, 44(1):17–39.

Lefebvre H. 2000. *Everyday Life in the Modern World*. London: Bloomsbury.

Liebenberg F & Kirsten J. 2013. Statistics on Farm Labour in South Africa. UP Agricultural Economics Working Paper 2013/#2. University of Pretoria. Available: http://www.up.ac.za/media/shared/Legacy/sitefiles/file/48/2052/2013workingpaperseries/statisticsonfarmlabourup17okt228nov13.pdf. (Accessed 15 April 2016).

Marcus T. 1989. *Commercial Agriculture in South Africa: Modernising Super-Exploitation*. London: Zed Books.

Mather C & Greenberg S. 2003. Market liberalisation in post-apartheid South Africa: The restructuring of citrus exports after deregulation. *Journal of Southern African Studies*, 29(2):393–412.

NALEDI. National Labour and Economic Development Institute. 2011. Identifying obstacles to union organizing in farms: Towards a decent work strategy in the farming sector. NALEDI final research report. Johannesburg: NALEDI.

SABC. South African Broadcasting Corporation. 2012a. More farm workers to down tools. SABC Online. Available: http://www.sabc.co.za/news/a/6ec0558 04d6e6add84eef5e570eb4ca2/More-farm-workers-to-down-tools-20121311. (Accessed 23 April 2014).

SABC. South African Broadcasting Corporation. 2012b. Farm labourers' situation not dire: Agri Western Cape. SABC Online. Available: http://www.sabc.co.za/news/a/5f562c804d761ca3b24ff3e570eb4ca2/Farm-labourers-situation-not-dire:-Agri-Western-Cape-20121115. (Accessed 15 February 2014).

SAPA. 2013. 900 farmers seek exemption from minimum wage. *City Press*. Available: http://www.citypress.co.za/business/900-farmers-seek-exemption-from-minimum-wage. (Accessed 23 February 2014).

Seekings J & Nattrass N. 2005. *Class, Race, and Inequality in South Africa*. New Haven: Yale University Press.

Stanwix B. 2013. Minimum wages and compliance in South African agriculture. Econ3x3. Available: http://www.econ3x3.org/article/minimum-wages-and-compliance-south-african-agriculture. (Accessed 16 March 2014).

Stats SA. Statistics South Africa. 2010. Monthly earnings of South Africans. Available: http://www.statssa.gov.za/publications/P02112/P021122010.pdf. (Accessed 6 June 2012).

Stats SA. Statistics South Africa. 2013a. GDP fact sheet. Available: http://www.statssa.gov.za/keyindicators/GDP/Fact%20Sheet%201_2_4thq2012.pdf. (Accessed 13 January 2014).

Stats SA. Statistics South Africa. 2013b. Quarterly labour force survey – First quarter 2013. Available: http://www.statssa.gov.za/publications/statsdownload.asp?PPN=P0211&SCH=5518. (Accessed 12 May 2014).

Stats SA. Statistics South Africa. 2013c. Quarterly labour force survey – Third quarter 2013. Available: http://www.statssa.gov.za/publications/statsdownload.asp?PPN=P0211&SCH=5661. (Accessed 20 May 2014).

TCOE. Trust for Community Outreach and Education. 2013. Update on the farm worker strike (week ending 18–25 January 2013). Available: http://tcoe.org.za/component/content/article/39-featured-articles/155-update-on-the-farm-worker-strike-week-ending-18-25-january-2013.html. (Accessed 19 March 2014).

Theron J. 2004. Employment is not what it used to be: The nature and impact of the restructuring of work in South Africa. In E Webster and K von Holdt. (eds). *Beyond the Apartheid Workplace: Studies in Transition*. Pietermaritzburg: UKZN Press.

Theron J. 2011. Sour grapes. *Law, Democracy & Development*, 14:1–23.

Theron J & Godfrey S. 2000. Protecting workers on the periphery. Institute of Development and Labour Law, University of Cape Town.

Van der Burg A. 2008. Going for broke: A case study of labour brokerage on fruit farms in Grabouw. Women on Farms Project and the Centre for Rural Legal Studies. Available: http://www.crls.org.za/documents/LB_Report_final.pdf. (Accessed 6 July 2012).

Vink N & Kirsten J. 2000. *Deregulation of Agricultural Marketing in South Africa: Lessons Learned*. Free Market Foundation Monograph No. 25.

Von Holdt, K & Webster E. 2005. Work restructuring and the crisis of social reproduction: A southern perspective. In E Webster and K Von Holdt. (eds). *Beyond the Apartheid Workplace: Studies in Transition*. Scotsville: UKZN Press. 3–40.

Von Holdt K, Langa M, Molapo S, Mogapi N, Ngubeni K, Dlamini J & Kirsten A. 2011. The smoke that calls: Insurgent citizenship, collective violence and the struggle for a place in the new South Africa: Eight case studies of community protest and xenophobic violence. Johannesburg: Centre for the Study of Violence and Reconciliation.

Wegerif M, Russell B & Grundling I. 2005. Still searching for security: The reality of farm dweller evictions in South Africa. Polokwane North: Nkuzi Development Association.

Wesso R. 2013. Worker organizing during the farm worker strike. Surplus People's Project. Available: http://www.spp.org.za/worker-organising-during-the-farm-worker-strike. (Accessed 30 January 2013).

White F. 2010. Deepening democracy: A farm workers' movement in the Western Cape. *Journal of Southern African Studies*, 36(3):673–691.

Williams G, Ewert J, Hamann J & Vink N. 1998. Liberalizing markets and reforming land in South Africa. *Journal of Contemporary African Studies*, 16(1):65–94.

Personal communication

CSAAWU. Commercial, Stevedoring, Agricultural and Allied Workers Union. 2013. Personal communication, 19 January 2013.

Chapter 11

FROM UBUNTU TO *GROOTBOOM*: VERNACULARISING HUMAN RIGHTS THROUGH RESTORATIVE AND DISTRIBUTIVE JUSTICE IN POST-APARTHEID SOUTH AFRICA

Bonny Ibhawoh

A defining feature of the human-rights movement is the claim to universality. The formation of the UN after World War II and the adoption of the Universal Declaration of Human Rights (UDHR) shortly afterwards, inaugurated a global human-rights movement premised on the notions of universality and inalienability. The UDHR outlined a regime of universal human rights and fundamental freedoms applicable to all the peoples of the world simply on the basis of their humanity. The rights outlined in the declaration were presented as values of human worth and dignity shared by peoples and cultures around the world. The declaration aspired to be 'a common standard of achievement for all peoples and all nations' (UN 1948). Since the adoption of the UDHR, the universality of human rights has also been affirmed at several international forums, notably the 1993 UN World Conference on Human Rights in Vienna, which validated human rights on a transnational and transcultural basis.

In spite of the transcultural claims of the UDHR, however, the universality of human rights remains in question. Universal human rights continue to be challenged on multiple fronts by proponents of varying degrees of cultural and political relativism, and by interpretative divergences and enforcement limitations. Even though most nations have signed the International Bill of Human Rights, the reality is that so-called 'universal' human rights are unevenly recognised, promoted and protected around the world.[1]

The universality of human rights therefore remains largely aspirational. The gap between universal human rights idealism and universal human rights in practice raises crucial questions: what does the universality of human rights mean in local contexts where primary obligations for rights implementation and enforcement reside? How can the lofty idealism of

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1   The International Bill of Human Rights refers to the three key UN human rights instruments: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights. The two covenants entered into force in 1976, after a sufficient number of countries ratified them.

universal human rights be put into practice and made relevant to local contexts? If they are to be relevant to local contexts, the aspirational vision of universal human rights, espoused in international declarations and covenants, must gain local acceptance, ownership and legitimacy. To gain local legitimacy, which enhances the prospects of promotion and enforcement by state and non-state actors, universal human rights must be intelligible in local idiom and vernacular. In other words, universal human rights must be vernacularised.

The notion of vernacularising human rights has been used to describe the process by which universal human-rights norms are grounded in local communities. It requires seeing human rights in specific situations, rather than as the application of abstract principles. It also draws on similar arguments that have been made about the vernacularisation of modernity (Yavuz 2003:61). The localisation and vernacularisation of human rights is a constructive process that grounds and expands the scope of human rights in different cultural contexts (Merry 2006a:37).[2] In this sense, vernacularisation refers to the complex process by which universalist impulses intersect with local ideas and situations to produce hybridised understandings of human rights. The focus is not on challenging or repudiating universal human rights but on investing them with local meaning that can potentially strengthen global enforcement. In this way, vernacularisation of rights as product and process make meaningful the rights that obtain to membership of a particular polity.

Other scholars have expressed this idea as the culturalisation of human rights law which requires the reconceptualisation of international human-rights law through a culturally based approach. The goal is to improve the effectiveness of human rights through cultural acceptance and legitimation, leading to better balancing of conflicts of rights (Lenzerini 2014:44). Although the notion of vernacularising human rights is analogous to the notion of culturalising human-rights law, I prefer the former because it suggests a process of indigenisation that transcends law. The promotion and protection of human rights are determined not only by legal instruments, but also by historical and sociopolitical conditions. The notion of culturalising human rights is also too closely connected with the old debate on cultural relativism. Whereas cultural relativism fundamentally challenges claims of human-rights universality, the idea of vernacularising human rights does not. Rather, it proceeds from the premise that forging a core universal

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2   For a discussion of the notion of vernacularising of human rights, also see Merry (2006b); and Ledger & Kheang Un (2003).

human-rights culture is necessary and desirable in our globalising world, but insists on attuning that universal culture to the peculiarities of local circumstances. The notion of vernacularisation therefore opens up new analytic space for conceptualising and theorising human rights.

The global is often constructed in opposition to the local. Yet the notion of localised (vernacularised) universal human rights is not an oxymoron. Universal human rights have an intrinsically local dimension, since they are only meaningful when applied to local contexts. What use is a legal and normative universal human-rights regime that does not address local social challenges or promote local humanist aspirations? The universal, (properly so called) is meaningless if it is not the aggregate of local perspectives and experiences. The obligation to promote and protect human rights at national, local and personal levels requires indigenising and vernacularising human rights. This is particularly true in the global South, where historical experiences of colonisation and domination reinforce the notion that the universal human-rights agenda reflects Western values and undermines local cultures. This, in turn, entrenches the narrative of inherent conflict between universal human rights and local culture. It is therefore important to explore how universal human rights can find local meanings and how local interpretations of human rights can expand the global scope of universal human rights.

This chapter explores the process of vernacularising or indigenising universal human rights in South Africa. Certain key political and legal developments in the country since the end of apartheid reflect an attempt to indigenise universal human-rights norms. I argue that these developments, as vernacularising processes, mark normative contributions to expanding the scope of universal human rights. I do this by looking at two examples. First, I examine ubuntu as a traditional African ethical concept, focusing on how it was invoked and deployed to legitimise the Truth and Reconciliation Commission (TRC) and the post-apartheid restorative transitional justice project. Secondly, I examine the use of ubuntu as a legal concept in the jurisprudence on the justiciability (ie legal enforceability) of economic and social rights in South African courts. The landmark case of *Government of the Republic of South Africa v Grootboom*[3] is significant in this regard because it was the first major case in which the Constitutional Court, in upholding the socio-economic rights provisions of the Constitution of the Republic of South Africa, 1996, delivered a judgment against the state

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3   *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

(McLean 2009:148). The central argument here is that the deployment of ubuntu in the context of the TRC and socio-economic rights jurisprudence represents a distinctive vernacularisation process that legitimises universal human rights in South Africa and marks a normative contribution to the global human-rights ideology.

Ubuntu as a paradigm for restorative transitional justice

The philosophy of ubuntu was a central theme in the work of the TRC, established by the South African government in 1994 to deal with human-rights abuses perpetrated under apartheid and to help the country come to terms with its past by advancing the cause of reconciliation. The role and relevance of ubuntu as the philosophical foundation of the TRC and the transition from apartheid to multiracial democracy have been well studied (Cornell 2014; Cornell & Muvangua 2012; Graybill 2002; Wilson 2001). The focus here is not primarily the work of the TRC or assessing how successful it was in the task of bringing justice to the victims of apartheid and forging national reconciliation. The emphasis here is on the articulation of ubuntu as a traditional African form of justice and how it was deployed to legitimise the TRC as a restorative transitional justice model within and beyond South Africa.

The term 'transitional justice' here refers to judicial and non-judicial measures implemented to redress legacies of human-rights abuses in the aftermath of conflict and repression. Transitional justice seeks recognition and justice for victims while promoting peace and reconciliation. National transitional-justice projects typically include one or more of five key features: criminal investigations and prosecutions of human rights violations; truth commissions established to investigate and report on abuses; reparation programmes involving state-sponsored initiatives to repair the material and moral damages of past abuse; institutional reforms aimed at transforming security and legal systems to prevent future abuses; and memorialisation projects in the form of museums and memorials that preserve public memory of victims and raise moral consciousness about past abuse (International Center for Transitional Justice 2009). As a national transitional-justice project, the mandate of the South African TRC centred primarily on truth finding and national reconciliation.

Ubuntu, as defined by its chief proponent, Archbishop Desmond Tutu, who headed the TRC, represents an indigenous African philosophy of justice centred on healing, forgiveness and reconciliation aimed at restoring the humanity of both victim and perpetrator (Tutu 2000:50–52). It encapsulates the notion of an interdependent humanity that is at the core of traditional

African cosmology. The essence of ubuntu is captured in the famous phrase *umuntu ngumuntu ngabantu* (a person is a person through other people). The humanness of the person who has ubuntu comes from knowing that the fate of each person is inextricably intertwined with his or her relationship with others. Ubuntu, in Tutu's words, is to say: 'My humanity is caught up in your humanity, and when your humanity is enhanced — whether I like it or not — my humanity is enhanced. Likewise, when you are dehumanized, inexorably, I am dehumanized as well' (Tutu 2000:31). Tutu draws an analogy between ubuntu and the Christian values of confession, forgiveness and clemency (Tutu 2000:81).

To be sure, the meaning of ubuntu and its congruence with restorative justice remain deeply contested. Some scholars have challenged the notion that ubuntu is an indigenous African justice system that has deep historical roots in African cultures or that it reflects principles of restorative justice. Some critics have suggested that ubuntu was used by Tutu and the ascendant ruling elites of the ANC to represent a romanticised but ahistorical vision of the rural African community based on reciprocity, community cohesion and solidarity. The connection between ubuntu and the concept of restorative justice, one scholar suggests, is 'less straightforward and unproblematic than often assumed' (Gade 2013:10). Other critics have argued that ubuntu, invoked as a nation-building philosophy, mandates conformity and a form of social cohesion that denies individual participatory difference.

Although the question of whether ubuntu is an authentic or invented African philosophy remains open to debate, what is evident is that it was invoked frequently in the work of the TRC and provided the basis of its restorative-justice mandate. The section in the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution) titled National Unity and Reconciliation references ubuntu to justify the formation of the TRC. Ubuntu was the grounding ideal of the black majority that made the Constitution possible. Central to the TRC's mandate was ensuring respect for victims and their experiences in a way that corresponded to its understanding of the victim-centred approach of restorative justice (Promotion of National Unity and Reconciliation Act 34 of 1995:s 11). In the TRC process, apartheid perpetrators were offered conditional amnesty if they could show that their individual acts of gross violations of human rights for which they sought amnesty were politically motivated. Amnesty applicants also had to disclose the full truth about their violations, normally during public hearings.

The TRC sought to balance the victims' need for justice with the fair and respectful treatment of perpetrators. By most accounts, this was largely achieved through the public's involvement in the process and the recurring invocation of ubuntu as a guiding philosophy behind the commission's work

(Llewellyn 2007:363). The TRC Report devotes an entire section to affirming ubuntu as the guiding principle for its work. In a section titled 'Ubuntu: Promoting Restorative Justice', the TRC foregrounds its work in ubuntu. The report states that the commission's central concern was not retribution or punishment but, in the spirit of ubuntu, the healing of breaches, the redressing of imbalances and the restoration of broken relationships. Its principal task was to 'restore the dignity of all South Africans' based on respect for human life, 'revival of ubuntu' and a commitment to 'strengthening of the restorative dimensions of justice' (TRC Report 1998, vol. 1:125). Restorative justice in this context required that the accountability of perpetrators be extended to making a contribution to the restoration of the well-being of their victims (TRC Report 1998, vol. 1:131).

The TRC explicitly framed its amnesty provisions in terms of ubuntu and restorative justice, which it presented as a more desirable option to retributive justice. According to the TRC Report:

> *Amnesty cannot be viewed as justice if we think of justice only as retributive and punitive in nature. We believe, however, that there is another kind of justice — a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships — with healing, harmony and reconciliation.* (TRC Report, vol. 1:9)

The offer of amnesty in return for public and full disclosure was framed in terms of a restorative understanding of justice centred on the healing of victims and perpetrators, and on communal restoration.

References to ubuntu in the context of the work of the TRC were not limited to official discourse. Several African participants at the TRC public hearings invoked ubuntu in testimonies and amnesty applications. For example, making his case for amnesty, one applicant proclaimed: 'I have a sense of ubuntu with me and I also respect the concept of ubuntu' (SABC 1999a). At the Faith Community Hearings in East London, a 'representative of the African Traditional Religious Community' claimed that the atrocities perpetrated under apartheid happened because the perpetrators did not have 'a humanness; they did not have ubuntu' (SABC 1999b). Others, however, doubted whether the constitutional injunctions about ubuntu and reconciliation could be achieved within the framework of the TRC proceedings where there had been 'absolutely no remorse and no repentance' (SABC 1999c).

Ubuntu was also invoked to rationalise the anti-apartheid struggle. During the TRC Armed Forces Hearings in Cape Town, for example, the delegates of the Pan Africanist Congress (PAC) were asked whether the

PAC, in its armed struggles against apartheid, was guided by the ethical standards stipulated in the Geneva Convention on the conduct of war. One PAC delegate responded thus:

> ... [W]e did observe ethics. The only difference is that we did not extract those from the international documents that you are talking about, because we had them in ubuntu. There was no African State in 1952 ... there was no African state which contributed to that [international law], but this does not mean that the Africans, themselves, did not have a code of ethics and a set of morals. We had them in the PAC and we were exercising our leadership, therefore, in terms of ubuntu, which, actually, goes even beyond those pieces of paper that you are talking about.   (SABC 1999d)

This response typifies the role that ubuntu came to play in official and public discourse on the TRC project. Ubuntu became a way of asserting congruence between traditional African moral philosophy of restorative justice, and universal human rights and humanitarian norms. Ubuntu was constructed as an indigenous expression of collective humanism and an affirmation of the principle of human dignity, which is at the core of the universal human-rights regime.

The invocations of ubuntu within the TRC mirrored earlier attempts by postcolonial African leaders to indigenise Western political ideologies. In the 1960s, African leaders, such as Julius Nyerere of Tanzania and Kenneth Kaunda of Zambia, used the concepts of *ujamaa* (African socialism) and so-called Zambian humanism, respectively, to describe their home-grown nationalist-socialist philosophies and to distinguish them from doctrinaire Marxist/Leninist socialism. *Ujamaa*, Nyerere declared, is opposed to capitalism, which 'seeks to build its happy society on the exploitation of man by man'. It is also opposed to doctrinaire socialism, which seeks to build its happy society on the basis of the 'inevitable conflict between man and man' (Nyerere 1968:170). For Nyerere, *ujamaa* represented a third way — a synthesis of what he considered best in traditional African peasant society and the best of what the country had acquired from its colonial experience (Nyerere 1967:7).

Like *ujamaa*, ubuntu represented an attempt to draw on traditional African norms to rationalise and legitimise a national ideological project. Ubuntu also represented something of a synthesis of the universal idea of restorative justice and what was viewed as a uniquely African expression of that idea. The distinction here is not simply between a focus on the individual (in European rights tradition), as opposed to a focus on the community in (African rights tradition). Rather, ubuntu represents a unique paradigm for understanding and articulating the notion of human dignity. To its

proponents, ubuntu cannot be reduced to secular or religious European conceptions of dignity or to a simple-minded communitarianism. To do so would be to miss its own contribution to giving shape and meaning to the very concept of dignity (Cornell & Muvangua 2012:xi).

In spite of the contestations over its meaning and historicity, ubuntu served to legitimise the work of the TRC, especially among Africans. A study that examined public attitudes toward the TRC by interviewing Africans, showed that most Africans believed that the TRC did a good job in making sure that those guilty of atrocities were punished, despite the fact that the commission had only the power to grant amnesty. A third of African respondents claimed that the amnesty process was fair to the victims, leading one scholar to the conclusion that 'the amnesty process of the TRC may indeed have matched, to some extent, traditional African concepts of justice and humanity (ubuntu). Ubuntu gave the whole amnesty process a certain moral legitimacy in the eyes of most African respondents' (Theissen 2008:207).

The question has often been raised whether the South African TRC was a miracle or model for the rest of the world. Can it serve as a model for other countries in the aftermath of serious human-rights abuses? Or was it a 'miracle' of the sort that occurs but rarely in the life of nations, one that was dependent solely on the compelling personalities of extraordinary leaders? (Graybill 2002:xi) These questions are partly addressed by the TRC's deputy chairperson, Alex Boraine, when he states that the TRC provided the only justice available in the context of a traumatic transition. 'The South African model,' Boraine argues, is 'not an abdication of justice, it is a form of justice particularly suited to the uniqueness of the transitional context, and this is the signal contribution it makes to the ongoing debate concerning transitional justice' (Boraine 2000:427).

Beyond its domestic impact, which remains open to debate, one of the key legacies of the South African TRC is that it served to popularise and mainstream the restorative transitional-justice model globally. The global interest in the South African TRC brought new focus to the possibilities and limitations of the restorative-justice approach to addressing the legacies of gross human-rights abuses at a national level. There was an unprecedented level of global interest and approval for the TRC. Although the granting of amnesty was contentious, the international community largely favoured the TRC model as a concept and as a compromise way forward for societies in transition where an amnesty is the pragmatic choice (Sarkin-Hughes 2004:6). The TRC was seen as reinforcing the vision of the human world of the twenty-first century as one in which peace among nations is a practical necessity, and not merely an elusive, optional ideal (Maluleke 2012:283; Shriver 1995:5). According to one European theologian, the work of the TRC

was an 'unprecedented exercise of deep remembering' and an approach that is relevant not only in South Africa, but all over the world. 'It is a challenge to the realists who say that the only criterion for politics should be the interest of the nations ... the South African approach is an important experiment in relating ethics to politics' (Müller-Fahrenholz 1996:99).

South Africa is not the first country to adopt a truth commission as part of a national transitional-justice project. Argentina established the Commission on Forced Disappearances in the 1980s, and Chile established its National Commission for Truth and Reconciliation in 1991 to investigate human-rights abuses under the rule of Augusto Pinochet. In fact, the South African TRC was inspired by the Chilean Commission for Truth and Reconciliation. However, the proliferation of national truth commissions since the mid-1990s is largely attributable to the global interest generated by the South African TRC. From 1974 to 2007, 32 truth commissions were established in 28 countries. More than half of these were established in the decade following the South African TRC. These include truth commissions established in Democratic Republic of the Congo, Ecuador, Ghana, Grenada, Guatemala, Indonesia, Liberia, Morocco, Nigeria, Panama, Peru, Sierra Leone, South Korea, Sri Lanka, East Timor, Uruguay and Yugoslavia (Amnesty International 2014).

It can therefore be argued that the South African TRC brought global legitimacy to the restorative transitional-justice model. Although many of the global truth commissions omit the explicit reconciliation mandate of the South African TRC, they were all concerned with the same core principles of restorative justice — accountability and upholding human dignity — that guided the work of the South African TRC. One of the unique attributes of the South African TRC, however, is the unprecedented level of transparency and public exposure that it brought to the truth commission process. The earlier national truth commissions, such as those in Argentina, Bolivia, Uruguay, Chile and the Philippines, did not even hear testimonies in public out of concern that this would be too inflammatory or might provoke retaliatory action. The reports of these commissions reflected a 'reticent approach to the testimony by offering only distilled, carefully edited summaries and cautious interpretations of what happened in the past' (Niezen 2013:11). The South African TRC broke with this tradition by opening up testimony to public view, permitting press and television cameras into hearings, widely disseminating verbatim reports, making the testimonies the subject of national spectacle and encouraging its report to be the subject of open debate (Niezen 2013:11).

Some later national truth commissions were directly inspired by the South African model and the philosophy of ubuntu that underpins it. One example is the Indian Residential School Truth and Reconciliation

Commission, established in Canada following the settlement arising from the abuses by the state against indigenous people in the residential school system. The leaders of the Canadian TRC specifically referenced the South African TRC as the inspiration for their work, acknowledging that their understanding of the purpose and value of truth-telling and reconciliation 'owe a great deal' to the South African TRC (Sinclair, Littlechild & Wilson 2013). Even the UN, which has historically been more inclined towards the retributive-justice model in the form of war crimes tribunals, has begun to advocate restorative justice as a viable transitional-justice option for post-conflict societies. The Vienna Declaration on Crime and Justice, adopted by the UN General Assembly in 2000, encouraged the 'development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties' (UN 2000:31, s 28). The UN Economic and Social Council subsequently adopted a resolution containing specific guidance for member states on restorative justice policy and practice (UN 2002:54–59).

The South African TRC and the role of ubuntu within it represent a uniquely South African normative contribution to the universal human-rights idea, and specifically the discourse on human dignity and transitional justice. Notwithstanding its well-documented shortfalls, the TRC brought visibility and some level of domestic and international legitimacy to the restorative paradigm of transitional justice. The TRC, and the philosophy of ubuntu mobilised to support it, offered a compelling alternative to the retributive transitional-justice paradigm. This alternative was necessitated by South Africa's unique post-apartheid nation-building challenge — the quest for accountability for historical wrongs and the simultaneous need for collective healing. Ubuntu, as deployed within the TRC, therefore represents a distinctive human-rights vernacularisation process informed by local exigencies. Besides serving to validate South Africa's transitional-justice project, ubuntu also represents an African-inspired contribution to the discourse on human dignity and a legitimation of the universalist model of restorative transitional justice. Similar normative contributions in vernacularising human rights are evident in South African's post-apartheid jurisprudence on economic and social rights.

Vernacularising economic and social rights

The judicial enforcement of international and domestic socio-economic rights provisions is contentious. On matters relating to issues of distributive justice, as opposed to than clear-cut civil and political rights, there is often no clarity on how the state's obligations can be enforced through the courts. Economic and social rights have therefore long been assumed to be inherently

non-justiciable (ie unenforceable in court) because their fulfilment is contingent on limited state resources. In the Indian Constitution, for example, the economic and social obligations of the state towards citizens are articulated as 'directive principles of state policy', which broadly enjoins the state to strive to promote the welfare of the people and to minimise inequalities (Constitution of India 2012:Art 38). The Indian Constitution also states clearly that these principles, though fundamental to the governance of the country, shall 'not be enforceable in court' (Constitution of India 2012:Art 37). This Indian model is replicated in several postcolonial African constitutions (Constitution of the Republic of Ghana 1992: Chapter 6; Okere 1983).

In contrast, South Africa's Constitution provides explicitly for legally enforceable economic and social rights. It protects the rights to housing, healthcare, food and water, social security and education. Section 26 of the Constitution states: 'Everyone has the right to have access to adequate housing' and 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right'. Section 27 stipulates the right to healthcare, food, water and social security.

The inclusion of justiciable socio-economic rights in the Bill of Rights is one of the most notable features of the Constitution. The inclusion of these rights demonstrates the Constitution's transformative agenda, which goes beyond abstract notions of equality and distributive justice. The provisions also reflect a commitment to transform society from one based on exclusion and socio-economic deprivation to one based on equal distribution of resources. Although the Constitution does not, in express terms, prescribe distributive justice, it is implicit in its provisions that this is the ideal form of justice that is envisioned (Mbazira 2009:132).

Several cases decided by the Constitutional Court of South Africa have laid the groundwork for the jurisprudence of economic and social rights globally. Some scholars have made the case for exporting South Africa's groundbreaking social rights jurisprudence to other national jurisdictions (Christiansen 2007:33; Yigen 2002:13). In such landmark cases as *Soobramoney v Minister of Health*[4] and *Government of the Republic of South Africa v Grootboom*,[5] the Constitutional Court has tackled problematic issues of distributive justice and provided useful directions for developing the jurisprudence on economic and social rights guaranteed

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4   *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

5   *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

in the Constitution. The philosophical foundations of the constitutional provisions of socio-economic rights and the court's interpretation of these provisions lie partly in the notion of human dignity expressed in ubuntu.

In the legal arena of the new South Africa, ubuntu represents the recognition and respect of African ideals and notions of law. It represents the evolving indigenisation of a historically colonial and exclusionary legal culture. Ubuntu has helped in defining constitutional obligations and working through the conflict-ridden situations often found in the demand for socio-economic rights (Cornell & Muvangua 2012:xi). In its politico-ideological sense, ubuntu has proved useful in bridging the conceptual divide between civil–political rights, on the one hand, and economic–social rights on the other. As a principle for all forms of social and political relationships, ubuntu enjoins and makes for peace and social harmony by encouraging the practice of sharing in all forms of communal existence. As a result, doing justice under ubuntu does not make a rigid distinction between civil–political rights and social–economic rights (Cornell & Muvangua 2012:7). Rather, ubuntu, as a jurisprudential principle, affirms the interdependence and indivisibility of all the dimensions of universal human rights.

The jurisprudence of ubuntu has been described as the 'law of laws of the new South Africa', which seeks to restore human dignity and ethical relationships between human beings. The Constitutional Court of South Africa has used ubuntu to support major decisions, and has affirmed ubuntu as an active and central constitutional principle (Ngcoya 2009:138). Nowhere is this more evident than in the 2004 case of *Port Elizabeth Municipality v Various Occupiers*.[6] In this case, the Constitutional Court had to decide whether a municipal authority had acted lawfully when it evicted residents who had occupied privately owned land in the municipality. Some of the evicted occupiers had lived on the land for eight years, having been previously evicted from other land.

Two lower courts held that because the occupiers were in unlawful occupation of the land, the municipal authority could evict them in the public interest. This ruling was ultimately reversed by the Constitutional Court. In a unanimous judgment against the eviction, Justice Albie Sachs emphasised the importance of interpreting and applying constitutional provisions in the 'light of historically created landlessness in South Africa'. He stressed the need to deal with homelessness in a sensitive and orderly manner, and the special role of the courts in managing complex and socially stressful situations. Invoking the philosophy of ubuntu, Justice Sachs stated:

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6   *Port Elizabeth Municipality v Various Occupiers* (2004) (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268.

> *The spirit of ubuntu which is part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalized and operational declaration in our evolving new society of the need for human interdependence, respect and concern.* (Port Elizabeth Municipality)

In what may be considered an exercise in judicial activism, Justice Sachs argued that the judiciary had an important role to play in redressing historical injustices in South Africa. 'The inherited injustices at the macro level,' he stated, 'inevitably makes it difficult for the courts to ensure immediate present-day equity at the micro level.' The 'judiciary cannot of itself correct all the systemic unfairness to be found in our society. Yet, it can at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails' (*Port Elizabeth Municipality*).

The Constitutional Court took the same approach in a similar case concerning the eviction of impoverished squatter residents by the City of Johannesburg in 2006.[7] The evictions, which were carried out as part of the city's urban renewal strategy, was challenged by the evicted residents. The residents, who were represented by several public-spirited attorneys offering pro bono services, challenged the eviction on two main grounds: first, that their right of access to adequate housing guaranteed in the Constitution would be infringed if the eviction order was granted; and, second, that the city had failed to meet its positive obligations to achieve the progressive realisation of the right of access to adequate housing, and should therefore be prevented from evicting them (McLean 2009:148). A compromise resolution proposed by the city authorities to relocate the residents to an informal settlement far away from the city centre was rejected by the Constitutional Court as being inconsistent with the concept of ubuntu. Ubuntu, the court held, 'pervades the Constitution and emphasises the interconnectedness of individual and communal welfare, and the responsibility to each that flows from our connection' (*City of Johannesburg*).

The court noted that the eviction of the residents would deprive them of their livelihood, since many of them eked out a living in informal economic activities linked to the city centre. It ruled that the city had an obligation to engage meaningfully with the occupiers before taking a decision to evict

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7   *City of Johannesburg v Rand Properties (Pty) Ltd* (253/06) [2007] ZASCA 25; [2007] SCA 25 (RSA).

them. This obligation, it held, was founded both within constitutional socio-economic rights provisions and the 'need to treat human beings with the appropriate respect and care for their dignity to which they have a right as members of humanity' (*City of Johannesburg*). The court also rejected the idea that the municipality could simply rely on its statutory powers to evict people from unsafe buildings and ignore the effect of eviction on the residents. The city, it deemed, must simultaneously take responsibility for safe and healthy buildings, and for the welfare of its residents: it could not simply carry out the one obligation and ignore the other (Van der Walt 2011:89).

Significantly, the Constitutional Court anchored this landmark ruling not only in the philosophy of ubuntu and the constitutional obligations of the state, but also in international human-rights law. Affirming that the right to housing is a basic human right, the court referenced international human-rights instruments, such as the UDHR and the International Covenant on Economic, Social and Cultural Rights, which stipulate that states have a minimum core obligation to ensure conditions necessary to fulfil the right to housing. This minimum core requirement with respect to the right to adequate housing entails a state's duty to address the housing needs of its population, especially if a significant number of individuals are deprived of basic shelter and housing. The failure to do so, the court held, constitutes a prima facie violation of the right to adequate housing (*City of Johannesburg*).

This Constitutional Court's judgment in the *City of Johannesburg* case epitomises the legal process of vernacularising human rights in the new South Africa. By grounding its ruling both in ubuntu and international human-rights law, the Constitutional Court proffered a hybridised understanding of human rights defined by the intersection of universalist norms and local values. The judgment in the City of Johannesburg case also exemplifies the underlying complementarity between local cultures and universal human rights, which are often overshadowed by the discourse of cultural relativism and the conflict of rights.

In the earlier case of the *Republic of South Africa v Grootboom*,[8] the Constitutional Court held that organs of the state have a special duty towards persons experiencing housing crisis or living in intolerable situations. *Grootboom* was the first major socio-economic rights case adjudicated by the court in which it gave a judgment against the state (McLean 2009:148). In this case, which addressed the right to housing for squatters in an informal settlement, the court ruled that governmental housing programmes violated

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8   *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

the Constitution where they failed to develop and implement a 'comprehensive and coordinated program' to advance that right, particularly if the programmes failed to address the housing needs of the poorest South Africans (Christiansen 2007:33). Similarly, in the *Treatment Action Campaign* case,[9] the Constitutional Court declared unconstitutional a government programme that significantly restricted distribution of medication that dramatically decreased the likelihood of mother-to-child transmission of HIV. The court ruled that the government had a legal obligation to extend HIV treatment beyond pilot research sites that had demonstrably reduced mother-to-child transmission, to benefit the population as a whole (Haywood 2003; *Treatment Action Campaign*).

In addition to cases dealing explicitly with economic and social rights, the Constitutional Court has also invoked ubuntu in its criminal and civil-law jurisprudence. In the landmark case of *S v Makwanyane*,[10] the court invoked ubuntu explicitly in striking down the legality of the death penalty under the interim Constitution. In this case, the court stated: 'To be consistent with the value of ubuntu, ours should be a society that wishes to prevent crime ... [not] to kill criminals simply to get even with them.' In her judgment, Justice Yvonne Mokgoro argued that life and dignity are like two sides of the same coin, and that the concept of ubuntu embodies them both (*S v Makwanyane*). It is noteworthy, however, that in some other significant cases, the Constitutional Court took more deferential and conservative approaches to socio-economic rights, passing judgments that critics considered a rejection of pro-poor jurisprudential options that might have improved the living conditions of poor and vulnerable claimants (Dugard 2007:973).

Fulfilling the constitutional socio-economic rights obligations imposed on the state is ultimately a question of distributive justice and depends on the resources available for such purposes. Nonetheless, the jurisprudence of the Constitutional Court advancing the justiciability of socio-economic rights in South Africa demonstrates that the state can be held legally responsible if it fails to create broad policy-based programmes that address the basic social needs of its most vulnerable citizens. The state and its agents have an obligation to take all reasonable steps necessary to initiate policies and sustain programmes that advance constitutionally guaranteed socio-economic rights (Christiansen 2007:33). Within and beyond South Africa, these cases herald a new paradigm in the judicial interpretation and fulfilment of socio-economic rights.

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9   *Minister of Health and Others v Treatment Action Campaign and Others No 1* [2002] (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (2002).

10   *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665.

Discussion about human rights in post-apartheid South Africa tends to be insular and focused predominantly on the internal dynamics of the human-rights movement within the country. This trend is linked to the widely held view that South Africa is unique because of its apartheid past and its complex colonial history. But, as other scholars have pointed out, this notion of South African exceptionalism has led to 'an intellectual and political parochialism that restricts both understanding of the specificity and the commonality of South Africa's democratisation process in the era of globalization' (Buhlungu et al 2006:199). This trend towards historical and political parochialism can be partly remedied by paying attention to how human-rights developments in South Africa since the end of apartheid reflect the indigenisation or vernacularisation of universal human-rights norms, and how these processes inspire and influence developments beyond South Africa. The deployment of ubuntu in both the context of the TRC and socio-economic rights jurisprudence represents a vernacularisation process that has served to legitimise universal human rights in South Africa. It also marks a distinctive South African normative contribution to the discourse on human dignity and the global fulfilment of universal human rights.

References

Amnesty International. 2014. Truth commissions. Available: http://www.amnesty. org/en/international-justice/issues/truth-commissions. (Accessed 2 May 2014).

Boraine A. 2000. *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*. Oxford: Oxford University Press.

Buhlungu S, Southall R & Webster E. 2006. Conclusion: COSATU and the democratic transformation of South Africa. In S Buhlungu. *Trade Unions and Democracy: COSATU Workers' Political Attitudes in South Africa*. Cape Town: HSRC Press.

Christiansen EC. 2007. Exporting South Africa's social rights jurisprudence. *Loyola University Chicago International Law Review*, 5(1):28–43.

Cornell D. 2014. *Law and Revolution in South Africa: Ubuntu, Dignity, and the Struggle for Constitutional Transformation*. New York: Fordham University Press.

Cornell D & Muvangua N eds. 2012. *Ubuntu and the Law: African Ideals and Post-apartheid Jurisprudence*. New York: Fordham University Press.

Dugard J. 2007. Judging the judges: Towards an appropriate role for the judiciary in South Africa's transformation. *Leiden Journal of International Law*, 20:965–981.

Gade CBN. 2013. Restorative justice and the South African Truth and Reconciliation Process. *South African Journal of Philosophy*, 32(1):10–35.

Graybill LS. 2002. *Truth and Reconciliation in South Africa: Miracle or Model?* Boulder: Lynne Rienner Publishers.

Haywood M. 2003. Current developments: Preventing mother-to-child HIV transmission in South Africa: Background strategies and outcomes of the Treatment Action Campaign case against the Minister of Health. *South African Journal of Human Rights*, 19:278–315.

International Center for Transitional Justice. 2009. What is Transitional Justice? Available: https://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf. (Accessed 29 July 2014).

Ledger JL & Kheang Un. 2003. Global concepts and local meaning: Human rights and Buddhism in Cambodia. *Journal of Human Rights*, 2(4):531–549.

Lenzerini F. 2014. *The Culturalization of Human Rights Law*. Oxford: Oxford University Press.

Llewellyn J. 2007. Truth commissions and restorative Justice. In G Johnstone & D van Ness. (eds). *Handbook of Restorative Justice*. Portland, Or.: Willan.

Maluleke T. 2012. Church and reconciliation. In EK Bongmba. (ed.). *The Wiley-Blackwell Companion to African Religions*. Malden, MA: John Wiley & Sons.

Mbazira C. 2009. *Litigating Socio-economic Rights in South Africa: A Choice between Corrective and Distributive Justice*. Pretoria: Pretoria University Law Press.

McLean KS. 2009. *Constitutional Deference, Courts and Socio-economic Rights in South Africa*. Pretoria: Pretoria University Law Press.

Merry S. 2006a. *Human Rights Gender Violence: Translating International Law into Local Justice*. Chicago: University of Chicago Press.

Merry S. 2006b. Transnational human rights and local activism: Mapping the middle. *American Anthropologist*, 108(1):38–51.

Müller-Fahrenholz G. 1996. *The Art of Forgiveness. Theological Reflections on Healing and Reconciliation*. Geneva: World Council of Churches.

Ngcoya M. 2009. Ubuntu: Globalization, accommodation and contestation In South Africa. PhD thesis, American University, Washington DC.

Niezen R. 2013. *Truth and indignation: Canada's Truth and Reconciliation Commission on Indian Residential Schools*. University of Toronto Press.

Nyerere J. 1967. *Freedom and Unity*. London: Oxford University Press.

Nyerere J. 1968. *Ujamaa: Essays on Socialism*. London: Oxford University Press.

Okere BO. 1983. Fundamental objectives and directive principles of state policy under the Nigerian Constitution. *The International and Comparative Law Quarterly*, 32(1):214–228.

SABC. South African Broadcasting Corporation. 1999a. *Truth Commission Special Report*, Isaiah Patrick Siyali, TRC Amnesty Hearings case AM7997/97, Cape Town, 21 October 1999; Brian Quna Mkhize, Amnesty Hearing, Richards Bay, 14 April 1998. Available: http://sabctrc.saha.org.za/documents.htmv. (Accessed 13 July 2014).

SABC. South African Broadcasting Corporation. 1999b. *Truth Commission Special Report*, DK Koka, TRC Faith Community Hearings, East London, 17 November 1997. Available: http://sabctrc.saha.org.za/documents.htmv. (Accessed 13 July 2014).

SABC. South African Broadcasting Corporation. 1999c. *Truth Commission Special Report*, Raymond Julius Radie, Amnesty Hearings (Zama Tuta, Nogawya Kulman), East London, 25 May 1998. Available: http://sabctrc.saha.org.za/documents.htmv. (Accessed 13 July 2014).

SABC. South African Broadcasting Corporation. 1999d. *Truth Commission Special Report*, PAC Delegate Armed Forces Hearings, Cape Town, 7 October 1997. Available: http://sabctrc.saha.org.za/documents.htmv. (Accessed 13 July 2014).

Sarkin-Hughes J. 2004. *Carrots and Sticks: The TRC and the South African Amnesty Process*. Antwerp: Intersentia.

Shore M. 2009. *Religion and Conflict Resolution: Christianity and South Africa's Truth and Reconciliation Commission*. Burlington: Ashgate.

Shriver D. 1995. *An Ethic for Enemies. Forgiveness in Politics*. New York: Oxford University Press.

Sinclair M, Littlechild W & Wilson M. 2013. TRC pays tribute to Nelson Mandela, 6 December 2013. Available: http://www.trc.ca/websites/trcinstitution/index.php?p=8. (Accessed 16 June 2014).

Theissen G. 2008. Object of trust and hatred: Public attitudes toward the TRC. In H van der Merwe & AR Chapman. (eds). *Truth and Reconciliation in South Africa: Did the TRC Deliver?* Philadelphia: University of Pennsylvania Press.

TRC Report. 1998. Truth and Reconciliation Commission of South Africa Report. Available: http://www.justice.gov.za/trc/report/. (Assessed 4 August 2014).

Tutu D. 2000. *No Future without Forgiveness*. New York: Doubleday.

UN. United Nations. 1948. Universal Declaration of Human Rights. Available: http://www.un.org/en/documents/udhr/index.shtml. (Accessed 20 July 2014).

UN. United Nations. 2000. Vienna Declaration on Crime and Justice: Meeting the challenges of the twenty-first century. Available: http://www.un.org/documents/ecosoc/dec/2000/edec2000-inf2-add2.pdf. (Accessed 12 August 2014).

UN. United Nations. 2002. United Nations Economic and Social Council. Basic principles on the use of restorative justice programmed in criminal matters. Document E/2002/INF/2/Add.2. Available: http://www.unicef.org/tdad/basicprinciplesuseofrj.pdf. (Accessed 12 August 2014).

Van der Walt AJ. 2011. Housing rights in the intersection between expropriation and eviction law. In L Fox-O'Mahony & J Sweeney. (eds). *The Idea of Home in Law: Displacement and Dispossession*. Burlington: Ashgate.

Wilson RA. 2001. *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-apartheid State*. Cambridge: Cambridge University Press.

Yavuz MH. 2003. *Islamic Political Identity in Turke*y. Oxford: Oxford University Press.

Yigen K. 2002. Enforcing social justice: Economic and social rights in South Africa. *International Journal of Human Rights*, 4(2):13–29.

Legislation

Constitution of India. 2012. Directive Principles of State Policy, Part IV. Available: http://indiacode.nic.in/coiweb/welcome.html. (Accessed 4 August 2014).

Constitution of the Republic of Ghana. 1992. Chapter 6: The Directive Principles of State Policy. Available: http://www.judicial.gov.gh/constitution/chapter/chap_6.htm. (Accessed 4 August 2014).

Constitution of the Republic of South Africa, 1996. Available: http://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1. (Accessed 28 March 2015).

Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution).

Promotion of National Unity and Reconciliation Act 34 of 1995.

Cases cited

City of Johannesburg v Rand Properties (Pty) Ltd (253/06) [2007] ZASCA 25; [2007] SCA 25 (RSA). Available: http://www.saflii.org/za/cases/ZASCA/2007/25.html. (Accessed 13 July 2014).

Government of the Republic of South Africa and Others v Grootboom and Others [2000] (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169. Available: http://www.saflii.org/za/cases/ZACC/2000/19.html. (Accessed 13 July 2014).

Minister of Health and Others v Treatment Action Campaign and Others (No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075. Available: http://www.saflii.org/za/cases/ZACC/2002/16.html. (Accessed 13 July 2014).

Port Elizabeth Municipality v Various Occupiers (2004) (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268. Available: http://www.saflii.org/za/cases/ZACC/2004/7.html. (Accessed 13 July 2014).

S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665. Available: http://www.saflii.org/za/cases/ZACC/1995/3.html. (Accessed 10 June 2014).

Soobramoney v Minister of Health, KwaZulu-Natal [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC). Available: http://www.saflii.org/za/cases/ZACC/1997/17.html. (Accessed 13 July 2014).

Chapter 12

SOCIAL PROTESTS AND THE EXERCISE OF CITIZENSHIP IN SOUTH AFRICA[1]

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This chapter argues that post-apartheid social protests in South Africa are fundamentally about the exercise of democratic rights guaranteed in the South African Constitution. This is a legitimate right to protest that was denied under apartheid. Although the majority of the people have voted for the ANC, returning the party to Parliament with majorities in five successive elections, they nonetheless reserve and exercise their right to protest against poor service delivery, lack of accountability by appointed and elected officials, and corruption. Through social protests, the people of South Africa exercise 'democratic citizenship', whereby they both vote for, and demonstrate and protest for change.

By 1994 black South Africans had achieved all the rights and freedoms associated with formal citizenship, and they retained and now continue to exercise their substantive political rights. In this context, the issue of social protests in post-apartheid South Africa is a cross-cutting one, where all three themes in this book — justice, freedom and citizenship — intersect.

Democratic South Africa, 1994–2014

The apartheid state was a racially exclusive capitalist state, in which black people, who constituted the majority, were excluded from the social, political and economic realms of the dominant society. At one level, apartheid South Africa was about the denial of citizenship rights to the black people of the country, while the fight against apartheid was as much a fight for justice and freedom as it was about the assertion of substantive political rights by black people in their fight for an inclusionary citizenship. In post-apartheid South Africa a lively debate ensued about the form and character of the state, state–society relations and an empowered citizenry.

The term 'developmental state' was coined by Chalmers Johnson to understand the post-World War II Japanese state (Johnson 1982). Since then there have been numerous variants of the developmental state — the Asian developmental state, the bureaucratic developmental state, the flexible

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1   Presented at the Critical Reflections on Twenty Years of Freedom in South Africa: 1994–2014, Symposium, University of Toronto, 1 May, 2014.

developmental state and, more recently, the democratic developmental state in Africa (see Huff 1995; Öniş 1991; Ó Riain 2000; Saloojee & Pahad 2011). The developmental state, in contrast to liberal, neoliberal, Fordist or post-Fordist capitalist states, refers to the factor of social cohesion, which in the context of South Africa deals with inequality, poverty and the legacy of racial oppression and exploitation. The post-apartheid state has to develop a social contract where the state is seen as acting largely in the interests of the majority, and bureaucracy is seen as responding to the needs of the majority.

In the case of South Africa, the role of the developmental state is to fight poverty, unemployment and underdevelopment. The developmental state, operating in an environment of democracy and political stability, ameliorates market-related and market-induced inequalities; creates conditions of equality of opportunity for all; and develops social cohesion in what is still a racially fractured society. As Saloojee and Pahad (2011) argue,

> *The developmental state in South Africa for example, also had to usher in a democratic Constitution, create a climate of respect for human rights, overturn apartheid legislation, bring in new legislation that was in conformity with the Constitution and undertake a massive and continuous transformation project.* (Saloojee & Pahad 2011)

These developmental goals of the state are informed by its ideological character, which also informs the nature of both state–society and state–citizenry relationships. President Thabo Mbeki called this the 'people's contract'.

The turning point in the struggle against apartheid came in 1985, when the armed struggle by the ANC, as well as socio-economic and political protests against the apartheid state, had reached such a point that the ANC called on the people of South Africa to render South Africa ungovernable. These protests were against an apartheid state that had legislated away the basic fundamental social, economic, political cultural and human rights and freedoms of the black people (ie the African, Indian and so-called coloured people) of South Africa. The apartheid state stripped black people of their formal citizenship rights. The people, however, continued to exercise their substantive citizenship rights — the right to engage in the politics of protest, including the right to overthrow, by all means necessary, the apartheid state, described by the UN as a 'crime against humanity'.

In 1990 the ANC, along with other political parties and movements, were unbanned and Nelson Mandela was released from prison. Between 1990 and 1994, negotiations on a new democratic dispensation began between the apartheid government and the ANC, as well as other political parties. The negotiations culminated in 1994 with the first democratically held elections in South Africa.

After the democratic dispensation in 1994, all South Africans, including the black people of South Africa, had their fundamental rights and freedoms, including their political, cultural, and social rights, enshrined in the Constitution of the country. Black people in South Africa were accepted as citizens of the state, and were accorded all the rights and privileges associated with formal citizenship, including, for the first time, the right to vote. After decades of exercising their substantive right to protest against racial injustice and fight for freedom, the black people of South Africa won the right to formal citizenship.

It is important to distinguish between two phases in the 20 years of democracy in South Africa. The first phase is from 1994, when the ANC won the first democratically held elections, to September 2008, when Mbeki resigned as president of the country. The second, somewhat overlapping, phase began in December 2007 and continues to the present. In December 2007 Jacob Zuma won the presidential leadership race in the ANC and became the party's president — an event that set in motion what the anti-Mbeki forces called the two centres of power challenge. It is unfortunate that significant challenges in the second phase — namely, corruption and 'tenderpreneurship', the Nkandla scandal, the Marikana massacre and the increase in community-based protests — are now some of the defining features of the entire 20 years of democracy in South Africa. And these defining features overshadow the achievements of the first 14 years of democracy — falling levels of poverty and unemployment, rising numbers of people who were housed, increased supply of clean water and electricity, and the restructuring of racially based public services.

The post-apartheid state in South Africa

In South Africa the citizenry view the central government as powerful yet it is local governments that are the crucial agents of day-to-day service delivery and hence closest to understanding and meeting the needs of the citizenry. The ANC, given its own history, has had to wrestle with how to understand, locate and deal with South Africa as a fundamentally market-based capitalist economy. In 2004, during President Mbeki's second term in office, the ANC began to talk of a developmental state (as differentiated from a neoliberal capitalist state), which would much more self-consciously pursue an interventionist, pro-poor economic agenda to close the socio-economic gap between the rich and the poor in South Africa. Gains were definitely made (with respect to data on poverty reduction, housing, healthcare, water and sanitation delivery, see African Peer Review Mechanism 2007; Van der Berg et al 2007; Yu 2010). It should be noted that the South African Constitution refers to the post-apartheid state as a developmental state and outlines some of its characteristics.

In 2009 the ANC election manifesto promised that 'the developmental state [would] play a central and strategic role in the economy. We will ensure a more effective government.' Developmental states are strong states characterised by a very high degree of 'embedded bureaucratic autonomy' and insularity; a capable, small bureaucratic elite in a pilot ministry who are given the political space to set national development objectives; public–private cooperation; and the ability to secure the compliance (at least initially) of all fractions of capital with the national development objectives that advantage only some of those fractions of capital (see Huff 1995; Johnson 1982; Johnson 1999; Ó Riain 2000; Saloojee & Pahad 2011). Clearly, South Africa is not a developmental state. Yet it does exhibit all the contradictions of developmental states (Saloojee & Pahad 2011).

South Africa's post-Mbeki record points to an ANC under Zuma that has failed as a nascent developmental state on three counts: reshaping the economy, running an effective corruption-free government and improving service delivery. The 2008 global financial collapse notwithstanding, the gains made by the poor and marginalised in the first 14 years of democracy have slowed in the last seven years and inequality has increased. What currently defines the ANC under Zuma is cases of corruption and scandals. In terms of state–society relations, the Marikana massacre points to the interpenetration of elites and the relative autonomy of one of the repressive arms of the state from the state itself. At the party-political level and at the level of the state, the chorus is one that justifies corruption, abuses in government tenders and the expenditure of nearly R250 million of public money on the home of the president. Annually, the Auditor-General of South Africa reports on financial mismanagement and fraud in state institutions, and in the 2012/13 financial year, the Auditor-General reported misspending of R30 billion across the three spheres of government.

The state in South Africa, with its centralising tendency, has to deal with local governments that often demand greater power and decentralisation of resources, arguing that central government does not comprehend the challenges at the local level. In South Africa, where power is shared among different spheres of government, the local sphere is the immediate and pressing face of government, especially as it applies to service delivery (crime prevention, refuse collection, sanitation, water, electricity, provision of affordable housing etc). And here lie three of the most intriguing tensions for the state in South Africa in the contemporary era. First, can local governments deliver on the promises of the (centralised) developmental state, especially given that the developmental state develops its priorities without much consultation with local government or the citizenry? Secondly, can the state overcome the very contradictions it generates — the

influence in politics of economic elites, corruption, abuses in state tenders, growing inequality and its sociopolitical disconnection and distance from the citizenry, particularly the mass of unemployed, marginalised, excluded and underserviced? And, thirdly, in response to these contradictions, will the state in South Africa continue to resort to a vicious cycle of blame — alternately casting aspersions on the political motivation of the protestors or arguing that the problem resides solely at the local level, where lack of capacity impedes service delivery?

Service delivery, protests and the challenges of national cohesion

In the 1994 elections the ANC's campaign slogan was 'a better life for all'. President Nelson Mandela said: 'Our country is going through a profound transformation at all levels of government and society ... This transformation will permeate every level of government, every department and every public institution.' (ANC 1994). Once in power, the ANC came to understand the legacy of apartheid and the limits to transformation in a country that was characterised by two economies in one — the first highly capitalised and integrated into the world economy; the other a second economy characterised by poverty and underdevelopment, and largely, though not exclusively, rural.

The ANC in power was constrained by the legacy of apartheid, which included immense material deprivation among the vast majority of South Africans; racialised poverty; racial segregation; a markedly unequal division of land, wealth and income based on race; and legalised, institutionalised and systemic racial discrimination in all walks of life. The ANC was also constrained by the need to integrate white and black South Africa (including cities, education systems, pensions etc), to integrate the economy, and in particular the mining sector, into the global economy and to end the concentration of wealth in a few hands. And it was constrained by policy choices that it had to make with respect to opening up the economy, dealing with debt and deficits, and with a public service that was largely white and in serious need of transformation.

Much was accomplished, particularly in the first 14 years of democracy, with respect to provision of housing, electricity, clean water, healthcare, free education and poverty reduction. And in the intangible realm of consciousness, in the post-apartheid period, even with challenges in service delivery and growing inequality, the historically oppressed people of South Africa have a new sense of self-worth and capacity. They have dignity and agency as they exercise their right to protest.

The term 'protest' here means a gathering of members of a community or organisation (such as a political party, trade union or NGO) who come together to direct their attention and actions at state institutions, elected or appointed officials or agencies of the state. This involves the legitimate exercise of a fundamental democratic right to, first, improve their socio-economic conditions; secondly, influence or challenge decisions made by political and administrative leaders; thirdly, hold them accountable for their decisions and actions in terms of corruption, lack of service delivery, failure to act on crime or their absence from the community.

There is a rich and deep tradition of social protest in South Africa. Protests were organised by anti-apartheid organisations, such as the ANC, the United Democratic Front, and the trade unions etc, as well as in spaces created by the people themselves, examples being the 1976 Soweto uprisings and the popular protests throughout the country in the 1980s and 1990s. Whether in organised spaces (by non-state actors) or in citizen-created spaces, sociopolitical protests in South Africa cannot be understood apart from notions of democracy and of citizenship. Protests in both spaces were essential to the eventual collapse of apartheid. In the post-apartheid era, however, 'organised' spaces have been largely, though not exclusively, used by the trade-union movement, the ANC itself and opposition political parties, while 'spaces created by the people' have been used primarily in township protests across the country.

There are some in the leadership of the ANC who allege these protestors are being used by a 'third force'. Following the 2014 elections, protests in Alexandra township resulted in police using rubber bullets and gas on protestors. Fifty-nine people were arrested and the ANC accused the Economic Freedom Front (EFF) of bussing protesters into Alexandra, a charge denied by EFF Gauteng leader, Dali Mpofu (*Mail & Guardian* 2014). This third-force argument completely ignores the notion of 'agency'– that is, seeing protestors as exercising their fundamental (constitutional) rights in the fight for basic rights and services. It is about the pursuit of collective action through the exercise of citizenship writ large in the fight for dignity, service delivery and the accountability of elected officials (for an interesting discussion about 'invited' and 'invented' spaces of citizenship, see Cornwall 2002; Cornwall & Gaventa 2001; Gaventa 2004; Miraftab 2006). It should also be pointed out that factions within the ANC often organise protests against their rivals, but this does not necessarily signify a loss of electoral support for the ANC (Friedman 2014).

Community protests in South Africa manifest themselves as protests over lack of service delivery, corruption of local officials and failure of the state to deliver on the promise of 'a better life for all', encapsulated in the

ANC's famous electoral slogan. But the protests are about more than service delivery: they represent an engaged and an empowered citizenry exercising human agency, claiming political space, exercising their fundamental democratic rights and seeking to hold public elected and appointed officials accountable for their actions and promises. In short, community-based protests are about exercising fundamental human rights to secure other human rights. This points to the importance of a citizenry exercising agency and challenging the claims made by the post-apartheid state that it is the instrument of social cohesion in the nation.

In South Africa, as in other countries around the world, when it comes to one very crucial dimension of political participation, namely political protests, it is citizens who claim and invent spaces of protest, and in these spaces they exercise substantive citizenship. They claim spaces, they occupy spaces and they redefine spaces, and through these essentially political actions they assert their citizenship rights. In this manner they continually reproduce the citizenship–agency–protest relationships in new and interesting ways. In South Africa Mottiar (2014) suggests:

> *Social movements contribute to making participation transformative by extending boundaries of citizenship to marginal groups and opposing a project of development while also opposing the ideology of that development. In this sense there is an emphasis on challenging existing power relations rather than working around them for piecemeal gains eg better service delivery.*   (Mottiar 2014)

Protests and the Marikana massacre

Alongside the history of protest, there is also a long history in South Africa of the police acting semi-autonomously and autonomously, and using repression against protestors. The role of the police in the Sharpeville massacre, the 1976 massacre in Soweto and the various subsequent massacres of citizens in the 1970s, 1980s and 1990s protesting against apartheid are all well documented. What is increasingly coming under scrutiny is the role of the police in dealing with protestors in the post-apartheid era — particularly in the aftermath of Marikana. As Friedman (2014) notes, protestors in South Africa are more likely to be the victims of rather than the perpetrators of violence during social and political protests.

Sociopolitical protests in post-apartheid South Africa gained world attention on 6 August 2012, when police officers shot 112 striking mine workers, killing 34 of them near the town of Marikana in the North West province. This is now known as the Marikana massacre. Dali Mpofu SC, counsel for the injured and arrested miners and their families, has described

the massacre as a 'toxic collusion' between the police, the state and capital in the shape of the Marikana mine's owners, Lonmin. A year before the massacre, at a summit on police killings in July 2011, the then Minister of Police, Nathi Mthethwa, called for a policy of 'maximum force' to deal with protestors (Bruce 2013).

David Bruce argues that it was Mthethwa's unlawful doctrine, the need to use maximum force against criminals, that was largely responsible for the massacre and, according to Bruce, 'it is therefore Mthethwa who urgently needs to account for the role he played in relation to the massacre' (Bruce 2013). Sipho Hlongwane, moving well beyond Bruce's argument, suggests that

> the chain of command from the police officers on the ground in Marikana, right up to the president of the country, will be of great interest to the Commission, as it will establish who knew what and most importantly, who decided to carry out the operation in [the] deadly manner that it was. (Hlongwane 2013)

This apparent complicity between the state (involving at least two ministers), big capital and at least one agency of the state (the police) points to the toxic collusion referred to by Mpofu. It also indicates the need to completely curtail, first, the influence that capital has on the state through the circulation of elites and, secondly, the influence that powerful individuals exert on both the party and the state.

The Marikana massacre and more recent treatment of protestors by the police beg the question of the relative autonomy of the police from the state. Though the Farlam Commission of Inquiry found no evidence to implicate key political figures in the massacre (Farlam et al 2015), it is clear that the state, through the police, played a repressive role in dealing with the striking miners. In the aftermath of the massacre state prosecutors used an apartheid-era law to charge 270 striking miners with the murder of 34 of their colleagues — men who were actually shot dead by the police. National Prosecuting Authority spokesman Frank Lesenyego announced that '34 counts of murder have been laid against the 270 accused' over the shooting dead by armed police of the miners at the Lonmin platinum mine. The miners, also accused of the attempted murder of 78 fellow miners who were injured, were charged under a law dating back to 1956 known as 'common purpose', said Lesenyego, in which members of a crowd present when a crime is committed can be prosecuted for incitement. In other words, the state claims the miners provoked the police to kill them. The legislation, passed by the apartheid regime, was used to convict anti-apartheid leaders and activists for leading marches or demonstrations where some crime was committed.

Marikana and the double autonomy of the state

The Marikana massacre points to the interpenetration and circularity of elites, but also to the police as an agency of repression that is semi-autonomous from the state. Marenin (1982) identifies the double relative autonomy of the state and one of its repressive apparatuses — first, the relative autonomy of the state from capital and, secondly, the relative autonomy of the police from both the state and capital. The police constitute one of the repressive arms of the state, with the right to exercise force and repression against the citizenry. In this sense, the police are not simply executors of the will of the state or of capital.

Marenin refers to the police as one of the agencies used by the state to deal with the citizenry. Certainly in their traditional role as serving and protecting, and maintaining law and order, their force can be used against the citizenry when the state determines that order and the status quo are threatened. However, as Marenin notes, the police are not simply puppets in the hands of the state or capital. They are fully capable of 'shaping both the development of police work and their relations to the social formation in which they are anchored' (Marenin 1982). They exercise discretionary power in the maintenance of law and order, the status quo and the dominant class, but also, argues Marenin (1982) of a more general cross-class order rooted in a commitment to general peace and safety. In this sense, they are not enmeshed with either the political or the economic elite in a social formation.

In the post-apartheid period this relative autonomy of the police has to be understood in the context of transformation, poverty and structural inequality, and the inability of the state to deliver on its promises. The post-apartheid state has not completely restructured the pre-democracy apartheid system based on the social relationship between the police and the policed (Brewer 1994). Marikana, the killings of township protestors and a general tendency towards repression suggest the police still deal with protestors in the same way they did before the democratic dispensation. The coercive power of the state, as vested in police power, has become, at least for now, the dominant way in which the state seeks to exercise power over the excluded and the marginalised. Brewer is correct to argue that given the culture of apartheid policing, no transformation of relations between police and policed will occur without structural change in society and without a state that is committed to dealing with structured inequality, unemployment and poverty (Brewer 1994).

Service-delivery protests and the exercise of formal and substantive citizenship rights

One of the central challenges in post-apartheid South Africa, 20 years into democracy, is corruption. Democracy in South Africa is increasingly influenced by the close relationship between political and economic elites, by the autonomy of the state from the very social forces that propelled it to power and by the relative autonomy of the police as it deals with socio-political protests. All these indicate the inability of the state to deliver on its promises. They also point to an entrenched unwillingness on the part of key state actors (and party-political actors within the leadership of the ANC), first, to root out corruption in government and in the ANC, and, secondly, to recognise that protests are an important feature of democratic South Africa where citizens engage in substantive political participation, where they define the terrain of protest and where they hold the state accountable. Protests in South Africa, whether at the workplace or in the community, are not simply, as Alexander (2010) notes, a 'rebellion of the poor'. They are also about agency, citizenship, realising the rights of post-apartheid citizenship and about non-formal, substantive political participation.

The issue facing the state in the national government/local government dichotomy is accountability. When services are decentralised to local government, or when they are deregulated, outsourced or privatised, does the desire to make profit seriously compromise and outweigh other important considerations — for example, public safety or equity? And what discernible impact will this have on poverty reduction and the promotion of national cohesion?

Poverty, unemployment, inequality, exclusion and marginalisation are all at the root of the protests (Friedman 2014; Kasrils 2013). Data shows that in the month of January 2014 the police had killed 10 people in service delivery protests in South Africa (Institute for Security Studies 2014). This points to the autonomy of the police as a repressive arm that is largely untrained in dealing with large crowds who are legitimately engaging in protests.

Understanding contemporary social protests in South Africa

Jane Duncan and her team culled the records of notifications sent by organisations seeking to hold gatherings and protests in seven municipalities in South Africa (Duncan & Royeppen 2013) — see Table 12.1. Their study looked at data over a five-year period and found that unions hold more protests than community-based organisations. It also found that crime is the underlying reason behind more protests than service-delivery issues.

However, in South Africa protests by unions are not exclusively shop-floor related. There is also a very strong strain of social unionism, and union protests are often sociopolitical in nature. Although Duncan disaggregates the data, distinguishing between protest data related to service delivery, and protest data related to crime and the inability of the police to deal with crime and put into place effective crime-prevention measures, these issues are in reality service-delivery problems (Grant 2014b).

According to annual statistics recorded in the South African Police Incident Registration Information System, the proportion of protest incidents that become violent — and are therefore classified as 'unrest-related' — is in the region of 10% of the total number of gatherings. These gatherings are ones that the police consider to have 'gone bad', and which therefore could have presented the authorities with legitimate reasons for prohibiting them. Duncan and Royeppen (2013) initially developed Table 12.1 from data taken from the Incident Registration Information System. Here the table has been updated using figures drawn from statistics supplied by then minister of police, Mthethwa, to the South African Parliament (Institute for Security Studies 2014).

Table 12.1 Community-based protests in South Africa, 2004/05 to 2013/14

Year	Protests (peaceful)	Protests with unrest	Total
2004/05	7 382	622	8 004
2005/06	9 809	954	10 763
2006/07	8 703	743	9 446
2007/08	6 431	705	7 136
2008/09	6 125	718	6 843
2009/10	7 897	1 008	8 905
2010/11	11 681	973	12 654
2011/12	9 942	1 091	11 033
April 2012–March 2013	10 517	1 882	12 399
April 2013–March 2014	11 668	1 907	13 575

Source: Duncan & Royeppen (2013), updated with data from the Institute for Security Studies (2014) and Makinana (2014).

Peter Alexander (2012), analysing similar data on the number of 'crowd management incidents' from 2009 to 2012 found that over that period there was an average of 2.9 unrest incidents a day. This was an increase of 40%

more than the average of 2.1 unrest incidents a day recorded for the period 2004 to 2009. In 2010/11 there was a record number of crowd-management incidents.

Using data from the Incident Registration Information System, the ISS found:

> ... police officers were deployed to monitor a total of 12 399 crowd-related events (34 incidents a day, on average) between April 2012 and March 2013. Most of these were public gatherings that had been given permission in terms of the Regulation of Gatherings Act 205 of 1993. However, as many as 1 882 (15%) of these gatherings turned violent, resulting in 3 680 arrests. This means that an average of five violent public incidents took place each day in that year. This represents a 54% increase from the previous year when 1 226 incidents were recorded.   (ISS 2014)

Nkosinathi Nhleko, the Minister of Police, told Parliament on 21 July 2014 that between April 2013 and March 2014 there had been 13 575 community-related protests (of which 1 907 turned violent), which the police had responded to and stabilised. The minister noted:

> These incidents arose mainly from unrest-related incidents such as labour disputes in the mining, education and transport sectors and dissatisfaction with service delivery by local municipalities ... We will continue to attend to these community protests with vigilance as we have done in the past with the sole intention of ensuring that we secure property and [the lives] of all South Africans. We also appeal to community leaders to exercise responsible leadership that ensures protection of property and human lives.   (Makinana 2014)

For Alexander, these statistics point to a 'rebellion of the poor' that has intensified over the past three years, and which has no end in sight unless the state improves service delivery to the poor and begins a concerted effort to eradicate both income and asset poverty (Alexander 2010, 2012). Protests in South Africa are not simply a rebellion by the poor or just about service delivery: they are expressions of politics in a democracy by those who are disenchanted with formal electoral politics and the limits of accountability in electoral politics. They are fundamentally about the exercise of democratic citizenship and a clear rejection of passive citizenship.

Clearly, this is an ongoing trend. A recent report on service delivery noted that the top five grievances by protestors were about service delivery in general, including housing, water and sanitation, political representation and electricity. The researchers — who based their research on over

250 interviews and drew data from four media sources, covering more than 2 000 protests since 2004 — found, first, that there was no evidence of a third force directed at destabilising the government that orchestrated service-delivery protests and, secondly, there was little correlation between the upcoming 2014 elections and the number of protests. According to one of the researchers, Carin Runciman (2011), characterising the protests as politically orientated '... serves to delegitimise the grievances and agency of ordinary working-class people' (see also Runciman, cited by Evans 2014).

The report also noted that between 2004 and 2014 the police reportedly killed a total of 43 protesters. This figure does not include the 37 miners killed during the strike at Marikana in 2012. It does, however, include seven people who were killed in the first two months of 2014 (Grant 2014a). Public complaints over lack of service delivery represent a legitimate reaction against the social democratic impulse to see service provision as the sole prerogative of a central state. The primary reasons for the protests centre on unaccountable and corrupt local government, issues of community safety, and lack of affordable housing, sanitation, water supply and electricity. In a world of intersecting inequities, the way in which the state through service delivery seeks to distribute valued goods and services should raise serious questions not only about efficiency and effectiveness, but also about alternative service-delivery models.

Social protests: The exercise of democratic citizenship

Protestors in South Africa clearly see protests as an important form of citizenship engagement and as a legitimate alternative to electoral politics, which is viewed as a formal, albeit non-substantial, mode of political participation that occurs every few years. Protests are an expression of democratic rights in action. It is at the point when the disadvantaged and marginalised in society demand equality, representation, access and power sharing that there is a backlash in the form of repression against their community protests.

These service-delivery protests and, more importantly, the reasons for them pose very significant challenges to the realisation of cohesion and inclusion in South Africa. Because the protests are as much about service delivery as they are about marginalisation and exclusion, poverty and inequality, and corruption and lack of accountability, using the repressive arm of the state to quell them serves only to increase antagonism towards the state and publicly elected officials in all three spheres of government.

It is readily apparent to many who protest that while they are developing internal social cohesion (at the sub-national community level) through protests, at a broader level, they are consigned to the margins and excluded from the centres of decision making about the very things that have an impact on their daily existence. The dominant state discourse is framed around issues of national unity and whether unity can be forged through diversity, but this ignores the reality of inequities in the urban environment, which are evident in inequitable service delivery and the absence of meaningful gainful employment.

The ANC has now governed South Africa for over 20 years, and inequality, poverty and unemployment are still critical issues. Linked to poverty and the erosion of cohesion is the need for service delivery to improve the socio-economic conditions of the indigent and the poor. On the one hand, the post-apartheid developmental state argues that it is the central factor in national cohesion; on the other hand, there is an active, engaged citizenry defining and claiming political spaces for protests and strikes — but these spaces are increasingly contested by the repressive arm of the state as the police in particular deal harshly with and kill protestors. The South African government tabled for discussion and deliberation in 2012 its National Development Plan 2030 (NDP) (NPC 2012).

The NDP is all too aware of the challenges identified above. In fact, very much like the 2004 Policy Co-ordination and Advisory Services Social Cohesion Report, the 2011 National Planning Commission's diagnostic document on nation-building identified fairly similar threats to national social cohesion in South Africa, including institutionalised racism, social fragmentation, residential and spatial segregation, language barriers, sexism, unemployment, corruption, unequal experiences with the law, decreasing trust in politicians and the institutions of governance, and an increase in the moral deficit. Chapter 15 of the NDP, 'Transforming society and uniting the country', also identified these as challenges that, individually and cumulatively, threaten national social cohesion. Twenty years after democracy, the NDP notes that 'too many people are trapped in poverty and we remain a highly unequal society'. The NDP is presented as a road map to 'eliminate poverty' and 'reduce inequality' by 2030, and identifies two high-level objectives:

1. Reducing the number of people who live in households with a monthly income below R419 per person (in 2009 prices) from 39% to zero.

2. Reducing inequality, as measured by the Gini coefficient, from 0.69 to 0.6. (Interestingly, the Policy Co-ordination and Advisory Services' Macro Social Report found that in 2000, South Africa's Gini coefficient was 0.59 but declined to 0.35 when social transfers were included. Therefore, income transfers from the state had the effect of reducing inequality.)

There is clearly the political will to realise the goals of the NDP, which would undoubtedly improve service delivery, create a better life for all and hold public officials accountable for service delivery and for treating citizens with dignity. The real challenge, however, still exists with respect to the ability and capacity of local government to deliver on the central promises of the NDP. But its major weakness is that the political will at the centre is not matched by the reality of implementation challenges at national and sub-national levels.

Social protests in South Africa have clearly gained momentum, particularly since 2007. The protests are simultaneously the exercising of democratic rights guaranteed under the Constitution (the legitimate right to protest denied under apartheid), and a response to poor service delivery, lack of accountability by appointed and elected officials and corruption and nepotism. These protests are about the exercise of democratic citizenship: citizens can both vote for change, and demonstrate and protest for change. Having said this, it is important to point to a disturbing feature of protests that occurred in 2008 and, more recently, in late 2014 and early 2015 — protests that take the form of xenophobic violence directed at immigrants from other African countries living in South Africa. These forms of protests need to be condemned by public officials as xenophobic, racist and ethnocentric, and contrary to the values of an inclusive democratic South Africa.

Growing inequality, increasing unemployment, the inability of the state to deal with corruption, service-delivery bottlenecks, 'tenderpreneurship', the morality deficit and the democratic deficit will weaken social cohesion, and increase community protests and labour strife. National cohesion is deeply threatened by the post-apartheid state, which reacts repressively rather than seeking to understand the roots of community protests around service delivery. The governing party, which has won five successive elections (though in 2014 with less support than ever before), is on a slippery slope to abandoning its claims to being a revolutionary populist movement. Trust is fragile and there is clearly an absence of strong state–society relations, which are essential to building national cohesion.

References

African Peer Review Mechanism. 2007. Country review report No. 5, Republic of South Africa. Midrand: African Peer Review Secretariat.

Alexander P. 2010. Rebellion of the poor: South Africa's service delivery protests – a preliminary analysis. *Review of African Political Economy*, 37(123):25–40.

Alexander P. 2012. Protests and police statistics in South Africa: Some commentary. Before It's News, 3 April 2012. Available: http://beforeitsnews.com/middle-east/2012/04/protests-and-police-statistics-in-south-africa-some-commentary-1974768.html. (Accessed 14 April 2014).

Alexandra residents scared to talk. *Mail & Guardian*, 10 May 2014. Available: http://mg.co.za/article/2014-05-10-alexandra-residents-scared-to-talk. (Accessed 10 May 2014).

ANC. 1994. The Reconstruction and Development Programme: A Policy Framework. Johannesburg: African National Congress. Available: http://www.polity.org.za/polity/govdocs/rdp/rdp.html. (Accessed 14 April 2014).

Brewer J. 1994. *Black and Blue*. Oxford: Oxford University Press.

Bruce D. 2013. Marikana not Ramaphosa's finest moment. *Mail & Guardian*, 18 January 2013. Available: http://mg.co.za/article/2013-01-18-00-marikana-not-ramaphosasfinest-moment. (Accessed 14 April 2014).

Cornwall A. 2002. Locating citizen participation. *IDS Bulletin*, 33(2):49–58.

Cornwall A & Gaventa J. 2001. From users and choosers to makers and shapers: Repositioning participation in social policy. *IDS Working Paper* 127.

Duncan J & Royeppen A. 2013. Inside Rustenburg's banned protests. *Daily Maverick*, 7 March 2013. Available: http://www.dailymaverick.co.za/article/2013-03-07-inside-rustenbergs-banned-protests/#.U2FM7sf8QYV. (Accessed 11 April 2014).

Evans S. 2014. Marikana service delivery researchers spooked. *Mail & Guardian*, 7 March 2014. Available: http://mg.co.za/article/2014-03-06-marikana-service-delivery-researchers-spooked/. (Accessed 11 April 2014).

Farlam IG, Hemraj PD & Tokota BR. 2015. Marikana Commission of Inquiry: Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin mine in Marikana, in the North West province. Available: http://www.sahrc.org.za/home/21/files/marikana-report-1.pdf. (Accessed 14 March 2016).

Friedman S. 2014. The path of the past: South African democracy twenty years on. In E Fakir, W Holland & K Kottler. (eds). *SA elections 2014: Continuity, contestation or change?* Johannesburg: Electoral Institute for Sustainable Democracy in Africa. Available: http://www.electionupdate.org.za/pdf/electionupdate2.pdf. (Accessed 1 July 2014).

Gaventa J. 2004. Perspectives on participation. In K Jassey. (ed.). *Developing participation: Challenges for policy and practice in approaches to poverty reduction and democratisation*. Uppsala: The Collegium for Development Studies.

Grant L. 2014a. Research shows sharp increase in service delivery protests. *Mail & Guardian*, 12 February 2014. Available: http://mg.co.za/article/2014-02-12-research-shows-sharp-increase-in-service-delivery-protests. (Accessed 1 July 2014).

Grant L. 2014b. Taking to the streets: Who is protesting and why? *Mail & Guardian*, 28 April 2014. Available: http://mg.co.za/data/2014-04-28-taking-to-the-streets-who-is-protesting-and-why. (Accessed 1 July, 2014).

Hlongwane S. 2013. Marikana: How much, and when, did Zuma know? *Daily Maverick*, 8 August 2013. Available: http://www.dailymaverick.co.za/article/2013-03-18-marikana-how-much-and-when-did-zumaknow/#.Ui3QFX_DLcw. (Accessed 12 April 2014).

Huff WG. 1995. The developmental state, government, and Singapore's economic development since 1960. *World Development*, 23(8):1421–1438.

Institute for Security Studies. Getting to the bottom of what really drives public violence in South Africa, 7 February 2014. Available: https://www.issafrica.org/iss-today/getting-to-the-bottom-of-what-really-drives-public-violence-in-south-africa. (Accessed 25 January 2016).

Johnson C. 1982. *MITI and the Japanese Economic Miracle*. Stanford, CA: Stanford University Press.

Johnson C. 1999. The developmental state: Odyssey of a concept. In M Woo-Cumings. (ed.). *The Developmental State*. Ithaca: Cornell University Press.

Kasrils R. 2013. How the ANC's Faustian pact sold out South Africa's poorest. *The Guardian*, 24 June 2013. Available at http://www.theguardian.com/commentisfree/2013/jun/24/anc-faustian-pact-mandela-fatal-error. (Accessed 15 April 2016).

Makinana A. 2014. New police minister vows to amend Act to fix SAPS woes. *Mail & Guardian*, 22 July 2014. Available: http://mg.co.za/article/2014-07-22-new-police-minister-vows-to-amend-act-to-fix-saps-woes. (Accessed 22 July 2014).

Marenin O. 1982. Parking tickets and class repression: The concept of policing in critical theories of criminal justice. *Contemporary Crises*, 6:241–266.

Miraftab F. 2006. Feminist praxis, citizenship and informal politics: Reflections on South Africa's anti-eviction campaign. *International Feminist Journal of Politics*, 8(2):194–218.

Mottiar S. 2014. Protest and participation in Durban: A focus on Cato Manor, Merebank and Wentworth. *Politikon*, 41(3):371–385. Available: http://ccs.ukzn.ac.za/default.asp?11,61,3,3120. (Accessed 15 April 2014).

NPC. National Planning Commission. 2012. National Development Plan 2030. Available: http://www.gov.za/documents/national-development-plan-vision-2030. (Accessed 15 April 2014).

Öniş Z. 1991. The logic of the developmental state. *Comparative Politics*, 24(1):109–126.

Ó Riain S. 2000. The flexible developmental state: Globalization, information technology, and the 'Celtic Tiger'. *Politics & Society*, 28(2):157–193.

Runciman C. 2011. Questioning resistance in post-apartheid South Africa: A response to Luke Sinwell. *Review of African Political Economy*, 38(130):607–614.

Saloojee A & Pahad EG. 2011. The bureaucratic, flexible, and democratic developmental state: Lessons for South Africa. In D Plaatjies. (ed.). *Future Inheritance: Building State Capacity in Democratic South Africa*. Johannesburg: Jacana Media.

Van der Berg S, Burger R, Louw M & Yu D. 2007. A series of national accounts-consistent estimates of poverty and inequality in South Africa. Department of Economics, Stellenbosch University, *Working Paper* No. 9/2007.

Yu D. 2010. Poverty and inequality trends in South Africa using different survey data. Department of Economics, Stellenbosch University, *Working Paper* No. 4.

Legislation

Constitution of the Republic of South Africa, 1996. Available: http://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1. (Accessed 4 August 2014).

Chapter 13

MIGRATION TO SOUTH AFRICA SINCE 1994: REALITIES, POLICIES AND PUBLIC ATTITUDES

Belinda Dodson | *Jonathan Crush*

In the lead-up to democracy in 1994, with the focus on internal political reconstruction and the return of South African exiles from abroad, little attention was paid to what immigration to South Africa might or should look like in the post-apartheid dispensation. There was a substantial body of scholarly literature on migrant labour from within and beyond South Africa's borders, with an emphasis on the mining industry, which reflected the dominant cross-border flows of the time (see, for example, Crush et al 1991; Harries 1994; Jeeves 1985; Moodie 1994; Murray 1981). Much of that work was historical in emphasis. Yet over the past 20 years, immigration to South Africa has emerged as a significant phenomenon. It has also become a particularly thorny political issue. Immigration legislation was one of the last areas of apartheid-era law to be overhauled, and remains fraught with internal contradictions, inconsistent in its application and ill-fitting with migration realities (Crush 2014; Crush & Dodson 2007; Crush & McDonald 2001; Klotz 2012; Peberdy 2001; Segatti 2011). Among the South African citizenry, African immigrants in particular have become the target of negative public sentiment, justifiably labelled as xenophobia (Crush et al 2008, 2015a; Desai 2010; Dodson 2010; Dodson & Oelofse 2000; Landau 2010, 2011; Matsinhe 2011; Mosselson 2010; Neocosmos 2008, 2010; Nyamnjoh 2006; Pillay 2013).

This chapter is a synopsis and update of work we have published over the past 18 years, mainly under the auspices of the Southern African Migration Programme (SAMP) and in collaboration with others in that network. We draw on work written with various co-authors and including in-house SAMP publications, as well as on articles in edited volumes and academic journals (notably Crush & Dodson 2007; Crush & Frayne 2007; Crush & McDonald 2000; Crush & McDonald 2001; Crush & Williams 2010; Crush et al 2008, 2015a; Dodson 2010; Dodson et al 2008; McDonald 2000; Peberdy & Crush 2007; Pendleton et al 2006). We discuss immigration to South Africa in three parts: first, sketching a background of migration patterns and trends; secondly, outlining the immigration policy context and trajectory since 1994; and, thirdly, addressing the matter of xenophobia, which has emerged as an unanticipated dark side to the construction of a racially inclusive South African citizenship.

Patterns and trends in migration

Migration to South Africa from neighbouring countries in southern Africa, as well as from the rest of the continent and further afield, has certainly increased since the end of apartheid (Crush 2014). Yet these flows build on a long-established regional pattern of labour migration dating back to the nineteenth century, especially to the mines. Furthermore, cross-border movements of people during the apartheid years were higher than officially recorded or acknowledged. With the exception of strictly regulated labour migration, official apartheid-era immigration policy accommodated only white immigration, or immigrants assimilable into 'European' culture, but there were additional clandestine flows of people across the country's borders (Peberdy 2009). It is also worth recalling that refugees from conflict in neighbouring countries — for example, Mozambique — were present in significant numbers in South Africa during the apartheid years, if not formally acknowledged as refugees because South Africa was not then a signatory to the 1951 UN and 1969 OAU refugee conventions (Polzer 2005; Steinberg 2005).

The alarmist post-1994 official and popular discourse depicts 'floods' or 'swarms' of migrants from countries in Africa — as if there had been virtually no cross-border flows before the easing of border restrictions and the abandonment of race-based immigration policy, which is far from the case (Danso & McDonald 2001; Murray 2003). South Africans have also taken refuge, or made their livelihoods, in other countries in the region, so regional migrant flows are not and never have been just inward.

Present migrant numbers are no easier to determine. The official number of immigrants, defined as residents of South Africa who are foreign-born, was 2 199 871 in the 2011 census, or approximately 4% of the population (Stats SA 2012). Census enumeration is unlikely to have captured all undocumented migrants, so the real figure is likely to be higher, if still below the exaggerated estimates that circulate in media and popular discourse. Figures for migrant flows are no more complete than those for migrant stock. The number of permanent-residence permits issued by the Department of Home Affairs in recent years has been below 10 000 a year — the figure was only 1 283 in 2012 and 6 801 in 2013, with the main countries of origin being, in order, Zimbabwe, Democratic Republic of the Congo (DRC), India, Nigeria, China and the UK (Stats SA 2013a, 2014). A far higher number of temporary-residence permits are issued each year: 141 550 in 2012 and 101 910 in 2013, with Zimbabwe and Nigeria being the top two source countries, followed by India, China, Pakistan and Bangladesh (Stats SA 2013a, 2014). The total number of official annual resident admissions in recent years is therefore between 100 000 and 150 000. But this is far from the whole story.

What has unquestionably increased is the total number of foreign nationals entering South Africa, including tourists, students, work-permit holders, business people and other visitors. As an indication of the general scale of mobility, legal entries of foreigners into South Africa for all purposes increased from 1 million in 1990 to 5.1 million in 1996, over 9 million in 2008, and close to 14 million in 2012 (Stats SA 2013b). Not only are these numbers increasing; they are also increasingly global in origin. The number of entrants from other African countries rose from under a million in 1990 to 3.8 million in 1996 and 7.4 million in 2008, mainly from countries in the Southern African Development Community (SADC) region. The large majority of these entrants return home after a vacation, business trip or cross-border shopping excursion, but legal entrants also include those coming on a more long-term basis on work and other residence permits, and those who enter legally but become overstayers. In its annual tourism report for 2012, Statistics South Africa notes that 'the volume of departures of foreign travellers has been lower than that of arrivals throughout the thirteen-year period [2000–2012], with a notable widening of the gap since 2006' (Stats SA 2013b:7). Although some of these 'non-departures' will be people who remain as legal visitors and residents, and others are people who exit the country without their departure being recorded, an undetermined proportion are overstayers. Added to the overstayers is an indeterminable number of migrants who enter the country without being recorded at a formal border post or port of entry.

Estimates of the total number of irregular (ie undocumented) migrants present in South Africa are highly questionable and commonly exaggerated, and have ranged from 1 million to an implausible 10 million. As one reporter quipped, asking how many undocumented migrants there are in South Africa is like asking how long is a piece of string (IRIN 2009). The clandestine nature of irregular cross-border entry or overstaying makes it impossible to quantify. Nor are undocumented migrants easily captured in census or other demographic surveys. This lack of records also means their national origins are impossible to state with certainty, although nationals from neighbouring SADC countries and other African states predominate. The unsettled political and economic situation in Zimbabwe over the past decade and more has led to a significant increase in cross-border flows from that country as Zimbabweans have sought political refuge and economic livelihoods in South Africa (Crush & Tevera 2010). Although their precise number is unknown, Zimbabweans in South Africa number several hundred thousand, with the 2011 census recording 515 824 Zimbabweans between the ages of 15 and 64. These include legally recognised asylum seekers and refugees, Zimbabwean special-permit holders and other residence-permit

holders, as well as undocumented migrants (Crush & Tevera 2010; Crush et al 2015b; Hammar et al 2010).

More readily quantifiable is the increase in the number of refugees and asylum seekers since 1994. This is a reflection of post-apartheid legislative reform providing rights and protection for refugees, together with political crises and conflicts elsewhere on the continent, which have produced large numbers of forced migrants. At the end of 2013, over 230 000 asylum seekers were awaiting a refugee status determination decision, making South Africa one of the top destination countries for asylum seekers anywhere in the world (UNHCR 2014). The total number of recognised refugees in South Africa in 2014 stood at 65 881 (UNHCR 2014). Almost all of these refugees are African in origin (Crush & Chikanda 2014). The DRC has been a major source, as has Somalia (UNHCR 2014). Other national groups in significant numbers are Burundians, Rwandans and Ethiopians. In recent years, Zimbabweans have made up the majority of asylum seekers (ie people awaiting refugee status determination and holding an asylum seekers' permit). In 2010, out of 180 000 asylum seekers, close to 150 000 were Zimbabweans. Although fewer than 2 000 Zimbabwean asylum seekers have ever been granted refugee status, a special dispensation for Zimbabweans was announced by the Department of Home Affairs in 2009, under which four-year residence and work permits were issued to 245 000 Zimbabweans who were already in South Africa without visas or other permits (DoHA 2014a). These were reissued for a further four years in 2014.

Two categories of migration have undergone significant decline since 1994. One is formal, permanent immigration, recently well under 10 000 a year from highs of around 50 000 in the late 1970s and early 1980s (Peberdy 2009). Post-1994 immigration policy favours various categories of temporary work permits over permanent residence, for which the criteria are strict and the application process cumbersome. Within this declining overall number, an increasing proportion of legal, permanent immigrants are from African countries, and from Asian countries such as India and China (Stats SA 2013a, 2014). This represents an important demographic shift from the whites-only immigration policy of the apartheid era.

Another category of migrant that has seen a significant numerical decline is that of migrant mine workers from neighbouring countries. The proportion of workers in the gold-mining industry who are foreign migrants, as opposed to local residents or domestic migrants, rose from 47% in 1990 to a high of 59% in 1997, and then fell sharply to just 38% in 2006. By 2014 only 28% of the overall mining workforce was made up of foreign workers (Christie 2014). In absolute terms, this has effectively led to more than 100 000 fewer jobs for migrants from the region. This has had a dramatic effect on the economic

circumstances of households in the main source countries of Lesotho and Mozambique, and is one of the factors behind a growing number of female migrants undertaking cross-border migration to replace lost income from male former migrant mineworkers (Crush et al 2010; Dodson et al 2008).

Along with a growing diversity in terms of their national origins and official categories, migrants to South Africa are also increasingly diverse in terms of gender, age, education and skills. Among migrants from the region, there has been a diversification of labour and livelihood categories, with mining and agriculture remaining important, but with increasing migrant involvement in the informal commercial sector, including cross-border trading (Peberdy 2000; Pendleton et al 2006; Tawodzera et al 2015). For female migrants from the region, domestic service is the primary employment category, followed by various forms of trading activities (Dodson et al 2008). Longitudinally, cross-border migration from neighbouring countries is becoming more of a long-term occupational strategy than in the past, even when it retains a circular form (Pendleton et al 2006). Increasing numbers of young women from the region are engaging in migration practices previously found among young men, migrating independently for work and income-earning opportunities rather than as dependants or spouses of male migrants (Dodson 1998; Dodson et al 2008).

These, then, are the overall trends: less permanent immigration and more temporary migration, some legal but also undocumented; a dramatic increase in the number of refugees and asylum seekers; an Africanisation and de-Europeanisation, as it were, of migrant origins; informalisation of migrant livelihoods; and a degree of feminisation of migration — along with an increase in the overall number of migrants. Migration also falls across a spectrum of legality, with official immigration under various forms of residence permit; formal labour migration under work and corporate permits; legally determined refugees; asylum seekers, both recognised and otherwise; and various forms of undocumented or irregular migration. These diverse migrant flows have varying temporalities, from short-term stays and various forms of circular migration to long-term and permanent residence. Sometimes this complexity can be captured within the trajectories of individual migrants, who may start out being legal migrants but overstay and become irregular; or they may start by being undocumented but then become legally recognised as asylum seekers or refugees; or they may come to South Africa intending to stay only temporarily but then either voluntarily or involuntarily remain on a more permanent basis.

This complexity and heterogeneity are at odds with, although in part driven by, an immigration policy framework formulated within a narrowly conceived protectionist and nationalist agenda.

Policy framework

Migration to South Africa is governed by two main pieces of legislation: the Refugees Act 130 of 1998 and the Immigration Act 13 of 2002, with subsequent amendments. For some time after 1994, the apartheid-era Aliens Control Act 96 of 1991 continued to govern the country's immigration policy, with only minor tinkering to remove its explicitly racial provisions (Crush & Dodson 2007). The Aliens Control Act was not repealed until 2002 with the passage of the new Immigration Act. This Act finally came into force only in July 2005, after amendment in 2004, a full decade after the first democratic national election. The Immigration Act 13 of 2002 has been subject to further amendments, most recently in the Immigration Amendment Act 13 of 2011, along with frequent revisions to its accompanying regulations (see Immigration Amendment Act 19 of 2004; Immigration Amendment Act 3 of 2007; Immigration Amendment Act 13 of 2011; RG 2014). Refugee policy, by contrast, was relatively quickly enacted in a piece of legislation reflecting the new government's 1996 signing of the UN 1951 Convention and 1967 Protocol on Refugees, and the 1995 signing of the equivalent 1969 Organisation of African Unity Convention (Handmaker et al 2008). This was part of the process of post-apartheid legislative reform, including the terms of the country's international obligations as it was readmitted to the global community of nations.

In practice, refugee policy and treatment have fallen far short of the rights-respecting framework of the Refugees Act (CoRMSA 2014; Handmaker et al 2008). Unlike many other refugee-receiving states, South Africa does not house refugees and asylum seekers in camps. Instead, after an often arduous and dehumanising refugee determination process, successful applicants are provided with Section 24 refugee permits and effectively left to fend for themselves (Landau 2006). This makes them less visible as a refugee population compared to those in other parts of Africa (for example, Somalis in Kenya), and also less readily distinguishable from other categories of migrants in South Africa. In turn, this leads to frequent violation of refugees' rights and denial of their entitlements — for example, to education and healthcare (Crush & Chikanda 2014; Crush & Tawodzera 2011a, 2011b; Landau 2006). There have also been increasingly restrictive bureaucratic measures put in place that make it more difficult to claim asylum in South Africa, including closure of the Johannesburg, Port Elizabeth and Cape Town Refugee Reception Offices (RROs) and insistence that people apply for asylum at one of the three remaining RROs, in Musina, Pretoria and Durban (DoHA 2014b). As Amit (2012:13) rather dismally concludes:

> *As long as the Department continues to seek ways to circumvent its obligations under domestic and international refugee law, the system will continue to fail to fulfil its fundamental purpose — providing protection to individuals who have fled persecution or general conditions of instability.*

Immigration policy, as distinct from refugee policy, was one of the most protracted and problematic areas of post-apartheid legal reform. The reasons can be associated with two main factors. First are the anti-immigration implications of South Africa's post-1994 nation-building project, and conscious creation of a new national identity and polity (Peberdy 2001, 2009). The underlying official and political mentality right from the start was one of immigration restriction and control: how to keep 'aliens' (later 'foreigners') out rather than any opening up of the country's borders to freer regional movement, despite the government's political rhetoric of re-engaging with Africa. The second factor was the broader politics of the government of national unity, and in particular the role of the Inkatha Freedom Party (IFP) and its leader, Mangosuthu Buthelezi. As Minister of Home Affairs from 1994 to 2004, Buthelezi was primarily responsible for developing the new immigration policy framework. This meant that ANC/IFP party politics intruded into the law-making process. The Immigration Act 13 of 2002 was passed only after years of delay and prevarication, followed by considerable wrangling in the parliamentary committee for Home Affairs and between the minister and the Cabinet.

Essentially, the Immigration Act was supposed to facilitate access by South African employers to foreign skills, but only on a temporary basis. A number of defined permit categories allow temporary residence for work and business purposes. Other temporary-residence permits include visitors' permits, cross-border passes for SADC citizens and relatives' permits, but these do not allow their holders to work and are for strictly limited durations. Permanent residence is granted primarily on the following bases: legal residence on a work permit for a minimum of five years; an offer of permanent employment (in a job that cannot be filled by a South African national); or being a spouse or immediate dependant of a South African citizen or permanent resident. The Preamble to the Immigration Amendment Act 19 of 2004 states that the Act

> *aims at setting in place a new system of immigration control which ensures that ... economic growth is promoted through the employment of needed foreign labour, foreign investment is facilitated, the entry of exceptionally skilled or qualified people is enabled [and] skilled human resources are increased.*   (Immigration Amendment Act 19 of 2004, Preamble, para *(d)*)

While considerably more pro-migration than the Aliens Control Act, the Immigration Act is almost entirely economic in its framing, but narrowly so and in ways that could be argued to undermine the very economic motives that it purports to serve. Its provisions also stand in sharp contrast to the reality of regional migration demographics of often unskilled migrants working in the informal sector, rather than the exceptionally skilled or affluent immigrants that the Act envisages admitting. Also, as with refugee legislation, immigration law has been inconsistently and often harshly applied within an inefficient administrative machinery and an official culture that remains inherently anti-immigration (Crush & Dodson 2007).

Another element of migration policy since 1994 is the SADC Protocol on the Facilitation of Movement of Persons. SADC came into existence in 1992 as the successor to the Southern African Development Coordination Conference (SADCC), which had been created in 1980 as an affiliated group of nations seeking to reduce their dependence on apartheid-era South Africa and assist in bringing about the end of apartheid rule (SADC 1992). Namibia's independence and South Africa's liberation from apartheid led to the SADCC's reconstitution as a more formal group of nations under the SADC Treaty, and the inclusion of South Africa and Namibia as members. The Declaration and Treaty of the Southern African Development Community (SADC 1992) sets out the main objectives of SADC: 'To achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration' (SADC 2012). One might expect that such regional integration would involve freer movement of people across the region's borders. Indeed, article 5(2)*(d)* of the treaty states that SADC shall 'develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States'.

Twenty years later, the promised freedom of legal movement remains elusive. Early on, there were signs that southern Africa would develop an EU Schengen-style policy of unrestricted intra-regional mobility. A SADC workshop on the free movement of people was held in Harare in 1993 and a Draft Protocol on the Free Movement of Persons in the Southern African Development Community was produced in 1995 (Oucho & Crush 2001). The protocol was revised, then shelved, then revived and finally formalised on 18 August 2005 as the SADC Protocol on the Facilitation of Movement of Persons. The shift from the term 'free movement' to 'facilitation of movement' occurred at South Africa's behest and is more than merely semantic, as the protocol is essentially about making cross-border movement within existing national policies and bilateral agreements more streamlined and

efficient. Ten years on, the protocol has been signed by a majority of member states, but not yet ratified by the nine it needs to come into effect (Kitimbo 2014). The watered-down protocol certainly does little to establish any form of regional citizenship or genuinely free cross-border movement.

Xenophobia[1]

If government policy can be interpreted as resistant if not directly hostile to immigration, the same cannot be said for public attitudes towards immigrants. A pervasive climate of xenophobia has come to characterise post-apartheid South African society, targeted primarily at migrants of African origin (Crush et al 2008, 2015a; Desai 2010; Dodson 2010; Dodson & Oelofse 2000; Landau 2010, 2011; Manik & Singh 2013; Matsinhe 2011; Mosselson 2010; Neocosmos 2008; Nyamnjoh 2006; Pillay 2013). Right from 1994, African migrants have been subject to anti-immigrant attitudes and xenophobic violence, by 'ordinary South Africans' as well as by agents of the state (Crush et al 2008). Migrants are viewed as 'stealing jobs' from South African nationals, 'stealing women' and 'bringing disease' (Dodson & Oelofse 2000). Migrants report having their rights as workers denied by unethical employers (Rutherford 2008; Ulicki & Crush 2007). From the earliest years of the new democratic government, politicians and officials up to the highest levels, including Buthelezi when he was Minister of Home Affairs, have blamed illegal immigrants for placing strain on state resources or engaging in criminal activity. There have been incidents of police brutality, such as the case of a Mozambican taxi driver who died after being dragged behind a police vehicle in Johannesburg in 2012; indiscriminate arrests of suspected foreigners on the basis of accent, appearance or vaccination marks; and a number of rights abuses against foreign nationals at facilities like the Lindela Repatriation Centre (Klaaren & Ramji 2001; Manik & Singh 2013).

The outburst of xenophobic violence in South Africa in 2008, which attracted worldwide attention and condemnation, was therefore an expression of deep-seated negative attitudes towards immigrants on the part of many South Africans. SAMP's xenophobia survey in 2006 showed that almost half (47%) of South Africans supported or strongly supported the deportation of foreign nationals, including legal residents, and as many as three-quarters (74%) supported a policy of deportation for any immigrant not contributing economically to South Africa (Crush et al 2008). At least two-thirds were of the opinion that undocumented migrants

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1   This section is a summarised and adapted version of a paper previously published in *Africa Today* (see Dodson 2010).

should be extended no rights or protections whatsoever. Only 47% believed that refugees warrant protection. The 2010 survey showed some lessening of anti-immigrant feeling, nevertheless a quarter of respondents said they would like to see all migrants deported. The same proportion indicated that they would take action to prevent an immigrant from moving into their neighbourhood, with 11% prepared to use violence (Crush et al 2013).

Strong differences of opinion have emerged about the origins and root causes of xenophobia in South Africa (Dodson 2010; Landau 2011; Mosselson 2010; Neocosmos 2008, 2010; Pillay 2008; Sharp 2008a, 2008b). Some of these explanations are mutually reinforcing, or act at different scales, whereas others are more competing, whether in terms of the primacy of economic, political or cultural factors, or the relative importance of individual versus structural, and elite versus grass-roots determinants.

Perhaps most common are economic or material explanations. In this line of argument, poor (still largely black) South African nationals see foreign Africans as competing with them for jobs, housing, and other services and resources to which they feel entitled. Meanwhile, wealthier South Africans, black and white, resent paying taxes to fund the provision of services to non-citizens. At the local level, this produces what has been described as an 'ethnicised political economy' in which 'microeconomic friction is displaced into hate-filled nationalism' (Manzi & Bond 2008). There is some validity in the idea of immigrants 'stealing jobs' — not because employment is a zero-sum game, but because immigrants, especially those not legally permitted to work in South Africa, are less likely to seek redress for low wages or exploitative employment conditions. Some employers favour immigrant workers, who are said to work harder or be more obedient than local labour (Griffin 2011; Sharp 2012). South Africa's high rate of unemployment, especially among black South Africans, exacerbates the intensity of competition for jobs and livelihoods in both formal and informal sectors of the economy, and in some sectors and localities South African workers probably do lose out in labour market competition.

A second axis of explanation is social, or perhaps rather sociopolitical. This line of argument proposes that the post-apartheid state's construction of an internally inclusive, non-racial sense of South African national identity inevitably meant the creation of a new oppositional 'other', and that this 'other' is essentially defined as 'non-South Africans' (Murray 2003; Peberdy 2001). The most clear and visible manifestation of this 'other' is foreign Africans living in South Africa, described by Murray (2003:460) as 'the ultimate strangers — the new helots — within the social landscape of South African cities'. In such explanations, xenophobia represents an unintended negative consequence of post-apartheid nation-building.

Closely and causally linked to this is the third type of explanation, namely cultural stereotyping and scapegoating as the basis for xenophobia (Harris 2002; Matsinhe 2011; Morris 1998). Increased immigration from other African countries has brought South Africans into direct contact with foreign Africans to a far greater extent than hitherto. During the apartheid era, African immigration was almost entirely prohibited, but for exceptions such as the tightly controlled migration of mine labour, and black South Africans were for the most part prohibited from travelling abroad. Post-apartheid African immigrants have come from a far wider, more pan-African set of source countries than at any time in South Africa's history (Morris & Bouillon 2001; Western 2001). Stereotyping of foreign Africans by South Africans essentialises and exaggerates perceived cultural differences and thus gives rise to prejudice and antagonism. Matsinhe (2011) has described this as 'apartheid vertigo', with xenophobia as a form of externalised and projected self-loathing.

Other explanations for xenophobia lie in realms of the political: the politics of defining and defending citizenship and its associated rights, and the politics of leadership and elite discourses on immigration. Xenophobic attitudes are seen as rooted in black South Africans' hard-won acquisition of the full rights and benefits of citizenship so long denied them, and their subsequent jealous protection of those rights and benefits against the perceived threat that they might be undermined or usurped by non-citizens (Murray 2003; Nyamnjoh 2006). Certainly there is evidence of popular confusion over which rights are universal, regardless of legal status, which rights apply to all who legally live in South Africa and which rights are restricted to citizens. There is also confusion about who is legally entitled to live and work in South Africa, and have access to healthcare and education and so on (Crush & Tawodzera 2011a, 2011b; Crush et al 2008; Mattes et al 1999). Such confusion is itself a potential source of conflict between South African citizens and those who are not South African citizens, often conflated with being 'illegal' (Danso & McDonald 2001; Fine & Bird 2006; Jacobs & McDonald 2005; Vigneswaran 2007).

Lack of political leadership must also be acknowledged as a factor (Crush et al 2008; Steinberg 2008a, 2008b). Among senior government figures, including three of the post-apartheid presidents, attitudes towards foreign Africans in South Africa have been at best ambivalent and occasionally extremely negative. Mandela, in a speech on the National Day of Safety and Security in October 1994, stated that 'the fact that illegal immigrants are involved in violent criminal activity must not tempt us into the dangerous attitude which regards all foreigners with hostility' (Mandela 1994). Successive ministers of Home Affairs and of Safety and Security have made similar remarks, identifying 'illegal immigrants' and 'foreigners' as a

drain on resources and a security threat. Such language, with the prefacing of 'immigrant' with the qualifier 'illegal', became almost a leitmotif, serving to promote the association of immigrants with not just illegal migrant status but actual criminality, despite evidence that African immigrants are far more likely to be victims than perpetrators of crime (Danso & McDonald 2001; Harris 2002). Such elite discourses serve to fuel rather than curb so-called grass-roots xenophobia.

A more troubling elite discourse on xenophobia is denial of its very existence, first articulated by ex-president Thabo Mbeki. On 3 July 2008, Mbeki addressed a gathering in tribute to victims of the attacks on African migrants, saying:

> What happened during those days was not inspired by possessed nationalism, or extreme chauvinism, resulting in our communities violently expressing the hitherto unknown sentiments of mass and mindless hatred of foreigners — xenophobia ... I heard it said insistently that my people have turned or become xenophobic ... I wondered what the accusers knew about my people which I did not know. And this I must also say — none in our society has any right to encourage or incite xenophobia by trying to explain naked criminal activity by cloaking it in the garb of xenophobia.   (Mbeki 2008)

Xenophobia could not readily be accommodated within Mbeki's discourse of an African Renaissance and was therefore simply denied, either by him or on behalf of his 'people'. More directly, Mbeki's weak stance on Zimbabwe and the resulting failure of South Africa and other SADC countries to intervene early and effectively in Zimbabwe's political crisis must also carry part of the blame. That political crisis and the collapse of the Zimbabwean economy led to the large influx of Zimbabweans into South Africa, many of whom were among the victims of the 2008 attacks. Mbeki's denialist argument is now the standard ANC explanation whenever there are attacks on African migrants.

Although debate continues, no one has yet fully explained either the prevalence of xenophobia in South Africa or how xenophobia broke out into specific acts of brutality in 2008 and again in 2015. Most analysts, however, point to the intersection and indeed co-constitution of political, economic and social factors. As Landau (2011:3) argues: 'Reflecting the by-products of the South African state's efforts to guide its citizens to salvation through economic transformation, outsiders have come to be understood as a threatening obstacle to achieving justice and retribution for decades of discrimination and indignity.' Immigrants and refugees continue to experience everyday forms of discrimination as well as difficulty accessing even those state services and rights to which they are legally entitled.

Somalis in particular continue to be victims of violence in what are isolated but clearly targeted incidents (Amnesty International 2014). In the absence of concerted public activism or political leadership, popular xenophobia and official schizophrenia on immigration are likely to persist.

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Under Zuma, there has been a marked silence on immigration in general and xenophobia in particular. Yet actions speak louder than words. Changes to the refugee determination process have seen the closure of some offices and an increasingly obstructive bureaucratic machinery, making the process of securing and renewing asylum seekers' permits and refugee determination even more onerous (Lawyers for Human Rights 2012). Amendments to the Immigration Act and its regulations have seen an increase in penal sanctions for visa overstayers in ways that have been described by human-rights organisations as overly harsh (Lawyers for Human Rights 2014). These changes suggest a continuation or even hardening of anti-immigrant attitudes on the part of the state. Also, as in most other national contexts, immigration in South Africa has become increasingly securitised. A new Border Management Agency is to be established by the end of 2016. Establishing this new agency and the recent changes to immigration regulations were among the main topics in Minister of Home Affairs Malusi Gigaba's 2014 budget vote speech to Parliament. He echoed his predecessors when he framed immigration management as a matter of defending national security and protecting citizens' rights, while denying any accusation of xenophobia:

> As well as facilitating the streamlining of our permitting regime, improving the administration of our visa-issuance, and regulating human movement into and out of South Africa, the new regulations enhance our security by addressing areas of weakness, risk and abuse … We reject with contempt any suggestion that these regulations are part of an Afrophobic agenda to keep Africans or any nationality for that matter out of South Africa … We value the contribution of fellow Africans from across the continent living in South Africa and that is why we have continued to support the AU and SADC initiatives to free human movement; but this cannot happen haphazardly, unilaterally or to the exclusion of security concerns.   (Gigaba 2014)

In a piece titled 'Belonging: Why South Africans refuse to let Africa in' on the blog Africa is a country, Johannesburg resident and social activist Sisonke Msimang responded to Gigaba's speech:

The image of Africa and 'Africans' as haphazard, disorderly and ultimately threatening is in stark contrast to South Africa and South Africans as organised, efficient and (ahem) peace-loving. The subtext of Gigaba's statement is that South Africans require protection from 'foreigners' who are hell bent on imposing their chaos and violence on us. (Msimang 2014)

Almost all analysts and commentators identify the origins of South Africa's exclusionary attitude towards African immigrants in the racism, nationalism, violence and isolation of the apartheid era. It is neither sufficient nor accurate, however, to place the blame entirely on the apartheid legacy. To do so is to suggest that xenophobia will simply fade away as that legacy weakens, rather than seeing it as also embedded in the construction of post-apartheid citizenship and ongoing contestation over the social contract between state and citizen.

As Hart (2013) argues in *Rethinking the South African Crisis*, South Africa's post-apartheid nation-building project was framed not only in terms of political and civil rights, such as the right to vote and freedom of speech, but also socio-economic rights to education, housing, water, electricity and, in the words of the ANC 1994 campaign slogan, 'a better life for all'. The post-apartheid state's inability to deliver that better life for all its citizens has led not only to popular protest against the state, but also to hostility towards non-citizens in the rise of a virulent new nationalism. The ANC government, similarly, continues to scapegoat immigrants for undermining its capacity to deliver on its promises and obligations to its citizenry. Although a theoretical discussion is beyond the scope of this chapter, we echo Fourchard and Segatti (2015), who, in their analysis of xenophobia in a number of different African country contexts, including South Africa, point to particular types of nationalism and political subjectivity that emerged from the liberation struggle. In South Africa, as elsewhere, contradictory narratives and practices of inclusion and exclusion are evident in everything from national immigration policy to everyday interpersonal encounters. Two decades after liberation, South Africans' ideas of citizenship and belonging remain contested.

References

Amit R. 2012. No way in: Barriers to access, service and administrative justice at South Africa's Refugee Reception Offices. Johannesburg: African Centre for Migration and Society.

Amnesty International. 2014. South Africa: Government and police failing to protect Somalis from deadly attacks. Available: http://www.amnesty.org/en/news/south-africa-government-and-police-failing-protect-somali-refugees-deadly-attacks-2014-06-12. (Accessed 10 October 2014).

Christie S. 2014. Labour pains. Johannesburg: TEBA. Available: http://www.teba.co.za/downloads/teba-mining-labour-earth-2014.pdf. (Accessed 6 October 2014).

CoRMSA. Consortium for Refugees and Migrants in South Africa. 2014. The Consortium for Refugees and Migrants in South Africa (CoRMSA) joins the rest of South Africa in commemorating South African Human Rights Day. *CoRMSA News*, March 2014.

Crush J. 2014. Southern hub: The globalization of migration to South Africa. In R Lucas. (ed.). *International Handbook on Migration and Economic Development*. London: Edward Elgar.

Crush J & Chikanda A. 2014. Forced migration in southern Africa. In E Fiddian-Qasmiyeh, G Loescher, K Long & N Sigona. (eds). *The Oxford Handbook of Refugee and Forced Migration Studies*. Oxford: Oxford University Press.

Crush J, Chikanda A & Skinner C. (eds). 2015a. *Mean Streets: Migration, Xenophobia and Informality in South Africa*. Ottawa and Cape Town: Southern African Migration Programme, African Centre for Cities and International Development Research Centre.

Crush J, Chikanda A & Tawodzera G. 2015b. The third wave: Mixed migration from Zimbabwe to South Africa. *Canadian Journal of African Studies*, 49(2):363–382.

Crush J & Dodson B. 2007. Another lost decade: The failures of South Africa's post-apartheid migration policy. *Tijdschrift voor Economische en Sociale Geografie*, 98(4):436–454.

Crush J, Dodson B, Gay J & Leduka C. 2010. Migration, remittances and gender-responsive local development: The case of Lesotho. Santo Domingo: UN International Research and Training Institute for the Advancement of Women.

Crush J & Frayne B. (eds). 2007. The migration-development nexus in southern Africa. *Development Southern Africa*, 24(1):1–23 (special issue).

Crush J, Jeeves A & Yudelman D. 1991. *South Africa's Labour Empire: A History of Black Migrancy to the Gold Mines*. Boulder, Colorado: Westview Press and Cape Town: David Philip.

Crush J & McDonald D. (eds). 2000. Transnationalism, African immigration, and new migrant spaces in South Africa. *Canadian Journal of African Studies*, 34(1):1–19.

Crush J & McDonald D. (eds). 2001. Evaluating South African immigration policy after apartheid. *Africa Today*, 48(3):1–13 (special issue).

Crush J, McDonald D, Williams V, Lefko-Everett K, Dorey D, Taylor D & La Sablonniere R. 2008. The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa. *Migration Policy Series* No. 50. Available: http://www.queensu.ca/samp/sampresources/samppublications/policyseries/Acrobat50.pdf. (Accessed 15 April 2016).

Crush J, Ramachandran S & Pendleton W. 2013. Soft targets: Xenophobia, public violence and changing attitudes to migrants in South Africa after May 2008. Cape Town: Southern African Migration Programme.

Crush J & Tawodzera G. 2011a. Medical Xenophobia: Zimbabwean Access to Health Services in South Africa. Cape Town: Idasa and Kingston, Ontario: Southern African Research Centre.

Crush J & Tawodzera G. 2011b. Right to the Classroom: Educational Barriers for Zimbabweans in South Africa. Cape Town: Idasa and Kingston, Ontario: Southern African Research Centre.

Crush J & Tevera D. (eds). 2010. *Zimbabwe's Exodus: Crisis, Migration, Survival.* Cape Town: Idasa and Ottawa: International Development Research Centre.

Crush J & Williams V. 2010. Labour migration trends and policies in Southern Africa. *SAMP Migration Policy Brief* No. 23.

Danso R & McDonald D. 2001. Writing xenophobia: Immigration and the print media in post-apartheid South Africa. *Africa Today*, 48(3):115–137.

Desai A. 2010. After the rainbow: Following the footprints of the May 2008 xenophobic violence in South Africa. *Review of African Political Economy*, 37(123):99–105.

Dodson B. 1998. Women on the move: Gender and cross-border migration to South Africa. Cape Town: Idasa and Kingston, Ontario: Southern African Migration Programme.

Dodson B. 2010. Locating xenophobia: Debate, discourse, and everyday experience in Cape Town, South Africa. *Africa Today*, 56(3):2–22.

Dodson B & Oelofse C. 2000. Shades of xenophobia: In-migrants and immigrants in Mizamoyethu, Cape Town. *Canadian Journal of African Studies*, 34(1):124–148.

Dodson B with Simelane HS, Tevera D, Green T, Chikanda A & De Vletter F. 2008. Gender, migration and remittances in Southern Africa. Cape Town: Idasa and Kingston, Ontario: Southern African Research Centre.

DoHA. Department of Home Affairs. 2014a. Remarks by Minister Malusi Gigaba on the announcement of the Zimbabwean special dispensation permit in Pretoria, 12 August 2014. Available: http://www.dha.gov.za/index.php/statements-speeches/506-remarks-by-minister-malusi-gigaba-on-the-announcement-of-the-zimbabwean-special-dispensation-permit-in-pretoria-12-august-2014. (Accessed 15 October 2014).

DoHA. Department of Home Affairs. 2014b. Reasons for the decision of the Director-General ('DG') of the Department of Home Affairs ('the Department') made on 31 January 2014 in respect of the future of the Cape Town Refugee Reception Office. Available: http://www.scalabrini.org.za/wp-content/uploads/2012/11/Decision-of-Director-General-on-future-of-Cape-Town-Refugee-Reception-Office.pdf. (Accessed 15 October 2014).

Fine J & Bird W. 2006. Shades of prejudice: An investigation into the South African media's coverage of racial violence and xenophobia. Johannesburg: Centre for the Study of Violence and Reconciliation.

Fourchard L & Segatti A. 2015. Xenophobia and citizenship: The everyday politics of exclusion and inclusion in Africa. *Africa*, 85(1):2–12.

Gigaba M. 2014. Budget vote speech 2014 by Minister of Home Affairs. Available: http://www.dha.gov.za/index.php/statements-speeches/489-address-by-the-minister-of-home-affairs-mr-malusi-gigaba-mp-on-the-occasion-of-budget-vote-11-at-the-extended-public-committee-on-home-affairs. (Accessed 15 October 2014).

Griffin L. 2011. Unravelling rights: 'Illegal' migrant domestic workers in South Africa. *South African Review of Sociology*, 42(2):83–101.

Hammar A, McGregor J & Landau L. (eds). 2010. The Zimbabwe crisis through the lens of displacement. *Journal of Southern African Studies*, 36(2):263–283 (special issue).

Handmaker J, De la Hunt LA & Klaaren J. (eds). 2008. *Advancing Refugee Protection in South Africa*. New York and Oxford: Berghahn Books.

Harries P. 1994. *Work, Culture and Identity: Migrant Laborers in Mozambique and South Africa, c.1860–1910*. Portsmouth, NH: Heinemann, London: James Currey and Johannesburg: Wits University Press.

Harris B. 2002. Xenophobia: A new pathology for a new South Africa. In D Hook & G Eagle. (eds). *Psychopathology and Social Prejudice*. Cape Town: UCT Press.

Hart G. 2013. *Rethinking the South African Crisis: Nationalism, Populism, Hegemony*. Scottsville: University of KZN Press.

IRIN. Integrated Regional Information Networks. 2009. South Africa: How many undocumented migrants? Pick a number. *IRIN News*, 13 November 2009. Available: http://www.irinnews.org/report/87032/south-africa-how-many-un documented-migrants-pick-a-number. (Accessed 2 October 2014).

Jacobs S & McDonald D. 2005. Understanding press coverage of cross-border migration in Southern Africa since 2000. Cape Town: Idasa and Kingston, Ontario: Southern African Research Centre.

Jeeves A. 1985. *Migrant Labour in South Africa's Mining Economy: The Struggle for the Gold Mines' Labour Supply, 1890–1920*. Kingston and Montreal: McGill-Queen's University Press.

Kitimbo A. 2014. *Is it Time for Open Borders in Southern Africa? The Case for Free Labour Movement in SADC*. Johannesburg: The Brenthurst Foundation.

Klaaren J & Ramji J. 2001. Inside illegality: Migration policing in South Africa after apartheid. *Africa Today*, 48(3):35–47.

Klotz A. 2012. South Africa as an immigration state. *Politikon: South African Journal of Political Studies*, 39(2):189–208.

Landau L. 2006. Protection and dignity in Johannesburg: Shortcomings of South Africa's urban refugee policy. *Journal of Refugee Studies*, 19(3):308–327.

Landau L. 2010. Loving the alien? Citizenship, law, and the future in South Africa's demonic society. *African Affairs*, 109(435):213–230.

Landau L. (ed.). 2011. *Exorcising the Demons Within: Xenophobia, Violence and Statecraft in Contemporary South Africa*. Johannesburg: Wits University Press.

Lawyers for Human Rights. 2012. Red tape ensnares asylum seekers in South Africa. Available: http://www.lhr.org.za/news/2012/red-tape-ensnares-asylum-seekers-south-africa. (Accessed 13 October 2014).

Lawyers for Human Rights. 2014. Lawyers for Human Rights submission on the draft Immigration Act regulations, 2014. Available: http://www.lhr.org.za/sites/lhr.org.za/files/lhr_submission_on_immigration_act_regulations_feb_2014.pdf. (Accessed 13 October 2014).

Mandela N. 1994. Address on the National Day of Safety and Security, 15 October 1994. Available: http://www.mandela.gov.za/mandela_speeches/1994/941015_safety.htm. (Accessed 1 October 2014).

Manik S & Singh A. (eds). 2013. Exploring and exposing xenophobia in social spaces in South Africa. *Alternation* 20(7):1–8 (special issue).

Manzi T & Bond P. 2008. Xenophobia and the South African working class. *Pambazuka News 375*, 27 May 2008.

Matsinhe D. 2011. *Apartheid Vertigo: The Rise in Discrimination against Africans in South Africa*. Farnham, Surrey, and Burlington, VT: Ashgate.

Mattes R, Taylor D, McDonald D, Poore A & Richmond W. 1999. Still waiting for the barbarians: South African attitudes to immigrants and immigration. Cape Town: Idasa and Kingston, Ontario: Southern African Migration Programme.

Mbeki T. 2008. Speech at a tribute to the victims of the May 2008 attacks, Pretoria, 3 July 2008. Available:http://www.thepresidency.gov.za/pebble.asp?relid=3330. (Accessed 1 October 2014).

McDonald D. (ed.). 2000. *On Borders: Perspectives on International Migration in Southern Africa*. New York and Cape Town: St Martin's Press and Kingston, Ontario: Southern African Migration Programme.

Moodie TD with Ndatshe V. 1994. *Going for Gold: Men, Mines, and Migration*. Berkeley: University of California Press.

Morris A. 1998. 'Our fellow Africans make our lives hell': The lives of Congolese and Nigerians living in Johannesburg. *Ethnic and Racial Studies*, 21(6):1116–1136.

Morris A & Bouillon A. (eds). 2001. *African Immigration to South Africa: Francophone Migration in the 1990s*. Pretoria: Protea Boekhuis.

Mosselson A. 2010. 'There is no difference between citizens and non-citizens anymore': Violent xenophobia, citizenship and the politics of belonging in post-apartheid South Africa. *Journal of Southern African Studies*, 36(3):641–655.

Msimang S. 2014. Belonging: Why South Africans refuse to let Africa in. Available: http://africasacountry.com/belonging-why-south-africans-refuse-to-let-africa-in/. (Accessed 20 October 2014).

Murray C. 1981. *Families Divided: The Impact of Migrant Labour in Lesotho*. Cambridge: Cambridge University Press.

Murray M. 2003. Alien strangers in our midst: The dreaded foreign invasion and 'Fortress South Africa'. *Canadian Journal of African Studies*, 37(2–3):440–466.

Neocosmos M. 2008. The politics of fear and the fear of politics: Reflections on xenophobic violence in South Africa. *Journal of Asian and African Studies*, 43(6):586–594.

Neocosmos M. 2010. *From 'Foreign Natives' to 'Native Foreigners': Explaining Xenophobia in Post-apartheid South Africa*. 2nd ed. Dakar: CODESRIA.

Nyamnjoh F. 2006. *Insiders and Outsiders: Citizenship and Xenophobia in Contemporary Southern Africa*. Dakar: CODESRIA.

Oucho J & Crush J. 2001. Contra free movement: South Africa and the SADC Migration Protocols. *Africa Today*, 48(3):139–158.

Peberdy S. 2000. Mobile entrepreneurship: Informal cross-border trade and street trade in South Africa. *Development Southern Africa*, 17(2):201–219.

Peberdy S. 2001. Imagining immigration: Inclusive identities and exclusive policies in post-1994 South Africa. *Africa Today*, 48(3):15–32.

Peberdy S. 2009. *Selecting Immigrants: National Identity and South Africa's Immigration Policies, 1910–2008*. Johannesburg: Wits University Press.

Peberdy S & Crush J. 2007. Histories, realities and negotiating free movement in Southern Africa. In A Pecoud & P de Guchteneire. (eds). *Migration Without Borders* Paris: UNESCO.

Pendleton W, Crush J, Campbell E, Green T, Simelane H, Tevera D & De Vletter F. 2006. Migration, remittances and development in Southern Africa. Cape Town: Idasa and Kingston, Ontario: Southern African Research Centre.

Pillay S. 2008. 'Fortress SA'? A response to John Sharp. *Anthropology Today*, 24(5):22.

Pillay S. 2013. Anxious urbanity: Xenophobia, the native subject and the refugee camp. *Social Dynamics*, 39(1):75–91.

Polzer T. 2005. *Adapting to Changing Legal Frameworks: Mozambican Refugees in South Africa*. Johannesburg: University of the Witwatersrand Forced Migration Studies Programme.

Rutherford B. 2008. An unsettled belonging: Zimbabwean farm workers in Limpopo province, South Africa. *Journal of Contemporary African Studies*, 26(4):401–415.

Segatti A. 2011. Reforming South African immigration policy in the post-apartheid period, 1990–2010. In A Segatti & L Landau. (eds). *Contemporary Migration to South Africa: A Regional Development Issue*. Washington: World Bank.

Sharp J. 2008a. 'Fortress SA': Xenophobic violence in South Africa. *Anthropology Today*, 24(4)1–3.

Sharp J. 2008b. 'Fortress SA'? John Sharp responds. *Anthropology Today*, 24(5):22.

Sharp M. 2012. Day labour and xenophobia in South Africa: The need for mixed methods approaches in policy-orientated research. *Urban Forum*, 24(2):251–268.

SADC. Southern African Development Community. 1992. Declaration and Treaty of the Southern African Development Community. Gaborone: SADC Secretariat.

SADC. Southern African Development Community. 2012. History and treaty. Available: http://www.sadc.int/about-sadc/overview/history-and-treaty/. (Accessed 14 October 2014).

Stats SA. Statistics South Africa. 2012. Census 2011, census in brief. Pretoria: Statistics South Africa.

Stats SA. Statistics South Africa. 2013a. Documented immigrants in South Africa, 2012. Pretoria: Statistics South Africa.

Stats SA. Statistics South Africa. 2013b. Tourism 2012. Pretoria: Statistics South Africa.

Stats SA. Statistics South Africa. 2014. Documented immigrants in South Africa, 2013. Pretoria: Statistics South Africa.

Steinberg J. 2005. *A Mixed Reception: Mozambican and Congolese Refugees in South Africa*. Pretoria: Institute for Security Studies.

Steinberg J. 2008a. End of the rainbow. *Guardian Weekly*, 24 October 2008:25–27.

Steinberg J. 2008b. *South Africa's Xenophobic Eruption*. Pretoria: Institute for Security Studies.

Tawodzera G, Chikanda A, Crush J & Tengeh R. 2015. *International Migrants and Refugees in Cape Town's Informal Economy*. Cape Town: Southern African Migration Programme and Waterloo, Ontario: International Migration Research Centre.

Ulicki T & Crush J. 2007. Poverty, gender and migrancy: Lesotho's migrant farmworkers in South Africa. *Development Southern Africa*, 24(1):155–172.

UNHCR. UN High Commissioner for Refugees. 2014. 2014 UNHCR country operations profile – South Africa. Available: http://www.unhcr.org/pages/49e485aa6.html. (Accessed 2 October 2014).

Vigneswaran D. 2007. *Free Movement and the Movement's Forgotten Freedoms: South African Representation of Undocumented Migrants*. Oxford: University of Oxford Refugee Studies Centre.

Western J. 2001. Africa is coming to the Cape. *Geographical Review*, 914:617–640.

Legislation

Aliens Control Act 96 of 1991. Available: https://www.lawsoc.co.za/upload/files/alienscontrolact.htm. (Accessed 9 October 2014).

Immigration Act 13 of 2002. Available: http://www.treasury.gov.za/legislation/acts/2002/act13-02.pdf. (Accessed 9 October 2014).

Immigration Amendment Act 3 of 2007. Available: http://www.gov.za/sites/www.gov.za/files/a3-2007.pdf. (Accessed 9 October 2014).

Immigration Amendment Act 13 of 2011. Available: http://www.gov.za/sites/www.gov.za/files/a13_2011_0.pdf. (Accessed 9 October 2014).

Immigration Amendment Act 19 of 2004. Available: http://www.gov.za/sites/www.gov.za/files/a19-04_1.pdf. (Accessed 9 October 2014).

Refugees Act 130 of 1998. Available: http://www.lhr.org.za/policy/south-african-refugees-act-no-130-1998. (Accessed 9 October 2014).

RG. Regulation Gazette. 2014. Commencement of the Immigration Amendment Acts of 2007 and 2011. Pretoria: *Government Gazette* 587 No. 37679, 22 May 2014.

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Afterword

As I write this brief afterword on the eve of the 2016 South African local government elections, the themes of *Domains of Freedom* – justice, citizenship and social change – are at the forefront of vigorous public debate, and quite literally shot through with contention. This has been by far the most violent election on record, with the *Mail & Guardian* of 29 July to 4 August reporting 23 election-related killings thus far.

The same newspaper reports that the governing African National Congress (ANC) is preparing to lose two of its former strongholds (Tshwane and Nelson Mandela Bay, formerly known as Pretoria and Port Elizabeth respectively). The ANC assures its supporters that Mandela will turn in his grave if the opposition Democratic Alliance (DA) takes over the city named for him; and the DA has appropriated Mandela's name for their own electoral ambitions on the grounds that the Mandela 'brand' is public property.

Over the past several weeks another major drama has played out, as courts overturned decisions by the management of the South African Broadcasting Corporation, the public broadcaster, to ban reporting on violent protests and suspend journalists who defied or criticised this decree.

In these turbulent times, the need for deeper understandings of rapidly changing forces in post-apartheid South Africa has never been greater. Rejecting what they see as the reductionist tendencies of many analyses, the editors of *Domains of Freedom* have assembled an extremely valuable set of insights into the profoundly and increasingly complex forces that have taken shape in South Africa since 1994.

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Johannesburg
30 July 2016