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Making the kettle boil

Rights talk and political mobilisation around electricity and water services in Soweto

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March 2005

A thesis submitted for the degree of Masters at the University of Witwatersrand

Declaration

I hereby declare that the work presented in this thesis is, to the best of my knowledge and belief, original, except as acknowledged in the text, and that the material has not been submitted, either in whole or in part, for a degree at this or any other university.

Peter McInnes

Acknowledgements

Many people have provided assistance and support during the preparation of this thesis. My first debt must go to my supervisor Ran Greenstein who oversaw and guided the preparation of this thesis. Without his encouragement and in particular his administrative support when I was absent from South Africa this thesis would not have been completed. My thanks go to those people who agreed to be interviewed for this thesis. Thanks also go to Patrick Bond, David McDonald, Rob Rees and Sean Flynn for their helpful exchanges on these and related issues which expanded greatly my understanding of technical and policy issues related to municipal service provision. Jean-Philippe Deranty, of Macquarie University was particularly helpful in providing insight into the role of recognition in social conflict.

Finally my heartfelt thanks go to my wife, Rosemary who put up with my absences, graciously read my drafts and provided direction and support when my commitment to the project was waning.

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Introduction

> A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.
>
> *Government of the Republic of South Africa v Grootboom*, 2000 (11) BCLR 1169 (CC) para 44.

This study looks at the attitudes, actions and opinions towards law, rights and political mobilisation, and in particular South Africa's Bill of Rights, of a small band of activists associated with the Soweto Electricity Crisis Committee. It provides a snapshot of attitudes towards the Bill of Rights prevalent at the birth of a small organisation, which since 2000 has been active and at times successful in guaranteeing affordable electricity in South Africa's largest township - Soweto.

The SECC in mid – 2001, when the study began, was a small, militant, community based organisation that had only just emerged as a real force in Johannesburg's political life. This was as a result of the disconnection of up to 20,000 households per month in the first half of 2001 by the state owned electricity utility, ESKOM.[1]

In response to these cut-offs Sowetans required urgent and appropriate forms of political action that would both provide immediate relief in terms of reconnecting disconnected households to the grid, wiping off unpayable electricity account arrears and, over the longer term, mitigating or transforming the policies that led to the cut-offs. These more immediate concerns also inevitably lead to broader questions surrounding the social and economic order which precipitated the crisis.

This study explores to what extent the Bill of Rights enhanced grass roots political mobilisation. The focus on mobilisation relies is based on the intuitive belief that there is a strong link between the dual goals of enhanced democratic participation and social justice.[2] The study will describe the potential mechanism through which rights discourse promotes community mobilization and provide some preliminary comments on the appropriateness of legal mobilization for political ends.

The SECC was an ideal choice to consider the questions surrounding the role of the Bill of Rights and political mobilisation because it had recently begun a grass roots campaign for affordable electricity. The SECC had also become involved with legal professionals who were advising them on potential constitutional avenues to further their political goals.

This focus on electricity enabled understanding of how a community based organisation strategised social mobilisation when a particular demand, in this case an essential service - electricity - is not explicitly included in the South African Bill of Rights. Specifically it allowed the study of strategies adopted to prosecute similar demands surrounding access to water, which was explicitly included in the

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[1] Fiil-Flynn, M. with the Soweto Electricity Crises Committee, *The Electricity Crises in Soweto*, Municipal Services Project, Occasional Papers Series No. 4., August 2001, p. 6 available at the Municipal Services website www.qsilver.queensu.ca.

[2] Young, I., *Inclusion and Democracy*, Oxford University Press, 2000, see Ch. 1. "Democracy and Justice."

Constitution. In this case the SECC strategy was to deliberately obscure the boundaries between the two services.

In mid 2001 the press had been reporting strong community disquiet over aspects of electricity provision, particularly the widespread use of disconnection as a way of forcing payment for electricity arrears.[3] The SECC was a prominent actor in channelling this disquiet, a role recognised widely in the press and in scholarly studies.[4] While the research for this study was conducted in 2001 and 2002, the SECC continues to be active in Soweto and the focus of study by other researchers and journalists.[5]

Because of the incipient character of the movement when this study was begun, the views expressed in respect of the Bill of Rights must be seen as tentative and constantly evolving. Different views were expressed, from grudging acceptance of rights talk as a pragmatic option in a constitutional state, to outright rejection of a legal strategy as inherently cooptative. There was also some evidence of an almost naive belief that the Bill of Rights could directly and immediately resolve household electricity supply problems. Despite this diversity of views, it was clear that wherever activists stood in this range, rights talk was important to the SECC.

This study has two goals: to identify what happened in the struggle for 'affordable' electricity, and to understand why. The material basis of such a struggle appears obvious.[6] Poverty plus denial of an essential municipal service, through service cut-offs, frequently equals protest. But is this necessarily the case? The assumption underlying this study is that the text and spirit of the law, and people's attitudes towards it, are equally crucial in understanding why people become engaged in political activity in their communities, and what strategies of mobilisation and struggle they choose.

Rights as a distraction to the real business of political activists.

The Bill of Rights is sometimes promoted as a document that will help facilitate social transformation of South Africa.[7] Given its central position in the post-apartheid legal order activists could be expected to increasingly seek inspiration and practical help from the Bill of Rights in their own transformative aspirations.[8]

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[3] Daniels, G., "Electricity Crises Deepens", *Mail and Guardian*, June 8 – 14, 2001 and Daniels, "Privatisation will hit consumers hard", June 29 – July 5, 2001 at 7.

[4] See for example Zuern, Elke, "Continuity in Contradiction? The Prospects for a National Civic Movement in A Democratic State: SANCO and The ANC in Post-Apartheid South Africa, Centre for Civil Society, September 2004, at p. 20.

[5] It is expected that the Natal Centre for Civil Society will publish a monograph on the SECC on their website in early 2005. See Anthony Egan and Alex Wafer (2004) The Soweto Electricity Crisis Committee at http://www.nu.ac.za/ccs/default.asp?5,56 accessed February 16 2005.

[6] Indeed it is implicit in the use of 'affordable electricity'. This demand for 'affordable electricity' was rarely articulated by the SECC, which preferred to couch its demand as a 'right to electricity'.

[7] Karl Klare, a US academic associated with the critical legal studies movement gives a particularly convincing exposition of the Constitution's deliberately intended transformative character see his, "Legal Culture and Transformative Constitutionalism", *South African Journal of Human Rights*, 1998, 14, 146 at pp 151 - 156. Klare argues that South Africa's conservative legal culture suppresses the transformational character inherent in the Constitution.

[8] As judicial review will play an important role in monitoring the "popular" decisions of legislators this transformative role is a key element of the Constitution and see Klug, H., *Constituting Democracy:*

Arguably the Bill of Rights may have little impact on why people become involved and stay involved in transformative social movements because the problems, which spark ordinary people's interest in engaging in social activism, occur almost always without reference to the Bill of Rights. They result from a particular issue, for example the disconnection of electricity and water services or forced removals.[9] People become politically active because of the intrinsic importance of the issue to their community and themselves. The Bill of Rights in this view is an afterthought at best in understanding why people get involved and stay involved with a social struggle. Or as one critical theorist jokingly put it - the oppressed don't necessarily need rights discourse to know that they are oppressed.[10]

In summary an activist may not need the Bill of Rights in his or her mobilisation strategy. People are angry because they have been denied water and electricity services. That these services are or could be interpreted to be guaranteed by a Bill of Rights makes no difference to why they attend community protests or strategy meetings and decide to get involved.

Such an argument while plausible was not represented in the literature. Most writers in the field of social movements and the law assume that rights talk is important in defining people's expectations and political behaviour. The question central to the debate is not if rights talk is significant for social movements, this much is common ground, but whether it should be. Those who argue for the abandonment of rights strategies do often implicitly assume that progressive change in certain social fields or society as a whole (via democratic mobilisation) could be achievable without recourse to rights talk precisely because of the inherent characteristics of the issues themselves to promote social mobilisation. Over and over again, history suggests that change in liberal democratic societies requires something more than a noble cause. This is particularly the case in those states that seek to legitimise their existence through reference to human rights norms and charters such as a bill of rights.[11]

Rights as empowering

A second hypothesis common in the literature is that social activists with transformative aspirations should use rights talk to mobilise a constituency to achieve their political goals. The utility of rights talk arises from the inherent characteristics of legal rights.

Characterising political demands in the non-negotiable language of rights heightens the seriousness of the government's failure to deliver on a particular issue, whether to protect a civil-political freedom or a guaranteed access to a socio-economic good of

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Law, Globalism and South Africa's Political Reconstruction, Cambridge University Press, 2000 pp 179-182.

[9] The latter was famously litigated in *Grootboom and Others v Oostenberg Municipality and Others*, 2000 (3) BCLR 277 C.

[10] Kennedy, D., *A Critique of Adjudication*, Harvard University Press, 1997 at p. 335.

[11] See for an interesting discussion, if somewhat narrowly focussed on civil and political rights, on the modern state's legitimation through human rights see Habermas, J., "Remarks on legitimation through human rights", contained in Habermas, J., *The Post-National Constellation, Political Essays*, The MIT press, Cambridge Massachusetts, 2002.

some sort. Entitlement to a 'right', as a consequence of your membership of the human race, can radically the way the community perceives the "problem" at hand.

The 'problem', which in this study is an inability of a household to pay for social services - electricity, water, refuse collection - ceases to be individualised when a rights framework is imposed. The issue becomes, in a judicially monitored constitutional regime, the responsibility of government. Everyone is entitled to water or electricity as residents of South Africa. The collective problem then calls for collective strategies to pressure government, often at all levels – municipal, provincial and national, to deliver on its duties enshrined in the Bill of Rights.

People, through the work of activists, recognise the interlinked nature of their problems. In this framework a Bill of Rights becomes an instrument for directly realising their social needs.[12] In particular the *language* of rights has a mobilising character. In the words of Chris Jochnick:

> Rights rhetoric provides a mechanism for reanalysing and renaming "problems" as "violations," something that needn't and shouldn't be tolerated…Rights make it clear that violations are neither inevitable or natural, but arise from deliberate decisions and policies. In their demands for explanations and accountability, human rights expose the hidden priorities and structures behind violations.[13]

Rights talk, by turning "problems" into "violations", gives activists a powerful tool to mobilise constituencies in support of political goals.

A survey conducted by the Community Agency for Social Enquiry (CASE) in 2000 found strong support for a number of important socio-economic rights. At the same time, however, the survey found that there was a low awareness of the Bill of Rights itself and its purpose.[14] Alerting residents to the existence of the socio-economic rights clauses contained in the Bill of Rights would provide further justification of their common sense values. Furthermore this would likely have the effect of re-confirming an understanding grounded in their lived experience. Their demands for free electricity and water would be made both more justified *and* realisable by their presence in the framework document for the new South African rights based social order. Their realisation would appear more imminent because, by their very presence in the fundamental law of the country, as the Government would arguably be in breach of its own laws. Pragmatically then, it would seem that rights are an important tool for mobilising a constituency *and* keeping it mobilised.

Rights and democratic participation

Many writers however have questioned the energising and empowering nature of rights discourse as necessarily leading to greater participation in civil society. Two

[12] See for example Mann, J., Steiner, H., (Eds) "Economic and Social Rights and the Right to Health", An Interdisciplinary Discussion Held at Harvard Law School in September 1993, and for a discussion of the tension between rights talk and other more "political" discourses, Heywood M., and Altman, D., "Confronting AIDS: Human Rights, Law and Social Transformation." *Health and Human Rights*, Vol. 5:1, 2001 149 at p. 162.

[13] "Unleashing Human Rights to Address Global Poverty", (Quito, Ecuador: Centre for Economic and Social Rights, 1997. Quoted in Heywood and Altman, *Ibid*.

[14] Greenstein, R., Pigou, P., *Awareness of human rights and human rights institutions*, CASE, 2001, the survey was conducted between August and November 2000.

issues arise here. Firstly, the outcomes of the new constitutional order have been slow to be realised. Working within a constitutional order necessarily slows down social mobilisation and deflects important community activism to the pursuit of legal judgements.

In practical terms the outcomes of rights litigation in both South Africa and in other countries has been marked by its modest achievements.[15] The most significant case in post-apartheid South Africa was the *Government of the Republic of South Africa v Grootboom.*[16] In this case squatters living in appalling conditions on private land in the community of Wallacedene in the Western Cape were evicted. The local government failed to provide adequate emergency housing after the eviction occurred. The Constitutional Court held that the government had violated resident's right to housing, guaranteed by the Bill of Rights, by not providing suitable emergency housing. Critics of *Grootboom* have pointed to the poor results for the litigants in question who for a number of years after the supposedly landmark judgement remained more or less in the same dire circumstance with no access to adequate housing.[17] While resources are available to launch constitutional challenges to Government policies through various international donors it is clear that structurally a constitutional case is large financial and organisational burden.

The slow evolution of the Constitution as a source of strategic advantage to activists has caused some writers to point to South Africa as an example of the constitutional rule of law, rights based state, posing a significant *barrier* to social transformation. After reviewing the Constitution and early case law Makau Mutua concludes with respect to the protection afforded to propertied, bureaucratic, judicial and military interests;

> The protection of these interests through the new Constitutional order in effect binds the ANC and robs it of any ability to carry out major reforms. In the case of South Africa, the democratic, rule-of-law, rights based state has ironically turned out to be an instrument for the preservation of the privileges and ill-gotten gains of the white minority.[18]

This stinging attack on the transformative constitutionalism envisaged by the progressive supporters of the Bill of Rights has enough basis in fact to make those, like myself, who from afar recognised the South African Constitution as arguably the most progressive of all the world's constitutions, pause in thought. The weight of conflicting demands placed on the Constitution adopted by the Constitutional Assembly in May 1996 invites, to some extent, these accusations of failure.

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[15] John Dugard, touches lightly on this controversy in his "20 years of Human Rights Scholarship, 10 years of Democracy", in 20 *South African Journal of Human Rights*, 2004, p. 345. Constitutional regimes of much longer duration, such as the United States, have produced a string of critiques against the usefulness of public interest litigation. See for example Rosenberg, G. N., *The Hollow Hope; can courts bring about social change*, University of Chicago Press, 1991, p. 343. An interesting review of the long term impact of the most prominent American Civil Rights case of the 20th century, *Brown v Board of Education*, can be found in Sunstein, C., "Did Brown Matter", *The New Yorker*, May 3 2004, p. 102.

[16] *Government of the Republic of South Africa v Grootboom*, 2000 (11) BCLR 1169 (CC)

[17] See *Financial Mail*, July 5 2002 "Low cost housing: Nought For Their Efforts", p. 16-17. Further discussion of Grootboom's legal, as distinct from its practical, failings can be found in Chapter 5.

[18] Mutua, M., *Human Rights a Political and Cultural Critique*, University of Pennsylvania Press, 2002, p. 151.

There is some truth in these accusations. While the transformation with respect to civil and political rights has been immense, the socioeconomic landscape remains perilously unequal, as demonstrated by the agonisingly slow land reform process.[19] That human rights discourse can be both a powerful sword and shield for established interests is an undeniable reality.[20] But of course such power would hardly dissipate in the absence of a constitutionally entrenched rights regime.[21]

The law to Zachie Achmat, one of the most successful community activists of South Africa's first decade of democracy, 'is one of the most important tools that human rights activists can use to promote equality, freedom, dignity and social security'.[22] Achmat, is the Chair of the Treatment Action Campaign, a group which successfully challenged the policies and practices of both private pharmaceutical companies and government.[23] In 2001 the TAC forced the Pharmaceutical Manufacturers Association into abandoning court action aimed to prevent government importing cheaper medicines. The TAC also played a pivotal role in a campaign to win access to anti-retroviral medication for people living with HIV/AIDS in South Africa.

So where does the fault lay for the slow progress in effective outcomes as a result of constitutional litigation? Achmat clearly believes that, rather than some intrinsic fault with legal strategies, civil society has to accept some responsibility for this state of affairs:

> Critical civil society players, mass based organisations of working class and poor people have failed to realize the Constitution's practical vision of equality for all. We have not realised that the Constitution and the law is a moral and practical force to improve the quality of life for all people. Yet we have enormous opportunities socially and through a creative use of law and social mobilisation to improve the delivery of water services, housing, education, health, land and to expand the frontiers of individual freedom.[24]

Achmat in reflecting on the successes of the TAC views speaks of the 'dialectical interplay between social mobilisation and law…'as playing an important role.[25] In his view success through the courts is dependent on an ability to generate an effective political campaign and base in the wider community, which in itself is contingent on successful strategic legal action. A successful legal case on its own is not enough to

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[19] The first post-apartheid decade has seen no more than 3% of total agricultural land transferred to blacks. See International Crisis Group, *Blood and Soil: Land Politics and Conflict Prevention in Zimbabwe and South Africa*, 2004, p. xxi and Lahiff, E., Rugege, S., "A critical assessment of state land redistribution policy in light of the Grootboom judgement", *New Agenda,* 7, 2002.

[20] For a critical portrait of the often one dimensional thinking about rights from the left see Bartholomew, A., and Breakspear, J., "Human Rights as Swords of Empire", in Panitch, L., and Leys, C., *The New Imperial Challenge: Socialist Register 2004*, The Merlin Press, London, 2003.

[21] Is Great Britain more egalitarian than Germany by not having a constitutionally entrenched Bill of Rights? This would be a very difficult question to answer but there is not in any obvious sense a link.

[22] "Law, Politics and Social Transformation", 32 *International Journal of Legal Information,* 2 (2004) 237.

[23] See Friedman, S., Mottiar, S., "*A Moral to the Tale: The Treatment Action Campaign and the Politics of HIV/AIDS", Centre for Civil Society, 2004. Achmat is profiled in Power, S., "Letter from South Africa: The AIDS rebel", The New Yorker*, May 19 2003.

[24] "Law, Politics and Social Transformation", 32 *International Journal of Legal Information,* 2 (2004) 237 at 240.

[25] *Ibid*, p. 237.

achieve transformation. Social mobilisation is contingent on a whole range of factors one of them being effective use of the law.

What these underlying issues may mean for link between rights talk and political mobilization is not overly clear. The dearth of studies which attempt to understand the relationship between rights and social movements has been highlighted by Neil Stammers who has called for a new research agenda that looks at the "socio-historical link between social movements and claims for human rights".[26] A review of the literature reveals some significant studies on these issues focused primarily on the legal rights activism in the United States.

The foundational studies in this field have attempted to analyze the role of social movements in reform prosecuted through the legal system.[27] Joel Handler's study of the factors, which in the 1950s and 1960s influenced the success or failure of various social movements' programs for social change through the use of the legal system, is particularly useful. He concluded that rights litigation was not an optimal solution for social movements, allowing change within fairly narrowly prescribed legal and constitutional parameters, primarily set by dominant social groups. Scheingold, further argues that legal strategies in themselves are inherently conservative and gradualist in nature and places more emphasis on the mobilizing capacity of rights.[28] A significant theme of this work is the ultimate failure of social movements to effectively challenge state power and the correlation with legal rights strategies in this depressing outcome.[29]

Michael McCann's sweeping study of legal activism over equal pay for women in the workplace disagrees with the conclusions of Scheingold and Handler. *Rights at Work* focused on grass roots mobilizers and activists and their understandings of the significance of rights discourse and litigation for their struggles for equal pay.[30] McCann's emphasis on the dynamic relationship between litigation and social movement building is an excellent study that provides a model for my own work. McCann sought to look beyond Handler's and Scheingold's narrow focus on the legal system and the positive or negative impact of specific legal cases and assess the impact of legal strategies throughout society and on movement activists.

Emerging from this is a holistic picture of the role legal strategies play in a complex, multi-dimensional process of social activism. In this sense a defeat in the courts does

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[26] "Social Movements and the Social Construction of Human Rights", 21 *Human Rights Quarterly,* 1999, 980 at 1007.

[27] Handler, J.F., *Social Movements and the Legal System, A Theory of Law Reform and Social Change,* Academic Press, 1978, Scheingold, S., *The Politics of Rights: Lawyers, Public Policy and Social Change,* 1974 and McCann, Michael, *Rights at Work, Pay Equity Reform and the Politics of Legal Mobilisation, The University of Chicago Press,* 1994.

[28] For example "The evidence suggests that litigation may be useful for providing remedies for individuals but that its impact on social policy is open to question. The implementation of social policy by court orders is likely to be slow, costly and self-defeating. There is very little reason to believe that legal and constitutional values are directly persuasive to the elites who are the most immediately responsible for making decisions for the polity." *Op. Cit.* p. 148.

[29] For a negative assessment of this line of argument see Hunt, A., Bartholomew, M., "Whats wrong with rights?", 9 *Law and Inequality*, 1 – 58 at 53-54, November 1990.

[30] McCann has recently spoken in South Africa at the Ten years of democracy, 20 years of human rights scholarship" conference, held in Johannesburg from 5 July 2004. It is expected his contribution may be available in the South African Journal of Human Rights.

not necessarily equate to a broader movement defeat. It can further strengthen activists resolve in the other dimensions of the struggle, direct action, policy activism and street protests. The sense of injustice can empower activists and their constituents to work harder in other avenues. Furthermore while the specific outcome, the loss of an important legal case, may appear devastating to the policy aims of the movement, the movement building, consciousness raising associated with the legal action may not dissipate and can be exploited in the other dimensions of the campaign.[31]

In the other direction experience in South Africa has shown that a groundbreaking doctrinal advance achieved in the courts may mean very little without an associated political mobilisation to enforce the judgment. The courts, because they have very little enforcement powers, are at the mercy of governments to implement their decisions.

McCann's study looks at a struggle of many years' duration with ongoing and diverse litigation and associated labor and feminist movement activities. My study, with its narrow focus on the preliminary stages of mobilisation, is therefore much more targeted.

There have been some historical studies, which address the relationship between rights and political mobilisation. David Kairys' study of the freedom of speech clause in the United States Constitution places considerable emphasis on the role of the union movement in defining the right to free speech during the first two decades of the early twentieth century.[32] Most notably Kairys analyses the role of the International Workers of the World (hereafter the Wobblies) in popularizing the United States Constitution through their free speech fights.[33]

Through direct action the Wobblies won the right to speak on militant labor and class issues in public spaces. They did this without support from the courts. Controversially when discussing the legal transformation of freedom of speech, which took place during the Great Depression, Kairys links the role of popular struggle over free speech and freedom association as influencing judicial decision making.[34] This emphasis is crucial as most legal analysis focus on the textual origins of rights through analysis of case law, international agreements, legislative enactments and constitutional documents.[35] In conclusion Kairys notes;

> The struggle for free speech…waged largely by leftists and finally realized by the labor and left movements, has been falsely redefined as a set of pre-existing natural rights whose essence and history are legal rather than political. A false pride in the legal system has displaced a source of genuine pride in the people, who fought business interests and the government – including the courts – to achieve recognition of free speech.[36]

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[31] McCann, Op. cit., p. 230.
[32] "Freedom of Speech", in his edited collection *The Politics of Law: A Progressive Critique*, Pantheon, 1982, 140 at 151.
[33] *Ibid* at 162
[34] *Ibid*.
[35] The notion of judicial independence is so jealously guarded that to say that a court decision was influenced by social protest in the right context can open oneself to a contempt of court proceeding for impugning the impartiality of the court.
[36] *Ibid*, p. 164. See for a vivid fictional description of the impunity allowed to vigilante groups and the police in terrorising the Wobblies for exercising supposedly constitutionally guaranteed rights of free

This study's focus on the struggle for basic electricity and water rights explores a similar terrain, except the focus is on a contemporary social movement. This historical example has some significant similarities with the SECC's use of the law. The SECC, while not having the same antipathy towards lawyers and judges as the Wobblies, nonetheless adopted similar tactics in defying the law, justifying this defiance on the basis the 'true' values of the Constitution. It is situated in a stage where the right to water has no clearly defined content as a result of intervention by the courts in the context of South Africa's new Bill of Rights. The mere existence of a right to electricity is highly controversial. As a result this study's focus on electricity as a right will explore the use of rights discourse to further the political demands of an incipient social movement.

As Kairys' review of the origins of free speech in the United States makes clear, the link between social activism and subsequent legal entrenchment of a particular demand is not always straightforward. It may be that the political activism around a social claim and the subsequent formal legal recognition of this claim can occur at distant points in time. This can sometimes makes any definite association between instances of social movement activism on any given rights issue and a related substantive change in the law, methodologically difficult to prove.

The ideas developed in this study respond to the work of the Critical Legal Movement that arose in the United States in the late 1970's.[37] A number of their claims surrounding rights discourse are explored and found wanting in the following chapters. The Crits, as they became known, were highly sceptical of the use of rights and litigation strategies as a tool to defend the poor and achieve a progressive society. They would argue that political mobilisation in defence of a 'right' to seek a court ruling for its protection is at best an ersatz democratic action. The rule of law, and legal strategies which seek court protection for 'our rights' legitimise the existing grossly unequal division of wealth and power in liberal democratic societies. To seek the legal system's protection for 'our' rights is, in their view, a fatal error.

The Crits methodological focus on the products of the legal system, appellate court judgements, is in stark contrast to the 'bottom up' approach pursued here. This study, adopts a holistic approach seeking to understand the impact of rights *in* society through an analysis of the understandings of non-legal actors to the utility of rights talk to social mobilisation and social change.

South African empirical work on the role of law, rights and political mobilisation is in its infancy. South Africa will provide a useful contrast to the older United States studies because of the significant role socio-economic rights can now play in a constitutional state. This may alter the utility of legal mobilisation for movement building allowing for a much more positive view of rights talk and social transformation than has been demonstrated in previous U.S. studies.

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speech see John Dos Passos, *U.S.A., - Nineteen, Nineteen*, John Lehmann, 1950, pp. 677 – 679. For a non-Bill of Rights manifestation of the same struggle see Burgmann, V., *Revolutionary Industrial Unionism, The Industrial Workers of the World in Australia*, Cambridge University Press, 1995 at 120-121.

[37] A good review of the history of the CLS movement can be found in Paul, J., "CLS 2001", 22 *Cardozo Law Review*, 2001, 701.

Ran Greenstein in his comparison between the two contrasting uses of law and rights to mobilise a constituency and achieve change to the new South African Governments policies and practices undertaken by the SECC and the Treatment Action Campaign (TAC) has reiterated this point.[38] Greenstein argues that effective and lasting challenges to state policy and practice must involve tangible legal victories through the courts if the changes resulting from political mobilisation are to endure. He labels the SECC as 'activists' who use law for grass-roots mobilisation but do not place similar emphasis on the substantive legal victories through the courts. The TAC's practice has been to adopt a rights strategy which places a strong emphasis on achieving practical change through the courts accompanied by more traditional South African activist tools such as civil-disobedience campaigns.

This study examines whether the particular combination of legal strategy and activism adopted by the SECC form a potential model for other activist groups seeking to provide the basic necessities of life to poor and marginalised South Africans as well as create a South Africa more likely to fulfil the desires of its citizens for freedom, dignity and equality.

Overview of chapters

South Africa has faced difficult and complex questions in the quest to expand water and electricity services to many poor urban and rural communities. In the context of this debate, the ANC government in the late 1990s adopted a business model rather than a public service approach to essential service delivery. The international, local and historical reasons for this move, and its consequences for Soweto residents, are explored in Chapter 1. This provides the necessary background for the social, legal and political struggles further elaborated in subsequent chapters

The focus of this study, however, is on the role that the South African Constitution and the Bill of Rights played in framing understandings of what was possible for participants in the community-based struggle to ensure high quality and affordable service delivery. This focus on law and rights is broader than their effectiveness in achieving concrete outcomes in specific legal cases. The main question here is how did the appeal to the legal form, in this case the language of rights, mobilise and energise a new social movement? In other words, were rights useful in 'making the kettle boil', where 'boiling the kettle' is "a metaphor for the project of good politics to generate certain feelings and attitudes in a group; to move from a state of just sitting around, inertia (water sitting in a kettle), to one of energy and action (boiling water)".[39] The catalytic role of rights talk, as used by the SECC, in mobilising a previously dormant constituency in Soweto is discussed in Chapter 2.

The struggle to overcome the unevenly distributed inheritance of the apartheid era in the new South Africa must of necessity start from the incomplete and uneven institutional inheritance of the difficult period of transition in the first half of the 1990's. Activists trapped in a society of great inequality have little practical

[38] Greenstein, Ran, "State, Civil Society and the Reconfiguration of Power in Postapartheid South Africa", *Centre for Civil Society* Research Report 8: 1-56 at pp 40-49 available at http://www.nu.ac.za/ccs/default.asp?3,45 accessed 22 February 2005.
[39] Gabel, P., Kennedy, D., "Roll Over Beethoven", *Stanford Law Review*, 36:1, 1984, p. 11 and 54.

alternative but to reach for a constructive, progressive interpretation of the Constitution. Chapter 3 explores this difficult path, the role that activists saw for the Constitution in reinterpreting the Bill of Rights, and the strategic thinking behind this work.

While I am using the aphorism of 'making the kettle boil' to encapsulate the goal of this study, it had an all too literal meaning for those households in Soweto who saw in the SECC a hope for affordable access to electricity. Beyond the immediacy of the sensuous experiences of 'a cup of tea in the morning' (due to access to electricity and tap water), or warmth on cold Johannesburg night, the use of rights talk had a powerful impact on marginalised and excluded individuals. By merely asserting rights a powerful psychological effect can be produced in the individual. In Chapter 4 I argue that rights talk in all its various manifestations, as used by the SECC, was often merely a proxy for the underlying need of Soweto's residents for respect and dignity. Chapter 4 looks closely at the psychological impact of rights talk in disadvantaged communities.

Chapter 5 looks at the role envisaged by civil society, in this case the SECC in influencing adjudication. This question is important, as a persistent critique of a legal approach to social transformation is that recourse to the courts is, by its very nature, anti-democratic.[40] The courts themselves in emphasising the apolitical/technical character of their decision making further encourage this view.[41] Thus while the law and its concepts may be enlisted to mobilise a political constituency, if the courts are inherently undemocratic, over the longer term there may be a democratic price to pay by continually seeking redress from the courts for questions which are in their essence political questions. The emphasis on a bottom up approach to legal questions however points to a less pessimistic conclusion. Democratic values are important in judicial decision making and this fact accompanies some of the strategic thinking of activists who hope to use the law to achieve their goals.

Methodology

The research design involved a triangulation methodological approach. This assumes that any one-research method is necessarily partial and flawed and it is only by adopting a range of methods, whose various strengths and weakness can be combined to complement each other, that an accurate analysis of complex phenomena, such as political mobilisation, can be achieved.[42] The main approaches involved:

Interviews with community activists - Interviews were conducted with activists from the Soweto Electricity Crisis Committee, the Anti-Privatisation Forum and other related organisations to determine what role the Bill of Rights played in furthering their mobilising strategies.

The research focussed primarily on SECC activists and overall ten interviews were conducted with SECC community activists. Three activists from the closely associated organisation the Anti-Privatisation Forum were interviewed. Interviews

[40] Unger, R., *What Should Legal Analysis Become,* Verso, 1996, p. 71 - 72.
[41] See Klare, K., Op. Cit.,, pp. 170 – 171.
[42] For a fuller explanation see McCann, M., *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilisation,* University of Chicago Press, 1994, p. 16.

were also conducted with Patrick Bond a co-director of the Municipal Services Project, Theunis Roux of the Centre for Applied Legal Studies (CALS) and George Dor from the Alternative Information Development Centre. All these latter organisations were in some way involved with the SECC. All interviews were recorded and about half were transcribed.[43]

Activists were initially selected for interview on the basis of observation of meetings to see who were most involved in speaking and organising. These first interviewees were asked for advice on whom else I should interview in the organisation. In this way I attempted to choose the most active members, as they would more likely have an in depth understanding of the strategic priorities and alternatives. Interviews went for about 40-60 minutes. Most interviews averaged 45 minutes.

Interviews were based around a dialogical method. While the same broad themes were identified to be covered in all of the interviews the structure of each interview was loose, allowing for unexpected avenues to be followed if the circumstances arose. This approach as result sacrificed some comparability between interviews.

The SECC tended not to articulate their strategy in newspaper articles or even in their own publications and as a result the main source of information for this study is interviews with their leading activists. I relied heavily on what the activists said they were trying to achieve through their use of rights talk. I also assessed the campaign literature carefully in order to verify some of the claims that were made at interview in reference to rights talk. This was clearly an imperfect strategy but language barriers made it impossible to effectively observe the use of rights talk in public rallies and large meetings.

Campaign literature, press releases and newspaper reports: Other data was taken from campaign literature, press releases and newspaper reports which commented on SECC protests. Most of these were helpfully supplied by the SECC. This material was analysed for their 'rights talk' content to give a picture of the use of rights in the formal campaign material and to determine the impact of such language through its representation in the press.

As a white male middle class Australian I was clearly an "outsider" culturally and racially to the activists involved in the SECC. This didn't however present any immediate problems for engaging with the SECC. Certainly intellectual/activists were strongly involved in the APF and I was probably simply perceived by the SECC's core constituents as another variant - the student/intellectual.

Perhaps my acceptance by the SECC was assisted by the fact that I had intended to work with the Municipal Services Project to develop a legal strategy for the SECC to assist their electricity campaign.[44] At one of the earliest meetings of the SECC I attended I was introduced as potentially undertaking such a role. As a result I may have, temporarily at least, held the mantle of an insider, an intellectual/student activist who was directly involved in furthering the goals of the SECC. While I did facilitate

[43] Informal conversations with David A. McDonald a co-director of the Municipal Services Project, Rob Rees of the APF and the South African Municipal Workers Union, and Heinrich Bohmke a legal adviser to the SECC from Durban also informed my research.
[44] A process which was begun by Sean Flynn.

one meeting between Centre for Applied Legal Studies and the SECC this 'insider' role did not eventuate.[45] Nonetheless this may have contributed to the undoubtedly warm and helpful way I was treated by all of the SECC activists whom I interviewed in this study. Certainly other researchers, with no claims on 'insider status' have had similarly positive experiences.[46] The concerns I initially held over potential problems resulting from my "outsider" status were perhaps overstated. I certainly sympathised strongly with the goals of the SECC and such a bias is reflected in the content and themes of this study. I hope however that my subjective appreciation of the SECC's goals has not compromised my attempt to objectively assess their strategic use of rights talk.

Participant observation: Direct attendance at the SECC's public rallies and a number of smaller activist strategy meetings played an important part in deepening my understandings of the SECC and the APF. I also attended a number of conferences and seminars in which SECC and APF leadership were involved in giving papers.

There were however obvious practical barriers that hindered the accuracy of the participant observer method. Clearly language was an issue. Many of the public rallies and larger SECC meetings were conducted primarily in Zulu and Sotho. As a result a key source of context for this study was impaired. Translation was sometimes available at smaller meetings but this could also cause problems.

For example when I attended a regular SECC meeting held in a household in Soweto in September 2001 I found that my presence became a hindrance to the SECC's own work. Out of politeness attendees provided translations of their contributions to the meetings for the 'outsider'. This considerably lengthened the meeting, possibly causing frustration to some who wanted, not unreasonably, to get on with it. Reliance on translation clearly misses cultural references.

Secondary academic research: A literature search was conducted through the Info Trac and Legal Trac database from the years 1980 – 2001. This resulted in surprisingly few South African specific studies in the sociology of law and rights. A search of the South African Studies Index from 1980 was not particularly fruitful although there is ongoing work on the role of social movements in the transformation of South African Society. There is a large body of literature on rights and development.[47] Other strategies involved general catalogue searches, website searches including the CASE website, which provided information on popular

[45] In the end I was contracted to do research for the Municipal Services Project on water service delivery in Pretoria. I collaborated with the South African Municipal Services Workers Union as part of developing this project. It was published as "Entrenching Inequalities: The Impact of Corporatisation on Water Injustices in Pretoria", in McDonald, D., Ruiters, G., (Eds) *The Age of Commodity: Water Privatisation in Southern Africa,* Earthscan, 2005.

[46] Peter Alexander, in an unpublished paper for the South African Sociological Association, Durban 27 June to 1 July 2003 - "Anti-globalisation movements, identity and leadership: Trevor Ngwane and the Soweto Electricity Crisis Committee", notes that the SECC was a "rather open organisation; sufficiently open that it allows a researcher – albeit a sympathetic one – to attend and gather information at its AGM." His experience and perceptions are very similar to my own.

[47] See Mohan, G., & Holland, J., "Human Rights & Development in Africa: Moral Intrusion or Empowering Opportunity," 88 *Review of African Political Economy,* 177 – 196, United Nations Development Program, *Human Development Report 2000,* Oxford University Press, 2000, Donnelly, J., "Human Rights Democracy and Development", 21 *Human Rights Quarterly,*1999, 608-632.

understandings of the new Bill of Rights.[48] I primarily relied on international legal sociology and legal theory journals as a source of references. In the South African context this has not been particularly fruitful, as a manual search of South African Sociological journals in the 1990s revealed only one article on the Bill of Rights.[49]

There has been an increasing interest in the work of the SECC, in particular its leader Trevor Ngwane.[50] While I feel confident that I was amongst the first researchers to have a comprehensive look into the phenomenon that was the SECC a number of researchers have subsequently been drawn to the SECC and the APF. I am grateful for the use of an unpublished paper by Peter Alexander, which focuses both on Ngwane as leader and the SECC more broadly.[51]

[48] See, http://www.case.org.za
[49] Murphy, J., "Second Generation Rights and the Bill of Rights Debate in South Africa,", *SA Sociological Review* 1992, 4:2, 30 – 53.
[50] It is expected that the Natal Centre for Civil Society will publish a monograph on the SECC on their website in the coming months. See Anthony Egan and Alex Wafer (2004) The Soweto Electricity Crisis Committee at http://www.nu.ac.za/ccs/default.asp?5,56 accessed February 16 2005.
[51] Ibid.

Chapter 1

The Policy Context

> …after apparently widespread agreement about the appropriateness of using the law to spirit the process of governmental change, there are signs that socioeconomic factors are inhibiting, or may even derail, this potential role. In other words, one needs to confront the question openly: Are there not basic levels of affordability and commitment which have to be met before the law is able to play the role expected of it? How far is the autonomy of the law linked to the minimal existence of such non-legal forces.
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> Hugh Corder, Prisoner, Partisan and Patriarch: Transforming the law in South Africa 1985 – 2000, *South African Law Journal,* 118:4, 2002, p. 773.

Introduction

The role of this chapter is to set the policy context driving developments in 2001 and 2002 in which the rights to water and electricity are being claimed. It will focus on the water and electricity policies promoted by national and local government, the Soweto Electricity Crisis Committee (SECC) and the SECC's supporters and intellectuals. The latter can be mainly found in three groups. The international research initiative the Municipal Services Project, the Anti-Privatisation Forum (APF) and the Alternative Information Development Centre (AIDC). The relationship between these groups is not always straightforward. I will fully explain these groups' roles in the struggles for affordable electricity and water services below.

The policy agendas of national and local governments and those in opposition to these policies have some surprising similarities in form. This is despite often-fundamental differences in the politics, which underlie their respective programmes.[1] The chapter aims to set out the "what" of national government policy, and how local government is implementing it. It will focus on policies for basic service provision directed towards urban residents. By setting out the political agendas of government and opposition groups such as the SECC I will set the stage for the next chapter when I discuss the rights arguments.

The cost of water and electricity services has increased markedly for many residents of Soweto since 1994.[2] A survey of international and regional financial institutions and national government documents points to a clear explanation for these increases. That is the commitment to full cost-recovery to encourage the entry of private sector into the delivery of urban infrastructure.[3]

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[1] The reasons for these similarities will be discussed in Chapter 3.

[2] While an overall trend of increasing prices in electricity and water charges clearly emerges household level data in townships to determine the true extent of the rise is difficult to find. See for example the acknowledged gaps in the Republic of South Africa National Treasury, *Intergovernmental Fiscal Review*, 2001, October 2001, pp. 156 – 157.

[3] Kerf, Michel and Smith, Warrick, *Privatising Africa's Infrastructure: Promise and Challenge*, World Bank Technical Paper No. 337, Africa Region Series 1996 and Development Bank of Southern Africa, *African Development Report 1999*, Johannesburg, 2000, especially Chapter 5 at 164 and GEAR, Growth, Employment and Redistribution a Macroeconomic Strategy, Department of Finance Pretoria,

Equity considerations nonetheless have an important place within government urban infrastructure policy. Thus for water tariff policy there is a commitment to a rising block tariff. This translates into increased cost per kilo-litre as consumption increases. The first tariff block is zero-rated in most urban municipalities so that each household receives 6kl of free water per household per month. Under this system the price per kilo-litre increase steadily with each tariff block.

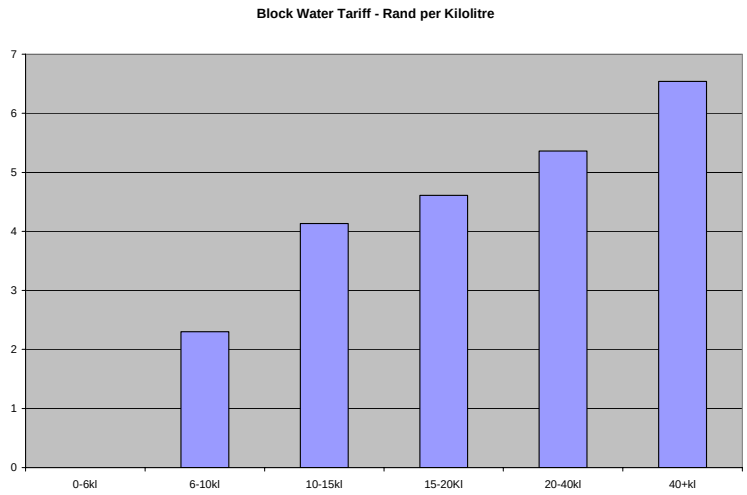


Chart 1: Rising Block Water Tariff (Rand) City of Johannesburg July 2001 – July 2002

For domestic electricity the national government has promised a similar initial "lifeline block tariff" with 50kwh free electricity per household per month for households that earn less than R800 a month.[4] This is not a universal grant but goes to those the council defines as poor. Implementation of this promise is uneven geographically in terms of the amount of electricity offered with some municipalities offering only the first 30kwh for free.[5] An important difference from water is that there is no rising block tariff to allow cross-subsidisation between large and small domestic users. After the initial free amount of electricity there is a flat rate thereafter regardless of the level of consumption. There is still, however, some cross-subsidisation between large industrial users of electricity and domestic consumers

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p. 16 and Department of Constitutional Development, *The Municipal Investment Infrastructure Framework, A User Friendly Guide*, 1996, p. 29 available at http://www.local.gov.za/DCD/dcdlibrary/miif/miifindex.html. See for further background on the inevitability of these processes Ballard, H., Schwella, E., "The impact of globalisation on local government in South Africa", *Development Southern Africa*, 17:5, December 2000 p. 746. One must note the earlier less strident approach to private sector involvement in infrastructure adopted in the World Bank's, *World Development Report 1994, Infrastructure for Development*, Oxford University Press, 1994, p. 37.

[4] See Deputy Minister of Minerals and Energy Susan Shabangu quoted in Robyn Chalmers, "Municipalities to phase in free power" *Business Day*, Wednesday July 10 2002 p. 2 and on the complex details of the offer with respect to City Power customers (Johannesburg minus Soweto) see Anna Cox, "Power to the people not so free after all", *The Star*, 30 June 2002.

[5] Kim Helfrich, "Tshwane to come on stream with free water, power scheme", *Pretoria News*, August 23, 2001.

with somewhere in the vicinity of R1.8 Billion transferred from large industrial users as a subsidy to domestic households.[6]

It is the SECC's assertion that such efforts are inadequate to provide Soweto with sufficient electricity and water to guarantee a decent life as is evident by the number of disconnections in Soweto. The Soweto electricity crisis, which saw 20,000 households per month being disconnected per month in the early part of 2001, is a result of a government inability to *effectively* prioritise equity rather than a total absence of concern for this important issue.[7] A survey of 200 households in Soweto in mid 2001 found that in the previous 12 months 45% of respondents had been disconnected from the electricity supply for more than a month.[8] 35% were disconnected for between one and three weeks while about 20% were disconnected for 1 to 2 days. The majority of those disconnected would have relied on illegal connections either provided by the household, neigbours, Eskom employees or by late 2001 the SECC's "Operation Khanyisa". Many would have remained without electricity. A number of households that were disconnected and able to pay would have reconnected fairly soon.

Some evidence of the national character of the crisis in basic services, which suggests that the problems that have arisen is Soweto are more than a local aberration, can be seen in the emergence of groups like the SECC in a number of South African cities.[9] Linked into this upsurge of protest is undoubtedly coordinated organisation through such national structures as the Anti-Privatisation Forum. It is in this environment that the SECC and other groups have looked to the Constitution, the Bill of Rights and legislation as a way of protecting their interests and the interests of those householders marginalised by government policy who form their mass base.

There is a need to unpack the complexities of urban water and electricity delivery policy because of the underlying commitment of all sides of the debate to the "right to water". The SECC in its campaign material argues that residents of Soweto have a right to electricity. There is no rhetorical commitment on behalf of the government to a right to electricity although the household electricity policy is similar in form to the free water policy, both of which guarantee a certain minimum level of water and electricity free to the household consumer.[10] Certainly concerns other than legal rights are compelling the introduction of free water and electricity services beyond any hoped for or actual commitment to them in the Bill of Rights.[11]

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[6] Fiil-Flynn, M. with the Soweto Electricity Crises Committee, *The Electricity Crises in Soweto*, Occasional Papers Series No. 4., August 2001, p. 6.
[7] This figure is quoted in Fiil-Flynn, *Ibid.*, p. 2.
[8] *Ibid.*, p. 17.
[9] Others include the Concerned Citizens Forum in Durban, similar in many respects to the SECC and the more conservative Attridgeville and Saulsville Concerned Residents Association (ASCORA) in Pretoria. See for Durban Desai, A., *We are the poors: community struggles in post-apartheid South Africa*, Monthly Review Press, 2002 and Prega Govender, "People poor in pocket, rich in spirit", *The Sunday Times*, 11 November 2001, www.sundaytimes.co.za
[10] Eskom initially resisted free electricity to any areas that it directly serviced unless there was compensation from government. Thus Soweto had not received the benefit of the Government's promise of 50kw of free electricity until relatively recently.
[11] For some of these forces see McDonald, D. "Ideology and Urban Ecology in the New South Africa", Background Research Series, Municipal Services Project, particularly at p. 14 also available in *Review of African Political Economy*, 75, pp. 73 – 88, 1998.

The disagreement as to what actually constitutes a right to water, an explicit constitutional right, unlike electricity, has its origins in the general vagueness of the constitutional commitment. Most traditional civil and political constitutional rights suffer from this same vagueness and have been the subject of continued contestation through the courts and on the streets ever since the first liberal democratic constitutions were proclaimed. The battle to define the meaning of socio-economic rights contained in the South African Constitution is just a new theatre of conflict in an ongoing war surrounding the scope of human rights. The previous spheres of conflict, civil and political rights, have a history arguably going back more than three centuries.[12]

Soweto Electricity Crisis Committee- history and profile.

The SECC is a community group or "civic" formed to represent community interests with respect to electricity cut-offs, rising prices of electricity, billing accuracy and other electricity supply related issues in May 2000.[13] It is a small, young and exuberant organisation that stands, to a large extent, outside the formal policy process of local, provincial and national levels of government.[14]

Ngwane in an interview with Peter Alexander in 2003 explained the origins of the SECC:[15]:

> The meetings that led up to SECC were CANSA meetings – the Campaign Against Neoliberalism in South Africa. . . . We had a workshop, a Johannesburg workshop, on CANSA, looking at how to spread ideas against neo-liberalism. We resolved to set up CANSA (Soweto). . . . We met for three months, but we just couldn't find a way forward.[16] . . . Then one day we decided 'look, let's find an issue.' (At that time it was not just Pimvillians, [but] people from Tladi, Zola . . . and [South African Council of Churches] types) . . . So, we discussed, and electricity was an issue. So, we found money for a workshop, through CANSA, from AIDC [Alternative Information Development Center] . . . and we decided we were going to form an organisation, so we called another workshop, which was addressed by Patrick Bond [and] Dennis Brutus.. . and afterwards we had our own

[12] For vivid descriptions of popular mobilisations in England with respect to important civil and political rights see E.P. Thompson, *The Making of the English Working Class*, 1963.

[13] The few in depth articles which provide some background on the SECC include, Norm Dixon, "Grass roots struggles survive" *Green Left Weekly*, No. 460 August 15 2001 at www.glw.org.za, Ferial Haffajee, "From Seattle to Soweto", *New Internationalist*, 338 September 2001, pp. 21 - 23, Jon Jeter, *The Washington Post*, Tuesday, November 6 2001 p.1, Arthur Nelsen., "New activist generation comes of age", *Red Pepper*, 25 March, 2002, "Sparks in the Township", Interview with Trevor Ngwane, *New Left Review*, 22 July – Aug 2003 at 37, Paul Kingsnorth, *One No, Many Yeses: a journey to the heart of the global resistance movement*, Free Press, 2003 from 87, Drew Forrest describes both the SECC and the APF in his, 'Social movements: 'ultra left' or 'global citizens'? *Mail & Guardian*, 4 February 2003, www.mg.co.za and Trevor Ngwane interviewed by Walter Turner, 'Soweto Resists ANC Privatisation Moves, *Africa Today*, August 18 2004, available at Centre for Civil Society web-site, www.nu.ac.za/ccs/default.asp?2,40,5,475 accessed 22 September 2004.

[14] This does not mean that the SECC is not without influence and has been mentioned in the ANC's mouthpiece *Umrabulo*, at www.anc.org.za and also see Pule Molebeledi, "Tripartite alliance must define roles", *Business Day*, August 14, 2002, p. 2.

[15] This quote is extracted from Alexander's unpublished paper presented to the South African Sociological Association, Durban 27 June to July 2003, *Anti-globalisation movements, identity and leadership: Trevor Ngwane and the Soweto Electricity Crisis Committee*.

[16] Alexander notes that the 'we' must refer to some of Ngwane's Socialist Group comrades. The Socialist Group appears to be of Trotskyites. The Socialist Group is affiliated to the SECC.

> discussion, and we had to find a name, so we decided to call it the Soweto [Electricity Crisis Committee].

It was the issue of electricity that gave focus to the activities of Ngwane and his comrades who were seeking to organise the community against neo-liberalism. Following its formation the SECC grew rapidly with considerable local and some international press focus on the SECC and its leader Trevor Ngwane.[17] To some of its most vocal supporters the SECC formed a mini-mass movement.[18] Support, however, has tended to wax and wane, often in response to government concessions to the SECC's core constituency.

A full understanding of the SECC would not be possible without a brief discussion of three other important organisations with a history of involvement with the SECC. These are the Anti-Privatisation Forum (APF), the Alternative Information Development Center (AIDC) and the Municipal Services Project.

The strongest organisational bond is between the SECC and the APF.[19] APF activists often spoke at meetings and seminars organised by the SECC that I attended. The SECC is equally prominent in APF marches. As a result of this symbiotic relationship the SECC, at their first Annual General Meeting/Conference held in March 2002 formally changed its name to Soweto Electricity Crisis Committee/Anti-Privatisation Forum.[20]

The APF is an umbrella organisation, which draws together a number of political parties and civics.[21] The APF was formed by a combination of groups opposed to Egoli 2002, a program designed to re-structure Johannesburg council by selling and corporatising municipal assets. These included unions such as the South African Municipal Workers Union (SAMWU), the National Education Health and Allied Workers Union (NEHAWU) and students from the University of Witwatersrand protesting over restructuring on campus. After the initial failure of those two campaigns, and the formal withdrawal of the unions from participation the APF turned its attention to the issue of basic service provision in Soweto. The APF is an umbrella organisation for 21 community-based affiliates and four political organisations. One of the community affiliates is the SECC. The APF is largely movement intellectuals and includes high profile activists such Dr Dale McKinley,

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[17] See for example the full-page profile of Trevor Ngwane during the World Summit on Sustainable Development in Johannesburg's *The Star*, Caiphus Kgosana, 'Rebel with a cause – the poor' *The Star*, Wednesday August 28 2002, p. 19.

[18] Ceruti, Claire. 'Masondo, Somyagazisa Malele – Masondo, We'll shake you while you sleep.' *South African Labour Bulletin* 26(3) 2002. It must be noted that even some supporters are skeptical of this claim pointing out that at no point have marches and rally's of the SECC attracted more than 1000 people, see Democratic Socialist Movement's (an affiliate of the APF in 2002) newspaper *Izwi Labasabenzi*, "The Anti-privatisation forum; which way forward?", Issue no. 1, June – September 2002, p. 7.

[19] See for a public discussion of this relationship see an interview with Trevor Ngwane, *Focus* 25, available at www.hsf.org.za/focus25.

[20] SECC/APF statement from the 1st Conference of the Soweto Electricity Crisis Committee/Anti-Privitisation Forum circa 4 March 2002.

[21] In 2004 these included 21 community based organisations including the SECC, Vaal Working Class Community Coordinating Committee, Orange Farm Water Crisis Committee, and small left parties such as Keep Left and Socialist Group see www.apf.org.za/article.php3?id_article=46 accessed 3 December 2004.

John Appolis and Trevor Ngwane to name a few. It is English speaking organisation and the activists are of a very different educational background in most instances to activists in the SECC.

The merger appears to have made little difference to the independent profiles of both the SECC and the APF.[22] The APF, as an umbrella body uniting a whole range of other groups has a separate public profile to the SECC. On the APF's web-site the SECC is listed as an affiliated member.[23] The SECC despite its new name has also retained a separate public profile to the APF reflecting its different membership base and more immediate concerns with service delivery. Trevor Ngwane, Secretary of the SECC is currently the full time organiser for the APF.[24] His joint membership and active involvement in both organisations perhaps explains the confusion over the separate or alternatively conjoined relationship of the SECC and the APF. During this study I will only use the SECC/APF if it is clear to me that the APF and SECC were acting in close coordination. I will use APF when it is clear that it is taking on a public role separate to the SECC.

The Alternative Information Development Center (AIDC) is a "political" NGO, which through an "integrated strategy of research…popular education, campaigning and coalition building" contributes to "challenges to the currently dominant global economic system". It is committed to the "empowerment and mobilisation of progressive and popular organisations and social movements to contribute to the development of alternatives that ensure fundamental socioeconomic transformation".[25] The Johannesburg office of AIDC closed down in mid-2002 but as the above quote from Ngwane makes clear the AIDC was an important organisation that facilitated the emergence of the SECC.

The Municipal Services Project is a research, policy and educational initiative examining the restructure of municipal services in Southern Africa.[26] The project's central research interests are the impacts of de-centralisation, privatisation, cost-recovery and community participation on the delivery of basic municipal services like water and electricity to the rural and urban poor.[27] The MSP like the AIDC also played an important role in establishing the SECC as a force in the townships. This role will be discussed at the end of Chapter 2.

All these groups had members who held joint membership and positions with one or the other organisation. Overtime there has been migration of officeholders or staff of one organisation to another by key players. This joint membership in the case of the

[22] For example the press reports of the new social movements makes a clear distinction between the two organisations. See Drew Forrest, Mail and Guardian, *Op. cit.*.
[23] *Organisational Report of the APF for the year 2003*, at www.apf.org.za/article.php3?id_article=47 accessed 3 December 2004.
[24] As at December 2004.
[25] Taken from an interview with George Dor, Research officer Alternative Information Development Centre, 3rd Floor Cosatu House, Johannesburg, 28 March 2002 and its mission statement contained in the *AIDC Annual Report*, 1999.
[26] Research partners include University of Witwatersrand, Queens University (Canada), International Labour Resource and Information Group (Cape Town), South African Municipal Services Workers Union, and the Canadian Union of Public Employees.
[27] For more details see the project website located at www.queensu.ca/msp.

MSP and the SECC has not gone unnoticed by critics who have attempted to use this fact to discredit the SECC and its militant activities.[28]

The SECC is an organisation whose core 'member' is most likely an older unemployed woman.[29] Geographically members are most likely to come from a range of established areas in Soweto including Meadowlands, Diepkloof, Pimville, Naledi, Dube and Orlando East. At the SECC's Annual General Meeting in early March 2003 of the 110 participants 77 responded to a questionnaire distributed by Peter Alexander designed to understand participant's background and motivations. The survey found that 1 in 4 respondents were over the age of 60. Over two-thirds were over 40. Just over 50% were women. Significantly some 88% were unemployed. The main languages used at the meeting were Zulu and Sotho. It is not likely that ethnicity is a significant factor as Zulu is now Soweto's lingua franca making any conclusions about ethnicity spurious.

This research confirms my own perceptions of the previous years Annual General Meeting held in March 2002. Except I would add that participation had grown somewhat from the previous year. Some demonstrations I attended were conspicuous by the attendance of large number of older women. This does point to an organisational weakness for the SECC and shows that the movement in order to prosper must extend the range of supporters into the employed and find ways to attract younger members.

One respondent I interviewed stated that the main attraction of the SECC, to many community members, was the fact that it was not aligned to any particular party.[30] Alexander found that no respondents were members of the ANC or SACP and there were only a few members of other political parties. The lack of any ANC members is not unusual given the oppositional stance the SECC/APF has taken towards the ANC government. The alliance with the ruling party brought into question the credibility of organisations such as SANCO (South African National Civics Organisation) as an independent representative of community concerns. The SECC leadership, therefore, was at pains to distinguish themselves from SANCO by emphasising their independence from the ANC. While membership of political parties may have been low 70% of respondents declared that they belonged to a church.[31]

The SECC in early 2002 had no full time officials although it received considerable support from staff employed by the APF. By March the following year, according to Alexander the SECC employed an administrator and an organiser and had an annual

[28] In this instance the SECC and the MSP - Simon Barber, "Narrowly focused story did SA's government no justice", *Business Day*, Wednesday 28 November 2001, p. 12 see a letter in reply from Dr David McDonald, "Seriousness of service crisis not understood", *Business Day*, 11 December 2002 and Patrick Bond's response to the allegations raised by Barber, *Unsustainable South Africa*: *Environment Development and Social Protest*, University of Natal Press, 2002. p. 350 – 352.
[29] The following information is from a survey conducted by Peter Alexander in 2003 at the SECC's Annual General Meeting. The author attended the 2002 AGM and my memories largely seem confirmed by the survey's results.
[30] Interview with Dudu Mphenyeke, SECC media Officer, 1st November 2001.
[31] This aspect will be discussed further at the end of Chapter 2.

budget of R330, 000.[32] The SECC's funding was sourced from a number of international NGO's including the British charity War on Want.

Key events have been crucial in raising the SECC and the APF's local and national profile. For example 87 SECC and APF activists were arrested on charges of public violence and malicious damage to property as a result of a protest outside Mayor Amos Masondo's house on the 6April 2002.[33] The Kensington 87 (named after the suburb they were arrested in), became a considerable focus of activism for the SECC and the APF. Marches and protests were held outside the Johannesburg's Jeppe Magistrate's Court leading up to their release and over the following twelve months at the various court hearings.

The protest aimed to present the Mayor with a memorandum at his home detailing the SECC's demands. There are various versions of what happened. What is certain is that following vigorous protesting, which included an attempt to disconnect the Mayor's water supply, a bodyguard fired 8 shots in an attempt to disperse the protestors. Two were slightly injured. The bodyguard was arrested and charged with attempted murder and released on bail on the Monday the 8th April. 37 of the protestors where either pensioners or children and were also released on the 8th of April.

The agonisingly slow bail application[34], which kept 50 of the protestors in the notorious 'Sun City' jail for 11 days, and the lenient treatment the guard, who was granted bail while the majority of peaceful protestors languished in prison, enabled the SECC and the APF to characterise their treatment by the police and the court system as unjust and politically motivated. Supporters argued that the Kensington 87's treatment was evidence that the ANC was tightening civil and political rights as a way of stifling dissent resulting from the government's neoliberal municipal services policies.[35]

This incident was projected by the SECC and the APF as the government restricting civil and political rights as a way of defending their neo-liberal policies. In a press release the APF put the case this way.

> Under the new South Africa order the right to protest peacefully, fight against evictions and water and electricity cut offs has become a crime…*In spite of shootings, arrests and illegal detentions we intend reclaiming the rights to*

[32] The two SECC full time staff that Alexander reports are probably the APF's, Trevor Ngwane as the organiser and Teboho Mashota as administrator. They are both affiliated with the SECC see discussion contained in *Organisational Report of the APF for the year 2003*, at www.apf.org.za/article.php3?id_article=47 accessed 3 December 2004.

[33] The details of the incident which lead to the arrests are contained in "Bullets fly as crowd stones mayor's home", *The Sunday Times*, April 7 2002 p. 1. For reportage more sympathetic to the SECC/APF see "Protesters lay siege to Jo'burg mayor's home", 7 April 2002, Sapa at www.iol.co.za and articles at www.southafrica.indymedia.org.

[34] Justified because of the need to determine the addresses of the protestors. In my view international standards on the treatment of non-custodial prisoners were breached. See clause 6.2 of the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), General Assembly resolution 45/110 which state that "(a)lternatives to pre-trial detention shall be employed at as early a stage as possible".

[35] Harvey, E. 2002. "A taste of the jackboot of the new ruling elite?" *South African Labour Bulletin*. Vol.26. No.3.

> *protest, movement* (and) *free political expression. The fight for free basic services goes on….*[36]

The imprisonment of the 87 protestors was a direct contestation of the Constitutional limits of freedom of association and the right to protest. While the police action may not have dented the activist vigor of the SECC protest actions became more laden with risk. After a number of delays and almost a year after the event the case against the 87 was dismissed by the magistrate due to a lack of reliable evidence.[37]

Much of the mainstream print media in Johannesburg characterised the events outside Masondo's home very negatively.[38] Despite this there was a lot of coverage even on the television. Trevor Ngwane when released on the 16 April 2002 gave a statement to the assembled press. A reporter raised the Mayor's right to privacy in the context of the melee outside his home by protestors. Ngwane responded in the following way:[39]:

> We respect the mayor's privacy but when they cut off our water and electricity they also invade the privacy of our own homes. So we wanted to give him a taste of his own medicine.[40]

The events surrounding the mass imprisonment did raise important and difficult tactical questions for the SECC.[41] The imprisonment and the associated legal costs caused much hardship to the protestors and their families. A vigorous solidarity campaign provided both material and emotional assistance to those in goal. The strain, both personal and organisational, from the Kensington arrests was high. The SECC and the APF tried to use this event to highlight their cause and arguably did so successfully. But it cannot be assumed that such events, because they raise the profile of the organisation, are automatically good for the SECC/APF.

Florence Belvedere, the then treasurer of the APF, after noting the benefits for the profile of the SECC of the jailing and subsequent legal case, suggested that there needed to be a rethink of protest strategies to take into account a possible recurrence of such a mass imprisonment:[42]

> But at the same time for me as treasurer has anybody thought about what the consequences are of having 300 people in goal. Who is going to take care of them? How are we going to get them out? Is this strategic? Is this strategic for us to march after people have been in jail for 11 days and they have hardly chowed

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[36] Italics in document APF press release, undated around 12 April 2002.
[37] APF Press release, 'Victory for the APF and the Kensington 87', Wednesday 5 March 2003 at www.apf.org.za/article.php3?id_article=13 accessed 2 December 2004.
[38] For example "Bullets fly as crowd stones mayor's home", *The Sunday Times*, April 7 2002 p. 1. A number of articles did give a brief voice to SECC claims of political interference in the legal process see Anna Cox, "Electricity protesters to stay in jail for a week", *The Star,* 9 April 2002 and "Angry Crowd Awaiting Appearance Of Mayoral Protesters", Sapa, 8 April 2002 www.iol.co.za and Vukile Pokwana, "Now the New Left rises to fight on" *City Press*, 25 May 2002. An APF activist's version of events can be found in Florencia Belvedere, "ANC orders arrest of anti-privatisation protestors", *Green Left Weekly*, April 17 2002, p. 15 at www.greenleft.org.au. Green Left Weekly is a small circulation Australian newspaper associated with the Democratic Socialist Party of Australia.
[39] Trevor Ngwane's reply was broadcast e-news, 16 April 2002.
[40] *Ibid*.
[41] *"Arrest SECC members"- ANC leadership'*, Johannesburg, 17 May 2002 at www.apf.co.za .
[42] Florencia Belvedere, Treasurer of the APF, Interview with the author. 6 May 2002.

> anything? Is it really pushing our struggles where we want to go? You also need to be strategic and not just for the sake of lets defy the law. I think you really need to choose your battles and say where are we going to do this? If you are to go on an illegal protest, go in thousands. Its about really being strategic in the kinds of things you take on. Because you don't want to burn yourself.

The notoriety of such a high-profile legal case carries real and attendant risks to the organisation. Defending comrades in jail or realeased on charges can deflect the focus of an organisation away from its core goals.

International events held in South Africa, such as the World Summit on Sustainable Development (WSSD) also helped raise the SECC's profile. A memorable Mail & Guardian front page framed Florence Nkwashu (a stalwart of SECC protests), in front of riot police with the headline "'We'll take Sandton!'- Summit Protestors".[43] The protest in question was not in response to the WSSD but another aborted court hearing for the Kensington 87.[44] The SECC did however organise specific protests around the WSSD's events[45] and was involved, with many other social movement organisations, in the memorable 25,0000 strong march from Alexandra to Sandton. This march was the largest post 1994 mobilisation in South Africa and was made more significant by the favorable contrast it made to the ANC much smaller march along the same route later that day. The SECC's involvement in the WSSD even resulted favorable comment in international media from Naomi Klein and even (a disparaging) mention in *The Economist*, for the SECC's 'Operation Khanyisa'.[46]

These basic issues continue, yet the SECC has shifted away from a campaign focus on electricity, to resisting the installation of pre-paid water metres.[47] This new technology for managing payment was introduced in Phiri, one of the townships in Soweto, on a trial basis in 2003.[48] While households get access to the free water component of 6kl per month many are concerned that this would not be enough and they would be unable to afford more water once the free component was fully utilised.[49] On 16 November the SECC/APF marched to the Mayor's offices to hand over a memorandum of grievances seeking to end the installation of pre-paid metres in Phiri.[50] The Memorandum stated that 'Water is not a privilege; it is a right -- a right that we are prepared to continue fighting for' echoing the campaign slogan 'Electricity is a right not a privelege'.[51]

Disconnection by a pre-paid metre occurs not as a result of a Johannesburg Water official disconnecting a household's water service, with all the potential political opprobrium entailed in that action, but as a result of a socially isolated household not purchasing a pre-paid card to enable continued access to water in the home. In this

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[43] The quote is actually from Trevor Ngwane, *Mail and Guardian*, August 16 – 22, 2002 p. 2.
[44] The protest was held in mid-August 2002 a week before the start of the WSSD.
[45] Melanie Gosling, "Kasril's water meeting stormed" *The Star*, Wednesday September 4 2002.
[46] 'A few green shoots', *The Economist*, August 31 2002, p. 59.
[47] Harvey, Ebrahim, "Managing the Poor by Remote Control: Johannesburg's Experiments with Prepaid Water Meters, in McDonald, D., Ruiters, G., (Ed.) *The Age of Commodity: Water Privatisation in Southern Africa*, Earthscan Press, 2005.
[48] Harvey, E., *Ibid.*
[49] Harvey, E., *Ibid.*
[50] 'He throws our memorandum in the dustbin' Johannesburg, South Africa' 16 November 2004, sapa.org.za.
[51] 'Water is not a privilege, it is a right' Johannesburg 16 November 2004, sapa.org.za

way a household disconnects itself from the water grid. This mode of water service disconnection is silent and the pernicious effects on low-income communities led to these devices being banned in England.[52]

Pre-paid water meters allow service disconnection to be privatised. Unlike traditional credit meters there is no longer any ability of households to temporarily withhold payment and negotiate with Johannesburg Water while they sort out their finances. On the same grounds they nullify a key tactic of the SECC - payment boycotts. Not suprisingly the SECC came out fighting when Johannesburg Water announced the idea of trialing them in Phiri. Johannesburg Water was ready, however, and placed an interdict against anyone who might interfere with the installation of the metres. As a result a number of SECC/APF members including Trevor Ngwane were arrested in September 2003. They went to trial in early November 2003. The APF has since launched a legal challenge to have these meters declared unconstitutional and therefore illegal.[53]

Overall the picture that emerges of the SECC/APF is of a relatively successful organisation in the midst of great change. I, like Alexander, viewed it as a relatively open organisation, quite willing to accept the support and questions of an outsider like myself. This probably relates to the need to seek possible support from anyone, as the SECC was in its very earliest period of growth, when I arrived to undertake my research.

Connecting water and electricity: Physical access to water and electricity in Gauteng and Soweto

The right of access to water and electricity must include both physical and economic access.[54] Arguably it also includes the right to a decent standard of service. Physical access to electricity and water services is still a considerable problem for many South Africans particularly in rural areas.

The national electrification program currently being implemented by Eskom had its origins in the late 1980s and aims to provide power to all households by 2012. Eskom's electrification program began in 1991 and by the end of 2001 had connected 2, 601, 219 houses.[55] In 2001 2 million of Eskom's household consumers were supplied electricity with pre-payment metres.[56] Most households, however, were supplied electricity through their municipality. In South Africa in 2001 and 2002 the number of homes connected for the first time was 209, 535 and 211, 628 respectively.[57] In 2003 the pace of electrification slowed somewhat with only 175, 396 homes being electrified.[58] By 2004 the number of households with physical

[52] For some of the background to this decision see Drakeford, M., "Water Regulation and Pre-payment Meters", *Journal of Law and Society, 25 (4),* 1998.
[53] E-mail communication, Dr Jackie Dugard, Centre for applied legal studies 15 December 2004.
[54] Kok, A., "Introduction to the right to access to sufficient water in the South African Constitution", in Mashava, L., (Ed) *A Compilation of Essential Documents on the Right to Water and the Environment, Economic and Social Rights Series Volume 7,* Centre for Human Rights, November 2000, p. 5.
[55] Eskom, *2001 Annual Report: Embracing Sustainable Development,* 2002, p. 64.
[56] *Ibid*, p. 131 and *Business Day*, "Free power to poor may cost rich more", 13 June 2001.
[57]Eskom, Annual Report, 2001, p. 64, and Eskom, Annual Report 2003, Corporate Delivery in a Decade of Democracy, p. 75.
[58] Eskom, Annual Report 2003, p. 75.

access to electricity was 70%.[59] By 2002 the Minister for Minerals and Energy, Phumizle Mlambo-Ngcuka stated that 80% of urban areas had access to electricity.[60]

Available data suggests that physical access to water and electricity services is less of a problem for Gauteng residents in comparison to rural areas. Yet access problems remain and are most likely arising from the massive increase in Gauteng's population growth, which grew by a staggering 20% between 1996 and 2001.[61] In 2001Gauteng's provincial government estimated that 459,000 households had no access to on-site water and/or adequate sanitation facilities. This amounted to approximately 2.35 million of Gauteng's residents or 29% of the Gauteng's population, primarily concentrated in informal settlements.[62] Census data for the City of Johannesburg, in contrast, which includes within its boundaries Soweto, found that 84% of households were connected for water (either on-site or in house connections).[63] 85% of households had access to full-flush sanitation, which accounts for a large component of household water use.[64]

Census data from 2001 also found that 85% of households in Johannesburg City used electricity as their main source of lighting.[65] A small survey of 795 residents of Guateng in 1998 found that 97% of households were connected for water (on-site or in house connections) and 87% to electricity.[66] Significantly of those households connected 88% had been connected to water and 85% had been connected to the electricity grid before 1994. While this data is old and would not fully reflect the population growth experienced since 1996 it suggests that in the more established areas of Soweto at least, which are the primary strongholds of the SECC, physical access to electricity and water is less of an issue.[67] Therefore in Soweto community concerns in relation to both electricity and water is primarily economic access or affordability.

In Soweto in 2001 there were 126,000 household consumers of electricity.[68] Most consumers in Soweto are supplied on the basis of an ordinary credit accounting system where electricity is paid for after consumption. Eskom, the government

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[59] Business Day, "Orange Farm lights up", April 6 2004, www.bday.co.za accessed December 2004 see also "Electrification plan will need huge subsidies" March 7 2002 www.bday.co.za/bday/content/direct/1,3523,1038862-6078-0,00.html accessed December 4 2004 which gave a figure of 63% in 2002.

[60] *Business Day*, "More People get chance to switch on the lights", February 26, 2002, at www.bday.co.za.

[61] Statistics South Africa, Census 2001: Key Results, 2001, available from www.statssa.gov.za.

[62] Gauteng Department of Development Planning and Local Government (GDDPLG), *Business plan for the elimination of backlog in services in the Gauteng Province*, 2001, p. iv.

[63] From Demarcation board figures based on Census data www.demarcation.org.za/infoIndex.aspx?type=PROVINCE&Prov=Gauteng&frm=home accessed December 4, 2004.

[64] *Ibid*.

[65] *Ibid*.

[66] Johnson, R. W., *Not so Close to Their Hearts: An Investigation into the Non-payment of Rates, Rents and Service Charges in South Africa's Towns and Cities*, Helen Suzman Foundation Special Reports, Johannesburg, 1999, p. 25.

[67] Soweto began to be electrified by the apartheid regime after the 1976 Soweto uprising, see Bond, *Unsustainable South Africa*, pp. 307 – 310 and 327, and also Beall, J., Crankshaw, O., Parnell, S., *Uniting a divided city: governance and social exclusion in Johannesburg*, Earthscan, 2002, Ch. 9 - Housing and Service Consumption in Soweto, p. 159.

[68] Fiil-Flynn, *Op. cit.*,, p. 13.

owned parastatal, supplies households directly in Soweto, whereas most South Africans receive their electricity from municipal service providers. Average summer consumption per month of electricity in Soweto is 500kwh per household, costing about R150 Rand.[69]

Despite the relative affluence of Soweto in comparison to newly electrified areas with pre-paid meters, where ability to pay is strongly linked to consumption, electricity usage in 2001 appeared higher than the capacity to pay.

An analysis of pre-paid meters can demonstrate the contradictions in the government's full cost recovery policy. Pre-payment metres closely tie ability to pay with actual consumption, as all electricity is paid for in advance. In 2001 households with pre-payment metres used an average of 90 kwh per month providing a measly R30 to Eskom. But, according to Eskom's 2001 annual report, consumption of households with pre-payment metres is "significantly lower than the amount required to cover operating cost and the depreciation of capital expenditure".[70] In other words consuming 90kwh per month, what these household's with pre-payment meters can afford, simply does not pay for maintaining the network.

If Sowetan's were to reduce average electricity consumption to these levels, summer electricity use would fall in the vicinity of 80%. This low consumption suggests that if full cost recovery could be achieved in Soweto, without pre-payment metres, it may lead to a situation where consumption would be so low that it would not cover the cost of operating and maintaining the network. This would necessitate some form of cross-subsidisation and deviation from the cost-reflectivity principle, which underlies government energy policy[71] or alternatively disconnection of those customers who, while being able to afford what they use would nonetheless be uneconomic customers. Given the commitment to the capital costs of electrification, subsidisation of operation and maintenance, logically follows unless the poor are to be deliberately excluded from electricity.

The 90kwh of households with prepayment meters when compared with the 500kwh used in Soweto suggests that pre-payment meter households are seriously underconsuming. Assuming that the average rate of consumption (500kwh) represents the needs of a standard household it is likely that if the Sowetan households could reduce their consumption of electricity to what they can afford it would be well below what they need.

This leads to the conclusion that there is an economic logic driving government's free electricity policy, as consumption of electricity must be increased to justify the cost of maintaining supply. In other words, in the absence of the 50kwh free electricity to poor households with low consumption levels some form of subsidy would need to be provided anyway. Eskom's delay in providing the free electricity to consumers also

[69] Fiil-Flynn, *Ibid*, p. 13. For comparison purposes, the average monthly bill in the area supplied by City Power, mostly white middle class areas, but including the township of Alexandra, was R237. Republic of South Africa National Treasury, *Intergovernmental Fiscal Review*, 2001, October 2001, p 152.
[70] Eskom, *Annual Report 2001*, p. 64.
[71] In the *Draft White Paper on Energy Policy* 1998, p. 7 it is stated that "Government policy is to…encourage energy prices to be as cost-reflective as possible.

suggested Eskom's unwillingness to shoulder this burden alone. Eskom's delays in providing the free electricity component to Sowetan household's while it haggled with the national government's Treasury Department for full refund of the cost of providing the electricity provided more evidence of Eskom's strong commitment to full-cost recovery.

Disconnecting water and electricity: Affordability crisis or culture of non-payment?

Disconnections of electricity and water services have been one of the responses to a rising tide of household municipal debt in Soweto. In all of South Africa at the end of 2001 local councils were owed R22.2 Billion in services of which Gauteng's debt accounted for about 50%.[72] Of this Johannesburg's five metropolitan councils accounted for R4.56 Billion.[73] Separate to this debt is R922 million of electricity arrears owed directly to Eskom by households in Soweto.[74]

The origins of this debt are contested. The main reasons put forward include:

- Sharp rises in prices for basic services particularly since the end of apartheid; and
- Inability to pay owing to rising unemployment levels and informalisation of the economy as a result of the implementation neo-liberal macro-economic policies such as GEAR.
- A culture of non-payment and entitlement in townships that developed during the struggle against apartheid; and
- Discretionary spending by poor households on luxuries such as gambling, cell phones and other "luxury" consumer goods.

The SECC/APF and their supporters tend to focus on the first two while Municipal and Eskom bureaucrats the latter points. A fifth factor in the rise in household debt, related to the last two points, is the shift towards a commercial mindset in water and electricity service delivery. This has responded to the dictates of conservative macro-economic policies, which mandates reduction in public sector spending and against deficit financing of social infrastructure provision. With this national budget imperative in place financing infrastructure services have shifted towards full cost recovery with increasing reliance on the private sector to supply the investment. It also results from an attempt to shift away from hidden subsidies for basic services which "distort" consumption patterns, to targeted subsidies which go directly to the most needy.

Rising prices for municipal services

The rise in electricity and water services came under attack from Tito Mboweni, the Reserve Bank Governor, who criticised state agencies such as water and electricity authorities for driving up the cost of living and impacting on the government's

[72] Hartley, W., "Local Councils owed R22.2bn in service fees", *Business Day*, May 7, 2002, p.1.
[73] *Ibid*. These five metropolitan councils have been rolled into one Johannesburg metropolitan Council. For a powerpoint presentation explaining the old and new structures see Nzimande, Phindile, Executive Director Contract Management Unit, Johannesburg Metropolitan Council, "Public Private Partnerships in Johannesburg, Making the City Work", Power point presentation *to Municipal Public and Private Partnerships in South Africa, National Conference*, 8 May 2002, available at http://www.miiu.org.za/MIIUIndex.htm
[74] Eskom Press Release, "Eskom launches the Service Delivery Framework", 30 November 2001.

inflation targets.[75] These rises in the "administrative pricing" of services such as electricity is the result of a more business-like focus of these authorities.[76] The greatest impact on pricing in townships has resulted from the shift from a flat rate payment for services, used during apartheid, to metered consumption, where households pay on the basis of the volume of the service consumed. For most township residents this has led to significant price increases. One study citing Eskom's 2000 annual report found increases of up to 400% on electricity accounts for some households since flat rates were abolished.[77] This suggests that those households serviced by Eskom in Soweto during apartheid received their services at levels significantly below cost as the average real price of electricity decreased by 15% between 1994 and 2000.[78]

There was also a sharp rise of the cost of bulk water, which was passed on to consumers in Johannesburg. This has resulted from the coming on line of the Lesotho Highlands Water Project which needed to be paid for by consumers.[79] Between 1996 and 2000 the cost of water in Johannesburg increased from about R60 to just over R100 for 30kl of water per month.[80] Increases were spread inequitably with low, generally poor, and high, generally rich, household consumers shouldering a different and inequitable burden of the price increase. Thus between mid-1995 and mid 1998 when there was an overall 35% increase in bulk water costs from Rand water in Johannesburg the retail price of the first block of the water tariff increased by 55%.[81] While both rich and poor absorb this same cost a more equitable way of absorbing this price increase would have been to raise the cost of hedonistic consumption by substantially increasing price per kilo-litre in later blocks.

The price increases in Johannesburg for municipal services would have also responded to a decrease in intergovernmental transfers, which decreased from R300 million in 1993 – 1994 to R26.6 million in 1999-2000.[82] This loss of revenue has introduced a significant fiscal pressure, which has been passed on to households in increased service charges.

Nonetheless precise figures on exactly how much these various factors have influenced the large rises in service charges for townships is difficult to ascertain. Longitudinal data on municipal service charges from townships is unreliable. Much of the best available data represents middle class/formally white areas.[83]

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[75] See *Pretoria News*, "Cost of living on the rise", August 21 2002, p. 1.
[76] Some scholars argue that "Administrative pricing" of electricity services would occur regardless of public or private ownership. The balance between pro-poor and pro-large scale industry pricing policies would most probably however be significantly different. See Gailbraith, J.K., *Economic and the Public Purpose*, Pelican, 1975, especially Chapter 12 "How Prices are Set", p. 126 – 137.
[77] Fiil-Flynn, *Op. cit.*, p. 6.
[78] *Ibid.* See also Eskom, *2001 Annual Report: Embracing Sustainable Development*, 2002, p. 19.
[79] Republic of South Africa National Treasury, *Intergovernmental Fiscal Review*, 2001, October 2001, p. 134.
[80] *Ibid*, p. 156.
[81] See World Bank Inspection Panel, 'Lesotho/South Africa: Phase 1B of Lesotho Highlands Water Project', para. 80, cited in Patrick Bond, *Unsustainable South Africa*, p. 153.
[82] Bond, *Ibid*, p. 148.
[83] See for a discussion of this problem Republic of South Africa National Treasury, *Intergovernmental Fiscal Review*, 2001, October 2001, pp. 156 – 157.

Rising poverty and inequality

The SECC point to growing unemployment with the corporatisation and privatisation of government services causing widespread job losses. Central also is the failure of the government's macro-economic Growth Employment and Redistribution (GEAR) program to create sufficient jobs in the private sector to compensate for those losses.

Some evidence of the failure of GEAR to produce employment growth can be seen in the difference between its projection of employment increases in annual formal, non-agricultural employment of 270,000 per annum and the actual rate of 125,000 losses per annum between 1996 and 1999.[84] The rate of job losses in the formal sector has slowed with only a 65,000 reduction between 2000 and 2001.[85] These jobs have not necessarily been lost entirely with many being transferred to the lower-paid, more insecure in-formal sector of the economy.[86] Gauteng's workforce, 75% of which, is in the formal sector will have most likely noticed the impact of these formal sector losses.[87]

Other useful indicators of ability to pay include the facts that in urban Gauteng, under the expanded definition of unemployment, in September 2001 41% of women and 29% of men were unemployed.[88] These statistics showed a significant worsening from six months earlier when the same unemployment rates were 26% and 38% respectively.[89] These figures provide only a rough guide to what was happening to households in Soweto around 2001 when the SECC emerged as real force in urban Johannesburg as the figures are not broken down by race. It can be fairly safely assumed, relying on national unemployment figures that unemployment would be worse in African communities such as Soweto.[90] The direct experience of some of the SECC activists I interviewed seemed to confirm this statistical picture. A number of older activists I interviewed had lost formal sector jobs in the previous five years and had subsequently been unable to find new employment.

The All Media and Products Survey conducted by the SA Advertising Research Foundation also points to a significant increase in poverty amongst African households.[91] The percentage of Africans living below the minimum living level

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[84] Padayachee, V., and Valodia, I., "Changing Gear? The 2001 budget and economic policy in South Africa", *Transformation*, Vol. 46:71 at 74.
[85] South African Institute of Race Relations, *Fast Facts*, No. 6, June, 2002, p. 9.
[86] If informal job creation is calculated it can change a net-job loss into an increase in jobs, see "Gear has more than met its targets" *Financial Mail*, 1 December, 2000.
[87] See data on Gauteng contained in the International Labour Organisation, *Women and Men in the Informal Economy: A statistical picture*, Geneva, 2002 p. 42. Available at http://www.ilo.org/public/english/employment/infeco/publ.htm#stat1.
[88] The expanded definition includes those people who are unemployed and have not made an attempt to find work in the last four weeks. Taken from Statistics South Africa, *Labour Force Survey: September 2001*, P0210, release date 26 March 2002 p. 13.
[89] Statistics South Africa, *Ibid*, p. 11.
[90] Using the expanded definition unemployment in South Africa as a whole 43% of African men and 55% African women in South Africa were unemployed. See, *Ibid*, p. 21. In February 2001 the same figures were 39% and 46% respectively see Statistics South Africa, *Labour Force Survey*, February 2001,
[91] Lawrence Schlemmer, "A better life for all? Poverty trends in South Africa," *Focus* 26 2002, Helen Suzman Foundation, p. 21 also available at www.hsf.org.za/focus26. See also the South African Advertising Research Foundation website www.saarf.co.za.

between 1993 and 2001 increased from 50% to 62%.[92] A rise of 12 percentage points. The same survey paradoxically points to an increase in living standards amongst poor African households. The living standard was calculated on the basis of the type of housing, whether or not houses had electricity, water, motor vehicles, servants, hi/fi/music centers and selected electrical appliances. On this basis the quality of life of the African poor has improved even though their numbers have actually increased! Government programs with respect to housing, electricity and water infrastructure rollouts must be credited with this increased standard of living, by connecting households to water and electricity. Once electricity is connected many useful household appliances can then be acquired often relatively cheaply. At the same time the increasing rate of those living below the minimum living level suggests that many households will have problems paying for this increased living standard.

This worsening social climate for the poor, as reflected in the increase in those living below the breadline, has emerged at the same time as the movement of small but significant numbers of Africans into management jobs in the public and private sectors. This has resulted in a convergence of measures of inequality amongst members of the African community and the general rate of inequality in South Africa as a whole. This level of general inequality has traditionally been and still remains heavily influenced by disparities in income between white and black communities. In 1995, the Gini co-efficient (a measure of income inequality) for South Africa was 0.596; it rose to 0.635 in 2001 suggesting income inequality had gotten worse.[93]

This trend has also emerged within the African community. In 1990 for Africans the Gini co-efficient was 0.35. In 1998 one study put it at 0.54 almost as high as the then national figure of 0.58.[94] If this data is accurate it points to the possibility of an increasing sense of social exclusion emerging *within* the black population. This phenomenon of an emerging black middle and upper-middle class will most likely be felt most keenly by the poor black urban residents of Soweto as it is from the more affluent areas of Soweto that the new black middle class is emerging.

Taken as a whole these figures point to a relative worsening of a significant sector of the urban African population's economic position since 1993. The rising living standards of the poor is a complicating, yet ultimately deceptive factor, that nevertheless needs to be taken into account. African households have been given the real taste (through increased access to household electrical appliances) of a more inclusive society only to have it frustratingly withheld from them at the last moment through unaffordable basic service charges.[95] This is clearly a recipe for significant social conflict if the sense of having a better life is removed at the last instance by unaffordable electricity services. The question is whether this sense of frustration can be mobilised into constructive political action.

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[92] The minimum living level was R755 for 1993 and an inflation adjusted R1,270 for 2001, *Ibid*.
[93] A figure of zero means almost perfect equality a figure of 1 almost perfect inequality. UNDP, South Africa, *Human Development Report, 2003*, p. 43.
[94] *Ibid*, p. 64.
[95] A similar situation could be observed in Australia in the 1920's with mass electrification of urban areas leading to the development of a household consumer culture amongst the working class. With the onset of the Great Depression with unemployment levels almost equaling current South African levels there was a massive default on electricity accounts.

Despite the civil and political victory over apartheid the rise of economic and social exclusion poses a great problem for the new South African democracy. This view was endorsed by the United Nations Development Program's South African *Human Development Report 2000*. After discussing the impressive institutional changes in South Africa, including the adoption of world's most progressive Constitution, the *Report* notes;

> The vast majority of the population remains, in many essential respects, isolated from the country's historic renewal. Levels of poverty and inequality are still growing. The economy continues to shed jobs – reducing the choice and opportunities of those already deprived.[96]

The conclusion reached three years later, while more empirically comprehensive, was little different with the UNDP noting that "South Africa's income inequality have increased during recent years…"[97]

A culture of entitlement and non-payment?

Research conducted by the Helen Suzman Foundation in black townships a few years prior to the emergence of the SECC concluded that the arrears problem is not primarily a problem of affordability but stems from a culture of non-payment.[98] The research found widespread evidence for non-payment of accounts, and illegal connections particularly in Gauteng.[99] The survey found, in particular, that "Gauteng residents were markedly more likely to voice sentiments that suggested non-payment was either understandable or acceptable and adopt an attitude of what could be termed 'egalitarian entitlement'."[100] I will spend a little time unpacking the findings of the study as if it can be proved that there exists a significant culture of entitlement, either through rights or on some other basis, it may suggest the possible existence of a socio-economic rights culture.

Firstly it is important to separate the related concepts of a culture of non-payment and a culture of entitlement. The culture of non-payment equates to a propensity for township residents not to pay for basic services as a result of the ingrained "culture" that developed in township struggles against the illegitimate apartheid government. The argument goes that the practice of not paying simply carried on because households had never been used to paying their bills. Johnson provides evidence of widespread non-payment of municipal services in African townships.

The culture of entitlement is more complex relating to a household's attitude towards the state. Johnson sees it as the underlying justification for the culture of non-payment for all social classes.[101] Charged with this sense of entitlement ordinary people become "impotent objects of government policy" expecting the "Leviathan" state to

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[96] UNDP, *South Africa, Human Development Report*, 2000, p. iii.
[97] UNDP, South Africa, *Human Development Report*, 2003, p. 43.
[98] This is a particularly rich source of information on payment issues relating to water and electricity services researched and written from a neo-liberal political perspective. Johnson, R. W., *Not so close to their hearts: An investigation into the non-payment rates, rents and service charges in South Africa's towns and cities*, Helen Suzman Foundation Special Reports, Johannesburg, 1999, p. 101.
[99] Johnson, *Ibid*, p. 86-87.
[100] Johnson, *Ibid*, quote at p. 67 and also see p. 81.
[101] Johnson, *Ibid*, p. 95.

do everything for them.[102] In Johnson's characterisation of the culture of entitlement the state is viewed as having an obligation to provide all basic services free of charge. "Egalitarian entitlement" is never clearly defined by Johnson but appears to mean a sense that services should be provided free of charge by the state regardless of one's ability to pay.[103] Johnson hints at the source of such community wide views as having its source in racial identity and the sense of historical injustice particularly amongst wealthier township households who have no obvious reason for not paying service charges.[104] Evidence of the egalitarian entitlement culture is suggested in the survey by strong support in Gauteng's townships for a flat rate for all basic services and strong support for statements such as "higher taxes should pay for services provided free".[105] Further evidence is provided by the fact that 70% of Gauteng's township residents did not disagree with the statement "Only those who can afford it should pay for services".[106] To Johnson this suggests a strong redistributive ethic in Gauteng's townships.

Johnson clearly has identified a culture of "egalitarian entitlement" in Gautengs' townships. However his evidence does not support his own definition. Based on his evidence resident's view that the wealthy should heavily subsidise those least able to afford high electricity charges. It does not necessarily imply that services be provided in townships regardless of their ability to pay. Indeed there was a significant support for a flat rate payment. The question is does his evidence support the related idea that there is a culture of non-payment.

Some of Johnson's evidence seems to contradict his conclusion that there is a culture of non-payment. For example when Gauteng respondents were asked why they thought people did not pay for services, "Household members unemployed" and "can't afford to pay – low salaries" topped the reasons why with 58% and 49% respectively. Those reasons that suggest an entrenched culture of non-payment such as "service boycotts" and "no one else is paying why should I" receiving only 8% and 7% respectively.[107] 11% thought it was because people were simply not used to paying. Only 3% thought that people weren't paying because services were a basic right.[108] If we assume, like Johnson, that many respondents were able to pay for services it seems possible that their own non-payment might be legitimated by reliance on very convenient rights based arguments. Yet his evidence shows no inkling of a rights based justification for non-payment. This points strongly to a, "can't pay" actuality than a "won't pay" attitude.

Other approaches have attempted to look at the issue of affordability and the culture of non-payment. A survey conducted in July 2001 by the Municipal Services Project in conjunction with the Human Sciences Research Council of 2530 people from across South Africa started from the premise that affordability was a major issue that impacts on payment for basic services. That survey found that the median cost for

[102] Johnson, *Ibid*, p. 94.
[103] Johnson, *Ibid*, p. 81.
[104] Johnson, *Ibid*, p. 81.
[105] This support implies redistributive taxation basic as many township household's income is so low they do not pay taxes. See Johnson *Ibid*, p. 68-69.
[106] 42% of Gauteng residents could neither agree nor disagree with the statement. See Johnson, *Ibid*, p. 70.
[107] Johnson, *Ibid*, p. 72.
[108] This is a very significant finding given the focus of this study

water, electricity, sewerage and refuse removal ranges from R224 to R400 per month in South Africa. For the 57% of households in the sample earning less than R1000 per month, services charges typically represented anywhere from a quarter to half of their total income.[109] 22% of respondents said they were in arrears for water. The average debt was for water R2274.[110] 13% had electricity arrears which averaged R2,189. This research confirms Johnson's own evidence, which he chose to ignore, that it is affordability and not vestiges of apartheid era struggles which are causing non-payment and subsequent disconnection.

Johnson, ultimately, is very uncomfortable with the egalitarian, re-distributive ethic he observes. His damning picture of the appalling poverty that is evident in township life is sobering, but he comes up short when trying to explain the source of this poverty.[111] His ideological obsession with anything being provided for free as being inherently dis-empowering is problematic. A case can be made that free access to basic amounts of goods and services can empower people.[112] Rather than see state intervention as inherently damaging to human freedom, except in the most limiting of circumstances, it should be seen a vital component of human freedom.[113] Liberal theory has always recognised this in its support for state intervention to guarantee social order and individual freedom by defending certain minimum standards for civil, political and economic participation.[114] This sphere of universal access should be expanded to include certain quantities of basic goods and services.

The rise of a consumer culture

South African society has a well-developed market economy and as a result has, within the white community, a strong consumer culture. This culture, through high-pressure advertising, is now being promoted in previously disadvantaged communities with uneven effects.

Jacob Moroga, Executive Director, Distribution Services, in Eskom put this argument on discretionary expenditure being one reason for the non-payment of service bills in a SABC documentary on electricity provision in Soweto (*Special Assignment* 2001).

> There are a number of issues which effect payment. I think one (is) socio-economic conditions in areas like Soweto, poverty and the issue of free electricity and the way the government wants to go with it. (This)… is motivated by the fact that there are clearly socio-economic issues. But there are also other issues, the lotto for example is about 2 Billion (Rand) per annum. Now our (Eskom's) total domestic market is around 2 Billion. The cell phones takes about 16 Billion per annum. The Casinos takes about 5-6 Billion. So when you add all of those its about 24 Billion on industries around the lotto, the casinos [and] the cell phones. Now that is what's Eskom's total revenue is, about 24 Billion. So they compete

[109] McDonald, D., "The Bell Tolls for Thee: Cost Recovery, Cut-offs and the Affordability of Municipal Services in South Africa, in McDonald, D., & Pape, J., (Eds) *Cost Recovery and the Crisis of Service Delivery*, HSRC publishers and Zed Books, 2002, p. 164.
[110] *Ibid*, p. 168.
[111] Johnson, *Op. cit.*, p. 95 – 100.
[112] Elson, D., "For an emancipatory socio-economics: A new synthesis of "economic" and "social" policy", *New Agenda*, First Quarter, 2002, 83.
[113] Amartya, Sen, *Development as Freedom*, OUP, 1999, p. 73 - 74.
[114] See generally on liberal legal attempts to resolve the problem of order and freedom, Unger, R., *Knowledge and Politics*, The Free Press, 1976.

> for the same disposable income. So those things impact on what is available to pay for electricity….To pay for other services.

Johnson's research gives a more accurate picture of how township residents prioritise their spending on household goods and services. Respondents were asked, given necessarily limited household budgets, what were their three most important items of expenditure in the order of priority that they feel they must pay. The most significant finding for this study was that in Gauteng formal households prioritised electricity as the item of household expenditure that must be paid for first before any other expenditure. Electricity was followed by rent, water and food.[115] This militates against the thesis, outlined by Eskom above, that household expenditure is being directed towards more "frivolous" goods and services.

Johnson interestingly surmises as to why water, a non-substitutable commodity, would be rated below electricity in terms of expenditure priority comments;

> Water is used for washing drinking and cooking but electricity is essential for far more purposes not just cooking and washing and but study, recreation, food storage and so on.[116]

Overall he concludes that, on the face of it, this suggests a healthy situation for payment of utility bills. Yet people's professed priorities may not reflect their actual payment patterns, as Johnson clearly believes. Certainly gambling is an increasing problem in South Africa and it would not be unusual for a respondent to deny diverting household expenditure to gambling. How a person's professed priorities and their actual expenditure relate is a difficult empirical question for which Johnson's study provides no answers.

It does, however, give a strong indication of the high importance electricity plays in the lives of Gauteng residents and explains why discontent arose with the widespread cut-offs launched by Eskom in early 2001.

Given widespread non-payment as a result of poverty it is likely that some township residents who are able to pay and have strong marketing pressures placed on them for conspicuous consumption items, would exploit this situation to allow extra discretionary expenditure in the private economy. In separate research on corporatisation of water services in Pretoria I found evidence of significant non-payment for basic services in Waterkloof Ridge the most affluent suburb of Pretoria. On questioning the City Treasurer as to why this would be the case given the high incomes of residents in this suburb he explained that these arrears were a result of newly arrived residents from African townships.[117] While affluent these households had, according to the City Treasurer, continued their non-payment patterns from the townships. Significantly this situation was reversed very quickly with standard credit

[115] Other items listed by respondents included phone, school fees, higher purchase instalments, rubbish removal, debts, home improvements, burial services and TV licenses see Johnson, Op.cit., p. 33.
[116] Johnson, *Ibid*, p. 30.
[117] Mr J.C.J. Eicker, City Treasurer, City Tshwane Metropolitan Municipality, Tuesday 7 May, 2002, 373 Pretorious St, City Treasury, Pretoria.

control techniques. This suggests that those who can pay, when threatened with disconnection, do act to resolve outstanding debts reasonably quickly.[118]

The distinction between necessary and discretionary expenditure is also difficult to determine. Rising rates of AIDS are undeniably impacting heavily on the disposable income in African townships and is included in Johnson's survey.[119] This spending will impact heavily on a household's ability to pay for basic services.

Dealing with Arrears

In the face of rapidly accumulating debt municipalities and national government adopted various strategies to increase payment rates. Under the *Local Government Municipal Systems Act Act No. 32 2000* a local government "must collect all the money that is due and payable to it."[120] Similarly community members "have the duty to pay promptly service fees, surcharges on fees (and) rates on property…imposed by the municipality."[121] With these mutually reinforcing legislative imperatives in mind municipalities must develop and implement a credit control and debt collection policy.[122] It is within the considerable constraints of this legislation that municipalities can provide some relief to those households indebted to municipalities for services. Credit control strategies, consistent with the legislation include amnesties on a proportion of the household debt on the basis of a signed agreement in which consumers agree to commit to a regular schedule of re-payment of the outstanding debt. If this fails municipalities may resort to legal action, attachment of personal property and household evictions. However the most efficient and simple method of enforcing payment of arrears is service disconnection.

The situation is slightly more complicated in Soweto as Eskom manages electricity provision, which is usually the largest component of a township household's basic service budget. In 1997 for example Eskom made an agreement with households relating to debts accumulated as a result of apartheid era boycotts. [123] The agreement stipulated that residents had to pay their debts over a five-year period, on the basis of a R35 payment each week above full payment of their current account. Many Soweto households failed to honor the agreement. This was one of a number of factors precipitating widespread cut-offs in 2001. The Service Delivery Agreement discussed below also provides an example of a more lenient credit agreement organised in response to community pressure from the SECC.[124]

Cost-recovery techniques were not limited to carrot and stick credit control techniques and municipalities were encouraged by national government to promote civic values. Operation Masakhane, or "Operation Lets Build Together", introduced in 1995 by national government, was designed to increase payment levels in municipalities

[118] The outcome of this work is contained in *The Age of Commodity: Water Privatization in Southern Afri*ca, edited by David A McDonald and Greg Ruiters, Earthscan Press, London, 2005.
[119] Johnson, *Op. cit.*, pp. 39 – 40.
[120] Section 96 (a).
[121] Section 5-(2) (b).
[122] Section 96 (b).
[123] Khunou, Grace, ' "Massive Cutoffs", Cost recovery and electricity service in Diepkloof Soweto', in McDonald & Pape, *Op. cit.*, p. 65.
[124] See above and "Soweto electricity crisis continues", *Services for All: The Newsletter for the Municipal Services Project"*, No. 3, April 2002, p. 1.

through the forging of partnerships with communities to promote the moral importance of payment of service fees by emphasising both the rights *and* responsibilities communities have with respect to basic services.[125] Those municipalities that achieved the best results appeared to focus on very localised arrangements for payment for services, performance related payments for community leaders linked to their areas payment rates and flexible and targeted payment amounts for those genuinely unable to afford the full cost of services.[126] Johnson, however, concludes that Masakhane largely failed in Gauteng to increase the commitment to payment.[127]

Cut-offs

Service disconnection is one the most effective strategies to get households to settle household arrears for basic services.[128] If households can afford to pay, a cut-off of their service should result in the payment of their accumulated debt.

Figures supplied by the Department of Provincial and Local Government between October and December 2001 show that there were 82 089 urban households disconnected from their water supplies or roughly 3.8% of households in Category A municipalities.[129] This equates, on a conservative estimate of five people per household, to 410,000 people in urban South Africa having had their water cut off.[130] During the same 3 month period there were only 15,978 reconnections suggesting that many of the disconnections are for significant lengths of time and most probably that there were large numbers of illegal reconnections. In metropolitan municipalities the number of reconnections as a percentage of disconnections was around 20%.

For electricity the disconnection rates are even higher with 183, 329 metropolitan households being disconnected with close to a million people being affected.[131] This amounts to 9.5% of all households receiving electricity from metropolitan municipalities being disconnected in the last three months of 2001. This is *before* any of the disconnections undertaken by Eskom, who directly supply a significant number of households in a number of metropolitan municipalities, are included. This figure suggest that the introduction of free water and electricity policies in 2001 in urban South Africa had little impact on the affordability of services for many households.

This data therefore underestimates the impact of disconnections. What the actual figures may be are highly contested. Data collected as part of the Human Sciences

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[125] Department of Constitutional Development, *The Municipal Investment Infrastructure Framework, A User Friendly Guide*, 1996, p. 29 available at http://www.local.gov.za/DCD/dcdlibrary/miif/miifindex.html.
[126] Johnson, *Op. cit.*, lists a number of success stories, p. 7-13.
[127] Johnson, *Ibid*, p. 64.
[128] Kerf and Smith, *Op. cit*, p. 29 and Kerf, Michel, Gray R., Irwin, T., Levesque, C., Taylor, R., (1999). *Concessions for Infrastructure: A Guide to Their Design and Award*, World Bank Technical Paper No. 339, Washington D.C. p. 30.
[129] These include municipalities of Johannesburg, Tshwane, East Rand, Cape-Town, Durban and Port Elizabeth. All subsequent references unless otherwise stated are based on category A municipalities. See DPLG, Quarterly Monitoring of Municipal Finances and Related Activities, *Project Viability Statements*, October – December 2001 p. 30.
[130] DPLG suggest an average of 5 people per household for urban areas in their report. It could be argued that poorer households subject to cut-offs would have more than five people per household.
[131] *Ibid* p. 30.

Research Council's national public opinion survey conducted in July 2001, but later disowned, suggested that in the previous year 7.5 million people were affected by both water and electricity cut-offs, 2 million people were evicted from their homes and 1.5 million had property seized.[132]

These stark figures while startling cannot do justice to the social misery, shame and humiliation households will have endured as a result of these processes.

Service Delivery Framework.

In October 2001 Eskom temporarily ended electricity cut offs and in late November offered Soweto residents, and other Gauteng township residents, a Service Delivery Framework.[133] This agreement offered to suspend 50% of a participating household's debt, recognise illegal connections and reconnect disconnected households, both for a smaller than usual fee. Another important concession was the 100% suspension of pensioner households' debt. Coupled with these concessions was the threat of normal credit management procedures being applied in the New Year if payment of current accounts and payment arrangements for non-suspended arrears were not honored.[134] As well the Framework made it clear that auditing of illegal connections in Soweto would be intensified in 2002 resulting in harsh penalties for those households still found with illegal connections.

The Service Delivery Framework was concluded with a number of organisations including SANCO who represented the community in the negotiations.[135] The SECC was deliberately excluded in negotiations as being non-representative of the community despite their well-recognised role in articulating residents concerns with respect to electricity issues in Soweto and other townships.[136] Despite an SECC call for residents to reject the Framework, Eskom's figures recorded 45,000 Soweto households signing agreements between December 2001 and March 2002.

While the Service Delivery Framework was an important strategic victory for the SECC it had the intended effect of releasing pressure building in the community over electricity services which the SECC hoped to organise into concentrated and widespread popular mobilisation against government policies. As the above figures from Eskom demonstrate, SECC attempts to de-legitimise the Service Delivery Framework did not work. The SECC's argument that temporary suspension of debt and reductions in reconnection fees did not address the unaffordability of current accounts and therefore only delayed the problem without resolving it, was largely

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[132] McDonald, D., "The Bell Tolls for Thee: Cost Recovery, Cut-offs and the Affordability of Municipal Services in South Africa, in McDonald & Pape, *Op.cit.*, p. 170.
[133] Details can be found in an Eskom Press Release, "Eskom launches the Service Delivery Framework", Friday 30 November, 2001.
[134] See Patrick Laurence, "Eskom v Soweto, the battle for power", *Focus 25*, March 2002 at www.hsf.org.za/focus25
[135] Other organisations were the Department of Minerals and Energy, Department of Public Enterprises, Department of Provincial and Local Government, Gaueteng Legislature, South African Local Government Association (SALGA), representatives of the City Councils of Johannesburg, National Electricity Regulator (NER), Human Rights Council and Johannesburg, Lekoa-Vaal, Sedidberg and Tshwane mayoral offices.
[136] See Tom Lodge, quoted in Patrick Laurence, "Eskom v Soweto, the battle for power", *Focus 25*, March 2002 at www.hsf.org.za/focus25.

unconvincing in the eyes of the community.[137] The point made by the SECC, however, remained valid. This setback for the SECC's payment boycott and reconnection campaign was therefore only temporary.[138]

The SECC continued their activism and, for example, by March 2003 had begun to remove newly installed pre-paid meters and reconnecting power so that consumers would not be charged for electricity.[139] This in turn lead to a new approach by Eskom announced in May 2003. Eskom proposed that in Soweto and 9 other townships in the Johannesburg area all debts accumulated between the April 2001 and August 2002 would be written off. This was a significant victory for the SECC and R1.4 Billion of the R2.4 Billion national debt was cancelled. Again SANCO was used to obfuscate the considerable role played by the SECC and the APF in forcing the debt cancellation.[140] While SANCO had played a minimal role in forcing Eskom's hand, Eskom nonetheless chose to anoint them as the key broker of the final agreement. But as David McDonald from the Municipal Services Project pointed out the agreement still left a lot to be desired. [141] Without a commitment to significantly lower electricity prices for the low income communities in townships and deal with debts accumulated before April 2001, in many cases debt over a decade old, the results of these offers were unlikely to produce a long term solution to the electricity crisis.[142]

Market versus the State: the case of water service delivery

Undoubtedly there is considerable stated commitment by the South African government to providing physical access to water and electricity services.[143] It is the extent to which government and municipalities are committed to provide affordable access to services of sufficient quality and quantity, which is the difficult question that needs to be answered. Debates between civil society activists and government officials reflect different ways of dealing with the issue of affordability.

The Municipal Services Project calls for a high standard of service for water and electricity with a considerable free component funded through a sharply rising block tariff which is set on a national basis allowing redistribution on a national scale.[144] The justification for this approach relies heavily on the concept of "transformative cost recovery" which entails historically justified re-distribution of income through electricity and water tariffs.[145] Historically advantaged groups in essence pay back the benefit they accrued under apartheid through a national tariff.

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[137] See Trevor Ngwane admitting as much quoted *Ibid*. For a criticism of the Service Delivery Framework see "Radebe's Deal Stinks", SECC/APF press release undated (December 2001?).
[138] See Trevor Ngwane, quoted in Patrick Laurence, *Ibid.*
[139] Alexander, *Op. cit.*
[140] See Ferial Haffajee and Vicki Robinson, 'Power to the People' *Mail and Guardian*, 14 May 2003 at www.mg.co.za .
[141] McDonald D., 'More carrot, less stick', *Mail and Guardian*, 23 May 2003.
[142] *Ibid*.
[143] See above and *The Sunday Independent*, *Business Report*, "Kasrils plans to erase water Backlog by 2008", May 12, 2002, 1 electricity *Business Day*, "More People get chance to switch on the lights", February 26, 2002, at www.bday.co.za/bday/content/direct/1,3523,1032272-6078-0,00.html accessed December 4 2004.
[144] Rural Services Development Network, "Water for All in South Africa: Policies, Pricing and People", Discussion Document prepared by Bond, P., Dor, G., Ruiters, G., for the "Water for All", Seminar Commonwealth People's Center Meeting, Durban, South Africa, 10 November 1999.
[145] I borrow this concept from Sean Flynn private communication.

The government until the year 2000 used a demand driven approach, which attempts to match the services standards to the capacity of low-income communities to pay. They emphasised full cost-recovery and where this is not possible targeted transfers to poor households to cover access to basic levels of service. This policy is the dominant paradigm within international financial institutions and water and sanitation groups.[146]

Thus the World Health Organisation based *Water Supply and Sanitation Collaborative Council's* plan of action to deliver water and sanitation to the developing world neatly summarises the essential components of the dominant policy paradigm;

> "…institutional development must ensure that indeed people come first and are at the centre of decision making….Decentralisation and democratisation are now impacting on institutional structures for services. A wide range of institutional and management options for the provision and management of water and sanitation is possible and is being used across the world. However, the most effective and efficient services come from adoption of commercial principles in management and effective regulatory mechanisms.[147]

Thus the commitment is to a strong sense of community participation in water and sanitation provision which seems inevitably to lead to the conclusion that market based commercial principles are the best way to provide water services. The commitment to markets and commercial values in management in basic service delivery often begins well before there is substantial evidence of their effectiveness and efficiency.

The national government's 1994 *White Paper on Water and Sanitation Policy*, policy principles are an uneasy mix of rights talk and neo-classical economics.[148] In principle two, basic services are characterised as a human right and the service standards are set to the minimum level which ensures a healthy environment. This suggests that central government has a strong role in providing services at least to the level which will ensure good health. Principle one states that development should be demand driven and community based with decision making and accountability vested in local structures. Local communities cannot rely on the state and it is their "obligation…to accept responsibility for their own development and governance." The White paper is explicit in giving priority to the demand driven approach over a state centered human rights approach. Further emphasis on the need for self-governing communities to shoulder most of the cost can be found in principles 5 and 6 which state that "(w)ater has economic value" and that "(t)he user pays". The last principle reflects the need to make water services sustainable in that they become self-

[146] For a good concise statement of this from the World Bank which explains the origins of this consensus, see *Water Resources Management*, Washington DC 1993.
[147] *Vision 21, A Shared Vision for Hygiene, Sanitation and Water Supply, 2000*, p. 9 available at http://www.wsscc.org/resources/publications/index.php.
[148] These principles were reviewed and a new white paper developed in 2003 see DWAF, *Strategic Framework for Water Services: Water is Life: Sanitation is Dignity*. Initial documents appear to stick as closely as possible to the original spirit of the 1994 White Paper, despite the clear hint of an alternative that the Free Basic Water Policy implies. See DWAF, *Towards a Water Services White Paper*, April 2002.

financing.[149] The only exception to this would be the poor communities where the Government would finance "basic minimum services but not the operating, maintenance or replacement costs". The state in this context has a narrow role which clearly appears derived from the fiscally conservative policies which underlie the "Washington consensus" model of development.

In some senses the document prepares the ground for the neo-liberal GEAR program of 1996 by providing a strong economic grounding for fiscal austerity in the water sector thus minimising government expenditure. Thus two years later GEAR, notes that "recognising the limited capacity of the fiscus, Government is committed to the application of public-private sector partnerships, based on cost recovery pricing where this can practically and fairly be effected".[150] In this context its radical democratic pretensions of community based development seem slightly sinister.[151] The potential of the "community" to deliver is so strongly embedded in the document that at times it verges on anarchist philosophy which exults the potential of small scale social organisation while promoting an uncritical negativism towards all state action.[152]

To take only one aspect of this paradigm the fiscally conservative notion that to be "sustainable" water programs should be self-financing as soon as possible seems to go against much of the experience of the late developing East-Asian nations. Thus in the word of Amartya Sen;

> The far reaching powers of the market mechanism have to be supplemented by the creation of basic social opportunities for social equity and justice.
>
> In the context of developing countries in general, the need for public policy initiatives in creating social opportunities is crucially important. (I)n the past of the rich countries today we can see quite a remarkable history of public action, dealing respectively with education, health care[153], land-reforms and so on. The wide sharing of these social opportunities made it possible for the bulk of the people to participate directly in the process of economic expansion.
>
> The real problem here is not the need for financial conservatism in itself, but the underlying…belief …that human development is really a kind of luxury that only the richer countries can afford. Perhaps the most important impact of the type of success that the East Asian economies have recently had is the total undermining of that implicit prejudice. These economies went comparatively early for massive expansion of education, and later also of health care, and this they did, in many cases, before they broke the restraints of general poverty.[154]

Thus in the enthusiasm to bring democracy to the people through the market driven water policy the White Paper runs the risk of entrenching poverty as people so long

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[149] "The basic policy of Government is that services should be self-financing at a local and regional level." White paper, p. 18.
[150] Quoted in Merrifield, Andrew, "Financing of Public Infrastructure Investment in South Africa", in Khosa, Meshack, Infrastructure Mandate for Change – 1994 – 1999, Human Sciences Research Council, 2000, p. 97.
[151] The document clearly implies that if communities do not want to govern themselves and simply "demand" services from government they will not receive those services. DWAF, *White paper*, 1994, p. 8.
[152] A similar point on the basis of overestimating community strength is made by Rall, M., "The demand responsive approach to community water supply and sanitation as interpreted and applied by Mvula Trust", 1999, p. 5. Available at www.mvula.co.za.
[153] Sen, *Op. cit.*, makes it clear that this includes public health care services – water, sanitation etc.
[154] Sen, *Ibid*, p. 143.

denied basic human respect are expected to shoulder an unnecessarily large proportion of the financial burden of water services.

Sen also notes the necessity of the state to undertake actions to promote social equity. The fundamental mistake of the White Paper, which occurred despite a damning assessment of the apartheid inheritance of massive racially based inequality, was to see the market as the institution which could be harnessed to overcome this crippling legacy.[155]

The classic donor definition of sustainability, used by the World Bank and most big bi-lateral donors to South Africa, which stipulates that "operational and maintenance" costs must be included in basic services projects to ensure full community participation and therefore sustainability. After the initial capital costs are supplied by government and/or donors the recipient community must supply ongoing operational and maintenance costs to allow the projects to continue with *no* ongoing support from the state or donors. Recently this definition came under attack in the most unusual of places. Jeffrey Sachs in a speech to the World Bank proposed that this donor definition of sustainability be abandoned due to it abject failure in the African context. He pointed out that most African countries are too poor to pay user-fees based on operation and maintenance costs.[156] This advice could easily be extended to African communities within South Africa.

A key aspect of the White Paper was its proposal for a lifeline tariff, which was set to the operation and maintenance costs of supplying 25 litres per capita per day. The basis for not providing a free lifeline was that by requiring communities to contribute some of the cost of supply they would have an interest in maintaining the system.[157] Consumption above the lifeline was on the basis of full cost recovery, justified by the principle - "Some for all – not all for some" - allowing for sufficient funds to be generated to allow for re-investment in communities that had no water services at all.[158] In this way the water sector could be largely self-financing.

The White Paper ruled out a uniform national tariff arguing that it would be virtually impossible to establish on the basis of the high regional variation in water costs and the administrative complexity and lack of transparency that would result from the funds being centrally collected before being redistributed.[159] National standards for water tariffs were promulgated in mid-2001 under s 10(1) of the *Water Services Act 1997*. The standards show both a continuity with the policies contained in the 1994 White Paper but clearly in the introduction of a small amount of free water the signs of a turn away from the demand driven, full-cost recovery approach.[160]

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[155] DWAF, *Water Supply and Sanitation Policy, Water an Indivisible National Asset*, November, 1994, pp. 3 – 5.
[156] Dr Jeffrey Sachs, "The economics of sustainability", speech to the World Bank April 18, 2002 audio available at www.worldbank.org.
[157] DWAF, *Water Supply and Sanitation Policy, Op. cit.*, p. 22.
[158] DWAF, *Ibid*, p. 21.
[159] DWAF, *Ibid*, p. 22-23.
[160] Jeremy Cronin, is his *Month Review* debate with John S. Saul from 2002 argued that this policy was an important achievement of the South African Communist Party in shifting the ANC away from the neo-liberal water policies of international donors such as the world bank.

The current policy of water tariffs is set out in regulations to the *Water Services Act 1997*.[161] There is no effective uniform national tariff, with each municipality having a large amount of discretion. Water Service Providers[*] when supplying to households must have a rising block tariff, of at least three blocks. The first block, is a lifeline tariff, which must be set at the lowest possible amount, *including a zero amount,* which still allows for the promotion of the sustainable use of water. The last block must be set at long term marginal cost to promote water conservation. The lifeline tariff cannot be extended beyond the maximum of 6kl per household per month, which for a household of 8 amounts to 25 litres per capita per day.

The key concession to the general neo-liberal slant of the 1994 White Paper is the option to set the life-line tariff at zero. Most large urban municipalities have taken this option and provided it as a universal entitlement to all households regardless of income. Exceptions remain with Durban Metropolitan Water charging for the full 6 kl once a household uses any amount of water above the 6kl. The national tariff standard, at its minimum, allows a water service provider to charge those households whom it defines as poor for the first 6 kl at a rate it views as sustainable. There is in fact no legal commitment of universal access to free basic water despite the political commitment made in late 2000 to free basic water. Access to free basic water is very much up to the discretion of local government.

Local municipalities are expected to fund the free basic water out of the equitable share grant from the national government. Of theR8.6 Billion provided by national government in the year 2002 – 2003 for local government R3.9 Billion is for the equitable share and is designed to assist municipalities implement the free basic services delivery policy. A further R 3.3 Billion has been set aside for municipal infrastructure investment mainly to assist access to basic municipal services.[162]

Incorporating equity into policy

Most government policies in basic services infrastructure provision include commitments to equity in the delivery. The most prominent example of such a commitment is the capital subsidies given to municipalities to ensure delivery of bulk and connector infrastructure to those in need of physical access to basic services. This is a concession to the reality that markets are risky especially for the most poor. This subsidisation must be transparent and managed by government (whether that be central, provincial or local), rather than the service provider. It should be provided only to those genuinely in need through some form of means testing. This form of equitable redistribution is a narrowly defined exception to the much more robust principle of full cost recovery.[163] All policy makers advocate full cost recovery. It is the extent to which individual consumers pay for the full cost of providing the service

[161] *Norms and Standards in Respect of Tariffs for Water Services in Terms of Section 10 (1) of the Water Services Act* (Act No. 108 of 1997), Government Gazette, 20 July 2001 No. 22472. They came into force on the 1st July 2003.

[*] Water Service Provider – according to the *Water Services Act 1997* provide water services to the community. The term encapsulates a number of service delivery mechanisms including direct municipality provision, a corporatised service utility run on commercial lines but still owned by the municipality or private corporation providing services under a contract or concession with the municipality.

[162] Xolani Xundu, "State doubles its grants to local councils" *Business Day,* April 18 2002, p. 3.

[163] See Chapter 3 for a more detailed discussion of the origins and implications of this style of re-distribution.

directly or whether those able to pay more than the cost of the service do so enabling the surplus generated to other consumers to pay less. To state the obvious, for a policy commitment for greater equity in municipal service provision to be viable, the mechanisms put in place to achieve the policy goal must be backed by sufficient institutional strength so that other compelling and competing policy principles do not in practice override the original laudable intentions.

Because these services are not consumed in a vacuum and rates and waste collection services must also be paid by household consumers the government recognises that a proportion of households will need extra help. Under the *Local Government Municipal Systems Act* 2000, section 97, municipalities are required to develop a credit control and debt collection policy which must provide for "indigent debtors" in a manner "that is consistent with its rates and tariff policies". An indigency policy is therefore used to assist those households who cannot afford what they consume above their free amounts of electricity and water.

Indigent policies are favoured by fiscally conservative administrations because they allow government to protect the poor, a political necessity where there is widespread poverty, while at the same time allowing clear transparency for the funds being spent.[164] Generally indigent policies contain a percentage reduction on rates for volumetric services such as electricity and water as well as low-income flat fees for property rates and other services such as sewerage and waste. Large scale cross subsidies on the other hand do not allow a clear idea of how the money is being spent and who gets what. The free water and electricity policies are nationally mandated policies that attempt to deal with the problem of indigents. Many municipalities continue with current indigent policies while implementing free water and electricity policies.

Indigent policies suffer from a number of problems.[165] Firstly they are relatively expensive to administer. Secondly, by targeting specific groups they run the risk of stigmatising the poor by providing onerous, demeaning criteria that have to be fulfilled before entitlements are granted.[166] In an attempt to limit the demands of the fiscus indigent policies can be too narrowly targeted denying access to worthy recipients that fall just outside the income criteria.[167] Another common complaint about indigent schemes is that by stipulating maximum income criteria, above which indigents lose access to assistance, they can stifle individual initiative in income generation creating poverty traps where recipients are discouraged from seeking work

[164] See later chapter 3 Municipalities are mandated by law to develop indigent policies as part of their broader credit control policy. See Section 96 (b) and Section 97 (I) (c) *Local Government Municipal Systems Act, 2000*. For a best practice example from Chile see Kerf, M., G., R., Irwin, T., Levesque, C., Taylor, R., (1999). *Concessions for Infrastructure: A Guide to Their Design and Award*, World Bank Technical Paper No. 339, Washington D.C. p. 35.

[165] See Elson, D., "For an emancipatory socio-economics: A new synthesis of "economic" and "social" policy.", *New Agenda*, First Quarter, 2002, 83 at 91.

[166] This is particularly the case if indigents fall into a racial minority.

[167] Johannesburg indigency policy which provided 30R per month for water and a bit more for other services was scrapped in July 2001 with the introduction of free water and electricity policies. However, instead of a figure in the hundred of thousands of households only 24,000 to 40,000 households actually took up the grant. See Bond, P. *Unsustainable South Africa*, the two figures are at p. 159 and p. 250.

or alternative sources of income lest it result in their losing access to guaranteed, if small, incomes provided through the indigent schemes.

This section will look at three different examples where cross-subsidisation appears under threat – local government restructuring of basic services, intergovernmental transfers, and fiscal conservatism. These provide some reasons why the government commitment to increased equity remains disturbingly under funded at the point of implementation.

The *White Paper on Local Government* specifies three types of subsidisation available to municipalities for subsidisation of the poor. Subsidisation can occur within a service, between services and through government capital and operating cost subsidies.[168] Within services the main options involve cross-subsidisation between rich and poor residential consumers and between business/industry consumers and residential consumers. In each case there are considerable barriers to progressive implementation of decent levels of cross-subsidy. Except for the cross-subsidisation between rich and poor household consumers these barriers can be directly traced to government policies, which form part of the ANC's neo-liberal restructuring of local government.

Cross-subsidisation between different local government services is becoming difficult. Corporatisation, an emerging trend in many municipalities, separates trading services such as water and electricity into increasingly autonomous units limiting the extent of cross-subsidisation between services. In this institutional framework water and electricity services must be self-financing. Also subsidisation of other local government services, particularly from electricity revenue, becomes similarly difficult. It is these tradable services which provide the bulk of local government revenue. The *White Paper on Local Government* noted that revenue from trading services accounts for 60% of local government revenue with electricity being the most important.[169] While ownership in corporatised services remains wholly in government hands many critics feel that it the first move in a process that may lead to full privatisation.

Intergovernmental transfers to local government, for example in the constitutionally mandated equitable share grant which assist municipalities pay for free basic services, is one example of a government cross subsidy.[170] According to Johannesburg Metro in 1993, Johannesburg received R500-million from provincial and national government. Since 1994, grants from the government have been progressively cut back - Johannesburg received just R24-million in 1999.[171]

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[168] Ministry for Provincial Affairs and Constitutional Development, *The White Paper on Local Government*, March 1998, p. 112.
[169] *White Paper on Local Government*, p. 110.
[170] Section. 227, entitles the local sphere of government to an equitable share of nationally raised revenue in order that it may "provide basic services and perform the functions allocated to it". See also Section 152 (1) which sets out the objectives of local government. One of these is to provide services to communities in a sustainable manner. Clause 229 gives municipalities the power to raise revenue via rates on property and surcharges on fees for services provided by the municipality.
[171] See the official Johannesburg web-site accessed July 2002 http://www.goafrica.co.za/joburg/help/rates1.stm#works and Republic of South Africa National Treasury which adopts a more conservative figure using 1994 as the base year for calculations *Intergovernmental Fiscal Review*, 2001, October 20001, p. 148.

There have been significant decreases in intergovernmental transfers from national to local governments, resulting in an 85% decrease (in real terms) between 1991 and 1997 and further decreases of up to 55% between 1997 and 2000.[172] Only in 2000-2001 and 2001-2002 were there modest increases in these transfers of approximately 15%. The latter may be in anticipation of the electricity sector, which forms the largest section of most municipalities' revenue, being restructured into six regional electricity distributors.[173]

There is still considerable room for cross-subsidisation in large urban municipalities such as Johannesburg Metropolitan Council between business, industrial and wealthy household consumers and the poor households through the mechanism of rising block tariffs. This has occurred in Johannesburg in the case of water amongst different types of residential consumers but the problems of affordability evidenced in poor communities suggest that the levels of cross-subsidisation remain inadequate.

One possible reason for this is the ability of powerful local business and residential elite's to outmatch poorly organised communities and frustrate municipal efforts to redistribute through the property rates.[174] In Johannesburg, Sandton Ratepayers Association effectively stalled further redistributive rates increases by a high profile legal action.[175] In this local political environment the only source of income for provision of basic services is pushing full-cost recovery from residential households as far as it is politically and legally possible. It is within this uneven environment that township civics must work to develop strategies to prevent cut-offs and property attachments and evictions for non-payment of services.

Constrained from more redistributive measures local governments may be tempted to run budget deficits to fund cross-subsidisation initiatives. This avenue is also limited as local governments by law must balance their budgets.[176] While this makes generally good fiscal sense there may be short-term justifications for running budget deficits. The other alternative, private sector loans, is also heavily dependent on the need for cost-recovery from residents. Access to private capital requires a demonstrated and consistent source of revenue, which invariably means an intensification of cost-recovery and credit control measures in the townships.

In summary the logic of decentralisation grants so much responsibility to local government that it is questionable that local government in an environment of such inequality, will have sufficient countervailing power to deal effectively with the various forces arraigned against it. Local government cannot on its own build the mythical rainbow nation.

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[172] See McDonald, D., "The Theory and Practice of Cost Recovery", *Op. cit.*, p. 23.
[173] They are being set up under the interim company EDI Holdings see Robyn Chalmers, "Power Market Begins to Take Shape", *Business Day*, January 7 2002, p. 2 and "Groups to Debate electricity Plan; Local government officials wary of minister's complex restructuring plan." *Business Day*, Thursday February 21, 2002, p. 3.
[174] For an example from Cape Town see Pape, J., "The Struggle Against Encroachment: Constantia and the Defence of White Privilege in the 'New' South Africa", in McDonald & Pape, *Op. cit.*, pp. 129 – 133.
[175] Bond, *Unsustainable South Africa*, p. 216.
[176] *White Paper on Local Government.*

The Alternative: The SECC, the Municipal Services Project and the Anti-Privitisation Forum

These groups argue for a '*de-commodification'* of basic needs goods and services.[177] Defining de-commodification is, however, not easy and it opens up a number of potentially unanswerable questions. De-commodification at one level can mean access to some level of minimum income guaranteed by government de-linked from the need to sell ones skills in the labour market.[178] This characterisation of de-commodification would not necessarily exclude the market as the mechanism for distributing basic services. Access to the market is guaranteed through some commitment to provide a minimum income to all households through social welfare payments.[179]

If decommodification is applied strictly to basic services and taken to its logical end-point it must mean the abandonment of price as a mechanism for regulation of consumption of water and electricity.[180] Yet in the short term at least there appear many problems with such an approach. Do rich households and industry get access to "free" water?[181] If this is the case how is the consumption of these powerful and large consumers to be regulated? Any such approach, which contemplates total decommodification, would necessitate an enormous shift in institutional and political culture.[182] This transformation does not appear very likely at all in the immediate future.

In practice de-commodification of access to water and electricity in South Africa does not mean free services for all but access to enough water and electricity to ensure that a reasonable definition of a residential household's requirements of basic services can be satisfied.[183] De-commodification of essential services should mean that, to adopt the theoretic of Amartya Sen, regardless of income (a chronic condition of life for most South Africans is lack of income), households should have equal *capabilities* to participate in social life.[184] The de-commodification of essential services should remove barriers to social participation and thereby enhance freedom. The main difference with neo-liberal approaches is that this level of services is not targeted towards an administratively defined group of citizens who are poor. Everyone gets access to the level of service, which is defined as a basic minimum for a household to cook, wash and perform necessary ablutions.

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[177] Bond, P., *Against Global Apartheid, South Africa meets the World Bank, IMF and international Finance*, University of Cape Town Press, 2001, p. 283.
[178] I thank Franco Barchessi for this insight.
[179] Most developed countries adopt this model. Most South Africans have limited access to welfare payments.
[180] McDonald, D., "The Theory and Practice of Cost Recovery" in McDonald & Pape, *Op. cit*., p. 33.
[181] I presume it was Mike Muller's (head of DWAF) intention to raise this question when, during a televised debate during the World Summit on Sustainable Development, he ironically exclaimed "Viva, swimming pools, Viva." *Down to Earth 2002*:*Damned to Africa*, hosted by Ben Cashdan, screened on SABC2, 9th September 2002.
[182] McDonald, D., "The Theory and Practice of Cost Recovery" in McDonald & Pape, *Op. cit.* p. 33.
[183] Interview with Patrick Bond, Public School of Development and Management, 6th July 2002.
[184] See Sen, *Op. cit.*, and the discussion in Marmot, M., *Status Syndrome: How Your Social Standing Directly Affects Your Health and Life Expectancy*, Bloomsbury, 2004, pp. 74 - 76.

The Municipal Services Project, along with the government, and most players in the water sector accept the idea of a rising block tariff for water. But the Municipal Services Project argues for a universal and mandatory commitment to providing 50 litres per person per day on the basis of household size as was promised in the original Reconstruction and Development program. Household size should be determined on an individual basis allowing for precise targeting of the level of sufficient water.[185] This could be done on the basis of an annual household application for a free water component per month based on the actual household members likely to be resident for the calendar year. Consumption above this level would be charged. The incline of the block tariff would be much shallower than is currently the practice. This would in effect places a large amount of the burden on paying for the water on the wealthier high consumption water users. This standard would be set on a national basis limiting the ability of each municipality to vary its tariff structure as it sees fit.

The Municipal Services Project also calls for a free first block of electricity but significantly larger than the 50 kWh proposed by the Government.[186] It also view a rising block tariff as essential to promote cross subsidisation and allow significantly reduced rates for low income and low consumption households. The sufficient level would be set at 1kwh per capita per day.[187] On the basis of a household of eight this would equate to a free lifeline of 240kwh a month. In both instances payment would be on the basis of the volume of the service consumed but there would be a much greater commitment to making basic needs more affordable through the free – lifeline tariff and sharply rising block tariff. The practice of disconnection for non-payment for both electricity and water would end but those households who do not pay for their consumption above the free lifeline tariff would be limited to the monthly consumption that their household size would dictate.[188]

This level of lifeline services would be funded through increased rates on commercial, industrial mining and agricultural consumers of water and electricity.[189] There is considerable ability to cross subsidise as a result of the fact that domestic consumption of water and electricity amounts to 12% and 18.5% of all water and electricity consumed in South Africa.[190] The rising block tariff initiative pioneered in the water sector would be exported to electricty consumers as well.

The Anti-Privatisation Forum in 2000 called for the introduction of a minimum amount of electricity needed for health, hygiene, cooking and heating.[191] They also

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[185] Interview with Patrick Bond, Public School of Development and Management, 6th July 2002.
[186] McDonald, D., "More carrot, less stick." A SECOND LOOK *Mail and Guardian* 23 May 2003
[187] Bond, *Unsustainable South Africa*, p. 327.
[188] See Bond, Patrick, *Local Economic Development Debates in South Africa*, MSP, Occasional Papers No. 6 at p. 25.
[189] See Patrick Bond on electricity quoted in Jaspreet Kindra, "Rich should subsidise the Poor", *Mail and Guardian*, June 8-14 2001.
[190] See for electricity the *Electricity Regulatory Journal*, March 2002 p. 4, The rest of consumption is made up of manufacturing, mining, commercial and transport sectors. The distribution of water consumption is described in Abrams, L. J., "Policy development in the water sector – the South African experience" in Howson, P., Carter, R., (Eds) *Water Policy: Allocation and Management in Practice, Proceedings of International Conference on Water Policy, held at Cranfield University, 23 – 24 September 1996*, E & FN Spon, 1997.
[191] See *Draft Declaration of the People Against Privatisation*, Anti-Privatisation Forum Council, 4 November 2000, mimeo in the authors posession.

argue for 50 litres of water per person per day. They place particular emphasis on the ownership and worker control of public services.[192]

The SECC in early 2001 demanded flat-rate payments for both water and electricity. This is seen by some of the leadership of the SECC as a medium term goal that results from apartheid era billing practices.[193] In policy terms the largest practical difference between the SECC's demands and that of the APF relates to the structure of the tariff. The SECC demand is for a flat rate per month regardless of actual consumption while their intellectual supporters see a sharply rising block tariff structure based on the volume of services consumed as being the ideal. If the SECC's demand were applied to all households in Johannesburg, significant inequalities would result as wealthy consumers would be paying very little for their often very high consumption of services. While the flat rate demand is viewed as only applying to the townships the increasing numbers of wealthier Africans living in the townships would benefit disproportionately from a flat rate.

While the SECC's demand for a flat rate may appear unrealistic and counter-intuitive to the general thrust of progressive activists it should be noted that at least with respect to water, some developed nations such as Great Britain have followed this flat-rate non-volumetric system of cost recovery.[194] As late as 1996 in England and Wales only 7% of households had volumetric water meters although volumetric metering was considered the long-term goal.[195] The English and Welsh system was slightly more complex in that it allowed for a more socially just, redistributive element through the setting of the flat-rate in-line with the property value of the household being serviced.[196] The SECC, no doubt coaxed by their leadership, eventually decided to shift towards the expanded free-lifeline approach of 240 kwh per household (based on 1 kwh per person per day) and 50 litres per capita per day.

Conclusion

Hugh Corder, in the question that opened this chapter, asks whether that in order for the Bill of Rights to play the transformative role envisaged by its framers the basic terms of social life must first be guaranteed. Is it the case that key socioeconomic factors must be dealt with first before the law can play its role in assisting those who want to positively influence government social policies? The many who are denied access to a basic services as a result of disconnection because of poverty may be skeptical of the new constitutional dispensation they live under. Nonetheless the following chapter will demonstrate that the law, far from being something which can provide assistance only after key basic socio-economic victories have been won, is central in constituting the very terrain on which these important battles are fought.

The question is how does the law, and particularly South Africa's Bill of Rights structure peoples understanding of their interests? Is it a useful tool for community

[192] See Chapter 3 for more on these issues.
[193] See interview with Trevor Ngwane, *Focus*, 25, March, 2002. Helen Suzman Foundation, available at www.hsf.org.za/focus25/focus25electric.html.
[194] I was more supportive of this approach in water as this seemed the simplest approach.
[195] Cuninghame C. J., and Laws, S. K., "A Child's Right to Water: the case of metering", in Howson, *Op. cit*., p. 351, by 2003 this was approaching 50%, *The Economist*, "Priceless: A survey of Water", July 19th, 2003, p.6.
[196] Jackson, H., MP, "Paying for Water ", in Howson, *Ibid*, p. 237.

groups? Does it help promote democratic dialogue by mobilising community opinion *against* damaging government policy? Or is it, as some vocal critics of rights suggest, a false hope. A hope that promotes a dangerous acceptance of the established order.

Certainly the actual legal and social impact of the Bill of Rights in terms of precedent development has been minimal in the 8 years of the new constitutional order. Socio-economic rights are justiciable and government legislation and practice has been invalidated because it does not comply with rights guaranteed by the Constitution. The Constitutional Court has, however, discharged its responsibilities with great care and these legal victories have only touched a small section of the huge social problems that face South African society. But the evidence from interviews with activists suggests that the Bill of Rights plays an important role beyond the court processes. It is this popular constitutionalism and its impact on community mobilisation which is the subject of the next chapter.

Chapter 2

Law as a Catalyst[1]

> Legal frames of reference tunnel the vision of both activists and analysts leading to an oversimplified approach to a complex social process – a role that grossly exaggerates the role that lawyers and litigation can play in a strategy for social change. The assumption is that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realisation of these rights; and further that realisation is tantamount to meaningful change. The *myth of rights* is, in other words, premised on a direct linking of litigation, rights, and remedies with social change.
>
> Stuart Scheingold, *The Politics of Rights*, Yale University Press 1974, p. 5.

Introduction

This chapter will demonstrate that the SECC used rights talk as a tool to identify, interrogate and challenge the logic of local and national public policies towards provision of basic services. It will demonstrate that rights were utilised, not as an end in themselves, but as a means of mobilising public support for the SECC's core goals. This chapter will analyse the origins and development of the SECC's use of rights talk including its appeals to the formal legal system. At the core of this chapter is the SECC/APF's march on Human Rights Day 2002 and the other direct action activities of the SECC which push the boundaries of the law. The influences which go into the formation of a social-movement are understandably diverse and this chapter will try and place rights talk in the context of other strategies and resources available to the SECC. The conclusions are necessarily tentative for, as one respondent stated, the legal strategy, was still in its infancy.[2] The essential premise of this chapter is that rights discourse formed an important role in structuring activists understanding of their struggle. Rights talk helped legitimate the activities and the rhetoric of the expanding SECC.

Human Rights and the law

As discussed in the last chapter there are very contested understandings of the constitutional right to water. Policy makers and commentators, when they speak of the right to water, often mean very different things. Most policy makers for electricity deny any existence of a right to electricity whilst at the same time the government is implementing a free "lifeline" of electricity for basic needs that is similar to the free basic water policy.[3]

The question addressed here is not the content of a particular right but what do people mean when they say that they have a right to something. When people say they have "rights" how does this relate to the law and to legal institutions such as the courts and

[1] The title of this chapter is borrowed from Michael McCann's, *Rights at Work, Pay Equity Reform and the politics of Legal Mobilisation*, University of Chicago Press, 1994.
[2] Wiseman Hamilton, 6 March 2002.
[3] *Business Day*, Robyn Chalmers, "Municipalities to phase in free power", Wednesday, July 10 2002, p. 2.

law enforcement agencies? South Africa, with its almost uniquely progressive inclusion of justiciable socio-economic rights in its Constitution, is a testing ground for an expansion of our legal understandings of what we mean when we assert a right to something.

This definitional issue goes to the heart of the question of whether rights are useful in political mobilisation because of the tendency to equate rights talk with those rights stated explicitly in the Constitution and realisable through litigation.[4] This interpretation of rights falls in what is generally characterised as legal positivism.[5] For legal positivists there are no rights outside of what is contained in the written law, whether these laws are in a constitution or in ordinary legislation. In other words there is a radical separation between law and morality.[6] The ethical nature of the law itself is guaranteed through the formulation, interpretation and application of these laws in accordance with the rule of law, which limits the power of the state and parliament according to certain principles which define how the institutions of social democracy can act so as to guarantee individual freedom from the tyranny of the majority.[7]

Categorizing rights

Commonly "rights" are used in a number of different ways in the everyday usage of the term. Thus legal rights refer to rights recognised and potentially protected by litigation, constitutional rights refer to rights recognised, and potentially protected by litigation appealing to express constitutional provisions, "moral rights" refer to rights placed within moral discourse and finally, "right-claims", refer to claims or demands advanced by social movements involving an aspiration to convert a moral right into a legal or constitutional right.[8] Another category that unfortunately muddies this neat delineation is termed an "implied constitutional right". This is a "right-claim" which is argued to be already part of a constitution, but which must be implied from existing constitutional rights.[9] In this scheme the SECC is seeking respect for a constitutional right when they talk of the right to water and an implied constitutional right claim when they speak of the right to electricity. For example electricity can be implied from the right to housing contained in the Bill of Rights.[10]

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[4] The following discussion is based on the discussion in Bartholomew, A., and Hunt, A., "What's Wrong with Rights?" 9 *Law and Inequality*, 1:1, 1990 at 6-7.

[5] Legal positivism or legalism "…is the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationship to consist of duties and rights determined by rules." See Shklar, J., *Legalism*, 1964, excerpted in Freeman, M.D.A., (Ed.), *Lloyd's Introduction to Jurisprudence*, 6th Edition, 1994, at 26.

[6] See Wood, D., Hunter, R., Ingelby, R., "Themes in liberal legal and constitutional theory." Hunter, R., Ingelby, R., Johnstone, R., *Thinking About Law: Perspectives on the history, philosophy and sociology of law*, Allen and Unwin, 1995, 41 at 50-51.

[7] See Hayek, F., *The Road to Serfdom*, George Routledge & Sons Ltd. 1942, p. 61-63.

[8] Bartholomew, A., and Hunt, A., "What's Wrong with Rights?" 9 *Law and Inequality*, 1:1 at 7.

[9] For example the Australian Constitution has controversially read into it by the High Court the right of freedom of speech implied from the provisions which set up a representative democracy. This technique is highly useful to a constitution which contains no formal bill of rights. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[10] This reading was given some hope in *Government of the Republic of South Africa v Grootboom*, 2000 (11) BCLR 1169 (CC) at paras 35-37.

It is important to remember that all legal rights contain antecedent moral and ethical reasoning which forms the basis of their constitutional or legal form. It is this moral character which underwrites the institutional protection given rights by the courts. For example the most categorical of all prohibitions in the International Bill of Rights against torture, must be, in both first and third worlds, constantly re-affirmed through police education, legal frameworks and the threat of punishment.[11] It is through human rights education that the moral character of the right of individuals not to be subject to torture is brought into play and people are allowed to discuss the right as if it had no institutional protection.[12] A legal or constitutional right that has no compelling moral core, if such a thing is possible, would undoubtedly be more difficult to enforce. Thus the fact that the SECC places great emphasis on moral rather than legal arguments when interpreting the Bill of Rights to its potential supporters is not unsurprising. It is from this moral base that a legal right can be created.

Any form of political demands, such as a claim to a basic amount of electricity, can be couched in the ordinary everyday language of rights. For example it may be surprising to some that the International Bill of Rights contains a right to a holiday. Article 24 of the Universal Declaration of Human Rights states that "(e)veryone has the right to rest and leisure…". Generally electricity is not included amongst international human rights conventions nor is it explicitly included in the South African Bill of Rights. Electricity is however mentioned in the *Convention on the Elimination of Discrimination Against Women (CEDAW)* in the context of a right to an adequate standard of living for rural women.[13]

Clearly United Nations conventions, while rich in radical demands for social justice, do not provide a propitious platform on which to ground a legal claim to the right to electricity.[14] The development of a moral right, to a claim right and in turn to a legal or constitutional right is a complex social process. This study tries to understand and analyse this process through looking at the SECC's and APF's activism around the supply of electricity in Soweto.

Rights and judicial institutions

Another important basic component of rights talk is the linkage to the whole set of institutions termed as the judicial sphere of government. This linkage can be an implicit or explicit characteristic of rights talk. Thus legal practice, whether via the long road of getting moral rights codified through the legislature[15] or through rights litigation from existing statutes and constitutional provisions, provides a pervasive background (or foreground) for talking about rights. Those who assert their rights, whether constitutional or otherwise, frequently contemplate some form of legal

[11] Article 7, *International Covenant on Civil and Political Rights.*
[12] I draw here on brief personal experience as an observer and participant in human rights education of the Zimbabwe Republic Police force.
[13] Signed and ratified by South Africa. Article 14-(2) (h) other services listed are water, housing, sanitation, transport and communications.
[14] On the radical character of the United Nations Declaration of Human Rights see "Reinventing Geography", an interview with David Harvey, *New Left Review*, 2000, 4:75 at 92-93 and also his *Spaces of Hope*, University of California Press, 2000, Chapter 5, "Uneven geographical developments and universal rights" pp. 73 - 94.
[15] See for a study of this process from the United States with respect to the *Americans with Disabilities Act*, Shapiro, J., *No Pity: People with Disabilities Forging a New Civil Rights Movement,* 1993.

practice. Generally, it is in the form of litigation in the courts. But this need not always be the case. It could mean seeking advice from lawyers to determine whether a particular social protest action would be legal or not.

The Constitutional basis of an implied constitutional right may appear unpersuasive to the legally trained observer - unpersuasive in the sense of the likelihood of it being recognised by the Constitutional Court. The legal argument against electricity as an implied constitutional right would be something like this.[16] If the Constitution makers had meant that implied constitutional rights could be read into the Bill of Rights at a later date why did they explicitly state a number of socio-economic rights. This must imply that socio-economic rights included in the Bill of Rights are the final and exclusive list.

Litigation through the courts in no way exhausts the usefulness of rights to groups like the SECC. The SECC may not immediately contemplate such legal action but use the notion to assist them in converting a vague sense of injustice and hurt through what is a "common sense" interpretation of the Bill of Rights. At the first instance the SECC is only interested in the political utility of rights talk and legal questions play a much more marginal role. Claim rights have an important role in getting interesting and novel claims heard.

This study adopts a particularly wide definition of legal practice that sees "morally justified" payment boycotts, sit-ins, street protests in which rights take a prominent role in the banners and speeches as constituting a form of legal practice.[17] There was also a consistent theme running through the interviews, that the SECC's and the APF's social protests and mass mobilisation would be useful if the movement ended up in court attempting to get the constitutional court to defend their right to electricity.[18] It is also a practical necessity because throughout the life of this study there was no high-profile legal action launched on the right to electricity or water.

The traditional legal approach emphasising the courts and litigation did form, however, a background to the activities of the SECC, always immanent but never actually realised by the setting in motion of a legal case on water or electricity cut-offs. The Centre for Applied Legal Studies (CALS) is currently preparing to further the SECC/APF's goals through litigation. This is expected to begin formally in early 2003 when a lawyer is employed full time to work on the issue of electricity.

Human Rights, Law and Politics

For those with a natural law perspective human rights exist independently of their codification by national parliaments or even the United Nations.[19] This view, common among the classical political theorists such as Tom Paine and Mary Wollstonecraft, sees rights charters as acting to, in practice, exclude many human rights as they, of necessity, can only include a limited number of basic rights. Human rights, whether codified or not, are the basis for challenging and/or interrogating state

[16] Drawn from an interview with Theunis Roux, CALS, 30 July 2002.
[17] This approach is adopted from Klare, K., "Law making as praxis", *Telos*, no. 40 (Summer 1979), pp. 123 – 135 at 124 fn. 5.
[18] See for example Bongani Lubisi, 26/10/2001.
[19] See Amartya Sen's, Chapter 1 of the *Human Development Report, 2000*, Oxford University Press, 2000, p. 25.

or transnational enactments and policies. The assumption within documents such as the "Universal Declaration of Human Rights", is that if the rule of law is not protecting these rights, in exceptional circumstances, rebellion is both permissible and necessary:

> …it is essential, if man is not to be compelled to have recourse, as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law…[20]

These broadly defined attitudes towards rights allow for a convenient framework for thrashing out the complex dialogues between individuals and social actors of the "ought" and "is" of any democratic polity. Law is what "is" and politics is what "ought" to be. The law can be interpreted with a reasonable degree of certainty and objectivity by a professional judiciary.[21] Politics on the other hand is value laden, interest based and seemingly involves endless squabbling.

Human rights norms can be seen to provide a standard to assess both law and politics. How these norms come into being is a matter of considerable political, philosophical and legal discussion.[22] For the purposes of this study human rights are viewed as socially constructed standards defined through struggle.[23] Defined in this way, the point at which a political demand becomes a human right is not very easy to determine and many would be uncomfortable with such an approach. What can be said with certainty is that, assuming this definition, constitutional codification of rights will always be behind the ever-expanding list of basic rights.[24]

Some authors have tried to put a historical timeline on the development of these civil, political and socio-economic rights.[25] Thus it is argued that civil rights developed in the 18th century, political rights in the 19th century and socio-economic rights in the 20th century. Each of these phases were as a result of considerable social movement activism, a fact sometimes obscured by the considerable difference in time from their institutionalisation, particularly in the case of civil and political rights.[26] The constant need to incorporate new human rights, especially socio-economic rights, stems from the realisation that for individuals to be able to properly participate in democratic politics they cannot be in abject poverty.[27]

At its simplest a right is a rational basis for a justified demand.[28] They provide to those who use them many seemingly priceless benefits. They can be:

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[20] Taken from the preamble to the *Universal Declaration of Human Rights*.
[21] Traditional legal theory has always allowed for some level of indeterminacy in legal interpretation.
[22] See Evans, T., *The Politics of Human Rights: A global perspective*, Pluto Press, 2001, p. 6 – 10.
[23] Following Stammers, N., "Social Movements and the Social Construction of Human Rights", 21 *Human Rights Quarterly*, 1999, 980 at 986 - 990.
[24] Germany has recently incorporated animal rights into its basic law extending a constitutional rights to non-human subjects.
[25] This draws on the work of T. H. Marshall, see Honneth's *The Struggle for Recognition; The Moral Grammar of Social Conflicts*, Polity Press, 1995, p 117.
[26] Stammers, *Op. cit.*, at 988.
[27] Honneth, A., *The Struggle for Recognition; The Moral Grammar of Social Conflicts*, Polity Press, 1995, p. 117.
[28] See Shue, H., *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, University of Princeton, 1980, p. 14.

> …urged, pressed, or rightly demanded against other persons. In appropriate circumstances the right holder can "urgently, peremptorily or insistently" call for his rights, or assert them authoritatively, confidently, unabashedly. Rights are not mere gifts or favours, motivated by love or pity, for which gratitude is the sole fitting response. A right is something that can be demanded or insisted upon without embarrassment or shame. When that to which one has a right is not forthcoming, the appropriate reaction is indignation; when it is duly given there is no reason for gratitude, since it is simply one's own or one's due that is received. A world with (legal or constitutional) claim rights is one in which all persons, as actual or potential claimants, are dignified objects of respect, both in their own eyes and in the views of others. No amount of love and compassion, or obedience to higher authority, can substitute for those values.[29]

When expressed in this way it appears hard to disagree with the proposition that rights talk is an important tool for the marginalised and oppressed to assert their vital interests. Yet in the United States in the late 1970's there emerged, towards the end of a long period of progressive social change, often achieved through litigation, a trenchant critique of using rights to achieve societal improvement.

Rights as legitimating the status quo

Some rights sceptics argue that using a liberal rights regime for social struggle poses many dangers. Critical Legal Studies (CLS) theorists or Crits have argued that legal rights, far from being an important transformative tool for the oppressed, have a strong tendency to legitimate the status quo - making it more difficult to effectively disrupt existing unequal distributions of wealth and power.[30] The Crits launched a frontal attack on liberal legalism in the 1970's and their main target was rights.[31] This group of self-consciously left-wing, primarily academic lawyers, focused their critiques on what had been seen by many on the left as one of the non-controversial bequests of liberal thought and practice - civil and political rights.

Given that the vast bulk of the CLS rights critique concentrates on north American legal culture it is perhaps pertinent to ask why CLS insights might be relevant to the new South Africa.[32]. Nonetheless the particular legal character of much neo-liberal inspired developmental programs under the auspices of the World Bank make the

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[29] Joel Feinberg, quoted in Shue, H., *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, University of Princeton, 1980, p. 14 - 15.

[30] For a comparative assessment of these arguments in the United States see Crenshaw, K., "Were the critics right about rights? Reassessing the American debate about rights in the post-reform era," in Mamdani, M., *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture*, Cape Town, 2000, 61.

[31] A full history of the movement is yet to be written. The best brief historical summary can be found in Davies, M., *Asking the Law Question: The Dissolution of Legal Theory*, Law Book, 2nd Edition, 2002. The precise fate of CLS is unclear. Some argue that the insights of CLS have been incorporated into the legal academy with barely a missed beat in the essentially conservative rhythm of legal pedagogy. Others, no less pessimistically, argue that the Crits far from being mainstreamed are marginalised, occupying a radical and somewhat precarious position on the edge of mainstream legal thought and practice. Still others lament the success the Crits have had in politicizing judicial practice see Campbell, Tom, D., 'Legal Positivism and Political Power', in Vincent, A., (Ed) *Political Theory, Tradition and Diversity*, Cambridge University Press 1997.

[32] Karl Klare, a founding father of U.S. CLS, has written specifically on South African legal culture see "Legal Culture and Transformative Constitutionalism", *South African Journal of Human Rights*, 1998 14, 146 - 188. Alan C. Hutchinson whose work is almost wholly focussed on Canadian jurisprudence, nonetheless looks to South Africa as being an important testing ground for his theories see the Preface to his book, *Waiting for Coraf: A Critique of Law and Rights*.

work of the Crits very relevant to developmental questions surrounding basic infrastructure. The restructuring of third world economies to more faithfully resemble a *particular* vision, a vision derived from wealthy countries' market based economic reforms adopted from the mid 1970's onwards, continues apace in the developing world. At the heart of that restructuring, from the lofty ideals of constitutions to the mundane delegated legislation setting national water tariff standards, is the law. As Kerry Rittich puts it;

> There are powerful claims made in the name of law and myriad functions that law now performs in the current global economic and political transformation. Within international financial and development institutions, law and legal discourse have come to play a particularly important role in the representation and legitimation of reforms. As development discourse becomes legalized, many of the institutional and value choices that market reform and development projects entail become transmuted or disappear from view; in the process, reforms lose their conflictual character and instead appear necessary or neutral.[33]

The adoption of the Bill of Rights by the South African Government to some extent appealed to international norms of good governance promoted by the World Bank and others.[34] The legal restructuring of water and electricity sectors are made in the same name of securing international legitimacy in the eyes of international investors. Regulatory reform to promote private investment in basic infrastructure services has been a prime focus of the World Banks program of reform.[35] The Critical Legal deconstruction of claims to necessity, and naturalness of the liberal legal order, the politics inherent in judicial review of legislation may provide some insight into the neo-liberal project.

The indeterminacy of rights

To the Crits the fundamental indeterminacy of legal rights means that there is little reason to suggest that they inherently favour the poor and oppressed as is often assumed by progressive legal practitioners. Indeterminacy implies that using the same legal materials it is possible to come to opposite conclusions.

The indeterminacy of law and rights expresses itself commonly in two ways.[36] The first emerges because rights are fundamental but not absolute. An individual's legitimate rights must often be balanced against competing social values or what is most often termed "the public interest". This balancing is an imprecise art in most

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[33] This was from a review of Duncan Kennedy's *Critique of Adjudication*, "Who's Afraid of the *Critique of Adjudication*?: Tracing the Discourse of Law In Development." *Cardozo Law Review*, 2001, Vol. 22:929 at 931.

[34] Klug, H. *Constituting Democracy: Law, Globalism and South African Political Reconstruction*, Cambridge University Press, 2000, p. 48.

[35] The World Bank since the 1960's has reduced its direct infrastructure lending from ¾ of all bank lending to 1/3 in the 1990's. "…the bank now focuses its efforts on facilitating the environment for improvements in infrastructure through regulatory reform." See World Bank *A Case for Aid: Building a Consensus for Assistance*, Washington, 2002, p. 46.

[36] On their malleability see Hutchinson, A., *Waiting for Coraf: A Critique of Law and Rights*, 1995, p.39. The canonical text for the following summary of CLS position on rights is Tushnet, M., "An Essay on Rights" 62, *Texas Law Review*, May 1363 – 1403, (1984). The alienation critique of rights, which never gained the acceptance of the indeterminacy critique within CLS, is not dealt with here see for example Gabel, P., "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves", *Texas Law Review*, May 1563 – 1599, (1984) and also his much more approachable "Law and Hierarchy" *Tikkun, March/April 2004* www.tikkun.org/magazine *accessed 24/11/2004*.

complex policy areas making it very difficult for any clearly "right" answer to be found in the legal materials themselves. When rights conflict with the public interest judges must inevitably engage in open ended policy debate in an attempt to resolve the conflict. Decisions in these cases appear highly political despite attempts to cloak them in objective legal language.[37]

For the "progressive realisation" of socio-economic rights contained in the Bill of Rights this balancing is formally included via the concept of "*reasonable* legislative and other measures". The "reasonableness" of the state's interventions in a particular socio-economic field is further constrained by the need to work within "*available resources*". These limitations demand the use of complex policy considerations to decide if the government's breach of a socio-economic right is justifiable in the circumstances.

Secondly, two different legal rights can be invoked to justify very different outcomes *and* there is no way of authoritatively, by the use of legal reasoning alone, choosing between them. The most common example given in the literature is the right to property and the right to free speech.[38] Activists can be prevented from distributing political leaflets within a shopping mall on the basis that as they are on private property. Activists alternatively can argue that the right to freedom of speech means that they must be allowed to distribute their leaflets. The Crits when analysing the case law argue that legally there cannot be a "right" answer to resolving the conflict.[39] While making it clear that they identify with the activists the Crits nonetheless point to the meaninglessness of the rights justification as a technique to resolve the dispute in a *neutral* and *objective* manner.

To deconstruct only one side of the debate: how "private" is private property given, once the mall owner decides to exclude the activists, the owner must rely on the police, the courts via injunctions and fines and ultimately the prison system to enforce that exclusion. Public power is very much implicated in maintaining the sanctity of "private" property. Secondly, shopping malls while undeniably private property in a legal sense, must of necessity, if they are to be of any economic value to their owners, encourage and entice swarms of strangers with diverse political, religious and social preferences, to traipse through their doors. Given the diversity of the citizenry attending shopping malls it is unclear on what basis they would need to be protected from the activist's political propaganda. Private property, in this instance, is a very public space indeed. The basis for excluding the activists, private property rights, becomes largely meaningless with a moment's reflection. The assertion of a right in this dispute was a fairly vacuous statement that solved nothing.

An analysis of the free speech shopping mall court decisions in United States in the 1960's and 70's found a maze of contradictory legal justifications and outcomes which alternatively favoured the mall owners or the activists.[40] But whatever the

[37] See Hutchinson, *Ibid*, p. 50 - 51.
[38] The following is adapted from Gordon, R., "Law and Ideology", *Tikkun*, 3:1, 1988 excerpted in Freeman, M.D. A.,(Ed) *Lloyd's Introduction to Jurisprudence*, London, 1994, 950 at 954
[39] For a more detailed discussion of US cases in this area see Kairys, D. "Legal Reasoning", in Kairys (ed.), *The Politics of Law*, Pantheon, 1982.
[40] Kairys, D. "Legal Reasoning", in Kairys (ed.), *The Politics of Law*, Pantheon, 1982.

outcome in any particular case the Crits argued that legal reasoning that ostensibly resolved each dispute, only served to hide the deeply political nature of the decision.

Whether it was rights in conflict or a right in conflict with the "public interest" CLS scholars argued that the judiciary's claim they could resolve these disputes in a neutral, objective way through the vehicle of autonomous legal reasoning was a sham. As Mark Kelman argues "… to look to apolitical courts to protect our "rights" is chimerical: judges are just actors with some command over state force and socially acceptable chatter; they are not acting in some privileged domain of reason that can or ought to be protected from openly political conversation."[41] In denying the political in their judgements they attempt to perpetuate a belief in the system as fundamentally just.[42] Appeals to an ostensibly apolitical judiciary to adjudicate a rights dispute furthermore legitimises the status quo and limits the possibility of redistributing wealth and power.[43]

The indeterminacy critique of rights raises a considerable point of tension in CLS writing. While often arguing the outcomes of any particular legal argument is indeterminate (a case can come out either way) they also argue that the legal system has a "tilt" which tends to favor the interests of the already powerful.[44] This latter assertion must, however, assume a minimum amount of determinacy. Without this determinacy the systematic bias, which they allege is at the core of liberal legalism, would be impossible.

The CLS critique of rights has a strong "false consciousness" component to it. They allege that activists, through the adoption of "legal" ways of thinking to achieve political ends, will ultimately frustrate those very ends. By characterising real people as "rights bearing citizens who are allowed to do this or that by something called the state" activists are being co-opted by the legal system. This abstraction from "reality" causes activists and their supporters to accept the legitimacy of judicial decisions and a *liberal* legal order, which is skewed against them and the people they seek to represent.[45] The "legalisation" of political demands offers only false hopes to the marginalised and excluded.

The sense that rights are ambiguous champions of the poor and the oppressed was not, however, absent from SECC activists minds. Some were well aware of the way rights could easily justify two contradictory outcomes. In the case discussed below by the activist, the right in question was the right to march on Human Rights Day 2002 to

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[41] In his *A Guide to Critical Legal Studies*, Harvard University Press, 1987 p. 200.

[42] Some Crits see this as an aspect of all legal reasoning not just rights talk -"Legal Reasoning is an inherently repressive form of interpretive thought which limits our comprehension of the social world and its possibilities." See Gabel, P., "Reification in Legal Reasoning", *Research in Law and Sociology*, Vol. 3, 1980 at 25.

[43] See Kennedy, D., *A Critique of Adjudication*, Harvard University Press, 1997, and a South African dialogue with Kennedy's arguments see Davis, D., "Duncan Kennedy's A Critique of Adjudication.": A challenge to the 'Business as Usual' Approach of South African Lawyers", *South African Law Journal*, 2000, 697.

[44] Fischl, R., "Its conflict all the way down", 22 *Cardozo Law Review*, 2001, 773 at 777 - 778.

[45] Gabel, P., & Kennedy, D., "Roll Over Beethoven", 36 *Stanford Law Review*, 1984, No. 1, 1 at 26. This must be distinguished from a traditional Marxist reading of the law, which views the unbalanced nature of liberal legal systems as resulting from underlying relations of production. Crits tend to take the law very seriously, rather than as simply bourgeois mystification, or entirely superstructural to the economic base which *actually* drives society.

claim their socio-economic rights to water, electricity and housing. The activist recounts a conversation he had with a metropolitan policeman the morning of the Human Rights day march when the SECC/APF were informed by police that they had been refused permission to march. The policeman was putting the position that the protestors would breach the laws of public assembly regulating the right to march and as such were outside the Constitution. The protesters responded in the following way;

> But we said that…whatever we are doing we (are) still hiding behind the Constitution. Because it give us the right to march. It give us the right to protest. It give us the right to picket. So are you trying to deprive or deny our rights as an individual?
>
> He said;
>
> "No"
>
> But whatever he said, he said he won't change (his view that they shouldn't march).
>
> That's when I started realising that…they used him as a weapon to go and tell the community, or the protestors or even the drivers (that the SECC/APF could not march). Then they started throwing the very same spears *to u*s (that we use) when we march for our rights.
>
> The Constitution doesn't address my problems neither as an individual. But it will only serve those who can afford (that is) the bourgeoisie.[46]

The respondent's use of the spear, as a metaphor for the constitutional right to freedom of assembly, is instructive. Through this image he highlights the often-ambiguous nature of rights as perceived by a community activist. The policeman justifies the blocking of the SECC/APF march to proclaim their socio-economic rights on the basis of the Constitution as operationalised through public order legislation. The SECC try and justify their alleged breach of the law, by marching when permission has not been granted, by appeal directly to the Constitution. The statement ends with the pessimistic conclusion that given the uneven distribution of wealth in South Africa formal rights may matter little. The respondent appears to be implying that given the resources of the policeman the SECC's challenge through the courts to re-inforce the SECC's understanding of a right to march would be very unlikely to succeed.

One possible end-point of the Crits thesis is that constitutional rights are useless and in some instances positively dangerous to those activists interested in transforming society.[47] Indeterminacy means in practice that, at best, rights can only provide temporary relief to the poor and their legal allies.[48] Rights indeterminacy is crippling to those who hope to build a progressive, redistributive politics. Rights can mean all things to all people but the dominant social groups only recognize those versions of rights that protect and perpetuate their interests. Alternative constructions of rights, which challenge established authority are marginalised and most often recognised only in peripheral cases. This is not to say that, often after heroic and lengthy

[46] Inteview with Bobo Makhoba, 22 March 2002.
[47] A position stated most forcefully in Tushnet, M., "An Essay on Rights" 62 *Texas Law Review*, May 1363 – 1403, 1984.
[48] Ibid, 1371. I will argue against this concept of the temporary nature of rights in the next chapter.

struggles, some meaningful change hasn't been achieved through the language of rights but that more could be achieved if the mystifying language of rights is rejected in favour of the language of needs.

The Crits seminal articles of the mid-1970's and early 1980's came at the height of the liberal reformist U.S. Supreme Court. This was a period when legal decisions emanating from the higher courts appeared to have a largely progressive intent. In fact a major focus of U.S. legal sociology in the 1960's and 70's was to demonstrate how the impressive victories won by civil rights activists and their lawyers through litigation in U.S. courts weren't being implemented in practice.[49] The Crits, partially in response to what they saw as the overly empirical bias of this sociological fieldwork, withdrew into the law library, opened the casebook and set about problematising the civil rights legal decisions and liberal legalism itself.[50] At the time the Crits seemed strangely out of step with the tide of history. Rights discourse it appeared really could make a difference. It was only when the tide turned against progressive court based law reform, as occurred within the United States from the 1980's on, that the Crit's indeterminacy critique seemed to make more sense.[51]

One of the core arguments of the Crits was that what happened in the law courts went a good way to explaining why so many people voluntarily accepted a deeply unjust social order. For example Gabel and Harris, view that the 'legal system works at many different levels to shape popular consciousness towards accepting the legitimacy of the status quo…".[52] Legal sociologists countered that the rhetoric of court judgements, particularly appellate courts the consistent focus of the Crits, hardly seemed likely to explain popular legal consciousness.[53] People draw their understandings of the law from diverse sources often outside the formal legal system.[54] Appellate decisions are unlikely to seep into popular consciousness and therefore understanding the social implications of rights discourse requires direct observation of how social movements use rights in practice. Activists may be more "critical" in their understandings and use of legal rights than the Crits imagined.

Rights versus needs

The Crits subversive 'trashing' of rights talk was aimed at normalising the concept of access to important resources whether they relate to the ability to participate in political activity through brakes on arbitrary interference by the state or achieving a

[49] A classic application of this type of research in a modern South African context would be to look at the *Grootboom* judgement from the perspective of the litigants and ask why the decision of the Constitutional court took so long to implement.

[50] See generally Trubek, D., "Back to the future: The Short Happy Life Of The Law and Society Movement" 18 *Florida State University Law Journal*, 1, 1990.

[51] Crenshaw, Were the critics right about rights? Op. cit., at 61.

[52] see Gabel, P., Harris, P., 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law', 11 *New York University Review of Law and Social Change*, (1983) 369 at 370 cited in Freeman, M.D.A., Lloyd's, *Introduction to Jurisprudence*, 6th Edition at 944.

[53] Hunt A., *Explorations in Law and Society: Towards a Constitutive Theory of the Law*, Routledge, 1993, pp. 148 – 149. See also Douglas, L. and Sarat, A., "(De)Mythologising Jurisprudence: Speaking the 'Truth' about 'Myth.'" 19, *Law and Social Inquiry*, (1994) 523 at pp. 529 – 530 and for the rebuttal, Kennedy, D., *A Critique of Adjudication*, *Op. Cit.*, pp. 267 – 271.

[54] For example sport, see Fraser, D., "*The man in white is always right": Cricket and the Law*, The Institute of Criminology Monograph Series, No. 4, Sydney, 1993.

certain minimum level of basic services.[55] While the Crits did not focus on socio-economic rights as part of their critique their core arguments can be applied in this context. The process of converting a basic socioeconomic need, such as water or electricity, would be to the Crits more trouble than it is worth. For example electricity is a basic necessity of modern urban existence. To live without electricity would be embarrassing, socially alienating, supremely difficult and most possibly dangerous to ones health. The adoption of rights terminology to justify access to a core minimum of electricity, however, converts the mundane concept of a basic need into a privilege to be *granted* by the judiciary, on their terms, *provided* certain legal conditions are satisfied.

While this view was not at all a feature of the interviews I conducted one activist did reflect briefly on the privileging of the basic requirements of modern life through the use of the language of rights:

> (They are) not only rights. They should be needs. You are talking about basic needs. These things should not be a privilege.[56]

Afro-American and Hispanic scholars in the United States weighed into the debate arguing that whatever their reasons, the Crits attack on legal rights was potentially demobilising for African Americans. Crenshaw noted that:

> In asserting rights, Blacks defied a system that had long determined that Blacks were not and should not be included. Whether or not the extension of these rights has ultimately legitimated the subordinate status of blacks, the use of rights rhetoric was a radical, movement building act.[57]

In particular the call by Crits for the rejection of rights discourse was seen by Critical Race Theorists as an arid claim given an absence of other credible discourses that would enable them to pursue their political goals by alternative means.[58] Rejecting the Crits calls for needs based arguments Patricia J. Williams noted:

> For Blacks, describing needs has been a dismal failure as political activity. It has succeeded only as literary achievement.[59]

For Williams the long history of pointing to the horrible social conditions endured by Black Americans was a demonstrated failure as a political strategy.

The failure of a needs based strategy to provide sufficient legitimation is exemplified in the South African context by an early exchange over the future form of a South African constitutional order. In response to the ANC's *A Bill of Rights for a New South Africa,* the Apartheid government's South African Law Commission report,

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[55] 'Trashing' refers to the critical activity of tearing apart the legal doctrine to demonstrate its incoherence, partiality to established interests and indeterminacy. Detractors while admiring the intellectual virtuosity of the critical project, having pointed to the lack of constructive proposals from the Crits as their Achilles heel (Roberto Unger's work notwithstanding).

[56] Florencia Belvedere, Treasurer, Anti-Privatisation Forum, 6 May 2002.

[57] See Crenshaw, K., "Race, Reform and Retrenchment: Transformation and Legitimation in Anti-discrimination Law", 101 *Harvard Law Review,* 1331, excerpted in Freeman, M.D.A., Lloyd's, *Introduction to Jurisprudence*, 6th Edition at 1229.

[58] Crenshaw, Were the critics right about rights? Op. cit.,, at 70.

[59] *The Alchemy of Race and Rights, Diary of a Law Professor*, Harvard University Press, 1991, p. 151.

Group and Human Rights, argued that rights did not exist outside of state law, and that human rights must not be confused with human needs.[60] The Law Commission Report's conception of human rights was narrowly focused on well-established political and civil rights contained in international instruments and aging constitutions of other countries.[61]

Given the uncompromising tenor of the Law Commission's response it would have appeared likely that a needs based argument would almost always be guaranteed to fail when it conflicted with a "right". The only possible alternative was to frame key social needs in the language of rights and push for them to be included in the new Constitution. This logic goes some way to explain the inclusion of the key socio-economic rights of the final constitution.

Given these realities the law may offer some hope. By denying the existence of politics in legal decision making, in part to legitimate 'the system', this paradoxically has the effect of opening up a "political space" which can provide considerable room for activists and their lawyers to push forward a progressive agenda.

To be effective in achieving the legitimation of liberal capitalism the law must be something more than mystification or a sham. If the law is obviously partial to the dominant elites interests "then it will mask nothing, legitimize nothing, contribute nothing to the ruling classes hegemony."[62] It is then this need for legitimation, which leads to the law being promoted as a site of independent, autonomous legal reasoning. It is this very characteristic then which makes the law so attractive to activists and lawyers who may harbour deeply felt antipathies to the liberal capitalist social system they inhabit. One influential Crit, Robert Gordon, put it in this way:

> So, since the legal system must at least appear universal, it must operate to some extent independently (or with "relative autonomy," as the saying goes) from concrete economic interests or social classes. And this need for legitimacy is what makes it possible for other classes to use the system against itself, and try and trap it and make good on its utopian promises. Such promises may therefore become rallying points for organisation, so that the state and law become not only instruments of class domination but "arenas of class struggle".[63]

The legal system, in this formulation, then becomes very useful for radicals in social movements trying to further their immediate interests. Rights have more discursive power than is credited by the rights sceptics. This is particularly the case if those interests can be framed in such a way as to heighten contradictions between the deeply needed legitimation required by liberal capitalism as against the obviously selfish material interests of dominant economic classes.

But the appeal to the legal system by activists who adopt this 'strategic' view of the law, is bitter sweet for there is a realisation that the very act of successfully

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[60] See Channock, M., "A Post-Calvinist Catechism or a Post-Communist Manifesto? Intersecting Narratives in the South African Bill of Rights Debate", in Alston, P., *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Oxford University Press, 1999, p. 415.
[61] *Ibid*
[62] E.P. Thompson, *Whigs and Hunters*, Penguin, 1975, quoted in Freeman, M.D.A., *Lloyd's Introduction to Jurisprudence*, London, 1994, p. 908.
[63] Drawing on E. P. Thompson, footnotes omitted, "New Developments in Legal Theory", in Kairys, D., *The Politics of Law*, Pantheon, 1982, 281 at 286.

challenging "illegitimate" power through the courts may lead to a further entrenchment of a system which they fundamentally oppose.[64] The judiciary by strategic recognition of peripheral 'rights' ensures the longer-term viability of a system designed for capital accumulation and not the rational maximisation of social welfare.

The radical activist seeking to transcend this dilemma faces some very difficult choices. Assertion that liberal rights are a sham runs the very real risk of undermining their community base as potential supporters notice the very real opportunities for change available to other more litigation minded groups. SECC and APF activists were acutely aware of the advances being made by the Treatment Actions Campaign through their use of strategic litigation to gain access to life saving medicines.[65] The TAC's work was viewed positively as a good example, which arguably could be adopted by the SECC.[66] I think there was also a contradictory feeling, not very clearly articulated, that too hearty embrace of a legal rights strategy would appear to endorse the 'justness' of the very system that they so fundamentally opposed.[67]

Radicals then, to paraphrase the words of Hugh Collins, are asked to walk a tightrope. On one side it is possible to concede too much independence to the law and the judiciary so that it merges into the liberal vision of judges as neutral arbiters of disputes between citizens and government. On the other side there lies the pitfall of diminishing the degree of autonomy available to the judiciary so that an insistence upon the directness of class rule is belied by the experience of successful challenges to the exercise of economic might.[68] This dilemma is perhaps most difficult for those activists who see some kind of revolutionary decisive break with capitalist modes of production as the preferred model for progressive change. Awareness of the problem does not mean resolution.[69]

It was this dilemma that some SECC/APF activists faintly perceived when appealing to the Bill of Rights. For example Wiseman Hamilton of the APF put forward a neo-Marxist critique of constitutional litigation at interview. He argued that the Treatment Action Campaign were likely to get a positive outcome through the courts precisely because the judiciary would seek to maintain their image (falsely in his view) as a neutral arbiter between contending class forces.[70]

An important question is what are the alternatives to rights discourse? Even if rights talk advantages the already powerful would there be greater advantages accruing to progressives if they jettisoned rights and litigation as a way of realising political demands? Capital is hardly going to decamp from the terrain of rights discourse along with the rights sceptical left. What are the alternatives, which are culturally appropriate that provide the same mobilising potential as rights? Outside of the revolutionary situation when economic collapse pushes an angry populace onto the streets, to the revolutionary socialist, liberal capitalism appears to offer very few

[64] Ibid.
[65] Wiseman Hamilton, 6 March 2002.
[66] John Appolis at interview saw the ability of the Treatment Action Coalition to get support from institutions through appeal to the courts as something to emulate. Interview - 12 March 2002.
[67] This came across most strongly in the interview with Trevor Ngwane, 17th October 2001.
[68] Collins, H., *Marxism and Law*, Oxford, 1982, p. 129.
[69] For a Marxist understanding of this dilemma Collins, Ibid, p. 128 – 130.
[70] Wiseman Hamilton, 6 March 2002.

effective alternatives to the hard slog of coalition building, defensive litigation to protect hard won gains and the mobilising of communities in certain circumstances using the law as a rallying tool around peoples direct material interests.

This chapter draws on the rich vein of progressive scholarship that arose in response to the critique of rights. The writings of the critical race theorists such as Patricia J. Williams, Kimberle Crenshaw and the rights and social movement scholars such as Alan Hunt and Michael McCann subjected the Crits message to considerable criticism. Through this dialogue there emerged a deeper understanding of the important uses that rights can have for those marginalised by liberal capitalism.

How was the Bill of Rights used by the SECC and the APF?

The fact that rights talks is perceived as compelling by SECC and APF activists can be seen in the almost ubiquitous use of the slogan "Electricity is a right not a privilege" in campaign material. As stated by Trevor Ngwane, SECC Chairperson;

> The SECC is opposed to the privatisation and commodification of all basic services. Its slogan is: Electricity is a right not a privilege.[71]

The development of a legal strategy was an evolving process. The question of what role the law and the Bill of Rights would play in the struggle for basic electricity for Soweto began very soon after the SECC's formation.

The origins of rights talk in the SECC

The following provides some evidence of a conscious strategy to legalise political aims. The SECC was formed from different concerned residents groups at a meeting held at Ipelegeng in May 2000.[72] The Legal sub-committee of the SECC, formed in early 2001, was tasked with incorporating the right to electricity in the Constitution.[73] It appears that this sub-committee met only sporadically in 2001 and 2002, largely in response to pressing outside events. The main focus of this group was getting legal protection for SECC activists who were subject to criminal proceedings as a result of their mass actions, illegal reconnections and other defiance campaigns.

An analysis of SECC and APF documents reveals an uneven development of a legal strategy probably contingent on other factors such as time available to look into the issue, access to legal advice and what other campaign related issues were pressing at the time, including imprisonment of their members for involvement in protest activities. Much activity of the Legal Sub-committee was the result of the need to defend those who were arrested for illegal reconnections.

As early as 6 months after the formation of the SECC there is written evidence of attempts to enlist the Constitution as a way of furthering the goals of the organisation;

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[71] SECC, press release undated late April 2002,"Militant Soweto organisation plans the way forward".
[72] Bongani Lubisi "Report on the Organizing Committee and other SECC sub committees", presented to the Soweto Electricity Crisis Committee, Diepkloof Community Centre, March 2nd 2002.
[73] See for example the Draft for Discussion, Constitution of the SECC, dated March 1, 2002 which states at Clause 7.2 – "The job of the SECC Sub-committee is to take care of all legal matters in the SECC, in particular, cases against our comrades and seeking to include access to electricity in the country's constitution as a right".

> Actions against ESKOM will be two pronged, mobilisation of the community backed by legal support. Though it is not included in the constitution as a basic need, **electricity is the measure to development and improvement to the health of society.**[74]

In this article, published in late 2000, electricity is demanded on the basis of its positive social consequences not as of right. The SECC's political demands are neither couched as a moral right nor as a legal right. The subsequently much emphasised implied constitutional right claim is not asserted here. The emphasis on the health of society perhaps provides an inkling of later attempts to link an implied constitutional rights claim to the right to a healthy environment contained in the Bill of Rights.[75]

Although the article admits that electricity is not in the Constitution as a basic need it nevertheless goes on to invoke the name of the Constitutional watchdog, the Human Right Commission, as a potential collaborator in assisting the SECC in its struggle against Eskom.

Workshops conducted by the Alternative Information Development Centre (AIDC) with the SECC raised the issue of the Constitution. It was in these workshops that the initial strategies towards how the SECC would relate to the Bill of Rights were worked out. The SECC committed itself to getting electricity included in the Bill of Rights. They were however faced with the fact that currently it was not in the Bill of Rights. These workshops developed the argument that the right to electricity could be implied from the Bill of Rights from existing provisions.[76]

An e-mail sent to a group called the Water Legal Task Team[77] by Sean Flynn (around February 16 2001) set out the possible issues for legal action and discussed the role of legal action in achieving the right to water and electricity. The e-mail under the subheading "The Role of Law" stated:

> There are a number of campaigns around the country that are challenging each piece of the neo-liberal policy prescription from the transformational viewpoint. Legal victories may help by establishing rules that make aspects of the neo-liberal agenda (1) illegal, or (2) much harder to implement (e.g. because of procedural barriers). Or (3) legal struggle might help the more particular struggles by drawing attention to the moral campaign (e.g. as is happening in the pharmaceuticals campaign), translating the demands into legal language that may be more persuasive to government officials, etc.

The legal strategy and the research were discussed in SECC meetings. On May 5 2001 Mr Flynn presented preliminary research into the constitutional source of a right

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[74] Huma, Boitumelo, SECC, "*Soweto electricity cut offs:* Attacking working class rights to a decent life", *Anti-Privatisation Monitor*, No: 2 November/December 2000, p. 7 – Bolding and underlining included in the document.

[75] Section 24 (a). Everyone has the right to an environment that is not harmful to their health or well-being.

[76] Trevor Ngwane, interview with the author, 17th October 2001.

[77] This was an informal group that met a 4-5 times in the first half of 2001. It included representatives from the Legal Resources Centre, the Mandela Institute at Witwatersrand University, the SECC, and Sean Flynn, from the Municipal Services Project.

to electricity to a mass meeting of the SECC in Soweto.[78] An activist characterised the seminar in the following way:

> He (Sean Flynn) introduced us to the concept in a workshop on how we can claim our rights. May 5 (2001). That was the first real attempt to show people what the Bill of Rights can do. On the 5th it was packed. The whole of Soweto was in that hall. You could feel that some of the people were not aware of some of the things Sean was raising.[79]

In a meeting I attended four weeks later there was still much interest in how to get a legal case underway. One method revolved around the distribution of "dispute forms", which would be filled out by Sowetan households. Sowetans' grievances with Eskom would be catalogued in a methodical way and would hopefully form the basis of a future legal action through identifying suitable individuals for the expected constitutional litigation. The form focussed on procedural issues relating to cut offs, including failure of Eskom to provide sufficient notice. Also where notice was not enough information was provided on how to dispute the contested bill. These were some of the main concerns of the community regarding the process of cut-offs. Sean Flynn was the legal expert and there were many questions directed to him by the SECC's constituency on the practicalities of building a legal case against Eskom to claim their right to electricity.[80] The legal claims forms were seen, not only as a useful tool for a possible legal action, but as a way of mobilising people to get involved with the SECC.[81] At the very least it would provide a list of potential supporters.

The legal adviser's role was to provide initial legal research into the right to electricity. Flynn also provided a link for SECC to other legal organisations, such as the Legal Resources Centre, the Mandela Institute based at the University of Witwatersrand's law school, organisations who might be able to provide the resources for a constitutional challenge.

The existence of this legal discussion confirms other research findings of the often-crucial roles played by lawyers from the very earliest existence of a social movement.[82] But Sean Flynn's role should not be overstated. There was considerable independent analysis of the Bill of Rights in the SECC.[83] Trevor Ngwane, below talks of the development of a political strategy with respect to the electricity cut offs:

> I remember clearly, one meeting when we were a still a small group. One lady was tasked to find out about the Constitution and find out more about this. She wrote one page where she showed what the Constitution says. And in the discussion, which ensued it was said that we should fight to have electricity specifically included in the Constitution. In a different context, during the local government election campaign, some comrade, part of the movement, when we were Campaign Against Neo-liberalism in SA. He spoke and said electricity is

[78] This research is contained in an unpublished paper Sean Flynn, "Rights to Essential Services – A Public-Private Continuum for Essential Service Rules", on file with the Municipal Services Project, 2003.
[79] Interview with Virginia Setshadi, 19/10/2001.
[80] SECC, meeting Friday 1 June 2001, Alternative Information Development Centre, 3rd Floor Cosatu House.
[81] Private communication Sean Flynn.
[82] McCann, *Rights at Work*, p. 48.
[83] Trevor Ngwane, interview with the author, 17th October 2001.

> written in the Constitution as a right. Later someone said "It's not true that its written". We were forced to actually go and study it and find appropriate, more accurate methods of introducing the question of the Constitution. This happened quite early.[84]

The central rights claim of the SECC was the implied constitutional right to electricity based on rights such as life, dignity, a healthy environment and housing. This argument while forming part of the research paper prepared for the Municipal Services Project was adopted strongly by the SECC and became a point often raised in meetings that I attended.[85] It is not difficult to see constitutional rights in a constitutional state might be a point of departure for social activists.

The slogan "Electricity is a right not a privilege" which adorns most of the SECC's campaign material such as leaflets, posters and banners came out of a dialogue with the service provider Eskom in mid 2001.[86] An example of this dialogue can be seen in the SECC's response to an article in the *Star* in which electricity was characterised as a "privilege not a right" by an Eskom spokesperson.[87] The SECC released a press statement, on the day this article was published in *The Star*, which stated:

> 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.[88]

The Bill of Rights was also used informally by activists in the early stages of the campaign to gain access to meetings. I asked one activist whether the Bill of Rights played a role in developing the SECC's strategies:

> It did play a role, a great deal, because in some areas when we were having meetings a councillor would come and say I am a councillor for this Ward. Where did you get permission you have no right to be holding meetings in my area without my permission. And we would take out the Bill of Rights say what does it say and quote from the Bill of Rights. "We have a right to meet here. We have a right to be with these people and these people have a right to express whatever emotions they have without having to ask permission from you." So whilst we were still having a lot of hostilities from councillors in most areas Virginia and I would carry a copy of the Constitution in our bags.[89]

This suggests that the Bill of Rights, civil and political rights clauses were being used by activists to simply raise issues in open forums about electricity and water service provision.

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[84] Trevor Ngwane, interview with the author, 17th October 2001. Ngwane ran as an independent in the local government elections at the end of 2000.
[85] Sean Flynn, "Rights to Essential Services: A Public Private Continuum for Essential Service Rules", unpublished paper on file the Municipal Services Project, 2003.
[86] Personal communication, Trevor Ngwane, July 2001(?). This understanding of the origins of the slogan was not mentioned subsequently in a formal interview when I asked him about the origins of the phrase electricity is a right not a privilege. However the following textual evidence suggest the origins of the phrase may lie in a dialogue conducted in early June 2001.
[87] Anna Cox, "Sowetans to defy Eskom over cutoffs", *The Star*, 4 June 2001, p. 1 and 8. The spokesperson was in a later article identified as Angela Dubini.
[88] Press release dated 4 June 2001 Time: 14:00 hours in my possession.
[89] Interview with Dudu Mphenyeke, 1st November 2001.

Mobilisation and litigation

The question of whether the SECC should proceed with litigation on the right to electricity and later water was raised at meetings that I attended of the SECC and the APF. Lack of access to legal resources, not least as a result of the pro-bono nature of the commitment, was one part of the reason why this never materialised until the very end of this study. Other reasons included a dispute amongst those lawyers interested in the work of the SECC over which basic service, water or electricity, would provide the most suitable basis for a test case. Given electricity was not an explicit provision in the Bill of Rights some on the team of lawyers felt that this was an inappropriate initial legal action.[90] One potential justification for this was the possibility of conservative lower court judges ruling against a constitutional challenge and the organisation suffering an award of costs against it.[91] In this context it would be assumed that the resources of a community organisation such as the SECC or the APF would soon be exhausted and they would fold in the event of an adverse judgement in which costs were awarded against them. This strategic dispute was never really resolved as Sean Flynn left for the United States in mid 2001. In effect the Water Legal Task Team disbanded in May 2001. The Centre for Applied Legal Studies (CALS) was approached in an entirely separate capacity by the SECC. [92] CALS subsequently took over the processes of developing a case against Eskom with respect to electricity.

The costs of litigation can therefore be seen as a factor, which may have delayed a constitutional legal case on electricity. This barrier to social reform through the law that the cost of litigation is a well rehearsed in the literature.[93] Certainly there was a view from one union activist that I spoke to that constitutional litigation to achieve access to basic services was, indeed a "hollow hope" and should not be pursued. This was primarily on the basis of the cost and level of organisation needed to run a constitutional case on the right to electricity.[94] The point needs to be made that considerable funding for this kind of litigation is available from international donors acting through public interest legal organisations.

Critics of the hope that litigation can assist in bringing about social change sometimes argue that litigation is a distraction from the "real" business of political mobilisation. Gerald Rosenberg put it in this way;

> Social reformers, with limited resources, forgo other options when they elect to litigate. Those options are mainly political and involve mobilising citizens to participate more effectively.[95]

[90] Presentation given by Sean Flynn, to SECC at meeting Friday 1 June 2001, Alternative Information Development Centre offices, 3rd Floor Cosatu House.
[91] There were differing opinions as to how likely such a scenario was. Theunis Roux, who was not involved in these initial discussions thought it unlikely but nonetheless a possibility.
[92] A SECC legal committee meeting on 18 October 2001 attended by CALS representative Theunis Roux who discussed various funding options for a legal case on the basis of electricity.
[93] Rosenberg, G. N., *The Hollow Hope; can courts bring about social change*, University of Chicago, 1991, p. 343.
[94] Anna Weekes, South African Municipal Services Union, Cape Town, Athlone, SAMWU offices, 4th February 2002.
[95] Rosenberg, Op. cit., p. 343.

Without any litigation launched on behalf of the SECC this assertion is impossible to prove or disprove. Certainly it was only rarely in the activities of the SECC where it was argued that litigation and political mobilisation were necessarily mutually exclusive.[96] It was not a dominant concern in the interviews that I conducted. The fact that no litigation has been launched by the SECC almost 5 years after its formation clearly suggests that while rights may be important to the activist's, litigation, as a way of enforcing these rights against the state, clearly is not.

When I asked activists about the possible negative consequences of litigation most saw constitutional litigation as a positive opportunity for the SECC and the APF in terms of mass mobilisation. A number of respondents saw explicitly the synergy that would be generated by a constitutional case for the SECC and the APF. Typical is this response from the Chair of the APF, John Appolis;

> that constitutional legal approach… will 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. Clearly we will then have education around the issue of the Bill of Rights, [and explain] why we think this is a violation of the Bill of Rights. [For example] the issue of water cut – offs, pre-paid metres. So we will have a whole process of awareness raising, consciousness raising around the issue of the Bill of Rights.

Rather than being a distraction the constitutional approach is viewed, regardless of the outcome, as a potential way to raise the public's consciousness and the organisation's profile in the community and also provide a national stage in which to highlight the issues of basic services. When the legal case is launched by CALS much groundwork exists in linking the achievement of rights to mass-mobilisation techniques.

Geoff Budlender, a prominent South African public interest lawyer from the Legal Resources Centre who was also a member of the "Water Legal Task Team", commented on the success of the Treatment Action Campaign's litigation.[97] He noted the success of the TAC's case was dependent on the ability of civil society to enforce the court's judgement. The TAC did this through the building of strong alliances with the trade unions, churches and the media. He contrasted this with the failure of the Grootboom litigation's legal success to be transferred into real results for the community, which two years after the judgement still had no access to housing.[98]

A legal strategy linked to mass mobilisation does not necessarily revolve around litigation. In one of the earliest articles by the SECC, the SECC's mass mobilisation is explicitly connected to working with the Human Rights Commission (HRC).[99] The HRC as an independent watchdog whose role is to monitor the government's fulfilment of its constitutional commitments would seem an important organisation to provide assistance to organisations such as the SECC.[100] The SECC had hoped to get

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[96] See below

[97] *Mail & Guardian,* July 12 – 18 2002, Geoff Budlender, "A paper dog with real teeth", p. 17.

[98] See also *Financial Mail,* July 5 2002 "Low cost housing: Nought For Their Efforts", p. 16-17.

[99] See quote from Huma, Boitumelo, SECC, "*Soweto electricity cut offs:* Attacking working class rights to a decent life", *Anti-Privatisation Monitor,* No: 2 November/December 2000, p. 7 see previously – The origins rights talk in the SECC.

[100] See Leibenberg, S., for the various possible roles that the HRC could play including investigations and possible litigation "Violations of Socio-Economic Rights: The role of the South African Human

the HRC to meet with the National Electricity Regulator surrounding affordability and customer service issues in early 2001. The main reason put forward by the APF for the failure of the HRC to engage with the SECC over Eskom's practices appears to be one of resources, not allowing the HRC to effectively fulfil its role as an independent watchdog of government. A point echoed in the HRC's fifth annual report to parliament when it warned that underfunding had robbed it of the independence it needed to discharge its obligations.[101] Mr John Appolis, Chair of the APF, explained the failure of the SECC and the HRC to work together in the following terms:

> we (the APF) and particularly the SECC have made many attempts to draw in and involve the HRC in taking up some of these issues. But there hasn't been any vigorous attempt on their part in strengthening the communities in terms of holding the government accountable through that process. So we have tried to use those institutions to assist us in keeping the government accountable but there seems to be no co-operation from, in particular the HRC, regarding those issues. We thought that those are important institutions that can assist in the facilitation of mobilisation and in raising issues. But they are not very effective at all.[102]

Appolis saw that the SECC and the APF needed access to institutions such as the HRC to further their cause for affordable electricity and basic services. As discussed previously the SECC has approached various legal providers including Wits law Centre, Legal Resources Centre and Centre for Applied Legal Studies. Wits Law Centre has been used as a pro-bono service for legal advice (but not representation) when members of the SECC are arrested for their protest and direct action activities.

One respondent, when asked whether he had attended workshops run by the SECC on the Constitution, stated;

> No. But I read the Constitution alone and try and discuss with the Constitution alone and try and discuss with some of the comrades so that we can analyse it. So that I can ask some questions from them so I can make clear to myself what is in the Constitution.

There is some evidence that the focus of some key activists was not on litigating rights through the courts. Later when asked about whether he had any contact with lawyers he quickly responded; "I just focus on mobilising. I usually preach about the Bill of Rights." This respondent, who was head of the organising committee for the SECC in Soweto, emphasised the utility of the Bill of Rights as a mode of attracting commitment from potential members and sympathisers. This commitment by the activist to rights talk was developed largely independently from formal legal advice and direct interventions by lawyers or through attendance at seminars run by the Alternative Information Development Centre.

Some of the early involvement by lawyers was however a significant factor in developing a rights consciousness amongst activists. Upon asking whether the idea of

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Commission", in Andrews, P., Ellmann, S., (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, Witwatersrand University Press.

[101] *Pretoria News*, "SAHRC 'robbed of its independence", Tuesday, November 27 2001 p. 5.

[102] Interview with the author John Appolis 12 March 2002. Appolis in referring to plural institutions is referring to the HRC and other institutions created under Chapter 9 of the constitution to monitor the government's performance with respect to its Constitutional obligations.

using rights was the result of internal or external influences to Soweto, Trevor Ngwane, Chair of the SECC put it this way;

> People like Sean (Flynn), myself maybe brought up the issue (of using the Bill of Rights) but with the activists it was the most natural thing in the world to …probably from outside the community. But it found fertile ground with a certain level of activists who thought this was a good thing.[103]

Given the low level of awareness of the Bill of Rights found by other studies in South Africa generally and particularly among the poor, the fact that lawyers and more relevantly activists would be educating people about their rights contained in the constitution and their potential utility for ordinary people should be welcome.

Naming injustice

Rights talk is also giving a framework for defining the struggle for basic services. It assists in identifying an enemy, in this case the government, which is a useful part of subordinate groups' struggles against injustice.[104] Rights talk also assists in naming a long felt injustice "in new more compelling and sensible terms".[105] No where did this come through more clearly than in one of the interviews with a member of the SECC whose main contribution to the SECC was to hold the regular local meetings of the SECC in her home. After a long description of the struggles to afford electricity, after the company in which she was working closed down, I asked her what she understood the SECC slogan "Electricity is a right not a privilege" to mean. She said;

> Before we thought that electricity it's a privilege, we didn't understand that electricity it's our right. Actually, we…all of us in Soweto were in the dark. Point number one…you cannot stay without electricity. You cannot stay without water. So that is our right. To have electricity and the water. Because you cannot survive without all those things.[106]

On a number of occasions activists spoke of the Constitution as a method through which they came to realise the injustice of their direct experiences.

One respondent when asked if the workshops he attended run by the SECC mentioned the Constitution, commented in the following way.

> Yes. They highlighted the Constitution, which the government wrote and introduced in South Africa. The same government doesn't follow what was in the constitution. Why I'm saying this is that it quotes all the rights of the human, the citizen. I think its 6.2 which says everyone has the right in access of good health, good environment.[107] Everyone has the right to life. Everyone has the right in shelter. So I started saying…let me go through this Constitution and watch and look at it thoroughly. So then I saw that… OK the government is denying our rights.[108]

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[103] Trevor Ngwane, interview with the author, 17th October 2001.
[104] See Newman, M., *Defining the Enemy: Adult Education in Social Action*, Stewart Victor Publishing, 1997 p. 7 and 31-32, and McCann, Rights at Work.
[105] McCann, *Ibid.*, p. 89.
[106] Nkele (Mabel) Chakela, Orlando East Concerned Residents and SECC, Saturday 27 October, 2001.
[107] Section 24 guarantees the individual the right to "an environment that is not harmful to their health or well-being".
[108] Bobo Makhoba, 22nd March 2002.

> When you try and fight for your rights there is someone who will block you, or will close the way for you so you mustn't know what is happening about your rights. That is why I am not working. That is why South Africa is still in poverty.[109]

The negation of rights by the government is viewed both in a personal and political way. Firstly in the sense of the unemployment of the respondent and secondly as the wider mass poverty and unemployment of South Africa generally.

The realisation that the Constitution can be understood to guarantee access to electricity through the mechanism of implied rights was by some activists described as a revelatory experience. Some respondents talked of having their eyes opened by the SECC. The denial of rights, implicit given the social context of widespread disconnections, seems to mean an automatic mobilisation for their defence. This defense will in its turn provoke resistance by "others".

Equality understandably loomed large in the rights talk. In particular much was made of the contrast between the promise of universal application of rights and the reality of water and electricity disconnections. A particular emphasis was placed on the differential charging of electricity between Sandton and Soweto and the constitutional right to equality.[110] For example Soweton's, who are supplied electricity directly by Eskom, are charged up to 30% more than the mostly white residents of northern Johannesburg, who are supplied electricity by Johannesburg Metro's corporatised utility City-Power.[111]

Direct Action and Rights

The Bill of Rights was used by SECC activists to give legitimacy to the aims of their organisation. This includes *sufficient* free-basic electricity and water for residents of Soweto as well as an end to basic service cut-offs by the metropolitan council. The subject of this section is the Bill of Rights' potential role in providing a justification for their militant activities in re-connecting households to electricity (Operation Khanyisa) and water (Operation Vulamanzi), re-instating evicted households to their homes as well as preventing evictions (Operation Buyel'endlini) and disconnecting councillors' water and electricity supplies.

Most activists saw the direct action tactics of the SECC as their best weapon against government policies as well as a useful way to get people involved in the struggle.

One activist Virginia Setshadi explicitly sees Operation Khanyisa as a key mobilising tool for the SECC.

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[109] Bobo Makhoba, 22nd March 2002.

[110] For example in a speech given by a representative of the APF Wiseman Hamilton in Soweto Launch of the MSP Report, *The Electricity Crisis in Soweto* , at Pimville, Zone 7, Catholic Church Hall, 24 September, 2001.

[111] See *The Electricity Crisis in Soweto*, p. 7 and for information on City Power a "self contained business operating at arms length from the council" see Johannesburg's website http://www.goafrica.co.za/joburg/services/citypower1.stm accessed 1 August 2002.

> "We see this as a form of mobilising. We don't ask why or when people were cut off, we just switch them back on. The SECC believes that everyone should have electricity.[112]

The draft constitution of the SECC notes of Operation Khanyisa:

> This campaign is central to the work of the SECC and is at the heart of *all* SECC's strategies…All SECC structures must ensure that Operation Khanyisa is used as a mobilising tool, works efficiently and in line with the policies of the SECC.[113]

Illegal connections have been an ad-hoc strategy of Soweto residents who have been unable to afford their electricity bills. Comparative data, which could compare the practice of illegal connection with other similar urban areas outside of South Africa, is not easily available. Anecdotal evidence suggests that illegal connections to the electricity grid are very common in times of high unemployment. In Australia in the 1930's, when there were similarly high levels of unemployment as in South Africa today, and minimal unemployment benefits, there were widespread illegal connections to the electricity grid in parts of Sydney.[114]

Illegal connections to the water mains and electricity grid pre-dated the activities of the SECC.[115] Nonetheless the direct action campaigns, in particular Operation Khanyisa, were generally considered to be the most important methods of attracting interest and commitment from the community to the SECC's goals. This suggests possibly that a considerable number of families had not been willing to re-connect themselves to the mains after disconnection by Eskom and before the arrival of the SECC. It is also likely that the SECC provided legitimacy to a practice that was considered morally and ethically wrong thereby lifting the burden of illegality and criminality from households with illegal connections. If the connection was done illegally by Eskom workers it opened up the possibility of blackmail as the technician could demand more money to avert them alerting Eskom to the illegal connection.[116] The SECC also played a role in making sure existing illegal connections were safe.

A picture of the emotional effect of a re-connection could have on a resident could be seen in a re-connection undertaken by the SECC for the South African Broadcasting Corporation current affairs program *Special Assignment.* In that case SECC activists, in front of the camera, reconnected a pensioner from Orlando West who had her electricity cut off months previously. Women, in this environment, are particularly under threat. Her reaction was very emotional and tearful, reflecting perhaps the built up

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[112] See Setshadi, Quoted in Norm Dixon, "South Africa: Grassroots struggles revive", *Green Left Weekly*, No. 460 August 15 2001, also available a http://www.greenleft.org.au,
[113] My italics.
[114] See Cannon, M., *The Human Face of the Great Depression*, 1995, at p. 285 where Edna Ryan, noted Australian feminist, reflecting 50 years later on her experiences as a young woman during the depression, "Electricity was essential but I still don't know how we paid that bill. There were many illegal connections to the mains."
[115] Wiseman Hamilton, 6 March 2002.
[116] Interview Tebogo Mashota 28 June 2002, APF offices, 3rd Floor Cosatu House.

tensions resulting from her fears over personal security at night for without electricity residents risk burglary and attacks.

> I'm so happy. I'm so grateful. At last I will be able to sleep peacefully. Now I will be able to drink a cup of tea in the mornings, instead of tap water.

This footage, while showing only one case, is an example of the powerful effect that connecting electricity for those unable to afford it can have. It was estimated by Eskom that 150,000 houses in the Soweto area are connected illegally and that 50 houses are connected a day.[117]

Criticism by government ministers, notably Jeff Radebe, the national government's Public Enterprises Minister, made much of the fact that the SECC was acting outside the law. He accused the SECC's activists involved in "Operation Khanyisa" of being "vandals and criminal bands".[118] This stereotyping would perhaps cause problems for the SECC as a large component of its constituency are pensioners who are unlikely to be sympathetic to an organisation characterised in this way.

The question is, does rights talk support this militant action and/or does it enable critics to attack the SECC on the basis of the obvious contradictions it raises. Or is it simply not relevant at all? The contradiction is simple. On the one hand, the SECC vocally asserts socioeconomic, civil and political rights under the Bill of Rights, while on the other hand they dismiss formal legal processes and reconnect services, which have been disconnected as a result of non-payment, illegally. It is the assertion of this study that the SECC's human rights perspective provided moral and political justifications for acts of economic necessity.

When I asked about the difficulties that the law and the idea of legality posed to their more militant activities, most activists pulled back from endorsing the Constitution as a justification for direct action. They, more often than not, agreed that the government could use the Constitution and the idea of legality to attack the re-connections undertaken by the SECC.

One activist was, however, adamant that the Constitution wasn't being violated by Operation Khanyisa. He began by stressing that Sowetan's are unable to pay, as well as the failure of Eskom to respond adequately to SECC complaints. He stated.

> We don't say we violate the Constitution. We say the Constitution doesn't deliver for the people as it is written that everyone should have access to their basic needs. So we want our government to practice what is written in their Constitution. The only way that we have (to do this) is to use force.[119]

And at another point in the interview the same activist stated;

> Also we know that the Constitution of South Africa is the best Constitution…but the main fact is that *our* government doesn't practice its *own* constitution. So also

[117] See Matari, M., Ndla, S., Mahlangu, D., "Minister Jeff Radebe called for tough measures against those behind illegal connections", *City Vision*, 25 January 2002. The 150,000 figure appears to be a large over estimation as Eskom has only 126,000 household consumers in Soweto.
[118] See Radebe interviewed in SABC's *Newsmaker,* Sunday, November 25 cited in *Pretoria News*, "Electricity arrears: talks on the cards", Tuesday November 27 2001, p. 5.
[119] Bongani Lubisi, 26th October 2001

> our Constitution is in favour of the South African citizen. That's why you say everyone has the rights to basic needs because of the Bill of Rights. We are willing to practice the Constitution in action.[120]

This activist saw the direct action activities of the SECC as being justified by the Constitution. The SECC was in effect, through connecting households to electricity, "willing to practice the Constitution in action".[121] This was a theme of the interviews and stemmed from the point that "(I)f the ANC was following the Constitution there wouldn't be so many complaints…"[122]

The distinction between the Constitution and the laws, which implement the Constitutional principles, was not raised by activists when talking about direct action campaign's such as Operation Khanyisa. This was however mentioned in passing with respect to civil and political rights and the laws that regulate protests and marches.[123]

This constitutional justification of the SECC's direct action campaigns was not the dominant response. Some activists saw the Constitution, and the concomitant commitment from South African citizens that logically flows from it, to obey the law, regardless of that laws content, as a double-edged sword that could be used against the militant activities of the SECC.[124] This was a tension that was not easily resolved. Despite the language of rights being widely used as a mobilising tool and as an implied moral justification for all sorts of social protest activities there was also an awareness that it could just as easily protect the interests of the powerful. It was almost a love hate relationship as rights arguments did obviously play an important part in mobilisation of the community.

In relation to the constitutional protection of property one activist noted that;

> At the same time, people like myself, maybe other left wingers, will not push the Constitution argument too much, because we also understand the limitations of the Constitution. Because its difficult to say the Constitution is good in this and then when it comes to, for example, protection of private property, it's bad. But at the same time, the SECC has to take it up. Because South Africa is a Constitutional state.[125]

The defining document of the new South Africa is it's Constitution and the Bill of Rights contained within it. Activists who feel uncomfortable with drawing on the Constitution selectively, for example socio-economic rights and not property rights implicitly feel that they may be creating a monster that will come back to haunt other progressives. By claiming their socio-economic needs through the relatively weak socio-economic clauses contained in the Bill of Rights they may be legitimising a document that, particularly through the property rights clause, favours the privileged.

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[120] Bongani Lubisi, 26th October 2001.
[121] Bongani Lubisi, 26th October 2001.
[122] Dudu Mphenyeke, 1st November 2001.
[123] John Appolis, Chair of the Anti-Privatisation Forum, 12 March 2002.
[124] Insert Section 2 of the Constitution.
[125] Trevor Ngwane, interview with the author, 17th October 2001.

There was also a sense in which the mobilisation aims of the SECC could be threatened by a legal approach. The issue of what role the Constitution can play was discussed in a regular weekly committee meeting held by the SECC in Soweto in early September 2001. Later I asked an activist who chaired that meeting what was the discussion all about on that day.[126] She began by commenting;

> Even if we belong to one organisation we have different strategies on how to deal with issues. There are some who feel law will do everything for us and there are some, like myself, I know that as much as law [can] do something but also the power of the people can have a lot of impact, more than law. The debate on that day was that we shouldn't concentrate so much on protest and we should use the Constitution. That's why I had to point out that as much the Constitution can help us but the power lies with the people. That's where we can get it [the Constitution] to make a difference.[127]

This response opens up a number of issues that demonstrate how the Bill of Rights can impair a social movement's goals.

Firstly legal action here is characterised as potentially de-mobilising for popular forces. The Bill of Rights is a symbol of the just system of government fought for by anti-apartheid forces. Water and electricity cut-offs are evidence of disequilibrium within the fundamentally just system, which is given symbolic representation through the Constitution and the Bill of Rights. The court system, acting on the mandate contained in the Bill of Rights, is the way to correct the dis-equilibrium in the law.[128] All one needs is a good lawyer, with a solid command of legal language, who, assuming sufficient technical legal skill, can put the case to the essentially objective judiciary. With good lawyers in a just Constitutional system there is no real need for force, through the power of popular mobilisation and direct action, to influence the legal processes to claim one's rights. The SECC constituent, who in the meeting wanted the SECC to focus on legal work and not protests, is implicitly accepting that the neutrality of the judiciary enabling the legal system to give a proper hearing to Soweto resident's rights claims. According to the activist, those who place faith in the rationality of the legal system overestimate the fairness of the Bill of Rights and the legal institutions that interpret it. The law is seen more as a discourse of logic and reasoning rather than what it is - a discourse of power.

Secondly, there is the vague sense that if the law can do everything the active agency to the people in influencing and shaping their own future is suppressed. There is also in this answer an implied warning to potential supporters not to alienate their powers of society making to lawyers and to the judicial system.[129] The "power lies with the people" to shape legal discourse to further the democratic and just goals of the SECC.

From a movement building perspective this makes sense. This statement also provides some evidence of the SECC activists attempting to puncture the vision of the courts as impartial, dispensers of justice. SECC activists thus shape the constitutional

[126] The meeting was primarily conducted in Zulu.
[127] Virginia Setshadi, 19th October 2001
[128] The characterisation of this exchange draws on Peter Gabel's, "Reification in Legal Reasoning", *Research in Law and Sociology*, Vol. 3., 1980.
[129] This idea is drawn from Kennedy, D., *A Critique of Adjudication*, Harvard University Press, 1997.

structure, which has the potential for an alienating, confusing elite discourse, to meet their own needs, that of building a popular movement.

Nor can it be denied that there are some profoundly anti-democratic tendencies in the structure of legal discourse. In the words of Roberto Unger this disturbing elitism can be seen in the near universal obsession of lawyers with the decisions of the "higher" courts, the need to limit majority rule and their identification of the "ideal of deliberative democracy as most acceptable when closest in style to a polite conversation among gentleman in an 18th century drawing room."[130] The vision of radical participatory democracy envisioned by a street wise SECC activist using the Bill of Rights as both a shield and a spear and the language of the courtroom could not be more jarring. Both lawyers and the SECC use the language of rights and the Constitution. However the tools used for the practical realization of these rights appear at odds. The SECC prides itself on the disruptive character of its rights claiming interventions. Lawyers must fulfil the complex rules of due process and courtly etiquette. When legal action around electricity finally gets underway it is possible that these two cultures may indeed clash despite the shared goals of the activists and their lawyers.

As such there is a dual picture which emerges of the Bill of Rights and the Constitution. On the one hand the Bill of Rights represents an important document that was born out of the anti-apartheid struggle. On the other hand, it is a document that may be twisted by the powerful to protect their interests. Thus, without the popular mobilisation of the people, it is simply a piece of paper.[131]

> You know our belief is that the Constitution is like a paper. Tomorrow we can burn it. The power is within the people.[132]

Activists saw rights not solely as ends in themselves. They saw rights also in light of their mobilising power and it is in this context that rights were most likely to be deployed to achieve the provision of basic social services.[133] There was not a widespread belief in the myth of rights, that legal action on its own can bring about progressive social change.[134] Issa Shivji presaged this process-orientated approach when he theorised that a right should not be seen;

> …as a legal right, which implies a static or absolutist paradigm, in the sense of an entitlement or claim, but a means to a struggle. In that sense it is akin to righteousness rather than right. Seen as means of struggle, 'right' is therefore not a standard granted as charity from above but a standard bearer around which people rally for struggle from below.[135]

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[130] See Unger, R., *What Should Legal Analysis Become*, Verso, 1996, p. 71 - 72.

[131] A consistent metaphor of bills of rights sceptics. Roger Sherman's letter to friend, on the United States Constitution on the essential uselessness of a bills of rights without adequate democratic structures describes rights as 'mere paper protection'; 'the only real protection for all your important rights must be in the nature of your government…If you are about to trust your liberties with people whom it is necessary to bind by stipulation...your stipulation is not even worth the trouble of writing." *Letters of a Countryman*, November 22 1787, cited in Hutchinson, *Waiting for CORAF*, University of Toronto Press, 1995, p. 232.

[132] Bongani Lubisi, 26th October 2001.

[133] Scheingold, S., *The Politics of Rights*, Yale University Press 1974, p. 148.

[134] See quote at head of chapter. The myth of rights may itself be a myth.

[135] *The Concept of Human Rights in Africa*, CODESRIA, 1989, p. 71.

The SECC exploited this rights talk to their advantage by empowering people with the sense that they had been wronged and denied their basic entitlements. The SECC activists largely characterised these rights, however, not as entitlements to be received on the table like a plate of food[136] but as something that needs to be fought for. This echoes Shivji's characterisation of rights as "a standard bearer around which people rally for struggle from below".[137] Given that the SECC's main technique for achieving its goals is mass mobilisation, such a characterisation would be instrumental in gaining support and spurring the movement forward. When used in this way rights form a crucial way of provide the initial impetus for mobilising community support.

Paradoxically this sense of rights being owned by the community can lead to considerable sympathy for those who are Constitutional rights sceptics who see the legal option as necessarily dis-empowering for those struggling for their rights.[138] Most notably this occurred in a session at the Services for All conference held in mid-May 2002 entitled - "Public services, Human Rights and the Law", in which Heinrich Bohmke from the Concerned Citizens Group in Durban, Glenn Farred from Community Legal Centres and Theunis Roux from Centre for Applied Legal Studies in Johannesburg spoke on the potential for using the Bill of Rights to assist communities gain access to municipal services.[139]

The presentation from Bohmke on his involvement in *Manqele*[140], a water disconnection case in Durban, argued that a legal strategy was necessarily disempowering and usurping of the communities political strategy.[141] Bohmke argued against the idea that the successful TAC legal strategy offered anything in the way of hope for further legal action. The TAC legal strategy was characterised as entirely exceptional due to the emotive nature of the subject matter - dying babies, and as a result offered little for those struggling for legal recognition of mundane rights such as water and electricity. Contributions from the audience, relayed graphic personal examples of the Constitution being an irrelevancy when they were faced with eviction from their homes. These dramatic individual experiences reaffirmed the sense, created in the debate, that a Constitutional legal strategy offered the poor little hope. To Roux the session descended into a dispiriting exercise in Constitution bashing which potentially threatened the possibility of legal action.

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[136] Bongani Lubisi, 26/10/2001 and also Bobo Makhoba, 22/3/2002.
[137] *The Concept of Human Rights in Africa*, CODESRIA, 1989, p. 71.
[138] This perspective comes from those broadly sympathetic to the goals and tactics of the SECC/APF. The dogmatic left represented by the Spartacist organisation, a presence at a number of APF/SECC marches where distinctly anti-human rights. "In a leaflet last March calling for a protest march on Human Rights Day (2001), the Anti-Privatisation forum is down on their knees appealing to the 'human face' of capitalism: 'privatisation violates human rights', 'Water and Electricity cut-offs violate human rights'…In fact the rights guaranteed under the decadent capitalist system mean everything for the filthy rich minority and unemployment, poverty, disease, ignorance and death for the majority of the population." The purity of their position is only exceeded by their powerlessness to bring about any real change. See the "The New South Africa Does Not Provide Power to the Poor", *Spartacist South Africa*, No. 2, Summer 2002, p. 15.
[139] Workshop 2C. 17 May 2002, School of Public and Development Management.
[140] *Manqele v Durban Transitional Metropolitan Council*, Case No: 2036/2000, High Court of South Africa, Durbam Division.
[141] This and what follows relies on my interview with Roux, 30 July 2002 and it was also corroborated by others who attended the session.

This argument rejects constitutional litigation as a way of making concrete gains and approaches the use of the Constitution in an all or nothing manner. Further it argues that engagement in legal approaches distracts and dis-empowers grass roots activists. Understandably this would create a problem for an organisation which is as overtly socialist and gains its legitimacy through its direct democratic relationship to its members. At a number of other sessions which I attended the Constitution was promoted as a legitimate, useful if not perfect way of holding the government to account.[142]

Complete rejection of the Constitution and the Bill of Rights as a useful tool for activist's arsenal was not a feature of any of the interviews I conducted with the SECC and the APF. Clearly rights claims, whether morally or constitutionally grounded, were an important issue for activists interviewed but many were in two minds as to the utility of the Bill of Rights for attaining the goals of the SECC.

An example of this skepticism can be seen in a short article by Annah Majokoh, entitled "Take heed lest you walk into a well from looking at the star" she discusses the victory over apartheid and the mixed outcomes of what was an incredible achievement at a great cost to many black people. [143] Her view is that the victory in 1994 has resulted in oppression by "our fellow black brethren…." Discussing a March 21 Rally in 2001 in Soweto which aimed to present a memorandum to the Mayor against privatisation she noted;

> "…people are being retrenched due to the fact that government structures are privatised and people are unable to secure jobs. In the midst of such hell you are expected to pay off your bills. Bathong! Where are we expected to dig the money from. The next thing you know your water and electricity is being cut off."

She goes on to discuss the role of the Constitution;

> "What is the role of our Constitution? You will agree with me that for us (the poorest of the poor) that it is like a Christmas tree decorating our bookshelves and bags. "TAKE HEED LEST YOU WALK INTO A WELL FROM LOOKING AT THE STAR."

The writer's proverb suggests that the Constitution provides a source of hope, promise and happiness in the simile of the Christmas tree. Yet there is scepticism that this promise will be fulfilled, and a recognition that a naïve belief in the promise of the Constitution could lead to disaster. In another sense she may want to suggest that the Constitution unlike Christmas trees contains no gifts. Everything must be fought for. In the article she goes on to stress the importance of struggle.

> If you were thinking the battle is over do not fool yourself…We are going to fight against this monster, if it takes sweat to turn into blood then let it be so.

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[142] Presentation by Mark Heywood, "Teaching the State its responsibilities", delivered to "Services for All?" conference, Public and Development Management, University of Witwatersrand, Thursday May 16, 2002.

[143] *Izwi Labasebenzi*, August – October 2001, Issue 1 & 2, p. 6. *Izwi Labasebenzi* is the paper of the Democratic Socialist Movement affiliate to the APF.

The evidence presented here does not bear out, at least among the level of the leadership cadre, of accusations of critical legal scholars of the legitimation effect of rights talk.[144] Activists, by and large, held a sceptical attitude to rights.[145] What came across very strongly was a scepticism of what has been termed as the myth of rights that constitutional litigation on its own could lead to meaningful change.[146] They were also not shy of communicating that scepticism to their constituencies.

The position taken by some activists was sometimes openly contradictory. One activist who was speaking positively of the rights that the SECC were using in their campaigns stated directly after this;

> The rights they said in the Constitution is like the rights which will always serve the bosses and not the poors. It is the rights, which serve the rich, unlike (the) poors. We thought by casting our vote for the government, we thought the rich would subsidise the poor at least to uplift the standard of the poor. But it's upside down. It's only the poor which subsidise the rich, who get more rich and the poor who remain poor.[147]

Michael McCann, in his study of the pay-equity movement in the United States found a similar perspective amongst activists. Drawing on the work of Mari Matsuda he noted;

> "…people at the "bottom" are used to seeing the law in two ways at once. From an "outsider" perspective, they view law critically as an unprincipled source of privileged power. From an "insider" perspective, they adopt an "aspirational" view of the law as a potential source of entitlement, inclusion and empowerment. Hence, they shift back and forth between the view that "I have the right to participate equally in society with any person", *and* "Rights are whatever people in power say they are".[148]

Why use Rights?

The SECC in attempting to end cut-offs and get affordable electricity must overcome a number of hurdles. First is the pervasive sense of inevitability that payment is fair and just and absolutely necessary for the continued functioning of local government and basic services. Local government and Eskom constantly reinforce this message. The SECC and APF must balance the supposed imperatives of business practices in a market economy, with other equally persuasive arguments, if a case for their militant direct action and demands are to be sustained. This rhetoric must have common sense legitimacy if it is to be at all effective and therefore must be couched in language, which has some official recognition, if it is to be both understood and believed.

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[144] Gabel, P., & Kennedy, D., "Roll Over Beethoven", 36 *Stanford Law Review*, 1984, No. 1, 1 at 26, Tushnet, M., "An Essay on Rights" 62, *Texas Law Review*, May 1363 – 1403, (1984), Gabel, P., "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves", *Texas Law Review*, May 1563 – 1599, (1984).
[145] This has been also confirmed by McCann, *Rights at Work*, p. 300-301.
[146] For the a full definition of the myth of rights see Scheingold, S., *The Politics of Rights*, Yale University Press 1974, p. 5.
[147] Bobo Makhoba, 22nd March 2002.
[148] McCann, *Rights at Work*, pp. 232-233.

This occurs even in the context of a seemingly widespread practice of non-payment and illegal connections. The non-payment and illegal connections are occurring in a disorganised, atomistic fashion. There is little sense that these practices are motivated in an organised political way. Indeed until the arrival of the SECC there appeared to be only sporadic organised opposition to Eskom's and Johannesburg Metropolitan Council's credit control activities. The hidden opposition in the form of illegal connections was quite high.

An organisation hoping to capitalise on widespread signs of discontent with credit-control policies which non-payment and illegal connection signify, must still challenge the moral order which underlies the system of provision of basic services. The payments boycott was an already existing phenomenon in Soweto. Trevor Ngwane in an interview in *Red Pepper* argued that the boycott of payments was merely drawing upon an existing phenomenon in the community.

> It was not an active boycott, it was happening because people simply couldn't afford to pay. Our strategy was to turn an action of default into an act of defiance.[149]

The low payment rates and high illegal connection rates before the introduction of operation Khanyisa arguably may reflect an amoral familiasm that does not collectively challenge the moral authority of the market, the source of the rapidly increasing prices.[150] Providing electricity through Operation Khanyisa may simply exacerbate this characteristic and not lead to any sustained ideological transformation in the community.

Those already connected illegally may be attracted to the SECC because it promises a long-term solution to their personal affordability crisis and allows them to live outside the law without fear of retribution from Eskom and the police. Hence in some instances Operation Khanyisa was justified to communities on the basis of a sense of entitlement or right but on the basis that the likelihood of legal action for illegal activities would be unlikely.[151] This does not appear useful for building consciousness on an alternative non-market way of seeing basic services over the longer term. The danger, apparent to some involved in this practice, is that no underlying transformation in consciousness may be achieved through the technique of providing prospective SECC members with free electricity via illegal connections.

Militant social action of this sort without reciprocal obligations from the beneficiaries has its limits. Any of the more fundamental socialist goals of the SECC/APF are unlikely to be achieved using Operation Khanyisa alone. The SECC in this context will only become a temporary bandage for the poor in what is in reality underlying structural failure of government possibly in partnership with international capital to provide basic services. Ashwin Desai, reflecting on Operation Khanyisa, in light of his own experiences of similar direct action campaigns in Durban put it this way.

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[149] Quoted in Nelson, A., "New Activist Generation comes of Age in Soweto", *Red Pepper,* 25 March 2002.
[150] The term is borrowed from the discussion in Wilkinson, R., *Unhealthy Societies: The Afflictions of Inequality*, Routledge, 1996, p. 119.
[151] Bobo Makhoba, 22nd March 2002.

> One of the dangers is that the very success of campaigns like Operation Khanyisa is that it leads to demobilization because once people have their lights switched on, they do not see the need for the collective. It also serves the purpose of reducing anger because people now have lights and water. This has certainly been the case in Mpumalanga, Chatsworth and Wentworth. This is the danger of remaining localized, particularistic and single issue. The state faced with collective resistance and exposes at a public level, simply retreats from the more militant areas and moves to areas less organized.[152]

To have any sustained organisational structure ideas that challenge the hegemonic dominance of liberal capitalism must be generated. Without this, people's commitment to the SECC may be as short-lived as attendance at a few meetings and until they get connected to the mains. Government has the sustained power to wait until the SECC's organisational structures weaken after the first waves of reconnecting activity have passed and demobilised communities who have become comfortable with their free electricity supplies can be made subject again to the full force of local government and Eskom's credit control techniques.

In short ideas matter for the long-term health of the organisation. In this environment local government tactics which emphasise limited amnesties for illegal connections, partial or complete arrears right-offs and harsh penalties for those who continue with illegal connections are likely to be successful. This is because fundamentally people accept the rightness of the government's position. The SECC must challenge the moral authority of the government position, which extends from the authority the ANC have as a result of their leadership in the overthrow of the apartheid regime. This authority is constantly being affirmed through dialogue with other civics and the SECC in the press and in community fora. The SECC must disperse and strengthen their limited power to counteract the power of the state by transforming popular understandings of service delivery. The SECC cannot hope to rely on popular mobilisation alone as a way of forcing the state to modify their policies in every instance of transgression. They must create a situation were residents are prepared to fight state power with a sense of right on a day to day basis.

The SECC must also appeal to the moral economy of the poor. The principles which may underlie the moral economy may appear vague and inchoate. The Bill of Rights allows a way of providing greater depth to the feelings that the government should not allow the poor to be exploited. The SECC through its work with the Bill of Rights and its acceptance of the community based flat rate demand – a holdover from apartheid era governance – is able to expand on a sense of moral outrage and thus encourage Sowetan's to join the SECC and engage in political struggle.[153]

Other factors effecting initial mobilisations

This section will briefly look at three other discourses that impacted on the formation and initial success of the SECC. While this study is about rights talk, understanding how other discourses and mobilising techniques are used by community based

[152] Ashwin Desai, "Neo-liberalism and its Discontents: The Rise of Community Movements in Post-apartheid South Africa", University of Natal CCS website: http://www.nu.ac.za/ccs. See also Desai, *We are the Poors*, Monthly Review Press, 2002 and *The Poors of Chatsworth*, Madiba Publishers, 2000.

[153] See E.P. Thompson, "The English crowd in the eighteenth century" 50 Past and Present, 1971, 76 at 78-79.

organisations is important. This balance is in part needed to correct the impression, in some critical legal theory of the overwhelming centrality of law, its language and its processes in defining social movement's tactics. There are other forms of discourse and organisation with intersect, strengthen and at times contradict rights talk and legal forms of struggle. Social movement organisations use a variety of techniques for mobilising support which complement and enhance the legal strategy.[154]

A key factor in promoting mobilisation was the research funded by the Municipal Services Project. Interviews were conducted in early 2001 detailed interviews were conducted with 200 randomly selected households in Pimville and Orlando East in Soweto. The study was launched in a rally in Zone 7 Pimville on the 24 September.[155] This was viewed by a number of respondents as being crucial for the initial successes of the SECC.

It firstly confirmed many of the unverified statements of the SECC. This was seen as empowering activists in their public speeches to rallies and meetings with Eskom. Two of the interviewees, who later became office holders in the SECC, became active after being involved in the door to door interviews in February 2000, which formed the basis of the research. There was significant press coverage of the findings of the study thus raising the profile of the organisation.[156]

Trevor Ngwane at interview noted the important role the act of research played in recruiting new and active members to the SECC. Trevor Ngwane put it in this way;

> It was immensely useful. In a number of ways…it consolidated the allegiance, loyalty and commitment of SECC comrades who conducted the research. People like Virginia (Setshadi) came out of the research. And they would speak at mass meetings. "I thought I was poor but when I went house to house I knew I was a privileged person." …It consolidated the structures of the SECC. We had a legal team, a research team, an organising team…But it also *authenticated* our argument.…it helped us to turn the SECC into a mass organisation. Because the first real mass meeting that was held was a report back on the research. You know usually we would hold meetings in different townships, and with the research we called the whole community to a meeting. And said "Hey we have just done some research "Look they are lying, when they are saying we don't want to pay…" And from that day the SECC has never been the same. [157]

In launching the report in Soweto, Greg Ruiters, from the MSP, explicitly linked the findings of the report to rights contained in the Constitution. He stressed the importance of the research, and any more that may be done like it, "in helping the fight for our basic rights." He also made the point that the working classes in Soweto make the electricity themselves and it is their rights as human beings and as South Africans to have electricity. This research was influential in promoting new legal interest in taking a constitutional court case after initial legal processes had stalled.

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[154] See McCann, Rights at Work, p. 294 - 295.
[155] Fiil-Flynn, M. with the Soweto Electricity Crises Committee, *The Electricity Crisis in Soweto*, Occasional Papers Series No. 4., August 2001.
[156] For example Elijah Mhlanga, "Electricity Crisis in Soweto" *Saturday Star*, September 1, 2001 p. 1
[157] Trevor Ngwane, interview with the author, 17th October 2001 and see also Ngwane quoted in Laurence, P., "Eskom v Soweto: the battle for power", *Focus 25*, March 2002, available at the Helen Suzman Foundation's website, www.hsf.org.za/focus25/focus25electric.html at p. 6 of website edition.

Another discourse central to the mobilising strategies of the SECC/APF was class struggle talk. This was so central that my focus on rights talk could be said to be missing the point. To provide only one example an SECC pamphlet distributed at the 24 September meeting in Pimville, included the SECC's slogan "Electricity is a Right not a Privilege" but the arguments did not try and base the SECC claims in rights discourse at all. The discourse was revolutionary in tenor suggesting that the SECC wants:

> To build a society where everyone is guaranteed a job, food, housing, healthcare, education, electricity, water etc…Such a society cannot be capitalism.
> The working class is the class which produces the wealth of the country including its electricity; the workers must lead and control society.[158]

The SECC adopts a more obviously tranformative vision than the Bill of Rights allows, stressing the importance of control over the economy and society of the working class. The SECC is using electricity to provoke ideas of a more transformative nature. Rather than a list of abstract rights contained in the basic law the broadsheet seeks to raise issues of ownership and control over the means of production.

This discourse is very different from the rights based analysis. It proceeds from a marxist perspective which has generally been hostile to the concept of rights. Marxist analysis usually views rights discourse and strategies of reform that attempt to gain more rights dismissively. This is linked to the Marxist belief that a society with a full range of civil and political and even some socio-economic rights would still not be a just society if the free-market remains the basic mechanism ordering production and distribution.[159]

I asked a question to SECC respondents about the role of religion. Prayer played an important role in meetings with many of them beginning and ending in prayer. While little formal or informal support was received from large township denominations it was felt that the role of organised religion was so important in Soweto that it was impossible to ignore. It appeared that the older women of the SECC initiated the prayers conducted at most meetings.[160] There was some differences in the interviews between those who saw it as strategically important who were not believers and those who saw it in meta-physical terms. One respondent, a pensioner, described the important role of prayer in meetings in the following way.

> Why are we starting with a prayer? Its because we believe that God will listen to our complaints. And whenever we finish whatever problem, we kneel to God. That really…God…we have been suffering and that he will have heard our prayers. One day the doors will be open for us. One day we will be living in the light. Because without God there is nothing that will come of us. It's a culture for us to pray. Especially when things are dark you pray. Whatever we are doing from god. Because everything has got a purpose. That purpose comes from God. He is the one who knows why we are suffering.[161]

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[158] Pamphlet, undated, in my posession.
[159] See Hugh Collins, *Marxism and Law*, Oxford University Press, 1982 and Duncan Kennedy, *A Critique of Adjudication*, Harvard University Press 1997, pp. 335 – 337.
[160] Trevor Ngwane, Interview with the author, 17 October 2002 and Dudu Mphenyeke, 1st November 2001.
[161] Nkele (Mabel) Chakela, Orlando East Concerned Residents and SECC, 27th October, 2001.

The SECC uses the example of the right to water in their "agitational speeches" as a counterpoint to neo-liberal ideologies which emphasize commodification and cost recovery. But it was also introduced to the concept of water coming from God.

> When we do agitational speeches we do a big thing with water. You know water comes from God, from the heavens. Now they say you can't drink the water. Next thing they will be trapping the air we breathe and selling it to us. And that makes it very clear to the people.[162]

The role of religion was a significant component used to legitimise the SECC in the eyes of the community, particularly the elderly women who played such a prominent part in SECC rally's. In a protest during the World Summit on Sustainable Development a representative of the SECC was quoted as interrupting Ronnie Kasril's discussions on privatisation partnerships in delivering water supply with the statement "Water is free from God. Water is ours."[163] More research needs to be done on the links between urban social movements and religious discourse.

Conclusion

As stated at the beginning of the chapter the SECC and APF's legal strategy is in its infancy. The reality has been that in the first 3 years of the SECC's existence constitutional litigation was no more than an idea. Greater practical help in getting access to resources and getting a higher profile in the media came from the SECC's relationship with policy development organisations such as the AIDC and the Municipal Services Project.

In the course of its first 3 years the SECC made several attempts to explicitly incorporate a socio-economic constitutional rights perspective into its struggle. It appears with the recent intervention of the Centre for Applied Legal Studies that this is about to come to fruition. Opinions of activists were clearly divided on the role of Constitutional socio-economic rights as useful tool for their political goals. Some appeared unsure of the constitutional basis of a right to electricity and the weakness of the right to water clause in the Bill of Rights. Some tentatively embraced Constitutional rights as a pragmatic necessity, while still others had more of a contradictory response embracing and alternatively rejecting the utility of rights. Underlying this tension was the central organisational need to mobilise mass support. A court based legal strategy was to some a danger in that it seemed to necessarily deny a role for mass participation and militant action. This was particularly the case as the constitutional values and the rule of law contradicted the best mobilising strategy – Operation Khanyisa. But equally Operation Khanyisa was sometimes legitimized on the basis of fulfilling the Bill of Rights.

The next chapter will look more closely at how rights are used to challenge neo-liberalism through changing peoples underlying conceptions of how the world should

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[162] Trevor Ngwane, Interview with the author, 17 October 2002. And see also Melanie Gosling, "Kasril's water meeting stormed." *The Star*, Wednesday, September 4 2002.

[163] Melanie Gosling, "Kasril's water meeting stormed" *The Star*, Wednesday September 4 2002. The protestor quoted appeared to be Dudu Mphenyeke, who as a Christian saw prayer as a "vital weapon for us as an organization" Dudu Mphenyeke, 1st November 2001.

function. This is as much the story of a political struggle, a struggle for hegemony and the role the law and rights can play.

Chapter 3

The struggle for 'local hegemony' in municipal service delivery and the Bill of Rights

> The living conditions and emotional pain endured by the majority of South Africans are a testament to capitalism's failure to acquire a 'human face'. Yet the values of that system pervade society…The alternatives seem ghost like, bereft of examples, shorn of hope. They come dressed in stiff declamations and jargonized denunciations. They speak in the name of rights, demands and desires, yet fail to speak to the lives of their audience. And all the while, as push comes to shove they are prone to endorse the very deeds they claim to oppose.
>
> Hein Marais, *South Africa - Limits to Change; the political economy of the transition*, 2001, p. 287.

> Men make their own history, but not of their own free will; not under circumstances they have chosen but under the given and inherited circumstances with which they are directly confronted.
>
> Karl Marx

Introduction

Critical modernist scholars, using Gramsci's writings, have argued that rights discourse is useful in developing a counter-hegemonic project against a resurgent liberalism.[1] Counter-hegemonic in this sense means "the construction of a new intellectual and moral order and hence the development of more universal concepts and more refined and decisive ideological weapons".[2] It is difficult to conceive of such a new intellectual and moral order without considerable changes being undertaken in our understandings of the world that are in turn shaped by the law.

This chapter takes a broader view than simply the law and the direct struggles of the SECC for electricity and water. Firstly it will look in detail at the concept of hegemony and counter-hegemony and then explore how these concepts may be applied to the struggles of the SECC/APF. It will then focus more specifically on the attitudes of APF activists and the literature of the APF. The APF saw the struggle over basic services as a part of a wider campaign against capitalist social relations. This influence gives the struggle over basic services undertaken by the SECC an overt counter-hegemonic dimension. The APF conceives the struggle over basic services as a way of bringing into the consciousness of ordinary people questions surroundings the structure, ownership and control of the South African economy. The influence of

[1] Gramsci's writings are open to much interpretation due to there non-systematic character, reflecting the extreme hardship of the circumstances in which they were written. I draw on his modern interpreters particularly Alan Hunt and Hein Marais. Those interested in reading Gramsci in the original should consult Gramsci, A., *Selections from the Prison Notebooks*, London, 1971.

[2] Gramsci, quoted in Davis, D., "Deconstructing and Reconstructing the Argument for a Bill of Rights Within the Context of South African Nationalism", in Andrews, P., Ellmann, S., (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, Witwatersrand University Press, 2001, p. 202 - 203.

this conception of politics can be seen in the increasing number of issues that the SECC has adopted as part of its program of action.

Some empirical work on the role of law in single-issue campaigns, particularly with respect to consumer rights, has concluded that generally consumer rights litigation is not a threat to the dominant social order. Reform through litigation is inherently "incremental, gradualist and moderate".[3] At a more fundamental level localised struggles on specific issues such as utility rates, services levels and credit control practices may not properly contextualise the important immediate concerns of consumers with the deeper structural or macro-economic origins of a localised affordability crisis. In this context minimum concessions offered by government can easily defuse protests while the underlying causes go largely unaddressed.

Such a critique does not sufficiently address three main concerns. Firstly, it is very difficult to imagine a transformative politics that does not source its legitimacy in the vital everyday concerns of South Africa's working class and women. This necessarily means looking at issues of consumption of basic municipal services. Given high unemployment levels a typically work place based political programme focussing on wages, labour conditions and industrial democracy would be unlikely to appeal to the many households in Soweto in which no one is employed in a full time formal employment sector.[4] A focus on the politics of consumption entails a narrow range of core issues. However their vital importance to township residents opens up transformative possibilities. With perseverance, luck and a lot strategic nous a serious challenge to capitalist values may just be achievable.

There is of course nothing inevitable about such a process and a concern with consumer issues does not in any way automatically lead to a radicalising of ones politics.[5] One non-aligned councillor in Tshwane who represented a similar constituency to the SECC, thought that township resident's in Tshwane were very unlikely to accept the socialist values which he saw as underlying the SECC's campaign around basic services.[6]

Secondly, the legitimacy of the current government excludes tactics that begin from entirely outside the current liberal democratic institutional order. The ANC retains overwhelming electoral support evidenced in the 2004 national election victory. While this support waxes and wanes, particularly amongst the urban poor,[7] there are no viable progressive electoral alternatives to the ANC. Therefore it is unlikely that

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[3] See Handler, J.F., *Social Movements and the Legal System, A Theory of Law Reform and Social Change*, Academic Press, 1978, Chapter 3: "Consumer Litigation" and at p. 233.

[4] In an entirely different cultural context it seems to me the radical consumerist politics of Ralph Nader in the United States presents a textbook example of how consumer issues can be used to challenge dominant elites. This is perhaps the only alternative in a country where radical sites of resistance in the field of production are so marginalised as to be of little sustained practical use for progressives.

[5] This could encapsulate a politics beyond the production/consumption nexus focusing on gender or environmental issues. As this type of political understanding was not a feature of the SECC or the APF I shall limit radicalism to imply a radical class politics.

[6] Interview with Councillor Themba Ncalo, Attridgeville and Saulsville Concerned Residents Association (ASCORA), Friday 10 May 2002, ASCORA offices, Pretoria city.

[7] Tom Lodge reviewing a Business Day/AC Nielsen Poll noted "Today's poor ratings of government performance by the worse off suggest the ANC's bedrock constituency is losing faith." See Lodge's interpretation of the poll in *Business Day*, "'Poll findings represent a sharp warning to government'" and "Image of ANC is still negative – survey", Monday July 29 2002 p. 2.

the electoral system will provide, any time soon, an avenue to radically influence national government policies. In the interim this implies engagement with the legal system as a way of influencing government policy. Sole reliance on the oppositional political mobilisation techniques developed during Apartheid will probably be less successful in a more obviously democratic order.[8] The policies of the ANC are clearly hegemonic.

The first two concerns discussed previously relate to the question of viable strategic alternatives to a rights the third point suggests that the critiques of rights strategies are overstated. Bartholomew and Hunt have argued that legally based struggles surrounding "single" issues can open up serious transformative possibilities within society.[9] Single-issue campaigns, in certain circumstances, can begin to challenge the dominant liberal capitalist system. This can happen either through a single issue being broadened in such a way that other political issues come to be seen through its concepts and priorities. Thus the general emphasis on de-commodified basic levels of water and electricity services can flow over into other important issues such as education, welfare reform and transport issues.

There is significant evidence in the literature put out by the SECC/APF of attempts to broaden peoples direct concerns with basic services in a way that challenges the hegemony of neo-liberal policies of government. These counter-hegemonic activities of the SECC/APF respond to the development of various forms of spontaneous micro-resistance (individual household payment boycotts and illegal connections) and localised forms of organisation that have arisen in the townships that predated the SECC.[10] For example a number of the SECC activists noted that their initial involvement in these issues was in a concerned residents association.[11] It is the intention of this chapter to analyse various aspects of the counter-hegemonic struggle of the SECC/APF against neo-liberal municipal services policies.

Hegemony

Hegemony is a state of affairs in which the values of a particular ruling group become entrenched as universal values applying to all social groups. The process of asserting and maintaining hegemony entails the universalising of the ideas of a dominant class in such a way that those ideas become the generally accepted "common sense" of the society *including* amongst those groups subordinated to the dominant class. The concept of hegemony draws upon Marx and Engels observation that "the class which is the ruling material force in society is at the same time its ruling intellectual force."[12] Gramsci, however, reconfigured the relationship between the material and the intellectual to emphasise how cultural and intellectual social life had an independent role in politics that was not simply reducible to the underlying forces of production.

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[8] See Hein Marais, *South Africa: Limits to Change*, University of Cape Town Press, 2001, p. 284 – 285.
[9] Bartholomew, M., Hunt, A., "What's Wrong With Rights?", 9 *Law and Inequality*, November 1990, 1 – 58 at 54-55.
[10] Interview Wiseman Hamilton, 6 March 2002 and Trevor Ngwane quoted in Nelson, A., "New Activist Generation comes of Age in Soweto", *Red Pepper*, 25 March 2002.
[11] For example Klipspruit/Pimville Concerned Residents Association and Diepkloof Concerned Residents Association.
[12] From *The German Ideology*, which can be found in Pierson, Christopher, *The Marx Reader*, Polity Press, 1997 p. 94.

This led Gramsci to a general rejection, for western liberal democracies at least, of brute force as a good explanation for capitalism's long reign.[13] In doing so he placed much less emphasis on the control of the dominant sectors of the economy and the coercive power this gave to capital than Marx did. Gramsci did see force as important tool of last resort when broad popular consent for the dominant social group fails.[14] But even this force must have some popular consent.

Gramsci expanded on the classical Marxist preoccupation with the inevitable tendency of capitalism to lurch into economic crisis. Gramsci's view of crisis spreads well beyond the economic sphere to the cultural level.

The working class, by and large, voluntarily and "spontaneously" appeared to accept a good deal of liberal capitalism's key characteristics before capital remotely exercised the coercive powers available to them by virtue of their ownership of the means of production. To Gramsci what really mattered was not the control of the commanding heights of the economy but the ability of capital to shape the cultural, psychological, ideological and moral life by permeating society with its values.[15] Hunt refers to this often slow and uneven process of value inculcation by capital as "incorporative hegemony".[16] The end stage of this process is a hegemonic situation in which the values of the dominant social group are widely accepted as "common sense".[17]

The concept of hegemony cannot be reduced to a crude version of "false consciousness" in which the masses are duped into supporting capitalism and liberal democracy by, for example, one-sided capitalist propaganda in the media, education and legal systems. Four factors used to explain the emergence of a hegemonic situation are the;[18]

- binding of subordinate social groups to the hegemonic value system through material concessions on behalf of the dominant social group that secure the minimum standards of social life for the subordinate groups.[19] This means tangible concessions to a range of subordinate social groups;
- ruling group's own restriction in its freedom of movement by the very value system through which the ruling group seeks to maintain and expand its power. The ideologies, reinforced by the rule of legal rules, which control subordinate social classes also constrain the behaviour of the dominant social class;
- dynamic nature of hegemony, with the value system being constantly reproduced and tested through class, gender and racial struggles in the legal, political and

[13] An example of this coercive power could be the capital strike. Rapid disinvestment when progressive policies favouring subordinate social groups is a way to bring adventurous governments into line.
[14] See for example Gramsci, *Prison Notebooks,* p. 12.
[15] See Harrington, M., *Socialism: Past and Future,* Pluto Press, 1993 p. 252.
[16] Hunt, A., "Rights and Social Movements: Counter-Hegemonic Strategies" 17 *Journal of Law and Society,* (1990), 3, 309 at 314.
[17] See, Evans, T., *The Politics of Human Rights: A global perspective,* Pluto Press, 2001, p. 19.
[18] Hunt, Rights and Social Movements, *Op. cit*., at 311.
[19] See Gramsci, *Selections from Prison Notebooks,* p. 161.

cultural systems.[20] This continuous process acts to legitimate the value system of the dominant social group but in certain circumstances can result in a hegemonic crisis in which the contestation of the dominant value system reaches such a point that it will break down and be replaced by a new hegemonic order.

- need for the dominant social group to form strategic alliances with subordinate social groups.[21] In South Africa, big capital's demonstrative commitment to empowering the rising black bourgeoisie is the most prominent example.[22] Economic classes, rarely if ever rule directly. Political power is always constituted as a block of social forces incorporating for example nationalist, ethnic and gender defined groups. Controversially this does not preclude a fraction of the dominant economic class forming an alliance with subordinate groups to form a "historic bloc".[23]

Incorporative hegemony is, in a sense, a form of crisis management in which the tendencies within the capitalist social order for class conflict need to be constantly contained. This containment occurs through processes, which ameliorate, distract attention from class or corporate subordination and attempt to make that subordination appear a natural and uncontestable fact of social life.[24] So for example the massive salaries of corporate executives are justified on the basis of the apolitical operation of the market mechanism.

Despite these crisis management techniques, in many instances the legitimacy of government can appear, and indeed is, very unstable. Sufficient to say that, at least in South Africa, neo-liberalism, while a dominant influence in government policy development, has in no way reached a hegemonic position.[25]

Relative autonomy and the state

An important point left unaddressed by the previous section is how the hegemonic intentions of a class are institutionalised in society. If the "struggle between two classes is usually the struggle between two hegemonic projects" how do these projects become integrated into the social fabric.[26] If we are to make sense of the idea of hegemony we must explain what is the role of the state in advancing a particular class project. The concept of relative autonomy describes the state's relationship to civil society (as broadly defined)[27] as the state acting with some degree of autonomy from

[20] As this study's focus is on the legal system I will ignore the many other components of creating a hegemonic situation. For a full discussion of the new South African states attempts to achieve a hegemonic situation see Marais, *South Africa: limits to change, Op. cit.*.

[21] Perhaps the reason for Marx's most glaring failure of prophecy - that the petty bourgeois would disappear as a class as modern industry developed see Karl Marx and Friedrich Engels, *The Communist Manifesto*, Penguin, 2002, at p. 246-247.

[22] Hein Marais, *South Africa: limits to change, Op. cit.*, at p. 234.

[23] *Ibid*. See also Hunt, Rights and Social Movements, p. 327 n. 11. Gramsci also used "historic bloc" to refer to the link between intellectuals and the ruling class.

[24] I draw this idea from Connell, R.W. & Irving, T.H., *Class Structure in Australian History*, 2nd Edition, Longman Chesire, 1992, p.19.

[25] Recent evidence of this is COSATU's national strikes against the government's policies of privatisation the latest being on October 1 2002

[26] The quote is from Marais, *South Africa Limits to Change, Op. cit.*, p. 231.

[27] This refers to the entirety of institutions outside the state including the economy. The name civil society in current times refers to "the space of uncoerced human association and also the set of relational networks – formed for the sake of family, faith, interest, and ideology that fill their space".

the direct interests of the dominant economic classes.[28] It reacts against a crude instrumentalism, which sees powerful business sectors dictating its desires to the "executive committee of the bourgeoisie" (as Marx and Engels sometimes described the state[29]). It is this degree of autonomy from dominant business interests that the state enjoys, which is the key institutional device of liberalism that sustains capitalist hegemony by ensuring both economic stability and the ideological credibility of the state as an independent arbiter of competing social interests. This device, not specifically used by Gramsci, provides an explanation for the commonly observed characteristic of the liberal democratic state enacting legislation, which sometimes acts against the direct material interests of dominant business elites.[30] This occurs while business interests behave in many ways exactly as crude Marxist theory predicts in attempting to frustrate at every level often mildly reformist programmes.

This relative autonomy the state enjoys from the selfish interests of capital, while still allowing for a significant degree of control for capital, provides enough flexibility to stabilise the system by accommodating to the real interests of subordinate groups. The state, in attempting to achieve a hegemonic situation, does not act at the behest of the dominant economic interests but on their behalf.[31] This agency relationship between the state and dominant business interests is more or less an institutional necessity as capital, on its own, has no easy way of integrating the demands of various subordinate classes into its relentless program of capital accumulation. The state as the agent of capital has considerable autonomy to prosecute the broad goals of the capitalist classes including the integration of subordinate groups into the capitalist social order. But in the last instance it is capital, owing to its grip on societies productive forces, which will determine state action.

Considerable controversy and conflict often mark this agent - principle arrangement. Firstly this is because in many complex social and economic policy areas it is by no means clear what actually is in the best interests of capital. Secondly, there may be vigorous disagreements, resulting from the different underlying interests of various fractions of capital[32], that can only be resolved through the intervention of an "independent" mediator such as the state to manage and resolve these disputes and articulate a common position. None of the autonomous functioning by the state that

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Michael Walzer quoted in Young, Iris Marion, *Inclusion and Democracy*, Oxford University Press, 2000, p, 157. This latter definition is particularly relevant to South Africa as civic associations, churches played a crucial role in the context of the anti-apartheid struggle see Mayekiso, Mzwanele, *Township Politics, Civic Struggles for a New South Africa*, Monthly Review Press, 1996 at 145.

[28] The concept of relative autonomy was used by Engels. In particular situations in which the bourgeois and proletarian social forces are equally balanced Engels saw that the state could act independently from the "ruling class" see Engels F., *Origins of the Family, Private Property and the State*, in Maureen Cain and Alan Hunt, *Marx and Engels on Law*, Academic Press, 1979, p. 157.

[29] Karl Marx and Friedrich Engels, *The Communist Manifesto*, Penguin, 2002, at p. 221.

[30] A good study of this type of legislation can be seen in 19th century British factory acts. David MacGregor in *Hegel, Marx and the English State*, University of Toronto Press, 1996 intriguingly argues that Marx, in *Capital*, unselfconsciously and in direct contradiction to most of his other writings, adopted a Hegelian understanding of the state as an autonomous political actor in its own right.

[31] In this formulation I follow Ralph Miliband, *Marxism and Politics*, OUP, 1977 pp. 73-74. Miliband stresses that at times of national crisis such as war this relationship can be reversed. For a critical assessment see Held. D., *Models of Democracy*, 1987, pp 205 - 214.

[32] Eg national capital versus international capital.

these processes imply suggests any fundamental disagreement with the goal of maximising capital accumulation.

The state as highly dependent on tax revenues and jobs generated by large-scale businesses, will of necessity be highly responsive to capital's needs, even if some of those needs have to be sometimes determined independently from capital's competing fractions. But the state's willingness to facilitate the process of capital accumulation can only go so far. After that the need for democratic legitimacy, implicit in the institutions of representative democracy and process of mass elections, will prevent the states total capitulation to the interests of capital. Capital in many instances will voluntarily accept the need for integration of some of the interests of subordinate classes so long as "in the last instance" capital's needs are ultimately protected.[33]

At the other end of the social hierarchy subordinate social groups can pressure the state to service their demands calling the state to account for its neglect of their interests. So while in many ways professional politicians, high-level public servants and judges are the dependent functionaries of the process of capital accumulation they nonetheless may have to push through reforms that are bitterly opposed by business interests. This may be on the basis of the need to ensure the longer-term health of the social and political order and capital accumulation or on the basis of their own short-term political needs for re-election.

The structure and membership of the state's administrative arm reflects the contradictions in the relationship between capital and the subordinate classes with the central agencies of finance and treasury closely aligned to the interests of big capital.[34] It is with these central agencies that welfare, health, and labour departments often find themselves in conflict.

All these various institutional and class struggles between the state and civil society are reflected ultimately in the law (one of the main ways the state enforces its control) and legal doctrine. Given all the qualifications needed to make the concept of relative autonomy fit observable characteristics of modern society have questioned its continued relevance as an explanatory tool.[35] The relative autonomy concept, as used to describe the functioning of the judicial arm of the state, denies both a direct link between ruling class domination and the structure of legal doctrine (Marxist instrumentalism) as well as the independence of legal doctrine from economic and class forces (autonomous legal reasoning).[36] For the concept of relative autonomy to be useful it must define its boundaries lest it lurch into endless contradiction. If the judicial arm of the state is *relatively* autonomous from the dominant social classes exactly when or where does this autonomy end and class domination begin? If this

[33] A mostly unreadable account that aims to define how the economy is determinant in the last instance can be found in Althusser, L., Balibar, E., *Reading Capital*, Verso 1997, pp. 216 – 224.
[34] I think an implicit premise of the classic study of Australian Commonwealth Government's bureaucracy, Pusey M., *Economic Rationalism in Canberra*; *A nation building state changes its mind*, Cambridge University Press, 1991.
[35] Hunt, A., *Explorations in Law and Society: towards a constitutive theory of law*, Routledge, 1993, p. 166 – 167, Klare, K., "Law making as praxis", *Telos*, no. 40 (Summer 1979), and Kennedy, D., *A Critique of Adjudication*, Harvard University Press, 1997, pp. 286 - 287. See also MacGregor, D., *Hegel, Marx and the English State*, University of Toronto Press, 1996 at p. 273.
[36] See the discussions in Chapter 2.

point can't be identified with any specificity then the theory cannot be verified empirically.

This is by no means a modern observation as Engels, in discussing the relationship between law and class power, summarised the basic problem in 1895.

> In a modern state, law must not only correspond to the general economic conditions, but must also be an *internally coherent* expression which does not, owing to its internal conflicts, contradict itself. And in order to achieve this, the faithful reflection of economic conditions suffers increasingly. All the more so the more rarely it happens that a code of law is the blunt, unmitigated, unadulterated expression of the domination of a class.[37]

This formulation admits that legal doctrine's rules, traditions and commitments to doctrinal coherence independently influence the content of legislation and legal interpretation. Law is therefore constitutive of society and not simply an expression of societies 'needs'.[38] Law cannot be explained away as some superstructural artifice hiding what really drives social formation. Both neo-liberals and Marxists can suffer from this misapprehension. For conservative legal economists it is society's need for efficiency or economic growth that primarily drives the common law and functions to produce efficient social outcomes.[39] For Marxists it is the needs of capital and the privileged social formations (ruling classes) arising from this social system that drive most law making, even 'ostensibly' pro-working class legislation and court decisions.[40] It could be argued that the neo-marxist form, described in this chapter, is only one of the more recent and nuanced form of a falsely dichotomous approach to law and society.

Writers sympathetic to this view, work primarily in the critical legal tradition, and argue that what masquerades as the modern *capitalist* state – the totalising and aggressive reproducer of a culture of possessive individualism in the pursuit of capital accumulation - is in fact a hodge-podge of *altruistic* (public) and *individualist* (private) social formations with no systemic logic.[41] Sean Flynn in a private communication explained:

> "…every system, including US capitalism, has blends of institutions some of which are more socially focused (governed by the rules of …"public" markets) and some of which are more individually focused ("private"). Political battles are waged, including in courts, over defining the content of the institutions that structure our social and economic relations. But there is possibility for more social and more individual in every system, including socialism and liberalsim.[42]

Law and legal doctrine simply reflects this messy situation. The contradictions in fields of law arise from the most fundamental and entrenched conflict in society, that is, between our understanding of our 'selfhood' and those 'others' that surround us.

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[37] Quoted in Hunt, A., *Explorations in Law and Society*, p. 166.
[38] See the argument contained in Gordon, Robert W., 'Critical Legal Histories',*36* Stanford Law Review (1984) 57 at pp. 110 – 113 ,
[39] See generally the work of Richard Posner.
[40] A Marxist critique of the Crits 'consitutive approach to law and society can be found in Sciaraffa, S., 'Critical Legal Studies: A Marxist rejoinder', *Legal Theory, 5 (1999), 201 – 219.*
[41] See Kennedy, D., *Critique of Adjudication*, Harvard University Press, 1997, p.287
[42] E-mail 27 June 2003. Most of what follows rely on Sean Flynn's contributions to South Africa's Debate discussion list cross checked with Unger's and Kennedy's writings.

To Duncan Kennedy the 'fundamental contradiction' is "that relations with others are both necessary to and incompatible with our freedom…[and that this] is not only an aspect but the very *essence* of every problem".[43] Rights talk, and liberal legalism generally, is but a fantasy resolution of this fundamental contradiction.[44]

Society is 'made and imagined' and the adoption of a Marxist determinism, places barriers to understanding how to change society now – in the midst of ordinary social life - by making us think that social systems must be replaced in their entirety, that is capitalism with socialism.[45] Markets, for example, have no predetermined institutional content - change the rules and you change the social outcomes. Markets can be made vicious by structuring social relations in all sorts of socially deleterious and hierarchical ways. Or they can be *made* to reflect very different social outcomes.[46]

For Roberto Unger the doctrinal/institutional contradictions between altruism and possessive individualism which he, along with many other Crits, argues is immanent in most fields of law, opens up the possibility of real social change through the development of 'deviationist doctrine'.[47] Real social alternatives are prefigured within these contradictory principles.[48]

In the context of this study the fact that the right to water and food exist in the Constitution both limits and opens up transformative options for social movements. Law constrains us by shaping the imaginative boundaries of the socially possible. Some doors to the future are simply closed by the inherited legal structures containing and defining the world we inhabit. Equally, and significantly, the same legal framework provides other exits to new social realities *should we choose* to force them open. The law is also crucial to understanding social formation. The emergence of a strong and vibrant working class movement in Soweto around services could be interpreted as an inevitable outcome of the neo-liberal turn in South African politics and society. Constitutive theory would also agree that the underlying relations of production are important but would also place significant emphasis on the law. Crucial to the understanding of the 'conditions for existence' of a vibrant class or social movement would be Sowetans:

1. Capacity to formulate interests as claims.
2. Ability to articulate these claims in legitimated form (custom, claims of right); and

[43] In any work that deals with critical legal studies it would be impossible not to site this seminal article so here goes "The Structure of Blackstone's Commentaries" 28 *Buffalo Law Review*, (1979), 209 at 213. The introductory pages to this long and difficult article have some really profound insights not only into law but the human condition generally

[44] Kennedy, D., *A Critique of Adjudication: (fin de siecle)*, Harvard University Press, 1997, p. 336

[45] Unger, R., *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy, Cambridge University Press*, 1987, p. 216. Unger clearly overstates his case. Many writers in the Marxist tradition are very aware of the gradualist process of social change and are alert to the pitfalls of revolutionary millenarianism. See Saul, J. S., 'Globalism, Imperialism and Development: False Binaries and Radical Resolutions', In Panitch, L. and Leys, C. *Socialist Register 2004*, Monthly Review Press, 2003, p. 239.

[46] Unger R., *Democracy Realized the Progressive Alternative*, Verso, 1997 p. 204.

[47] See Davies, M., *Asking the Law Question*, p. 182 discussing Unger. Unger, for example spends a lot of space in False Necessity reconfiguring the consolidated property right, a right that he views as *the* problem for liberal rights theory, in order to make it more democratic.

[48] See Hunt, on Unger's concept of 'devianionist doctrine.,' *Explorations in Law and Society*, p. 171

3. The capacity to mobilise (and win allies) in advancing and protecting these claims.[49]

The third point is, as will be described below, interlinked with the use of rights. The use of pre-legitimated claims (constitutional rights) is an important way of turning sympathisers into supporters.

The use of legal principles applied in one field, for example the Constitutional commitments to water, can be transferred to the related, but nonetheless quite distinct, area of electricity service provision. The fact that such an approach appears convincing to Sowetans is because of the pre-existing constitutional legal regime. A communities understanding of the possible is shaped by the Bill of Rights. Any attempt to work totally outside this framework, for example an anti-rights perspective, is considerably less likely to succeed. This may explains why those who reject rights discourse in their entirety remain marginal to social protest in Soweto while on the face of it their strong rhetoric of radically redistributing wealth and power should be appealing to the marginalised.[50]

Social conflict is embedded in ostensibly stable and settled fields of law. A law is simply the point at which the social conflict, which led to the law in the first place, ended, and the terms of a truce was written up. Adjudication revisits the initial conflict and opens up the possibility of renegotiating (popularly understood as a re-interpretation of the law) the terms of the truce.

For me these debates represent a dilemma. Clearly I think that the Crits views on the importance of the law (as opposed to the underlying relations of production) opens up transformative possibilities in ways that a purely materialist understanding of social formation (Marxist and neo-liberal) don't. But at the same time I also draw my understanding of what was happening in Soweto very directly from some of the participants in the struggle.[51] To me an elaboration of the meaning of counter hegemony in relation to law and rights is a crucial step in understanding what was happening in respect to the struggle over municipal services and is the reason why at this point I must end my dialogue with critical legal theory. However it appears to me that the concept of 'deviationist doctrine' could easily be interpreted as a complex restatement of Gramsci's exhortation that progressives must begin the long march through the institutions including the law.[52] Alan Hunt also makes the point that there are great similarities between theorists who adopt and constitutive understanding of the law and those who view law as 'relatively autonomous'. The method and theoretical moves are very similar but the intellectual errors of judgement occur at different ends of the spectrum. The risk for the 'relative autonomy' theorist is that they can lurch into a crude economic determinism in explaining social phenomena while for the constitutive theorist the risk is the reverse. They can naively see the law

[49] See Hunt, A., *Explorations in Law and Society*, p. 178.
[50] For example the Spartacists. See the "The New South Africa Does Not Provide Power to the Poor", *Spartacist South Africa*, No. 2, Summer 2002, p. 15.
[51] My discussion with John Appolis is very relevant here. In many ways this chapter is an extended meditation on his views on the role of the law and rights in the movement.
[52] I am guessing here, as Roberto Unger doesn't adopt the traditional approach to footnoting as is standard in academic texts. In postulating Ungers's debt to Gramsci I rely on his Bibliographical Notes, the appendix to *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy, Cambridge University Press, 1987, p. 599-600.*

as determinative without reference to underlying economic forces.[53] Clearly a careful analysis of both legal and economic determinants and their interplay is the most robust intellectual approach.

Hegemony and reform of basic services

Within urban services the dominant neo-liberal position emphasises the need to run services on commercial lines. This was primarily voiced in Johannesburg's municipal services reform plan iGgoli 2002, which divided the municipality into 11 council owned companies, all of which are run along business lines. Critics have seen iGoli 2002 as the "ultimate expression of the local level neo-liberal model".[54] Whether this amounts to an ersatz privatisation is open to question. But the implications are clear. These coporatised entities must be financially self-sufficient or risk facing the wrath of the municipality. To achieve this self-sufficiency requires a much greater emphasis on cost-recovery even amongst the very poor. In the eyes of iGgoli's supporters this approach has seen many positive changes. Johannesburg is seen as "very much a managers city" with mayor Amos Masondo being the "political figurehead".[55] The introduction of iGoli 2002, has seen a marked improvement in the financial situation in Johannesburg.[56] But the question must be asked, at what social cost?

On a national level the move is to restructure electricity services to enable privatisation of significant parts of the currently 96% publicly owned parastatal.[57] This is in advance of the full sale of the power generation section of electricity infrastructure in 2003 and 2004.[58] For electricity the new arrangements mean the imposition of "cost reflectiveness" which will most likely mean cost increases in the already seriously unaffordable prices for much of the population in Soweto.[59] The full parameters of this formulation are discussed in Chapter 1. Within this general shift towards full "cost reflectivity" so "that customers may receive the correct economic signals"[60] and transfer of publicly run companies into the hands of local and foreign capital, there is an attempt to legitimate this highly advantageous transfer of control to the private sector to limit the inevitable class and racial conflict that will

[53] See Hunt, A., *Explorations in Law and Society: towards a constitutive theory of law*, Routledge, 1993, p. 178.
[54] See Pape, J., McDonald, D., "Introduction" in McDonald, D., Pape, J., (eds) *Cost Recovery and the Crisis of Service Delivery in South Africa*, HSRC, 2002, p. 6.
[55] See *Financial Mail*, January 18 2002 "Johannesburg's new broom starts to clean things up: But opposition slams arrears and deteriorating services".
[56] It wiped out a Rand 300 million deficit and cleared up a Rand 450 million overdraft in its 3 years of existence see Ibid and *Financial Mail*, April 20 2001, "Johannesburg Metro: Optimism in Defiance of Gloomy Financial Reports: Remedy for bookkeeping deficits imminent", p. 36.
[57] See for the public discussions on this process, Robyn Chalmers, Xolani Xundu, "Avoiding California scenario in SA will cost", *Business Day*, Thursday June 21 2001 p. 15 and Robyn Chalmers, "SA must get it right the first time", *Business Day*, Tuesday July 17 2001 at p. 11, "Power market begins to take shape", *Business Day*, Monday January 7 2002 p. 2, "Groups to debate electricity plan; Local government wary of minister's complex restructuring exercise" and "Setting up of EDI Holdings 'under way': Company set to reshape power sector", *Business Day*, Thursday, February 21, 2002, p. 3, "Eskom to be converted into a tax paying public company", *Business Day*, Monday July 1 2002, p. 12.
[58] Robyn Chalmers, "Three steps to be taken in reshaping power arena", *Business Day*, Monday January 7 2002 p. 2.
[59] The term is Eskom's and relates to long-term commitments to electricity tariff reform along these lines so as to achieve "market related returns sufficient to attract new investors into the industry", *Eskom Annual Report 2001, Embracing Sustainable Development*, pp. 56-57.
[60] See Press Release National Electricity Regulator, 29 April 2002 at www.ner.org.za.

occur. For some preliminary evidence of the potential negative impact of privatisation one need look no further than the record of the multinational AES which after purchasing Kelvin Power Station in Johannesburg retrenched almost ¾ of its workforce soon after taking control.[61]

The transfer of ownership is admittedly in its infancy with no clear path publicly announced by the Department of Mineral's and Energy or the Department of Public enterprises.[62] There has also been some speculation that owing to the massive collapse in the share prices of potential investors such as the US electricity giant AES, which already owns Johannesburg's Kelvin Power station, foreign investors may be shy of investing in South Africa.[63]

There are three main techniques used by government, which attempts to cement these policies with the broad mass of the township population by providing some benefits to the overwhelming majority of township residents and the very small but influential black bourgeoisie.

Firstly there is indigent policies, which provide tightly controlled direct subsidies for basic services to means tested recipients, are the domain of local government.[64] They allow the poor to be protected from the harsher measures denoted by cost recovery for most easily commodifiable municipal services. They provide a limited space for the poorest of the poor to maintain access to municipal services.

Secondly, the provision of free basic water and electricity. This response has always been part of various legitimating strategies by neo-liberal political elites wanting to transfer ownership of public utilities and/or charge for utility consumables at long term marginal cost.[65] The free component of the first tariff block was a distinct concession to subordinate interests as lifeline tariffs are often priced at operation and maintenance costs.

As discussed in Chapter 1 influential international financial institutions have also pre-varicated over whether to use this technique. This is because if lifeline pricing of the first tariff block is taken to an extreme, that is zero-rating of a significant component of household consumption, it can undermine the moral, economic and labor reproduction goals of the neo-liberal programme. This of course has to be balanced against the potential financial, moral, constitutional and political impacts of under-consumption of essential resources by a significant proportion of the population.

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[61] See Peter McInnes, "Privatised power company sacks workers" *Green Left Weekly*, February 27, 2002, p. 24. AES in the calendar year to February 2002 saw its share price drop from US $63 to around $4.00.
[62] Robyn Chalmers, "Radebe pushes on privatisation", *Business Day,* May 17 2002.
[63] Eskom privatisation is no cut and dried affair, *Business Day,* September 2 2002.
[64] For a full discussion see Chapter 1.
[65] See James L. Blasiak, "Reform of Electricity Pricing in the United States", (1975) 25 *Buffalo Law Review*, 183 – 209 at 208 which puts the case for long term marginal cost pricing of electricity in the largely privately owned U.S. electricity sector. He puts a humanitarian case for "lifeline" pricing of an 300kwh at a "relatively cheap rate".

Thabo Mbeki promised the zero-rated lifeline tariff for water and electricity as part of campaigning surrounding local government elections in September 2000.[66] This promise seemed aimed at ensuring re-election for the ANC in local government elections in December 2000 but some argue that the cholera outbreak in Kwazulu Natal was the key determinant for the introduction of a free "lifeline" policy for water.[67] Despite world's best practice emergency medical intervention the first five months of the outbreak saw 66 deaths from 18,000 infected.[68] The business press saw this outbreak as negatively impacting on South Africa's vital tourism industry suggesting national economic considerations could have also played a part.[69]

Thirdly there is the promise that the ownership of the privatised capital will be "de-racialised".[70] Government sale of electricity power generation is promoted on the basis of the fact that the sale will go to previously disadvantaged groups.[71] This is perhaps the most prominent aspect of the legitimation strategy of government which has been supported, if not always enthusiastically, by big capital and the business press.[72]

The public character of this hegemonic struggle is reflected in the statements put out by Eskom in response to the activities of the SECC in reconnecting houses disconnected by Eskom. The press present the arguments from Eskom's position when covering protests and actions organised by the SECC. These public pronouncements stress the commitment by government to provide free electricity and water to township residents. They have a distinct moral and ethical tone when urging payment.

They suggest that there should be reciprocity in relations between Eskom and the community. Jacob Marogas, executive director of Eskom's distribution arm, was quoted in the Star newspaper as saying;

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[66] See Bond, P. *Against Global Apartheid: South Africa Meets the World Bank, IMF and International Finance,* University of Cape Town Press, 219 – 220 and also Jeremy Cronin's explanation for the origins of this policy as an outcome of the internal struggles of the South African Communist Party and COSATU against their more neo-liberally minded comrades in the alliance in his "Post-Apartheid South Africa: A reply to John Saul", *Monthly Review*, December 2002.

[67] See Laurence, P., "Brave New World of free water for the poor: International scepticism and scrutiny of SA plan", *Financial Mail*, March 2 2001 p. 36. See also Johannesburg Water on the Official Site http://www.goafrica.co.za/joburg/services/water1.stm accessed 25 July 2002. Patrick Bond places the policy shift championed by Kasrils much earlier at around February 2000. Firm commitments however did not occur until September 2000. Interview with the author 6 June 2002.

[68] Haffajee, F., "Exposing SA's Rural Underbelly: Outbreak highlights First- and Third-World dichotomy", *Financial Mail*, January 19 2001, p. 30.

[69] Ibid, p. 30.

[70] This term is misleading, perhaps deliberately so. It clearly denotes the racialised practice of black empowerment. Thabo Mbeki used the term in a speech to black managers in 1999. Thabo Mbeki, 'Speech at the annual National Conference of the Black Management Forum", Kempton Park 20 November 1999, at the ANC website quoted in Saul, J. S., "Cry for the Beloved Country: The Post-apartheid Denouement", *Review of African Political Economy,* 89 429 at 444.

[71] *The Star's, Business Report*, "Eskom units to be sold this year", Tuesday March 12, 2002, p. 20.

[72] This is part of a broader strategy of black economic empowerment primarily being pioneered in the mining industry. International mining capital appears to have endorsed the mining charter supporting the 'South Government in its "endeavours to improve the lot of the blacks"', Barry Fitzgerald, "South African mining charter wins early industry support", *The Age*, 11 October 2002.

> "Eskom has an obligation to provide electricity, customers have an obligation to pay."[73]

In suggesting that it is an obligation for Eskom to supply electricity and equally an obligation for customers who receive electricity to pay for that electricity Eskom comes close to adopting the logical correlative of a right which is a duty.[74] This is as close as commentary by Eskom goes to adopting the language of rights to justify its claims to be paid. But to be obliged to do something is not having a categorical duty to do it. Nor does it specify that such an obligation means supply at an affordable rate to enable the poor to get access to electricity or alternatively only at an economic rate which enables the supplier to get a sufficient return to justify their investment.

A spokesperson for Eskom in response to Operation Khanyisa explained the imperatives that drove Eskom's policies in Soweto.

> We will then take legal action (against the illegal connections). It must be stressed that we will not be intimidated by these actions. We are in constant negotiations with the community but we are running a business and we cannot afford the huge losses we have been sustaining through non-payment. We have to insist that all arrears be paid in full. Electricity is a privilege not a right.[75]

As this quote shows Eskom officials deny strongly that electricity can be characterised as a right. They do often talk of Eskom's obligation to supply electricity at a national level. This obligation is framed within a commercial context and attempts to suppress the public goods characteristics of electricity provision preferring to stress the contractual character of individualised supply agreements between Eskom and each household.

The SECC's direct action campaigns are crucial to achieving significant concessions from Eskom and Johannesburg municipality. This is economic coercion through the organising and mobilising power of the SECC. SECC threats of a payment boycott, coupled with organised illegal connections did win crucial concessions.[76]

These victories are claimed on the basis of the government's moral and legal commitment to respect, protect and promote their citizen's rights. When declaring victory after Eskom decided to temporarily suspend cut-offs in October 2001 the SECC Chairperson Trevor Ngwane, was quoted in *The Star* newspaper as seeing the temporary suspension of cut-offs by Eskom as a;

> …victory for humanity, for development and for the expansion of our Constitutional rights to lead lives of dignity. The news comes on the eve of our

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[73] "Eskom in clash with residents over payments" *The Star* published on the web at www.iol.co.za July 6 2001.

[74] See W.N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1923) excerpted in M.D.A. Freeman, Lloyd's Introduction to Jurisprudence, 6th Edition, London, 1994, pp. 494 – 499.

[75] Anna Cox, "Sowetans to defy Eskom over cutoffs", *The Star,* 4 June 2001, p. 1 the spokesperson was in a later article identified as Angela Dubini.

[76] Coercion here is used in a non-pejorative way as being a natural and necessary part of economic activity. It is of course assumed that the SECC's coercion is very limited in comparison to the state. See Hale, R., "Coercion and Distribution in a Supposedly Non-Coercive State", *Political Science Quarterly*, 38, 1923, 470 – 94 and Mercuro, N., Medema, S., Samuels, W., "Robert Lee Hale (1884 – 1969) – legal economist", *The Elgar Companion to Law and Economics.*

> launching major civil protests and legal action against Eskom and municipalities which persist in denying constitutional rights to low income citizens. We will not rest, but will intensify the struggle of poor and working class Sowetans in related socio-economic grievances.[77].

The success is framed in terms of Section 10 of the Bill of Rights, the right to dignity.[78] Dignity, is perhaps the vaguest human right within the Bill of Rights but provides an easily understandable way of framing the increasingly varied claims of the SECC. According to one activist the concept of dignity resonates with the community when attempting to understand the psychological pain and hurt of electricity disconnection.[79]

That the victory was framed in the language of human rights may disguise the actual extent to which human rights played a part in the victory. At the level of political language rights talk was prominent, but not necessarily an overwhelming presence. In the context of South African townships a counter-hegemonic strategy does not necessarily mean starting from rights talk. It is an important symbol but as other research has shown many township residents have only a limited understanding of what the Bill of Rights actually means.

The SECC in many instances begin by educating people about the current hegemonic order. They inform people about some of the rights contained in the Bill of Rights that are relevant to their current problems with water and electricity cut offs. The main organiser for Soweto clearly engaged in a process of promoting the Constitution amongst potential supporters. When asked about whether he used rights when speaking at public rallies he stated.

> I stress it. In South Africa we have the *best* constitution and this best Constitution allows everyone to have their rights of water. It doesn't say the few must have their right to water, the majority their water must be cut. It says *everyone* must have access to their basic needs. . I also stress that the Constitution says that everyone has the right to a decent life. If you have your water and electricity cut off are you living a decent life? No you are not living a decent life.[80]

The extent to which the dominant class's concessions support the hegemonic ideology would depend on a number of factors. Firstly, concessions must be meaningful to subordinate social groups and provide sufficient reasons to bind them to the hegemonic class. Subordinate classes must be given a sufficient level of economic security. Secondly the values which the hegemon is trying to universalise, must be expressed in such a way that they take on significant trans-class appeal which at the same time masks their bias towards the ruling class.

Very different types of property, for example consumption goods and capital goods, are rarely if ever distinguished in popular defences of the right to property.[81] The law protects everyone's right to property but clearly the significance of this protection

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[77] "Sowetans celebrate Eskom's decision to suspend cutoffs" *The Star* Friday October 19 2001 p. 2.
[78] "Everyone has inherent dignity and the right to have their dignity respected and protected."
[79] Interview with Dudu Mphenyeke, 1st November 2001.
[80] It appears that the concept of the decent life is linked to the constitutional right to dignity. Bongani Lubisi, 26th October 2001.
[81] I take this from Hunt, A., "Rights and Social Movements: Counter-Hegemonic Strategies" 17 *Journal of Law and Society*, (1990), 3, 309 at 311.

varies greatly between the subjects of the law. Clearly the right to "my" hat and the right to "my" diamond mine are in practice almost non-comparable in terms of the consequences flowing from such protection.[82] Equal protection before the law in terms of property rights in the context of massive inequality in access to capital goods is largely meaningless. The continued focus on consumption goods theft, such as street and household theft of personal goods, by the media and the law enforcement system has a background legitimating function for all property rights no matter how different the consequences of such protection may be in practice.[83] This is all the more powerful as a legitimating device as personal consumption goods often mean much more to the desperately poor than the wealthy.

One of Gramsci's key insights was to highlight how the interests of subordinate groups were integrated into the dominant moral and political order of liberal capitalism in a way which tended to diffuse their transformative potential. The institutionalisation of welfare rights provide the best example of this process. This is perhaps the most controversial of Gramsci's insights as welfare rights have been a consistent demand of the working class. Even those rights, which can be interpreted as entrenching the values of liberal democracy, have often been some of the most important achievements of socialist activists in the long history of industrialism.[84] The entrenchment of these rights appear most often in societies exactly where there is a vigorous labour movement and not where capital is most dominant. Thus while welfare rights have gone a long way to legitimising capitalism amongst subordinate social groups in advanced western countries they do not appear prefabricated from the ruling class.[85]

I will now provide an example of how welfare rights can be implemented so as to weaken their potential emancipatory and transformative capacity. Local government indigent policy in South Africa targets the "poorest of the poor".[86] Thus indigent policies are means tested with very restrictive criteria which place strict evidentiary burdens on the prospective welfare claimant, before access to the meagre payment is

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[82] See Duxbury, Neil, "Robert Hale and the Economy of Legal Force", 53 *The Modern Law Review*, 1990, 4:421 at 437.

[83] The importance the new government (national and provincial) places on policing can be seen in the budget statistics. In the seven years between 1998/99 and 2004/05 spending on protection services Defence, Police, Prisons and Justice will increase from 16.2% to 17% as a percentage of all budgetary expenditures. Source South African Institute of Race Relations, *Fast Facts*, March 2002, p. 6.

[84] The Marxist medical writer Vicente Navarro puts the case, I think convincingly, for explaining some of the welfarist reforms of Keynsian states not as a result of top-down ruling class inspired welfare liberalism for the purposes of legitimation but as a result of vigorous working class struggle. *The Politics of Health Policy: The U.S. Reforms, 1980 – 1994*, Blackwell 1994, at p. 139 - 143. It is a critique of Harrington, M., *Socialism: Past and Future*, Pluto Press, p. 127 – 128.

[85] See for an example Bismarck's social insurance system, the pre-eminent example of "progressive" reform designed explicitly to suppress working class political movements (in this case the Social Democratic Party), nonetheless drew on ideas which came out of the revolution of 1848. It became an initial model for subsequent national health systems. See Sigerist, Henry E., "From Bismarck to Beveridge: Developments and Trends in Social Security Legislation" 1943, reprinted in *Journal of Public Health Policy*, 20:4, 474 at 477.

[86] For a modern defence and justification of liberal social policy see Dr G. Raichle's, from the Liberal Institute of Germany, recent contribution on this to South African audiences, "Twelve principles of liberal social policy", reproduced in *Fast Facts*, No. 6 June 2002.

given.[87] Rather than liberate the poor from the market they provide only limited and, as they are reassessed on a regular basis, temporary relief. They are meagre, and intentionally so lest they threaten the interests of capital in a compliant labour force. This characteristic of local government welfare rights has a long history.

J.S. Mill, writing in 1861, put the case for central government control of indigent policy formulation in such a way;

> Again, in the administration of public charity the industry and morality of the whole labouring population depend, to a most serious extent, upon adherence to certain fixed principles in awarding relief. Though it belongs essentially to local functionaries to determine who, according to those principles, is entitled to be relieved, the national Parliament is the proper authority to prescribe the principles themselves; and it would neglect a most important part of its duty if it did not, in a matter of such grave national concern, lay down imperative rules, and make effectual provision that those rules not be departed from.[88]

To Mill, if working people think that municipal goods and services can be delivered free, the quality of labour that the capitalist system can draw upon will be lowered as the incentive to engage enthusiastically and deferentially in wage labour to industry will be gravely weakened.[89] The common justification for indigent policies is to protect the "poorest of the poor" who have been left destitute due to the vagaries of the market. As this quote demonstrates this is not the full story as there is clearly a class interest to indigent policies, that is the proper disciplining of the labour force, which explains why they so often appear inadequate and difficult to access. It also provides another explanation for why the government was so resistant to pricing the lifeline supply of water below operations and maintenance levels until late 2000.

A similar role is played by the free lifeline component policies. The struggles over the extent of the free lifeline is very significant. From an outsiders perspective whether the government sets its lifeline at 25 litres per capita or 50 litres per capita may seem only a question of degree not content. But as Mill's point implies an overly generous indigent or lifeline policy can have a distinctly liberating effect on the poor.

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[87] For a critique of indigent policies from an entitlement perspective see Elson, D., "For an emancipatory socio-economics: A new synthesis of "economic" and "social" policy.", *New Agenda*, First Quarter, 2002, 83 at 91.

[88] J. S. Mill, *Considerations on Representative Government*, 1861 - Chapter XV "Of local representative bodies". From the collection Lindsay, A.D., (Ed.) *Utilitarianism, Liberty and Representative Government*, J.M. Dent and Sons Ltd, 1944, p. 358. As far as I am aware the national government's power, (provided for under the *Municipal Systems Act* 2000 Chapter 9. Credit Control and Debt Collection, Section 104 (1) (l)), to promulgate national principles for the development and implementation of indigent policies, whose development is made mandatory for local governments by the same Act, has not been exercised.

[89] A point made to explain why subsidisation of mass consumption for basic services in western democracies after WWII by Keynsian inspired social policy remained so parsimonious in light of the obvious benefits that would accrue to large capital if such subsidisation were introduced. See Kaleki, M., "The political aspects of full employment", in Wheelright, E., and Stilwell, F. (eds) *Readings in Political Economy*, Vol: 2, Australian and New Zealand Book Co. Ltd, 1979, p. 63.

Legitimation and Legal reform

There is very unlikely to be any legitimation of liberal capitalism without some form of transformation.[90] Thus North American and South African blacks attempts to "de-racialise" capitalism, rid societies of pre-capitalist caste distinctions based on colour and promote a black bourgeoisie has had considerable support from powerful institutional actors within each society. The public sector, the military, the court systems and some private corporations are at the forefront of attempts to integrate previously marginalised racial minorities and majorities into commodity capitalism. That this commitment involves a considerable amount of self – interest can be seen in the urgings of the Industrial Developments Corporation's Chair Christo Wiese, who commented:

> Unless all South Africans can participate meaningfully in the economic life of the country we will not be able to sustain a market orientated political philosophy.[91]

However, I do not agree with an argument, which imputes a Machiavellian strategy on behalf of the dominant business and political elites for its support for, or at least grudging acceptance of, anti-discrimination law and affirmative action.[92] The relationship between race and the ruling classes need for legitimation is much more dynamic than the ruling class "granting" affirmative action so as to legitimate their rule.[93]

For a racially defined subordinate social group in a capitalist society often the weakest point of the oppressor's ideological bulwark against progressive change is the liberal capitalist's own commitment to formal equality of opportunity. In any particular historical circumstance that black social movements found themselves in it might have made perfect sense to focus on convincing and coercing progressive liberal elements of the ruling class into acceptance of the need for greater equality of opportunity *within* existing class relations. As Kimberle Crenshaw puts it:

> The possibility of ideological change is created through the very process of legitimation, which is triggered by crisis. Powerless people can sometimes trigger such a crisis by challenging an institution internally, that is, by using its own logic against it. Such crisis occurs when powerless people force open and politicise a contradiction between a dominant ideology and their reality.[94]

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[90] This point is drawn from Crenshaw, K., "Were the critics right about rights? Reassessing the American debate about rights in the post-reform era," in Mamdani, M., *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture*, Cape Town, 2000, 61.

[91] IDC is a parastatal committed to the development of South African industry. Quoted in Marxist author Marais, *South Africa: limits to change, Op. cit.*, at pp. 246 - 247.

[92] For example "…at least since the 1950's it has been in the interest of America's ruling classes to accept and partially implement a commitment to end racism…", from Freeman, A., "Anti-discrimination Law: A critical review", in Kairys, D., (ed) *The Politics of Law: A Progressive Critique*, Pantheon, 1982, 61 at 110.

[93] South Africa's business class's support for black economic empowerment and affirmative action clearly waxes and wanes see *Business Day* "Black business burden", October 16, 2001, "The trust dividend", July 29 2002 and "Time for trust" August 14 2002.

[94] Crenshaw, K., "Race, Reform and Retrenchment: Transformation and Legitimation in Anti-discrimination Law", 101 *Harvard Law Review*, 1988, 1331, excerpted in Freeman, M.D.A., Lloyd's, *Introduction to Jurisprudence*, 6th Edition at 1230.

An important criticism levelled at black economic empowerment by both the left and liberal critics is that as currently framed it appears only to reward a narrow band of ANC insiders.[95] But the possibilities suggested by this extract do not end with the embourgeoisment of significant components of racially defined subordinate groups.[96]

The dominant ideology in South Africa is a humanised capitalism with, almost uniquely in liberal constitutions, an explicit constitutional commitment to socio-economic rights. The existence of such clauses within the Bill of Rights opens up the possibility of progressive change from within. The reality of service cut-offs and evictions is contrasted to the formal commitments in the Bill of Rights. The extent to which this contrast resonates both within the people *and* the ruling political class gives an idea of the extent of progressive change available within the system.

A word should be given about the scale, both temporally and geographically, of this process. Gramsci and his modern interpreters argue that hegemony functions on an international and national level in all areas of social life. Globalisation implies that incorporative hegemony is practiced by local, national and international elites in such diverse areas as the news media, popular entertainment such as film, television drama and sports, the churches, the legal system and the economic sphere. Therefore a socialist transformation strategy that focuses solely on the economic sphere is unlikely to be successful.[97] The speed at which market capitalism interrupts and transforms social life in a globalised world is often seen as revolutionary in its pace.

Socialists often imply that capitalism can, within a relatively short space of time, be replaced by socialism as a result of capitalism's inherent crisis tendencies. Such a concept implies, but does not always explicitly include, some privileged vanguard with which to lead and coordinate various sectors of the working class against the hegemonic order.[98] Some writers who still subscribe to some concept of "revolution" nonetheless have stepped back from a coordinated attack on liberal capitalism on all fronts, which will result in a complete regime change to something approximating "socialism".[99] They look to some idea of radical or revolutionary reforms in which significant changes in discrete areas of social life will lead to meaningful change and not simply reformist tinkering.[100]

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[95] Patrick Bond estimates that those empowered by the ANC's BEE program was in the low hundreds, see his *Elite Transition*, p. 39.

[96] See also the critiquing of government's black economic empowerment program by a *Business Day* editorial because of its failure to deal with working class empowerment! "Black business burden", October 16, 2001.

[97] Marais, *South Africa: limits to change*, *Op. cit.*, p. 287.

[98] For a discussion of these issues in a review of the post-marxist writers Laclau and Mouffe see Smith, Anne Marie, *Laclau and Mouffe: The radical democratic imaginary*, Routledge, 1998.

[99] This is a very complex area and many other ways of discussing this basic problem. For an alternative construction see John S. Saul, "South Africa: Between Barbarism and structural reform", *New Left Review*, 188, 1991 and for a brief discussion of these issues with respect to basic services see McDonald, D., "The Theory and Practice of Cost Recovery" in McDonald, D., Pape, J., (eds) *Cost Recovery and the Crisis of Service Delivery in South Africa*, HSRC, 2002, pp. 33-34.

[100] See Roberto Mangabeira-Unger, *Democracy Realized: the progressive alternative*, Verso 1998, p. 18-19 and *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy*, Verso, 2001 introduction to the 2nd Edition "Words without echo". The introduction is downloadable from www.law.harvard.edu/unger.

In trying to understand hegemonic struggles within municipal government it is this understanding of social change that seems most relevant to the modest aims of this study. As such I shy away from Hein Marais negative assessment of the South African left's ability to develop a new hegemonic order quoted at the beginning of this chapter. The development of a local hegemony for basic social services is being undertaken as part of the wider neo-liberal project some of the policy parameters I mentioned in Chapter 1. The total commodification of basic services particularly in desperately poor countries in Africa would be a major victory of transnational and national neo-liberal elites.[101] But there are ways of developing counter-hegemonic possibilities beyond the all-encompassing embrace of the market order and they can occur one step at a time.

Counter-hegemony

The picture of hegemony sketched above can sometimes lead to the pessimistic assessment that change is impossible to achieve, as even ostensibly progressive reforms appear to further entrench liberal capitalism. Social conflict rather than posing a threat to dominant business interests is in fact incorporated in such a way which leaves the system strengthened. Gramsci used the term counter-hegemony as a description for the process through which a hegemonic situation could be challenged. Counter-hegemonic thought is most able to transform a discrete sphere of social life when the hegemonic system is in a period of crisis. I would argue that the electricity and water cut –offs precipitated such a local hegemonic crisis.

Generally Gramsci viewed counter-hegemony as a slow incorporative process. This was encapsulated in his terms "war of position" or "passive revolution" which reflected his understanding of the strategic battles that of necessity must take place in modern societies with developed political infrastructures.[102] This then is a gradual process through which the working class wins over other groups through its moral and intellectual leadership. It has a strong pedagogical focus in which education adapts, modifies and subverts common understandings already prevalent in society in order serve the interests of an emerging ruling class.[103]

Counter-hegemonic thought and action has its origins in the terms and values of the hegemonic ideology. In many ways it represents the reverse process of incorporative hegemony. Thus while many aspects of a counter-hegemonic strategy would be oppositional in nature it cannot be treated as a Trojan horse, wheeled into the corridors of power fully formed. The most devastating academic intellectual critique of neo-liberalism cannot then be seen to power a transformative process.[104] This is in

[101] As to whether these neo-liberal elites actually exist and possess the required agency to prosecute such a complex agenda see Bond, P., *Elite Transition: From Apartheid to Neo-liberalism*, Pluto Press, 2000 and Leslie Sklair a transnational sociologist has attempted to identify neo-liberal policy elites who organise, promote and defend the interests of global capital both at a national and international level - see his *Transnational Capitalist Class*, Blackwell, Oxford, 2001 and in the Australian context "Who are the globalisers, a study of the key globalisers in Australia", 38 *Journal of Australian Political Economy*, December 1996.

[102] *Selections from prison notebooks of Antonio Gramsci*, 1971, Lawrence & Wishhart, 1971, p. 243 and Joll, J., *Gramsci*, Fontana, 1977, p. 98.

[103] *Selections from prison notebooks* p. 350.

[104] See Gramsci's attack on Bukharin's popular scholarly work for ignoring this reality, see Gramsci, *Selections from prison notebooks*, p. 419.

part because ideas cannot be separated from social forces and it is the latter which primarily give the former their strength. Secondly it is because subordinate social groups do not adopt, for example neo-liberal ideology, in any coherent manner.[105] Our understandings of our social universe are inevitably fragmentary, drawn from a number of experiential, intellectual and institutional sources. A comprehensive critique of neo-liberalism grounded, for example, in economic theory will almost always miss the mark as a tool of social change if it is presumed that it is simply a matter of delivering the new understanding of the world as a complete package.

Two things follow from this observation. Firstly the new ideas emerging from the working class must be subject to vigorous contestation both by the dominant social group opposed to the ideas being put forward and the subordinate social group themselves. This contestation will in many instances threaten to overwhelm the ideas and social practices advocated by working class organisations. Secondly a system, which attempts to supplant hegemonic understandings, must interact with people at their level of understanding. Counter-hegemonic ideas develop most often from existing discourses and social practices, some of which inevitably have their origins in the dominant social class's hegemonic ideology. In the South African context with respect to basic service delivery it is also linked to social practices used during the apartheid era which have a residual presence in a society increasingly influenced by neo-liberal economic ideas.

Hunt refers to this characteristic of counter-hegemonic mobilisation as the need for social activists to start where people are at. To Hunt all struggles commence on old ground.[106] That position is invariably tied up with some conception of the "common sense" understandings of society influenced by the dominant social classes.

The content of counter-hegemonic values and norms are constructed by and through struggle. The development of a counter-hegemonic idea to the point at which it becomes the accepted "good sense" of the society must mean the incorporation of the interests of other social actors into the struggle.[107] Without the formation of a "historic bloc" it is unlikely that the working class, on its own, can create the new moral order. For example free education, a political demand of the working class in many developed countries, was proposed in such a way so that significant sectors of the middle class would gain benefits from it. The right to free education was instituted in many developed and some developing countries and could be said for a brief period to have gained hegemonic status.[108]

Rights and counter-hegemony

It is argued that single issue campaigns, particularly if they are rights based will have little impact on changing peoples understandings of the social order. The SECC/APF contests the hegemonic order of basic services in a number of ways. Firstly, it

[105] *Ibid*
[106] Hunt, "Rights and social movements", *Op. Cit*, p. 324.
[107] In Gramsci's argument "common sense" is supplanted by "good sense" when working class ideas and social practices become hegemonic in society.
[108] Nonetheless the increasing chipping away at free-education in many developed countries suggests the emergence of a hegemonic crisis in free education.

contests cut-offs through re-connecting houses to the electricity grid. It contests commodification of services through boycotting payment for electricity services.

It frames this question in legal terms through its use of the right-claim of electricity – "Electricity is a right not a privilege" and its rhetorical discourse surrounding procedural issues – proper notice, insufficient information to allow disputation of electricity bill which also has a constitutional basis.[109] Secondly the organised contesting of cut-offs may lead to broader questions surrounding the social system that causes the cut offs in the first place. The SECC consciously press these issues with a view to drawing into question the goals and directions of wider government policy:

> What we do is that we always make a link between electricity cut offs and water cut offs and the issues of globalisation, privatisation. For example the reason why we experienced a lot of cut-offs this year is the fact that the government was preparing for ESKOM's privatisation. So it always our duty in the meetings, when we address meetings, (to) show those links. And also issue of the policies of the World Bank and the IMF. They are big concepts but we try be all means to come down to the level of the people and try and give them a sense of what is actually happening. And show them that what they are suffering from is not isolated from what is happening round the world.[110]

This role in many ways fell to the APF in larger rallies but was according to SECC activists a feature of all meetings not just larger rallies where APF activists gave formal speeches.[111]

Rights are excellent carriers of counter-hegemonic ideas precisely because they are framed as universal principles.[112] Politically the framing of an issue in terms of a right claim enables a particular social group (the working poor, the unemployed and pensioners in Soweto) to begin legitimating their demand (free water, free electricity) by separating it from their direct corporate interests. As discussed previously this is a crucial component of hegemonic legal concepts such as property.

Why should the residents of Soweto get free basic water and electricity? There are plenty of good reasons why. Because they fall below a certain level of household income, because they lack the skills for engagement with the labour market, because they were historically marginalised etc. But these reasons have a stigmatising effect, highlighting their own marginal position in society, as a technique to direct attention to their basic service *needs*.

Rights talk on the other hand immediately frames the question in universal terms. Everyone should get access to basic services by their very membership of the human race. Many people in South Africa already have access to these basic commodities and this should be extended to all. This is an inclusive perspective and it is particularly important starting point for novel right-claims that do not enjoy some

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[109] Section 33, Right to just administrative action, codified in *The Promotion of Administrative Justice Act*, No. 3 of 2000.
[110] Virginia Setshadi, 19 October 2001.
[111] *Ibid*.
[112] See Hunt, A., *Rights and Social Movements, Op. cit.*, at 321. See generally for discussion as to how rights are conceived as universal see Evans, T., *The Politics of Human Rights: A global perspective*, Pluto Press, 2001, pp. 6-7.

form of legal or institutional protection and legitimacy. Thus when the SECC's slogan is used "Electricity is a right not a privilege", this has a specific non-legal significance. It separates the obviously selfish group/corporate character of any claim on the state and universalises it as something that should be enjoyed by all regardless of the ability to pay. It also directly challenges the hegemonic systems characterisation of electricity provision as just another business.

More than likely any new right claim will be viewed sceptically by many and will be contested by other social groups in society.[113] Clearly the consequences of a right to a free basic level of service will be markedly different between social classes. South Africa's middle class does not need a legally sanctioned right to some minimum level of electricity. They are affluent enough to afford these services with little or no trouble. They could, however perceive a benefit of a free-lifeline if it was significant enough to marginally reduce their bills. Given that it is assumed that any sufficient lifeline will need increased prices for hedonistic consumption it may be argued that the lifeline policy does not satisfy the conditions for incorporative hegemony. That is the need to provide some material benefits to lower middle class consumers. This may need a greater emphasis on cross-subsidisation between large industry and the residential consumers so that middle class consumers share the burden of cross-subsidisation with industry.

When I have raised the possibility, amongst my middle class circles, that electricity is a right it has often been greeted with extreme disbelief. The notion that electricity is something that can be claimed as of right is viewed as absolute nonsense. It is part of the "common sense" of the wider community that the full costs of electricity provision should be charged. While it might be common sense that there should be payment according to the amounts consumed the SECC argue that it would make "good sense" that a component of basic services be supplied free of charge.

Promoting hegemonic crisis through the language of rights

A tactic used again and again by the SECC/APF is the use of the language of rights to challenge the government's hegemonic construction of basic service delivery. Crucial to this challenge is the language of socio-economic rights but there is also a role for the formal civil and political rights contained in the Constitution. This challenge occurs on two levels. Firstly there is the level of local hegemony in which the SECC highlights the failure of the government's own promises with respect to service delivery for water and electricity contained in the Bill of Rights. The second level of the challenge, more associated with the APF but also an important focus of leading SECC activists, attempts to draw out these issues to challenge neo-liberal hegemony in all aspects of South African governance. Here the focus is much wider and leads to discussions of globalisation, privatisation and worker control of industry. This section will look at how a hegemonic crisis is promoted through use of the civil, political and socio-economic rights contained in the Bill of Rights.

I am classifying all rights including civil, political and socio-economic explicitly contained within the Bill of Rights as representing the current South African hegemonic legal order. Those right claims such as electricity, which lie, for the

[113] See for example the dismissive treatment of the SECC and Operation Khanyisa in *The Economist*, August 31 2002, "A few green shoots", p. 59.

moment at least, outside the constitutional framework represent counter hegemonic right claims against the state.

Socio-economic rights

Socio-economic rights did not significantly feature in the 1993 interim Constitution's Fundamental Rights section. The ANC negotiators advocated for their inclusion but as a result of National Party pressure they were largely excluded. By the Constitutional Assembly stage however, the ANC had much greater control of the Constitution making process. Dennis Davis has argued that most changes between the Fundamental Rights of the1993 interim Constitution and the 1996 Bill of Rights were of an editorial nature.[114] This could not be said with respect to socio-economic rights, as the Constitutional Assembly incorporated water, food and health care rights during this stage. This was a much more democratic process than the interim Constitution with a considerable space for public participation. The general public and powerful civil society organisations campaigned for the inclusion of socio-economic rights.[115] Hugh Corder, a prominent South African legal academic records this participation in this way. The "millions" of individual and collective submissions provided a "constant refrain" of "calls for bread, water, work, houses and health services".[116] Subsequent evidence of widespread ignorance of the Constitution and the Bill of Rights draws into question the long term effects of this public participation on developing a culture of human rights or at a minimum a basic sense of ownership of the Constitution. But most agree that it is nonetheless significant that socio-economic rights were included at this time of unprecedented popular participation in the Constitution making process.[117]

Socio-economic rights were included in the Bill of Rights, as a result of popular struggle and the need to legitimise the constitutional settlement.[118] The struggle over the defence of privilege that the incorporation of a strong property rights clause into the Bill of Rights entailed was resolved through the incorporation of the counter-hegemonic socio-economic rights.[119] The balance of forces made exclusion of property rights a very unlikely alternative.[120] Therefore socio-economic rights are important fruits of the negotiated settlement which arguably resulted from increased democratic participation in the drafting of the Bill of Rights and as such cannot be ignored. They do now, nonetheless, form part of the hegemonic constitutional order

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[114] Davis in "Deconstructing and Reconstructing the Argument for a Bill of Rights Within the Context of South African Nationalism", in Andrews, P., Ellmann, S., (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, Witwatersrand University Press, 2000, p. 216.

[115] See for example of the latter "Cosatu submission to public hearings of the Constitutional Assembly", June 3 1995 at www.cosatu.org.za/docs/const95.html.

[116] Hugh Corder uses the figure of "millions", and this may not be an exaggeration, "Prisoner, Partisan and Patriarch: Transforming the law in South Africa 1985 – 2000", 118:4: 772 at 784. Sarkin, S., "The Development of a Human Rights Culture in South Africa", *Human Rights Quarterly*, 20, (1998), 628 at 631 quotes a figure of 1.7 million submissions 'mainly petitions'.

[117] Ibid and Klug, H., *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, Cambridge University Press, 2000, especially at pp. 116 and 123 - 124.

[118] An argument put in John S. Saul's now classic article, "Cry for the Beloved Country: The Post Apartheid Denouement", *Review of African Political Economy*, 2001, 89:429-460 at 433.

[119] See also Klug, H., *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, Cambridge University Press, 2000, especially at pp. 123 - 124.

[120] COSATU argued for its exclusion. See "Cosatu submission to public hearings of the Constitutional Assembly", June 3 1995 at www.cosatu.org.za/docs/const95.html..

through which the ANC legitimise their rule. That they form part of the hegemonic order does not, paradoxically, make their fulfilment in any way automatic. They require social struggle to be realised just as claim rights such as electricity. Because they are pre-legitimated claims as a result of their inclusion in the Bill of Rights their fulfilment is, however, much more likely.

The view that socio-economic rights are included in the Bill of Rights as the result of ordinary peoples struggles and activism was a theme of the interviews. John Appolis, Chair of the APF put it this way.

> (F)or us the issues within the Bill of Rights which we see as progressive these are conquests of our struggles. The fact that they are actually codified within the Constitution this is an important advance for the majority of South Africans because those were the issues that we struggled for under the Apartheid regime. Therefore it was important for us that the Bill of Rights is actually enshrined in the Constitution.[121]

These progressive elements in the Bill of Rights undeniably form a background framework in which the ANC government legitimise its rule.[122] This is most often seen with the promotional material put out by the Department of Water Affairs and Forestry (DWAF). Thus a DWAF pamphlet directed towards the general public promoting new water and sanitation regulations entitled "Know your water and Sanitation rights and obligations" begins in the following way;

> Our Constitution and other legislation guarantee the right of access to basic water supply and sanitation to everyone. Since 1994 all spheres of Government have actively participated in programmes to extend basic services to the unserved. The results…have been impressive and by December 2001 a basic water supply had been provided to an additional seven million people….[123]

As discussed in chapter one this fails to mention the many households who have been cut off for non-payment of water, as well the considerable number of water and sanitation projects in rural areas, which were not sustainable owing to the introduction and increased enforcement of operation and maintenance user fees.

The Constitution is being used to justify policies, which even on their own terms failed miserably. Between 1994 and 2000 the right to water meant a right contingent on payment of full operational, maintenance and replacement costs. This is not the place to recount the history of the development of water policy but it is enough to say that the government will always argue that its water policies are Constitutional.

SECC activist's sometimes distance themselves from the Bill of Rights because it is used as part of the political defence of current government policies. This dismissive attitude occurs when the disruptive and illegal direct action practices of the SECC are challenged as being outside the Constitution. Commenting on just such an accusation made in a question from the floor at a large SECC meeting[124] a respondent noted:

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[121] Interview with the author, 12 March 2002.
[122] See ANC editorials on human rights day 2001 and 2002 at ANC website.
[123] DWAF information sheet undated - 2002(?)
[124] The meeting was held to launch the MSP report, 21 September 2001, Zone 7, Pimville Catholic Church Hall.

> He goes by the Constitution but we used to say that the powerful will never listen to the powerless until the powerless unite. Why am I saying this? Because the community started coming up with a certain slogan, "Its better to break the law than to break the poors".
>
> So then they said *down* with the Constitution because it doesn't serve their needs. It was only the anger, which comes out from the community because they said (that) whatever we (the SECC) are doing was right because it suits them.[125]

This outright rejection of the Constitution was rare in the interviews I conducted and was not sustained. It is also ambiguous as to whether the respondent means the laws that should be broken or the Constitution itself. To some this distinction is hardly relevant as the rule of law restricts citizens to respect laws properly made by parliament unless otherwise ruled outside the Constitution by the judiciary in the ordinary course of litigation. On the whole the Bill of Rights was seen by all activists as a legitimate source of worthy aspirations to aim for.

My expectation was the government's use of the Constitution to legitimate their social programmes would in the eyes of a significant number of activist's de-legitimise the Bill of Rights as a tool of social transformation. I expected that there would be a much more openly contradictory view of the Bill of Rights and the Constitution with a shifting between it being a *people's* Constitution representing democratic values and it being the Government's Constitution representing state coercion and false legitimation. On the whole there was much less evidence of the latter position.

It was not entirely absent however. Trevor Ngwane saw that the Constitution and Bill of Rights as explicitly "contradictory" and took a Marxist position that "any law within a capitalist framework should be taken with a grain of salt".[126] Another saw the Constitution and the Bill of Rights as, at best, an unreliable ally owing to "all these limitation clauses".[127]

In its place was a concept of the Constitution as being nothing more than lofty, utopian ideals, which, without the intervention of people's power, remains a lifeless piece of paper.

Human Rights Day

Human Rights day on the 21 March 2002 was a major focus of activity for the SECC and the APF. This was the second Human Rights day march that the SECC and APF had organised. It was however the first march in which they were represented under the same banner. The annual conference of the SECC, held earlier in the month, had resolved for the organisations to be merged and go under the name SECC/APF.[128] The march was to council offices, at Jublani in Soweto, to present a memorandum containing the APF's demands to the Mayor of Johannesburg Amos Masondo.[129]

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[125] Bobo Makhoba, 22 March 2002.
[126] Trevor Ngwane. Interview with the author, 17th October 2001.
[127] Virginia Setshadi, 19th October 2001
[128] Press Release un-dated circa Sunday 3 March 2002.
[129] The march was organised by the APF as it role as a representative of a number of community organisations. While the APF and SECC marched under the same banner some of the campaign material implied that the SECC and APF had a clear organisational separation with the SECC being an affiliate of the APF.

A leaflet, banner and a press release prepared to publicise the march gives an idea of the public face of rights discourse as used by the SECC/APF. The material produced by the SECC unsurprisingly focused on human rights. Human Rights Day, heavily promoted by the government, provided an excellent opportunity to highlight the failings of government to deliver a better quality of life for many in urban areas which were suffering rising prices, increased unemployment, and basic service cut offs. The focus of the SECC/APF on Human Rights day celebrations shows that human rights issues played an important part in the mobilisation strategies of the SECC.

In the APF's leaflet to attract supporters to the march their position was put very clearly.

> 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.** [130]

In my view the understandable government tendency to celebrate and reflect on past ANC achievements in the arena of civil and political rights leads to a backward looking, historical perspective in many of the official celebrations.[131] The APF's focus subjects the government's contemporary achievements in basic service delivery to critical evaluation.

The dominant slogan in the leaflet characterises the Human Rights Day march as a "march against human rights abuse" turning the official celebrations emphasis on Apartheid era's abuses on its head. In this way we see human rights discourse acting as a way of asserting the claims of civil society and challenging government policy.

When the constitutional parameters of the post-apartheid social order were being finalised both sceptics and advocates of the South African Bill of Rights saw rights discourse as "energising, mobilising, and emotive…" and able to be used "…to empower people psychologically: to give them a sense of self determination and self affirmation, to instil in them a healthy scepticism about states and political parties…."[132] The SECC/APF literature around Human Rights Day is a definitive example of civil society activists attempting to use the Bill of Rights in just such a way. The emotiveness of rights talk is highly advantageous as a way of mobilising people to engage in the march.

The failure to deliver electricity and water was highlighted through the contrasting of rights with the government's promises. It challenged the government's attempts to use human rights to celebrate and commemorate past human rights struggles against

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[130] "March Against Human Rights Abuses Thursday 21st March 2002," Bolding in document.

[131] See for example coverage of the ANC's commemoration of the Sharpeville massacre (a shooting of 69 unarmed protesters in *The Sowetan*, "Human Rights Day wrap-up - New monument for Sharpeville". The article "Only PAC can usher in true liberation, rally told", covered the Pan African Congresses commemoration. Both were contained in *The Sowetan* Friday March 22 2002, p. 3.

[132] The two quotes are from Karl Klare (a CLS rights sceptic) and Albie Sachs (now constitutional court judge and strong advocate for a judicial bill of rights), respectively, in debate in 1993 at an interdisciplinary discussion held at Harvard University. See Mann, J., Steiner, H., (eds) "Economic and Social Rights and the Right to Health", An Interdisciplinary Discussion Held at Harvard Law School in September 1993.

apartheid. It is the voice of a new – generation of activists who did not play a significant role in the struggles against the apartheid regime.



Figure 1: SECC/APF Banner: 21 March 2002.

Baba u Government tell us
Where are our rights…
We're Sick and Tired of Your Promises

No to Electricty Cut-Offs
No to water Cut-Offs
No to Eviction…

The language adopted on the banner contrasts the government's promises of free basic water and electricity[133] with the SECC's rights claim to water and electricity. It highlights in a stark manner the difference between the government's promises and what should be delivered as an entitlement. In the context of Soweto the knowledge that Eskom has refused to deliver free electricity to Soweto until proper compensation was received from central government would also be an important aspect of the rhetoric of the banner and the march.

The leaflet and the press release also expressed concern about the limiting of political rights as expressed in the response to the SECC's activism. The press release argues that;

> Even on occasions when we have organised our communities to resist the conditions that have been imposed on us, the government has chosen to ROB us of the right to do so. Freedom of expression and protest was just ink on statute books as police were deployed to arrest picketers outside the Potchefstroom magistrate's court. The recalcitrance of local authorities when APF affiliates have applied for permission to march has deliberately tried to stifle the free organisation of people.[134]

In the event police approval was not given for the march that took place on Human Rights Day. Nonetheless the police, for public safety reasons, escorted participants

[133] In Soweto at the time Eskom had refused to supply 50kw of free electricity and water cut offs were continuing as part if credit control policies of the council see editorial in *The Star,* "Stop Cutting Water", Monday April 8 2002.
[134] Press Release, undated, circa 15 March 2002.

despite it being officially illegal. To my knowledge there was no coverage of the march in the mainstream press. *The Sowetan*, despite its name, covered a march in Pretoria calling for the write-off of arrears but which did not promote payment boycotts and illegal connections to services.[135] The fact that the media largely ignored the SECC/APF march shows that linking your struggle to official ideologies cannot guarantee a hearing in the media. To the SECC/APF the goal of highlighting human rights is a way of pointing out the contradictions in government's macro-economic policy, and as such provides a vehicle for creating an understanding of a more radical commitment to restructuring society.

The following comment by George Dor, an activist working in the Alternative Information Development Centre is typical of an activist's guarded defence of the role of the Constitution in progressive struggle. The AIDC's Johannesburg branch began a campaign for affordable electricity in 2001 and was an active presence at most of the SECC/APF rallies I attended. Starting from the premise that the Constitution is a product of a negotiated compromise, reflecting the failure of the ANC to militarily defeat the apartheid government, the respondent reflects on how it can and should be used to further the struggles of the poor and oppressed;

> Of course there are limitations as to what one can get out of the Constitution. But I don't think that means you take a principled position around the Constitution (as) being problematic, being bourgeois. It may well be all of those things. But in struggle you organise around the real needs and the real issues that people want to struggle around and you find the ways to advance that struggle…
>
> I do think that as we take our position around our rights to water, or food or shelter or the implicit rights towards electricity in the Constitution I do think that the mechanism to do that is important. If the mechanism to do that is simply a legalistic process by which we are effectively endorsing the Constitution as the thing that speaks for us and the judgements coming out of the judiciary as the things that bind us that there are no other forms of addressing one's struggles then one does fall into the trap of taking on board a legalistic framework and accepting the broad parameters of the Constitution. Whereas I think if you are saying people are struggling for their rights (and that) this is an ongoing struggle. Those rights have not been won as a result of the defeat of the apartheid regime per se. Only certain rights the right to vote for example have been won but basic socio-economic rights remain un-addressed and in many instances are a lot worse than they were in 1994. If you start from that premise then you have got to look at ways of organising to win those rights. Those ways of organising include utilising the elements of the Constitution which reflect peoples perspectives coming through in that negotiated process and of course rejecting those elements that were forced into the negotiating process by the other side. Things like property rights and so forth.[136]

This engagement with the Bill of Rights is a response to the need to find appropriate transformative tools to assist people's pressing concerns on the ground. As discussed in chapter one the most pressing concerns in Soweto was and is electricity, its affordability and its accessibility following the swathe of cut-offs undertaken by Eskom for non-payment by residents. The very fact that there were socio-economic rights in the Constitution would mean that activists and their organisations would look to the Bill of Rights as a source of potential strategic leverage for the cut-offs. As the

[135] *The Sowetan* "Human Rights Day wrap-up -Residents call for scrapping of debt", March 22, 2002, 3.
[136] George Dor, Alternative Information Development Centre, 3rd Floor Cosatu House, 28 March 2002.

comments show, however, they do so without illusions and with the awareness that other forms of organisation separate from the legal struggle are of equal importance.

The continued use of rights talk by the South African political classes opens up the possibility of strategic political action by activists such as the SECC. The contrast between when the government uses the legitimising language of human rights and the lived experience of service cut-offs drives much of the political rhetoric of the SECC and the APF. The whole exercise of state power is meant to be underpinned by the Bill of Rights. One aspect of this technique, of promoting hegemonic crisis can be seen by activists in the vague terminology of accountability.

Education and accountability

Much of the work of the SECC/APF appears to be an educational one. To hold the government accountable to the people, the people must be aware of what standards the government should be held to. At another level the SECC/APF educates people about the Bill of Rights with the specific goal of challenging neo-liberal ideology by pointing out the contradictions between constitutional commitments and macro-economic policy.

A number of activists thought that basic education about the Bill of Rights was a crucial aspect of the SECC/APF's campaign. One put it this way;

> You know people don't know about the Bill of Rights. They don't even know about the Constitution and whether they should use it as ordinary people. And it's a big challenge, … we have a big challenge in educating people. Maybe there are people who know, but not in big numbers. Since we have formed the SECC, and have called the meetings for the people. People begin to be lighting up and realise that their Constitution is for their own use. But I don't think it's completely done.[137]

Many activists had different responses to the question of whether the Bill of Rights was understood by people in Soweto. A representative example is Trevor Ngwane's response to a question about whether township residents link their experience of being disconnected with the Bill of Rights socio-economic clauses;

> Not necessarily. I think their understanding is uneven. For example for our activists who maybe have had arguments, it is easy for them to take up the argument. You know the Constitution guarantees you this and that. They are even aware that electricity is not in the Bill of Rights so they kind've improvise and say but it also talks about guaranteeing a decent life and what is a decent life. So it is also received wisdom but it is easy for them to take it up. Ordinary people when you raise the Constitution they kind've understand. But I think for them the Constitution represents what the struggle was all about rather than a document.[138]

Ngwane, in the last sentence, characterises township residents as seeing the Constitution as embodying a utopian promise of a better life under a post-apartheid order. In this instance the role of the SECC/APF was to fill out the detail of what is, to many, a vague but powerful symbol of their aspirations for a new South Africa.

[137] Viginia Setshadi, 19 October 2001.
[138] Trevor Ngwane, interview with the author, 17th October 2001.

One respondent, who was not a core activist in the SECC did not seem to understand the that the Bill of Rights was an issue at all in the SECC's campaigns.[139] A recently joined member of the SECC stated that information about the Constitution was difficult to find and that most people did not understand what the Constitution was all about.[140] This assumption confirms the data found in other research on the Constitution, which showed a very low understanding of human rights norms contained in the Bill of Rights. This points to the Bill of Rights being primarily the tool of activists. But as suggested in the previous paragraph its overall symbolic resonance may still be very important even if little is actually known about particular clauses.

Other activists in the SECC/APF did not see that the victories of the old struggle, as codified in the Bill of Rights, needed restating:

> The Constitution is a reflection of the old struggle. If people need new education it is in understanding the way in which the governments broad macroeconomic strategy becomes an impediment to the fulfilment of the promises of the Constitution and the Bill of Rights.[141]

This way of using the Bill of Rights came through very strongly in interviews with SECC and APF activists. In this sense the socio-economic rights when infringed or denied became a shorthand way of promoting the very different political position of the SECC/APF to the government. It is in this way that rights talk forms a distinctly counter-hegemonic character. If GEAR and privatisation can't deliver basic human rights what is the alternative?

On the other hand the government counter mobilises by using the Bill of Rights as a legitimating strategy in two distinct ways. Firstly, it uses rights as a form of ideological obfuscation. Rights talk is used to justify arguably regressive policy interventions in urban infrastructure where socio-economic rights such as housing and water are implicated. For example the *Draft White Paper on Water Services* argued strongly that the free basic water policy simultaneously fulfils its constitutional commitments with respect to water *and* defends the "user pays" principle a cornerstones of neo-liberal infrastructure policies:

> The right to water is not an absolute right. It is subject to the state taking reasonable legislative and other measures within its available resources, to achieve the progressive realisation of these rights. It is also subject to specific obligations such as payment for services (over and above the basic amount) and the limitation and disconnection of the service in certain circumstances.[142]

The user pays principle relies heavily on the threat of disconnection of services in certain circumstances. In an attempt to give authority to this policy the new White paper speaks of "(t)he right to disconnect and/or restrict" water services held by the water services provider.[143]

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[139] Nkele (Mabel) Chakela, Saturday 27 October, 2001.
[140] Interview with Roy Mokgatlhe, 28th June 2002.
[141] Interview Wiseman Hamilton, 6 March 2002.
[142] *Draft White Paper on Water Services, Water is Life, Sanitation is Dignity*, October 2002, p. 33.
[143] Ibid, p. 40.

But if rights were wholly an ideological ruse then the task of activists pushing for a transformative politics would be immeasurably easier. Thus to continue its hegemonic project, which always seems to be on the verge of crisis, the government must offer real concessions. It does so on the basis of fulfilling the Bill of Rights commitments to water and housing, trying to do so within the severe constraints imposed by neo-liberal policy. The free basic water policy is one such concession.

The activist's statement that neo-liberal policies are an impediment to the realisation of socio-economic rights is to my understanding absolutely correct. The question, which logically flows from this observation, is to what extent do rights provide a tool to challenge the government's macro-economic and urban infrastructure policies? Can they be used to put the government's macro-economic policy on trial?[144] Are rights a tool which provide only a minimum "safety net" in a South African economy that remains constructed in the image of the "obsolete buccaneer's paradise of Victorian times"?[145]

Informing people that they have rights is a way of overcoming a sense of inevitability and naturalness of the new South African government's more regressive social and economic policies. This is an order in which people's expectations are constantly being managed downwards in part as a consequence of the strictures imposed by International Financial Institutions. This is a consequence of using the market to provide services which ensures that people must be provided a minimum level of service that they are able to afford. The predisposition of market driven models against significant forms of cross subsidisation or tax base funded state intervention must mean correspondingly low service standards given the context of widespread poverty.[146]

The Bill of Rights also serves as a tool to liberate people from an Apartheid era mindset that has lowered people's expectations. It educates people that the extreme levels of poverty that they face daily are not inevitable nor should they be tolerated. George Dor of the AIDC put it this way.

> I think coming out of Apartheid where people have been denied their rights for so long…there is just the sense that *well* this is the way life is. Do we really have rights? At least we are not getting harassed as much as what we were before on the race question. But jobs wise, services wise do we really have rights? I think people live a hand to mouth existence and aren't confidant enough coming out of that Apartheid legacy. And I think it's something we really have to build on. [147]

The Bill of Rights is very useful in providing a context to the water and electricity cut-offs.

When I asked Trevor Ngwane about whether it's the role of the SECC to educate people about the rights he made the following point:

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[144] The legal case undertaken by CALS appears to be heading tentatively in such a direction. Interview with Theunis Roux 30 July 2002.
[145] This vivid description is from the editorial "Time for Trust" in *Business Day*, August 14 2002.
[146] See Chapter 1.
[147] George Dor, Alternative Information Development Centre, 3rd Floor Cosatu House, 28 March 2002.

> Oh yes…I think so. The only thing is, it's a broader thing. Why do we have a new government? So ordinary people are orientated towards that. It's not a piece of paper. It's like the promises they made. Now the promises are codified in a document which SECC activist leaders can raise. I think it's for the good.[148]

In this formulation the Bill of Rights is very much the ANC government's document. It is a document inherently political in character in that it is almost like list of campaign promises that the ANC made during the transition. In this sense some activists would refer to the Bill of Rights as entirely separate from the aspirations and struggles of ordinary people. It is politically very useful "to say that the government is not working to *their* Constitution…" and that "they are breaking *their* laws."[149] This formulation is a narrow version of accountability in that it would be enough if the government just did what they have committed themselves to in *their* Constitution.

A broader vision of accountability was put most clearly put by the Chair of the APF John Appolis when I asked him whether the Constitution was used by the SECC/APF to make the government more accountable:

> That's the main approach at the moment regarding our attitude to the Bill of Rights. These are our conquests, these are our rights we have won over the years. We have elected the government and they are obliged to, in terms of the Constitution and in terms of the Bill of Rights, to actually meet these expectations, and the needs of the people. And that's how we then compare to what people are experiencing now with what is stipulated within the Constitution and the Bill of Rights. And through that process we want to ensure accountability of the government both to the electorate but also to the people as a whole. Because this is a Constitutional state…the government is supposed to frame its policies and its laws within the context of the Bill of Rights. For us its an important approach to keeping the government accountable and expose the kind of contradictions between a restrictive macro-economic policy, privatisation and the Constitutional requirement to foster a climate and a culture of human rights within South Africa.[150]

Here accountability is not just to a document of campaign promises, masquerading as a Bill of Rights, but directly to the people, in so far as the Constitution reflects the outcomes of hard fought struggles to codify their progressive aspirations.

Constitutional rights form what Hunt refers to as "pre-legitimated claims". In the context of any particular social struggle these pre-legitimated rights become possible tools of social transformation. For example an existing constitutional right being used in a context in which it was not previously understood as applying to.

The extent to which this strategy can be pursued will depend on how closely demands, which lie outside the Bill of Rights can be characterised in a way that closely resembles rights that are already in the Constitution. The right to a healthy environment opens up the question of a right to electricity. The right to housing opens up the right to services, which make the house livable. The right to life enables the SECC to discuss the deaths, which result from fires caused by paraffin accidents.

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[148] Trevor Ngwane, interview with the author, 17th October 2001.
[149] Trevor Ngwane, interview with the author, 17th October 2001.
[150] Interview with John Appolis, 12 March, 2002.

In each way a pre-legitimated claim is adopted, altered and transformed to further the goals of the counter-hegemonic rights claim.

This last paragraph has both a legal and non-legal sense. This challenge can occur on the political front in which a popular understanding of the Bill of Rights is used to draw people into the movement. Rights in this context have an overtly political character and need not pass a test of strict legal coherence through their legitimation in a court of law. They are used as a tool for popular mobilisation in an attempt to alter the balance of forces.[151] The next stage, that of litigating rights, may be a direct extension of that process in that the contestation gains a much wider audience through drawing institutional resources not available to small civic groups. In this sense one adopts the language of the powerful to draw on the resources of the powerful.

The extent to which there is recognition of the down side of the accountability approach is not clear. The downside is where the Constitution can be used to narrow the sphere of what is considered appropriate government action. The standards to which the government is to be held is by no means clear on any particular socio-economic right.

Furthermore any socio-economic claim that lies outside the Bill of Rights, for example electricity, may get scant recognition by the judiciary. Somewhere there is a line which organisations like the SECC/APF can cross if they begin to use the language of the powerful unwittingly and un-critically. I mean the language of the powerful in the sense of the ruling class but also in respect of left legal intelligentsia there natural allies in the legal struggles. The language of legal rights is not necessarily a straightforward language to master. It is complete with its complex rules of exposition. As used in the courts, it is the language of technical expertise that, no matter how well intentioned, can be alienating to those without a legal background.

But I think that it is an unqualified human good that government power is not only limited by the rule of law and the Constitution but in the case of socio-economic rights may enable government power to be expanded and maintained where this can be justified to protect, promote and fulfil socio-economic rights. In an age where government is increasingly retreating from the social sphere this opportunity should not be abandoned lightly. Where appropriate, litigation should be adopted as one strategy to prevent the power of the state from being transferred, to private bureaucracies through the transfer of ownership to the private sector.[152]

Macro-economic policy and rights

The more ambitious project sourced from the SECC/APF of preventing privatisation of state owned utilities is incorporated into the language of human rights by drawing to the publics attention the inherent contradiction between conservative macro – economic policies of the government and its commitment to a human rights respecting

[151] Much in the way Stuart Scheingold, suggests rights should be used. *The Politics of Rights*, Yale University Press 1974, p. 148.
[152] For an example of such an approach see the exposition in Flynn, S., Chirwa, D. '*The Constitutional Implications* of Commercializing Water in South Africa', in McDonald, D., Ruiters, G., *The Age of Commodity: Water Privatisation in Southern Africa, Earthscan, 2005.*

culture.[153] Thus on the leaflet advertising the human rights march we have the following;

> Capitalist policies – like privatisation and GEAR – can never build a human rights culture. **Our experience of capitalism is that it undermines human rights.** Gear does not lift the people socially but leads to their impoverishment.
>
> **WE SAY A CULTURE OF HUMAN RIGHTS MEANS:**
>
> - **Privatisation must stop**
> - **Scrap GEAR**
> - **Cut offs and evictions must stop**[154]

The rights arguments put forward by the APF are used to enhance the SECC's claims to a significant increase in the amount of free basic electricity. The hegemonic human rights language is being appropriated for a specific ideological project of limiting private control of production in the national economy.

Thus the SECC/APF are trying to exploit the cracks that have developed within the full-cost recovery model of water and electricity supply. These have developed from the government's attempts to assert its legitimacy through the offering of real, if inadequate, economic concessions. These deviations from neo-liberal pricing norms are justified by the Government in the case of water on constitutional grounds and in the case of electricity on humanitarian and national development grounds.

The SECC/APF have attempted to undermine this gambit through using the Constitution as a tool for accountability and through this approach undermine the government's claims to legitimacy by questioning the sufficiency of the levels of water supplied. In electricity the service is framed in terms of an implied-constitutional rights claim, thus attempting to expand the meanings of some socio-economic and environmental rights contained in the Constitution.

Rights talk and payment options

The counter-hegemonic use of rights is slightly more complex than previously stated as there is differing understandings of how the rights to water and electricity should be institutionalised. There was a clear conflict between the wishes of those I interviewed in the leadership of the SECC and the APF, and the mass constituency of the SECC.

Payment for services in some form is part of the common sense of the community in Soweto. While there is some argument for zero-rating of electricity and water services there is no evidence to suggest that Sowetan's would support this

[153] This contradiction is a characteristic of a number of polemics against international human rights legal regime in the literature see Evans, T., *The Politics of Human Rights: A global perspective,* Pluto Press, 2001. But see also the more considered arguments of the political philosopher C. B. Macpherson, "The problems of human rights in the late twentieth century", *The Rise and Fall of Economic Justice and other Essays*, Oxford University Press, 1985, pp 33 – 34.
[154] Italics in the original see APF Leaflet, "March Against Human Rights Abuse, Thursday 21st March 2002".

argument.[155] There is a commitment from most of the constituency that there should be some payment for electricity and water. For example one respondent put it this way,

> Basically the people is Soweto feel that they must pay. The people of Soweto know that you cannot have things for free. At the end of the day it is about the affordability part of it. At the present rate of unemployment at 45% you are looking at almost half the country that is not working. Are you saying that half the country cannot get services? No we cannot allow that to happen so somewhere along the line there are compromises that have to be made. It is better for people to pay a small amount of money than for people not to pay anything at all.[156]

Thus when the SECC talks of the right to electricity there is within the slogan a hidden commitment to some form of payment. The payment proposed by the SECC is on the basis of a flat rate. This is the way services were paid for in the apartheid era. Payment in some form is a practical a necessity as the tool of economic coercion that withholding payment serves for the SECC will only work if there is the some hope on behalf of service providers that payment will be forthcoming if grievances and differences can be worked through. Unions don't go on strike to so workers can be paid for doing nothing. The capacity to work or pay service bills is the carrot which unions and consumer organisations holds out to employers and service providers to hopefully attract more pay or lower service bills. In the routine struggles of social life it is very difficult to effect a clean break with capitalist property relations.

Advocates of neo-liberal policies in basic service provision argue that a common sense understanding of basic service provision requires payment for the amount of electricity and water you consume. If you do not pay for it then you should have those services withdrawn. As Chapter 1 discussed such an understanding is merely a social convention as in some first world countries people do not pay for water by volume and disconnection of water for non-payment is illegal.

However in urban areas, as a result of the legacy of the apartheid era, there is a strong commitment to the payment of a flat-rate for services regardless of how much you use.[157] This is reflected in the continued use of the flat-rate demand as part of the SECC's core demands. Even after the shift to cost-reflectivity in payment Eskom encouraged those customers who fell behind in their bills to pay whatever they could afford each month. The flat-rate is in essence an access fee for unlimited use of a resource. For many in Soweto, with a long term supply of electricity, the shift to strict credit control based on full payment for volumetric consumption is akin to the criminalization of everyday life. This term was first used by E. P. Thompson to describe the impact of early capitalist legal reforms on traditional peasant social relations and used to explain incorporation of the African peasantry into capitalist

[155] This position was occasionally put in meetings of MSP researchers which I attended on the basis of the small percentage of total consumption of water and electricity that previously disadvantaged areas consume.
[156] Phillip Matseone, interview with the author 22 March 2002.
[157] See Chapter 1.

social relations.[158] The process of criminalisation used in this sense is the re-interpreting of everyday behaviour as an offence against the state. It can also include the criminalisation of behaviour which although formally illegal is in fact widely tolerated.

To use the term in the context of flat rate payments stemming from the Apartheid era appears inappropriate. For a start the practice of flat rate payment would for many not have been a particularly long-standing practice. However it would have been many township households' only experience of paying for electricity. Certainly many households were encouraged to return to the flat rate system regardless of their levels of consumption presumably as a way of encouraging at least some payment on accounts.[159] Those who made their contribution on this basis and still were cut off have a sense that they have been very unfairly treated by Eskom.

Access to a variable amount of electricity based on need, after the payment of a small fee, which may or may not relate to actual consumption levels, is a very pre-capitalist way of providing a service. They get access to as much water and electricity as they need. How the flat-fee is set will determine how "just" the system is. The user is in effect getting access to an electricity and water commons. Given the logic of any form of capitalism of ever increasing consumer needs, which require ever larger energy and water inputs, this system has the potential to be both highly unjust economically *and* environmentally unsustainable. The environmental critique of this practice is powerful. There is undeniably a tragedy of the commons, which will if unregulated lead to overuse of the resource.[160]

From the perspective of electricity as a collectively consumed good by South African consumers of similar income in an easily defined geographic area it makes more sense. Within a particular geographic area bargaining with Eskom over electricity prices is much easier as a community can set a price collectively to campaign around. If the flat rate is set on the basis of some measure of capacity to pay it can also reflect to some extent the propensity to consume the commodity. If it is set on the basis of property prices it can to some extent track the propensity to consume as well as the capacity to pay.

It is on this point that there is the sharpest divergence between the community and the leadership of the SECC, the APF and the MSP. The community is strongly committed to the low flat rate for electricity.

> In Soweto, at the moment, it's not all the sections of the community that are part of the SECC. When you go to different areas you are getting different layers who are coming into the SECC's meetings. Then you find one section will say flat-rate others free life line. So what we are trying to do is to combine these various processes. We are saying for example for the pensioners and the unemployed there must be free services, and then those who can afford it should be a flat rate.

[158] Sally Engle Merry, "The criminalisation of everyday life", in Sarat, A., Constable, M., Engel, D., Hans, V., Lawrence, *Everyday Practices and Trouble Cases,* North Western University Press, 1998, 14.
[159] Nkele (Mabel) Chakela, Saturday 27 October, 2001.
[160] See Hardin G., 'The Tragedy of the Commons' in Hardin, G., Baden, J., *Managing the Commons,* San Francisco, 1977, 20 , 28-29.

> So we trying to have a combination of various demands that can capture the various interests within the community.[161]

But despite these different signals coming from the community on the memorandum presented to the Mayor of Johannesburg, Amos Masondo on Human Rights Day 2002 a R50 flat rate is still the demand of the SECC/APF. At a mass meeting held in Pimville a representative of the APF, who addressed the crowd, Wiseman Hamilton argued for a free basic lifeline with a block tariff.[162] Trevor Ngwane, Chair of the SECC and the full time organiser for APF is on record as supporting the free lifeline rising block tariff as a long-term goal of the SECC.[163] It is my view that many leading activists of the SECC/APF have modified their personal views on pricing as a result of the demands of their constituency.

Alliances of the SECC/APF

One of the ways in which the SECC and APF aim to entrench a counter-hegemonic conception of the basic service provision is through the incorporation of social groups within Soweto beyond their direct and immediate constituency - pensioners and the unemployed. They need to draw into their struggle those who have the capacity to pay for basic services as part of the process of building a wider constituency for their demands.

Thus instead of stressing free basic electricity for the poor, the SECC stress free basic services for all and affordable electricity. The use of rights discourse is a convenient shorthand way of expressing this conception of service provision. They also stress the importance of affordable electricity. At this stage there is a strong commitment to broadening their base within the working class of Soweto. This is in line with any realistic assessment of the options available to a relatively new civic organisation and the practical realities of a core constituency developing outside of Soweto. However in the SECC's Chairperson's report to the 2002 SECC annual conference we get a hint of alliances being formed beyond the narrow confines of the working class in Soweto.[164] Thus gender issues are promoted as an important part of the struggle. Ngwane states that "(t)he SECC must take up gender issues and address the problems faced by women."

The SECC is also linked to alliances that go beyond the narrow confines of Soweto and South Africa. Thus the struggle is to some extent internationalised by drawing on support from first world middle class student movements at their protests held at meetings of the G8 and the World Bank and the IMF.[165]

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[161] Interview with John Appolis, 12 March, 2002.
[162] Wiseman Hamilton, speaking at the launch of the Municipal Services Project Report Pimville Catholic Church Hall, 11 September 2001.
[163] Interview with Trevor Ngwane, *Focus* 25, March 2002 see www.hsf.org.za/focus25.
[164] Just what the term working class may mean in the context of massive unemployment is perhaps an issue. Often activists would refer to the poor or the poors when talking about their constituency.
[165] It is these cross class alliances that particularly infuriate some international development politicians. The ideals of middle class students who attend these protests are portrayed as naïve and unrealistic, particularly so *because* of their privileged class origins. This position was clearly argued by Clare Short, British Secretary of State for International Development, at the launch of the British government's White Paper for International Development - *Eliminating World Poverty: Making Globalisation Work for the Poor* –, December 2000, in Pretoria in early 2001.

> The SECC must be part of the internationalist anti-capitalist movement. The SECC joins with organisations throughout the world who believe, like the World Social Forum, that "another world is possible". A world run by the working class to satisfy the needs of the working class and its allies.[166]

Another way is the legitimation that association with the Constitution and the Bill of Rights provides. Withdrawal of service by Eskom or Johannesburg Water for non-payment is promoted as a breach of human rights. The language appeals to the globalised human rights framework.

Conclusion

Alan Hunt has argued that for the achievement of real social change "require…securing…'local hegemony'" in which as a result of "political contestation, ethical justification and legal recognition some claim which at one time was controversial and contestable becomes self-evident and thus secure."[167] The political struggles, which the SECC and the APF have embarked on with the assistance of the Bill of Rights have by no means reached a stage of 'local hegemony'. The political activities of the SECC/APF have invited a reaction from government that selectively attempts to diffuse the radical activities of the SECC by inviting some of their claims while ignoring others as well as engaging political repression through mass arrests.

The partial de-commodification of basic services which seems to be accepted, if weakly by national government, is an important concession which may lead to the creation of a different conception of how municipal services should be delivered. It is the expansion of this sphere of de-commodified collective consumption that is one of the goals of the SECC/APF. This reality, an existing space for de-commodified provision of services, coupled with use of the major hegemonic symbol of the post apartheid social order, the Constitution and the Bill of Rights has been one of the key starting point for the political mobilisation around municipal services such as water and electricity. The fact that the political demands of the SECC/APF have been able to be framed in terms of rights contained in the Bill of Rights is an important first step in getting their claims recognised by other groups in the community. It is in this way that the Constitution may have an important role in the future of transformative social action surrounding municipal services.

[166] SECC/APF, 1st Conference 2nd and 3rd March 2002, Chairperson's report.
[167] Hunt, A., "Rights and Social Movements, Op. cit., at 326.

Chapter 4

The Struggle for Recognition

> The right is what you want to take out of the agenda of short-term politics. The right creates a protective sphere for vital interests, which people need to persuade them that they may accept vulnerability, run risks, undertake adventures in the world, and operate as citizens and as people. The relationship between rights and democratic experimentation is like the relationship between a parent's love and the capacity of a child to mature. Once the discourse of rights is humanized in this way, it no longer endangers the development of human solidarity.
>
> Roberto Unger, participating in a multidisciplinary discussion on the right to health held at Harvard, September 1993.[1]

Introduction

The subject matter of this chapter stems from a SECC meeting early in the research for this study. The meeting was one of the regular weekly meetings organised by township residents. In it an older woman was relating her experience of being disconnected from the electricity grid. The obvious hurt and shame that the retelling of her experience evoked in her face seemed to point to something more than a purely materialist struggle over the price of electricity. I may have misunderstood this event, as her explanation was not translated, but nonetheless it lead me to think that the force of emotions that Eskom's harsh cost-recovery techniques had unleashed could not be explained fully through a materialist framework whether it be Marxist or liberal in origin. Unfortunately no clear theoretical alternative seemed available.

While class or individualistic interest based approaches featured prominently in academic and popular explanations of the emerging social struggle in Soweto, they appeared to describe behaviour of social and individual actors in a purely rational and materialist framework. In this sense all behaviour is reduced to a struggle over prices for basic services.

In liberal theory "struggle" is highly individualistic with utility maximising individuals prioritising expenditure to maximise their happiness through assembling an appropriate mix of goods and services within a given expenditure base. The sovereign consumer in Soweto through an individual act of prioritisation of desires directs producers of municipal services to satisfy these subjectively determined desires. It is this normative order which must be strengthened if people's individual happiness is to be achieved. This market model is used both as a descriptive model, that is it describes what happens in Soweto as well as a normative model – what *should* happen. In the latter use this must mean, although it is rarely explained in this way, marginalising customary social practices such as cultures of entitlement or the

[1] Mann, J., Steiner, H., (eds) *Economic and Social Rights and the Right to Health, An Interdisciplinary Discussion*, Harvard Law School, 1995, published online at http://www.law.harvard.edu/programs/HRP/ accessed 1 December 2002.

entreaties of socialists who speak in terms of "rights" which run counter to the morality of the market.[2] While this struggle has an obvious social character neo-liberal technocrats often speak only in terms of the individuals and their preference satisfaction. Individuals by "zero-rating" electricity and water services must engage in theft in order to access these services as no reasonable service provider would or could continue service provision without payment. The non-payment of electricity and service charges in this framework becomes an individual *moral* defect. The morality in question is that of the free-market which believes that the market price is just. The price hinges on due respect for property rights and the rule of law, which protects both buyers and sellers.

The Marxist alternative sees the appropriate subject of investigation as class. Class struggle is used as a conceptual device to explain current tariff structures for electricity and water as a result of the relative strengths of social actors in conflict.[3] The existence and/or extent of cross-subsidisation, between large industrial consumers and households and between rich/high consumption and poor/low consumption households, is primarily a measure of the balance of forces between classes. The extent to which working class consumption of basic services is provided for free or heavily subsidised is primarily a class issue. "Theft" of basic services whether individually or collectively organised, is an act of class struggle and can be morally justified on the basis of collective material interests.

While I certainly favour the latter explanation, neither, it seems to me, provides a full explanation of the observed social phenomena in this study.[4] The moral nature of the struggle in Soweto in many ways confirms the observations by some scholars that the impetus to engage in social change results from moral norms being disrupted. Barrington Moore Jnr, speaking generally of the need to incorporate something more than economic factors to explain social change puts it thus;

> Granting and even emphasizing that ideas cannot become effective without economic changes, there is still an important positive point to be made. Without strong moral feelings and indignation, human beings will not act against the social order. In this sense moral convictions become an equally necessary element for changing the social order, along with alterations in economic structure.[5]

The first chapter outlined some of the economic reasons for the restructuring of basic service provision and the economic impacts of these "reforms" on the majority of South Africans. This chapter will explain one particular component of the social process which I think provides an explanation as to why the activism of the SECC and the APF have struck such a chord amongst some Sowetons.

Axel Honneth and the moral grammar of social conflict

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[2] A right to a good or a service could be described as an a-priori investment of value into a commodity before that value has been set objectively by the market mechanism.

[3] Patrick Bond's work on municipal services is representative of this style of discussion. I became exposed to this reading through his political economy of infrastructure course held at the University of Witwatersrand in May 2001. At interview Bond repeated this emphasis on class struggle for explaining tariff structures.

[4] A further and I think useful materialist explanation, not discussed here would be institutional economics which focuses not on class nor individuals but on institutional actors.

[5] *Injustice: The Social Bases of Obedience and Revolt*, MacMillan, 1978, p. 469.

The writings of the German critical scholar Axel Honneth question the dominant materialist explanation for resistance, revolt, which grounds most liberal and Marxist accounts of social change. Rather than accept materialist explanations for the sources and structure of much social conflict and institutional change, Honneth, drawing on Hegel's early writings and the sociologist George Herbert Mead, argues that social conflict is driven by the individual and group need for inter-subjective recognition.[6] This recognition can only come from significant interaction partners. One cannot develop a sense of self, ones own interests, needs and desires without interaction with others. This occurs at a family level, crucially with respect to the mother/child relationship and also at a group level.

An individual, to fully engage with the world, must have self-confidence, self-esteem and self-respect.[7] These traits cannot be realised individually. They arise through interaction with significant others in the life world, through the recognition of others whom one also recognises.

Honneth uses respect and its logical correlative - self-respect in a particular way. He does *not* mean respect for the specific individual traits of a person, in the sense that one might esteem an individual for their ability to play football well, write good academic sociology texts or for any myriad of private and public activities humans engage in. Nor does it refer to personality traits such as qualities of agreeableness, tough-mindedness or stoicism in the face of personal hardship. These are individual traits, which help us distinguish ourselves from and between others.

Respect, in Honneth's use of the word, has a universal character structured through relations associated with legal recognition. Individuals gain legal recognition or rights in a way that allows no exceptions or privileges.[8] As a "fully-fledged" member of a political community one's level of economic power should be irrelevant, in so far as it relates to the ability to engage in struggle as an equal partner with others, for representation of one's political interests.[9]

Self-realisation depends on the establishment of conditions that allow for mutual recognition. Honneth sees three main types of relationships important for mutual recognition and the development of the three traits listed above are; a) the love/friendship relationship b) community networks of solidarity and shared values and c) legally institutionalised relationships of universal respect for the autonomy and dignity of persons.[10]

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[6] It should be acknowledged that the eminent Crit Peter Gabel's dense legal writings also deploys the concept of legal recognition. To Gabel, however, legal rights represent a false and alienating form of recognition. See "The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves", *Texas Law Review*, 62:1563, 1984 particularly at 1591 – 1597.

[7] Honneth has his own particular definitions for all of these commonly used terms. For the purposes of this chapter I will only explain the latter.

[8] Exceptions emerge in practice as a result of liberal societies inherent inequalities in economic power. Nonetheless the normative point, what people believe society should be like, is what is at issue.

[9] Honneth, A., *The Struggle for Recognition; The Moral Grammar of Social Conflicts,* Polity Press, 1995, p. 115.

[10] Honneth, A., *The Struggle for Recognition; The Moral Grammar of Social Conflicts,* Polity Press, 1995, taken from Anderson, J., "Translators Introduction" p. xi-xii.

It is the latter, the individual manifestation of which he calls "self-respect" that is most important for understanding the role of rights in promoting social change. Honneth explains;

> Since possessing rights means being able to raise socially accepted claims, they provide one with a legitimate way of making clear to oneself that one is respected by everyone else. What gives rights the power to enable the development of self respect is the *public character that rights possess* in virtue of their empowering the bearer to *engage in action* that can be *perceived by interaction partners*. For, with the optional activity of taking legal recourse to a right, the individual now has available a symbolic means of expression whose social effectiveness can demonstrate to him,…that he or she is recognized as a morally responsible person…we can conclude that in the experience of legal recognition, one is able to view oneself as a person who shares with all other members of one's community the qualities that make participation in discursive will-formation possible. And we can term the possibility of relating positively to oneself in this manner 'self-respect'.[11]

Self-respect, however, can only be observed in the negative, that is when it has been denied. It is as a result of "legal under-privileging", when rights are denied, that there emerges a crippling sense of shame in individuals. This shame can only be extinguished by active protest and resistance.[12]

Can this shame be observed in the struggles in the community over electricity and water? What happens when someone's electricity and water is cut-off? In the small survey conducted in Soweto, under the auspices of the SECC, it was found that "many (women in particular) stated that they worry that their neighbours will look down on them for not having electricity in their house".[13] There was widespread agreement that loss of electricity affected dignity with 70% of respondents agreeing with the statement that "it is degrading to my family to live without electricity".[14]

Phillip Matseone the publicity officer of the SECC characterised it in this way when asked if households felt shame when their water and electricity was cut off.

> When people get cut off it's a lot more serious when somebody gets diagnosed as having full-blown AIDS. It isolates you like it's a sin to be poor. People cannot afford to have what we call to have class discrimination. I believe personally, and the SECC does as well, that it is not a sin to be poor. But now if you have to stay without electricity and people around you have electricity it has an effect on you psychologically. It rubs down to the kids and rubs down to the whole community. That is why we are actively reconnecting people.[15]

The social stigma associated with contraction of HIV/AIDS is compared to loss of electricity as a basic service. Matseone clearly implies that the social consequences of electricity disconnection are very significant.

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[11] *Ibid*, p. 120 my italics.
[12] *Ibid*, p. 121 and p. 164.
[13] Fiil-Flynn, M. with the Soweto Electricity Crises Committee, *The Electricity Crises in Soweto*, Municipal Services Project, Occasional Papers Series No. 4., August 2001, p. 18.
[14] Ibid.
[15] Phillip Matseoane, SECC Media Officer**,** 22/3/2002.

The disease imagery may also be instructive. Honneth interestingly argues that the consequences of social-disrespect are often *characterised* by the recipients of the disrespect as being in a state of disease. When talking about the effects of disrespect people often refer to states of deterioration of the human body.[16] This may be more than a metaphor as the experience of social disrespect has been argued by some epidemiologists as a factor that explains persistent class differences in the incidence of all types of disease.[17]

Generally most respondents felt that disconnection was an event that led, at least initially, to a sense of social exclusion and social withdrawal that was linked to a feeling of social shame. Teboga Mashota of the SECC provided a personal description of the consequences of being disconnected. I asked her about whether she thought that households in Soweto felt shame following having their basic services disconnected.

> Yes…You know…I will make an example of myself - before I joined the SECC we were cut-off for 3 months and you feel ashamed of yourself. Sometimes you feel ashamed of showing people, this is my house, because it's dark. And everyone in the street will keep on asking. It was called Dark City because it was dark in my house. And we used to come out during the day. At night we didn't come out because we ashamed of what people will say…you know – you are poor, all those kinds of things…And people also say - they don't have electricity - why don't they find a job so they can pay for electricity. So my friends used to make fun of me and say, "Eskom has taken her things, her electricity so you have to go and pay to get it back".[18]

The shame, discussed here, is very much linked to the relative standards of the community and what the immediate community will think of the household if they don't have electricity. The shame is expressed as a sense of social exclusion. In this case the family begins to exclude themselves from the community in the evenings for fear of subjecting themselves to social ridicule.

As described here the shame is not particularly perceived in terms of the source of the shame, Eskom. The significant partner for recognition is the disapproving immediate community. Eskom's act of disconnection in effect shames the household in front of their community or peers. Nor does it correspond to an obvious 'legal under-privileging" in the sense that there is an obvious, straightforward right to electricity that is being denied through the credit control actions of Eskom and the Johannesburg municipality. The hidden character of the struggle suggests that people do not think that they have a publicly acceptable claim against Eskom to electricity.

There is nothing in these feelings of shame that in anyway suggest an immediate move towards some kind of political or social action. Poor people experience all kinds of humiliation and this does not often lead to revolt or even minimal political organisation. Honneth argues that "the motives for social resistance and rebellion are formed in the context of moral experiences stemming from the violation of deeply

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[16] Honneth, *Op. Cit.*, p. 135.
[17] Wilkinson, R.G., "Income Inequality, Social Cohesion and Health, Clarifying the theory – A reply to Muntaner and Lynch", *International Journal of Health Services*, 29:3, 1999, 525 at 529-531 but in this case Wilkinson is referring to rates of morbidity and mortality associated with violence.
[18] Tebogo Mashota, Administrative Officer, Soweto Electricity Crisis Committee, 28 June 2002.

rooted expectations regarding recognition".[19] But these feelings cannot serve as an impetus for social action unless there is some shared language, which articulates and generalizes these individualised feelings.

It was the SECC who provided this language and articulated a sense of what people should expect of their new government. This was provided by contrasting the practices with respect to water and electricity that occurred in the obviously illegitimate period of apartheid governance and the practices that were being followed by the legitimate post-apartheid ANC government. Apartheid denied the residents of Soweto their humanity by violating basic civil and political rights. It did not, however, in many people's memory, engage in mass cut-offs despite widespread non-payment by residents of Soweto.

Some evidence of this particular construction of social reality can be found in the words of Agnes Mohapi as interpreted by Jon Jeter of the *Washington Post*. In reference to her need to ask the SECC to illegally reconnect her household to the electricity grid Agnes comments;

> "We shouldn't have to resort to this," Mohapi, 58, said as she stood cross-armed and remorseless in front of her home as the repairmen hot wired her electricity. Nothing, she said, could compare to life under apartheid…But for all its wretchedness, apartheid never did this: It did not lay her off from her job, jack up her utility bill, then disconnect her service when she inevitably could not pay.
>
> "Privatisation did that," she said, her cadence quickening in disgust. "And all this globalization garbage our new black government has forced upon us has done nothing but make things worse…But we will unite and fight this government with the same fury that we fought the whites in their day."[20]

Agnes Mohapi's personal experience of being denied access to important social resources, such as work and electricity, under the new ANC government, when this was not the case under the obviously illegitimate apartheid regime, heightens her sense of moral indignation against the ANC government's and Eskom's policies.

Dudu Mphenyeke, media officer for the SECC when asked what were the most useful techniques to inspire people at SECC rally's said the following;

> We actually quote the things that the old government used to do that are no longer happening…Electricity we used to pay a flat rate. We were sure of it and no one was taken out for not paying. What is happening right now in a "better life" in the new government? It's worse. Actually we say we were living better in the old government. We take it from there. "No one is going to take us out of this misery we have to do it ourselves. We have to do it now and not postpone it". That actually inspires the people.[21]

As chapter one explained these points about the apartheid era basic services are surprisingly accurate for the long-term residents of Soweto. The apartheid councils in townships largely didn't disconnect services for non-payment and charged a very low flat rate for water and electricity services. Soweto resident's expectation of what is fair was largely formed by their experience under apartheid. This is an example of a

[19] Op. Cit. p. 163.
[20] Jon Jeter, *Washington Post*, Tuesday November 6, 2001, p. 1.
[21] Interview with Dudu Mphenyeke, 1st November 2001.

breach of the moral economy of Keynesian apartheid era infrastructure policies in which cost-recovery was not central to the provision of basic services.

It is to this, arguably paternalistic, model that poor Soweton's look to understand their present experience of shame and humiliation due to service disconnection. This provides a powerful rhetorical tool to SECC activists to delegitimise the policies of Eskom and the local government. They highlight, in essence, that Eskom has broken a widely held expectation of entitlement. It is via highlighting these broken social norms that the SECC hopes to build the inevitable moral indignation that can be channelled into social action.

The moral economy and the social struggle

Fundamental to Honneth's interpretation is that the moral element of any social struggle is very important. The feeling of injustice stems from individual experience of moral norms being violated and not just from the experience of people being forced below some bureaucratically or community defined level of consumption. Honneth does not reject the interest based nature of many social struggles but simply wants to bring to the fore another possible explanation for social change.

Other writers have recognised the moral basis of social revolt and resistance. Barrington Moore Jnr in his study of the struggles of the German working class, *Injustice; The Social Bases of Obedience and Revolt*, almost used the term "moral outrage" to explain his findings but in the end rejected it for the more neutral "injustice".[22] E.P. Thompson emphasised the mix of morality and law in his study of food riots in 18th century England through his concept of the "moral economy".[23] The "moral economy", being legally defined conceptions of consumer protection against the unrestricted free play of the market which justified particular forms of riotous behaviour by peasants against various profit seeking practices of the bourgeoisie which impacted on the traditional rights and material interests of the new industrial working class.[24]

Clearly the moral economy concept will need reinterpretation but on an initial assessment it appears to provide a useful pointer to the construction of political protest by SECC activists and there use of socio-economic rights.[25] One of the clear differences in this context is that the moral economy is constructed from the framework provided by a reforming Constitution and Bill of Rights. Thompson's research followed subordinate social group's use of pre-industrial legal forms to resist the capitalist transformation of traditional forms of human association.

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[22] See *Injustice: The Social Bases of Obedience and Revolt*, MacMillan, 1978, p. xiii – xiv although see Ch 14, "Inevitability and the Sense of Injustice", Part 7, "The expropriation of moral outrage" where he seems to return to the term rejected in the preface.

[23] See "The moral economy of the English crowd in the eighteenth century", *Past and Present*, 50, 1971, 76 and *The Making of the English Working Class*, London, Gollancz, 1963. Hay, Douglas, "Moral Economy, Political Economy and the Law", in Randall, A., Charlesworth, A., (eds), *Moral Economy and Popular Protest: Crowds, Conflict and Authority*, Palgrave, 2000, 93.

[24] See also Fine, R., "The Rule of Law and Muggletonian Marxism: The Perplexities of Edward Thompson", (1994) *Journal of Law and Society*, 193 at 200 – 201.

[25] For a review of other such appropriations of the term see Randall, A., Charlesworth, A., "The Moral Economy: Riot, Markets and Social Conflict", in Randall & Charlesworth, (Eds), *Moral Economy and Popular Protest: Crowds, Conflict and Authority*, Palgrave, 2000, 1 at 25.

The Bill of Rights clauses the SECC seek to rely on are clearly new or novel claims as far as liberal constitutions are concerned. A central point is that the moral economy in eighteenth century England relied heavily on the law for its strength as a mobilising and legitimating device for riotous crowd behaviour. This use of the law is equally apparent in the SECC's attempts to legitimise its actions.

The politics of recognition in the SECC's struggle for affordable electricity

Recognition relations featured prominently in the struggle between the SECC and Eskom. There was a strong belief articulated and promoted by the SECC that community standards relating to "a better life" are breached by Eskom and Johannesburg Metropolitan Municipality when electricity and water services are cut-off. This breach is the subject of considerable social shame by certain classes of Soweton's who are unable or unwilling to reconnect legally. There is some evidence to suggest that this shame continued despite subsequent illegal connection. This shame can only be relieved through political action, which uses the language of rights, allowing a socially valid claim to be expressed publicly. This claim is then used to promote protest actions against both Eskom and the government.

In many ways this structure, which may lead to engagement against Eskom by members of the community, is the result of the interaction between the leadership of the SECC and the community. The SECC helps articulate this structure through its engagement with the strongly felt community experiences of disconnection. It is something that is introduced from outside the experience of the SECC's core constituency. It is not only the language of rights that gives voice to these feelings. As discussed in chapter 2 it is also the language of class struggle and technical policy discourse.

The politics of recognition was most prominent in the sense of being heard and on the other side listening to the claims of the "other". Most prominent was the notion, continually stressed by activists that the SECC had made every attempt to interact with Eskom. The lack of a proper response to their demands and exclusion from agreements resulted in the imperative of using direct action to be properly heard. When I asked one activist about whether Operation Khanyisa was justified by reference the Bill of Rights he responded in this way.

> You know we have tried to engage ourselves with the government and also ESKOM on the basis that everyone has the right to [electricity]. By showing that they don't want to respond to our demands the community decided that the only way they will understand is to defy ESKOM. When they switch off let us switch on. And we do it legally in terms that you have to demand your right, it's not like a plate of food that you will get it on the table. So that our government can hear what we want, and also electricity it's a right. The only way [you can get it] is to use force. As I was saying we have tried so many times to engage ourselves with ESKOM and the government to address the problems of the community. But they don't want to address it. They run away. So the community said the only way to address it is to use a defiance campaign against [ESKOM on] these issues.[26]

[26] Bongani Lubisi, 26/10/2001.

In an obvious sense the militant direct action campaign of the SECC can only be justified *if* Eskom or the local government fails to give proper recognition of the legitimacy of the concerns of the SECC. Illegal reconnection while a "right" also enables the pain, discomfort of the people to be heard by the "government".

Eskom also engages in the politics of recognition by arguing that it engages exhaustively with the "legitimate" representatives of the community before it proposes its solutions to the ongoing crisis in electricity in Soweto. In June 2001, during Eskom's cut-off campaign to increase the rate of payment and reduce the outstanding debt owed by households, an Eskom spokesperson discussed what will happen once Eskom completed their audit to detect illegal connections;

> We will then take legal action. It must be stressed that we will not be intimidated by these actions. *We are in constant negotiations with the community*, but we are running a business and we cannot afford the huge losses we have been sustaining through non-payment.[27]

The intimidation in this instance refers to the SECC's Operation Khanyisa.

Eskom is at pains to present itself as an understanding entity. In the words of John van der Byl, Guateng regional manager of Eskom;

> We are not an enemy of the community. We are willing to work with them to solve problems.[28]

The protests of the SECC are an example of attempts to elicit recognition and respect from both Eskom and Johannesburg's Mayor Amos Masondo. Mayor Masondo as the public face of local government has been the consistent focus of SECC protest actions.[29] Demands are presented through memorandums to both the Mayor's offices and his personal residence.

The disconnection of the water and electricity from Johannesburg councilors' houses and the Mayor's residence is an attempt to make the decision-makers aware of the implications of their policies. The argument is to make "them" feel what the community is feeling, to give them "a taste of their own medicine".[30] These are acts, which are designed to facilitate amongst the political leaders of the ANC recognition of the consequences of everyday credit control practices as exercised by Eskom and Johannesburg Water.

Respect is explicitly an issue in some of the publications put out by the SECC. In a press release put out by the SECC, Dudu Mphenyeke, then SECC Media officer, is quoted as describing the process of being cut-off in the following way;

> They just come without respect, without even greeting you in your own yard, and cut off your electricity. As Soweto, we are not going to keep quiet. We cannot

[27] Anna Cox, "Sowetans to defy Eskom over cutoffs", *The Star,* 4 June 2001.
[28] "Eskom in continuing battle over accounts", *City Vision,* 8 June 2001, p. 2.
[29] Marches to his offices have been held on Human Rights Day 21 March 2001 and 2002, and as well on the 9 June 2001 and to his home on the 30 June 2001 and the 6 April 2002.
[30] Trevor Ngwane, statement to press on South Africa's, E-news, 16 April 2002.

> live with paraffin fumes and coal smoke. The man from Eskom says electricity is a privilege, we say electricity is a right.[31]

One of the points of contention with Eskom, the Johannesburg municipal administration and the community, as represented by the SECC, is whether electricity is a legal right at all. The SECC/APF is articulating the community feeling that the government and Eskom are denying proper recognition to households through the disconnection of electricity services. The construction of this argument occurs at all levels starting from the very act of disconnection which is characterised as abusing and disrespectful of the right to privacy.

When articulating the concerns of the community the SECC uses language, which evokes and dramatises the community's experience.

> The electricity crisis among SOWETO residents has reached saturation point. After several negotiations with ESKOM management, who turned a deaf ear to the grievances of the residents. (sic) The people of SOWETO can no longer tolerate the terrorist behaviour of ESKOM anymore, who keep on *humiliating* people with unjustifiable cut-offs. (My Italics)[32]

Dignity, according to Honneth, is nothing more than the capacity to assert claims against the collective.[33] The concept of dignity, in the campaign, was sometimes used prominently at the point of partial democratic victory, when it was clear that the agitation, protests and direct action had resulted in some kind of concession from the authorities. Thus Trevor Ngwane was quoted in the *Star* after Eskom suspended electricity cut offs in late 2001 as saying that the suspension was a;

> …victory for humanity, for development and for the expansion of our Constitutional rights to lead lives of dignity. The news comes on the eve of our launching major civil protests and legal action against Eskom and municipalities which persist in denying constitutional rights to low income citizens. We will not rest, but will intensify the struggle of poor and working-class Sowetons in related socio-economic grievances.[34].

The suspension of cut-offs, was an act of recognition by Eskom of the grievances of the SECC. While there was no formal legal action underway, the suspension is characterised as a rights victory.[35] The dignity spoken of here is the Constitutional right, which has little legally defined content. Clearly the primary linkage to dignity is Sowetan's gaining temporary unconditional access to electricity regardless of ability to pay. But I think it can also be argued that dignity spoken of here also relates to having their legitimate claims recognised by Eskom.

Honneth's term "discursive will-formation" entails the capability of individuals, as independent, autonomous moral agents, to engage in public deliberation. One way law's gain legitimacy is the extent to which they have been subject to a process of democratic creation and revision. People who are subject to laws must be able to be present at their formation.

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[31] SECC Press release, "Light is Life" Tuesday 5 June 2001.
[32] SECC Press release, "Electricity Crisis in Soweto", Monday 4 June 2001.
[33] Honneth. *Op. cit.*
[34] "Sowetans celebrate Eskom's decision to suspend cutoffs" *The Star* Friday October 19 2001 p. 2.
[35] Although it was clearly being contemplated. See Chapter 2.

The extent to which participation is possible relies mainly on the structured positive and negative rights of association. Yet ultimately the laws, which implement these basic civil and political rights of association, are insufficient to guarantee the democratic participatory legitimation which liberal democracy craves. The presence of participatory legitimation in modern societies implies a certain level of access to basic goods and services. First world countries' plethora of welfare legislation and social programs bare testament to implementation of a socio-economic rights framework even without explicit endorsement through a formal Bill of Rights.

One cannot hope to fully participate in democratic life without access to a certain amount of goods and services. Services such as education are obviously implicated in the relationship between market-traded services and the human requirement for dignity through democratic self-assertion of political interests. But there is also the need for electricity and water services. Adequate supplies of clean water are crucial to child and maternal health the block upon which most societies are built.[36] Beyond this long-term cost-benefit analysis inspired observation is the more intuitive idea that people cannot become fully-fledged members of a political community if their everyday activities (drinking, food-preparation, personal hygiene, and entertainment within the home) bare testament to their social exclusion. It is these extremely important but nonetheless mundane aspirations that are captured in the ANC's election slogan of "A better life for all".

It is this phrase that was continuously ridiculed in the SECC/APF's public rallies. In the words of one activist commenting on the SECC's mobilising techniques;

> (W)e ask rhetorical questions. Like - When you compare the old government and the life that we were promised do you see any better life? No. Are you having better jobs or are you employed? No. Is life OK? No.[37]

Recognition and full participation in democratic life

The leadership of the SECC admits that the practice of illegal re-connection was widespread before the introduction of the SECC's Operation Khanyisa. Trevor Ngwane at a presentation to the *Sustainable Energy for All* seminar, reflecting on the success of Operation Khanyisa, asked the rhetorical question – what is the use of illegal re-connections as a way of mobilising support for the SECC if there are so many people illegally reconnected already? His answer reflects on the psychology of being disconnected and having to reconnect illegally.

> But they felt like criminals. We (the SECC) made this (re-connection) an act of defiance. It is your right to have electricity.[38]

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[36] Bond, P., "Basic Infrastructure for Socio-economic development, Environmental Protection and Geographical Desegregation: South Africa's Unmet Challenge", 30 *Geoforum*, 1, 1999, 43-59 and Fraser Mustard, J., "Early Child Development and the Brain – The Base for Health Learning and Behaviour Throughout Life", in Eming-Young, M., (Ed) *From Early Child Development to Human Development: Investing in Our Children's Future*, World Bank, 2002, p. 39-40.

[37] Interview with Dudu Mphenyeke, 1st November 2001.

[38] Presentation by Trevor Ngwane, Chair of the SECC, to the *Sustainable Electricity for All Semin*ar, University of Witwatersrand school for Public and Development Management, 29th August 2002.

In Foucaultian terms the residents of Soweto, before the intervention of the SECC, are engaged in micro or everyday resistance against the pricing practices of Eskom and the local government. The exercise of this power, both literally and figuratively, is at the ends of the capillaries of control and discipline of the state over its subjects.[39]

This resistance did not have a public character. It was and still is, in many instances, clandestine and secretive. Few are willing to admit that they are engaging in illegal connections to the electricity grid.[40] The rights justification then becomes a way of *publicly* challenging the morality of capitalism through highlighting the different moral norms (socio-economic rights) already existing within the current institutional structure. These socio-economic rights run counter to the neo-liberal morality which, acts to exclude them from important social resources.

The SECC is challenging the legal order of the ANC's neo-liberal basic services policies. The legal order is in many ways inconsistent and weak in the townships. This is as a result of widespread corruption in the process of disconnecting electricity. Contractors hired to disconnect accounts in arrears and illegal connections often return to household after they have received payment from council for disconnection only to reconnect the same household after payment of a bribe. These contractors often return for further payments, which will need to be paid in order to prevent Eskom from being alerted to the illegal connection.[41] A second reason stems from the nature of the services. Because they are supplied directly to houses access to the service without payment is relatively easy. Most wealthy countries local governments and public services suffer some problems with non-payment despite relatively affluent communities.[42]

For Honneth's scheme to work there must be some evidence, either at the level of articulation by SECC activists or by the SECC's supporters that access to water and electricity are perceived as being necessary for full participation in social life, *including* political participation. This latter evidence is not easy to find. Nowhere is this construction clearly articulated in the evidence I collected.[43]

Nonetheless there is some evidence. Trevor Ngwane, at interview, equated quintessential democratic rights such as the right to vote with socio-economic rights

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[39] See Foucault, M., "Two Lectures", excerpted in Freeman, M.D.A., (Ed.), *Lloyd's Introduction to Jurisprudence*, 6th Edition, 1994, at 891.

[40] See Johnson, *Not so close to their hearts: An investigation into the non-payment rates, rents and service charges in South Africa's towns and cities*, Helen Suzman Foundation Special Reports, Johannesburg, 1999 for some evidence of the clandestine nature of the Gauteng community struggle against high prices. See also the discussion in MacDonald, D., "The Bell Tolls for Thee: Cost Recovery, Cut-offs and the Affordability of Municipal Services in South Africa, in MacDonald, D., & Pape, J., *Cost Recovery and the Crisis of Service Delivery*, HSRC publishers and Zed Books, 2002, p. 173 also available at www.qsilver.queensu.ca.

[41] Interview Teboga Mashota, Administrative Officer, Soweto Electricity Crisis Committee, 28 June 2002.

[42] For example in Melbourne, Australia local government rates debt in 2002 was in the order of 45 million Australian dollars or 250 million Rand. Tamara Heath, "Nagging problem on civic 'lifeblood' ", *Progress Leader*, September 23, 2002, p. 7.

[43] An article written in AIDC Alternatives magazine by a Cape Town activist goes close, arguing electricity as being important receiving information and education. See Connie Brink, "Electricity is a Basic Human Right" *Alternatives*, 2:2 June 2002, p. 10.

such as electricity.[44] There was also a linking of the struggle for socio-economic rights such as water and electricity with the need for "real" democracy. One justification for electricity as being a right was articulated as the consequence of electricity as being essential for living a modern life. In the words of Roy Mokgatlhe a newly joined member of the SECC;

> When we say electricity is our basic right…I mean now, at the present time (with) the life we are living, I don't think there is any family that can live in a house that doesn't have electricity. That must be a government property. What I understand is that the people…they are the one's who must govern. Not the people who have been chosen those are just a few. The minority cannot control the majority. So that's what we classify as a basic need, that is electricity, that is water, that is housing that each and every family must have its own house.[45]

The democratic issues at stake are juxtaposed with the discussion about the essential character of electricity for modern life. The denial of that "right" is then compared with the denial of the capacity for "discursive will formation" or the ability to influence public policy formation so that electricity would be supplied in a way that reflected its essential characteristics. The denial of electricity then becomes an example of the denial of democratic rights of having ones opinions and aspirations listened and responded to in a meaningful way.

These right claims cannot be realised without the similarly "basic need" of a more direct and responsive democracy. In this way goods and services become an issue of democracy. The denial of the ipso facto fundamental right of electricity necessarily implicates equally fundamental democratic values. This commodity is so important that its denial is prima facie evidence of the failure of democratic values. Democracy at its most basic is the right to be heard and to have ones opinions listened to.

Other research conducted in Soweto has uncovered similar attitudes linking democracy to the right of economic access to basic services. A Ms Buthelezi of Diepkloof Extension linked rights, ability to pay for services and the sense that democracy is implicated in this relationship in the following way;

> A lot of poor people are never in a position to realise their rights because they are never able to access these. I think democracy should allow for everyone access to basic needs and I consider electricity a basic need. Because not everyone has access I think democracy in South Africa has a long way to go.[46]

Conclusion

Axel Honneth's ideas point to a way of explaining how the immediate political demands of the SECC/APF were made to sound convincing to their constituency in Soweto. The SECC/APF appealed to Soweton's fundamental need for recognition as morally autonomous agents. This recognition is linked to the supply of adequate amounts of electricity and water in part because of norms developed during the

[44] Interview with the author 17th October 2001.
[45] Roy Mokgatlhe, 28/6/2002.
[46] Quoted in Khunou, G., "'Massive Cut-offs': Cost Recovery and Electricity Service in Diepkloof, Soweto' MacDonald, D., & Pape, J., *Cost Recovery and the Crisis of Service Delivery*, HSRC publishers and Zed Books, 2002, p. 69.

apartheid era as well as a result of arguments that have been made possible by the inclusion of novel socio-economic rights contained in the Bill of Rights such as water and food. Electricity is not so recognised in the Bill of Rights and as such needs stronger rhetorical defence to be included in the pantheon of social goods that no human being can reasonably live without. As a result the SECC/APF resorts, when defending the right to electricity, to various arguments that draw on the law and the Bill of Rights as well as from well-recognised community norms developed in Soweto during the apartheid era. In so far as the SECC/APF is convincing with such a rights based strategy this then allows them to generate sufficient moral outrage to fuel community activism.

This study may have been privileged to be at the emergence of a new and important understanding of what allows South Africans to claim their full citizenship. The fact that electricity can be characterised in the form of a right itself facilitates the generation of community involvement and therefore political power. The continued applicability of such a political strategy may depend, to some extent, on official judicial recognition of the right to electricity. From this vantage point such an outcome is by no means likely. An important test for the right-claim of electricity will come when the case is litigated in a court of law.

Nevertheless recognition by the courts is not the last word on the right to electricity. Trevor Ngwane when asked what he hoped to achieve with formal legal action stated;

> We have to take up the legal matters combining it with mass action militancy. It will serve two purposes. Either to win our right to electricity whether we are rich or poor. And if we lose it is going to expose to the people that they have to rely on their own strength.[47]

The very act of denial of legal recognition becomes in the activists mind an opportunity for mobilising support for their political demands for water and electricity.

[47] Trevor Ngwane, Interview with the author

Chapter 5

The Rule of Law: Civil society's engagement with the judiciary

> Values such as justice are products of politics, not its antecedents. They take root in a public that engages in debate and argument and that is given the opportunity to nurture notions of reasonableness and community. Deprived of such empowerment, public values corrode and civic energy dissipates. Deferring to "specialists", citizens lose their capacity to define their own values and traditions. Public morality will atrophy rather than be energised. The appointment of the judicial philosopher kings exacerbates the problem it was intended to remedy.
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> P. Monahan, A.C. Hutchinson, "Democracy and the Rule of Law", in their edited collection *The Rule of Law: Ideal or Ideology*, Carswell, 1987, p. 119.

Introduction

This chapter tests the hypothesis that an undue reliance on legal values associated with the Bill of Rights was limiting to the SECC's strategic use of other mobilisation techniques which involved challenging power with mass mobilisation via civil-disobedience campaigns. In other words the Bill of Rights in encouraging people to challenge authority did so in a way which curtails and channels dissent into techniques and forums largely controlled by the powerful.

The real test of the hypothesis, a constitutional case on electricity which would force the SECC to "tone down" their militant style of activism did not get underway during the life of this study. Nevertheless, enough relevant information was collected to allow some consideration of the original research question. In the period under review this hypothesis was largely not borne out by the evidence I collected. The Bill of Rights and the values of legalism had some influence on the tactics of the SECC and the APF.[1] It was largely subordinate to mobilising techniques adopted from apartheid era struggles. In many ways rights discourse, and the Bill of Rights, was the justification for militant action.[2]

The particular focus will be the judiciary as adjudicators and the way activists in the SECC and the APF saw the role of popular protest as influencing the work of these "philosopher kings" in interpreting and enforcing the rule of law. In many ways this was a very speculative task given that there was no constitutional case or interim lower court decisions with respect to water or electricity that would demonstrate to activists the favourability or otherwise of the legal system as a tool to achieve their political goals. In doing so this chapter will critique the assumption that the concept of the rule of law is necessarily anti-democratic in that it places too much power in the

[1] Legalism "…is the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationship to consist of duties and rights determined by rules." See Shklar, J., *Legalism*, 1964, excerpted in Freeman, M.D.A., (Ed.), *Lloyd's Introduction to Jurisprudence*, 6th Edition, 1994, at 26.
[2] See Chapter 2.

hands of the judiciary - a powerful un-elected minority - to the detriment of more important democratic values. It will attempt to provide a version of the rule of law from the "bottom up" drawn from my research on the APF and SECC and the writings of E.P. Thompson.

Development and the rule of law

The rule of law is strongly associated with the social system characterised as liberal capitalism.[3] The transfer of the institutional structures of liberal capitalism to the developing world, since the implosion of "actually existing socialism" of the Soviet Union and its satellites in the early 1990's, has been the ambition of a considerable amount of western donor aid to the developing world.

> Advocacy of the rule of law and the promotion of constitutionalism emerged as a major part of international development assistance and programmes in the 1990's. Well over a billion dollars is being spent in 'exporting what is called "the rule of law" by a host of different institutions from non-government organisations through to the United Nations.[4]

In this context the rule of law, in its role as underpinning the market, becomes a substitute for the central planning of the former communist nations and the dominant role of the state in the Keynesian era of the mixed economies of the west up until the early 1980's.[5] It is from this type of funding that the Centre for Applied Legal Studies aimed to finance a constitutional challenge to electricity cut offs.

The rule of law

Heinz Klug, lists seven components of the rule of law (1) popular sovereignty, (2) constitution as the supreme law, (3) political democracy and representative government, (4) limited government based on the separation of powers and an independent judiciary (5) respect for and guarantees of individual rights (6) institutions to monitor and ensure respect for the institutional blueprint and (7) respect for self – determination.[6] This is an extremely broad interpretation of the rule of law and in practice conservative supporters and radical critics alike tend to focus mainly on points (2) (4) and (5).

In its broad form the rule of law appears almost impossible to disagree with sensibly. Indeed various components form part of definitions of good governance as promoted by donors. Each component listed above admits much possibility for institutional

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[3] Hutchinson, A. C., *Waiting for CORAF, A Critique of Law and Rights,* 1995, University of Toronto Press, pp. 8-9, although in its most rudimentary form it clearly precedes bourgeois democracy see Cole, D. H., "'An Unqualified Human Good': E.P.Thompson and the Rule of Law", *Journal of Law and Society,* 28:2, June 2001, 177 at 197-198.

[4] Heinz Klug, *Constituting Democracy*: *Law, Globalism and South Africa's Political Reconstruction,* Cambridge University Press, 2000, p.66 (footnotes omitted).

[5] Klug, *Ibid*, p. 2 and see Hirschl, R., "The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions", 25 *Law and Social Inquiry,* (2000) 91.

[6] Drawn from the renowned international human rights legal scholar Louis Henkin's list who was involved in organising one of the first influential debates surrounding the post-apartheid constitutional order see Klug's *Constituting Democracy*: *Law, Globalism and South Africa's Political Reconstruction,* Cambridge University Press, 2000, p. 67 and 83.

variety on implementation. The democratic character of a state run on the basis of the rule of law can vary across a broad spectrum from relatively authoritarian to a participatory democracy depending on how each of these components are institutionalised in practice. For instance the value of democratic elections, a core value of this expanded version of the rule of law, is linked to the level of popular mobilisation. The conditions which lead to a high level of participation by individuals in public life are complex.[7] Many advanced western democracies, on even the most basic indicators of participation such as voting, fair relatively badly on this front.[8]

This chapter will focus narrowly on one component of the rule of law, the limiting of government power through the "separation of powers" and the important role given to an "independent" judiciary in this constitutional structure. It is the concept of the separation of powers that is at the heart of the neo-liberal project. It is best articulated through Friedrich Hayek's influential writings on the rule of law.

To some the rule of law is associated with the imperial project of neo-liberalism. Yash Tandon, an activist and researcher from the Southern & Eastern African Trade Information and Negotiations Institute (SEATINI), based in Zimbabwe, for example has argued that the rule of law promoted by the international community has resulted in the current abysmal amount of land redistributed in South Africa since 1994.[9] A popular left understanding the rule of law implies protection of property rights, reduction in state involvement in the economy and the privileging of the rights of corporations over the rights of the poor. Conversely, for donors, international financial institutions, many international NGO's and the South African government the fulfilment of the norms of good governance including observance of the rule of law, are meant to bring with it, in a fully globalised economy, the benefits of increased foreign direct investment.[10]

This negative characterisation by many on the left is balanced by the awareness that the values of the liberal state to freedom of association, expression and the rights of the person provide an important space for the prosecution of the traditional left-wing project based on working class mobilisation. This emphasis is also driven by the profoundly negative legacy left by many nominally Marxist regimes' authoritarianism.[11] In this version of the left project the goal is to both to expand the

[7] See Putnam, R., Leonardi, R., and Nanetti, R., *Making Democracy Work, Civic traditions in modern Italy*, New Jersey, Princeton University Press, Princeton, N.J., 1993.
[8] For a table that allows some comparison on rates of participation in elections see United Nations Development Program, *Human Development Report, 2000*, Oxford University Press, 2000.
[9] Less than one per-cent by 2002. Quoted by Yash Tandon, in a paper to the International Forum on Globalisation, preparatory "teach-in" to the World Summit on Sustainable Development, University of Witwatersrand, 24 August 2002. A fascinating chapter on the background to the World Bank inspired land reform program in South Africa which explains why the ANC saw advantages in engaging with the Bank's market led model of land redistribution can be found in Klug, Op. Cit..
[10] The New Partnership for African Development is heavily premised on this view. For a positive view of the potential of NEPAD, Hawthorne, P., "The Selling of Mbeki's New Deal: Another plan for African Development is about to be launched, but this one just might work." *Time*, June 10 2002 and for a critical perspective see Bond. P., (Ed.) *Fanon's warning a civil society reader on the New Partnership For Africa's Development*, Trenton, Africa World Press and the AIDC, 2002.
[11] A point made by Joe Slovo in a key historical document of the transition period "Has Socialism Failed" *South African Labour Bulletin*, 14:6, 1990.

concept of rights to include the social, economic and cultural and *equally* importantly to ensure existing civil and political rights are enjoyed by all.[12]

The rule of law allows for limits on a democratic legislature's power to rule so as to protect the individual's personal freedom from encroachment by the democratically empowered state.[13] A Bill of Rights, enforced by an independent judiciary, becomes a way of enhancing the liberal ideal of the private autonomy of individuals. The emphasis here is on liberty and not necessarily on democracy.

This reading of the rule of law immediately places difficulties on the developmental state for it hampers the state's reconstructive power which can be used to empower disadvantaged groups through interventionist, redistributive social programs. Neo-liberal economic policy, adopted enthusiastically by the ANC government, is drawn from intellectual groundwork laid by Hayek during the long years of Keynesian macro-economic policy dominance and goes hand in glove with a legal vision which risks evisceration of socio-economic rights of any practical content.[14] Neo-liberals have a tendency to characterise all distributional questions as against the rule of law.[15]

Also liberal legalism has tended to grant corporate entities of massive size (agglomerations of many individuals), or corporate citizens, with many of the same rights as freeborn citizens.[16] While obviously stretching the boundaries of common usage of the term "individual", this could be described as a welcome concession to the reality of the group nature of modern social relations. The lack of such rights empowerment for similarly large corporate entities, such as unions, should alert us to the highly ideological character of the defence of individual liberties in liberal theory.[17]

However with the constitutional incorporation of socio-economic rights, as in South Africa's Bill of Rights, this neo-liberal reading of the rule of law becomes very strained indeed. Because of the positive character of socio-economic rights the state must intervene to provide access to them. This is particularly the case when the poverty and inequality of South African society is the product of aggressive and

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[12] Miliband, R., *Marxism and Politics*, OUP, 1977, p. 189 - 190.

[13] I take this as being the most popularly understood version of the rule of law see Held, D., *Models of Democracy*, Polity, 1987, p. 249, Hayek, F., *The Road to Serfdom*, George Routledge & Sons Ltd. 1942, p. 61-63.

[14] The ANC government's neo-liberal credentials were recently endorsed by the International Monetary Fund. The IMF's Directors in 2002 "commended the government for maintaining strict fiscal discipline in the face of budgetary pressures…and welcomed the authorities' efforts to pick up the pace of privatization…", taken from "IMF Concludes Article IV Consultation with South Africa", IMF *Public Information Notice* (PIN) No. 02/75 July 19, 2002. For an excellent popular history of the emergence of neo-liberalism through an analysis of Hayek's ideas tortuous road to respectability see Yergin,D., Stanislaw, J., *The Commanding Heights: TheBattle for the World Economy*, Simon and Schuster, 2nd Edition, 2002, 123 - 138.

[15] See generally Hayek, F., *The Road to Serfdom*, George Routledge & Sons Ltd, 1942 and for a critical perspective Held, Op. Cit. p. 253.

[16] For a representative discussion of the empowerment of corporations with commercial free speech see the discussion in Hutchinson, A. C., *Waiting for CORAF, A Critique of Law and Rights*, 1995, University of Toronto, 198 - 202

[17] On the right of unions, under the principle for freedom of expression, to picket a corporation see *Retail, Wholesale and Departmental Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573, discussed in Hutchinson, *Ibid*, pp. 128 – 132 and for a further example of the de-facto lack of free speech for unions in Canada see *Ibid*, p. 218.

sustained state intervention over 50 years designed to privilege the white population above all others. In this context the relative withdrawal of the state in the name of community empowerment appears premature.

The right to water

This section will look at an example of the legal problems, which arise when Constitutional action is contemplated. It will in no way attempt a comprehensive review of the legal possibilities for challenging government policy with respect to basic services but simply show some of the legal complexities that arise if such a challenge is contemplated. It is an attempt to construct a simple case for defining the possible content of the right to water on the basis that this would assist the SECC's arguments if they could later establish an implied constitutional right to electricity. The focus is defining what would be a sufficient amount of water for a household to fulfil the Constitutional right to water.

The right to water states that "everyone has the right to have access to…sufficient water".[18] The states positive obligation to realise the right to water is contained in the following clause.

> The State must take reasonable legislative and other measures, within its available resources to achieve progressive realisation of each of these rights.

Key questions arising from these simple formulations relate to what "access" may mean, what "sufficient" may mean, and what can be considered "reasonable" measures to realise the right. Another important question is how "reasonable" will be interpreted against the need to realise the right to water "progressively" within "available resources". This section will look briefly at the possibilities of challenging government free water and electricity policy on the basis that the 6kl per month are insufficient and not reasonable.

The legal argument for "sufficient" water

If it could be proven that there was a prima facie violation of Constitutional rights in a particular instance of water disconnection the onus of proof would be on the government to prove that their policies, programmes and legislation were reasonable measures in the circumstances.[19] The Constitutional Court has decided to avoid making value judgements on what may be the best or ideal form of government policy.[20] The reasonableness standard for assessing government policies and legislation is vague, depending heavily on the context of each individual case.[21] This suggests that almost any policy could fit the requirement as long as the government made an attempt to justify to the court that government policy was at least logically coherent. Nonetheless there are some limits that may provide some guidance. The state must allocate its resources reasonably. A policy or programme would not be reasonable if;

[18] S 27 (1) (b) Everyone has the right of access to sufficient food and water.
[19] Much of what follows relies on Waal, J., Currie, I., Erasmus, G., *The Bill of Rights Handbook*, Fourth Edition, 2001, Chapter 26.
[20] *Grootboom*, para 41.
[21] *Grootboom*, para 92.

- a significant segment of society were excluded.[22]
- it was not balanced and flexible. That is it did not take into account the short, medium and long term needs of society.[23]

A water policy, which, for example, does not allow for the emergency trucking of water into recently formed urban squatter settlements but has a comprehensive well funded 10 year infrastructure development plan for delivery of piped water into all South African homes would most likely be ruled unconstitutional on the basis of *Grootboom*.

Furthermore government policy and legislation, while meeting these criteria in terms of policy proclamations, could still be ruled outside the law by if the programme *in practice* breached the criteria of reasonableness. This is to address the situation where good, constitutionally valid policies are compromised by insufficient resources or administrative incompetence.

An important way to deal with the problems of the ambiguity of the current standard would be to have the courts provide a minimum core standard for any constitutionally recognised service such as water or housing. The minimum core-obligation standard has its source in the *International Covenant of Economic, Social and Cultural Rights* (ICESCR), which the South African government signed in 1994, but has yet to ratify, making it inoperable within South Africa unless the court sees fit to recognise it. If such a test were recognised it *should* make it easier for poor people to prove that their right to a certain basic level of services guaranteed in the Bill of Rights had been violated.[24] It could have the effect of drawing reluctant courts into the issues of what level of services is appropriate. An insight into what this level might be can be seen in the recent general statement on the right to water by the Economic and Social Council.[25] This text appears to endorse 50 litres per day as a measure of what amount of water is a human right.[26]

As it stands there is no simple standard to determine when rights have been breached. The adoption of the minimum core obligation might be a basis for the judiciary to challenge the appropriateness of the level of free services mandated by government policy. The judiciary has shown itself very reluctant to even engage in this debate.

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[22] *Grootboom*, para 43.
[23] *Grootboom*, para 43.
[24] For the Constitutional Courts position on the minimum core obligation see *Grootboom*, para 32. Liebenberg, S, "Enforcing Basic Rights", *Financial Mail*, 12 July, 2002.
[25] Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 15, 2002 , *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* E/C.12/2002/11 26 November 2002, p. 5.
[26] I say appears as General Comment 15 cites two main articles for a justification of what is sufficient water for human consumption in terms of the right to water. The first Peter Gleick's "Basic Water Requirements for Human Activities: Meeting Basic Needs", *Water International*, 21:83-92, 1996 unambiguously argues for 50 litres per person per day as a basic human right see p. 90. Bartram and Howard in "Domestic water quantity, service level and health: what should be the goal for water sectors and health", WHO 2002, www.who.int/water_sanitation_health/Documents…/domestwater1.html., accessed 6 May 2003 do not set any clear level for what might constitute sufficient water to provide content to the right to water.

A case that asked the judiciary to set the level of water that was sufficient for a household involved Thulisile Manqele an unemployed woman who headed a household of nine people in the suburb of Chatsworth in Durban.[27] The water provider, Durban Water, had a policy that stated that the first 6 kl of water per month was free but once consumption reached a level above this the consumer had to pay for all water consumed *including* the first 6 kl. Thulisile Manqele's lawyers argued in court that 6kl was insufficient for her large household and as such Durban Water's decision to disconnect her service was a breach of their responsibility under the *Water Services Act* 1997 to provide water to poor households unable to afford water. At that time regulations under the Act had not been promulgated. Judge Vivien Niles-Duner ruled that since there was no definition of "sufficient" the right of basic amounts of water conferred in the *Water Services Act 1997* was too vague and therefore unenforceable. The significance for current purposes of *Manqele,* is that Niles-Duner made the comment that defining what was "sufficient" was also beyond the role of the courts.[28]

> These are policy matters, which fall outside the purview of my role and function, and are inextricably linked to the availability of resources.[29]

It is to this case that Department of Water Affairs and Forestry spoke when justifying local government policies of water disconnection for non-payment.[30] While the specific situation in *Manqele* arose before the national 6kl free basic water level was promulgated and was directly argued on the basis of laws which give effect to the Constitutional right to water, the case demonstrated the judiciaries unwillingness to scrutinize government policy.[31] The timidity of the courts in interfering directly with government policy is a constant barrier to a court led strategy of challenging cut-offs. This timidity would severely limit a challenge to the 6kl level defined in the regulations on the basis that it is insufficient to fulfil the Constitutional right to water. The courts in ruling on these matters would be to engage in policy formulation beyond the scope of their technical competency and breach the doctrine of the separation of powers.

The right to electricity

Legally the Constitutional Court has given some hope that the right to electricity is contained in the Bill of Rights through some brief comments that it made with respect to Section 26(1) on the right to adequate housing. In *Grootboom*, a case relating to the eviction of squatters on private land in the community of Wallacedene in the Western Cape, in discussing what the right to "adequate housing" may mean,

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[27] For a more detailed discussion of this case see Desai, Ashwin, *We are the Poors: Community Struggles in Post Apartheid South Africa,* Monthly Review Trust, New York, 2002, Chapter 11, "Thulisile Manqele's Water", p. 67 – 76.

[28] Counsel argued for 50 litres per person a day. This challenge was based under the Water Services Act 1997 which at the time mid – 2000 had not promulgated the regulations which later set the level of free basic water to be supplied by councils at 25 litres per person per day or 6 kilo-litres a month.

[29] *Manqele v Durban Transitional Metropolitan Council*, Case No: 2036/2000, Court copy p. 8.

[30] See M. Muller, "Press release: Reply to Bond" Pretoria 18 April 2001. Excerpted in full in Bond, P., *Unsustainable South Africa*, 2002, p. 295.

[31] See *Norms and Standards in Respect of Tariffs for Water Services in Terms of Section 10 (1) of the Water Services Act (Act No. 108 of 1997),* Government Gazette, 11 June 2001, they came into force in July 2003.

electricity was included in the ambit of the right to housing depending on the context.[32] As electricity access was not the subject of the case *Grootboom* provides only a weak legal basis for any constitutional challenge to test whether there actually is a right to electricity in the Bill of Rights.

There is no clause, which specifically contains electricity. The SECC loosely base their right claims to electricity on a number of clauses within the Bill of Rights including the rights to a healthy environment[33], equality[34], dignity[35] and life[36]. This list is not inclusive but merely reflects what I observed at rally's, and meetings organised by the SECC. Another right which could arguably be affected include the right to basic education as without electricity it would be impossible to study at night and the right to adequate housing.[37]

The Centre for Applied Legal Studies (CALS) has pursued a number of challenges to government electricity policies. In their analysis of the constitutional options they explicitly rejected a constitutionally based legal action on the basis of implied constitutional right to electricity on the basic of the right to life or dignity.[38] By late 2004 CALS had abandoned all attempts to actively pursue a constitutional case.[39]

Section 33, the Just Administrative Action clause is also important in this context and while not mentioned by the SECC the issues it raises are of everyday significance for the political campaigns of the SECC. This section is implemented through the *Promotion of Administrative Justice Act 3 of 2000*.[40] Legal challenges possible under this Act include failure to give proper notice for a service disconnection and failure to provide adequate information to the consumer to allow representations to be made to contest a case of incorrect billing.[41] CALS pursued a number of small electricity cases on the basis of billing mistakes which were successful.[42]

The latter is done on the basis that discriminatory pricing in which pre-payment metres are charged at a higher rate that normal payment and low service levels provided in RDP houses are discriminatory against black residents who are the beneficiaries of such practices.[43]

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[32] Yacob J., *Government of the Republic of South Africa v Grootboom*, 2000 (11) BCLR 1169 (CC) at paras 35-37.
[33] Section 24 states that everyone has the right to an environment that is not harmful to their health or well being.
[34] Section 9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms.
[35] Section 10. Everyone has inherent dignity and the right to have their dignity respected and protected.
[36] Section 11. Everyone has the right to life.
[37] Education - Section 29 (1) (a) Everyone has the right to a basic education and housing - Section 26. (1) Everyone has the right to have access to adequate housing.
[38] Roux, Theunis and Vahle, Rebecca, *Electricity Rights in Soweto: An Analysis of Possible Legal Arguments*, (Law and Transformation Program, Centre for Applied Legal Studies, 2002, p. 30 available at http://www.law.wits.ac.za/cals/lt/publications/ accessed February 2005.
[39] Dr Jackie Dugard, Senior Research Officer, Centre for Applied Legal Studies (CALS) University of the Witwatersrand, Private e-mail communication, December 15 2004.
[40] See Section 3 of this Act.
[41] Similar strategies are contemplated under *Electricity Act 41 of 1987.*
[42] Jackie Dugard, op. cit.
[43] Roux, Theunis and Vahle, Rebecca, *Electricity Rights in Soweto: An Analysis of Possible Legal Arguments*, (Law and Transformation Program, Centre for Applied Legal Studies, 2002, available at http://www.law.wits.ac.za/cals/lt/publications/.

Presuming that a case could be made that electricity does fall within the right to housing, which is by no means certain, a challenge to the governments' free water and electricity policy, on the basis that they provide insufficient levels of free water and electricity, would face a number of hurdles similar to the ones outlined for water above.

Grootboom, in my view, provides some basis for coercing government into targeting South African citizens ignored by government policy. It is useful, however, only at the margins. While this is not something to be scoffed at, real social transformation can only occur through mass provision of adequate quantities of water and electricity.[44] An urban infrastructure policy, which sets out to provide an extremely low service standard for water and electricity provision to the poor ("some for all"), could not, arguably, be in breach of the Constitution. In legal terms the debate between various policy approaches means very little because many different policy options can be interpreted as being reasonable given the constraints facing government policy.

Interpreted in this way the Bill of Rights provides very little basis for which a successful legal challenge could be launched against government policy to challenge the levels at which the government will provide free water and electricity.[45] Unlike civil and political rights where precedent has built up over centuries the legal antecedents for nationally and individually defined socio-economic rights are minimal and the Constitutional Court has shown a distinct tendency to avoid questioning government priorities.[46]

This vagueness has led one constitutional litigant to complain before the court that the way the court has interpreted the Bill of Rights has led to a situation where, "nobody has a right to anything in particular, and therefore, everyone has a right to nothing at all."[47] The eventual victory of the Treatment Action Campaign over the Department

[44] A point made about the TAC case in light of the broad based public health interventions required to deal with the spread and treatment of HIV in South Africa in George J., Annas, "The Right to Health and the Nevirapine Case in South Africa", *New England Journal of Medicine*, 348:8, February 20, 2003 pp. 750 -754.

[45] I am aware of two cases in which right to water was invoked to challenge disconnection from water services. *Residents of Bon Vista Mansions and Southern Metropolitan Local Council*, Case No. 01/12312 - in the High Court of South Africa Witwatersrand Local Division was a case based around procedural issues and did not in any way seek to determine whether national government policy was compliant with the Bill of Rights. *Manqele v Durban Transitional Metropolitan Council*, Case No: 2036/2000 in the High Court of South Africa did seek to challenge what has eventually become national policy and is discussed below.

[46] International precedent, which the Court must take into account, is also poor with only Sri Lanka, Hungary, Lithuania and Portugal having similar justiciable socio-economic rights. Hungary provides the best example of the possible results of an activist court acting against a neo-liberal's government policies. At the end of their first term in office all the activist judges were removed from the Constitutional court by parliament. See Scheppele, K.L., "Democracy by Judiciary, (Or Why Courts Can Sometimes by More Democratic Than Parliaments)", Paper Prepared for the Conference on Constitutional Courts, Washington University, 1-3 November 2001. http://law.wustl.edu/igls/Conconfpapers/Scheppele.pdf.

[47] Wim Trengrove, acting for the Community Law Centre and the Institute for Democracy (Idasa), amicus curae (friend of the court) in the Treatment Action Coalition's case against the government over supply of Nevirapine in public hospitals, quoted in Steinberg, J., "Obeying letter rather than spirit of the law?", *Business Day*, May 8, 2002, p. 13.

of Health, which forced the Department to implement a comprehensive nationwide program to prevent mother to child transmission of HIV, does not, in the short term, significantly alter this depressing conclusion as the court refused to recognise the *amici curiaes'* argument that the courts should specify minimum core obligation for the fulfilment of a socio-economic right.[48]

While the TAC victory points towards the court as a site of struggle for the realisation of socio-economic rights the details of each victory should be carefully analysed. The test of reasonableness as set out in *Grootboom* and confirmed by the TAC case leaves much open to interpretation and the reasonableness standard needs to have further criteria which are much better defined before the Bill of Right's full legal potential can be realised. From a purely legal point of view *Grootboom* is a weak precedent and much will be determined by the context of the next socio-economic rights case.

It is a consciously pessimistic view of the legal opportunities open to poor people trying to challenge government policy on basic services. It attempts only to sketch a possible legal basis to the many activist's scepticism about the usefulness of the Bill of Rights for the SECC. In doing so it takes the most obvious and simple challenge to national government's policies on water provision. In a full legal challenge the argument discussed below would form one of a number of legal arguments. This clearly may not be the legal action most likely to succeed and is used solely for illustrative purposes. I think justifying a more expansive, transformative, visionary *and* legally convincing reading of the Constitution is actually quite a difficult, time consuming exercise to develop which I neither have the legal interpretive skill, nor the space to develop.[49] The legal cause of action developed below appears to me to have great political utility even if it's legal merits are perhaps questionable. The attempt to increase the level of free water provided by government has been an important goal of groups like the SECC and the APF.

The fact that six years after the proclamation of the Constitution, a period which has seen millions of people disconnected from their household water supply,[50] whilst not one case on water has reached the Constitutional Court may be testament to the complex policy issues raised by this formulation. Theunis Roux from the Centre for Applied Legal Studies made the point that the lack of a water case was also the result of the lack of a strong activist organisation to take up the extra-legal struggle and to sponsor the legal case itself.[51] Challenging government social policy requires resources at a level that partially matches the policy-making capacity of government.[52] This capacity does not come cheaply. Despite this fact money is largely not a problem as long as there is sufficient organisational capacity to approach the international donors who sponsor constitutional challenges.[53] In early 2005 the

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[48] See also Liebenberg, S, "Enforcing Basic Rights", *Financial Mail*, 12 July, 2002.
[49] On the issues surrounding the politics of transformative legal interpretation see Klare, K. "Legal Culture and Transformative Constitutionalism", *South African Journal of Human Rights*, 1998 14, 146 – 188, Davis, D., "Duncan Kennedy's A Critique of Adjudication: A challenge to the 'Business as Usual' Approach of South African Lawyers", *South African Law Journal*, 2000, 697, and Kennedy, D., *A Critique of Adjudication*, Harvard University Press, 1997.
[50] DPLG, Quarterly Monitoring of Municipal Finances and Related Activities, *Project Viability Statements*, October – December 2001, p. 30.
[51] Interview Roux, 30 July 2002.
[52] Ibid
[53] Interview Roux, 30 July 2002.

initiation of a constitutional case over the provision of water through pre-paid metres appears likely.[54] This case is being developed directly with the APF.

Does this mean that a case can be made for abandoning litigation altogether? The very same unsettled and vague nature of the law, which provides legal pessimists and conservative judges with much ammunition, provides equal space for social movements to push their case. Geoff Budlender, an attorney for the TAC, in a stirring endorsement of the Bill of Rights as providing "the promise of real transformation" makes a telling point as to where the real source of the TAC victory might lie;

> The TAC built a strong alliance with key pillars of civil society – trade unions, churches and media… In some ways the final judgement of the Constitutional Court was simply the conclusion of a battle that the TAC had already one outside the courts… [55]

The legal question proposed here does not exhaust the constitutional possibilities for seeking redress through litigation.[56] A useful other technique may be for the South African government to ratify the ICESCR to force the courts to engage with the concept of minimum core standards for determining if socio-economic rights have been violated.

E.P. Thompson and the Rule of Law

The constitution making enterprise in South Africa, according to Hugh Corder, was heavily influenced by E.P. Thompson's assertion of the rule of law is an "unqualified human good". This assertion made by Thompson, a self-described Marxist, in the final chapter of his book, *Whigs and Hunters*, was the source of much controversy amongst leftists.[57] It seemed, on the face of it, to commit leftists to an unqualified support for liberal constitutionalism with its inherent biases in favour of propertied interests. This debate, and its apparent resolution in favour of Thompson's views, was seen as significant in the development of the South African Constitution.[58] The role of the law as acting as some kind of at least minimal restraint on the unbridled power of the Apartheid State was at the back of many of the best legal minds when they began assisting the negotiators and drafter's of South Africa's interim constitution.

Thompson hoped through his historical work to reconstruct the notion of the rule of law as brake on illegitimate state power. A notion that he viewed had been marginalised once the bourgeoisie had gained power in the 17th and 18th centuries. The development of the rule of law was in the context of a political struggle against the pre-capitalist ruling class of the aristocracy, the church and the monarchy. The revolutionary ideals of the rule of law had been transformed into the constraining

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[54] Dugard, op.cit.,
[55] Geoff Budlender, "A paper dog with real teeth", *Mail & Guardian*, July 12 – 18 2002, p. 17.
[56] For an excellent paper on possibilities for electricity cases see Flynn, S., "Rights to Essential Services: A public private continuum for essential service rules", March, 2003, held at the office of the Municipal Services Project, Witswatersrand University, Johannesburg.
[57] For a full discussion of various critics of Thompson, Cole, D. H., "'An Unqualified Human Good': E.P. Thompson and the Rule of Law", *Journal of Law and Society*, 28:2, June 2001.
[58] See Corder, H., "Towards a South African Constitution", 57 *Modern Law Review*, 4, 491 at 527 – 528 (1994).

belief that the law must be followed no matter how unjust it is. The Rule of Law was no longer used as a device to disrupt illegitimate exercise of state power but became a powerful legitimating tool for liberal capitalism. Thompson, in his historical work tried to recover "the classical conception of the rule of law as a standard against which to measure and resist the authoritarianism of the modern state".[59]

Thompson's use of the term the rule of law implies very little commitment to the expansive institutional commitments of the imperial rule of law projects.[60] Thompson's definition equates to an equal application of the rules, which limit ruling class power, whether that ruling class is the proletariat or the bourgeoisie. In other words the exercise of power should not be arbitrary and the poor and the rich, the powerful and the powerless, the politburo and the proletariat, the white and the black *must* be subject to the law. Laws, which lack democratic legitimacy as well as obviously unjust laws, all fall within the ambit of this "unqualified human good". Thompson's defence of the rule of law, impassioned and articulate as it is, does not mean, if we are to agree with Thompson, that we are obliged to defend the rule of law and its strong link to liberal capitalism.

Thompson attempted to re-capture the rule of law as vehicle for challenging illegitimate state power, rather than what it had become, which was, more often than not, a way of further entrenching class and bureaucratic privilege.[61] Nonetheless if everybody must be subject to the law it seems obvious that this will work heavily against the underprivileged as many laws only materially effect the poor. This idea is captured well by the ironic statement of the "majestic egalitarianism of the law, which forbids rich and poor alike to sleep under bridges, to beg in the streets and to steal bread".[62] The rigorous credit control policies of the Johannesburg metropolitan municipality clearly are not a problem for affluent households. Equal application of laws can lead to highly unequal outcomes. In this instances it could be argued that "It is better to break the law, than break the poor".[63] And on this Thompson I think would be in agreement. In an interview for Thompson tried to defend his championing of the rule of law in the following way.

> In a contest for a human order, laws must be changed and disputed of course. Particular laws may and will be broken, as a matter of conscience, as has been done in the past. There must be inflexible opposition to trench upon basic constitutional rights, and if they do trench we must disobey.[64]

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[59] Fine, R., "The Rule of Law and Muggletonian Marxism: The Perplexities of Edward Thompson", Journal of Law and Society, Volume 21, No. 2. June 1994, p. 210.
[60] Cole, D. H., "'An Unqualified Human Good': E.P.Thompson and the Rule of Law", *Journal of Law and Society*, 28:2, June 2001.
[61] By bureaucratic I am referring to private (corporate) as well as public bureaucracies. Thompson treatment of socialist states was less explicit as the subject of his research was the rise of capitalist social relations in Britain. Nonetheless his defence of the rule of law was an attack on a type of Marxism that saw the rule of law as a crutch of the bourgeois social order with no relevance for the "actually existing" socialist governments of the Soviet bloc in the 20th Century.
[62] The quote is by the nineteenth century French writer Anatole France, *The Red Lily*. See for a meditation on its jarring contemporary relevance to the crisis in housing in New York see "From the Editor's notebook", *Journal of Public Health Policy*, 23:4, 2002, 501-502.
[63] A slogan sometimes used by the SECC. Mentioned in interview by Bobo Makhoba, 22nd March 2002.
[64] E.P. Thompson, "State of the Nation", *Writing by Candlelight*, 1980, p. 253 quoted in Cole, *Op. Cit.* p. 196.

Even with this qualification Thompson's version of the rule of law doesn't lead very much farther in the direction, which as progressives, we want to go. It simplistically characterises the state as a threat and not as an opportunity. It fails to fully address the constructive power of the state in promoting freedom by providing important capabilities to its citizens. It is not that Thompson's view of the rule of law is not important, to deny that would be to suppress much evidence authoritarian state terror in a cold war justified defence of both capitalism and socialism.[65] But if that is all there is it leaves too much unsaid.

As stated by Thompson the rule of law is impossible to disagree with. Who could argue that the powerful not be subject to their own laws? Or that the exercise of power *should* be arbitrary.[66] It is vitally important that the state not interfere with rights to protest, associate and engage in political life. But it must do much more than simply leave progressives to get on with the business of fighting the good fight. Full engagement in public life requires a whole mix of capabilities, which cannot be left to the individual alone to supply.

The left cannot be successful unless it implants within the liberal state itself the seeds of a new post-capitalist order. Within South Africa those seeds must to some extent fall within the furrows left by the teams which produced the constitutional settlement. The ploughshares of liberty must include more than the traditional concerns of the liberal state with restraining the exercise of state power. For too long the ploughshares of economic, social and cultural rights have been let sit above the field as the deep and not so deep furrows of civil and political rights have led the way.[67] It is time for the economic, social and cultural ploughshares to be inserted fully into the social field.[68] With this a greater liberty, underpinned by access to basic goods and services, can be achieved.

Separation of powers and an independent judiciary

One important aspect of any expanded definition of the rule of law is the need for laws and the Bill of Rights to be interpreted by an independent judiciary. The notion of an independent judiciary is closely linked to the concept of the separation of powers, which asserts that the accumulation of all powers, legislative, executive and judiciary, in the same hands will inevitably lead to tyranny.[69] This system is maintained not only by constitutional fiat but through the intrinsic human tendency for those who control the various arms of government to seek power and glory for themselves by appropriating the other powers of government.[70] This fact means that the men in control of the various arms of government will jealously guard their privileges and powers thus preventing any dangerous concentration of power leading to tyranny. A secondary justifying principle for the separation of powers is the need to place a check on the problem denoted as "the tyranny of the majority". In both the

[65] See Chomsky, N., *Turning the Tide,US Intervention in Central America and the Struggle for Peace,* Boston, South End Press, 1985. Koestler, *Darkness at Noon.*
[66] This hardly needs stating as the 12th Century Magna Carta is the main source of this version of the rule of law.
[67] And to some will continue to do so to the detriment of an enriched concept of democracy Evans, T., *The Politics of Human Rights: A global perspective*, Pluto, 2001.
[68] Harvey, D., *Spaces of Hope,* University of Edinburgh Press, 2000.
[69] See Dahl, R. A., *A Preface to Democratic Theory,* University of Chicago Press, 1956, p. 11.
[70] See James Madison, *The Federalist,* No. 48, excerpted in Dahl, *Ibid,* p. 20.

United States and South Africa in the constitutional debates and negotiations it was assumed that the property-less would come to dominate the legislative arm of government threatening the rights of the privileged.[71] The 'tyranny' which separation of powers has traditionally meant to avoid more or less means, primarily civil and political rights and particularly the right to property.[72] It is particularly this notion that underpins the breach of the "rule of law" accusation surrounding Zimbabwe's fast track land reform program.

The critical legal enterprise is directed towards opening up this role to rigorous scrutiny. Crits assert, that there is considerable judicial freedom in legal and constitutional interpretation. If this is the case, what does possessing an independent judiciary actually mean? Does it mean independent from wider social forces as class, gender, race and sexuality? Such lofty impartiality would provide a justice so divorced from the society the judiciary oversights, all done in the hope of neutral arbitration in resolving fundamental social conflict, that it is hard to imagine justice being achieved at all. Judges come from a particular social context and it is not sensible to deny those origins. The existence of a Constitutional Court full of Judges with impressive anti-apartheid credentials bares testament to the practical rejection of this version of an independent judiciary.[73] But it is to this sense of blind or impartial justice that the courts still commonly appeal.

Commonly this notion is captured in the ideal that "Man is free if he needs to obey no person but solely the laws".[74] The tendency is to deny human agency in judicial interpretation to enhance the authority of judicial decisions. Thus South African's are, in effect, ruled by the Constitution and the Bill of Rights and, where they are not in conflict, the legislative enactment's of parliament.

It is these considerations which were prominent in the initial internal ANC discussions surrounding the possible institutional structure of a post apartheid order. Thus, in 1988 after the publication of the ANC's *Constitutional Guidelines for a Democratic South Africa*, which committed the ANC to a Bill of Rights, Albie Sachs (now Constitutional Court judge) pointed out that the "assumption in most current writings on a Bill of Rights…that its final watchdog should be a body of highly trained and elderly judges, applying traditional legal wisdom in what in what is considered a neutral and unbudgeable manner". But to Sachs, if "the dog is to watch the interests of the formerly oppressed, it would have to have a totally different pedigree and training".[75] Sachs, here is not just talking about the possibility of an un-transformed judiciary frustrating a democratically elected parliament, a distinct

[71] This assumption common to powerful forces behind much of the content of the American and South African constitutions. In the United States the concerns of Madison and others proved baseless soon after the revolution as the legislature came to be dominated by the propertied interests see Dahl, *Ibid*, pp. 142-144. It remains to be seen in South Africa but the ANC, as nominal representatives of the propertyless, does not appear to represent a significant threat to propertied interests.
[72] Dahl, citing James Madison, *Ibid*, p. 12.
[73] The controversy surrounding the rules of appointment of Judges to the Constitutional Court not only points to the perceived power of the Constitutional Court but also to the awareness that who decides really matters. See Klug, Op.cit., pp. 140 – 141.
[74] Immanuel Kant, quoted by F. A. Hayek, *The Road to Serfdom*, George Routledge & Sons Ltd. 1942, p. 61.
[75] Albie Sachs, "For a Bill of Rights for a democratic South Africa", *Hastings International and Comparative Law Journal*, 12:2, 1989, 289 at 307 quoted in Klug, *Op. Cit.*, p. 82.

possibility at the time, but also the question of a transformed judiciary's relationship to a democratically legitimised parliament.

Later when a Constitutional Court judge Sachs seems to reject his former activist mindset which views Judges as real people, from a particular place and time, a situatedness that must affect their interpretive role, and adopts the very neutral text based analysis which his earlier article questioned. Thus in defending the Constitutional court's particular interpretation of a very difficult legal and political question he seeks to appropriate the traditional aura of judicial neutrality, by denying his agency, and upholding the 'sanctity' of the constitutional text. To Sachs the court judgement in *Makwanyane,* which ruled the death penalty unconstitutional, was based on ideals not "to be found in the minds of the judges, but both in the explicit text of the Constitution itself and the ideals it enshrines".[76]

To activists in the SECC/APF the Constitutional Court *does* exist within a particular society with a particular balance of class forces. Far from the Constitution being self-explanatory the view is that social forces impinge on how the courts interpret the constitution. This is from the Chair of the APF John Appolis.

> The judges are not immune to the pressures of society. So in the context of the ruling class being stronger and more hegemonic in terms of ideas - clearly that will rub off on any public institution like the Constitutional Court. So it's our task and responsibility to win over people to a different set of values, a different approach to social development in the country. And win over the intellectual intelligentsia, the educated classes to convince them of a different route to the Constitutional questions in our country. I think really when the poor and the working class raise those issues in a much more strong and stark manner then I think people will sit up and take notice of those things. That's the only way and that's how you can then change the balance of power more in favor of the poor and the working class. Because it's the working classes and the poor that are raising the issues in a very stark manner. And if the wealthy classes and the government do not take note of that they will have problems on their hands. So they have to weigh up the social cost of at least accommodating some of these things or making some reforms or allowing certain space for these thing to emerge around it.[77]

Independence also has an institutional meaning, which means independence from the government of the day. Again the concept obscures more than it illuminates. The courts then are above the party or parties who control the legislature, that is the government of the day. The judiciary when faced with a legislature swept into power by radical democratic desire for fundamental change must interpret the legislative enactments of parliament in light of their commitment to uphold the Constitution. If their considered interpretation is that the laws are outside the Constitution then those laws must be invalidated. The democratic will of the people, as voiced through their representatives and the rule of law do not necessarily coincide. A lack of judicial independence, like pornography, is something we all know when we see it.

The problems inherent in the imperial version of the rule of law is that laws properly constituted through an institutional system which approximates the idealised institutional structure listed above must be obeyed no matter how unjust. This is an

[76] *S v Makwanyane,* 1995 (6) BCLR 665 [392], cited ibid p. 166.
[77] John Appolis, Chair of the APF, Johannesburg, 12 March 2002

imperative and can be seen as a form of legalism. It is a process-orientated view of the law. It also seeks to deny the power relations inherent in the transformation of South Africa.

The constitution making process was a very visible, if not always democratic, *political* process that somehow once certified takes on the appearance of a non-political document. It is the supreme law to which all other laws and practices must comply. Judges are now asked and feel pressure to interpret the Constitution in an independent, non-political way. Instead of viewing the Constitution as merely the point at which the struggle between groups was halted and the truce lines drawn up, the Constitution, over-time, begins to be viewed with a degree of awe that it's grubby political origins belie. This utopian vision of justice is not only promoted by the judiciary but by the SECC itself as a way of enlisting the Rule of Law in their struggle.

The myth of constitutional democracy is that through the application of impartial principles the Judiciary can decide, in a neutral way, the appropriateness of all subsequent laws. None of the respondents in any way accepted this idealised conception of democracy and the rule of law.

There was amongst some respondents a complex articulation of the relationship between constitutionalism, the rule of law and other important values such as democratic participation. One respondent made the point that there needed to be an "understanding of the dialectical interplay between the struggles amongst the classes within society and constitutions and bourgeois law in general". He articulated the struggle in the following way:

> If the SECC or the APF were to accept that the parameters of the Constitution provide a sufficient basis for the fulfilment of the aspirations of the people on the ground then I think the struggle would fail. But for those people that have illusions in the constitution it is something…to the extent that is implemented, (and) responds to the pressures that are exerted upon it by the social forces that are organised within society. To the extent that the working class, through mass mobilisation, raises the limitations of that Constitution there are *possibilities of it being compelled to reflect what the people are demanding and to give legal force to it.*
>
> (The Judges) try and avoid, encouraging the idea of civil disobedience…Because it is their job in the end…to try and protect the Constitution as something that is in an independent arbiter over the conflicts between the social forces in society, which we all know is an illusion. In the final analysis, bourgeois law and bourgeois Constitutions exist in order to legitimise and preserve the sanctity of property and wealth and the power of the ruling class within society. And therefore sometimes it is necessary for them to act *against* the political representatives of the class in whose interests they are acting in order to preserve the credibility of the Constitution in the minds of the population as a whole.[78]

A number of points can be drawn from this contribution. The Constitution is characterised, in its essence, as an illegitimate manifestation of ruling class power. The Constitution = ruling class power. This is a very traditional Marxist form of interpreting the law. A Constitution is a document, which exists "in order to

[78] Wiseman Hamilton, APF, Interview with the author, 6 March 2002.

legitimise and preserve the sanctity of property and wealth and the power of the ruling class within society." Clearly that is not all it is because the very fact that it represents such a powerful "illusion" impacts on the way people are likely to behave. To the extent that the people have "illusions" the Constitution is something that the APF and the SECC can and most probably, if they are to be a relevant social actor, must use.

But the Constitution is, at a second reading, not necessarily weighted heavily in favour of the ruling class. The working classes can "compel" the Constitution to act in their interests. In this way the "illusion "of justice or the rule of law can, in certain circumstances, become the actuality of real gains for the people. In this sense the Constitution becomes a legitimate site for class struggle and not just the manifestation of a dangerous false consciousness. The strategy for using the law in the context of a particular social struggle amounts to the attempt to force through popular action the constitutional system to make good on its utopian promises.

Challenging the law through acts of disrespect, - illegal marches, illegal connections and other act of civil –disobedience, compels the judiciary, lest they be exposed as only representing the interests of the ruling class, to either block or grant the claims of the poor. Mass disobedience on a wide enough scale would bring into question the authority of the law. If their pronouncements from on high bare no relation to ordinary people's everyday social practices they risk their decisions being ignored. This is most likely only in extreme cases were the law is obviously partial to a small and unrepresentative minority.

In almost all other instances the situation is not so clear. Judges with every decision run the risk of de-legitimating themselves as neutral arbiter's of conflict between social actors under capitalism. In this view legal struggle underpinned by mass mobilisation means the judges must concede to the claims of the subordinated. The respondent makes it clear that any such positive outcomes are by no means inevitable and depends on a whole number of factors, including the judicially perceived level of popular support for the groups pressing their claims through the courts, balanced against the need to gain legitimation from traditional sources of power in a capitalist society. It is on this later point that the respondent perceives the struggle in democratic terms, in terms of the ANC's overwhelming electoral legitimacy, as against the immediately quantifiable legitimacy of the mass-mobilisation on the streets or in the homes.

At another point in the interview the respondent makes the point that the Constitution, "to the extent that it represents working class interests", an extent regulated by the successes and failures of working class struggle in the transition period, can be used in a limited way to promote the interests of the working class. Here the Constitution is much more than an illusion it's very structure, clauses and transformative possibilities are patterned by historic class/race struggle against apartheid. The use of the Constitution for the prosecution of the SECC/APF's program becomes both a strategic and a principled intervention.

Democracy, rights and Critical Legal Theory

Critical Legal Theorists argue that the structural withdrawal from ordinary social life and democratic political processes of absolutely fundamental questions of human association that is the product of a rights perspective is a serious problem. For example - what are the boundaries of free speech and how far should the state be allowed to intrude in the private sphere? A constitutional rights regime hands these fundamental questions to an unelected, remote and specialised class of decision-makers.

The patina of objectivity of 'factual' judicial decision-making further encourages a paralysing demobilisation of the public from engagement in resolving these fundamental questions of human association. By turning political questions (in this instance who should receive subsidised or free municipal services) into questions of law or rights, these fundamental questions of social life are handed to a professional class (lawyers, judges) whose specialised discourse and antidemocratic practices alienate those (the public) who will be most effected. Belief in liberal legalism is false consciousness and promotes a dangerously low energy public sphere whereby people consent to a process of decision making which takes away significant power from more democratic forums – parliament, the workplace, local government, the neighbourhood - just to name a few.

If this is not enough it further seriously compromises peoples ability to imagine social alternatives, let alone act to create a version of those alternatives in the midst of ordinary social life. Key parts of liberal democracies institutional structure appear more necessary and less changeable than they should and can be. This critique goes beyond a radical or conservatives refrain of legal bias on behalf of a court.[79] Duncan Kennedy put it thus:

> The diffusion of law making power (to the judiciary) reduces the power of ideologically organised majorities, whether liberal or conservative, to bring about significant change in any subject matter heavily governed by law. It empowers the legal fractions of intelligentsias to decide the outcomes of ideological conflict among themselves, outside the legislative process. And it increases the appearance of naturalness, necessity, and relative justice of the status quo, whatever it may be, over what would prevail under a more transparent regime. In each case, adjudication functions to secure both particular ideological and general class interests of the intelligentsia in the social and economic status quo.[80]

To the Crits the natural and necessitarian character of the status quo emerges out of and is sustained by rights talk. Rights exist between factual judgements and value judgements.[81] Legal consciousness, both in the popular mind and in the professional legal world, is understood as being located well towards the facts end of the spectrum. Fact's 'objectiveness' means that the specialist technician (judges and lawyers) can legitimately handle them in a democracy where ordinarily the assumption is that majoritarian decision making processes are privileged. Because of this fact like

[79] (when they – conservatives or leftists - don't get what they want through an appeal to the court system)
[80] Kennedy, D. *A Critique of Adjudication, {fin de siecle}* Harvard, 1997, p. 2.
[81] Kennedy, *Ibid*, 1997, pp. 305 – 306.

quality legal decisions to resolve rights disputes are popularly viewed as more determinate than political decisions in which difficult social questions are resolved, ultimately, by number counting.

Values, on the other hand, are the domain of majoritarian processes, such as parliament, and it is popularly accepted that there are no "right" answers when resolving value conflicts.[82]

The critical legal project is a complex, and heavily theoretical, agenda intent on exposing legal adjudication for what it is - decisions about values. In doing so, the crits hope to make legal decision-making a self-consciously (for judges and lawyers) political act.[83] This is linked to a broader, and less coherent, goal of democratic empowerment through the politicisation of legal discourse. Just as they view judges and lawyers are in denial about the political character of adjudication so, they argue, is much of the population in liberal democracies. To the Crits rights are not 'pre-political', they are the very stuff of politics and the judiciary, a heavily male, often conservative band of apologists for the established order, is the last group who should be deciding fundamental political questions in the guise of 'objective' resolution of conflicts over constitutional principles.

The Crits have often been misrepresented as putting forward the case for abandoning rights strategies for progressive social change. Apart from a few prominent exceptions most did not call for the total abandonment of critically orientated legal practice.[84] They just didn't think that one should believe in rights as an objectively good project, which can deliver a better society in the long run. Overall they conclude, somewhat pessimistically, that some battles may be won through the courts but overall it's a wrong turn to use rights as vehicle for progressive social change

As such the observations contained in this study could be viewed with some cause for optimism. I found little evidence of a naïve belief in 'liberal' rights discourse. Legal action, as a strategy to move the organisation forward was vigorously debated in a number of activist forums. At times there was a tendency to alternate in a contradictory manner between strong advocacy of 'rights' and an equally strong cynicism about the utility of the courts in delivering anything but what the rich want.

Conclusion

Rights were political tools for SECC activists. Rights talk rather than promoting a low energy public sphere appeared to act as a fuel for democratic participation. Activists saw that through their attempts to mobilise a constituency they had the chance to influence adjudication. Rather than deferring to specialists through the use of rights the SECC activists saw a role for their activism to influence the judiciary. Civil society has an important role to play in the process of adjudication. Whether the judiciary denies the influence of civil society activism in their adjudication is irrelevant. There is an important relationship between civic mobilisation and positive

[82] The crits paradoxically, while ostensibly favouring majoritarian processes (ie democracy), spend most of their considerable intellectual energy debunking the impartiality and objectivity of the law.
[83] Klare, *Op. cit.*, at p. 187.
[84] Mark Tushnet's call for the abandonment of rights strategies is the most prominent and influential exception. His arguments are discussed in Chapter 2.

and progressive legal outcomes. More work needs to be done to define and analyse the extent and character of this relationship in South African society.

Conclusion

Rights talk was adopted by the SECC to serve political ends. The need of Sowetans for reliable, consistent and affordable supplies of electricity was transformed and demanded *as of right* by the SECC. Such a characterisation had obvious advantages to the SECC activists trying to build a movement that could challenge Eskom's and the municipal government's credit control policies.

Rights talk provided:

- A catalyst to engage interest in the campaign. By characterising electricity as a right people sat up and listened.
- A spark to ignite a sense of moral outrage in the community. On attracting an audience by 'rights talk' the allegation that service disconnection denied 'fundamental human rights' tapped into already existing feelings of hurt and humiliation. Rights talk legitimated peoples private feelings of pain and humiliation. The evolving sense of outrage as a result of this denial was then directed (hopefully) towards involvement in protests and meetings.
- Protection – appeals to the constitution were used to justify protest actions.

Further it opened up the possibility for more sustained consciousness-raising through a prominent legal case. A prominent constitutional legal case would provide increased media attention, a possible influx of money to pay for meeting venues as well as an excuse to have meetings to explain and publicise the legal action and the wider goals of the movement to potential members. Important resources would have been brought into grass roots organising and provide a new focus to shape actions, meetings, street mobilisations and protests.

Informal legal advice was provided by Sean Flynn to a number of SECC meetings in mid-2001.[1] This had the effect of planting the seeds of a rights-consciousness in relation to electricity in SECC's constituency. Subsequently I noticed that participants would raise the role of the Constitution in the campaign in meetings I attended. This early legal advice arguably also made the SECC's use of rights talk in their mobilisation strategies more effective and refined. It provided some important depth to their slogan "Electricity is a right not a privilege" at a key moment in the development of the SECC. Such depth was useful for justifying their key campaign tools such as Operation Khanyisa.

To Sowetans, characterisation of electricity as a right was also plausible in a direct 'lived experience' sense because electricity, in the 20 years or so since it had been

[1] Flynn was a former clerk for Chief Justice Arthur Chaskalson of the Constitional Court and lecturer at the University of Witwatersrand. Various versions of an unpublished paper prepared for the Municipal Services Project elaborated on constitutional arguments surrounding electricity. One copy "Rights to Essential Services: A Constitutional Analysis of Water and Electricity Policy in the New South Africa" was circulated on the South Africa debate list. Aspects of this paper relating to water have subsequently appeared in Flynn, S., Chirwa, M., The Constitutional Implications of Commercialising Water in South Africa", in McDonald, D., Ruiters, G., (Eds) *The Age of Commodity: Water Privatisation in Southern Africa*, Earthscan, 2005.

introduced to Soweto, had become such a central and essential part of everyday existence that to do without it would be both extremely difficult and shameful. Social hardship in Soweto meant that the increased prices being demanded for electricity by Eskom made the service unsustainable for many households. In light of massive arrears on electricity accounts across Soweto Eskom disconnected a large number of households from the electricity grid in early 2001. It was into this environment that the slogan "Electricity is a right, not a privilege" and "Operation Khanyisa" was launched.

This latter use of the law to justify illegal activities while at the same time appealing to Government to respect the Constitution is not without risk. This can easily be cast as a highly cynical manipulation of the rule of law and constitutional democracy. The SECC's approach appears emblematic of what one social critic has dubbed the 'tactical attitude' to the law. Drew Forrest in the Mail and Guardian argued that social movement organisations, such as the SECC, use the law if it "is to their advantage; (and) flout it if they consider it unjust".[2] While this is descriptive of attitudes expressed by some activists at the fringes of the SECC it gives an inaccurate picture of the views of activists interviewed in this study. SECC activists had a more complex and contradictory approach towards the observance of the law and the Constitution.

The SECC's acts of defiance - illegal marches, illegal water and electricity connections and disconnections[3] - were justified on the basis of the higher values contained in the Constitution and the Bill of Rights. They broke the law but in the defence of the higher law.

But to then seek formal protection from the courts appears incongruous. The Constitution represents to activists both a tool of the ruling class and a legitimate representation of 'our human rights' and it does so *almost* simultaneously.

This apparent opportunistic use of the Constitution to justify direct action is a manifestation of the 'double consciousness' of grass roots activists observed by Michael McCann in his study of pay equity activism in the United States.[4] The system which enforced South Africa's Constitution was sometimes represented by activists as hopelessly corrupt, a mere plaything for the ruling classes. This extended to the police, the courts and government. Nonetheless the separation between the institutions which enforce the Constitution and the document itself allowed enough space for an aspirational view of the Constitution to emerge where the Bill of Rights became a legitimate source of entitlement, inclusion and empowerment.[5]

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[2] Forrest, D., "Social Movements: 'ultra-left' or 'global citizens'? *Mail and Guardian*, 4 February 2003

[3] Of councillor's water and electricity services.

[4] McCann, M., *Rights at Work*, University of Chicago Press, pp. 232-233.

[5] Perhaps double consciousness is not the right analogy. I would characterise it as the Necker cube of rights-consciousness in which the Constitution is analogous to the Necker cube – classic example of visual perceptual ambiguity. In the same field of vision the structure affirming and structure 'smashing' roles of the Constitution will tend to alternate, depending in part on the context in which the a social action is being contemplated (the courts, the streets, a pitch to progressive lawyers to further a political goal etc) and in part on the inherent ambiguous nature of the Constitution itself. See for a discussion of Necker cubes http://www.cs.ubc.ca/nest/imager/contributions/flinn/Illusions/NC/nc.html

Activists by engaging in defiance actions, were defending and enforcing a people's conception of the rule of law, though they never expressed in directly in this way. To the extent that the Constitution reflected the aspirations of the peoples' struggles against the apartheid regime, and the socio-economic rights clauses contained in the Bill of Rights were an important part of that struggle, there was an obligation to defy the government's failure to protect those rights.[6]

Some of the broad themes present in the writings of critical legal theory on rights emerged in discussions with activists.[7] For example the malleability and indeterminacy of legal discourse to suit your own ends, the tilt within the legal system to already powerful interests within South African society, and the risks of constitutional litigation to the democratic character of the struggle were all present, to some extent, in the minds of activists. Yet ultimately legal strategies were of ongoing interest to SECC activists because of the undeniable potential leverage they provided to promote social mobilisation and allow for real changes in harmful government policies through the assistance of the courts. These potential uses outweighed the identified attendant risks of a constitutional litigation strategy.

In particular the suggestion that framing political questions in legal terms risks a harmful disengagement from politics by the public was a danger clearly perceived by activists.[8] Activists recognised that their rights talk, and the associated perception that a Constitutional challenge to government policies was therefore inevitable, might lead to popular demobilisation of their supporters. Activists countered this potentially damaging understanding in their organisational practice by strongly emphasising to their supporters the intimate relationship between claiming 'your rights' and the hard work of popular mobilisation and public protest. There was no evidence of a "myth of rights" present in the leadership of the SECC. That is, that legal action, by itself, could achieve significant social change.[9]

One important characteristic of rights talk was the psychological strength it gave to participants in the social struggle. Framing political issues in rights terms provided to struggle participants the view that they were important. Their private concerns, electricity disconnection, were public concerns that demanded rectification. It also enabled them to stand tall and assert their claims in terms that were understandable by government and in a way that demanded a response.

This study described the emergence of a popular and direct constitutionalism that was largely divorced from the products of the legal system, that is court judgements. The Bill of Rights was used by the SECC as a rallying call for immediate democratic engagement and civil disobedience – no activist bothered to consult the last constitutional case to see if their actions were justified. SECC activists mediated elite level rights discourse to their constituents. Their understandings of rights emerged primarily from a dialogue with their supporters more than it drew upon formal advice from trained legal advisers. Though the existence of legal advisers at the earliest

[6] See for example E.P. Thompson, "State of the Nation", *Writing by Candlelight,* 1980, p. 253
[7] See Chapter 2.
[8] As implied by Monahan & Hutchinson, in excerpt heading Chapter 5. See their "Democracy and the Rule of Law", in *The Rule of Law: Ideal or Ideology,* Carswell, 1987, p. 119.
[9] As implied by Scheingold in excerpt heading Chapter 2. See his *The Politics of Rights,* Yale University Press, 1974, p. 5.

stages of the campaign suggests that they did play some role in assisting the initial mobilisation.

The activists' motivations, their texts and their contexts were very different from those of judges and lawyers.[10] The evidence provided here suggests that rights had an important role in mobilising a constituency well prior to entering into any formal legal proceedings. This early period of social mobilisation analysed in this study formed part of the first of Michael McCann's typology of the four stages of social movement development. The *movement building process* is where citizen expectations regarding political change are raised, where potential constituencies are activated, where there is a building of group alliances, and organising of resources for tactical action.[11] Rights talk and the law played a crucial role in this stage for the SECC.

It only takes a moment's reflection to understand that if a constitutional case was initiated, the prior existence of a mobilised and a concerned citizenry could also have a significant role in claiming rights through the courts. Such a role would extend beyond the end of successful legal proceedings and would be crucial to ensuring the implementation of any court orders. In this view, legal interpretation of the Bill of Rights by the judiciary is a complex social process in which the legal advocates' skills in court are empowered through the support from a popular constituency itself created by a street based rights strategy. There is, as Zachie Achmat describes it, a complex dialectical relationship between the law and political mobilisation.[12]

Popular mobilising, using the Bill of Rights as a rallying call was key to gaining the SECC support in their community during the initial stage of developing the movement. By using rights talk as a way of creating and influencing popular understandings of legality and morality, community based organisations may win the legal battle well before the final judgement of the courts is made.[13] Sean Flynn, who was the SECC's legal expert in the initial stages of their campaign, described the significance of social mobilisation to legal work in the following way:

> (L)egal strategy only works when it is part of something bigger. The Constitution does not interpret itself -- social mobilisation interprets the constitution.[14]

The myth of rights, spoken of by Scheingold, that the law on its own can make important and vital contributions to social change was actively resisted by activists in the day to day mobilisational practices. Citizens don't parrot in word or deed the

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[10] Therefore it is not useful to conclude a-priori that the products of the judicial system have a straightforward impact on ordinary peoples' understanding of the fairness/unfairness and/or plasticity of their life world. Or to similarly believe that rights talk automatically leads us all down the path of political quietism and resignation to the necessity of the existing social order.

[11] See *Rights at Work, Pay Equity Reform and the Politics of Legal Mobilisation*, University of Chicago Press, 1994, p. 11. The other three involved - *The struggle to compel formal change in official policy* that address movement demands at least in principle; *The struggle for control over actual reform policy development and implementation* that evolves among the various interested parties; and *The transformative legacy of legal action* for subsequent movement development, articulation of new rights claims, alliance with other groups, policy reform advances, and social struggle generally.

[12] "Law, Politics and Social Transformation", 32 *International Journal of Legal Information,* 2 (2004) 237.

[13] A point made by the Geoff Budlender in the context of the Treatment Action Coalitions legal victory, "A paper dog with real teeth", *Mail & Guardian*, July 12 – 18 2002, p. 17.

[14] Sean Flynn, South Africa Debate Discussion list 11 June 2003.

products of the legal system. The Bill of Rights, on the contrary, was used promote a 'dangerous' insurrectionary element, where the law is disregarded and broken by ordinary people using the Bill of Rights itself as their justification.

While no formal constitutional process began during the life of this study, there was a complex understanding by some activists of the role of law as being one of the tools that, if used strategically, could shift peoples' views. This could occur both at the immediate level of service delivery but also on broader societal questions of access to power and privilege. The fact that no Constitutional legal case was begun, in my view, stemmed from two issues. Strategically, the option of a constitutional case was not a priority for some in the leadership of the SECC. There was a strong emphasis within the SECC and the APF on direct action. Secondly, the constitutional challenge that would need to be undertaken was particularly difficult as it related to a social good – electricity –not directly contained in the Bill of Rights. As a result the SECC's legal advisers, who would have been tasked with taking a case to the Constitutional Court, baulked at initiating such a complex and difficult enterprise.[15]

This rejection of electricity as strategically inappropriate by the SECC's legal advisers points to another criticism of legal rights strategies as being inherently gradualist and moderate.[16] This criticism does not do justice to the complex and difficult reality faced by activists engaged in social change and their need to use the tools that are to hand. These tools of necessity emerge from the existing social order and, as a result, often appear ambiguous to the radically minded activist. This way of thinking about rights was a component of some of the key activists who saw in Gramsci's concept of counter-hegemonic struggle a link with the role of law, rights and the complex process of progressive social change they were engaged in.

Activism in this terrain must attempt to transform understandings of existing rights that have already been granted. The SECC's struggle was over the content and breadth of existing rights. Through social mobilisation and street based arguments they attempted to expand and extend the socio-economic rights discourse to include a right to electricity. The struggle, however, must of necessity commence within the parameters of the hegemonic system on *old ground* using discourses already dominant in society. One of these discourses is that of rights.

By far the majority of the struggle in any constitutional state is directed towards making the existing order live up to its core values – freedom of speech, freedom of association and in the case of South Africa's post-liberal constitution key socio-economic rights such as the right to water. Nonetheless SECC activists deliberately engaged in a program of interpretative broadening of existing socio-economic rights in the Bill of Rights in order to include electricity. This was, and remains no easy task and many, not only in government, would remain unconvinced that electricity is

[15] This happened first in mid - 2001 when the obviously appropriately named 'Water Legal Task Team' declined to support the SECC's attempts to get an electricity case off the ground advising that a water case was more 'strategic'. Later the Centre for Applied Legal Studies also declined to launch a constitutional case around electricity. CALS legal arguments, which are contained in, *Electricity Rights in Soweto: An Analysis of Possible Legal Arguments,* appears permanently on hold. Dr Jackie Dugard, private e-mail 15 December 2004.

[16] Handler, J.F., *Social Movements and the Legal System, A Theory of Law Reform and Social Change,* Academic Press, 1978, Scheingold, S., *The Politics of Rights: Lawyers, Public Policy and Social Change,* 1974.

a right guaranteed by the Constitution. The argument that electricity can be implied into the Bill of Rights on the basis of existing rights is legally tenuous given that it was drafted less than a decade ago, and its drafters consciously decided not to include electricity. Implied rights cases work best in regards to older constitutions, such as the United States or Australia were there is more room for interpretation.

While the legal intelligentsia may remain unconvinced there is some evidence emerging of a strong belief in Soweto that electricity is a right. By late 2003, by which time the SECC had been active in Soweto for over three years, a survey of 799 households found that 97.7% of participants agreed with the statement that "Everyone in South Africa has a right to electricity".[17] This is a surprising outcome given that electricity is no where to be found in the Bill of Rights. It is arguable that the SECC's activism may have played an important role in the emerging consensus in Soweto that electricity is a right. In this context it is also important to note that when asked why electricity is a right 52% said that no person could survive without electricity suggesting that the intrinsic characteristic of electricity as an essential service also played a role in forming people's understandings.[18] The SECC's success at mobilising a constituency in Soweto against ANC neo-liberal policies and more specifically the engagement of CALS as a legal and policy advocate on electricity issues, pushed ahead the roll out of a 50kwh per month per household free-electricity in Soweto which had been resisted by Eskom.[19]

There is plenty within the Bill of Rights that invites, to paraphrase the words of Alan Hunt, an opening up of the silences immanent within the existing socio-economic rights order.[20] Hunt considers it as impossible to stand outside ordinary social norms and forms of rhetoric, including those norms constructed by a Bill of Rights legal regime. Those interested in social change must work within the shell of the old, or in this case the new, social order using the tools that are to hand.

SECC activists used rights discourse by exploiting the silences surrounding the extent to which services such as electricity are necessary to fulfil other explicit rights contained in the Bill of Rights, such as the right to a healthy environment, adequate housing and dignity. In this way the SECC opened up counter-hegemonic possibilities.

Such a process starts organically from local struggles in a particular sphere of social life, in this case, electricity service provision. Hunt's concept of local hegemonic struggle envisages self-aware social actors launching a struggle within a discrete social sphere to provide redress for immediate social grievances. The SECC's focus was on essential service delivery, the impetus for such a focus the widespread cut-offs of electricity services in early 2001.

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[17] See Nefale, M., *A survey on attitudes to pre-paid metres in Soweto*, Centre for Applied Legal Studies, June 2004, p. 11.
[18] Ibid, p. 12.
[19] Dr Jackie Dugard, Senior Research Officer, Centre for Applied Legal Studies (CALS), University of the Witwatersrand, Private e-mail communication, December 15 2004. Dugard worked in CALS on the electricity issues with the SECC and the APF.
[20] Hunt, A., "Rights and Social Movements: Counter-Hegemonic Strategies" 17 *Journal of Law and Society*, (1990), 3, 309 at 314.

Gramsci's concept of hegemonic crisis substituted Marx's economistic argument of an inevitable tendency of capitalism to lurch into economic crisis with a much more politically charged notion of crisis. For Gramsci this economic tendency seemed less likely than Marx had prophesised. As a result, political struggle, while emerging out of the objective material circumstances of the society, is to Gramsci intimately tied to struggles over symbols and cultural practices that are, in many ways, independent from the economic base. The Constitution as a potent symbol of the often vague, inchoate wishes of the South Africans to live a better life in the new social order is key site of hegemonic/counter-hegemonic struggle. The SECC pushed, through its use of rights discourse, to precipitate a local hegemonic crisis in government service delivery. Key to this strategy was the constant references to the pretence of the Government as upholder the constitutional order when it permitted widespread service disconnection.

This style of activism has a long and proud lineage. Hunt provided an example from the nineteenth century where the quintessential liberal claim of male suffrage dependent on property ownership was slowly transformed to the right of universal male suffrage and then universal male and female suffrage by successive waves of activism involving different social actors. The most effective path for social improvement is not to abandon existing 'bourgeois' rights, in this case property based suffrage, but to focus on building upon the existing hegemonic discourses through the introduction of elements that ultimately transcend the original discourse. In Gramscian terms, the hegemonic common sense that "those who own the country should run it" was transformed by successive waves of community struggle to the 'good sense' position that any proposal to link property ownership with the vote would be viewed as nonsensical. These examples point to the fallacy of critics' claims that rights strategies can only ever be limited to short-term gains.

To most activists the hardline Critical Legal project of abandoning rights as a tool for social change would make little practical sense.[21] Rights appeared to make the kettle boil so why not use what is at hand and what appears to resonate in the community? This is not to say that the more chastened version of the critical legal project, where rights have only a short-term strategic value, was not reflected in those activists who advocated 'constitutionalising' the struggle for basic services. These activists used rights in their day to day organising but at the same time they communicated a certain disquiet about such a strategy.

There is little doubt that rights have an ambiguous character.[22] Their use in a litigation strategy has clear attendant risks. Effective, progressive and successful legal cases, which seriously challenge some element of the existing social order, will arguably entrench the authority of a judiciary. This same court may, with a small change in membership, dismiss the claims of a legally orientated progressive community based organisation with similar claims or endorse the conservative

[21] As advocated by Mark Tushnet his "An Essay on Rights" 62, *Texas Law Review*, May 1363 – 1403, (1984).

[22] As currently envisaged. Writers such as Roberto Unger have expanded the common list of rights in an attempt to overcome their tendency to support the status quo. See his *False Necessity, Anti-necessitarian social theory in the Service of Radical Democracy*, Cambridge, 1987 and for an interesting endorsement of his proposed new rights see David Harvey, *Spaces of Hope*, Edinburgh University Press, 2000.

counterclaims of litigants acting as representatives of the forces of reaction. The ability of the judiciary to weather any subsequent storm will have depended in part on their decision in the former progressive case. The loss of an important legal case could have catastrophic implications for the authority and financial viability of a small organisation. Such an outcome would imply a particularly narrowly construed organisation focussing their efforts wholly within the legal sphere. The SECC, while contemplating some form of legal action in the future, had a whole range of other discourses and strategies that they relied on to grow the movement.

The significance of this effect for long-term social change hinges on whether the law is essentially indeterminate as some critical legal theorists have suggested.[23] If law is truly indeterminate and society does not move in any particular direction the (short-term) strategic use of rights is all we can ever possibly hope for.[24] No long-term advantage is ever possible. Two central components of critical legal theory – indeterminacy – a case can turn out either way and – tilt – the legal system is stacked against the poor and underprivileged are contradictory. This tension formed a complex internal struggle within critical legal theory.[25] A strategy, which envisages rights activism in the context of a counter-hegemonic struggle in my view effectively counters this accusation. But even if it were true there is something in Keynes' maxim that in the long-run we are all dead, which suggests that even short term strategic advances should not be scoffed at in the real world.

If, however, we accept the Critical Legal Theory view of rights as hopelessly indeterminate, they become to appear unequivocally as tools to legitimate the existing social order.[26] Such a narrow understanding appears to me as just plain wrong, at least in the South African context, and reflects the entirely different cultural and political context than that of the United States where the critique of rights first emerged.[27] The very ambiguity and malleability of rights discourse comes into its own when strategic social actors come into play. Rights by their very nature can be expanded and transformed in progressive directions by self-conscious actors like the SECC. While not endorsing the concept the indeterminacy of rights discourse (a legal case can turn out either way) is suggestive of the many pitfalls inherent in the mounting of a counter-hegemonic challenge to a dominant hegemonic discourse. Challenge, counter-challenge and the debunking of progressive interpretations of existing legal and social norms are unavoidable hazards in the long-term development of any counter hegemonic project. Such a project cannot be conducted in a linear

[23] See Kennedy, D., "Legal education as training for hierarchy", Kairys, D., *The Politics of Law*, pp. 48-49. This has recently been published in longer form as *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System: A Critical Edition*, New York University Press, 2004.
[24] See for an elaboration of this approach Gordon, R., *Critical Legal Histories*, 36 *Stanford Law Review*, January 1984, 57 at 100.
[25] For a discussion of the experience of a Crit passionately believing in both these ideas at once see Fischl, R., "Its Conflict All the Way Down", 22 *Cardozo Law Review*, 2001, 773 at 778.
[26] This belief in the radical indeterminacy of legal discourse was a feature of early critical theory. As the Crits aged some like Mark Tushnet have appeared to mellow. Still defences of the central CLS conceptual tool continue to be written see Davies, M., *Asking the Law Question*, Sydney, 2002, at p. 194.
[27] Hunt, for example appears prepared to concede that in the North American context the very narrowness of the hegemonic discourse of rights, limited as it is to the struggle between 'liberty' and 'rights', amounts to what he terms a 'blocked hegemonic project'. In this context the ability to broaden the dominant discourse to include social and collective rights is so constrained as to render an effective counter-hegemonic rights strategy as very unlikely to succeed.

evolutionary fashion. The counter-hegemonic concepts put forward by social movements will inevitably be challenged, possibly radically change direction and necessarily suffer defeats (and victories) in an attempt to broaden and transform the hegemonic discourse.

To some, albeit at the fringes of the SECC, belief in a rights strategy was represented as a real danger. Adherence to the rule of law equated with a dangerous quietism, which was institutionally determined. How do you expect to get radical results by an appeal to the courts? Any serious tactic must involve law breaking. Engendering trust in the legal system by an appeal to the courts can only offer false hope to the marginalised.

This approach in part confuses the use by the SECC of a rights based strategy and litigation based strategy. The SECC's rights based strategy placed a legal case through the courts well down their list of priorities. This debate surfaced from time to time in activists' forums. After one such instance there appeared to one progressive lawyer, who was interested in supporting the SECC through a court based challenge, such hostility to using litigation that he despaired at playing any effective role with the SECC. Such powerful opposition to litigation using the Bill of Rights should not lead to the conclusion that rights were not important to the SECC. A rights strategy does not necessarily include litigation.

It may be that the right to electricity will never be read into the Constitution. The idea of launching a constitutional case on electricity has been put into abeyance permanently by the SECC's legal advisers.[28] Nonetheless the rights consciousness surrounding electricity promoted by the SECC appears to be firmly entrenched in Soweto. This points to an important distinction between a counter-hegemonic legal strategy, which relies on litigation, and a counter-hegemonic rights strategy, which is primarily based around social mobilisation. The SECC were adept at using rights to mobilise a constituency.

Nonetheless the strategic implications of the SECC's observed approach to rights, which emphasised their use for immediate and direct forms of social action and civil-disobedience, will need to be worked through by later researchers.[29] While the SECC's approach was successful on a number of occasions in achieving important concessions from government, maintaining these concessions proved to be difficult. It is arguable that without assistance from the courts the gains achieved by the SECC will likely only be temporary. The way the SECC have used rights rhetoric inevitably invites the question – why not challenge the government in court? The fact that they have not done so may, over time, undermine the utility of their rhetoric to promote political mobilisation and as a result decrease the pressure on governments to change their policies.

The APF is involved with CALS in developing a constitutional case over the imposition of pre-payment water metres in Soweto. If this case gets underway it

[28] Dr Jackie Dugard, Senior Research Officer, Centre for Applied Legal Studies (CALS), University of the Witwatersrand, Private e-mail communication, December 15 2004.
[29] See the points raised by Ran Greenstein in his "State, Civil Society and the Reconfiguration of Power in Postapartheid South Africa", *Centre for Civil Society* Research Report 8: 1-56 at pp 40 – 49 available at http://www.nu.ac.za/ccs/default.asp?3,45 accessed 22 February 2005.

would enable comparison between the two different but related approaches to rights based activism.

This study leads me to conclude that rights can form an important component of the progressive activists arsenal of weapons against liberal capitalism. This is both understandable in a short-term strategic sense (as implied above in the SECC's use of rights) as well as a more complex longer-term project of building a better society.

Interviews

Trevor Ngwane 17 October 2001
Chair
Soweto Electricity Crisis Committee

Virginia Setshadi 19 October 2001
Deputy Chair
Soweto Electricity Crisis Committee

Bongani Lubisi 26 October 2001
Organiser for Soweto
Soweto Electricity Crisis Committee

Mabel Nkele, 27 October 2001
Hosts regular SECC meetings for Orlando East
Soweto Electricity Crisis Committee
47 – 41 Simelane Street,
Orlando East, 1804.

Dudu Mphenyeke 1 November 2001
Media Officer
Soweto Electricity Crisis Committee

Wiseman Hamilton 6 March 2002
Anti-privatisation Forum
Affiliated with the Democratic Socialist Movement

John Appolis 12 March 2002
Chair
Anti-Privatisation Forum

Bobo Makhoba, 22 March 2002
Soweto Electricity Crisis Committee

Phillip Matseoane 22 March 2002
Media Officer
Soweto Electricity Crisis Committee

George Dor 28 March 2002
Alternative Information Development Centre

Hamilton Rappoo 8 April 2002
Youth Desk Officer
Soweto Electricity Crisis Committee

Florencia Belvedere Treasurer Anti-Privatisation Forum	6 May 2002
Patrick Bond Director Municipal Services Project	6 June 2002
Roy Mokgatlhe Soweto Electricity Crisis Committee Diepkloof Concerned Residents	28 June 2002
Tebogo Mashota Administrative Officer Soweto Electricity Crisis Committee	28 June 2002
Theunis Roux Centre for Applied Legal Studies	30 July 2002

Meetings attended

Launch of the MSP Report, 24 September 2001, Zone 7, Pimville Catholic Church Hall.
SECC meeting 11 September, 2001, Pimville.
SECC legal committee meeting, 18 October 2001.
Anti-Privatisation Forum Meeting, 10 March 2002.
Human Rights Day March 21March 2002
A Conference of Local and International Research on Social Justice Strategies & Struggles of Labour, Communities, Women and Environmentalists, University of Witwatersrand School of Public and Development Management, 15-18 May 2002.
Sustainable Electricity for All Seminar, University of Witwatersrand School for Public and Development Management, 29th August 2002.
International Forum on Globalisation, Teach-in Which Way World Summit on Sustainable Development? Corporate Rule or Social and Ecological Sustainability? University of Witwatersrand, 24th and 25th August 2002.

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