RIDING THE TRANSITIONAL ROLLERCOASTER

the shifting relationship between civil society and the Constitution in post-apartheid South Africa

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  – Abahlali base Mjondolo protest the Slums Act at the Constitutional Court in Johannesburg, South Africa. Photographer: Sekwanele 2

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GLOSSARY

ABM	Abahlali base Mjondolo (Shack-dwellers Movement)
ACAOSA	Association for Community Based Advice Officers in South Africa
AEC	Anti-Eviction Campaign
AMCU	Association of Mineworkers and Construction Union
ANC	African National Congress
APF	Anti-Privatisation Forum
BCEA	Basic Conditions of Employment Act
BBBEE	Broad-Based Black Economic Empowerment
BEE	Black Economic Empowerment
CAPS	Curriculum and Assessment Policy Statements
CALS	Centre for Applied Legal Studies
CASAC	Council for the Advancement of the South African Constitution
CBO	Community-Based Organisation
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CCS	Centre for Civil Society
CEC	Central Executive Committee
CER	Centre for Environmental Rights
CORMSA	Consortium for Refugees and Migrants in South Africa
COSATU	Congress of South African Trade Unions
CSO	Civil Society Organisation
DA	Democratic Alliance
DMR	Department of Minerals and Energy
DOJ	Department of Justice
EE	Equal Education
EFF	Economic Freedom Fighters
EJNF	Environmental Justice Networking Forum
FXI	Freedom of Expression Institute
GEAR	Growth, Employment and Redistribution Programme
HRC	Human Rights Commission
HSRC	Human Sciences Research Council
ICASA	Independent Communications Authority of South Africa
IDASA	Institute for Democracy in South Africa
IDP	Integrated Development Plan
IPID	Independent Police Investigation Directorate
ISS	Institute for Security Studies
JSC	Judicial Services Commission
LAB	Legal Aid Board
LASA	Legal Aid South Africa
LHR	Lawyers for Human Rights
LPM	Landless People's Movement
LRA	Labour Relations Act
LRC	Legal Resources Centre

MDGs	Millennium Development Goals
MSA	Municipal Systems Act
MFMA	Municipal Finance Management Act
MPRDA	Mineral and Petroleum Resources Development Act
NADEL	National Association of Democratic Lawyers
NEMA	National Environmental Management Act
NGO	Non-Governmental Organisations
NIA	National Intelligence Agency
NPA	National Prosecuting Authority
NUMSA	National Union of Metalworkers of South Africa
ODAC	Open Democracy Advice Centre
OUTA	Opposition to Urban Tolling Alliance
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Access to Administrative Justice Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
POSIB	Protection of State Information Bill (the 'Secrecy Bill')
PR	proportional representation
R2K	Right to Know Campaign
RCL	Representative Council of Learners (schools)
RDP	Reconstruction and Development Programme
RGA	Regulation of Gatherings Act
SABC	South African Broadcasting Corporation
SACP	South African Communist Party
SACE	South African Council of Educators
SADC	Southern African Development Community
SALC	Southern Africa Litigation Centre
SAMWU	South African Municipal Workers Union
SAPS	South African Police Services
SARS	South African Revenue Service
SASSA	South African Social Security Agency
SASA	South African Schools Act
SATU	South African Teachers Union
SCA	Supreme Court of Appeal
SCOPA	Standing Committee on Public Accounts
SERI	Socio-Economic Rights Institute
SDCEA	South Durban Community Environmental Alliance
SJC	Social Justice Coalition
Sonke	Gender Justice
SSA	State Security Agency (also SASSA)
SWEAT	Sex Workers Education and Advocacy Task Force
TAC	Treatment Action Campaign
UISP	Upgrading Informal Settlements Programme

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INTRODUCTION

South Africa is fast approaching the 20th anniversary of the formal adoption of its Constitution. Not only does this provide an opportune moment to critically reflect on how this widely celebrated Constitution has shaped South Africa's overall political, economic and social journey, but also on the path that the consequent relationship between the Constitution and civil society[1] has travelled.

Casting our minds back to a time before the 1994 democratic breakthrough reminds us that the central political, social, economic and cultural edifice of the apartheid system in South Africa was built on the racialised foundation of a legally-framed, institutionalised violation of basic human rights. Indeed, the struggle against apartheid was, at its core, a struggle for the democratic reclamation of those human rights, whether civil-political or socio-economic. It was the popular strength and depth of this struggle that was primarily responsible for bringing an end to the apartheid system and ushering in a new democratic dispensation.

Within this historical setting then, it makes sense that one of the key requirements of a post-apartheid South Africa would be to lay down a new foundation; a deracialised, legally-framed and institutionalised affirmation of basic human rights. The adoption in 1996 of South Africa's new Constitution, containing a specific 'Bill of Rights' as well as the institutional architecture of a democratic system, represented the foundational layer of such an affirmation. The underlying rationale being that all the rights contained therein are, in and of themselves, basic human rights that are inherent, universal, inalienable and indivisible to every human being (in this case, as applied specifically to those living in South Africa).

Regardless of the historic and ongoing debates (some of which will be touched on later in this report) around whether South Africa's Constitution and constitutional framework represent a legal-institutional affirmation of basic human rights or alternatively, a well- constructed 'mask' that affirms and entrenches the social and economic status quo, the fact is that 20 years on the Constitution remains essential to any serious analysis and understanding of South Africa's developmental journey. Central to that journey is the relationship between the Constitution and civil society.

It is within such a contextual frame that this report is located. Conceived as one component of a multi-faceted research and archival project through the South African History Archive (SAHA), the primary aim is to explore the changing relationship between civil society and the South African Constitution. The core material used derives from thirty-three interviews conducted with leaders of a range of civil society organisations (CSOs) as well as individual activists, academics and lawyers [see list of interviewees at end of document]. Taken together, the interviews cover the three main 'sectors' of civil society which this research targets – namely:

- legal / litigation;
- NGO / academic;
- community / union / activist.

[1]Radical theorist Antonio Gramsci posited that 'civil society' was constituted by a wide range of social, economic and political forces that are contested within the institutional framework of capitalist society. As such, socio-economic and political progress and change was the result of the very forces of civil society struggling for societal hegemony (i.e., of ideas, of power relations) and not simply a matter of one or the other force capturing institutional (class) power. [See, David Forgacs, 1998]. For the purposes of this research project the term 'civil society', while broadly located within Gramsci's understanding, is understood to mean all progressive, non-state actors/organs and non-corporate entities that are socially, economically and politically active.

The interviews have been complemented by desktop research on crucial constitutional rights cases that have come before the Constitutional Court as well as relevant academic, legal and activist materials written over the past two decades on civil society's commentary on, outreach / advocacy about and interactions with, the Constitution.

Key issues informing this research are:

- The impact of the Constitution on the work of civil society;
- The changing attitudes of civil society towards, and levels of trust in, the Constitution;
- The extent to which the Constitution is accessible to civil society as a tool for transformation.

THE CONSTITUTION & THE CONSTITUTION-MAKING PROCESS

The relationship between the Constitution and civil society began long before the formal adoption of South Africa's Constitution. At the same time that many South African civil society organisations (CSOs) were heavily involved in the intense, multi-pronged mid-1980s internalised struggle against an increasingly ailing and desperate apartheid regime, informal talks towards a negotiated settlement were taking place between the main components of the exiled national liberation movement - the African National Congress (ANC) and the South African Communist Party (SACP) - and various representatives of the apartheid order. These talks, which represented the start of what would gradually become a more structured and formal process of negotiation out of which the Constitution would eventually emanate, were largely an elitist, closed-door affair.

A privileged minority coming from both sides of the racial, class and organisational divides and purporting to represent their respective 'masses', took most all the major decisions with little meaningful participatory and popular processes involving those forces of civil society - such as civics, unions, youth congresses, women's organisations and church groups - that formed the bulk of the liberation movement, which was as diverse as South African society itself.[2] As Ben Fine has pointed out:

> ...ANC-SACP approval was given to those who flew its flag, 'enemies of the people' were targeted and 'unity' was turned into a demand for political conformity ... the central problem was that the unity of the 'people' tended to be conceived in terms of an abstract and monolithic 'general will' discounting the actual and divergent empirical wills of its constituent members ...[3]

[2]In much of the literature on civil society, such anti-apartheid and revolutionary organisations/movements would not be considered to be part of 'civil society' since the apartheid system was itself not 'civil' (i.e. with an inclusive constitution, a culture of rights, representative democracy etc.). Such finer points might well be theoretically correct but as pointed out in the previous footnote, a more expansive definition (and thus application) of 'civil society' is employed for the purposes of this research.

[3]As quoted in Friedman, Steven and Maxine Reitzes (1996), 'Democratisation or Bureaucratisation?: Civil Society, the Public Sphere and the State in Post-apartheid South Africa', *Transformation* 29: 55-74, p.60

The cumulative impact was that crucially important decisions taken as to what would and would not be included in a future Constitution, alongside the perspectives and beliefs informing those decisions, were largely reflective of the practical political (both domestic and global) context within which the negotiations transpired. As an example; the progressive social and economic clauses in the 'Bill of Rights' that eventually found their way into the Constitution, such as a woman's right to freedom of choice, the abolition of the death penalty, the right to education and the right to water, were derived predominantly from the more universalist and liberal politics / perspectives of some of the leaders of the long-exiled liberation movement participants.

Complementarily, their inclusion (given the apartheid National Party's opposite stance) was clearly the result of an insider trade-off with other more conservative / status quo clauses. Examples here would be the exclusion of an explicit nationalisation clause, the legal sanctification of private property and the adoption of a provincial federalism, the latter two of which were never part of (the bulk of) civil society's vision of a post-apartheid society. Further, the practical realisation of various progressive rights clauses were immediately constrained by the inclusion of the 'reasonable' test and the 'available resources' equation.

There were some attempts to 'involve' civil society in the constitution-making process in the early 1990s. However, the general thrust of such 'involvement', outside of more specific intra-ANC Alliance meetings and processes, was through managed consultations[4]. While these various consultations with selected community structures alongside some public meetings and a 'constitutional talk line' did produce a plethora of written submissions to the Constitutional Assembly[5] when the draft Constitution was made public after years of negotiations, it was then presented as a document which axiomatically represented the will and desires of the vast majority of South Africans.

The Constitution was, and still remains, the product of political compromise. While most of all of civil society recognises this, there are widely varying interpretations of what it means for that same civil society. For some, despite these compromises, the Constitution represents a transformative document which at its core, seeks to "transform … political and social institutions and power relationships in a democratic, participatory and egalitarian direction"[6]. Thus, the vision that the Constitution offers is one of "a different society … based on substantive and procedural equality, as well as political freedom and democratic institutions such as the rule of law."[7] In this view, the Constitution makes civil society, and more particularly its poor / working class components, stronger; providing a catalytic tool in the struggle for the positive realisation of the rights contained therein as well as for what Mark Heywood calls a "radical reorganisation of society."

For others though, such as Roger Ronnie, the Constitution represents:

> …a kind of a double-edged sword. On the one hand [it] promises all these things, on the other hand it has all these safeguards that protects the rights of those people who have been historically advantaged and who continue to enjoy these advantages.

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[4]McKinley, Dale T. (1997), *The ANC and the Liberation Struggle: A Critical Political Biography*, London: Pluto Press

[5]Jagwanth, Saras (2003), 'Democracy, Civil Society and the South African Constitution: some challenges', Discussion Paper 65, Management of Social Transformations, UNESCO, p. 10

[6]Klare, Karl (1998), 'Legal culture and transformative constitutionalism', *South African Journal of Human Rights*, 14: 146-188, p. 150

[7]Calland, Richard (2013), 'Conclusion', in Bentley, K, Nathan, L and R Calland (Eds), *Falls the Shadow: Between the promise and the reality of the South African Constitution*, Cape Town: UCT University Press, p. 196

Some go further – Patrick Bond argues that the Constitution deludes civil society, given that:

> [it] facilitates inequality because it serves as a myth-making, deradicalising meme, with its grounding in property rights typically trumping activist claims to human (socio-economic) rights.

And, we even have representatives of the ruling ANC and government arguing - albeit for fundamentally different reasons - that the Constitution "reflects [a] great compromise ... tilted heavily in favour of forces against change ... [through] migrating substantial power away from the legislature and the executive and vesting it in the judiciary, Chapter 9 institutions and civil society movements."[8]

There can be little doubt that, in both its draft and final versions, the 'Bill of Rights' as well as the democratic institutional framework of government and governance that the Constitution frames and legitimates was broadly accepted. However, what must also be understood and appreciated is that the constitution-making process ensured that the relationship between civil society and the Constitution would, from its beginnings, be a contested and varied one.

As we will see, the subsequent attitude and approach of the new democratic state to the Constitution as well as the practical application and implementation of subsequent policies that flow from this framework and that are the major means through which the majority of civil society 'experiences' the various rights contained in the Constitution have become a constant source of serious political and social contestation.

MACRO CHANGES IN THE RELATIONSHIP BETWEEN CIVIL SOCIETY & THE CONSTITUTION

By the time the Constitution was formally adopted in 1996, the more immediate political economy of post-apartheid South Africa had been largely set. The first two years of the new democracy witnessed the ANC's gradual, even if at times contested, political and ideological acceptance of the broad framework of a globally dominant, neo-liberal political and economic orthodoxy.[9] For the poor / working class majority as well as a sizeable number of progressive CSOs and activists who were looking to the Constitution as a primary catalyst for political and socio-economic transformation, this meant that even before the constitutional journey had really gotten underway there was already a significant gap between constitutional promise and policy reality.

> **"I think now there's quite a kind of a distance between civil society... and the question of the Constitution. I don't think the constitution has a central... place in people's consideration for socio-economic change."**
> **– JOHN APPOLIS**

[8]Ramatlhodi, Ngoako (2011), 'ANC's fatal concessions', *The Times*, 1 September

[9]This was ameliorated, to some extent, by a period of intense legislative activity designed to repeal apartheid-era discrimination and facilitate new social and economic opportunities for 'historically disadvantaged' sectors of the population.

The neoliberal variant of capitalism embraced by the new ANC government, through the 1996 adoption of the ironically named Growth, Employment and Redistribution (GEAR) macro-economic programme was, and remains to this day, fundamentally at odds with the full realisation of the socio-economic rights set out in the constitution and also a significant barrier to the complementary enjoyment of the Constitution's civil-political rights[10]. As Richard Calland has put it rather civilly, "the model of capitalism that is practiced in South Africa ... will not bend sufficiently to the will of the Constitution."[11]

Making the start of the relational journey between civil society and the Constitution even more fractious was the fact that a large portion of independent and progressive non-governmental organisations (NGOs), community-based organisations (CBOs) and other political-social activists were demobilised and / or absorbed into the organisational framework of the ANC itself and also into the state apparatus. As a result (in the short-term at least), the political and organisational terrain for a robustly independent and active civil society with the ability and desire to counter the neoliberal thrust and push the rights boundaries of the constitutional promise, was severely curtailed.

Judith February captures the early contradictions well:

> We [in formalised CSOs] took for granted the fact that we've got a Constitution, the democratic framework's in place, all we need is to implement. A lot of us who'd ... opposed apartheid ... we always said we wanted to be critical allies of the transition, and so therefore we want to be constructive, we wanted to try and work alongside government where we can, but criticise where we also need to.
>
> We were so keen [for] the project to succeed. I do think that we were blind to certain things. I think we shied away a little bit ... because we wanted to give those in power the benefit of the doubt.

Long-time civil society lawyer Geoff Budlender confirms the subsequent macro-impact of what happened during those earlier post-1994 years. He points out that:

> ...in a sense, civil society was disarmed by the process. There was a demobilisation of civil society and of popular movements, the consequences of which we are still suffering.

The knock-on effects were substantial and long-lasting. Budlender continues:

> ...there was an over-optimistic expectation ... that the Constitution itself would make things happen ... an over-optimistic expectation about the capacity of government to make things happen and ... that government would always want constitutional rights effectively enforced or applied.

Cumulatively, these added up to what Budlender importantly calls, "a failure to see that rights only become real when they are asserted by ordinary people".

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[10]McKinley, Dale T. (2006), 'Democracy and Social Movements in South Africa', in Vishnu Padayachee (Ed), *Development Decade*, Cape Town: HSRC Press: 413-426

[11]Calland, Richard (2013), 'Conclusion', in Bentley, K, Nathan, L and R Calland (Eds), *Falls the Shadow: Between the promise and the reality of the South African Constitution*, Cape Town: UCT University Press, p. 202

In other words, the macro-political and economic context of both the constitution-making process and early post-1994 period framed and then catalysed a situation in which important elements of civil society were drawn onto an institutional-governance terrain that, to a large extent, strategically neutered them. This not only impacted on those CSOs and activists who consciously opted for a more 'insider' role but also on those community and social movement elements of civil society who remained 'outsiders'. S'bu Zikode from Abahlali base Mjondolo (ABM) surfaces the resultant conundrum:

> I think most of us thought it was the duty of somebody else from somewhere else, you know, to make sure that the things that appear in the Constitution really talk to, you know, the day to day lives of ordinary people.

The combined and contradictory result was that much of civil society confused tactical contingency with strategic necessity. Put differently, while tactical 'insider' engagement through and within the state and its (constitutionally-framed) institutional-legal-legislative architecture should no doubt have been part of civil society's 'tool kit', it should have been contingent on a strategic approach that prioritised grassroots organising, mobilisation and participation to contest the parallel structural, political and policy-related undermining of the Constitution's promise. David Fig notes the macro-consequence:

> Part of that thrust to (neo) liberalism and political conservatism [was a] moving away from the notion of popular participation, [of] embedding democracy in a kind of daily existence … we lost that.

This relational problematic is practically confirmed by Jacob van Garderen of Lawyers for Human Rights (LHR), one of the oldest and most prominent legal CSOs in South Africa:

> Through LHR's activities in the 90s, or that first ten years … there was a close relationship with parliament, with government departments and trying to make an input on how the constitution should be given effect through other legislation and policy. We enjoyed a fairly good relationship with parliament, with different government departments, but that changed over time, dramatically.
>
> We became less effective, we had less of a … good reception and we found ourselves more and more compelled to use more legal means to protect the rights of the groups and the individuals and the communities that came to our law clinics for legal assistance. We became less effective through advocacy and negotiation with different government departments to address unconstitutional practices and policies and we were left with very little other options than to approach the court. So if you look at the history of our activities … you'll see there's this shift away from engagement to litigation.

While 'insider' avenues for constitutional and related policy advocacy were being choked off, the state was moving full steam ahead with implementing neoliberal policies that were directly in opposition to the spirit and letter of both the socio-economic and civil-political rights set out in the Constitution. Because communities and movements began, and have continued, to actively resist such policies and their enforcement, the overall relationship with the state (and specifically its coercive forces) has progressively deteriorated. This has gradually but systematically produced a situation in which the 'outsider' space for popular participation and associated political-social and policy contestation within the democratic, institutional architecture framed by the Constitution, has

been largely closed down.
Jane Duncan argues that one of the earlier by-products of this was "a disjuncture between legal practitioners and [grassroots] activists that really created a chasm". At the same time, as Alison Tilley points out:

> [the Constitutional Court] started to put out its decisions in terms of social and economic rights and it was at that point that we started to see the shift away from the whole question of core minimum, rights … saying there was a core minimum deliverable on any right, and which government could be held to… that then pushed civil society into rethinking how it was going to engage with government … and the relationship then became more adversarial

This multiple 'assault' coming from the very (state / public) institutions that much of civil society had looked to as initial partners in pushing forward the progressive potential and promise of constitutionally-framed rights and accompanying (democratic) institutional architecture, has had a dual macro-outcome for civil society's relationship with the Constitution that continues into the present.

On the one hand, it created the conditions for the rise of a range of new social movements and community organisations[12], many of whose identity and approach were, to a large extent, moulded by what they saw and had experienced as the 'failure' of the Constitution. Jaap De Visser puts it thus:

> …they are saying, 'Well, this Constitution is not ours, and we are disgruntled with the pace of service delivery and we don't even recognise this Constitution as being the vehicle through which we can achieve it'.

Even if some of these CSOs have since come and gone, the varied strategic and tactical fault-lines (in respect of civil society's relationship to the Constitution) that they have brought to the surface remain very much alive today.

On the other hand, conditions were also created for a shift towards more politicised, targeted and frequent litigation emanating from the 'failure' of the Constitution. Over the last few years in particular this has produced more coordinated and solidaristic litigation efforts, often accompanying by wider campaigning and mobilisation activities, within civil society.

For Jane Duncan, increased "attacks on rights at the level of elite society" created a new "consciousness" that has helped to narrow the gap between the legal / NGO and more grassroots / community 'sectors' of civil society. The shift was, and remains, more particularly related to policy implementation, or lack thereof, around socio-economic rights and the associated conduct of the state in respect of (critical) civil society voice, participation / involvement and mobilisation (civil-political rights).

[12]Some of the social movements that arose in the late 1990s and early 2000s (such as the Landless People's Movement and the Anti-Privatisation Forum) no longer exist in their original forms but remain 'present' through the myriad community organisations that were spawned and/or inspired by their struggles.

SHIFTING TERRAIN OF CIVIL SOCIETY STRATEGIES & TACTICS

In the initial few years after the democratic breakthrough in 1994 when South Africa's Constitution and constitutional order were incipient, the dominant strategic thrust of a generally weakened civil society was largely defined by a ''critical solidarity' with the new ANC government. In turn, this framed a tactical approach whose main points of focus were centred on:

- Getting the associated legislation right (that is, in line with, and affirming of, constitutional rights, checks and balances, and so on);
- Engaging in 'insider' advocacy and attempting to make use of the still-untested institutional (and constitutionally enshrined) avenues and spaces for public participation; and,
- 'Testing' some key constitutional rights through targeted litigation in the Constitutional Court.

That strategic and tactical line of march was then gradually but surely turned on its head as a result of the implementation and associated practical impact of, policies that went a long way to vitiate the critical solidarity approach as well as whatever trust there was in government's willingness and ability to follow the spirit of the constitution and enforce and apply its attendant rights.

The fragmentation of the once previously dominant strategic and tactical approach meant that there was no longer substantive (strategic and tactical) commonality within civil society. This remains the case despite more recent attempts by leading ANC / SACP and government leaders such as Jeremy Cronin, to paint civil society in South Africa as some kind of homogenous entity with a common "strategic agenda". According to Cronin, such a civil society seeks to "constrain the democratic state, to weaken and divide the majority, to sow popular demoralisation about government, and to mobilise against what is supposed to be a dire threat to our Constitution emanating from the 'ruling elite'"[13]. Noting could be further from the reality.

Even if to a lesser extent prior to such fragmentation, the tendency of civil society to operate in sectorally-framed and issue-based silos now became much more pronounced. As Jane Duncan argued back in the early 2000s[14], the accompanying silo mentality has most often translated into the practice of taking on very narrow areas of expertise [resulting] in the development of a 'tunnel vision' that privileges an individualist approach as opposed to one that recognises the interconnectedness and collective nature of the struggle to realise various constitutional / human rights. Bonita Meyersfeld supports this in arguing that much of civil society has understood rights in too much of a "vacuum".

> **"...rights don't occur in a vacuum nor are they violated in a vacuum ... The intersectionality between civil and political rights on the one hand and economic and social rights on the other has never been more apt and has never been more evident in their violation... "**
>
> **– BONITA MEYERFELD**

[13]Cronin, Jeremy (2010), 'Whose Terrain?' *Umsebenzi Online*, Volume 9, No. 22, 17 November

[14]Quoted in McKinley, Dale T. (2003), 'The State of Access to Information in South Africa', Research Report compiled for the Centre for the Study of Violence and Reconciliation, Johannesburg

What this has produced is a strategic and tactical terrain - which still pertains today even if less pronounced - in which different components of civil society adopt widely divergent strategies and tactics vis-à-vis the constitution. One component, as described by Bonita Meyersfeld, consists of those "in civil society who [are] trying to advance a human rights agenda that speaks about what their view of what social justice is as opposed to what an indigent or marginalised person's view of social justice is." In other words, an approach that is in strategic and tactical isolation from the perspectives, lived experiences and struggles of those in whose name it is most often being pursued. Meyersfeld then refers to a second component of "people on the ground working extremely well, listening, responding [and] working on behalf of people of South Africa as generic as that is … as opposed to working on behalf of some ideal that they think is very important". Set against the perennial class, racial, ideological and resource divides within much of South African civil society, the related strategic and tactical divergences become that much more evident.

With specific reference to how these components have directly applied their strategic and tactical approach to the Constitution, Mark Heywood offers this perspective:

> There are parts of civil society that have consistently and effectively used the Constitution in campaigns [and] there are parts of civil society that have used the Constitution but are more sceptical of the Constitution … Then there are parts of civil society that … are outright anti-Constitution: see it as nothing other than a compromise.

Perhaps the best example over the last decade or so, of the strategic and tactical divides within civil society, is that between the labour movement and the community sector. Largely due to its mass character and close political and organisational relationship with the ruling ANC / SACP at the time, the dominant labour federation, the Congress of South African Trade Unions (COSATU) was largely successful in ensuring that a range of workers' and trade union rights found their way into both the Constitution and succeeding (enabling) legislation.[15] As a result, there have been no explicit socio-economic and / or political-civil rights-based cases taken to the Constitutional Court by COSATU since the Constitution was adopted. Almost every legal case involving workers and unions has rather, come before statutory bodies / courts set up by the enabling legislation (for example, the Commission for Conciliation, Mediation and Arbitration).

It has been the exact opposite for the majority of community organisations and social movements. Their generalised political and organisational distance from the ruling ANC / SACP, smaller mass base and experience of exclusion from legislative and governance related participatory spaces has ensured that their main strategic and tactical locus has been centred on oppositional mobilisation and rights-based litigation through the courts (often ending up in the Constitutional Court). The cumulative effect of this divide has been what Roger Ronnie describes as:

> …an inability of the labour movement to extend their [rights] struggle and see the struggles of communities and workers as two sides of the same coin … [resulting in] a disconnect between workers and the communities from which these people are drawn.

[15]See interview with John Appolis, 2014.

The labour-community divide surfaces another, linked part of the terrain that has seen a significant degree of divergence; that of civil society's approach to and use of, the law. Some civil society activists have long offered a critique of CSOs placing too much energy and time in pursuing legal cases to enforce and / or realise their constitutional rights. Patrick Bond argues that:

> ...activists hold off on other more effective strategies and tactics because they've invested so much, including money, in expensive lawyers and in the illusion that the Constitution will actually serve them at the end of the day.

And yet for the Treatment Action Campaign (TAC), the legal approach was a considered one which recognised the inherent political and ideological limitations of the law in a capitalist society. Nathan Geffen explains:

> When we went to court we were pretty sure we'd win. We tried to use the law to incrementally make gains rather than to try and use the court as a revolutionary tool - it can't be done.

Indeed, if the experiences and views of those from most community organisations / social movements, alongside those who have been directly involved in rights litigation, are prioritised it is clear that the 'anti-law' perspective is distinctly in the minority.

Rather than (strategically) seeing the law and (tactically) pursuing litigation as some sort of panacea for the enforcement and realisation of their rights, movements such as Equal Education are very clear that their approach is contingent.

Nthuthuzo Ndzomo explains:

> We don't just rush and use the courts; we prefer to first engage ... litigation is usually a last resort. We had been engaging with government for two or three years [on norms and standards for school infrastructure] ... they were not listening to us, they were not reacting, so we [then] took the Department of Education to court.

Organisations such as the Consortium for Refugees and Migrants in South Africa (CORMSA) have a similar tactical approach, according to Alfani Yoyo:

> Litigation is our last resort but it is always pushed to go to that level because we lobby and engage the government but they don't come on board, they don't even want to respond to your queries or whatever you try to challenge them to do.

Jackie Dugard, who was intricately involved - at both the legal and community level - in the years-long *Mazibuko* water rights case (that ended up in the Constitutional Court[16]) points out that the Phiri (Soweto) residents only opted for litigation after having exhausted "most forms of political action, including petitions, political meetings and marches".

[16]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) (8 October 2009)

Crucially, Dugard notes:

> As poor communities such as those in Phiri have discovered, the institutional political realm, particularly at the local government level, has shown itself to be overwhelmingly unaccountable and non-participatory. There is growing evidence across South Africa that, in what has been described by some commentators as "lawfare", courts are increasingly being used as domains of struggle where theoretically other forms of political engagement should have been better placed. Increasingly the choice is between the courts (if the actors can secure the necessary resources and institutional support) and political violence. When faced with this choice, the majority of people in Phiri chose the courts.[17]

The picture that emerges is one where those on the frontline of the struggle for socio-economic equality and justice as well as democratic political voice and space, while adopting a consistent strategic approach centred on the need and desire for meaningful personal and societal change employ a range of tactics, inclusive of litigation. The strategic 'approach' is informed by seeing the Constitution – as the framing legal / institutional and aspirational document of society - as symbolic; symbolic of the long-standing socio-economic aspirations of the majority and the potential promise of societal justice and equality. As such, it has broadly been accepted as having political legitimacy, as representing the system-framework for legitimising South Africa's institutional democracy and developmental path and has become a core reference point for the reaffirmation of that legitimacy.

Conversely, the tactical 'approach' is informed by the practical experience of how the Constitution, as societal reference point and 'supreme law', is applied / pursued and also experienced through the various institutions of society and the state. In this case, the Constitution's socio-economic rights clauses and promises have been alternatively 'tested' through political and social mobilisation - in the form of demands on the practical realisation of the promises and expectations created - as well as occasionally through the law itself (that is, legal challenges / cases). It is on this tactical terrain that the majority relate to the Constitution as the contradictory 'location' for the potential securing, challenging and transcending of its rights-based limitations and possibilities.

When it comes specifically to the legal side of the strategy and tactics equation, it is not an either/ or calculation. From her experiences in working with many poor inner-city residents in Johannesburg Kate Tissington, says that when residents go to court, "it might not necessarily be so much about the constitution or the law as it is about seeing us as people with some power who are doing something." As David Cote of LHR proffers, "movements have realised what litigation can do for them … they're using [it] as a stick … in order to further their political goals as well."

Nonetheless, there are words of warning related to the ways in which an over-reliance on walking the rights and legal path on the constitutional journey, can limit the potential strategic and tactical arsenal of civil society. Jane Duncan argues that "the shift towards constitutional talk [has] necessarily been limiting … because [the] problem with rights talk [is] that it can only go so far in terms of changing power relations in society." As a result, Duncan continues, "I think [we] have lost a lot of the kind of richness of debate around strategy and tactics in many progressive organisations". Likewise, Bobby Peek states that:

> …a report is not necessarily going to deliver change, a legal strategy neither … you have to work with community people that are on the frontline. If you go for the legal or policy, it's structural, but if you don't have the basis you're going to lose out.

[17]Dugard, Jackie (2009), 'Phiri water rights struggle epic rather than pyrrhic', *Mail & Guardian*, 20 July

CIVIL SOCIETY & THE LEGAL SYSTEM: THE JUDICIARY & JURISPRUDENCE

One of the biggest ironies in respect of the constitutional journey in South Africa over the last twenty years is that while the Constitution itself has been hailed and affirmed by many as 'transformative', the very judiciary that is constitutionally mandated and entrusted to administer justice - through the Constitution - has struggled to transform. This is a crucial matter for civil society since that judiciary is one of the main avenues through which ordinary people experience the legal system and seek justice, with the Constitution as the ultimate arbiter.

While the Constitutional Court itself has seen a significant degree of racial transformation, having gone from seven white and four black judges to the present make-up of nine black and two white judges, there has been no progress on gender transformation with the number of women judges - two - remaining unchanged in two decades[18]. When it comes to the Supreme Court of Appeal (SCA) the picture is very much the same, with six woman judges out of a total bench of twenty-three. The situation in the high courts and then the more numerous magistrates' courts are significantly worse and when one looks at lawyers themselves - from the ranks of which most judges come - whites and males dominate across the board.[19] Cherith Sanger of the Sex Workers Education & Advocacy Task Force (SWEAT), which works with some of the most vulnerable of women in society, notes that "diversity is crucial" for their membership who end up in the courts regularly:

> If I'm going to take a case to court and my bench is mainly men, black men even with one white woman, I'm not comfortable with that. They don't understand my background, and my experience and they don't understand how my vulnerability is different.

Besides racial and gender transformation there is also the issue of the class and ideological disposition of the judiciary and how this relates to their commitment to the values and rights framework of the Constitution and more particularly, to the poor/working class who are at the forefront of the fight for justice and equality. As one recent candidate for the Eastern Cape High Court told the Judicial Services Commission (JSC), the "'broader requirement" in transforming the judiciary is "to seek to achieve the commitment of all judicial officers to the underlying values of the Constitution".[20] Alison Tilley argues that the judicial appointment process "is a serious problem" and that most of civil society has simply not paid enough attention on this front.

According to Tilley:

> We have a JSC which is not doing its job in terms of testing the candidates ...we have civil society who mostly don't even realise they can have anything to say and when they do realise, they struggle. It's all happening back in the provinces with those Judges President. And that's critical to how the Constitution's understood [and] to how it's applied, and therefore it's critical to how people believe that a Constitution is a valuable project.

[18]Centre for Applied Legal Studies and the Foundation for Human Rights (2014), 'Transformation of the Legal Profession', Research Report, August

[19]Gregory Solik (2013), 'Why should only lawyers become judges?' *Ndifuna Ukhwazi*

[20]Legalbrief (2015), 'Judiciary's racial make-up in the spotlight', 25 March

The quality and character of the judiciary becomes even more crucial in the context of civil society's overall relationship to the Constitution precisely because it is that judiciary's (at whatever level) interpretation of the rights framework as well as the separation and boundaries of their powers in the Constitution that directly impacts on those seeking justice and equality through the legal system. This is especially the case when it comes to the lower courts (at the magistrates' level) because this is where the vast majority of people experience the legal system and where "justice does, or more often does not happen". As Bonita Meyersfeld says:

> Magistrates are getting away with untold amount of ineptitude, coupled with a prosecutorial department that is suffering from a lot of evils … [as civil society] we need to get the hell out of the Constitutional Court, and we need to get our behinds into every single magistrate's court in this country.

On another level, Geoff Budlender argues that:

> …the courts have still not figured out and they struggle all the time with, the question of the boundaries of their power and the separation of powers, how far they should go; that has been a continuing theme.

Simon Delaney supports this, noting that:

> …there have been enough [cases] … to teach judges that they mustn't step too far out of line because if they start making orders that the executive is not going to enforce then there's going to be an undermining of confidence in the judiciary.

This is most noticeable in the rights versus policy arena (for example, with the *Grootboom* case[21]) where, despite the Constitutional Court affirming the right to benefit from a government policy around provision of housing and sanitation, the actual realisation of the constitutional right to housing was, according to Jaap de Visser, subsumed within the - completely inadequate - policy itself.

Unfortunately this is exactly what has been taking place for some time, although there have been some Constitutional Court judgments since 1996 that have affirmed the judiciary's constitutional obligations in respect of whether general law and government policy is meeting the constitutional rights standards. For example, in *Minister of Health and others v. Treatment Action Campaign and others* (July 2002), the court held that:

> …where the court, being a part of the judicial arm of government, sits in judgment on the reasonableness of steps taken by the executive in the fulfilment of its constitutional obligations, it is exactly a perfect example of how the separation of powers should work. In doing so, a court does not take over the functions of the executive, it merely pronounces on a constitutional obligation.[22]

[21]Grootboom v National Prosecuting Authority and Another (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013)

[22]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 (5 July 2002)

And again in an earlier case - *Carmichele v. Minister of Safety and Security* (August 2001) - the court ruled that:

> ...although the major engine for law reform should be the legislature, courts are under a general duty to develop the common law when it deviates from the spirit, purport and objects of the Bill of Rights.[23]

However, there have been many cases - at both the Constitutional Court and high court level - that have highlighted the consistent problem of judicial deference (to the government / executive). Besides *Soobramoney v. Minister of Health (KZN)* (November 1997)[24] in which the Constitutional Court held that Mr Soobramoney was not entitled under sections 11 or 27(3) to receive life-saving dialysis treatment, arguably the most prominent Constitutional Court case is *Mazibuko v. City of Johannesburg* (November 2009). Here the court rejected the arguments of the Phiri (Soweto) community and found that the City's free basic water policy falls within the bounds of reasonableness as set out in section 27 of the Constitution as well as with relevant national legislation. It also found that the installation of pre-paid meters in Phiri was did not constitute discrimination or violate the residents' administrative justice rights as set out in the Constitution. As Sandra Liebenberg argues:

> The judgment fails to engage, even in a cursory manner, with the meaning of the right of access to sufficient water. Instead, the concepts of 'reasonableness' and 'progressive realisation' in section 27(2) of the Constitution are relied upon to divest the right of much its potential to ensure that people's basic water needs are met. A court cannot evaluate whether the state's conduct or omissions are reasonable in relation to the fulfilment of socioeconomic rights unless it develops a prior understanding of the normative goal to be achieved.[25]

Judgments like *Mazibuko* have no doubt had a negative impact of how large parts of civil society alongside poor / working class communities see / trust and experience the transformative thrust of the Constitution. Besides judicial deference though, one of the most enduring points of frustration and anger in respect of a sizeable section of post-1994 constitutionally-oriented jurisprudence has been the seeming impunity with which the executive and various arms of government simply ignore both the law and court judgments. This is often the case even when it comes to domestic legislation that has been enacted to implement the country's obligations in terms of the Rome Statute for the International Criminal Court (ICC). Despite what is considered to be a "model piece of legislation", the South African government refuses to "act in line with that legislation". According to Nicole Fritz, this forced the Southern African Litigation Centre (SALC) to go all the way to the Constitutional Court, in order to try and "push the authorities to act in accordance with its domesticating legislation." In the judgment, the Constitutional Court unanimously ruled that the South African Police Service (SAPS) has "a duty to investigate the crimes against humanity of torture allegedly committed in Zimbabwe" as per the "Constitution, the ICC Act and South Africa's international law obligations"[26].

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[23]Carmichele v Minister of Safety and Security (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001)

[24]Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

[25]Liebenberg, Sandra (2009), "Water rights reduced to a trickle", *Mail & Guardian*, 21 October.

[26]National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC) (30 October 2014)

The Socio-Economic Rights Institute (SERI) is one of the legal CSOs that have probably gone to court more than most over the last several years on behalf of poor communities in relation to issues of housing / evictions. According to Jackie Dugard, SERI had to return to both the constitutional and high courts "time and time again … to try to force the government to do what the court has ordered it to do."

LHR has had exactly the same experience with refugee access and detention cases. One of the crucial results of this is that while LHR can, after much effort, occasionally "secure the rights of the individuals or the particular groups who brought that specific problem to us", according to Jacob van Garderen, there is no "systemic impact." This shows how the practical interpretation, application and implementation of constitutional law can combine to disaggregate constitutional rights and thus effectively deny all affected citizens the full realisation of their constitutional rights.

There are two further, linked problems for civil society on this general legal terrain. The first revolves around the lack of direct recourse to a constitutional right "when subordinate legislation specifically regulating (and limiting) the attainment of that right already exists". If such legislation "unduly limits a fundamental right" then "that statute's constitutionality" must be attacked first.[27] This is what prevented residents of the Harry Gwala informal settlement in Gauteng from realising their right to basic municipal services, when the Constitutional Court handed down judgment in *Nokotyana and Others v Ekurhuleni Metro and others* (November 2009)[28].

The second and related problem is the huge amount of time and resources taken up as a result of having to pursue rights litigation at a number of different levels of the legal / court system and often through and around various institutional, legislative and appeals processes. Unionist Roger Ronnie, who now works with casualised / informal workers, tells how it took one worker who had been dismissed from his job seven years for his case to get to the Constitutional Court while in more than one case, workers actually died before their cases had been finally determined.

Give such realities it is not surprising that across the spectrum of civil society there is a sober assessment of what the legal system, and specifically the Constitutional Court, can 'deliver' in respect of people's constitutionally enshrined rights. For community leader / activists such as Mashao Chauke, "the lessons that we have drawn … [are] that you can have victories in a court of law, but it is still a struggle to realise that victory". According to Melissa Fourie, much of that struggle involves trying to get the relevant government authorities, who have the necessary delegated and legal powers, to simply follow the law and do their jobs.

> **"I think it's a huge mistake for activists to have the delusion that they're going to actually both change policy and get immediate relief, using the constitution"**
>
> **– PATRICK BOND**

[27]From personal email correspondence with Heinrich Bohmke, 20 November 2009.

[28]Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others (CCT 31/09) [2009] ZACC 33; 2010 (4) BCLR 312 (CC) (19 November 2009)

WITHER ACCESS TO JUSTICE?

At the heart of the civil society's roller coaster relationship with the Constitution has been the consistently large gap between written promise and lived reality, between stated intent and actual practice. Nowhere is this gap more apparent than in respect of access to justice. The gap cannot hope to be filled if we understand access to justice in the way President Zuma does. Namely, that it is largely about "citizen education about the justice system … [about] people need[ing] to know their basic rights, the different courts and other structures they can have recourse to when they have problems.[29] Indeed, it is one of Zuma's own Ministers, Deputy Justice Minister John Jeffrey, who has perceptively noted that access to justice does not just apply in the narrower sense of the term, which limits its application to people being able "to take matters to court and to access the justice system".[30] A much more holistic (constitutionally-framed) understanding encompasses people actually being able to effectively make use of all of the rights-based ways and means and institutional avenues as set out in the Constitution to realise both immediate and longer-term social, economic and political justice.

Unfortunately, the lived reality / actual practice that has held dominant sway in South Africa for the last twenty years is one in which the ability to access justice is tied directly to political and economic position, power and wealth. In other words, access to justice has largely become politically and socio-economically commodified. For the majority of people in South Africa - who are poor / working class - this has meant that access to justice has become more of an occasional privilege, often dependent on others, rather than a regularly enjoyed and independently realised right in itself. In the words of Mashao Chauke:

> My experience, which has been shared by most of the poor people out there, is that we feel … alienated, you know, side-lined. If you can't have a powerful lawyer or have somebody who can assist you in making sure that at least you are in the system, you'll find it difficult to do whatever you want to do as a poor community member. To realise a fair trial is expensive in this country. I think that … the system itself [is built so] a few people will benefit from this system at the expense of the majority.

There is a double-bind here for poor / working class people. On the one hand, accessing "the system" (that is, the legal and institutional architecture) as part of the broader struggle to access justice is difficult enough on its own. In this regard, independent human rights lawyer Simon Delaney alerts us to a crucial yet mostly ignored practical reality: that the vast majority of courts are themselves still "located in places [that] are there to serve a white minority … it's still the domain of middle class, upper class folk in South Africa".

On the other hand, even if "the system" is accessed the generalised experience is one of prejudice and hostility and most often undermining of both personal and collective human dignity. As veteran land / natural resource / women's rights activist Samantha Hargreaves notes, this double-bind has ensured that there has been little if any "change at all" in the experiences of the rural poor and more specifically, farmworkers and labour tenants, when it comes to accessing justice through the legal system.

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[29]Keynote address by President Jacob Zuma on the occasion of the 3rd Access to Justice Conference, Pretoria, 8 July 2011
[30]Benjamin, Chantelle (2014) "Know your rights says new government programme', *Mail & Guardian*, 10 December

This brings to the surface a very uncomfortable reality for civil society; that despite the adoption of a constitution that enshrines a range of rights and lays down an institutional, democratic architecture, the ability to access justice through the resultant "system" remains a massive contemporary challenge for the very same poor and black majority that were historically excluded, oppressed and discriminated against as a result of the previous, non-democratic "system" of apartheid. Out of the eighteen times since 1994 that the provision for direct access - section 167(6) - to the Constitutional Court has been made use of, Jackie Dugard asserts that in only one of those cases "can you really say it was [to] allow a poor person who would have otherwise not been heard." Besides this effective ring-fencing of the Constitutional Court though, a key reason behind the access challenge is that in the post-apartheid period one of the strongest components of apartheid-era civil society - human rights / public interest lawyers - has become a shadow of its former self.

Even if South Africa now has a publicly-framed and funded Legal Aid Board (LAB) which is supposed to provide easily accessible and free legal assistance / representation to those who cannot afford private legal counsel (a serious systemic problem in and of itself), the LAB does not take up civil rights matters. Further, it is hopelessly over-burdened and under-funded, and thus simply cannot fulfil the stated promise of adequately and competently providing legal assistance / representation in criminal matters, many of which now involve the criminalisation of the right to gather / protest. This has meant that the burden of taking up civil / constitutional rights matters has, since 1994, been shouldered by a much-reduced collection of civil society legal outfits that are equally over-burdened and under-funded.

Not only are there now much fewer such civil society legal organisations, there has also been a massive haemorrhaging of community-based paralegals that historically provided the most informed and useful means of access for the poor / working class (especially in rural areas). Indeed, as Alison Tilley points out, "one of the premises in writing the Constitution [was that] there would be a paralegal sector, which is where now?" In turn, the dearth of paralegals has, according to Richard Calland, catalysed a situation where:

> ...folks either have to abandon [their search for legal justice] or they have to find lawyers to go the high road ... and that limits ... the number of opportunities then for working class people to be exposed to the Constitution in practice, in action, because paralegals are a really powerful linking force in that sense...

The harsh reality, which many in civil society do see and understand, is that there is a crisis of conscience within the legal sector. Leaving aside that very small minority that remains committed to practicing human rights and public interest law as well as being directly involved in working with and supporting community organisations and social movements, the legal profession has failed the poor / working class. For legal academic Sandra Liebenberg, "the whole ethos is about money ... not about a profession that's actually there to promote justice and be accessible for people".

Development activist John Clarke feels that:

> ...the legal profession needs to take a long, hard, bloody look at itself ... [they] need to be challenged as to what their founding values [are]. There's no commitment to the Bill of Rights from the legal profession.

Nathan Geffen concurs:

> The big problem is the lawyers themselves. They don't want the extra *pro bono* work to do; they don't want to bring down their fees. They're an entrenched interest [with] … very high positions in society to protect. They're the ones who have to be challenged.

Yet, even if there were more progressive lawyers active in CSOs, this would not deal with a more fundamental challenge which faces civil society when it comes to the legal side of access to justice. Cherith Sanger identifies a key component of that challenge:

> There's a problem even with NGOs providing legal services. [For example] … the Women's Legal Centre doesn't take every case to court involving violence against women or around housing or domestic partnerships … it has to be strategic cases that will change the law.

In other words, CSOs can have more than enough lawyers but if they are not taking up cases that are of direct and immediate import and consequence to people's lived realities, then the associated relationship with the Constitution becomes pre-determined and structured by interests other than those of the very people in need. Bobby Peek reminds us of what is needed:

> The accessibility of the entire legal system is dependent on a coming together of NGOs with a good public interest law firm and a strong working with community people that are dealing with the issue on a day-to-day level … it's not easy to find that combination and then to be able to use that combination to not only get access to court but then to be able to take this process through…

There is also the 'small' matter of the Chapter 9 institutions that are supposed to act as the institutional guardians and catalysts for various forms of access to justice on behalf of the citizenry. One does not have to be a civil society activist to know that the overall track record in this regard since 1994 has been extremely disappointing to say the least. This is especially the case when applied to the Commission for Gender Equality, the Human Rights Commission and until more recently also to the Public Protector. Movements like ABM have "lost hope in these Chapter 9 institutions". As ABM leader S'bu Zikode explains, this is "because the impression that we have, which they have failed to prove otherwise, is that they are run by the very same people who attack us".

From the legal side, Geoff Budlender offers a linked critique. Including other "institutions that underpin the whole structure of the Constitution [such as] … the National Prosecuting Authority and Police Service", Budlender points to how they have "been corrupted by political processes … and have become sites of political struggle instead of doing the job they're supposed to do under the Constitution."

Possibly most problematic of all arenas in the struggle for access to justice though, is the gap between the rights promises of the Constitution and the practical application and implementation of associated and enabling law / legislation / policy. This gap has presented civil society with all sorts of contradictions and challenges precisely because, as pointed to early in this paper, law / legislation / policy is the main means through which the majority of civil society 'experiences' the various rights contained in the Constitution. If, in practice, those laws, legislation and policies are consistently deflecting and undermining the realisation of most socio-economic and political / civil rights - despite equally consistent struggles and efforts by civil society to know, engage, change and make positive use of them - then the Constitution becomes little more than a legal abstraction at best. There are many examples of the yawning gap; here are a few offered by various interviewees:

- A South African Law Reform Commission process around legislation dealing with adult prostitution has been going on since 2001. Meanwhile, as Cherith Sanger points out, sex workers are dying: "While sex-workers have been murdered [and] raped continuously and face other high levels of human rights abuses … the state drags its feet with its law reform process"

- Irrespective of the seemingly endless amendments to relevant policies as the result of civil society struggle and engagement, according to Alfani Yoyo, the conferred rights and entitlements for refugees and migrants remain largely "on paper because in practice they do not really happen."

- Even though the *Municipal Services Act* "requires municipalities to hold consultations with communities" the local authorities hold them "at times when people are working". So, while "at face value" the law and accompanying policy implementation seems fine, Roger Ronnie asserts that "it's completely disempowering". The result is that people's rights around earning a living through being able to trade when they want to and to have their dignity respected are "completely rejected by the manner in which {they're] given expression"

- Despite what looks like very progressive and enabling access to information legislation (*The Promotion of Access to Information Act* - PAIA), both the government and private sector have used it - helped by the absence of any enforcement mechanism - to block access and thus to consistently undermine the right[31]. During 2011-2012 the Mineral Resources Department refused ninety-seven per cent of over one hundred PAIA requests for information on environmental health and protection, made by the Centre for Environmental Rights (CER). The refusal rate by private companies was almost as high.[32] No surprise then that various interviewees reflect the ways in which civil society's ability to lift the veils of secrecy and thus to expose wrong-doing and hold both government and the private sector accountable to the law and to the demos has been substantially neutered.

- Even though the *Restitution of Land Rights Act* of 1994 (and which has gone through several amendments since) was one of the very first pieces of legislation passed in post-apartheid South Africa, according to Samantha Hargreaves, its practical application has not resulted in any meaningful "radical redistribution of land" in either urban or rural areas. Likewise, the existence of a plethora of related land / tenure rights policies and legislation has miserably failed to change the continued socio-economic marginalisation and exploitation of farm workers and rural dwellers or to catalyse an "agrarian reform programme."

[31]PAIA Civil Society Network (2015), 'Shadow Report 2013 – 2014.'
[32]Centre for Environmental Rights (2012), 'Unlock the Doors: How greater transparency by public and private bodies can improve the realisation of environmental rights'

- Although there is dedicated legislation, such as the *National Environmental Management: Air Quality Act* of 2004, as well as a host of subsequent policies designed to ostensibly protect and enforce people's environmental rights (section 24 of the Constitution), ESKOM was very recently granted a five year extension to meet air emission standards that should have already been in place. Not only does this mean that civil society's struggles over many years for a cleaner environment have now been seriously undermined but it also opens the doors to private sector challenges to the application and enforcement of other constitutional rights. According to Bobby Peek, representatives from the private sector can now say, "Yes, we agreed to this in the last twenty years but actually now prove that what we're doing is impacting on our constitution and the people of South Africa."

AWARENESS AND KNOWLEDGE: WHAT CONSTITUTION, WHAT RIGHTS?

It is one of the supreme ironies (albeit without empirical verification) that in all probability, there are more people outside of South Africa who know more about its Constitution than there are inside the country. Indeed, over the last twenty years it is likely that the South African Constitution has become one of the most studied, written about and popularised documents amongst and within international civil society, academia, legal circles and governments. And yet, when it comes to South Africa itself all evidence points to the fact that a majority of its inhabitants have little to no awareness and / or knowledge of this 'transformative' document, of the supreme law of the land. While a series of rights-based media, advocacy and educational campaigns were launched by government and CSOs in the 1990s, levels of awareness and knowledge about the meaning and content of the range of constitutional rights as well as enabling legislation / policies have remained exceedingly low as well as highly uneven among civil society, government and the general population alike.

The latest confirmation of this state of affairs comes from a 2010 / 2011 nationwide 'Human Rights Awareness and Knowledge Baseline Survey' conducted by the Foundation for Human Rights (FHR)[33]. The survey, which focused on the 'vulnerable and marginalised' and consisted of a representative sample of over four thousand respondents, found that only forty-six percent of respondents were aware of the existence of either the Constitution or, more specifically, the Bill of Rights. When broken down by geographical location, a sizeable majority of those living in rural areas (sixty-three percent), farm workers (sixty percent) and refugees / migrants (seventy-four percent) were not aware of these two documents. Further, less than ten percent of respondents had read these documents, or had either of the documents read to them.

Awareness levels of three key pieces of rights-centred legislation - the Promotion of Administrative Justice Act (PAJA), the Promotion of Access to Information Act (PAIA) and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) was extremely low. Only ten percent of respondents were able to identify any one of these laws. When it came to Chapter 9 institutions, just fewer than ten percent of respondents indicated that they knew of any one of these institutions, with less than one percent being able to correctly identify any of the institutions. Perhaps most worryingly, when respondents were asked what they actually did the last time they felt their rights had been violated (for example, when some individual or organisation had acted in a discriminatory manner towards them), sixty-five percent said they did nothing.

[33]All subsequent information comes from, Dale T. McKinley (2013), 'Popular Write-Up of Baseline Survey', Foundation for Human Rights Report

These findings were borne out by most of civil society activists / organisations interviewed for this project. According to Mashao Chauke, a community leader and organiser for over two decades:

> The majority of the people don't know [their rights]. And you will be amazed when you go to a community where there are struggles and people don't know where to go with regards to whatever their problem is; it is simply because they don't know, they don't have information and they only realise that they've got rights when they're struggling on that particular issue. If people have information and they have the knowledge, they will start questioning them [the authorities] as to 'where is this, where is that, why is this not happening?

Similarly, Bayanda Mazwi of the predominantly student-led CSO Equal Education says that from their experiences, "A lot of people in South Africa lack knowledge … what they see is what they believe". Their frequent visits to learners residing in deep rural areas have revealed that most "don't even know that they have specific rights … that give them the right to complain, give them the right to ask questions."

But it is not just poor rural and urban dwellers whose awareness and knowledge of the Constitution, not to mention enabling legislation and policies, is minimal. Prakashnee Govender (who was head of COSATU's parliamentary office when she was interviewed), is convinced that the Constitution "is just not on their [workers] minds" nor central to their work and struggles:

> If it's [the Constitution] something that you don't see [and / or] not something that you can use, it means then that it's not accessible; whether they're choosing not to use it or whether they can't use it, it's just not present in their lives.

From her own recent experience in running a training workshop for a union, Jackie Dugard relates a similar 'story':

> I said to the comrades there, 'Have you guys ever actually looked at the Constitution?' No. Section 9, equality, discrimination, we went through that – never heard of it, didn't understand it, no reference point.

Even if those who could benefit the most from more in-depth awareness and knowledge do not have such, this does not mean that they do not "recognise the fact that they have rights". Rather, it might well be the case that the lack of awareness and knowledge stems directly from the parallel recognition that, as Jane Duncan explains, "The institutions and the resources necessary to protect the rights simply aren't there; they simply aren't being taken seriously."

In other words, if the dominant lived experience of the poor / working class is one of endless frustration at the lack of practical assistance and redress in their search for justice and equality, then it is inevitable that they will question both the value of the Constitution and its inclusive rights as well as associated legislation / policies. Bonita Meyersfeld makes the point in a different way:

> [In] my experience, particularly with sexual violence and particularly with women and children who are survivors of this violence [what] happens is you say 'do you realise that this is a violation of the law and these are your rights.' And they laugh at you [and say] 'let me tell you about these rights of yours that you think are so sacred' … their assessment of the rights is that it's nonsense.

Civil society needs to be reminded though that there are also millions of middle-class people (in both the public and private spheres) who, while often generically invoking the Constitution and engaging in lots of individually-centred constitutional rights talk, maintain a conscious knowledge ignorance and distance from the rights struggles of the majority. Speaking as a 'member', Richard Calland argues that civil society has to pay closer attention to the middle class: "If we don't know about and care about the constitution, it's got no chance".

Indeed, if - as appears to be the case - those components of civil society who possess in-depth awareness and knowledge are mostly "just talking to each other", then, to use Jackie Dugard's words, "there's clearly a serious problem … a massive disconnect." In practical terms this can, according to Geoff Budlender, produce a situation - which might already be well in-the-making - where increasing numbers of people simply say, "'Screw constitutions, those are no use to us'. Or alternatively, people can say, 'Well, that means the Constitution isn't working [so] we've got to make it work' … and I think that's the area of vulnerability of the whole constitutional project".

CIVIL SOCIETY, THE CONSTITUTION & THE ANC / STATE

As detailed earlier in this paper, in the first few years after 1994 the relationship between civil society and the ANC (as the ruling party) alongside the state it now politically controlled, was predominately one of 'critical solidarity'. With a few exceptions, the general thinking and approach of civil society during that period was that the ANC / state was committed to the Constitution and that the best way to ensure that this continued was largely through involvement inside the ANC / state as well as general advocacy and engagement through the new democratic institutional framework.

However as we have seen, by the late 1990s / early 2000s the relationship began to change, mostly as the result of the ANC / state's implementation of neoliberal policies that were seen and experienced by ever-larger sections of civil society as being in direct opposition and / or conflict with the realisation of key socio-economic rights in the Constitution. This change was further catalysed by increasing signs, by the ANC / state of; political intolerance, lack of accountability, centralisation of power, corruption, political manipulation of state and public institutions and a creeping 'us (ANC/state) versus them (civil society)' mentality.[34]

At the heart of this gradual but decisive shift was an attitude (morphing into a belief) within the ANC / state that increasingly saw civil society as an oppositional force that was using the rights in the Constitution to spearhead a strategic and tactical approach that was unnecessarily critical and interfering with the governance 'mandate' of the ANC / state.

[34]See: Hein Marais (1998); Patrick Bond (2000), Elite Transition, London: Pluto Press; Richard Ballard et al. (2006) (Eds), *Voices of Protest: Social Movements in Post-Apartheid South Africa*, Scottsville: UKZN Press; Roger Southall (2013).

Geoff Budlender provides a hugely instructive 'birds-eye' insider view of how that attitude came to the fore:

> I remember when we were involved in drafting legislation dealing with tenure security working incredibly hard on it, thinking we were doing the right thing, having been through agonising debates and negotiating and bargaining and all sorts of stuff. When there was chirping coming from civil society organisations I wanted to say, 'Screw you, you're not helping; here, I'm doing this difficult job working so hard and what are you doing criticising me; don't you understand, I'm in the real world and you're just civil society.'
>
> ...[There were] two problems: Like all managers and administrators, they wanted to be protected from other people messing with them and telling them what to do and so very many of them, wanted to limit the extent to which these rights penetrated the daily business of government; There was a second response which was that there was a concern that conservatives would use this to obstruct the process of government. That sort of culture absorbs people in government very quickly. I was frightened when I saw what happened to me; I thought, 'Jeez, I've heard this story before from people I don't approve of.' It was a very extraordinary phenomenon.

Once such an attitude began to take hold at the national level, it quickly percolated down through the lower institutional and political ranks of the ANC / state and was soon being 'deployed' widely to rationalise and cover for a range of practices that were increasingly at odds with the practical application of the spirit, values and rights that framed the Constitution. Mashao Chauke describes how this has come to structure the relationship of poor communities with the ANC / state:

> It has been the same pattern; there has always [been] a passive response with regards to those [rights] demands put forward by the communities. You go [to] local, provincial and national government departments [and] you are unable to get assistance.

For Chauke, the main reason why this pattern has taken hold is "precisely because most of the time they are trying to make sure that whatever they do, they don't do for the entire community; it's only a few people that are benefiting. Our government is not responsive to the people's issues [and] it needs to ... change that attitude". As Simon Delaney argues, that attitude has, over time, become one of general "intransigence which manifests itself in using every trick in the book to try and avoid responsibility".

A good practical example of how this plays itself out when civil society pushes the ANC / state - in this case through the courts - to deliver on its constitutional rights mandate is provided by Melissa Fourie of the Centre for Environmental Rights (CER). In 2012 several legal CSOs took the government to court over rights to water access[35] of residents in Carolina (part of the Chief Albert Luthuli Municipality Carolina municipality in Mpumalanga Province) and secured a ruling requiring the municipality to deliver clean water to residents within seventy-two hours. In response, the Minister of Water and Environmental Affairs Edna Molewa publicly accused the CSOs and the judiciary of waging a "war against the state".[36]

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[35]This stemmed from a water crisis that initially began with problems of acid mine drainage from local mines seeping into the municipal water system and which resulted in the water supply to the town of Carolina being cut off for several weeks. See Kings, Sipho (2012), 'Carolina's water woes indicate larger structural problems', *Mail & Guardian*, 19 July

[36]Legalbrief (2012), 'Ripple Effects of Water Judgment', July.

No doubt Molewa was taking her cue from President Zuma who had made a major speech to a national "Access to Justice' conference the previous year.[37] In the speech Zuma effectively demanded that the judiciary stop interfering with the 'democratic mandate' of the ANC and thus also with the parallel 'policy mandate' of the Executive branch of the state. It is worth quoting Zuma at length since his remarks go to the core of constitutional provisions related to the separation of powers as well as to the constitutional directive in section 165(4) which requires organs of state to "assist and protect the courts" to ensure their "independence, impartiality, dignity, accessibility and effectiveness":

> ...[i]t is our well-considered view that there is a need to distinguish the areas of responsibility between the judiciary and the elected branches of government, especially with regards to government policy formulation.
>
> The Executive, as elected officials, has the sole discretion to decide policies for government ...
>
> *This means that once government has decided on the appropriate policies, the judiciary cannot, when striking down legislation or parts thereof on the basis of illegality, raise that as an opportunity to change the policies as determined by the Executive area of government...*
>
> *...The powers conferred on the courts cannot be superior to the powers resulting from the political and consequently administrative mandate resulting from popular democratic elections.*
>
> *Political disputes resulting from the exercise of powers that have been constitutionally conferred on the ruling party through a popular vote must not be subverted, simply because those who disagree with the ruling party politically, and who cannot win the popular vote during elections, feel other arms of the State are avenues to help them co-govern the country.*
>
> *This interferes with the independence of the judiciary. Political battles must be fought on political platforms". [My italics]*

Not long thereafter, the Minister of Justice and Constitutional Development Jeff Radebe issued a media statement[38] announcing the release of a Cabinet discussion document on "the transformation of the judicial system and the role of the judiciary in the developmental South African State". The statement, while affirming "the independence of the judiciary as well as that of the executive and parliament" indicated that such affirmation would be approached "with a view to promoting interdependence and interface that is necessary to realise transformation goals envisaged by the Constitution".

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[37]Zuma, Jacob (2011), 'Keynote address by President Jacob Zuma on the occasion of the 3rd Access to Justice Conference', Pretoria, 8 July

[38]Radebe, Jeff (2012), 'Media statement by the Minister of Justice and Constitutional Development, Jeff Radebe, on the occasion of releasing a discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State on 28 February 2012, Cape Town'

What these arguments / opinions reveal is that at the highest levels of the ANC / state there is a conscious misrepresentation of core constitutional directives / principles around the separation of powers that is being used politically as a way of trying to avoid democratic oversight and accountability. Simultaneously they represent an attempt not only to cow the judiciary into institutional and political deference to the ANC and the Executive arm of the state but to paint those in civil society that make tactical use of the law and courts to try and enforce constitutional rights and adherence to the law, as being anti-transformation and bent on undermining the forces of change (as represented by the ANC / state). It is no wonder then that the relationship between civil society and the ANC / state has become, especially over the last two-three years, increasingly conflictual and that at the centre of that conflict are the ways in which the Constitution is understood, interpreted and acted upon.

Crucially, when the approach of the ANC / state becomes one of misrepresenting the constitution to wage political power battles this then also impacts further on people's trust, not only in government but also in the Constitution itself. David Fig characterises such "politics' as having become one of the most fundamental problems for civil society. This is because, if "political position" (and here one could also add class position) becomes the main determinant of one's adherence to and respect for, the law then it is a short step to determining "immunity from prosecution, or [the] impunity with which you can disregard the law".

From his own experience in the state, Geoff Budlender confirms this in practice:

> It [has] turned out that if you don't get it right you're not in deep trouble and people have learnt that lesson. If [parliament's] Standing Committee on Public Accounts (SCOPA) or the Public Protector asks you a question you [can] ignore it ... because there aren't any consequences.

Janet Love also points to the parlous state of legal capacity and associated practice within various arms of government as another important factor that "creates mistrust in the law".

> **"I really wish ... that there was less faith in law. Our sense is that law has to be the last resort, is only effective in certain circumstances and that it can't do the job of ordinary political activism"**
> **– NICOLE FRITZ**

It certainly seems to be the case that the political elites within the ANC / state increasingly see the Constitution and more specifically its attendant rights and democratic institutional architecture as "negative constraints" on their exercise of power. If so, then the subsequent political trajectory could well "land up justifying a movement against the current constitution that could lead us towards an even more conservative constitutional order than we have at the moment." Whether or not such a trajectory does ultimately move in that direction, it is already having a major impact on people's understanding of and approach to, the law / constitution. In the words of Alison Tilley,

> ...people learn by what they see, they don't learn by what they're told ... and what they see is that power is the important thing; not that law gives you power or that power stems from law.

CIVIL SOCIETY, THE CONSTITUTION & THE PRIVATE SECTOR

Arguably, one of the biggest gaps in relation to civil society's work and struggles around the Constitution, accordingly to Geoff Budlender, has been the "failure to work through what the consequences are for the private sector, of the Constitution." In many ways, this can be sourced from the fact that civil society has historically (and largely justifiably) seen the public sphere / the state as the guarantor of the Constitution. As such, the dominant approach to the private sector's regular and often systematic abrogation of constitutional rights and violations of various laws and policies has been to engage / pressure or take legal action against, the state to punish the private sector in various ways and / or enforce constitutional provisions, relevant laws and regulations. This still remains the case today.

This approach does make conceptual and political sense. After all, in a democracy and more especially in one where much of civil society continues to struggle against the impacts of the deeply embedded monopoly character of its country's economy and to reign in the huge economic, social and political power of corporate capital, the state should be on the side of 'the people'. As Jackie Dugard argues, "Our focus should remain on the state and that is because the state has a lot of arsenal to regulate the private sector that it just simply isn't using". Likewise, Jacob van Garderen and David Cote of LHR argue that it should not be "the burden" of legal CSOs to "get the state to enforce their own rules against the private sector".

However, things that make conceptual and political sense do not necessarily always make the best strategic and tactical sense. This is especially the case in the context of a state that has, since soon after 1994, most often shown itself to be more closely allied to corporate capital than to the very people whose interests it is supposed to represent, protect and advance. So, at the same time that Jacob van Garderen and David Cote of LHR rightfully note that the state should be the ones going after the private sector, they also recognise that "all big corporations have a very close relationship with government ... whether construction, or mining, or banking; they are protected, one way or the other." Similarly, as Samantha Hargreaves points out from her work with mining communities:

> They [corporates and the state] are so closely aligned in so many instances ... it's just the twinning of interests. The corporates place a lot of pressure, economic and political, on the state, and there's obviously ruling party interests; that's how they secure economic benefits, it's through the corporates. It's such a tightly knit relationship that I don't necessarily think that the majority of mining-affected communities see much potential to unlock that alliance.

To make matters worse for civil society, the Constitution allows that private sector bodies (companies, corporations etc.) have the same rights as 'natural persons' (that is, ordinary people). This is possible because of the inclusion of a 'juristic person' as set out in section 8 of the Constitution (in the Bill of Rights). In subsection (3) it states that "a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". What this has meant, much like what has happened in the United States of America, is that corporations have been able to "get one right after the other through case law" and in the process largely deflect whatever constitutional rights and associated legal claims there might be against them.

According to Patrick Bond, when corporates "have the same rights we do as ordinary people, then it's a matter of the lawyers, the social weight they can bring to bear, which is about money, against ordinary people." Civil society and more directly, poor / working class community organisations, know all too well how difficult it is to take on, and extremely rare to triumph against, the corporate behemoths in court. Yet there are those rare examples, as was the case when Biowatch took on both the state and Genetically Modified Crops giant Monsanto and succeeded in overturning a huge costs order in the Constitutional Court (Biowatch Trust v. Registrar-Genetic Resources and others, June 2009)[39].

As Bobby Peek notes about experiences in the environmental justice movement; "we don't have the corporate make-up that will follow the law, they will break it until they are caught … and we know in South Africa that when you're caught you pay a puny fine and then you continue doing what you were doing". Melissa Fourie puts it bluntly: "It's a very simple equation - unless there's a consequence for them, they're not going to … comply with the law; It's capitalism". Further, Simon Delaney observes that, "the Constitution doesn't give one many angles and laws generally don't give many angles to go up against companies". On top of that, Simon continues:

> Twenty years on government has simply subcontracted a lot … to private companies, so government has abrogated its duty to implement rights and the Constitution doesn't reflect that nuance; that in fact the state actors have become smaller and the non-state private actors have increased in both their capacity to implement but they are the providers of many of the constitutional rights. And yet, they are shielded by these constitutional rights that make them equivalent to citizens and I think that's a serious flaw in the Constitution that this sort of public function that private companies now enjoy, they're not subject to the same constraints that government is. The constitution and the laws and institutions that underpin those rights are out of step with reality. Corporations are pretty much doing their thing without the same scrutiny that is on government.

Lynette Maart and Elroy Paulus of Black Sash provide a good example on the social security front. As a result of a recent Constitutional Court ruling in the *AllPay Consolidated Investment Holdings and others v. Chief Executive Officer of the South African Social Security Agency and others*[40], it was revealed that a private company, 'Cash Paymaster Services' which had contracted with the South African Social Security Agency, received "huge amounts of state money".

What also emerged was that:

> …state officials sitting on this tender committee had not asked those questions about … the synergy between legislation and constitutional mandate … and the sharing of information [which was] used very generously to market all sorts of things to, to poor people.

[39]Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009)

[40]AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2015] ZACC 7 (24 March 2015)

When it comes to the middle class and the private sector Nathan Geffen reminds us that:

> We've got a situation in the country where middle-class people are becoming more and more dependent on the private sector to supply traditionally public goods: education, health [and] security. The problem is the more middle-class people depend on the private sector, the less interest they have in fixing the public sector. And that's disastrous, especially around education. So … I think there must be room for lots of constitutional action around restricting the … infringement of the private sector into public goods.

But it is not mainly in the courts and through legal avenues that the private sector can be taken on, although that path can sometimes open up other, more offensive fronts. As is the case with many others aspects of the Constitution, their potential and practical use / enjoyment is directly tied to the ability of civil society to mobilise and create 'power' of a different sort that is centred on people's organisations. The question that then arises is, can the Constitution be related to and used in different ways to give it "some bite" when it comes to holding the private sector accountable for what it does, and does not do; and in the process, also hold the state more accountable? If not then, like Lonmin at the Marikana (Farlam) Commission, corporates will simply continue to say that the Constitution has nothing to do with them (when they stand accused of rights violations) but everything to do with them (when they are the ones invoking their rights).

KEY DEBATES WITHIN CIVIL SOCIETY

One of the historic macro-framing strengths but also one of the weaknesses, when applied to more specific and practical impact in the post-1994 period, of South Africa's civil society has been its organisational, ideological and strategic / tactical heterogeneity. The trajectory of this contradictory terrain over the last twenty years has meant on the one hand, that civil society has been able to launch and sustain varied intellectual, activist and practical struggle engagements / battles. On the other hand, it has created and sustained numerous and often shifting barriers to the coming together, in both thought and practice, of the myriad components of that civil society. As the Constitution approaches its twentieth birthday, such a context continues to frame civil society's overall relationship to the Constitution and as a result, there remain key debates within and amongst civil society around the meaning, interpretation and application / impact of the Constitution.

One of the central debates that was already being engaged from the 1980s, both 'inside' the ANC-Alliance and 'outside' amongst other forces of civil society, was whether or not the adoption of a rights-based constitution was desired and / or necessary under continued conditions of capitalist rule and society. As the South African transition has moved forward this debate, while losing a substantial amount of its previous political, organisational and ideological reach, remains present even if largely amongst civil society intellectuals and progressive academics.

For those like Patrick Bond, South Africa's constitutional journey over the last twenty years has only served to confirm that the Constitution has successfully contained more radical change and struggle. The main argument here is that the Constitution "undergirds a liberal, political order that in turn veils the neoliberal economic order [which then] helps the system to reproduce itself". Ultimately, this "veil … sucks activists" onto a legal / institutional terrain that "discourages them from intense activism" and "stops [them] from developing other weapons more effectively". As Heinrich Bohmke[41] puts it, the Constitution and accompanying rights-centred legislation fundamentally frame and facilitate "strategies of social containment that we see operating within the discourse of human rights".

While these perspectives, which also hold some sway amongst sections of what remains of South Africa's independent (political / ideological) left formations, are theoretically powerful (especially given the generalised intensification of socio-economic inequality and concentration of power in post-apartheid South Africa), they have not taken practical hold amongst the majority of civil society nor the 'mass' of poor / working class people.

John Appolis offers an argument as to why this is the case. Whilst recognising the inherent limitations of a rights-based constitutional dispensation in the context of a capitalist system whose raison d'être is the institutionalised exploitation of the poor / working class, Appolis argues that it is nonetheless important "to struggle … for the codification of rights" precisely because one can "generalise [those] rights" which can then become "part of the overall discourse, construct and values of the society you want to build" in order to change "power relations". Crucially, it is in the struggle for the generalisation of those rights - however difficult and contradictory that might be within capitalist society - that "space" is created for the exercise of the very basic freedoms that can fundamentally contest the "lack of democracy … which the "left has [historically] downplayed".

This is precisely what increasing numbers within civil society have been doing, with widely varying degrees of approach, intensity and impact, over the last twenty years. So, for example, Roger Ronnie argues that "if [the] constitution talks about [the right to] participation", community organisations can use / extend this in a struggle to "change legislation to permit local communities to recall counsellors [or to] change the system of election of counsellors so local people have more authority". That can result in both an extension of democracy as well as a shifting of power that can "give effect to constitutional rights in a much more empowering way than what it does at the moment."

Another very creative example is provided by S'bu Zikode:

> We are saying, of course not everything is good in the Constitution, but we are saying most of the things that are there really talks to our daily lives and their ability to transform. If you occupy the land, we think it's the only way that really invites debate. Once you are on it, it talks to the Constitution. In the particular experiences of Cato Crest, there was a time in which we said 'we have won, we must celebrate, we are on the land; they may be tearing [down shacks] every day, but we wake up in the very same land'. So it's no longer our fight; it's no longer Abahlali's fight, but it's the state versus the rule of law.

Even if some within civil society understandably see the Constitution and the associated legal system that institutionalises it as a tool to "depoliticise" people's "rage and disgust" at continuing political repression and socio-economic oppression[42], what the last twenty years of social and political

[41]From personal email correspondence with Heinrich Bohmke, 20 November 2009

struggles have shown us is that a majority of 'the people' continue to see the Constitution as a tool to be used in an on-going struggle for real, practical improvements in their daily lives. As Dustin Kramer of the Social Justice Coalition argues from experiences with the struggles of informal settlements in Khayelitsha, the Constitution represents a codified set of "positive entitlements … as some something that is there, we fought for, we deserve this…" According to Kramer:

> …one would be more hard-pressed to find poor and working class people living in an informal settlement who are sort of anti-rights … that's not to say that they won't be very critical … [but it is] not a critique of the rights as though the rights themselves are a barrier to improving their lives.

Another important area of debate revolves around the desire / need to change, through formal amendments to, the Constitution itself. Jane Duncan maintains that this debate has often been stifled because:

> …we have constitutional romanticism in the country, where people feel that the Constitution is above criticism …people aren't recognising the historically-situated nature of the document and how the document may well need to change in order to address future challenges that society is facing.

Nowhere has this debate been more engaged than in relation to section 25 (the property clause of the Constitution). Indeed, for many in civil society it is the property clause that is responsible for blocking much of the rights claims and struggles over socio-economic transformation of the poor / working class. Samantha Hargreaves, for example, argues that:

> …[the former Landless People's Movement (LPM)] had no way of drawing on the Constitution to justify a call for a radical land redistribution programme or for expropriation without compensation. I guess the calls that we were making politically would have required amendments to the Constitution.

Contrarily, Jackie Dugard argues that the property clause is not a "structural stumbling block" to the kind of land redistribution and expropriation called for by the LPM. In her opinion, the clause actually could "allow wholesale expropriation by the state without giving market value" but that this has never been on the table because of a lack of "political will".

Besides the property clause debate (which will certainly continue, as it should), there are on-going, if more muted, debates related to the need for constitutional amendments around electoral reform. Here, the key issue is centred on the constitutional requirement - in section 46 (1d) - of an electoral system that "results, in general, in proportional representation" (PR). Under this dominant PR system, political parties present lists of candidates for parliament, the nine provincial legislatures and for half of all local government elections[43]. Many in civil society have argued that this effectively ensures that elected representatives are answerable to their respective political parties (and party bosses in particular) as opposed to being held directly accountable to the electorate. Alison Tilley argues that "it makes everything harder in terms of creating change because it just reduces the number of entry points in terms of shifting power."

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[41]From personal email correspondence with Heinrich Bohmke, 20 November 2009.

[43]In local government elections, half the councillors are elected in first-past-the-post, ward elections and the other half in terms of proportional representation on local lists

And then, more particularly since Jacob Zuma became President, there has been intensified debate in respect of the constitutional powers granted to the President and the national Executive (in Chapter 5 of the Constitution). Late last year none other than Deputy Chief Justice of the Constitutional Court, Digang Moseneke, publicly called for a review of powers of the national executive. Moseneke argued that, "a careful examination of the powers of the national executive chapter in the Constitution displays a remarkable concentration of the president's powers of appointment" and suggested that this was not "always optimal for advancing the democratic project".[44] Even though this debate has not been taken up in any sustained public way by civil society, there is no doubt that significant components of civil society agree with Moseneke. Gareth Newham points to the President's power to unilaterally appoint the National Commissioner of Police - in section 207(1) - as a prime example of the need to revisit the Constitution in order to better ensure democratic accountability and de-politicisation of the police services.

As mentioned earlier in this paper, there are also historic and contemporary debates on the issue of separation of powers. The most contentious is that involving the constitutionally-framed powers of the judiciary vis-à-vis the other two 'arms' of the state, the Executive and the Legislature. For academics such as Steven Friedman, those in civil society who want, for example, the Constitutional Court to "decide what poor people should get" (in relation to the 'delivery' of socio-economic rights) are not only being "patronising" but are setting the "fight against poverty back". According to Friedman, this is so because "the first task of a court, which takes social and economic rights seriously, is to empower people to claim rights themselves".[45]

This view is countered strongly by a fellow academic Sandra Liebenberg who argues that without the courts setting down some kind of "standards against which the state (and in appropriate cases, private parties) should be measured in assessing whether they have complied with their obligations", there is much less room for the state to be held accountable.[46] Similarly Jackie Dugard argued in 2008 in response to criticism of 'judicial overreach' in the High Court judgment (*Mazibuko* case) ordering the City of Johannesburg to provide specified amount of water to residents of Phiri, that "when judges are called on to adjudicate whether government infringes a right they are fulfilling a judicial duty to uphold the Bill of Rights, as mandated by the Constitution."[47]

THE STATE OF THE CONSTITUTIONAL STATE

Ask anyone living in South Africa today what they think of the 'state of our constitutional state' and you are likely to get as many answers as there are people. However, there would probably be broad agreement that there are a number of highly troubling 'big issues' facing the country and its inhabitants when it comes to respecting and realising the broader values and vision of the constitution: the high and ever-increasing levels of inequality; the rapid spread and growing levels of corruption within both the public and private sectors; the absurdly high and sustained rate of joblessness; the rising levels of societal violence and intolerance; and, the seeming impunity with which those who possess political and economic power act.

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[44]Tabane, Rapule (2014), 'Moseneke calls for review of presidential powers', *City Press*, 12 November

[45]As quoted in Henning Melber (2014), 'South Africa's Battle for Human Dignity: The Constitution debated and tested', 12 October 2014

[46]Liebenberg, Sandra (2009), "Water rights reduced to a trickle", *Mail & Guardian*, 21 October.

[47]Dugard, Jackie (2008), "A judge of the first water", *Mail & Guardian*, 3 June.

Leaving aside those - evidently including the President of the Republic[48] - who for varying reasons, would rather see South Africa operating under a different kind of institutional and legal 'order' other than a constitutional democracy, there can be little argument that a majority of people, including within civil society, agree that twenty years on from the democratic breakthrough South Africa is navigating in perilous waters. Where there is disagreement about the present 'state of the constitutional state' within civil society though, it relates broadly to whether the identified problems (the 'big issues' mentioned and many others) constitute an imminent threat to the constitutional 'order', whether they can be overcome within the boundaries of that same 'order' and whether enough people actually believe and have trust in, that 'order' to turn the ship around.

Civil society activist S'bu Zikode thinks that the present problems are resolvable as long as "the country really remains in the hands of South Africans" and is not "remote controlled by foreign forces which are not necessarily worried about anything in South Africa". Zikode does not think that "we are in that much trouble" because it is individuals who are the forefront of "the troubling things that are happening". As such, he "believes that we have to somehow via these tests". In a similar (if differentially conceptualised) vein, Jaap de Visser says that although he worries about the present state of "politics … for now, we still have a lot of problems that are solvable. Our institutions have proved to be very resilient [and] government generally respects the judiciary and the Constitution". For Richard Calland, "we continue to have a constitution that enjoys, despite some pushback from the new right, a large amount of social legitimacy [and] I believe that's still the case". What he is most worried about though, is that because the Constitution "still doesn't matter enough to enough people and still hasn't palpably and tangibly been seen by working class people to have benefited them", it remains "vulnerable".

Helping to reduce that "vulnerability", argues Judith February, is that "South Africans are still very engaged [and] … there's everything to fight for". The biggest concern for her is civil society "fatigue … that sets in because we get so tired of the same thing. [So] we need to be careful that things don't slip under the radar because [of] our tolerance levels and this fatigue."

February's critical optimism is shared by Bonita Meyersfeld, who doesn't think that "we can, or should, draw these radical conclusions about 'the state of the nation.'" Meyersfeld believes that:

> [while] our constitution is definitely being clawed back … that is not the end of the world; the end of the world is hunger and desperation. If [fighting for the Constitution] is going to alleviate hunger and desperation then let's fight that battle.

Veteran academic Roger Southall adopts a comparable stance:

> If constitutional rule is to survive and advance in Southern Africa, it will need the support of counter-elites and wider society to contest the repressive components of liberation movement culture in order to secure the freedoms for which the liberation movements themselves claim to have fought.[49]

[48]In late March 2015, in an address to the South African Local Government Association, President Zuma was recorded as saying that: "If I was a dictator, I would change a few things … but this is a democratic country" [See, Olebogeng Molatlhwa, 'JZ: If I were a dictator', 25 March]

[49]Southall, Roger (2013), *Liberation Movements in Power*, Scottsville: UKZN Press, p.97.

Others place the principal responsibility for what they see as a much more serious and immediate political and socio-economic crisis, squarely on the shoulders of the ANC / state. Bobby Peek argues that:

> ...there is a level of desperation amongst folk in South Africa where it's difficult to push a social justice agenda. The government has allowed for society to be so desperate that they can just shove anything down [their throats] and I think that is the state we're in now.

Likewise, John Appolis sees "a strong tendency of authoritarianism that is emerging from the ANC; the more the ANC is going to lose legitimacy [and] popular support, the more you will see these kinds of tendencies coming up".

Jackie Dugard and Jane Duncan put the case more bluntly. Dugard says, "I think we are in trouble, I think the Jacob Zuma regime is hell-bent on siphoning off as much money out of the system as it can, on securitising everything, on making sure everyone is bugged or scared or assassinated. I think it is actually quite a political crisis that we're in". Duncan sees the "political elite [resorting] to desperate measures, in order to protect their grip on the state". Even though she thinks that "the Constitution prevents them from entering into outright repression ... what it is doing is that it's driving repression underground". The result, Duncan warns, is an "informalisation of repression and the organisation and the industrialisation of hit squads".

Taking a more expansive view that combines the range of constitutive (bigger and smaller) problems that South Africa presently faces, there surely can be no denying that South Africa is in a combined if uneven systemic crisis. The fundamental, longer-term question for civil society and its relationship with the Constitution is whether the Constitution as it stands is alternatively, a key part of the transformative solution to, or at the conceptual and practical heart of, that crisis? While there are just as surely no easy answers to that question, the associated question that civil society cannot avoid confronting in the present is what needs to be done?

WHAT DOES CIVIL SOCIETY NEED TO DO?

The first thing that needs to be acknowledged is that forces of civil society in post-apartheid South Africa have remained absolutely central to not only providing a direct and indirect vehicle for a diversity of individual and collective democratic voices but also to sustaining (as per Gramsci) a struggle to contest societal hegemony. Nonetheless, there is also widespread acknowledgment within civil society that there have been many failures, lost opportunities and consistent weaknesses over the last twenty years. In many ways, this dual transitional 'heritage' of civil society parallels the journey of South Africa's constitution - undulating, contested, an unfinished 'product'.

Within this context and once again reminding ourselves that there are no simple, all-inclusive or easy answers in confronting the question of 'what is to be done?', what follows are summary ideas and suggestions derived through the research process, primarily from project interviewees.

- According to Jane Duncan, what is needed is more intensive and sustained, "activist-oriented research, where people are taking seriously the realities of what's happening on the ground and allowing that to structure their understanding of the kind of spaces that have been opened up by rights talk, but also the spaces that have been closed down." Simon Delaney echoes this: "If [we] want to have a meaningful debate about how rights are implemented then [we] have to go and ask the people who are the recipients of these rights about how it is working for them; there is not enough of that"

- Mark Heywood argues for a consciously planned attempt to engage debates and struggles around an intersectionality of rights through trying "to build a consensus on what the Constitution actually represents for us; for progressive civil society to have that debate. And then to analyse the different parts of the Constitution and say, what are some of the critical victories that are there … low-hanging fruits that, if you won on this you would have a knock-on redistributional effect, a knock-on economic effect, an empowering effect on communities". For example, "a fight on basic education is not just about children, it's about rural development, it's about electrification [and] it's about employment creation"

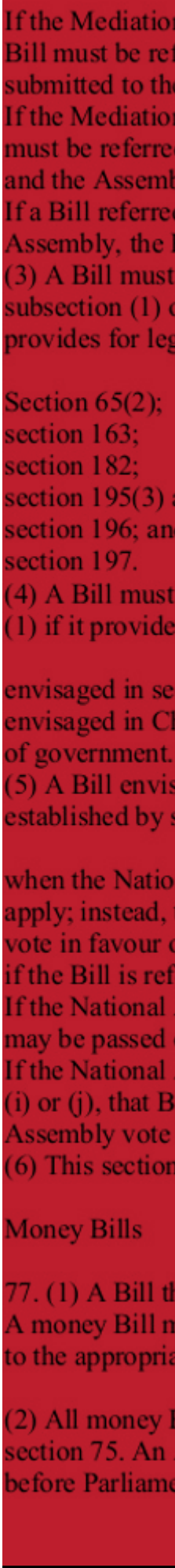
- Janet Love suggests that what is needed is to identify, think through and then have collective civil society discussion around those "parts of the Constitution that … need to be working properly in order for the Bill of Rights to be delivered on in any shape or form". This would include general constitutional principles of transparency, accountability, inter-governmental cooperation [and] independent institutions"

- John Clarke argues for the creation of space for a specific dialogue "between the kind of Western understanding of human rights which is where [many in civil society have] come from [and] local, traditional culture" and understandings of rights and responsibilities. In doing so, "our [constitutional] rights [can] be brought to a human scale, as interpersonal values, not just simply as juridical concepts"

- Through existing civil society networks, coalitions and campaigns, to collectively organise a programme for community-based public forums on constitutional values and social / political tolerance: Such forums should be constitutional rights-topic driven (e.g. same-sex rights, freedom of expression, right to protest, right to a healthy environment, non-citizen rights etc.), be as inclusive as possible and be accompanied by creative publicity methods to mobilise broader public participation.

- A more concentrated and dedicated focus on community-based constitutional rights education, advocacy and capacity, specifically involving CSOs in poor, rural communities. Such an initiative should be grounded in the reality of a fairly high level of real, lived rights knowledge as well as the centrality of self-organisation and self-emancipation. In this way, the foundations for an organic shift in critical consciousness and empowerment (as opposed to a top-down, passive recipient approach) can be strengthened, increased rights awareness / knowledge better sustained and doors to rights access and action for redress opened further.

- Dustin Kramer suggests that what is needed is specific, collective discussions about how CSOs (not just the legal ones) can engage both with the academy, and more particularly with social science and law departments, as well as with law students themselves in order to encourage and facilitate young lawyers coming into the public interest law field.



- A common thread running through the interviews with David Fig, Samantha Hargreaves and Bobby Peek relates to the need to organise dedicated cross-civil society debate / discussion forums on what kind of model of development (socio-economic and political values and goals, and so on) is desired and needed in order to catalyse and eventually realise both the broader vision and more specific rights promises contained in the Constitution. This is informed by the fact that the current South African 'development model' is incapable of the above and that the only attempted definition of development in the Constitution - section 24(b)(iii) - says development shall be socially and ecologically just.

- Gareth Newham talks of the need to bring more civil society groups together in dialogues, networks and coalitions that can connect various intellectual / research work and practical campaigns / struggles: "...we could have a lot more impact if we were able to start saying, well what is the commonality between Abahlali's being victims of police while protesting for better housing and fighting illegal evictions, all the way through to people who're actually studying [the] police..."

- The forging of specific political solidarity between community-based movements / organisations so that struggles involving what Samantha Hargreaves calls those "constitutional rights being denied to communities" can take on a collective and solidaristic character.

> **AUTHOR'S POSTSCRIPT: Above all, what civil society needs to do is to be at the heart of the reconstitution of the demos, through education, organisation, mobilisation and practical action; to act as the fulcrum of democratic voice and power. In doing so, the possibilities of reconstructing and then defending a constitutional order that is of, and for, that demos can become more than just a deferred dream.**

APPENDIX A - INTERVIEWS CONDUCTED

Audio recordings and transcripts of the interviews conducted in 2014 as part of this research are archived in SAHA Collection AL3297

- Interview with ALFANI YOYO (CORMSA), 17 October 2014. Archived as AL3297_A03.18.
- Interview with ALISON TILLEY (ODAC), 13 August 2014. Archived as AL3297_A01.12.
- Interview with BOBBY PEEK (GroundWork), 10 September 2014. Archived as AL3297_A02.02.
- Interview with BONITA MEYERSFELD (CALS - University of the Witwatersrand), 7 October 2014. Archived as AL3297_A03.14.
- Interview with CHERITH SANGER (SWEAT), 14 August 2014. Archived as AL3297_A01.11.
- Interview with DAVID FIG (BioWatch), 30 September 2014. Archived as AL3297_A03.09.
- Interview with DUSTIN KRAMER (SJC), 13 August 2014. Archived as AL3297_A01.06.
- Interview with ELROY PAULUS & LYNETTE MAART (Black Sash), 15 August 2014. Archived as AL3297_A01.09.
- Interview with GARETH NEWHAM (ISS), 22 September 2014. Archived as AL3297_A03.15.
- Interview with GEOFF BUDLENDER (human rights advocate / LRC), 17 September 2014. Archived as AL3297_A03.02.
- Interview with JAAP DE VISSER (Community Law Centre - University of the Western Cape), 15 August 2014. Archived as AL3297_A01.02.
- Interview with JACKIE DUGARD (human rights activist / legal scholar / SERI), 15 September 2014. Archived as AL3297_A03.06.
- Interview with JACOB VAN GARDEREN and DAVID COTE (LHR), 29 September 2014. Archived as AL3297_A03.17.
- Interview with JANE DUNCAN (ex- FXI; University of Johannesburg Department of Media / Communications & activist), 6 October 2014. Archived as AL3297_A03.07.
- Interview with JANET LOVE (LRC), 6 October 2014. Archived as AL3297_A03.13.
- Interview with JOHN APPOLIS (veteran unionist and political activist), 14 October 2014. Archived as AL3297_A03.01.
- Interview with JOHN CLARKE (Opposition to Urban Tolling Alliance & activist), 23 September 2014. Archived as AL3297_A03.04.
- Interview with JUDITH FEBRUARY (ex-IDASA and now ISS - governance and democracy), 20 October 2014. Archived as AL3297_A03.08.
- Interview with KATE TISSINGTON (SERI), 29 September 2014. Archived as AL3297_A03.16.
- Interview with MARK HEYWOOD (Section 27), 18 September 2014. Archived as A03.12
- Interview with MASHAO CHAUKE (Schubart Park Residents Association / unionist), 30 September 2014. Archived as AL3297_A03.03.
- Interview with MELISSA FOURIE (CER), 13 August 2014. Archived as AL3297_A01.03.
- Interview with NATHAN GEFFEN (ex-TAC leader and Editor of GroundUp), 11 August 2014. Archived as AL3297_A01.04.
- Interview with NICOLE FRITZ (SALC), 29 September 2014. Archived as AL3297_A03.10.
- Interview with NTHUTHUZO NDZOMO & BAYANDA MAZWI (Equal Education), 15 August 2014. Archived as AL3297_A01.08.
- Interview with PATRICK BOND (Centre for Civil Society - UKZN), 9 September 2014. Archived as AL3297_A02.01.
- Interview with PRAKASHNEE GOVENDER (COSATU Parliamentary Office), 11 August 2014. Archived as AL3297_A01.05.
- Interview with RICHARD CALLAND (University of Cape Town Law School), 14 August 2014. Archived as AL3297_A01.01.
- Interview with ROGER RONNIE (ex-General Secretary of SAMWU / unionist & activist), 12 August 2014. Archived as AL3297_A01.10.
- Interview with S'BU ZIKODE (Abahlali base Mjondolo), 10 September 2014. Archived as AL3297_A02.03.
- Interview with SAMANTHA HARGREAVES (ex-LPM leader / women's rights activist), 3 October 2014. Archived as AL3297_A03.11.
- Interview with SANDRA LIEBENBERG (University of Stellenbosch Law School), 13 August 2014. Archived as AL3297_A01.07.
- Interview with SIMON DELANEY (human rights lawyer - independent), 19 September 2014, Archived as AL3297_A03.05.

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APPENDIX C - CONSTITUTIONAL COURT CASES CITED

All court papers were retrieved from the Southern African Legal Information Institute (SAFLII) at http://www.saflii.org/za/cases/ZACC/

- Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)
- Carmichele v Minister of Safety and Security (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001)
- 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 (5 July 2002)
- Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009)
- 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) (8 October 2009)
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- AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2015] ZACC 7 (24 March 2015)

"It's kind of a double-edged sword almost, the Constitution; on the one hand it promises all these things, on the other hand it has all these safe-guards that protects the rights of those people who have been historically advantaged." - ROGER RONNIE

This report is the product of a research project undertaken by the South African History Archive in 2014, exploring the changing relationship between civil society and the South African Constitution, as part of a broader SAHA archival collection project on the Constitution in advance of marking 20 years of the Constitution in 2016.

Drawing on over 30 hours of interviews with civil society activists, community leaders and public interest lawyers, this report traces the constitutional journey over the past two decades to reflect upon:

- the state of the constitutional state
- the impact of the Constitution on the work of civil society
- the changing attitudes towards, and levels of trust in, the Constitution, and;
- the extent to which the Constitution is accessible to civil society as a tool for transformation.

This report is intended as a catalyst, to stimulate debate around how civil society could be engaging with the constitutional project moving forward.

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For more information about this project, please access SAHA Collection AL3297: The Constitution and Civil Society Project Collection on the SAHA website at www.saha.org.za.