

POPULAR POWER, CONSTITUTIONAL DEMOCRACY AND CRISIS: SOUTH AFRICA 1994-2014¹⁾

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Abstract

The establishment of representative democracy in South Africa was an important victory for people who had been suppressed from the first days of white conquest and who had experienced the seizure of land of African and other indigenous people. With some still cherishing ideas of popular democracy as experienced in the 1980s, electoralism may not have met every person's expectations. But in the context of the history of South Africa with its multiple forms of oppression and exploitation, the vote represented an important advance. It created the possibility of engaging with issues that had not previously been on the agenda. The transition took place within a framework establishing a constitutional democracy, where all organs of government would be bound to act in conformity with the constitution. Regrettably, constitutionalism is currently in crisis and extensive lawlessness undermines democratic gains. The article argues for the formation of a united, non-sectarian organisation behind broadly agreed goals, including defence of the constitution, clean government, and an end to violence.

1. Constitutional democracy and its tensions

The advent of universal suffrage occurred within the framework of the establishment of a rights-based, constitutional democracy where all organs of government including parliament and the executive would be bound to act in conformity with the constitution. A newly-established

Constitutional Court had the powers to decide whether such organs were acting in conformity with the constitution. Tensions between institutional structures, have become critical in recent years, with increasing violations of constitutional obligations and failure to account for misuse of funds and failure to perform other duties.

The supremacy of the Constitution is set out in Section 2 of Chapter 1 of the Constitution which declares: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled" (Constitution of the Republic of South Africa, 1996, henceforth referred to as 'Constitution'). Negotiating the workings of this new framework would not be easy. The relationship between the Constitution and other institutions, as interpreted by the courts, would sometimes lead to tension with the elected legislature and the executive.

The Constitution was born out of a particular history, that of rightlessness of the majority of the people of South Africa, and a range of injustices that were visited against them. The Constitution incorporated a Bill of Rights that sought to remedy the injustices of the past, both through protecting the freedoms of ordinary people but also by providing for measures that would address social and economic inequality (Chapter 2 of the Constitution).

In establishing what has been described as 'transformative constitutionalism' various obstacles have been encountered, notably claims by the ruling African National Congress (ANC) that the courts in interpreting the Constitution have encroached on the powers of the legislature and that the judiciary has pitted itself against democratically elected representatives.²⁾

2. Popular struggles prior to the onset of democratic elections

Important as the achievement of becoming a constitutional democracy was, many have taken broader democratic cultures and experiences, including people's direct social and political action in the course of struggle against *apartheid*, as their departure point, when assessing it. During that earlier period, notions of democracy had developed, partly through the actual, grassroots practices of communities that took ideas of political participation further than periodic voting.

In other words, many who helped bring a negotiated settlement

into the realm of possibility did not intend their political activities to be restricted to elections (Morobe 1987:81-83). In the 1980s they had participated in street, ward and block committees and a range of other ground-level, self-empowering organisations, concerning themselves partly with resistance to the *apartheid* regime and partly with their own environment. In some cases communities successfully managed crime control, notably in areas where the police had been driven out or feared patrolling the townships. In other cases local organisation concerned itself with recreational activities, cleaning the townships, creating people's parks and other interventions aimed at improving and managing their habitat.

At the time, some 600 organisations were affiliated to the United Democratic Front (UDF), a coordinating body established in 1983. In order to draw in groupings which may have been deterred by that document's identification with the ANC, the front did not initially adopt the Freedom Charter as a condition for affiliation. The charter was nevertheless a statement of founding principles to which most affiliates and followers appeared to have adhered and it was later adopted by the UDF in August 1987.³⁾

During the popular power period that the UDF's existence is often referred to, grassroots practices led to an expanded or enriched understanding of the Freedom Charter. The role of 'the people' came to mean not only voting for a democratic parliament but also people taking control over their own lives in an immediate sense, before, and also after the moment of 'seizure' or 'transfer of power'.

Weza Made, a Uitenhage community leader declared in 1986 that what people were doing in their local level organisations was implementing the first clause of the Freedom Charter, which reads "The People Shall Govern!" (Interview, in Suttner 1986: 12. For text of the charter see Suttner and Cronin 2006: 262-266).

That this was to happen immediately and not after 'transfer of power' was also a refinement of the prevailing view of insurrection t, including amongst many UDF activists, as some future event when, after a decisive moment of rupture, there would be a dramatic improvement in peoples' lives. What was being built then, and what had been built for some time by unions, engaged with the reality of people confronting and finding ways of making gains that would better their lives in the interim.

This was an implicit critique of statism, the idea that one should

look to the state for resolution of all problems, and that the state is an instrument or thing to be used by whoever 'holds power' to do what they wish. The insufficiently articulated alternative was to see power as a relational concept, where the political party 'in power' would have to engage with other sites and relationships of power and transform relationships with their distinct class bases, such as big capital and labour, in order to achieve its goals (See Poulantzas 1978: 257-258).

The democratic terrain, in the later period of the 1980s was occupied not only by forces aligned to the ANC, including popular, grassroots organisations, but also a range of other actors representing sizeable sections of the white community and business. These organisations had a broad commitment to achieving a democratic order. They included the Five Freedoms Forum, the Institute for Democracy in Africa (IDASA) the End Conscription Campaign (ECC) and the Consultative Business Movement. Some of these engaged directly with the ANC, through travelling to Lusaka, but all made efforts to break the impasse and took steps to achieve democratic rule.

Insofar as the argument presented here suggests that popular democracy bears relevance to the present it is necessary to probe conditions that determined when such initiatives were successful or where conditions made failure more likely. The crucial factor, it is contended, was the extent to which these initiatives were broad-based, involving the community as a whole, as opposed to the youth acting on their own.

It may be safe to generalise, from historical evidence and experience that youth tend to be relatively impatient compared with older people and are often reluctant to slowly build relationships of trust and organisational structures.

Port Alfred in the Eastern Cape is often referred to as a successful exercise of popular power in the 1980s and this was partly because it was based on broad community involvement, with representation of women, community organisations ('civics'), workers, the youth and students. In general, these organs of popular power were conceived as representing the whole community on a cross-generational and non-partisan basis, that is, those who lived in a specific space, irrespective of political affiliations.

Consequently, where a decision was taken to organise a consumer boycott, there were constraints against the exercise of coercion and mechanisms for building consensus (Suttner 1986: 23). That is not

to say that such non-sectarianism always applied, for there were many cases of political intolerance in the period.

But when the more seasoned activists were arrested in the swoop of June 1986 and the months that followed (the second emergency of the 1980s, that was repeatedly renewed and lasted over two years), many of the structures collapsed or were taken over by young people who were sometimes infiltrated by gangsters ('comtsotsis'⁴). They were more ready and able to use violence than had been the case where the presence of older people exercised a restraining influence. This sometimes led to the creation of kangaroo courts, which meted out severe punishments, including necklacing.⁵

3. The ANC and the popular

In the course of the history of resistance to *apartheid* the ANC was for most of its 102-year existence neither a nationalist movement nor a hegemonic force within the liberation struggle. For much of this period it did not advance the idea of Africans being represented as Africans, the notion of an African political subject. Instead, through the notion of 'loyalism', it sought rights for Africans as British subjects. It was only in the 1940s that universal suffrage was advanced and not until the period of the rise of the ANC Youth League (ANCYL) in 1944 that the idea of African nationalism and African political subjectivity was brought to the fore, though that had previously been done by the Garveyites and the Industrial and Commercial Workers' Union (ICU) in the 1920s and 1930s (Bradford 1987, Vinson 2012, Suttner 2014: 132-135).

In the 1950s, however, the ANC simultaneously advanced the notion of an inclusive African nationalism and a popular political subjectivity that embraced people of all races, from a range of sectors that together combined in an alliance (the 'Congress alliance') and formulated the Freedom Charter that declared, in the name of "the people of South Africa" that "South Africa belongs to all who live in it, black and white" (Suttner and Cronin 2006: 1-110). This inclusionary language became one of the key points of rupture leading to the breakaway of the Pan Africanist Congress — PAC.

That period of ANC hegemony was snuffed out by *apartheid* repression during the 1960s and it was only in the 1980s that the popular subject again re-emerged, in this case, through the actions of the UDF and its affiliates again advancing a political subjectivity, that

was multi-racial in organisation and non-racial in orientation.⁶⁾ The UDF was not an ANC surrogate though many UDF activists and leaders saw themselves retrieving the traditions of the 1950s and advanced similar goals to the ANC (See Suttner 2005: 70-71).

The period of transition to democratic elections had seen the crushing of most UDF structures during the states of emergency. The formation of the Mass Democratic Movement (MDM), mainly comprising the South African Council of Churches (SACC) and the Congress of South African Trade Unions (COSATU) was established and continued to advance the broad inclusive ideas of the UDF. But the organisational relationships which were the foundation of the UDF, had been ruptured. The MDM was a structure without direct links to grassroots organisations, unable to re-establish the link between the masses on the ground and leadership (Neocosmos 1998).

The period after the unbanning of the ANC in 1990, saw the UDF dissolve itself, implicitly seeing itself as a 'curtain raiser', prior to the arrival of the ANC, the 'A team'. While the rhetoric of the popular remained in vogue, the pre-eminence of the ANC as leader of negotiations and later of (a 'people-driven') government saw the displacement of the popular subject, where the people would act in their own name through direct representation. Instead, with the emergence of an elected government, there was substitution of a supposed 'people's government' for direct action of the popular subject (Neocosmos 1998: 210-237; Suttner 2014: 140-143).

4. Negotiations do not discuss informal political or social structures

The ANC did not instruct the UDF to dissolve itself nor pronounce against popular organisation. But the character of a negotiated settlement by its nature addresses institutional structures for constitutional government. Insofar as organs of popular power were independent of and often intended to remain without formal connections to the state and focused on self-empowerment of communities, they were not on the agenda of the negotiating table. It was not that the Constitution was necessarily intended to stand against popular power. Failure to mention popular power was because negotiations debated the constitutional values to be enshrined and the shape of institutions, the way they would operate and relate to one another, whether or not they included

one or other mechanism or excluded others at various levels of the state.

This is not to suggest that there was necessarily wide enthusiasm for popular power amongst the ANC leadership. The presence of organs of popular power during the UDF period was weak in some parts of the country and leaders in those areas may have had less appreciation of its significance than those places where it had been a lively presence. In addition, many, but not all of the leaders from Robben Island and exile believed that 'government has to govern' and 'leaders have to lead', as my personal experience as a political leader in the UDF and ANC-led alliance in the 1980s and the 1990s led me to believe. This meant that the nexus between organised leadership and grassroots structures was sometimes a secondary consideration.

The ANC claims to have engaged in extensive consultations with its membership and the wider public prior to the negotiated settlement, but the issues were intricate and specialised and it was impossible for those unversed in all the documentation to make a meaningful contribution.

Many of these constitutional discussions were, however, contentious and ones that all could understand, for example one or other variant of National Party (NP) attempts to delay elections or have an extensive period of power sharing or dilute majority rule, through securing privileges for minorities. In order to strengthen its hand the ANC did invoke the power of the masses to break deadlocks. This was described as 'rolling mass action', not to ensure direct popular power but to strengthen the hands of the negotiators and break resistance of *apartheid* negotiators stalling on democratic constitutional provisions.

In some ways, the organisations, communities and individuals associated with the broad Congress movement (the way in which supporters of the ANC were known or described themselves) also contributed to this insofar as they 'relinquished' their control in favour of leadership decisions. This was done on the basis of trust and understanding that the leaders, whoever they may have been, would promote the interests of the people and represent them in the best way possible.

The way this notion of the popular was invoked by the ANC was not then as self-acting, self-initiated action of the masses, although it was, arguably, in the interests of the masses to strengthen the hands of negotiators and government where they wished to see constitutional

provisions that best advanced their needs. Thus while the masses may have been 'used' instrumentally to break deadlocks, in most cases these were situations where they made their power felt in order to secure results that would benefit them.

5. ANC monopolises political arena

There was never a decision taken that independent organs of popular power would be suppressed by the ANC as government or the ANC as organisation, but the tendency emerged or it became plain that the ANC understood its role in relation to independent organisations as one where it monopolised the political space, a pattern replicating that found in national liberation movements (NLMs) turned governments in independent Africa (Melber 2002, Suttner 2004).

From the outset, the ANC did not conceive independent organs of civil society, sectoral organisations or social movements as contributing to its conception of the unfolding of democracy and building a new nation. It saw the ANC itself as the bearer or the 'sole and authentic' bearer of the democratic and nation-building project and its notion of pluralism was limited to multi-partyism.⁷⁾ While the rhetoric surrounding voting for the first elected parliament used the phrase 'people-driven and people-centred' democratic development there would be limited space for popular involvement.

What this meant is that the primary focus of democracy as conceived by the ANC after 1994 was:

- periodic elections where the ANC as popularly elected government would be repeatedly elected;
- the 'people's government' would enact legislation and through its administration see to the implementation of provisions that would provide a better life for all, an assumption that we will see was undermined to an increasing extent through diversion of funds meant for providing basic needs (see below); and
- supportive constitutional provisions would protect individuals and vulnerable groups from abuse, and supplementary law, judicial interpretation and executive action, assumed to act in good faith, would amplify the broad rights set out in the Constitution.

In this scheme of things, the ANC and government saw themselves as solely responsible for covering the entire terrain of political activities and

were hostile to the formation of independent sectoral organisations. This is part of a more general trend found in NLMs throughout the continent where the NLM has depicted itself as equivalent to the nation, manifested in slogans used by liberation movements from Nkrumah's Ghana ('CPP is Ghana, Ghana is CPP') down to South Africa ('ANC is the people') (Suttner 2004: 1-2, Melber 2002).

In the years that followed the first elections the new government did indeed initiate fundamental changes in people's lives, providing water, electricity and health care in areas which had never before seen these. Insufficient these may have been, slow in coming and inadequate in maintenance in many cases, but very many people did see fundamental changes in their lives.

While unemployment and social inequality has continued to rise, by 2013 16.1 million people were receiving social grants in the form of old age pensions, child support grants, disability and other grants (Southall 2014:8).

5.1 Hostility to civil society and failure of state to 'deliver'

This was done within the paradigm of statism. Instead of the earlier idea of self-empowerment of communities of the popular power period, they were to expect and wait for government to deliver the good things of life. Where this did not happen, many communities were initially very patient, understanding with the political maturity that seasoned resisters had developed that it would take time for all things to be put right.

Where there was impatience, groups that were part of the ANC or broke away from the ANC or had never been in the ANC formed social movements to attend to electricity cut offs or water shortages, housing problems and other basic needs.

They encountered considerable hostility from the side of the ANC, which believed there was not place for multiple players in a terrain, which it saw itself as occupying on its own. This enmity endured, as illustrated by the ANC's open attack on a civil society conference called by COSATU in 2010. In more recent times, other social movements have emerged, some of these like the shack dwellers' movement *Abahlali baseMjondolo* based primarily in KwaZulu-Natal (KZN) and the Western Cape have experienced assassinations and illegal evictions and other attacks emanating from the KZN ANC and eThekweni muni-

central government and in the Western Cape the Democratic Alliance (DA)-led government has also enforced illegal evictions.⁸⁾

5.2 Statism and anti-pluralism

There are at least two understandings at work in limiting the character and scope of democracy and leading to erosion of popular organisation. On the one hand, there is the notion of statism or reliance on state delivery, and fetishising the state as the place from which lives are improved or through whose interventions problems are addressed. This removes or places little weight on community initiatives, which had in many cases served people well in the 1980s.

Reference to the local is not a romanticisation of 'small' being beautiful, but a sense that something is being lost. In some of the townships that are now in uprisings over inadequate services, police meet them with teargas or bullets. In the 1980s while they did not have power to provide water and electricity, amongst other basic needs, in many cases they did create important systems that had a measure of success in the control of crime (Suttner 1986). That possibility diminishes insofar as the building of local level organisation, aimed at representing not just ANC supporters but communities as a whole is not pursued.

The argument is not that the state should vacate the terrain of providing basic needs. It must carry out its constitutional duties. But what is argued is that there is also a role for local organisations of various kinds, both in liaising with government over how it meets these needs, but also in action that is independent of and without necessarily relating to institutional structures of the state, actions that are self-empowering.

The second element of the problem relates to pluralism, the need to accept that the ANC and government cannot occupy the entire terrain of democratic self-expression. There are interests that need manifestation in a way that the ANC or any ruling party on its own cannot provide. It cannot represent the needs of carpenters or informal traders or football players or domestic workers in the way that these sectors can themselves do. The same is true of issues affecting women or those who pursue or identify with sexual orientations other than heterosexuality.

It is important that pluralism becomes embedded in democratic

development; otherwise a range of interests will not be adequately defended and advanced, if at all. This failure to respect and imbibe the principle of pluralistic democracy operates, not only in relation to grass-roots structures, but as will be indicated, has a bearing on critical national issues affecting parliament, the executive and other constitutional institutions.

6. Constitutional democracy in crisis

One of the results of the negotiation process and subsequent meetings of the first democratic parliament sitting as a constitutional assembly was, as indicated, the adoption of a constitution with features quite different from that of the *apartheid* constitution. The new framework provided for parliamentary institutions and an executive, but these would act under a constitution, whose interpretation would be subject to judicial scrutiny, notably by a newly created Constitutional Court. Democratic governance would also be strengthened by a range of democracy-supporting 'Chapter 9' institutions, including a Public Protector with powers akin to but wider than that of most ombuds, able to scrutinise alleged irregularities and make recommendations to parliament (Constitution Sections 182 (1) (a), (b) and (c)).

The legislature and executive have been charged with law-making and execution of laws that go beyond that provided in most liberal democratic constitutions, insofar as the Bill of Rights provides also for the duty to make provision for realisation of socio-economic rights, meeting basic needs to education, social security, healthcare, food and water, amongst others (See Constitution, Bill of Rights, Chapter 2, sections 24-29).

Throughout the 20 years of democracy but more notably in recent years there has been considerable irregularity in the performance of ministers and public servants. Courts have sometimes been called upon to make assessments of compliance of ministers and officials with their constitutional obligations. Likewise there have been cases where senior appointments, for example that of the head of the National Prosecuting Authority (NPA) was found by the courts to be invalid by virtue of the person not being a fit and proper person to hold such office.

In addition, the Public Protector has reported, in response to complaints, on various irregular actions of government officials. This

has sometimes led to enquiries and dismissal of officials as with a previous Commissioner of Police, General Bheki Cele. But more recently the Public Protector has reported on unauthorised expenditure, which has enriched the President under the guise of providing security measures for his private home in the rural area of in KZN. The total costs of the improvements have been estimated by the Public Protector at R246 million, of which she has found that the President should refund a reasonable portion of that which benefitted him personally.⁹⁾

In the case of judicial findings that have stood against government plans there has been a growing tension between the courts and the ruling party, with the courts sometimes being described as 'counter revolutionary' and attacks by the South African Communist Party (SACP) on what is called anti majoritarian liberalism or simply 'liberal constitutionalism'.¹⁰⁾

The report of the Public Protector on Nkandla has been presented to parliament and the Constitution requires the President to indicate what measures he will take to remedy the irregularities, in this case enrichment that he has experienced. Instead of addressing this, the President has failed to answer questions put to him and treated the constitutional status of the Public Protector's report as just one of many reports, equal in weight to those provided by departmental officials and the special investigative unit (SIU) which are his appointees and not equivalent in status to independent constitutionally-empowered organs of state.

The Public Protector has insisted that the President should answer her report, though it appears that she depends on the legislature and executive for implementation of its findings. The tension that has arisen between the Public Protector's demand for compliance, supported by various opposition parties and the President's failure to abide by his constitutional obligations has led to various attacks on the Public Protector by the ANC and its allies, depicting her as standing in the way of implementing the will of the majority through their elected representatives. This question is likely to be taken to the Constitutional Court for resolution.

The pressures on constitutional rule go further. The duty of government to improve the lives of citizens and prevent power being abused has been threatened and undermined in ways that prevent the core functions of some crucial institutions from being performed. These include:

6.1 Judicial appointments

In general, it may be true that the ANC-led governments have abided by the decisions of the courts. In recent times, however, there has been a disturbing tendency to pack the Judicial Service Commission (JSC), responsible for the appointment of judges, with those loyal to the current faction leading the ANC.

It should be recalled that the establishment of the JSC was aimed at remedying a situation that prevailed under *apartheid* where the President on the advice of the Minister of Justice simply made appointments, generally political appointments to the bench.

In the current JSC, the majority are ANC-nominated members, and include many who tend to be silent in proceedings. They are in effect there purely to vote. In many cases in interviewing candidates for the bench, the focus of hostile questions has been on candidates who may loosely be described as human rights lawyers, whose credibility as potential judges has been questioned by ANC nominees on the JSC.

The stress in this questioning has been on a rigid version of the separation of powers and lawyers who may as judges be open to examining whether or not the executive has carried out its constitutional duties, have been weeded out.¹¹⁾ This has also coexisted with appointments that have raised eyebrows, notably that of the current Chief Justice following a suspect process and with question marks over his commitment to parts of the Constitution.¹²⁾

6.2 Prosecuting authority

The functioning of the Rule of Law has been undermined by various acts of interference in the independence of the prosecuting authority. While this started in the period of Thabo Mbeki's presidency it has taken on the character of a crisis under the presidency of Jacob Zuma, where there has been no permanent head of the NPA in place for more than a year, with the current head under suspension, as are other leading figures. The suspensions and many appointments of senior officials appear to be connected with who is prosecuted and who may appear to be untouchable even if the law appears to demand prosecution.

The elevation of Zuma to the state presidency was itself dependent on the withdrawal of hundreds of corruption charges on grounds that are likely to be challenged, as they were by some of the

former prosecution team (Trengove 2009). The potential prosecution of Zuma himself, may also have been a factor in creating instability in the tenure of prosecutors, especially in the light of increasingly determined efforts, primarily by the opposition Democratic Alliance (DA) to reinstitute his charges that were withdrawn in 2009. These efforts are currently being reinforced by a court decision to release tapes whose contents were the basis on which the prosecution was withdrawn, to the DA (Trengove 2009).

But there appears to be malfunctioning of prosecution at all levels, with inadequately prepared prosecutions for murder, as with Andries Tatane killed in full view of television cameras. There are also repeated reports of prosecutors losing dockets and other malfunctioning.

6.3 Policing

This is also an area where evidence shows that duties are often not performed in compliance with the Constitution. There are cases where police do not comply with court orders and act with impunity against opponents of the ANC, amongst others, notably in action against shack dwellers and other vulnerable people.¹³⁾

More generally, there is a problem in enforcement of legal rights, where these are controversial or do not enjoy universal support. It is commonplace for police to ignore certain categories of complainants, especially when they disapprove of the complainant's identity or the work they do, for example, commercial sex workers, or their sexual orientation, notably lesbians who experience 'corrective rape'.

Likewise cases of gender-based violence suffer neglect. Despite domestic violence being a crime police tend to treat it as a family matter and the complaint is often not investigated. In these and other contentious or controversial cases police may not take statements from complainants or if they do, investigations tend to be tardy and it can take years before a case reaches court if it does at all. In many of these, the evidence is not properly managed and prosecutions that ought to succeed fail, both because the police are not keen to pursue offenders or the prosecution is insufficiently diligent or the bench, especially at the lower levels is also unsympathetic to the complainant. Much evidence corroborating these observations was presented in evidence and in the findings of a commission into policing in Khayelitsha in the Western Cape, which has recently reported on its findings.¹⁴⁾

6.4 Policing and the constituency behind rights

It has become apparent that while all rights in the Bill of Rights are of equal status, in practice, there is a more powerful constituency behind some rights, like the right to protection from racism, rather than others, for example freedom of sexual orientation and gender equality. Consequently, there is less pressure brought to bear to police those rights, which enjoy less organised support.

This may also be related to the reconfiguration of the forces with which the ANC is in alliance. Some constituencies with conservative approaches to patriarchy, previously hostile to or having a limited relationship with the ANC have become closer to the organisation since the 1990s and especially after 1994. This includes elevation of the status of Traditional Leaders and charismatic churches at the expense of bodies like the South African Council of Churches (SACC) that had a record of involvement in the liberation struggle. Both of these new allies are known for homophobic attitudes and hostility to gender equality.

6.5 Selective policing and prosecution of individuals close to the present leadership

At the same time, those who may have engaged in illegal activities but are favoured by the powers that be, find that they are able to circumvent regulations for considerable time and that prosecutions collapse through inadequate policing, losing dockets or inadequate preparation of state cases,

The result of the multiple cases of lack of enforcement of the law and the withdrawal of charges against Zuma is that the Rule of Law has been undermined and it is widely believed that there are wrongdoers who are untouchable and complainants who will never see their complaint heard in court.

7. Constitution and enforcing the Bill of Rights for the vulnerable

Whether or not the full promise of the Constitution is realised depends not only on judicial officers or prosecutors but also, as indicated, on the extent to which constituencies or communities can harness their strength in order to secure their own interests. It may well be that the

demobilisation of many of the popular organisations of the 1980s has weakened the capacity of vulnerable communities to ensure that their rights are realised. Where organisations have been built, sometimes with the aid of sympathetic non-governmental organisations (NGOs) some communities have been able to forestall prejudicial legislation or executive action.

The decision to build organisations that can defend and advance people's rights under the Constitution is dependent on more than will power. All organisations require funds, for members of an organisation to be transported in order to meet, possible hiring of a venue, accommodation, refreshments and similar expenses. Churches sometimes assist but NGOs tend to be better able to access specialised experts. There are cases where litigation has been instituted with the assistance of NGOs or research institutes in order to advance or defend the rights of communities. The availability of this expertise is a powerful resource in support of constitutionalism. But it needs to be unpacked.

Insofar as the poorest communities, most in need of remedial litigation do not have the expertise or the resources to secure this on their own, they value outside expertise. But how they relate to NGOs and other institutes can follow more than one pattern. There are some NGOs that employ lawyers or have their own in-house lawyers who take legal action and present the communities and the state with a problem that is resolved in the interests of the communities. While this may strengthen constitutionalism, to have a judicial interpretation that is empowering to communities or protects them, the process of achieving this will then have been without involvement of those who are most affected. In that sense we can speak of a specialised rather than democratic, community-empowering process of securing an objective.

There are other NGOs and specialised organisations that work with vulnerable communities, who ensure that these communities are part of discussions on how they understand their interests and how these should be advanced. In this context, they arrange workshops and other *fora* where issues can be unpacked and every person can articulate their understanding.

If it is decided that litigation is the best option, members of such communities often themselves present evidence in court or if it is decided to make representations to parliament, members of the affected communities present evidence to parliamentary committees. That way the process of constitutional development or achieving remedies is not

reduced to technical expertise but is a way of invoking the voices of the people most affected. In the course of opposition to the Traditional Courts Bill and related legislation, organisations like the Centre for Law and Society and the Legal Resources Centre worked closely with the Alliance for Rural Democracy in a series of consultations about ways of waging resistance to the Bill and ultimately ensuring that it lapsed during the 2014 session of parliament. Equally the Social and Economic Rights Institute (SERI) has worked with *Abahlali baseMjondolo* over evictions and informal traders who have been illegally removed from the inner city of Johannesburg, amongst other vulnerable communities.

8. Undermining of the Constitution through patronage and corruption

The promise of 'transformative constitutionalism' is being challenged in multiple ways, one of the most serious being the widespread practice of patronage and corruption. Patronage is not unlawful but the loyalties deriving from patronage may lead to appointments of people who are not best suited to hold positions or granting of tenders for the realisation of rights that provide for basic needs, to those who are not best able to deliver what is required.

The loyalties relating to patrons and clients have also converged with illegality as in the steps taken to prevent the prosecution of former Police Commissioner, Jackie Selebi, ultimately convicted of corruption, during the Thabo Mbeki presidency.

Patronage is antagonistic to democracy because it relies on loyalties that create bonds that may be tighter than those that bind people to parties or even the Constitution. Insofar as loyalty to a client is on the expectation of a reward it has the tendency to lead to irregularities, sometimes resulting in allocation of tenders which have resulted in loss of life, through collapse of buildings, for example, and other damages to people's wellbeing.

While there were irregularities prior to Zuma's presidency, it has now become commonplace. Insofar as there is daily evidence of individuals close to Zuma or the ANC leadership implicated in bribery and often evading prosecution, there is a general atmosphere that suggests a high tolerance of illegality, undermining the foundations of the constitutional state and democracy.

The response of the current administration to judicial scrutiny and reports of the Public Protector has, as indicated, been aggressive, suggesting at times that judicial powers, especially that of the Constitutional Court need to be reviewed, that as a result of compromises during the period of negotiations the courts were allowed powers that impede the transformatory role of the party elected by the majority. The Public Protector has come under sustained attack over the Nkandla report, described as representing anti-majoritarian forces, witting or unwittingly advancing regime change, and other attacks.¹⁵⁾ Opposition members of parliament (MPs) have at the time of writing (late September 2014) walked out of a parliamentary committee addressing the issue because the ANC has been unwilling to accord the Public Protector's report higher status than that of presidential appointees, and refusal to call the President and others to appear before the committee.

What needs to be emphasised in articulating the rationale for constitutionalism is that the insistence on following procedures is not simply pursuance of technical regulations. The monitoring and oversight by the courts and Public Protector of procedural observance is precisely part of ensuring that the transformational duty imposed by the Constitution, to meet basic needs is observed. This cannot be done where procedures are flouted. This is dramatically illustrated in the Nkandla saga where the very monies used to enrich the President were intended for social spending that would have bettered the lives of the poor.

9. Crisis of leadership and 'ungovernability'

This pattern of illegal actions and neglect of duties that has been prejudicial to the populace has evoked widespread reaction. In recent times a number of features of the present system of malgovernance have coalesced to create seething discontent, which has seen almost daily protests all over the country. The elements of the crisis relate amongst others to the following features of the current situation:

- **A crisis of legality:** From top to bottom Government is surrounded by allegations and proof of wrongful use of power benefitting individuals and often simultaneously denying basic needs to communities.
- **A crisis of violence:** While earlier police ministries sometimes

saw police use of force as necessary, this has been a more marked feature of the Zuma administration, manifested in the Marikana massacre of 2012, but also in multiple shootings of often unarmed or scantily armed protesters. Police have often tended to use force as a first resort and not tried to negotiate with the crowds.

- **Gratuitous violence:** Unrelated to protests, there are also numerous cases of gratuitous police violence and murder, as in the dragging of Mozambican taxi driver, Mido Macia, handcuffed behind a police van followed by his beating to death in a police station.
- **De-politicisation of grievances:** In many cases, the police meet the crowds, without mediation or intervention from the political authorities at any level. Police have complained that they are put in an impossible position because they are not in a position to address the grievances.¹⁶⁾ Those who bear responsibility for the issues that have provoked the protests do not make an appearance or if they do it is later and often not at the level requested. Consequently political issues are often reduced to questions of law and order and grievances are not addressed
- **Internal divisions:** In many cases, however, the protests are related to internal ANC disputes where disgruntled aspirant councillors help stoke up protests, not because of broad political goals, but because politics and holding office has become a source of enrichment.¹⁷⁾
- **Threat to governability:** The level of protests has reached such intensity that it has been difficult to sustain governability in many parts of the country. This ought not to come as a surprise to government because they have long known of many of these problems, as in the Madibeng municipality of North-West province where fraud and dysfunctional local government has been reported on for years, but not seriously addressed. That malgovernance is a consistent pattern is shown by the fact that clean audits have only been recorded for less than 10 per cent of municipalities.

10. How do South Africans re-empower themselves to recover democratic gains and advance on an emancipatory route?

Despite all the flaws in current ANC leadership that have been mentioned, there is little likelihood of the organisation being voted out of power in the foreseeable future. There are, however, signs in electoral returns that there is a growing level of dissatisfaction in the ANC. Voting patterns in the last election show a significant decline in electoral participation of those eligible to vote (Schulz-Herzenberg 2014: 20-41). In effect, a minority of the potential electorate voted for the ANC.

The ANC is under increasing strain as it has to weather storms resulting from repeated scandals relating to the President. It may be that Zuma will be removed, though that does not mean that the relationships of patronage and corruption and other attendant negative consequences on the well-being of the population will necessarily be remedied.

But there is no alternative political party likely to defeat the ANC in elections in the short term, nor offering a clear programme that will defend constitutionalism and advance a broad programme to meet peoples' basic needs. Parliamentary opposition parties, notably the DA, while sometimes taking legal action around issues like a vote of no confidence in the President or reinstating Zuma's fraud charges, do not generally lend direct support to popular grievances around meeting basic needs or land rights or other issues of concern. This is partly because they are themselves guilty of failure to observe legality in many cases of eviction and failing to meet basic needs in areas where they are in control.

The Economic Freedom Fighters (EFF), a new organisation formed by expelled ANCYL leader, Julius Malema, has entered parliament as the third largest party and created dramatically embarrassing situations for the ANC. But it has not provided the public with clear policies or programmes that will better the lives of the poor and restore legality.

The critical issue of the moment is not to advance socialism and end neoliberalism as some left rhetoric would suggest. The burning question today is to restore legality and end violence, both state violence and private vigilante violence which may be one of the symptoms of loss of confidence in the police.

In order to achieve such goals it is necessary to strengthen formal and informal processes of participation and ways of holding people accountable. One of the most effective vehicles to achieve such goals may be through building a united civic movement, going wider than the UDF. 'Going wider' is necessary because it is not only the poorest of the poor but also a broad range of citizens from all classes who wish to see clean government and peace.

There is an initiative to establish a united front advanced by the powerful National Union of Metalworkers of South Africa (NUMSA), but it is ambiguous in its message insofar as it argues for unity but simultaneously stresses 'revolutionary socialism' and Marxism, neither of which can be a point of entry for many who might potentially join a broad front.

One of the most critical issues of the moment is to reconnect representative democracy with direct participation of citizens, formal political actors and their constituencies, listening and learning from one another. That will not only broaden and deepen democracy but can also provide social weight behind the rights that are now being violated or inadequately respected and enforced.

If one is to find a way out of the present morass, it may be that one should try to identify agreement on a range of core issues, like constitutionalism, clean government and non-violence and build a coalition of forces, on a non-sectarian basis to clamp down on the violence and illegality, the corruption and abuse of the dignity and attacks on the very lives of people.

There can be no quick fix, despite the urgency of the situation. There needs to be patient building of a broad coalition, binding people who may previously not have considered working together, around a programme whose content and scope can be developed as its cohesion increases.¹⁸⁾

Endnotes

1. This paper is concerned with democracy, as a value in its own right. While I recognise that political democracy does not fill anyone's stomach, it is beyond the scope of this article to consider choices made in relation to broader social and economic transformation after 1994.
2. On 'transformative constitutionalism', see amongst others Langa (2006), "Transformative constitutionalism", *Stellenbosch Law Review*, Vol 17, No 3,

- pp 351-360. One example of various examples of government and ANC attacks on the judiciary is the reference by the Secretary General of the ANC to the judiciary being part of counter-revolutionary forces. (Available at: <http://mg.co.za/article/2008-07-04-anc-boss-accuses-judges-of-conspiracy-against-zuma>, accessed 27/9/2014.)
3. The Freedom Charter had been adopted at the Congress of the People in Kliptown on 26 June 1955 after an extensive campaign where demands for inclusion in the charter were collected. The document was subsequently endorsed by the ANC, its allies and many other organisations and individuals. The process is described and the charter analysed in Suttner and Cronin (2006).
 4. Gangsters (*tsotsis*) posing as comrades, or comrades who were raised in an environment where it was fairly common to resort to violence when arguments failed, following practices not very different from *tsotsis*, but held in abeyance where political organisation proceeded with an element of order and tranquillity undisturbed by the state repression that later ensued.
 5. Referring to killing through placing a tyre around an alleged informer's neck and setting it alight.
 6. The UDF, like the Congress Alliance, was not a single non-racial organisation, but comprised affiliates who organised in their own communities, often based in white, Coloured or African areas and not involving multi-racial membership, in the main.
 7. 'Sole and authentic representative' is the terminology that was used by the OAU and UN to refer to recognised liberation movements, in South Africa's case the ANC as well as the PAC.
 8. Accounts of such attacks can be found on the website of the Social and Economic Rights Institution (SERI) (<http://www.seri-sa.org>) and also that of Abahlali baseMjondolo (abahlali.org). Illegal evictions in the Western Cape are extensively covered on the Groundup website (www.groundup.org.za). See Also Sandra Liebenberg: <http://mg.co.za/article/2014-09-01-what-the-law-has-to-say-about-evictions>.
 9. The Public Protector's report. (Available at: http://www.publicprotector.org/library%5Cinvestigation_report%5C2013-14%5CFinal%20Report%2019%20March%202014%20.pdf.)
 10. See account by Greg Nicolson. (Available at: <http://www.dailymaverick.co.za/article/2014-09-22-sacp-we-will-huff-and-we-will-puff-and-well-blow-the-eff-down/#.VCZwl77N6-I>, accessed 27/9/2014.)
 11. Chris Oxtoby, "A week in the life of the JSC". (Available at: <http://www.theconmag.co.za/2014/06/09/a-week-in-the-life-of-the-jsc/>.)
 12. See H Corder (available at: <http://www.bdlive.co.za/articles/2011/08/31/hugh-corder-constitution-reigns-whether-zuma-likes-it-or-not>). and P De Vos, "The difficult choices facing Chief Justice Mogoeng", 9 September

- 2011, (available at: <http://constitutionallyspeaking.co.za/the-difficult-choices-facing-chief-justice-mogoeng/>).
13. See references in note 9 above.
 14. The report under the direction of former Constitutional Court Judge Kate O'Regan and former Director of Public Prosecutions Vusi Pikoli can be found at: <http://www.khayelitshacommission.org.za/final-report.html>.
 15. See note 11 above.
 16. See discussion in Raymond Suttner article. (Available at: <http://www.polity.org.za/article/loss-of-trust-and-legitimacy-result-in-ungovernability-2014-02-11>.)
 17. The New Age (2011), "Disgruntled ANC members stirring violent riots in Brits", 4 November. (Available at: http://www.thenewage.co.za/34116-1008-53-'Disgruntled_ANC_members_stirring_violent_riots_in_Brits', accessed 5 April 2014.)
 18. I am indebted to Nomboniso Gasa for continued debating of ideas and comments that have enriched this article.

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