Civil Society, Social Movements and Power in South Africa

Prof. Ran Greenstein, Department of Sociology, School of Social Sciences, University of the Witwatersrand

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Introduction
This paper is part of a larger project that examines transition processes in post-apartheid South Africa. It looks at state and civil society in the context of local and global social and political developments, with a focus on notions of power and democracy. In contrast to conventional political analysis, which looks at state and civil society as mutually exclusive and internally consolidated sectors, this paper regards them as spaces of power. Within their boundaries political identities, principles of organisation, and modes of operation are formed, shaped and modified in interaction between actors and institutions. Central to the analysis presented here is the concept of power, defined as a set of practices and discourses that govern the interactions between social actors. The identities and interests of these actors are shaped in relation to contests over agendas, strategies, meanings, and resources. Power thus has several dimensions, of which three are of particular importance. These are: social power (access by individuals and groups to resources and control over their allocation), institutional power (strategies employed by groups and institutions in exercising administrative and legal authority), and discursive power (shaping social, political and cultural agendas through contestations over meanings).

Scholarly literature on transitions in contemporary South Africa focuses on the social dimension of power, discusses to a limited and insufficient extent the institutional dimension, and largely ignores the discursive dimension of power. This means that power is incompletely understood, and that one of its crucial dimensions, which makes sense of the others, is missing from the analysis. As a result we are left with a truncated picture in which state and civil society are regarded as actors that operate on behalf of other social forces (usually defined in race or class terms). Alternatively they are seen as blank spaces that merely reflect conflicts and interests that are generated from outside their boundaries, in the economy and society at large.

Thus, for example, some left-wing activists regard the state as an agent of capital, operating wittingly and unwittingly to further local and global business interests, while civil society in the form of unions, NGOs and new social movements represents the interests of workers and the dispossessed. Conservative observers regard the South African state as a tool in the hands of an elite black racial group serving to empower and enrich themselves at the expense of established white interests and the black masses. Supporters of the government like to see themselves as a vanguard representing the black population (elite and masses alike), who had been denied political rights by the apartheid regime, and are now moving to assume their full role in the new political dispensation, and so on.
Analyses such as those above offer different and opposed political viewpoints, but they share an understanding of politics as a forum for representation and struggle between consolidated interest groups. What is missing from such analysis, however, is precisely what is unique and interesting about the state and civil society as spaces of power: the extent to which they create and shape rather than merely reflect pre-existing social interests and identities; the specific organisational logics developed and deployed within their boundaries; the policy debates informed by discourses of democracy, modernity, rights, representation and popular participation; the contestation over the meanings of widely-used concepts (such as development, empowerment, transformation and capacity building), which may be interpreted and applied in many different ways; and the local and global alliances formed between actors in different locations, which undermine the notion of internally homogenous and externally bounded sectors.

In brief, the limitation of conventional approaches, of the left and the right varieties alike, is that politics as an independent field of action, discourse and analysis disappears from view. In its place an analysis of social forces is conducted, as if these forces had a meaningful pre-political and pre-discursive existence. Of course, social differences exist independently of our conceptualisations of them, but they become bases for the formation of identities and interests and for social mobilisation only when they are endowed with meaning by discursive-political processes.

Civil Society, State and Power: Theoretical Reflections

Since the late 1980s, a large body of literature on the concept of civil society and its relevance to the analysis of social and political processes has been produced. One of the prominent theorists to use and disseminate the concept, John Keane, distinguishes between three main approaches:

- An analytical approach, which aims to “develop an explanatory understanding of a complex socio-political reality by means of theoretical distinctions, empirical research and informed judgements about its origins, patterns of development and (unintended) consequences.”

- A strategic approach aimed at “defining what must or must not be done so as to reach a given political goal”, such as fighting despotic power by creating a network of oppositional civic organisations (as may have been the case in some South American countries and in South Africa), and identifying the tactical steps that enable political mobilisation to fight the existing power structure and replace it with another.

- A normative approach, which emphasises “the multiplicity of often incommensurable normative codes and forms of contemporary social life”. It places value on political and cultural pluralism in order to create space that provides people and groups with the freedom to debate, agree with and oppose each other. Civil society, in this approach, is a way of subjecting power to mechanisms that enable disputation, accountability, representation and participation. In this sense, Keane argues, civil society is “either an actual or anticipated a priori of the struggle for egalitarian diversity.”
More radical implications of the civil society concept are explored by Gideon Baker in his innovative work on visions of civil society, democratic transitions, and political theory and practice in Eastern Europe and Latin America. Baker focuses on the extent to which “the democracy of civil society represents a coherent alternative for democratic theory and practice.”

Baker examines the common conceptualisation of civil society in liberal and left wing political theory, and concludes that it views civil society in instrumental terms, as a counter-balance to state power. This means that civil society itself is seen as essentially apolitical, important only in that it influences state policy. Through studying the role civil society theory and practice played in democratic struggles in the 1970s and 1980s, Baker aims to identify and develop an alternative view of civil society as “a democratic end in itself, as a space for the realisation of that elusive promise of democracy – self-government”. Largely drawing on the theory and practice of the Zapatista movement in Mexico, Baker’s approach leads us away from a focus on the capture of state power (which is seen as inherently oppressive and exclusionary) towards the creation of counter-public spheres, where democratic and decentralised practices of communal organisation prevail.

This focus on decentralised and self-determining democratic practices, and the rejection of the quest for a takeover of the state, clearly resonate with Michel Foucault’s opposition to “global, totalitarian theories” and his emphasis on the “local character of criticism”. For Foucault these are derived from an “autonomous, non-centralised kind of theoretical production” that is linked to “particular, local, regional knowledge” of academic and popular nature. Interestingly though, Foucault’s notion of power, which denies the autonomy of individuals and the possibility of a sphere of freedom outside of power, clashes with some of the elements in civil society theory.

Drawing on Hanna Arendt and Vaclav Havel in particular, Baker constructs a model of civil society that combines the quest for an autonomous private sphere with a notion of active citizenship based on a decentralised model of self-government. This model does not clarify, however, the relationship of civil society to the state, and how the state might be reconfigured to allow self-rule in civil society. Unless we adhere to utopian notions of the withering away of the state, or of the extension of spaces of freedom in civil society until they encompass the entire social body, this is essential. The model also fails to outline the relationship between local organisation and global forms of economic and political domination. We need then “a more ambitious, wide-ranging imagery of republican politics in a global network of civil society, even if only as an animating ideal, rather than as a putatively practical goal”.

Baker’s discussion leaves us with three analytical and practical challenges, with which to frame the discussion of civil society and its relations to state and power. Not all these challenges are presented in this precise manner in Baker’s work, though his analysis of the theory and practice of political
opposition and civil society in the democratic struggles in Eastern Europe and Latin America gives rise to the following crucial questions:

- How to combine and transcend autonomous forms of self-rule located in civil society, in order to create a macro-political democratic order, without undermining the vitality of its micro-political foundations in the process? A related question is how local self-rule can challenge global power, without constructing a global counter-power, which would resurrect the same forms of oppression that gave rise to the quest for self-rule in the first place?\(^\text{10}\)

- How to move beyond the definition of civil society as an independent sphere of freedom and self-rule residing outside of state boundaries, and link it to the state, but without regarding civil society merely as an interest group, seeking to constrain state power and gain rights from it (thus entrenching the state's political supremacy)?

- How to recognize the full diversity of identities and interests in the sphere of civil society, without portraying a picture of incoherent disparate multiple voices on the one hand, and without marginalizing some of these voices in the name of others (that are supposedly more important) on the other hand? In other words, how to recognize diversity without excluding the possibility of unity?

These challenges are addressed by Chantal Mouffe, who has put forward the notion of radical democratic citizenship, seen as “an articulating principle that affects the different subject positions of the social agent...while allowing for a plurality of specific allegiances and for the respect of individual liberty.” She goes on to argue that radical democracy depends on “a collective form of identification among the democratic demands found in a variety of movements: women, workers, black, gay, ecological, as well as in several other ‘new social movements’. This is a conception of citizenship which, through a common identification with a radical democratic interpretation of the principles of liberty and equality, aims at constructing a ‘we’, a chain of equivalence among their demands so as to articulate them through the principle of democratic equivalence.”\(^\text{11}\)

Ernesto Laclau, working in a similar vein to Mouffe, elaborates this point further. He maintains a distinction between the notion, which he accepts, that social and political demands are discrete “in the sense that each of them does not \textit{necessarily} involve the others”, and the notion, which he rejects, that “they can be politically met only through a gradualist process of dealing with them one by one”.\(^\text{12}\) He moves on to argue that universality – an overall discourse of emancipation – can be the outcome of interaction between particularities – specific demands. Under conditions in which issue-specific demands are rapidly proliferating, and the grand narratives of the past such as class emancipation and national liberation are in decline, the task facing the left is “the construction of languages providing that element of universality which makes possible the establishment of equivalential links”.\(^\text{13}\) The language of radical democracy provides the potential of linking various demands in that way.
This operation, which links particular demands in the same universal chain, is termed \textit{hegemonic articulation}. In contrast to the grand narratives of the past, which asserted universal validity, and into which all particular cases were coerced, Laclau’s radical democratic articulation is based on the notion that universality can only emerge “through an equivalence between particularities, and such equivalences are always contingent and context-dependent”.\textsuperscript{14} In other words, there is no inherent logic that always unites social demands regardless of context.

To what extent can we use this approach, with its focus on the articulation of diverse elements in order to produce a contingent unity in civil society, to understand the nature of the state as well? Working along similar lines but drawing on Pierre Bourdieu, Joel Migdal advances a definition of the state as ‘a field of power’, which is shaped by “the image of a coherent, controlling organization in a territory, which is a representation of the people bounded by that territory’, and at the same time by “the actual practices of its multiple parts”.\textsuperscript{15} Whereas the state’s image is usually that of a unified and centralised entity, its diverse practices may serve to reinforce the image as well as to undermine it.

The state then, is a “contradictory entity that acts against itself”. It projects a powerful image of a unified actor but can also be seen as “the practices of a heap of loosely connected parts or fragments, frequently with ill-defined boundaries between them and other groupings inside and outside the official state borders and often promoting conflicting sets of rules with one another and with ‘official’ laws”.\textsuperscript{16} We must keep in mind here that the state extends beyond government to cover a range of institutions, including the courts, security services, parliament, public companies and so on. Thus for example, state agencies in South Africa may be involved in the violation of human rights (the police, Department of Home Affairs) as well as in monitoring their practice (Human Rights Commission) and protecting them from offenders (Constitutional Court). They may preside over different and even contradictory policy agendas, and some of them may find greater affinities with agencies external to the state than with other state institutions.

At the core of political analysis then is the examination of the various projects at state and civil society levels, aimed at articulating different concerns under unifying hegemonic themes and images, and the extent to which these projects intersect, clash with and modify each other. They do not pit a unitary state against a unified civil society but rather allow for the interpenetration of sectors and crossing of boundaries between them.

If we take the notions outlined above of contingency and context-specificity seriously, can we regard theories developed in a European context and in relation to historically specific realities, as valid for other realities, such as those of the post-colonial world and specifically South Africa? One answer is that although notions of state, power, civil society, and rights were conceptualised in their current form in Europe, based on its specific historical and intellectual experiences, they are equally
applicable to societies in other parts of the world (as long as we take the historical specificity of each into consideration).17

In a similar manner, Partha Chatterjee uses the term civil society to refer to modern institutions of associational life which are based on notions of equality, autonomy, freedom of entry and exit, contract, deliberative procedures of decision-making, and recognised rights and duties of members. Even though non-European societies may have given rise to different norms and organisations, the civil society model is useful in order “precisely to identify these marks of difference, to understand their significance, to appreciate how by the continued invocation of a ‘pure’ model of origin – the institutions of modernity as they were meant to be – a normative discourse can still continue to energize and shape the evolving forms of social institutions in the non-Western world”.18

Having acknowledged the relevance of the concept of civil society, Chatterjee introduces the notion of political society to account for a range of institutions and practices that mediate between the population and the state in post-colonial societies, but fall outside the boundaries of modern civil society. They work in a context of a developmental state, which seeks to relate to different sections of the population through the governmental function of welfare.

Post-colonial political society has four distinctive features: many of its mobilisations are illegal, including squatting, using public property, refusal to pay taxes, illegal service connections, etc; people use the language of ‘rights’ to demand welfare provision; the rights so demanded are seen as being vested in a collective or a ‘community’, which may be very recent in origin, and not as individual rights; state agencies and NGOs treat these people “not as bodies of citizens belonging to a lawfully constituted civil society, but as population groups deserving welfare. The degree to which they will be so recognised depends entirely on the pressure they are able to exert on those state and non-state agencies through their strategic manoeuvres in political society”.19 The affinities between this description and South African social protest movements seem obvious.

Where do the preceding theoretical reflections, and their post-colonial applications, leave us? We can summarise them in the following points:

- The concept of civil society has acquired different meanings and has been used to different ends. Most important of these are: (1) its use as a descriptive-analytical tool to examine relations between different sectors as well as their internal structure and function, and (2) its use to challenge existing power relations and put forward an alternative radical democratic vision.
- The latter approach presents us with questions that deal with the nature of power and resistance, the organisation of elements of civil society such as new social movements, their application of notions of radical democracy, and the extent to which they seek to balance the excesses of established power or rather to provide alternatives to the ways in which it is conceptualised, organised and exercised.
Post-Apartheid South Africa

The relations between the state and civil society are in particular need of clarification in South Africa, because of the common equation of democracy with majority rule in this country. The long exclusion of the majority of the population from having a say in the way they and the country were governed, made the demand for a political system based on the principle of ‘one person, one vote’ of great concern during the apartheid era. Slogans such as ‘power to the people’ or ‘the people shall govern’ were used interchangeably with this demand. In essence they called for the creation of a system in which all citizens would be able to vote and thus gain access to power.

Other more radical implications of transformation, involving a change in the way in which power is conceptualised and exercised, were mooted as well, but rarely given an operational definition. At present they do not seem to have much concrete meaning, although they are rhetorically invoked at times. The notion of ‘the people’ was seen in the 1980s as a unified whole, which does not allow for much internal differentiation and diversity. That the people are composed of different groups, with sometimes overlapping and sometimes contradictory interests, which cannot be collapsed into a larger unity, is not a common notion in South African political discourse.

The structural limitations of formal democracy are evident in countries such as South Africa, which are burdened by the historical legacy of an obtuse bureaucracy ruling over large masses of subjects who were not regarded as citizens. South Africa is politically led by a government that has formally committed itself to the welfare of all citizens, and the need to overcome the legacy of past neglect and misrule. The state however, is still burdened by the same bureaucratic mentality and organisational culture that prevailed under apartheid. More often than not, new officials have assimilated the existing ethos of state departments, and now operate in a similar manner to that of officials left from the old order. The hostility of the Department of Home Affairs to so-called ‘illegal aliens’ from other African countries, and the appalling conditions under which they are kept and treated, is a case in point.

Much of the concern with transformation of the state in the post-1994 period has focused on the need to change policy frameworks and the racial complexion of the public service, by formulating new policies and implementing affirmative action. Important as these are, little attention has been paid to the need to transform the ways in which state power is organised, distributed and exercised internally, and the ways in which it interacts with civil society. Only by attending to these issues can meaningful political transformation be effected.

The ANC and its alliance partners share an emphasis on the state as the guiding force of economy and society. Frequently qualified as ‘the developmental state’, or ‘the new democratic state’ or ‘the national democratic state’, this conceptualisation of the state is similar in principle to that common in those circles in the 1980s. State-directed development is still seen as the best way forward.
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Aliance partners sometime make concessions to the reality of limited capacity of the state to transform society and control the economy under conditions of globalisation. They frequently mention the need to involve popular forces in the process of governance and invoke the notion of ‘partnerships’ with civil society and the private sector. Popular participation in always seen, however, as a way of bolstering the role of the state under ANC leadership, rather than as potentially contradicting, challenging, or forcing it to re-think its policies and practices. From this perspective, the focus on participation does not reflect recognition that civil society forces may play a role independently of, let alone in opposition to, the ruling party.

The concern with the need to redistribute resources and allow planning to address the legacies of the apartheid past is understandable and justified, but centralisation gives rise to problems. It tends to shift power upwards, away from people and structures closer to the ground. It empowers an expanding non-elected and unaccountable bureaucracy, which is needed to administer affairs and transmit policies from the upper echelons of power to lower levels of implementation. It makes the incorporation of local inputs, which of necessity are diffuse, unsystematic and location-specific, difficult. It creates filters through which the concerns expressed by the grassroots become diluted or marginalised. It encourages the formulation of large-scale policy frameworks that are usually removed from practical constraints of implementation at the local level, and therefore can make even the best policy intentions unrealisable.

Particularly problematic from our perspective is that centralisation subverts the logic of participatory democracy, which operates at the level in which policy matters most, and where intended beneficiaries, people and communities are located. It replaces it with a logic that is based on the nature of the state as an articulated complex of structures, with a distinct mode of operation, which structurally serves to exclude popular participation, regardless of the intentions of politicians. To understand the logic of the state, we must consider its operation in the post-apartheid era.

Literature on political transition in South Africa has focused on the role of external constraints on the state in policy making: limited financial resources, pressure from international agencies, conflict between powerful old and new social groups, demobilisation of the labour movement and the masses, capitulation of political elites to local and global business interests, self-enrichment drive on the part of new political and business elites, etc. In particular, the notion that the ANC-led government has failed to meet the goals it set itself before 1994 has been highlighted and various explanations advanced to account for it. What John Saul refers to as the ‘neo-liberal logic of global capitalism’ and its adoption by the South African government, has become the main culprit for critics on the left.

All these explanations contain kernels of truth, but they generally suffer from a focus on social forces and political economy to the exclusion of power and discourse. Consequently they fail to
consider an essential aspect of politics: a process involving contestation within and between collective actors over the mode of organising and exercising power, and a process of re-positioning social and political relations within wider discourses, which endow them with meaning (such as the discourses of nationalism, race, development, and alternative paths to modernity). In terms of the conceptual framework outlined earlier, these accounts of transition in South Africa focus on social power, ignore institutional and discursive power, and regard state and identity formation processes as derived directly from socio-economic developments.

It is argued here, in contrast, that political, institutional and discursive processes must be analysed in their own terms. Although they operate in relation to socio-economic developments, these do not determine them. State structures, which form an articulated institutional network with a distinct logic and mode of operation, are independent of the specific social interests they may serve at any point in time. While they can further a variety of concerns (organised around race, class, gender, ethnicity), they are never passive actors in the service of pre-existing interests. Rather they act to create, define and consolidate social interests. In analysing policy in the context of political transition, then, we must consider state structures, mechanisms and practices, shifting relations between institutions and forces (within as well as outside state boundaries), and the discourses that govern their operation.

The 1994 elections marked a shift in the configuration of power in South Africa. The opposition between ‘the regime’ and ‘the people’ was laid to rest. This is not to say that relations of political and social domination have been transformed since then. In fact, in many areas little change has taken place and in some respects the change is for the worse. What have decisively changed, however, are the terms in which power is conceptualised and exercised. The conflict between two mutually exclusive and internally homogeneous camps has given way to the interpenetration of partially opposing and partially collaborating forces, which are internally heterogeneous.

Past political affiliations are important, no doubt, but they are not frozen in time. The re-alignment of forces in the post-1994 period has led to the emergence of a new style of governance that combines elements from the old and the new, but is not a direct continuation of either. It can be termed a New-Old State, the contours of which are becoming increasingly visible with time. A process of merger has been taking place, in which the political edges on each side were shed, and a new politics of the centre has arisen. Members of the apartheid bureaucracy who discarded the discredited discourse and practices of the past, and embraced change in principle, and ANC-aligned bureaucrats willing to accommodate the existing structures and adopt a cautious and gradual attitude towards change, have found a common language. This language and its related institutional arrangements exclude die-hard guardians of the old order on the one hand, and advocates of radical change of policies and institutions on the other. The dividing lines of the pre-1994 have dissolved to a large extent, and other alliances are taking their place.
The view of the state advanced above does not imply the state is becoming homogenous and that no internal conflicts within its structures take place. Rather it serves to question whether such conflicts can be meaningfully seen as a continuation of the struggles of the apartheid era, pitting two mutually exclusive camps against each other. With some exceptions in the state repressive apparatus, which continue to contain unreconstructed elements from the old order, most state structures have embraced change and moderate reform, but have managed it through the particular discourse and institutional arrangements of the new-old state.

**Social Movements, Power and Democracy**
Existing research on civil society in South Africa shows a clear focus on questions of size and reach of the sector, and the relationships of civil society organisations (primarily NGOs and to a lesser extent CBOs) with government, in the area of service delivery. From this perspective, the critical role of civil society organisations is restricted to monitoring government performance, and helping marginalised communities and constituencies to make their voices heard and make an input into the policy process. More visionary perspectives, seeking to provide a new understanding of power and propose a strategy for those who find existing analyses limited and limiting, are rare, as the scene has become dominated by technical arguments about efficiency in service provision. Some of the critical power of the civil society concept, however, has been taken over by new social movements that have come into being in the last few years. It is to their potential that we should turn now.

In order to understand the challenges facing us today, a step back into the 1980s and early 1990s is needed. The anti-apartheid movement, internally led by the United Democratic Front (UDF), sought to bring down the apartheid regime and replace it with a democratic government. At the same time, in the course of struggle, many other concerns were raised by affiliate organisations, including working conditions, rent, environmental degradation, urban services, agricultural productivity, AIDS awareness, liberation theology, people’s education, school curriculum, and so on. These reflected the range of issues of interest to civil society organisations, communities and activists, who were deeply politicised but whose concerns extended beyond the issue of state power. Specific local conditions and grievances, and issues of sheer survival in many localities throughout the country, fed into a strategy of overall political mobilisation.

The ability to articulate numerous disparate local concerns into a global anti-apartheid movement was the strongest asset of the opposition, as it allowed it to present a united front against the regime. At the same time, however, it left a dangerous legacy that eventually led to the demise of the movement. Forming a united front left little room for voices expressing dissenting interests and values. Although after 1990s, during the transition period, much of ANC rhetoric stressed the need for an independent civil society, and accepted in principle the vision of a pluralist political system, many civil society organisations found it was not easy maintain a balance between political support
for the movement on the one hand, and critical independence from it on the other. This difficulty extended into the post-transition period, when the ANC assumed the leading role in government.

The relations between the ANC and civil society organisations remained contested throughout the transition period. The contradictory legacies of the top-down structured ANC in exile, and the mass-based and participatory UDF, produced tensions within the movement, but not a break. Having just returned from exile, the ANC relied heavily on the organisational and human resources of civil society allies. Civil society organisations without much popular backing outside their own ranks relied on the ANC for political legitimacy and leadership. Political transition and the assumption of power by a legitimate government tilted the balance in favour of a more authoritarian and less participatory mode of governance that remains in place today. Despite developments such as the formation of the South African National NGO Coalition (Sangoco), civil society organisations were left with no ability to provide leadership and pursue an agenda independently of the state.

When we look today at post-apartheid realities in the light of the experience of the previous decade, it is important to bear in mind that the goal of toppling oppressive white rule, which unified the anti-apartheid movement, is no longer relevant in the new South Africa, while the local concerns that fuelled the struggle are still much alive. In retrospect, one of the major reasons for the slow – or no – progress towards meeting these local concerns, is paradoxically the success of the anti-apartheid struggle. To be more precise, it is the conceptualisation of the demise of apartheid and the victory of the ANC as an overarching goal, which required the subordination of local struggles in the name of national unity against the common enemy. This has led to the continued marginalisation of these concerns in the successful aftermath of ‘the struggle’.

Let us clarify the argument. The anti-apartheid struggle had a coherent centre as well as disparate, uncoordinated, locally focused and untidy margins, expressed in the proliferation of multiple terrains of struggles spread geographically and thematically all over the country. It was natural to attempt to unify these multiple strands into a force that could meet apartheid head-on, confront power with power, and present an overall challenge to the regime, forcing it to yield ground and embark on negotiations. This did not necessitate, however, a surrender of local concerns and their relegation to the background until the larger question of political transition was settled. The ANC chose this path, and its allies and UDF affiliates largely followed suit, because of the legacy of a centralist political discourse, which glorified national unity (and reviled internal dissent) as a sacred principle of the struggle.

Reverting to the theoretical language introduced earlier in this report, we can see this development as the subordination of local, decentralised and regional criticisms to a global totalitarian theory (Foucault), or the articulation of particularities into a universal chain of equivalencies, not in a contingent and context-dependent manner as advocated by Laclau, but in a manner that served to
subordinate the particular in the name of the universal. It is based on what legal theorist Roberto Mangabeira Unger calls ‘false necessity’, the political approach that proceeds from the notion that “real transformation requires the replacement of a supposedly indivisible system like capitalism by an equally indivisible and fantasmagorical alternative like socialism”.29

Of course, local, community-based and constituency-specific concerns and demands were only suspended to allow the political process of transition to proceed, with the idea that the new government would take care of basic needs once it has consolidated its control. In practice, once a new power took office it tended to retain or to re-invent the same disregard for local concerns as the power it had replaced. While the ANC government is clearly different from and superior to the apartheid government in its social basis, values and policy goals, it shares to some extent its mode of operation and disdain for dissent. While the why and who of power changed, the how of power changed to a much lesser extent.30

An interesting reflection on the way social mobilisation has become subordinated to the nationalist project led by the ANC is found in a response by a leading member of the SACP, Jeremy Cronin, to a critique from the left. According to Cronin, the decline in popular mobilisation in the post-apartheid era has had an impact “on the coherence and resourcing of grassroots structures in our mass constituency.” In facing this situation, “it would be a betrayal to simply retreat back into the social movement alone, for the left is also in parliament, in government, in the security forces, in the Constitutional Court, in the educational and public broadcast institutions, and many more sites of institutional power. Each of these is a site of struggle, to be sure. We are not alone in these places. In each of these sites, the key strategic struggle is between all ANC-aligned forces on the one hand and a range of neoconservative forces, ranged outside of and indeed within these state institutions.”31

Clearly, Cronin cannot think of mass mobilisation as anything other than the organisation of popular forces aligned with the ANC, serving its strategic struggle against the remnants of the old order. That people may regard the ANC alliance as part of the problem rather than part of the solution, or that they may wish to organise against both the ‘ANC-aligned forces’ and the ‘neoconservative forces’ that he identifies, is inconceivable from his perspective.

The focus on gaining control of the state is countered by John Holloway’s critique of the instrumental notion of power, which “subordinates the infinite richness of struggle, which is important precisely because it is a struggle for infinite richness, to the single aim of taking power”. The problem, according to Holloway, is that “in doing so, it inevitably reproduces power-over (the subordination of the struggles to the Struggle) and ensures continuity rather than the rupture that it sought...to struggle through the state is to become involved in the active process of defeating yourself”.32
How are these historical and theoretical reflections expressed in our present conditions? To illustrate the argument let us have a look at one incident that captures some of the positions in the debate over power, civil society and democracy. In August 2002, the World Summit on Sustainable Development was convened in Johannesburg. Among the activities that took place on this occasion, on the margins of the official meeting, was a march from Alexandra township to the Sandton convention centre, called by a range of organisations and social movements, which came together under the name of United Social Movements. They reflected a range of concerns including land, housing, water, electricity, environmental degradation and so on.33

In joining the call for the march, Indymedia South Africa, a left-wing group, announced that “multiple subjectivities that constitute the South African social movements” will not only target poverty and living conditions, but also the way much of the left “have tried to ‘represent’ the social subjectivity of the poor, their struggles, desires and, especially, the immediately subversive power of their actions”. It claimed that the left has “systematically tried to recruit social movements’ politics for the pursuit of political agendas that developed entirely above their heads: national liberation, the party of the working class, sustainable development, international workshops”.34 In the view, social movements are “plural and diversified”, “un-representable and unpredictable”, and “express a qualitatively new level of the struggle, a level in which life itself becomes the stake”. This makes them “radicalized and militant in completely new ways”, which threaten not only state control but also the established left’s understanding of struggle and politics.35 In the words of one activist, it is a critique “of the leadership practices of a left that has historically tended to reproduce subordination and discursive expropriation of the movements’ grassroots subjectivity”.36

This critique of the left – and by implication of conventional understandings of power – celebrates new social movements whose practices are based on “forms of community self-management, construction of grassroots discourse, direct action in ways that are so rich, plural and diversified to be totally at odds with the hierarchical organisational practices of the traditional Left”. These “grassroots subjectivities” based in communities, struggles over housing, land, service provision, health and education rights, question the validity of “unifying identities (be they called ‘class’, ‘party’, ‘union’) as the form of expression of common desires. This is simply because these forms of representation and delegation, quite effective when the stake of conflict is State Power, simply no longer work when the stake becomes immediate reappropriation of life, which is as radical and subversive as the constraints imposed by the market and the commodity form are tight and is, especially, unavailable to mediate, to be channelled, represented, predictable.”36

In a similar manner, Ashwin Desai talks about “a plethora of community movements”, which mobilise “around diverse demands like land titles, water and electricity supplies, and access to housing and health facilities” with a focus on the family and the community as “a fighting unit”. By
refusing to go through the normal political channels of parties, unions and NGOs, these movements challenge the boundaries of politics, becoming “a source of tremendous potential counter-power, if not counter-politics”. The linkages between them and other organisations and movements, locally and globally, are not clear however, and the extent to which they would be able to sustain their activities or even see a need for them if their local demands are met is equally unclear.\(^{37}\)

Desai’s focus on community struggles is similar to Chatterjee’s notion of political society discussed earlier in the report. In both, the unruly masses are seen as posing a fundamental challenge to power in the post-colonial state precisely by bypassing the formal channels of parties and NGOs, and overcoming the limitations of civil society. The concern with the possibility of demobilisation once basic needs are met seems misguided, however. Social mobilisation is always aimed at achieving particular goals. To expect people to remain in a permanent state of mobilisation in order to satisfy the concern of analysts and activists with total transformation is unrealistic and involves the imposition of external agendas on people’s own sense of urgency and priorities.

The approach outlined above, which focuses on the proliferation of ‘militant particularisms’ that must not be forcibly unified under the banner of the universal, even if they have a common enemy, contrasts sharply with the ‘official’ views of the march’s organisers. In a press statement issued after the march, the Social Movement Indaba celebrated “a turning point in the country's political landscape. A new movement is being built that for the first time since 1994, poses the potential of a serious challenge to the South African government amongst its historic core constituency – the broad working class”.\(^{38}\)

This centralist attitude is evident in the words of a prominent activist, Trevor Ngwane, talking about the links between daily local concerns and global issues: “In Soweto, it’s electricity. In another area, it is water. We’ve learned that you have to actually organize—to talk to people, door to door; to connect with the masses. But you have to build with a vision. From Day One we argued that electricity cuts are the result of privatization. Privatization is the result of GEAR. GEAR reflects the demands of global capital, which the ANC are bent on pushing through. We cannot finally win this immediate struggle unless we win that greater one. But still, connecting with what touches people on a daily basis, in a direct fashion, is the way to move history forward.”\(^{39}\) Although Ngwane concedes the disparate nature of local issues, he undermines this by asserting that they must be seen in terms of a ‘greater’ struggle.

Interestingly, in this view the value of the coming together of disparate movements consists in posing a unified challenge to state power, countering it with the power of ‘the masses’. In this process, the incoherent and untidy diversity and multiplicity of social movements are overcome and superseded. However, it is precisely this uncontrolled untidiness that is the source of strength of social movements as argued earlier.
In a similar manner to Ngwane, Patrick Bond and Thulani Guliwe see in the march and events surrounding it a preparation for “a deep-rooted challenge to capitalism”, which will create unity between “radical communities, labour, women, environmentalists and health activists”. They quote David Harvey to the effect that there is a need not simply for “dispersed, autonomous, localised, and essentially communitarian solutions” but for “more complex politics that recognises how environmental and social justice must be sought by a rational ordering of activities at different scales.” This is essential in order to confront “the realities of global power politics” and to “displace the hegemonic powers of capitalism”.

David Harvey, earlier than most Marxist academics, recognised the proliferation of local-specific politics, informed by a variety of concerns over race, ethnicity, gender, ecology and sexuality as the (only) progressive aspect of the condition of postmodernity. He also regarded it as an ultimately dangerous development because of its tendency to fragment what should be a unified struggle against Capital: “It is hard to stop the slide into parochialism, myopia, and self-referentiality in the face of the universalising force of capital circulation.” Given this danger, he sees the way forward as a recuperation of “such aspects of social organisation as race, gender, religion, within the overall frame of historical materialist enquiry (with its emphasis upon the power of money and capital circulation) and class politics (with its emphasis upon the unity of the emancipatory struggle)”.

Harvey obviously fails to realise that it was precisely the inadequacy of political ideas and practices premised on the universalising logic of capital that triggered the rise of new social movements in the first place. The feminist and ecological movements, to take two examples, came into being because of the inherent inability of class politics to address gender and environmental issues, without subordinating these to its own concerns. Harvey’s depiction of the new social movements as parochial, narrow and sectarian, with a fascist potential, is based on the assumption that a universal logic of oppression can and should be countered with a universal logic of emancipation. We should keep in mind in this respect, however, Audre Lorde's warning that the master's tools will never dismantle the master's house, and that emancipation cannot be achieved by using oppressive methods of analysis and organisation.

Neither of the approaches discussed above (Barchiesi and Desai on the one hand, McKinley and Ngwane on the other) uses the concept of civil society explicitly. I would argue though, that it is the emphasis on self-organisation, internal diversity and resistance to forcible unification of social movements under a universal banner, which allows elements within civil society to develop its radical potential. In this way civil society organisations may pose a challenge to state power that would not result in replacing one set of relations of domination with another. The line taken by the Social Movement Indaba replicates, obviously on a much smaller scale, the same move that had led to the demise of the radical potential of social movement under the UDF umbrella before the 1994 transition.
Beyond service delivery partnerships with government, and playing a watchdog role in monitoring its performance, civil society organisations may challenge the way power is conceptualised and exercised by supporting community struggles, social movements and popular campaigns that contest the uses to which state power is put, and take part in the re-shaping of social life outside the control of state authorities. This, not by trying to impose a unity that will meet power with counter-power, but by allowing the untidy nature of the new social movements to flourish and spread to hitherto unaffected aspects of society.45

The kind of politics advocated here conforms to Unger’s notion of ‘transformative politics’, which focuses on shaping the practical and discursive routines of social life. It works towards an ‘empowered democracy’ precisely by adopting a piecemeal and cumulative approach and eschewing grandiose revolutionary rhetoric that sounds radical but ends up achieving very little because it is removed from people’s daily concerns. It seeks to bypass the two ‘languages of fatalism’ that have dominated developmental challenges, “the language of a fossilized and truncated Marxism, and the language of applied, positive social science”.46 Of necessity the new language would not be universal in nature but adapted to the specific concerns and issues affecting local struggles wherever they take place.

An important aspect of the new language is the notion of rights, and specifically social or socio-economic rights. As was argued by Partha Chatterjee earlier in this report, politics in post-colonial societies is characterised by a collective notion of rights, which replaces the individual focus of liberal political discourse. This is a central feature of politics in many places, including India, Latin America and southern Africa.47 Not surprisingly all these share a combination of relatively open political systems with massive social inequalities. It is to the examination of the relations between the discourse of rights, social mobilisation and power that I now turn.

**Rights Discourse and Social Mobilisation**

One of the distinguishing features of the transition away from apartheid towards a new political order in South Africa is the role that debates regarding social and human rights, and their relationships to discourses of popular power and democracy, have played in the process. Compared to the two other major cases of transition from authoritarian rule that unfolded around the same time, Eastern Europe and Latin America, the South African transition has displayed a stronger emphasis on socio-economic change as an essential ingredient of the overall process of change.

For most anti-apartheid activists in the 1980s, overcoming the legacy of apartheid meant putting in place an electoral system based on common citizenship for all South Africans, but not only that. The common perception at the time was that social transformation would follow the political demise of apartheid. In addition to abolishing racially discriminatory legislation, as a necessary first step, this called for some form of redistribution of material resources. While various
conceptualisations existed of what a future socio-economic policy might entail – from the implementation of social-democratic reforms to the application of radically egalitarian principles – there was a consensus that the transition process would begin with the ‘one person, one vote’ principle rather than culminate with it.

Most activists took it for granted that the state would play a major role in efforts to redress the legacy of apartheid (and of decades of racially exclusionary policies preceding it). They rarely thought in terms of the concrete legal and political mechanisms and institutions that would be required to achieve that goal. The precise nature of the future post-apartheid state and its likely mode of operation were not issues that received much attention. In line with the classical Marxist emphasis on social relations as a primary sphere (base), and consequent de-emphasis of the secondary sphere of state institutions and practices (superstructure), South African activists did not bother to specify the concrete mechanisms needed to make effective social and economic interventions. For the most part they did not regard the need to think about such mechanisms as important, seeing them implicitly as technical tasks and leaving the task of design to a later stage.48

The failure to give serious consideration to questions of political mechanisms, institutions, practices and discourses, had consequences for the direction taken by social and political developments with the demise of apartheid. The period of transition and negotiations between 1990 and 1994, extending into the post-apartheid period, gave rise to debates and struggles over these issues, which have shaped the contours of the new South African political order. One aspect of these debates, concerning the notion of socio-economic rights and their role within the evolving structures and practices of power, is the focus of this section.

The Bill of Rights became part of the 1996 Constitution. It sets the framework for exercising the role of the state, and defines conditions that must be met in order for the state to comply with constitutional requirements. These conditions have to do with the services and policies needed to ensure a basic standard of social justice and human dignity. They are usually referred to as socio-economic rights. They include the right to a healthy environment, access to adequate housing, health care services, sufficient food and water, social security, and basic and further education.

There are different ways in which discourses of socio-economic rights intersect with relations of power. One such way, the legal route, seeks to use the courts to enforce compliance by the state with its constitutional obligations. It does not challenge the primacy of the state in policy formulation and implementation, but rather aims to extend the scope of policy in order to provide relief to individuals and communities in crisis conditions. The activist route uses rights discourse as a mechanism to force the state to change its policies, but again without challenging the role of the state as such. It may use a legal strategy when it is deemed capable of yielding results, but usually regards it as a supplementary measure alongside the primary strategy of political struggle for
change. The legal-activist route combines legal and popular mobilisation strategies in order to change policy but also to put in place an expanded definition of rights that may implications beyond each specific case. This latter route potentially poses a fundamental challenge to the organisation and the reach of state power, and therefore is of most interest here.

Challenges to the dominant role of the state have come from different directions, from ‘below’ and ‘above’. They focus respectively on the role of civil society organisations in giving voice to marginalised constituencies that fall between the cracks of representative democracy, and on the role of human rights mechanisms (the courts, the Constitution, the South African Human Rights Commission, legal and activist NGOs) in shaping the operation of state structures. At times these challenges have been linked, serving to reinforce each other with the use of a similar notion of rights as a legitimating discourse. Although not opposed to the power of the state as such, these challenges raise questions about the scope of state power, the ways in which it shapes and is being shaped by other forms of power in society, and the extent to which it may be reconfigured in order to ensure a deeper and more meaningful democracy.

The Constitution does not provide clear guidelines with regard to the concrete obligations of the state in relation to socio-economic rights, as might be expressed in the creation and operation of administrative and financial mechanisms or in the adoption and implementation of policies. In most areas, with the exception of the provision of emergency medical treatment and prevention of house demolition or eviction, the Bill of Rights recognises that the realisation of rights cannot be expected to be immediate. The language used in the text emphasises that such realisation must be gradual, reasonable and practicable. Explicitly with regard to housing, health care, food, water, and social security, and implicitly with regard to other areas, steps taken by the state must be ‘reasonable’, the state must operate ‘within its available resources’, and realise the rights ‘progressively’.

This formulation leaves wide open the interpretation of the concrete meanings of socio-economic rights, the circumstances under which they may be deemed to have been realised, and the minimum conditions that the state must satisfy in order to meet its constitutional obligations to respect, protect, promote and fulfil the rights in question. This means that the implementation of rights may be limited by practical considerations of time and finances, and by reason. The validity of these considerations and the authority to decide what is ‘reasonable’, are issues subject to public debate.

By refraining from offering concrete definitions of budgets, timeframes, performance indicators and targets, the South African Constitution deliberately leaves socio-economic rights open to contestation between the state, civil society organisations, the public a large and the courts. It is only in interaction between these forces that the specific meanings of rights in South Africa will be established in the course of time. Beyond practical issues of measurement, larger political questions are looming: who should have the authority to determine what is ‘reasonable’ in the area of
realisation of rights, what criteria may be used for such determination, and what is the impact of all this on broader relations of power in the social and political arenas? These are particularly pertinent questions in our specific context for three reasons:

• The South African democracy has emerged from years of struggle against political oppression, during which the meanings of democracy and power were debated and shaped. The notion of representative democracy – exemplified in the slogan of ‘one person, one vote’ – has become accepted as the main though not only form of rule. Challenging the sovereignty of elected representatives (parliament, parties and cabinet), by creating a role in the exercise of power for civil society organisations, the courts and non-elected structures such as the SAHRC creates a danger that the primacy of the Constitution and participatory democracy would be interpreted as attacks on majority rule (a problematic notion with distinct racial ramifications).

• Tackling socio-economic issues is a task that is carried out against a background of decades (if not centuries) of state policies aimed explicitly at undermining whatever rights the majority of black people exercised. Under these conditions it is not obvious whom to hold accountable for violating socio-economic rights. It is not the current state officials but their predecessors, together with elements in the private sector, who created the legacy of neglect, abuse and massive violation of socio-economic rights. It may follow that the responsibility for and burden of dealing with this legacy should extend beyond the existing state institutions.

• There is no clear institutional and legal separation between the apartheid and post-apartheid states. The new South African state is a direct continuation of its apartheid predecessor, albeit with different boundaries (re-incorporating the ‘homelands’) and different officials in some top management positions (the middle and lower ranks have been affected to a lesser extent). Although government’s declared policies have changed profoundly, its mode of operation vis-à-vis popular constituencies and their demands, and the latter’s attitudes towards government and its policies, have changed only to a limited extent.

Socio-economic rights are commonly seen as a mechanism to advance social demands and increase the pressure on the state to provide basic services to disadvantaged citizens. Beyond that, the notion of rights potentially opens a broader challenge to power, which may lead to a shift in political discourse involving the state as well as popular forces facing it. The most interesting issue that emerges in this context, then, is the role the discourse of rights plays in the way people articulate their needs. They may regard the socio-economic clauses in the Bill of Rights as rights, thus establishing their inalienable claim to certain material and symbolic goods independently of state policies and priorities. On the other hand, they may regard these rights merely as social demands to be advanced and met in a political process, thus retaining the political primacy of the state. These are not mutually exclusive strategies of course, but the choice of focus on one or the other has implications for the configuration of power in society at large.
To clarify this point, people in need of emergency shelter, medical care, or clean water cannot be expected to be concerned with the impact of their campaigns on the organisation of state power. Normally they would seek assistance from all available sources, and would regard the solution to their immediate needs as a primary goal to be achieved in the most effective manner possible. At the same time, their local campaigns may become linked to wider strategies used by legal authorities, civil society organisations and political movements to re-shape power beyond the specific issues at stake. Such linkages between the ‘local’ and the ‘global’ can be forged or articulated in different ways, and may contest or re-affirm existing power relations.

When linkages between the legal discourse of socio-economic rights and popular mobilisation at the local level are forged, they impact on the way power is organised through and exercised by the state. The logic of representative democracy in which people, through periodic elections, delegate power to their elected representatives and government, is thus being challenged as inadequate as a sole mechanism used in meeting basic needs. Alternative logics that emphasise participatory democracy and judicial oversight supplement (though not necessarily replace) it. I would argue here that neither the legal discourse of rights, nor popular mobilisation, can provide on their own a strong challenge to the political primacy of state officials. This can only be done when the two are articulated together in a critique of state power simultaneously from above and from below. The combination of legal-constitutional mechanisms and grassroots organisation is the best guarantee for a successful challenge to the state-centred politics as usual, which tends to leave citizens as subjects who must rely on the benevolence of an omnipotent state for their survival.

**Socio-economic rights in practice**

Two prominent cases, known as Soobramoney and Grootboom, gave rise to public interest and concern, but were not accompanied by active popular and political mobilisation. Some local NGOs and political organisations took up these cases, and their legal implications have become a basis for debate among scholars and activists. However, they were not primarily derived from or became precursors to social and political struggles.49

Two other cases discussed here are different in this respect. They both explore the intersection between rights and power with varying emphases on the relations between the discourse of rights, legal strategies and political mobilisation. I begin by discussing the activist route as exemplified in the case of struggle over the provision of water and electricity and preventing cut-offs of these services, and follow this with a discussion of the legal-activist route as exemplified in the struggle over the provision of antiretroviral medication to prevent mother-to-child transmission of HIV and improve the condition of people living with HIV/AIDS.

It is important to realise that the distinction between the activist and the legal-activist routes does not indicate the existence of two completely distinct strategies. Rather they involve differences over
the ways in which political and legal strategies may be combined, and over the extent to which route facilitates effective linkages between local and national campaigns in the service of a common cause.

**The activist route**

In the last few years, criticisms of the slow pace and limited scope of service delivery by state agencies have mounted in a number of areas, ranging from job creation through housing to medical care and education provision. Most of these criticisms have been presented and pursued as political matters rather than as matters calling for constitutional or legal intervention. In some areas, however, notions of rights have been used more prominently, though never to the exclusion of more politically explicit concerns. In particular, evictions of ‘squatters’ from private and state land, and cut-offs of water and electricity services to people in marginalized communities who cannot (or will not) pay for them, have been discussed in these terms. The primary route taken by residents and activists in these areas, however, remains social mobilisation, aimed at putting pressure on the state and its various agencies to cease these practices.

Of interest here is that mobilisation in such cases has focused more on ‘negative’ rights – rights not to be hampered by the state in gaining access to services, such as the right not to be evicted or the right not to be cut off – than on ‘positive’ rights to be provided services such as water and electricity by the state. In other words, social movements have demanded primarily that the state refrain from interfering in residents’ exercise of their rights. Although they maintain that the state must promote the rights in question, this is not always a pronounced element in their campaigns. In part this is due to the lack of specific Constitutional rights to land ownership and service provision (though there is a provision for “equitable access to land”), and in part this may reflect a low level of expectations of the state. Usually this is a matter of emphasis and degree rather than absolute distinction between different approaches, and the language of rights does play an important role in both.

**Land rights**

The use of rights discourse in social and political struggles can be illustrated by campaigns advocating land rights, launched by the National Land Committee (NLC) – a national network of land rights NGOs – and the Landless People’s Movement (LPM) – a movement of rural and urban landless people fighting for land reform in South Africa. Recently the NLC issued an invitation to a Court of Women on Landlessness and Poverty. Although using legal imagery (reference to a Court), the aim of this process is to serve as “a means of highlighting women’s stories of suffering and resistance to mobilise poor and landless women in South Africa”. It regards the Court as a symbolic – rather than legal – space in which women’s voices can be heard, as victims and as survivors but also as women “who resist, who rebel, who refuse to turn against their dreams.”
Court is expected to challenge “the dominant human rights discourse” and “the master narratives of our times”\textsuperscript{51}, thus combining political mobilisation and rights-oriented educational efforts.

Another example of this approach is provided by the Land Access Movement of South Africa (Lamosa), an NLC community-based affiliate movement of rural communities from various provinces. The movement announced on Human Rights Day 2003,\textsuperscript{52} that “South Africa’s 19 million poor and landless rural people will not be celebrating” what has become an occasion “for the privileged few of our country to celebrate the rights which are not enjoyed by the majority of our people, while millions continue to suffer from landlessness, poverty and human rights abuses.”\textsuperscript{53} Lamosa identified the existence of millions of poor and landless people, and others who “are suffering abuse and evictions from the white-owned farms where they have lived and worked for generations”, as violations of rights, indicating the “failure of the new South Africa to extend human rights to the poor and landless”.

Without specifying the legal content of the rights in question, or the mechanisms to be used in addressing their violation, Lamosa makes a link between the discourse of rights and political mobilisation. Together with a local community, it organised a ‘Landless People’s Camp’ in the North-West province around Human Rights Day, which included workshops, discussion of case studies, and a demonstration outside the gates of a game reserve which, it claimed, was created at the expense of indigenous communities and farm-workers evicted from their land. Clearly the human rights symbolism is combined here with more political forms of protests, though with a focus on educational activities.

On the same occasion, in another province, the Rural Action Committee-Mpumalanga (Trac-MP) – an NGO affiliated to the National Land Committee – convened a meeting, which it termed a landless people’s assembly. Farm dwellers, landless communities and land rights activists got together to highlight human right abuses in order to “raise awareness about the rights contained in the Constitution”, as well as to provide information about recent developments such as new legislation which introduces minimum wage for farm workers. This was meant as an occasion for “victims of human rights abuse by farm owners and the state” to give testimonies regarding their plight, and for people to discuss strategies to combat abusive practices.

The organisers presented the meeting as “an effort to raise awareness among the poor and landless, and the public, about the conditions prevailing in rural South Africa today. Trac-MP believes that once people are aware of their rights and where they can get support in terms of protecting these rights it is likely that the level of abuse by the state and certain reactionary farmers will decrease. In essence the enforcement and promotion of these rights is a cornerstone of our society and ensures that the Constitution of South Africa remains a living document.”\textsuperscript{54}
In the week preceding Human Rights Day, a campaign titled “Stop Forced Removals! Stop Evictions!” was launched by the LPM, Lamosa, a Durban-based organisation the Concerned Citizens Forum (CCF) and a Cape Town-based Anti-Eviction Campaign (AEC). Again, an explicit reference was made to human rights and criticism of the post-apartheid state for “increasingly abandoning the ‘progressive’ human rights provisions of its Constitution in favour of repressive measures, like apartheid-style forced removals, evictions and service cut-offs, aimed at forcing the country’s poor majority further to the margins of society.”

The strategies advocated for fighting these conditions are political in nature with no explicit legal component, calling on ”all poor and landless urban people to join forces and rise and resist these barbaric plans”, and further calling “on all poor and landless rural people to join forces to rise and resist the brutal evictions of farm dwellers.” The LPM called on government to “place an immediate moratorium on all forced removals and evictions”, to hold “a national land summit to review the fundamental problems of the country’s World Bank land reform programmes that simply do not work!” and demanded that the government “changes its policies to provide Land! Food! Jobs! and Houses! for the poor and landless.”

Significantly, no distinction between rights provided for by the Constitution such as food and housing, and those that are not provided for such as land and jobs, is made here. The language of rights used by activists is thus not restricted to those rights explicitly included in the Bill of Rights of the Constitution, and is part of a more diffused discourse combining notions of natural rights, social entitlements and political demands. While this distinction may not matter much for purposes of grassroots mobilisation, it has important legal and political implications, which will be explored further later on.

On 16th June 2003, another symbolic day in South African history (Youth Day, historically known as Soweto Day to commemorate the 1976 high school students’ protest against the imposition of Afrikaans as a medium of instruction), the Landless People’s Movement organised a ‘solidarity festival’. This included speeches, discussions, films, cultural activities and games, and a solidarity walk aimed at raising public awareness around the struggle of residents of the Thembelihle informal settlement against the “apartheid-style efforts” of the Johannesburg Metropolitan Council to forcibly remove residents from their shacks on the outskirts of the city. People were invited to show solidarity with a “struggle to prevent the use of apartheid-era tactics against the poor and landless”, attempting to draw an analogy between human rights violations under apartheid and the policies of the post-apartheid government.

Two weeks before Youth Day 2003, the LPM embarked on a “Free the Farm Dweller” campaign in order to “bring an end, by whatever means necessary, to the continued abuse and eviction of the country’s seven-million farm dwellers”. The campaign, centred in the KwaZulu-Natal province,
aimed to bring together representatives of LPM farm dweller structures from across the country to “deliberate on various strategies to free farmdwellers from their current sub-human working and living conditions”. The statement further attacks “the land ownership pattern inherited from colonialism and apartheid” whereby “nearly 85% of the country’s land remains in the hands of 60,000 white farmers” while “more than 7-million farmworkers, labour tenants and their families continue to live and work in slave-like conditions for a white landowning elite that continues to abuse and evict them from the land of their birth.”

Making reference to the failure to protect the rights of farm workers and labour tenants through the legislation enacted since 1994, such as the Extension of Security of Tenure Act and the Land Rights (Labour Tenants) Act, the “Free the Farmdwellers” campaign regards itself as a “declaration of war against all landowners who illegally evict, abuse and deny burial rights and fair wages to farm workers and labour tenants”, and makes threats to form a Landless People’s Army to defend farm dwellers and their rights. In this case clearly, the language of rights conveys little sense of legal or constitutional concern, and is meant primarily to provide legitimacy for militant statement and political actions.

This seems to be the case as well for another campaign, also based in the KwaZulu-Natal province but more local in nature. A provincial affiliate of the NLC, the Association for Rural Advancement (Afra), came out in support of the people of the Dukuduku forest near the St Lucia lake and wetlands. They lodged a claim for a restitution of their ancestral land but were rejected by the Commission on the Restitution of Land Rights, which ruled that the claim could not be met because the people were already living on the land, and that the claim was aimed at preventing a planned forced removal by the Department of Water Affairs & Forestry. A court challenge to this ruling was subsequently launched.

The crucial point about all these campaigns is that they use the discourse of rights mainly in order to bolster political mobilisation and to legitimise public action, as a rhetorically powerful device and educational tool, rather than as a serious legal argument (whether or not it is subsequently taken up in court). While some of the activities outlined above may have a legal aspect, they do not usually involve engaging with the Constitution and the Bill of Rights, as these do not include a specific right to hold, own or reside on land. While this activist route has yielded limited results in advancing awareness of the plight of the landless and the need to deal with their concerns, it has not moved beyond the boundaries of protest and pressure politics, to challenge the primacy of the state in defining rights and entitlements.

Interestingly, in a submission to the Growth and Development Summit that took place in June 2003, the National Land Committee Network, argued for land reform on the basis of “the need for restorative justice, by returning to people the land that was taken from them, both in the distant past
and within living memory”, the opportunity to unlock “productive capacity” and to contribute to economic development, and as a way to meet “basic food needs” and boost cash incomes.\textsuperscript{60} While the notion of restorative justice is evocative of fundamental rights, and the NLC goes further to include the “protection of land rights” (without specifying what these rights are) among its demands, clearly these are not meant to be interpreted in a strict legal sense but rather to provide socio-political demands with greater moral power.\textsuperscript{61}

\textit{Electricity and water rights}

Although water and electricity are treated differently in the Bill of Rights – everyone is granted the right to access to sufficient water and there is no mention of a right to electricity – the two have been conflated frequently in popular and political discourse. The reason for this is technical in part – both are usually provided by the same authority and charged on the same bill – and substantive in part, as these are the most important utilities managed by a public service provider and channelled directly to people’s homes, frequently through a common access point. This latter fact makes disconnections and re-connections public events and facilitates social mobilisation around service provision.

By the end of the apartheid era in 1994, millions of South Africans remained without access to electricity and clean drinking water. The Reconstruction and Development Programme (RDP), which served as the 1994 election platform of the African National Congress (ANC), identified its first priority as the need “to begin to meet the basic needs of people – jobs, land, housing, water, electricity, telecommunications, transport, a clean and healthy environment, nutrition, health care and social welfare”. In general, the RDP advocated paying for meeting the needs of un- and under-serviced communities, though cross subsidisation, whereby wealthy users would pay part of the cost of supplying poor and rural users, to ensure that everyone is provided with basic levels of consumption. In practice, various ideas including indigent grants, free lifeline services, flat rate basic provision and full cost-recovery have been advanced in subsequent years, with mixed results.\textsuperscript{62}

Residents in a number of places have organised to put forward a demand for free provision of water and electricity to those who cannot afford to pay for them, continued provision of service regardless of payment and, in a more activist vein, re-connecting those who have been cut off due to inability or unwillingness to pay. Some of the prominent community-based organisations operating in this vein are the Soweto Electricity Crisis Committee (SECC), the Water Crisis Committee in the informal settlement of Orange Farm, the Concerned Citizens Forum in Durban and many other resident groups working in a more localised and less publicised fashion.

Although water clearly is essential to human survival and electricity clearly is not, debates about rights of access and costs of provision have usually ignored this distinction. Among other issues,
discussion has focused on the role of the state in service provision, the meaning, feasibility and desirability of public ownership, privatisation and public-private partnerships, and the extent to which service provision has improved, remained the same or even deteriorated in post-apartheid era. These socio-political debates have obscured to a large extent considerations of legal entitlements and rights in the specific context of the Constitution and the Bill of Rights.

The SECC was formed in 2000 in response to the perceived failure by government to provide residents with affordable electricity in line with its election campaign promises of 1994 and 1999. The shift in policy from cross-subsidisation (costs to be borne by beneficiaries together with other established customers) to cost recovery (cost of infrastructure connections and on-going service provision to be borne primarily by direct beneficiaries, with some cross-subsidisation as well), resulted in taking services beyond the reach of many households in poor communities. This has led to the accumulation of payment arrears and subsequently to the disconnection of service to thousands of households in poor communities by municipalities and the state electricity company (Eskom). Alternative sources of energy – such as coal, paraffin and wood – are cheaper but more burdensome to collect and use and less safe.

On the face of it, the provision of electricity is related to issues of economic and energy policy, transport and communication infrastructure, quality of housing, and so on. However, rights have entered the debate on electricity in two ways. In a more formal way, legal arguments about the obligations of the national electricity regulator, arbitrary and unfair billing practices and procedural issues regarding cut-offs, have been advanced by socially-engaged lawyers. In a less formal manner, the SECC has engaged in discussions about possible legal challenges that invoke the Bill of Rights in support of the campaign to stop disconnections, reconnect houses to the electricity grid and put in place policies that provide affordable electricity to poor people, and particularly women, pensioners, the disabled and members of other vulnerable groups.

Shortly after its formation, the SECC started to explore the possibility of using the Constitution to bolster its position. It adopted the slogan ‘electricity is a right not a privilege’, and justified that by arguing that “We as the SECC we know for sure that electricity is a right not a privilege because it is enshrined in the Bill of Rights of the South African Constitution Act 108 of 1996, that people are to live in an environment that is not harmful to their health and well being as opposed to paraffin fumes and pollution from coals.”

In this interesting formulation, the SECC claims that the right is ‘enshrined’ in the Bill of Rights ‘for sure’, and goes on to prove it by quoting other rights (to health, clean environment) as evidence. This does not seem to stem from confusion and carelessness but rather from a conscious strategy attempting to annex electricity into the list of socio-economic rights, as an implied rather than explicit right. Extending the application of rights from original texts to new areas through
Logical argument has a long history in civil rights legislation and constitutional innovation in the USA. It has been countered by a focus on the original intent of the framers of the Constitution.

An example of the above would be the application of the statement “all men are created equal” to women and slaves who were excluded from it at the time the Constitution was framed. What was accepted as common wisdom in the late 18th century was no longer so a century or two later. This approach may not work in South Africa, however. The Constitution was finalised a few years ago under circumstances that have remained essentially the same. Its framers were aware of other rights that could have been added to the Bill of Rights, and chose not to include electricity among them. It would be very difficult to convince the Court that developments since 1996 justify a modification of the Constitution or alternatively that its framers ignored its obvious implications. Unlike the Grootboom case, there is not much room for interpretation here as the Bill of Rights is straightforward in what it did and did not regard as rights.

On Human Rights day 2002, the SECC together with a related organisation (Anti Privatisation Forum – APF) organised a march in Soweto, focusing on the gap between government’s human rights rhetoric and its practice. In calling for the march, the APF argued that, “the government celebrates Human Rights Day but tramples on the Human Rights of our communities. The constitution of the country says the government should protect and advance the living and working rights of our people. But every day the government breaks these rights.”

Not surprisingly, the statement is vague on the specific content of the ‘living and working rights’ that government is accused of breaking, and the manner in which this is happening (by failing to advance new rights, or to protect existing ones, or by violating them directly and indirectly, etc). In a more concrete vein, referring to service provision, the poster carried by the marchers on that day included the following:

\[
\begin{align*}
Baba u Government tell us \\
Where are our rights? \\
We’re Sick and Tired of Your Promises \\
No to Electricity Cut-Offs \\
No to Water Cut-Offs \\
No to Eviction... \\
\end{align*}
\]

The feasibility and desirability of taking rights forward, from the realm of political rhetoric and social mobilisation into the legal arena, to exert pressure on government to meet explicit and implicit constitutional obligations, is an issue debated by activists and lawyers. Electricity in particular presents a difficult challenge. Losing a legal battle (a distinct possibility as electricity is not mentioned in the Constitution) would result in demoralisation and a setback for the cause, in
addition to becoming a drain on meagre financial resources. Beyond these tactical concerns, the broader question of how legal strategies help or hinder political mobilisation must be considered.

Although in some contexts a legal strategy may be seen as an alternative to mass action, and would thus lead to demobilisation of social movements, this does not seem to be the case for South Africa. According to the APF chair, John Appolis, a legal approach should be “linked to the kind of struggles we are having at the moment. We will see that as one of our tactical options that we will be using… So we will have a whole process of awareness raising, consciousness raising around the issue of the Bill of Rights.”

In this view, a legal strategy may play a useful role in raising awareness of the issues of basic needs and of electricity and water disconnections, among community members and the public at large. Of course, consciousness raising is an essential element of political campaigns, both by attracting support for the cause and gaining legitimacy for direct action and mass mobilisation. A focus on rights, from this perspective, serves political struggle though it may be of little interest on its own.

Legitimacy is very important in this context, as it may transform activities bordering on the criminal (such as illegal re-connections of houses to the water mains and electricity grid, and re-occupation of houses by evicted tenants) into civic action undertaken by residents who technically may be violating the law but are morally in the right. A sense of operating within a broader framework legitimised by an authority higher than local government or public service providers may encourage people to join such action despite the risks involved in it, and convince themselves and others that they are justified in taking this route. Just as notions of justice, liberation and democracy legitimised the anti-apartheid political struggle (also technically illegal at the time), activists may hope that the language of rights would play a similar role in current social struggles.

There are two important differences between the apartheid era struggles and conditions today, however. First, the apartheid regime was widely perceived as being illegal in terms of international conventions, due to the disenfranchisement of the majority of the South African population. In contrast, the current South African government has been democratically elected and enjoys international legitimacy. This poses a challenge to activists. A way of dealing with this challenge would be to argue that the legitimacy of the post-apartheid government must depend on the extent to which it has transcended the practices of its predecessors, and has managed to deal effectively with the legacy of apartheid.

Many water and electricity rights activists argue, in fact, that the legacy of apartheid is not being addressed but rather is being entrenched and even strengthened by the current government’s policies. The principle of cost-recovery makes the cost of services to poor communities higher than the cost to well-off communities – in absolute terms as well as a proportion of income – as the latter
are more centrally located and do not have to bear the cost of new infrastructure, having benefited from subsidised public service provision under apartheid. Thus those who were disadvantaged under apartheid continue to be so under the new dispensation.\textsuperscript{70}

A second challenge to activists is that whereas fighting political oppression in the name of justice and democracy is logically consistent, using \textit{illegal} tactics in the fight to assert \textit{legal} rights is internally contradictory. This means that activists must navigate carefully to avoid undermining their own rights-oriented rhetorical strategy. A possible distinction between the Constitution as a higher moral and legal authority, and ordinary ‘law and order’ legislation as a tool in the hands of government to enforce compliance with its regulations, would go some way to address this issue. Activists have used both arguments to legitimise their approach, though the extent to which they may convince the courts in the viability of their approach has not yet been tested in practice.

Developing a legal-constitutional framework to defend the case for free lifeline water and electricity provision, involves making a distinction between private and public market approaches to service delivery. With the latter, essential services must not be seen as commodities, access to which is regulated by supply and demand forces and ability to pay. According to this interpretation, government must either supply the goods in question, to which all citizens have an equal entitlement, or else avoid cutting them off if consumers cannot pay. The mode of service delivery (whether by government directly or through subsidising private providers and prohibiting them from disconnecting essential services) is a secondary issue. The constitutional obligation of government is to ensure that citizens are not deprived of essential goods and services (though of course what these services are and how they may be provided and paid for are contested issues).\textsuperscript{71}

Partly as a result of the activities of organisations such as the SECC, and partly because of the approaching 2004 elections, the state electricity company Eskom announced a write-off of the bulk of payment arrears in poor townships in May 2003. This was done in a way that gave credit to the government and its ally, the South African National Civics Organisation (Sanco), and ignored the pressure applied on government from the outside by community organisations and social movements.\textsuperscript{72} Similar steps may be expected in the area of water services as well, in particular action to address the problem of disconnections. Fierce debates about the issue – the number of cut-offs, the impact they have had on the affected people and communities, and their importance in the framework of overall government policies – have ensued since the beginning of 2003, pitting government officials against academic and activist critics.

Triggered by a \textit{New York Times} article on water cut-offs in South Africa, the debate involved the Minister of Water Affairs and Forestry, Ronnie Kasrils, who vehemently denied claims made in David McDonald’s article cited above, that up to 10 million people have been affected by water cut-offs, and rejected “the allegations of the coterie of self-proclaimed ‘real revolutionaries’ that
government has failed on its RDP promises”. Responses to his attack appeared in the local press. An undertone of blaming ‘foreign agitators’ for criticising government – some of the leading academics involved in the debate are North Americans – is evident in government’s response, echoed recently in President Mbeki’s attack on “the ‘friends’ who populate our ranks, originating from the world of the rich, who come to us, perhaps dressed in jeans and T-shirts as advisers and consultants”. 73

With these developments, the political focus of the debate on service provision and socio-economic rights, concerning government’s achievements and failures, is likely to overwhelm the specific legal aspect of the meaning of ‘rights’ and their relevance to social mobilisation. This may result in concrete gains for the communities affected by inadequate and even regressive service delivery. Using the discourse of rights to attract support for a political campaign and facilitate mobilisation may prove to be an effective strategy, but it is unlikely to lead to a fundamental challenge to the way that power is reconfigured in post-apartheid South Africa. For such a challenge and its impact on power we must turn to the legal-activist route.

**The legal-activist route**

To illustrate this approach let us examine one case study, that of the Treatment Action Campaign (TAC) which is using the discourse of human and socio-economic rights to convey the voices and address the concerns of a particular constituency, and in the process to challenge power.

The TAC is an association independent of government and the pharmaceutical industry. It has campaigned for affordable treatment for people with HIV/AIDS, treatment for pregnant women with HIV to reduce the number of children infected by the virus, awareness about HIV/AIDS treatment and how to live healthier lives, and training a leadership of people living with HIV. By combining legal and political modes of action, and addressing a range of HIV/AIDS-related issues at local, national and international levels, the TAC has acquired a name as a well-organised social movement and effective policy lobby. Recent political and legal victories in the struggle to make treatment of HIV/AIDS widespread and affordable have enhanced its reputation, though the extent to which these have resolved or even alleviated the problem of access remains in doubt. 74

On 8th August 2003, the South African government announced its intention to develop a detailed operational plan for a national anti-retroviral AIDS treatment programme, following on a report by a joint health and treasury task team on treatment options and their budgetary implications. The national Department of health was mandated with the task of preparing such a plan by the end of September 2003. This decision may not seem surprising when we keep in mind that South Africa has the world's highest number of HIV infections, near five million, approximately 20% of the adult population, and that it is estimated that hundreds of thousands of people die of AIDS-related
diseases every year. However, for years the government rejected the call to provide anti-retroviral drugs to people living with AIDS, using a range of excuses from lack of funds to logistical difficulties to the toxicity of drugs, culminating with the notion that AIDS is not caused by HIV but rather by poverty and its related manifestations (inadequate nutrition and living conditions). If poverty indeed is the cause of AIDS drugs would be of no help in dealing with the problem.

The denial of the link between HIV and AIDS has become a personal trademark of President Thabo Mbeki, and has never been adopted by the ANC, the government or any state department. In fact, due to international outrage at Mbeki’s position, government frequently asserts that its policies are premised on such a link, but it is widely assumed that denialism is a main reason behind the refusal to embark on a wide-ranging treatment programme. This has been expressed not only in failing to provide people living with AIDS, who are dependent on the public health system, with the necessary drugs (such as AZT), but also in the reluctance to provide HIV-positive pregnant women with a dosage of the drug Nevirapine that would reduce mother to child transmission of HIV by 50% and save the lives of hundreds of babies a day.

Whatever the precise combination of reasons behind government’s policy, it is clear that the TAC has played a major role in debunking its arguments and forcing government to adopt policies to which it had expressed strong opposition. Combining educational efforts, public campaigns, and legal strategies, the TAC has shown remarkable persistence and tactical flexibility in striving to achieve its goals. The struggle over the provision of Nevirapine to HIV-positive pregnant women is a case in point.

Since 1999 the TAC has campaigned for a government programme to prevent transmission of HIV from mother to child during birth. Government raised concerns regarding the safety and efficacy of the drug, despite its registration by the Medicines Control Council (MCC) in the previous year. Following the International AIDS Conference in Durban, in August 2000, the Minister of Health announced that the provision of Nevirapine would be restricted to 18 pilot sites (two in each province) for further research into possible complications, and not be made available to the public in general. In response, TAC decided to give the Health Department a chance to roll out these projects to the whole country, but with the subsequent failure of government to extend the programme, the TAC took it to court.

The case revolved around the question of whether government could reasonably refuse to make Nevirapine available in the public health system to pregnant women with HIV, even though the drug is registered, considered safe, is free (or costs very little) and is medically indicated. A related issue – on a more practical note – was whether government was required not merely to adopt policy, but to put in place concrete time frames for implementation of various aspects, including counselling, testing, drug therapy, and the use of formula milk for feeding.
In a unanimous judgement affirming the decisions of lower courts, the Constitutional Court ruled in July 2002 that government policy regarding mother-to-child transmission of HIV was inadequate. Government violated the Constitutional clauses mandating that it must formulate and implement a comprehensive programme to realise progressively the right of pregnant women and their newborn children to have access to health care services. The Court ordered the government to remove without delay the restrictions preventing Nevirapine from being made available, in order to reduce the risk of mother-to-child transmission of HIV at public hospitals and clinics that were not research training sites, and to permit and facilitate the use of Nevirapine to that end.

The victory achieved in court was an occasion for a big celebration, though the compliance of the government with the ruling since then has been sluggish and uneven, eventually leading to a dissipation of much of the initial enthusiasm. An interesting analysis published at the time sought to capture some of the implications of the TAC’s victory, and is worthy of presenting here. It examines the court case through the prism of relations between state, civil society and the courts.

First, it argues, the Court asserted that social and economic rights could be legally enforced. This is particularly important in the context of addressing poverty, as they are “poor people’s rights”, forcing government to focus on the most vulnerable and disadvantaged sectors of society. Second, the Court reinforced the notion of public accountability of government, whose policies must conform to the Constitution and may be reviewed by the courts. Third, it confirmed the importance of protecting children’s rights. Fourth, the decision demonstrated the effectiveness of civil society alliances, bringing together social movements, trade unions, churches and media, and showed the importance of social mobilisation to challenge government. Fifth, it illustrated how civil society, using the Constitution, can ensure that government attends to the basic needs of the poor, the vulnerable and the marginalised.75

It is important to realise that the legal victory came against the background of an elaborate public campaign, and it led, in turn, to a continued campaign to broaden access to treatment (not just drugs) throughout the country, to all people affected by HIV/AIDS. The August 2003 policy shift by government recognising the need for a national anti-retroviral treatment programme is a testimony to the ongoing efforts of the TAC, bolstered by supportive media, other civil society organisations, and international agencies. Doctors and nurses who have provided medication off-list independently and even in opposition to government policies (sometimes paying for the drugs out of their own pockets) made a crucial contribution to the gradual erosion of government’s position.

In its response to the decision, the TAC praised it as a “critical step to develop a more comprehensive treatment and prevention plan for managing the HIV/AIDS epidemic. Properly implemented, this will restore hope, dignity and life for millions of people in our country, and, hope throughout the continent. This will also give doctors, nurses and communities the opportunity to
work together with government to build a better health care system that meets the needs of all people in South Africa.”

Of course, it is premature to celebrate the new direction taken by government, which might end up being no more than a publicity stunt in preparation for the 2004 elections. The dragging of the proverbial feet in the aftermath of Constitutional Court ruling of July 2002 is a bad omen in this respect. Government has been criticised already for declaring the need for a ‘detailed operational plan’ before beginning to deal with the problem, when a large number of hospitals and clinics in several provinces are ready to start immediately.

Having said that, it is a positive sign that on the day before the policy statement, the South African government signed a pending agreement with the Global Fund to Fight AIDS, Tuberculosis and Malaria, long held up due to national Department of Health’s objections to its focus on antiretroviral treatment.

In addition to policy work, since its inception the TAC has been involved in raising public awareness about AIDS treatments and facilitating access to treatment through public protests, demonstrations, petitions, presentations to Parliament, regular media coverage, working with labour and religious groups, workshops, importing and disseminating generic drugs, and lobbying efforts, using hundreds of volunteers in these processes. These efforts culminated with a ‘disobedience campaign’, which was launched to force the government to comply with the Court ruling and stop using delaying tactics to avoid putting in place a treatment plan. The decision by TAC’s most prominent representative Zackie Achmat to avoid taking antiretroviral drugs to deal with his personal condition as a person living with AIDS grabbed international headlines. This decision was reversed just a few days before government’s policy shift and the disobedience campaign was suspended immediately after that shift.

Another campaign, with international implications, involved taking on pharmaceutical companies, highlighting the extent to which they derive huge illegitimate profits from the abuse of patent laws. An aspect of this campaign saw a successful challenge, mounted together with American AIDS activities, to US government threats to impose sanctions on the South African government for its attempts to reduce the prices of essential medicines by introducing the Medicines and Related Substances Control Act of 1997 (which was seen in the US as violating patent rights).

Despite the change in US policy, the Medicines Act was challenged in the South Africa courts by the Pharmaceutical Manufacturer’s Association, which attempted to prevent it from being implemented because of its provision for generic substitutes for patented drugs, price controls and encouragement of parallel importation of drugs from countries where they are available at the lowest price. TAC has campaigned in support of the Act (and the government), together with other
local and international organisations, including the World Health Organisation, Oxfam and Medecins Sans Frontieres. The judge awarded TAC the status of a ‘friend of the court’, against the wishes of the pharmaceutical industry, which eventually was forced to withdraw its claim. Indirectly this case subsequently led to massive discounts in the prices of AIDS drugs in 2001, making them much more accessible to the public.

The ability of the organisation to address the needs of its immediate constituency (people living with HIV and AIDS) and gather support from diverse local and international sources is due in large part to the prominence of the issue of treatment in South Africa and its vast implications for society, economy and politics in the country at present and the foreseeable future. In addition, being led by activists with legal background has facilitated the design and conduct of legal and constitutional campaigns. It is the linkage between the grassroots constituency directly affected by the outcome of the campaigns, the contributions by doctors and nurses, NGOs, scholars, activists and their networks on the margins of power, and dissenters within the ANC and its allies at the centre of power (including former president Nelson Mandela), which has allowed the TAC’s to have made its impact. In a unique way, the TAC has combined challenges from ‘above’ (through the courts and public lobbying) and ‘below’ (through constituency-based grassroots campaigns) to the dominant role of the state, bypassing in the process the limitations of formal democracy. The challenges facing social activists was eloquently put by the Constitutional Court in its description of the context in which the Bill of Rights was to be interpreted:

_We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration have a hollow ring._

Tackling this enormous challenge calls for a multi-dimensional approach that combines different ways and means to achieve the lofty goals set out by the Court. A legal approach on its own is not adequate without social and political mobilisation alongside it, as the lack of follow-up on similar legal victories has demonstrated. An activist approach on its own may result in certain tangible achievements (cancellation of payment arrears for electricity for example, or halting of evictions of illegal tenants). However, it uses a conception of power that leaves intact the dominant position of the state, even though its policies are affected by popular pressure from the outside. Once the pressure eases, the state may easily revert to its erstwhile practices.
Conclusion
It is only by addressing the organisation of power itself, by challenging the dominant position of the state in the policy process, that a more meaningful and sustainable change may take place. By bringing together disparate constituencies who approach the issue of treatment from a variety of political perspectives, but share the belief that state policy is woefully inadequate, the claims of the state to be in control – legally, morally and politically – have been shattered. No other failure to provide services in South Africa has undermined the notion that policy must be left to the state, and that civil society and constituencies should be relegated to the role of external pressure groups, as the HIV/AIDS issue has managed to do. In a sense, the courts together with popular constituencies, the media, civil society organisations and some state officials, to a large extent have confiscated control over the process from the hands of state officials, though the obstructive capacity of the latter is still significant.

In conclusion, the perspective advocated in this report, with its focus on politics as a contested terrain involving conflict and cooperation between disparate elements, is not conducive for the development of a universal model of relations between state and civil society. The main argument though, is that the notion of civil society has a radical dimension with the potential to challenge the practical dominance of the state in the political arena and the analytical dominance of state-centred approaches in political theory. Examining social and political actors, their modes of operation and concrete interactions, is essential for our understanding of the politics of transformation in South Africa, and for developing empirically informed theoretical insights into the challenges and opportunities presented by political change more broadly.
Endnotes

2 ibid, p. 41.
3 ibid, p. 53.
4 ibid, p. 64.
5 Gideon Baker, Civil Society and Democratic Theory (Routledge, 2002), p. 3.
6 ibid, p. 148.
7 ibid, pp. 130-44. In somewhat similar vein, see John Holloway, Change the World without Taking Power (Pluto Press, 2002).
8 Michel Foucault, “Two Lectures”, in Power/Knowledge (Pantheon, 1980), pp. 80-82.
9 Baker, Civil Society and Democratic Theory, p. 166.
10 In a similar vein, but with a focus on domination rather than on challenges to power, the question is posed as “how are the macro-social order, and macro-forms of domination, constructed out of the diversity of micropowers”, in Mitchell Dean, Critical and Effective Histories: Foucault’s Methods and Historical Sociology (Routledge, 1994), p. 156. The answer given by Dean is that Foucault uses the notion of ‘strategy’ as “the condition of the assemblage of the diverse relations of power into a code” that gives domination coherence (ibid, p. 157). We must examine whether the same logic can be applied to resistance to domination.
13 ibid, p. 209.
14 ibid, p. 211.
16 Ibid, p. 22.
17 Jack Goody, “Civil Society in an Extra-European Perspective” in Civil Society: History and Possibilities, edited by Sudipta Kaviraj and Sunil Khilnani (Cambridge University Press, 2001), pp. 149-64. It should be added of course that Europe itself has never been homogenous and there is no reason to believe that what may have applied in 18th century Britain, say, necessarily has more relevance to 20th century Portugal or Poland than to India and China.
19 ibid, p. 177. The resonance of this with South African developments is obvious, and will be discussed later on.
20 A common feature of colonial rule in Africa, as argued by Mamdani, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism (Princeton University Press, 1996).
22 See in particular Patrick Bond, Elite Transition: From Apartheid to Neoliberalism in South Africa (Pluto Press, 2000), Hein Marais, South Africa: Limits to Change: The Political Economy of Transition (UCT press,
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25 See the extensive survey in *ibid*.


28 As Ashwin Desai puts it in his *We are the Poors: Community Struggles in Post-Apartheid South Africa* (Monthly Review Press, 2002), “this revolt had a flaw. The multitude that brought down the apartheid regime had a millennial faith in the exiled and imprisoned leadership of the ANC. The multitude that brought that ANC to power with millions of acts of rebellion, from strikes to burning barricades to refusing to stay and pay and obey, became a (just slightly fractious) people under the ANC.” (my italics)


33 For background on WSSD and the protest against it see “Contesting ‘Sustainable Development’: South African Civil Society Critiques and Advocacy” by Patrick Bond and Thulani Guliwe, November 2002.


35 “After the March on the Left”, by Franco Barchiesi, 31 August 2002.

36 *ibid*.


38 The Social Movement Indaba, press statement, 1 September 2002. It is not made clear here how the various community organisations, landless people and the ‘poors’ mysteriously transformed into the ‘broad working class’ or indeed what this terms means.


42 *ibid*, p. 355.

43 A more measured evaluation is found in “Starting from Scratch? A Reply to Jeremy S. Cronin”, *Monthly Review*, 54, 7, (December 2002), by John Saul, who asserts that “it would be naive to overestimate the strength and unity of the new social movements, the breadth of their reach and of their alliances, the clarity of their strategies, and the current level of their organizational capacity”. He shares the quest for an overall unity in the name of a “working-class civil society”, however, but believes an alliance with the unions is essential for that purpose. Useful insights regarding the lessons South African movements can draw from the

Though to be sure, not even the most centralist of social movement activists share Cronin’s reverence to a unified national project under a single leadership as outlined above.

Perhaps this is what Michael Hardt and Antonio Negri refer to as the ‘democracy of the multitude’, which goes beyond resistance and abandons the goals of insurrection and constituent power (that is of challenging power and building an alternative at the national level) to focus instead on the “power of unbounded invention” under conditions of globalisation in their “Globalization and Democracy”, pp. 109-121 in *Implicating Empire: Globalization and Resistance in the 21st Century World Order*, edited by Stanley Aronowitz and Heather Gautney (Basic Books, 2003).

Roberto Mangabeira Unger, *False Necessity*, p. xxii. While referring specifically to Brazil here, this characterisation resonates with South African debates, pitting a technocratic political-economic discourse against state-centred leftist critique championed by Cosatu and its intellectual allies.


While there was a substantial amount of legal debates about future constitutional principles in that period, this did not revolve specifically around socio-economic rights and the practical requirements of governance. See Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* (Cambridge University Press, 2000), pp. 69-85. The intensive policy debates and planning in the period between 1990 and 1994 dealt primarily with policy principles rather than state mechanisms and institutions.

See discussion of the cases in Ran Greenstein, “Socio-Economic Rights, Radical Democracy and Power”.

There is a degree of overlap in membership between the two (and other movements discussed here), though the LPM is supposed to be more of a grassroots movement than a policy and advocacy organisation, such as the NLC.

NLC press statement, 20th June 2003

Taking place on 21st March, Human Rights Day was originally known as Sharpville Day, in commemoration of the 1960 massacre of anti-apartheid protesters in a township by that name.

Lamosa press statement, 18th March 2003.


LPM press statement, 28th May 2003.


The right to land restitution involves specific communities and their claims to land that was taken away from them after 1913 (the date of the first Land Act), rather than a general right of indigenous people to ancestral land or right of landless people to a piece of land.


The same goes for campaigns against forced evictions of residents who cannot pay rent or bond. See “Anti-eviction Campaign Activists Defiant in the Face of Apartheid Style Bannings” by Max Ntanyana and Fonky Goboza of the Anti-Evictions Campaign (AEC) in the Western Cape, January 2003. On evictions as violations of human rights see the work of the Centre on Housing Rights and Eviction (COHRE) in Geneva at www.cohre.org.


The scale of the problem is documented in Maj Fill-Flynn, *The Electricity Crisis in Soweto*, Municipal Services Project Occasional Papers, Number 4 (August 2001).
The Electricity Rights Project at the University of the Witwatersrand produced work in this vein. See Theunix Roux and Rebecca Vahle, *Electricity Rights in Soweto: An Analysis of Possible Legal Arguments* (Law and Transformation Programme, CALS, 2002).

The best source on the SECC is the MA dissertation by Peter McInnes, “Making the Kettle Boil: Socio-Economic Rights and Community Struggles for Affordable Water and Electricity Services in Soweto”, (University of the Witwatersrand, forthcoming).

SECC press release, 4th June 2001, quoted in McInnes, Making the Kettle Boil.

SECC statement, 21st March 2002, emphasis in the original.

Text and picture of poster in McInness, Making the Kettle Boil.

Quoted in *ibid*.


See Flynn, *Rights to Essential Services*, for a discussion of modalities of provision meeting this criterion.


The best sources on TAC policy positions, legal efforts and public activities, as well as other AIDS-related issues in South Africa are the TAC website: www.tac.org.za, and a health news website: www.health-e.org.za.


