

# The 'Right to the City', limits to Rights Talk and the need for rights to the *Commons*:

## Beyond Ostrom, urban injustice and imperfect justice in South Africa

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### Introduction: the city as a challenge for scale-politics

There is an emerging debate about how and *whether* to invoke 'Rights Talk' – the appeal to a higher juristic source of power than standard state social policy – so as to gain access to greater levels of state services and goods, with the 'Commons' posed as the alternative approach. Many strategists of social justice have become more familiar with the Commons idea in recent years, following the 2009 Nobel Prize in Economics awarded to the late Elinor Ostrom (1990) based on her book *Governing the Commons*. On the left, there is awareness of the problem of Ostrom's 'contradictions and ambivalences' – because after all she labored as an academic within the conservative discipline of Political Science in one of the world's most backward sites of intellectual and social solidarity, the United States, where she played a heroic role in contesting neoliberal *homo economicus* dogma, in which rational actors are merely individually self-interested.

Unlike an organization such as the Rosa Luxemburg Foundation (RLF), which seeks 'a society built on solidarity, while meeting the requirements of ecological sustainability', Ostrom thus was compelled to ask very limited questions based largely on efficiency criteria, and so her legacy requires us to go 'Beyond Ostrom' (i.e. not 'against' but 'through'). As one RLF conference statement on this theme remarked,

The question on the commons is the question on the reproduction of the society and how to keep, to protect, to increase the possibilities enabling a decent life for everybody, for realizing a good society – Buen Vivir. So we should ask on the conditions for

- being free from violence, repression, discrimination, and surveillance,
- being able to determine one's own life and to influence the development of the society,
- being socially protected – having decent work, a decent income, and decent housing,

- having access to education and to medical care on a high standard,
- living in an intact nature.

This is not 'only' a question about governance but about overcoming the societal structures which prevent the possibility of realizing such conditions. It is a question about socio-ecological reconstruction or transformation.

(<http://beyondestrom.blog.rosalux.de/2013/10/30/workshop-organisers-workshop-suggestions-3/#more-134>)

Scale is of great importance here, for the limitations of around 15,000 people served by a Commons (Ostrom's highest level of collaboration) is obviously inadequate for the required societal-scale changes that will be required for the next mode of production, after capitalism is fully exhausted. David Harvey (2012:69) sets out the problem in this way:

As we 'jump scales' (as geographers like to put it), so the whole nature of the commons problem and the prospects of finding a solution change dramatically. What looks like a good way to resolve problems at one scale does not hold at another scale. Even worse, patently good solutions at one scale (the 'local,' say) do not necessarily aggregate up (or cascade down) to make for good solutions at another scale (the global, for example).

The single most portentous site for societal reconstruction with scale politics as a central question is the giant metropolis that characterizes late capitalism. There are increasing struggles for social and economic justice, as well as ecological rebalancing, going on in mega-cities across the world. To some extent these reflect the campaigns by political forces to influence what happens in a national capital city, but in a great many sites, the catalyzing force that generates unrest is specific to the urban character of the site of struggle, and the process of systematic marginalization in the mega-city.

As a result, the idea of a 'right to the city' as a rallying cry has gained popularity, for good reasons. It potentially offers a profound critique of neoliberal urban exclusion. In one field especially, water and sanitation services, the right to state services is increasingly adjudicated in courts, and the largest conurbation in South Africa – Johannesburg and especially its well-known township Soweto – has had the most advanced case to date, one that lasted from 2003-09. However, because of its intrinsic liberal limitations, the right to water demanded ended in defeat, reminding of the warning by Karen Bakker (2007:447) that a narrow juristic approach to rights can be 'individualistic, anthropocentric, state-centric, and compatible with private sector provision.' While attempts to expand liberal socio-economic rights through incremental legal strategies *may offer victories at the margins*, the lessons of the Sowetans' defeat in 2009 bear close examination in order that social movements do not make the mistake of considering rights as a *foundational philosophical stance*.

Most urban radical activists have at some stage embraced rights talk, because there is propaganda value and mobilizing potential in accusing opponents of violating rights, and also as a result of the waning respectability of more explicitly socialist narratives. In 2004-

05, the 'World Charter for the Right to the City' (2005) was developed in Quito, Barcelona and Porto Alegre by networks associated with the World Social Forum. To illustrate using the case of water, its twelfth article made the following points:

#### RIGHT TO WATER AND TO ACCESS AND SUPPLY OF DOMESTIC AND URBAN PUBLIC SERVICES

1. Cities should guarantee for all their citizens permanent access to public services of potable water, sanitation, waste removal, energy and telecommunications services, and facilities for health care, education, basic-goods supply, and recreation, in co-responsibility with other public or private bodies, in accordance with the legal framework established in international rights and by each country.
2. In regard to public services, cities should guarantee accessible social fees and adequate service for all persons including vulnerable persons or groups and the unemployed – even in the case of privatization of public services predating adoption of this Charter.
3. Cities should commit to guarantee that public services depend on the administrative level closest to the population, with citizen participation in their management and fiscal oversight. These services should remain under a legal regimen as public goods, impeding their privatization.
4. Cities should establish systems of social control over the quality of the services provided by public or private entities, in particular relative to quality control, cost determination, and attention to the public.

Although one might argue that far too many concessions are made to water commercialization (i.e., supply 'by private entities'), this language is a reflection of the reality too many activists confront: compelled to use weak liberal tools to pry concessions from neoliberal municipalities. The arguments above require reforms that pay close attention to both technical and socially-just (if not necessarily ecological) considerations about water services, as well as subsidiarity and community control principles.

But as part of a broader right to the city, can the right to water be recast in more radical terms set out by urban revolutionaries such as Henri Lefebvre and David Harvey? The 'right to the city', in Lefebvre's (1996:154) class-conscious understanding of community, meant that:

Only groups, social classes and class fractions capable of revolutionary initiative can take over and realize to fruition solutions to urban problems. It is from these social and political forces that the renewed city will become the oeuvre. The first thing to do is to defeat currently dominant strategies and ideologies... In itself reformist, the strategy of urban renewal becomes 'inevitably' revolutionary, not by force of circumstance, but against the established order. Urban strategy resting on the science of the city needs a social support and political forces to be effective. It cannot act on its own. It cannot but depend on the presence and action of the working class, the only one able to put an end to a segregation directed essentially against it. Only this class, as a class, can decisively contribute to the reconstruction of centrality

destroyed by a strategy of segregation found again in the menacing form of centres of decision-making.

There is today, no one 'class' that can destroy class segregation. Still, at a time in South Africa (and everywhere) when debate is intensifying about the alliances required to overthrow urban neoliberalism, as discussed below, we should heed Lefebvre's suggestion about the centrality of the working class to these struggles. The broadest definition of that class is now appropriate, as contradictions within capital accumulation play out in cities, in the process generating a potentially unifying class struggle, as Harvey (2008) argues.

A process of displacement and what I call 'accumulation by dispossession' lie at the core of urbanization under capitalism. It is the mirror-image of capital absorption through urban redevelopment, and is giving rise to numerous conflicts over the capture of valuable land from low-income populations that may have lived there for many years... Since the urban process is a major channel of surplus use, establishing democratic management over its urban deployment constitutes the right to the city. Throughout capitalist history, some of the surplus value has been taxed, and in social-democratic phases the proportion at the state's disposal rose significantly. The neoliberal project over the last thirty years has been oriented towards privatizing that control.

The right to the city is therefore not foremost about liberal constitutionalism, but as a vehicle for political empowerment, Harvey (2008) continues:

One step towards unifying these struggles is to adopt the right to the city as both working slogan and political ideal, precisely because it focuses on the question of who commands the necessary connection between urbanization and surplus production and use. The democratization of that right, and the construction of a broad social movement to enforce its will is imperative if the dispossessed are to take back the control which they have for so long been denied, and if they are to institute new modes of urbanization.

### **Rights in a neoliberal context and within liberal framings**

Contrast such radical analysis with a near-simultaneous technicist statement – in a 2009 booklet, *Systems of Cities: Integrating National and Local Policies, Connecting Institutions and Infrastructure* – from what many consider to be the brain of urban neoliberalism, the World Bank (2009). There is, to be sure, a confession that the neoliberal project was not successful in what the Bank had advertised since at least its 1986 New Urban Management policy (Bond 2000). The Bank (2009) brags that 'many developing country governments and donors adopted an 'enabling markets' approach to housing, based on policies encouraged by the World Bank.'

The core urban neoliberal policy strategy introduced more decisive property rights to land, cost recovery for water, electricity and municipal services, fewer subsidies within state housing institutions and expanded mortgage credit. On the latter component, private

housing finance, the Bank's earlier 'hope has been that pushing this and other aspects of the formal sector housing systems down market would eventually reach lower income households.' But it didn't work, the Bank (2009) finally admitted:

Despite some successes, affordability problems persist, and informality in the housing and land sectors abounds. By the mid-2000s, it became clear that the enabling markets approach was far too sanguine about the difficulties in creating well-functioning housing markets where everyone is adequately housed for a reasonable share of income on residential land at a reasonable price. The general principles of enabling markets are still valid, but must be combined with sensible policies and pragmatic approaches to urban planning and targeted subsidies for the urban poor... Experience suggests that only a few regulations are critical: minimum plot sizes and minimum apartment sizes, limitations on floor area ratios, zoning plans that limit the type of use and the intensity of use of urban land, and land subdivision ratios of developable and saleable land in new greenfield developments.

Unlike Harvey, the Bank has virtually nothing at all to say about 'human rights' (except property rights and 'rights of way' for new roads and rail), and nothing at all to say about urban social movements. The closest is the document's reference to 'community-based organisations' which operate in 'partnerships' in Jamaica and Brazil to 'combine microfinance, land tenure, crime and violence prevention, investments in social infrastructure for day care, youth training, and health care with local community action and physical upgrading of slums.' Civil society in its most civilized form hence lubricates markets (even though it is evident that microfinance is replete with literally fatal flaws, such as the 250,000 debt-related farmer suicides in India between 2005-10) and acts as a social safety net for when municipal states fail.

Yet notwithstanding the confession, the Bank's (2009) discursive strategy leaves states with more scope to support markets, because rapid Third World urbanization generates market failures: *'The general principles of enabling markets are still valid, but must be combined with sensible policies and pragmatic approaches to urban planning and targeted subsidies for the urban poor.'*

Recall that from the late 1980s, the World Bank had conclusively turned away from public housing and public services as central objectives of its lending and policy advice. Instead, the Bank drove its municipal partners to enhance the productivity of urban capital as it flowed through urban land markets (now enhanced by titles and registration), through housing finance systems (featuring solely private sector delivery and an end to state subsidies), through the much-celebrated (but extremely exploitative) informal economy, through (often newly-privatized) urban services such as transport, sewage, water and even primary health care services (via intensified cost-recovery), and the like. Recall, too, the rising barriers to access associated with the 1990s turn to commercialized (sometimes privatized) urban water, electricity and transport services, and with the 2000s real estate bubble. As a result, no matter the rhetoric now favouring 'targeted subsidies', there are few cases where state financing has been sufficient to overcome the market-based *barriers* to the 'right to the city', a point we will conclude with.

As Swyngedouw (2008:3) pointed out, the context included a general realization about the limits to commodification in the private sector, if not the World Bank:

This seems to be the world topsy-turvy. International and national governmental agencies insist on the market and the private sector as the main conduit to cure the world water's woes, while key private sector representatives retort that, despite great willingness to invest if the profit prospects are right, they cannot and will not take charge; the profits are just not forthcoming, the risks too high to manage, civil societies too demanding, contractual obligations too stringent, and subsidies have often been outlawed (the latter often exactly in order to produce a level playing field that permits open and fair competition).

These contradictions were especially important where social and natural processes overlapped. During the 1990s, the 'Integrated Water Resource Management' perspective began to focus on the nexus of bulk supply and retail water provision – in which water becomes an economic good first and foremost – but only to a very limited extent did it link consumption processes (especially overconsumption by firms and wealthy households) to ecosystem sustainability. Hence the rights of those affected by water extraction, especially those displaced by mega-dams that supplied cities like Johannesburg, have typically been ignored.

This is where liberal rights-talk appears so attractive. Since the United Nations (UN) Declaration of Human Rights, the idea that all individuals have certain basic human rights, or entitlements to political, social, or economic goods (such as food, water, etc) has become a key framework for politics and political discourse. In appealing to human rights, groups and individuals attempt to legitimise their cause, and to accuse their opponents of 'denial of rights'. As water is essential to human life, social conflict surrounding water is now framed in terms of the 'human right' to water. In this 'culture of rights', social groups use 'rights talk' as a blanket justification for the provision of water; in some cases, however, even popularly elected governments dispute their exact responsibilities for water provision and management.

During apartheid, water was a relatively low-cost luxury for white South Africans, with per capita enjoyment of home swimming pools at amongst the world's highest levels. In contrast, black South Africans largely suffered vulnerability in urban townships and in the segregated 'Bantustan' system of rural homelands, which supplied male migrant workers to the white-owned mines, factories and plantations. These rural homelands had weak or non-existent water and irrigation infrastructures, as the apartheid government directed investment to the white-dominated cities and suburbs, and also in much more limited volumes to black urban townships.

After 1994, racial apartheid ended, but South Africa immediately confronted international trends endorsing municipal cost-recovery, commercialisation (in which state agencies converted water into a commodity that must be purchased at the cost of production), and even the prospect of long-term municipal water management contracts roughly equivalent

to privatisation. At the same time, across the world, commercialisation of water was being introduced so as to address classic problems associated with state control: inefficiencies, excessive administrative centralisation, lack of competition, unaccounted-for-consumption, weak billing and political interference.

Across a broad spectrum, the commercialisation options have included private outsourcing and the management or partial/full ownership of the service. At least seven institutional steps that can be taken towards privatisation: short-term service contracts, short/medium-term management contracts, medium/long-term leases, long-term concessions, long-term Build (Own) Operate Transfer contracts, full permanent divestiture, and an additional category of community provision which also exists in some settings. Aside from French and British water corporations, the most aggressive promoters of these strategies have included a few giant aid agencies, especially USAID, the British Department for International Development, and the World Bank. As a result of pressure to commercialise, water was soon priced beyond the reach of many poor South African households, resulting in an estimated 1.5-million people disconnected each year due to inability to pay by 2003 (Muller 2004).

The reason for this epidemic of disconnections (and all that it represented in terms of gendered oppression, public health and hygiene hazards, lost economic opportunities and simple misery) was the South African state's brazenly neoliberal orientation. The first water minister in the post-apartheid government – a social-democratic constitutional lawyer, Kader Asmal – had in November 1994 adopted advice of the Bank and his department's neoliberal technocrats, and declared in the *Water Supply and Sanitation Policy White Paper* (p.18), *'The basic policy of Government is that services should be self-financing at a local and regional level. The only exception to this is that, where poor communities are not able to afford basic services, Government may subsidise the cost of construction of basic minimum services but not the operating, maintenance or replacement costs'* (original emphasis). Less than a year later, the World Bank's main water expert deployed in Southern Africa, John Roome (1995:52), insisted to Asmal that he now needed 'a credible threat of cutting service' to people who weren't paying the full operating and maintenance costs.

It took Asmal's replacement, Ronnie Kasrils, nine months into his 1999-2004 tenure to reverse the cost-recovery fetish and declare a 'Free Basic Water' policy. But Kasrils was systematically sabotaged in implementing the policy by the same technocrats as well as municipal officials. To illustrate the pressure, within weeks of announcing his intention, the World Bank's 'Sourcebook on Community-Driven Development' contained this mandate to its staff: 'work is still needed with political leaders in some national governments to move away from the concept of free water for all.' The Bank booklet continued, 'Promote increased capital cost recovery from users. An upfront cash contribution based on their willingness-to-pay is required from users to demonstrate demand and develop community capacity to administer funds and tariffs. Ensure 100% recovery of operation and maintenance costs' (World Bank 2000 – after this was made public, the first clause was removed in the document's 2001 republication, but the second set of injunctions remained – and for further interpretations see Bond 2002, 2006).

In stark contrast, the South African Constitution included socio-economic clauses meant to do away with the injustices of apartheid, including, 'Everyone has the right to have access to sufficient food and water' and 'Everyone has the right to an environment that is not harmful to their health or well-being' (Republic of South Africa, 1996, s27(1)(b)). The Water Services Act 108 of 1997 put these sentiments into law as 'the main object': 'the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being' (Republic of South Africa, 1997, s2(a)). Grassroots water activists seized on these guarantees to clean water and their discourses soon invoked rights talk. They insisted upon a social entitlement to an acceptable supply of clean water, amounting to at least 50 litres supplied per person per day, delivered via a metering system based on credit, not 'pre-payment'.

However, as Kasrils' failure to change the system from above became obvious, not just rights talk but active protest against water disconnections – including the new prepayment meters characterised by self-disconnection due to unaffordability – also intensified. Resistance included informal, illegal reconnections to official water supplies, destruction of prepayment meters, and even a constitutional challenge over water services in Soweto. While such protests confront powerful commercial interests, they attempt to shift policy from market-based approaches to those more conducive to 'social justice'.

Nevertheless, based upon experiences in the 2003-09 courtroom drama, it is now evident that in South Africa, a rights discourse has significant limitations so long as it remains primarily focused on the social domain, and within that, to household-scale demands. In contrast, a broader conception of rights would entail making water primarily an *eco-social*, rather than a commercial, good. Including eco-systemic processes in discussions of water rights potentially links consumption processes (including over-consumption by firms, golf courses, commercial agriculture and wealthy households) to environmental sustainability.

However, the lawyers developing strategy in the seminal case I consider below decided to maintain only the narrowest perspective of household water usage, since to link with other issues would have complicated the simple requests for relief. In view of the 2009 defeat, the most fruitful strategic approach may be to move beyond the 'rights' of consumption to reinstate a notion of 'the commons', which includes the broader hydropolitical systems in which water extraction, production, distribution, financing, consumption and disposal occurs.

### **Justice against the people**

The judges' wariness of supporting social movements requesting even basic civil and political rights was on display on Human Rights Day, 21 March 2004. Just before the grand opening of the Constitutional Court's new building in central Johannesburg, at the site of the old Fort Prison where Nelson Mandela had been incarcerated, community activists in the Anti-Privatisation Forum (APF) called a march to demand their rights to water. They were specifically protesting against the installation of pre-paid water meters in Soweto by the French company Suez, which was running the city's outsourced water company. City officials banned the peaceful protest on grounds of potential traffic disturbances – on a



Sunday. The police arrested fifty-two activists and bystanders, some simply because they were wearing red shirts, and blocked travel of APF buses into Johannesburg. Neither the judges nor Mbeki – who attended the opening ceremony – uttered a word in the protesters' defence, revealing the true extent of their underlying regard for civil and political rights.

The country's highest court had by then heard three major cases on socio-economic rights. The first, in 1997, led to the death of a man, 41-year old Thiagraj Subramoney, who was denied renal kidney dialysis treatment because the judges deemed it too expensive. Inspired by the Constitution, Subramoney and his lawyers had insisted that 'No one may be refused emergency medical treatment' and that 'Everyone has the right to life.' Chief Justice Arthur Chaskalson replied, 'The obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources.' The day after the ruling, Subramoney's plug was pulled and he died (Constitutional Court of South Africa, 1997).

The next high-profile Constitutional Court case on socio-economic rights was over emergency municipal services, in a lawsuit brought by plaintiff Irene Grootboom in her Cape Town ghetto of Wallacedene. Although she won, the outcome was not positive, for the Court decided simply that the 1994 *Housing White Paper* – Housing Minister Joe Slovo's last major initiative before he died of cancer in 1994 – was unconstitutional for not considering the needs of poor people. That document had as its main priority the 'normalization of the market' for housing in townships. By 2000, when the Grootboom case went to the Constitutional Court, the Slovo policy had left national, provincial and municipal housing authorities without a mandate and plan to supply emergency housing and associated services.

The Court's decision was, however, merely 'negative', for it slapped down existing policy for failing to meet constitutional standards. But the Court did not have the courage and self-mandate to prescribe the policies and practices that *would* be considered of minimal acceptability. As a result, Grootboom and her community remained as destitute as ever, and by 2008, it was tragic yet also logical to read the headline, 'Grootboom dies homeless and penniless,' according to Pearlie Joubert in the *Mail&Guardian*:

Judge Richard Goldstone, a Constitutional Court judge at the time of the hearing, described the Grootboom judgement as unique, saying it will be remembered as 'the first building block in creating a jurisprudence of socio-economic rights.' Grootboom's victory gave legal muscle to the poorest of the poor and has been studied around the world. Her legal representative at the time, Ismail Jamie, said the Grootboom decision was 'undoubtedly one of the two or three most important judgements the Constitutional Court has made since its inception.' This week Jamie said that Grootboom's death 'and the fact that she died homeless shows how the legal system and civil society failed her. I am sorry that we didn't do enough following-up after judgment was given in her favour. We should've done more. I feel a deep regret today,' he said (Joubert 2008).

The third high-profile case was more encouraging. In 2001 the Treatment Action Campaign insisted that the drug nevirapine be offered to HIV-positive women who were pregnant in order to prevent transmission of the virus to their children. Recall that a year earlier, Mbeki spokesperson Parks Mankahlana had explained the state's reluctance in an interview with *Science* magazine in cost-benefit terms, essentially arguing that refusing to supply nevirapine was logical in terms of saving state resources (*Mail & Guardian*, 21 July 2000). The callous nature of his cost-benefit analysis was confirmed by state AIDS policies, often termed by critics as being basically 'denialist.'

The result, according to Harvard School of Public Health researchers: 'More than 330,000 people died prematurely from HIV/AIDS between 2000 and 2005 due to the Mbeki government's obstruction of life-saving treatment, and at least 35,000 babies were born with HIV infections that could have been prevented' (Roeder 2009). The word for this scale of death, genocide, was used to describe Mbeki's policies by the then president of the Medical Research Council Malegapuru Makgoba, by leader of the SA Medical Association Kgosi Letlape, by Pan Africanist Congress health desk secretary Costa Gazi, by leading public intellectual Siphon Seepe, by Young Communist League of SA leader Buti Manamela and by others.

In its mid-2002 judgment, the Constitutional Court criticized the state: 'The policy of confining nevirapine to research and training sites fails to address the needs of mothers and their newborn children who do not have access to these sites. It fails to distinguish between the evaluation of programmes for reducing mother-to-child transmission and the need to provide access to health care services required by those who do not have access to the sites.' One of the lawyers on the successful case, Geoff Budlender (2002), observed that this victory 'was simply the conclusion of a battle that TAC had already won outside the courts, but with the skilful use of the courts as part of a broader struggle.' As argued below, the lessons learned from the TAC struggle are vital to further political development in South Africa, with or without constitutional components.

However, the limits of rights-talk became evident in the fourth of the highest profile socio-economic rights cases, over the right to water. Activists in the Phiri neighbourhood of Soweto insisted upon a social entitlement to an acceptable supply of clean water, amounting to at least 50 liters per person per day and delivered via a metering system based on credit and not pre-payment meters. In October 2009, the Constitutional Court overturned a seminal finding in lower courts that human rights activists had hoped would substantially expand water access to poor people: *Mazibuko et al v Johannesburg Water*.

In the first ruling, Johannesburg High Court Judge Moroa Tsoka had found that prepayment meters were 'unconstitutional and unlawful', and ordered the city to provide each applicant and other residents with a 'free basic water supply of 50 litres per person per day and the option of a metered supply installed at the cost of the City of Johannesburg' (*Mazibuko & Others v the City of Johannesburg & Others*, 2008). Tsoka accused city officials of racism for imposing credit control via prepayment 'in the historically poor black areas and not the historically rich white areas.' He noted that meter installation apparently occurred 'in terms of colour or geographical area' (cited in Bond and Dugard, 2008). It was the first

South African case to adjudicate the constitutional right of access to sufficient water (Republic of South Africa, 1996).

Johannesburg's appeal was also joined by the national water ministry, and was based on the decision by Johannesburg officials, just a few weeks prior to Judge Tsoka's decision, to retract the ANC promise of universal free basic water service. In the 2000 municipal election campaign, the ANC's statement had been clear: 'The ANC-led local government will provide all residents with a free basic amount of water, electricity and other municipal services so as to help the poor. Those who use more than the basic amounts, will pay for the extra they use.' Initially, Johannesburg Water officials reinterpreted the 'right to water' mandate regressively by adopting a relatively steep-rising tariff curve. In this fee structure, all households received 6000 liters per month for free, but were then faced with a much higher second block (i.e., the curve was convex-up), in contrast to a concave-up curve starting with a larger lifeline block, which would have better served the interests of lower-income residents. The dramatic increase in their per-unit charges in the second block meant that for many poor people there was no meaningful difference to their average monthly bills even after the first free 6kl. Moreover, the marginal tariff for industrial/commercial users of water, while higher than residential, actually declined after large-volume consumption was reached.<sup>1</sup>

What is the impact of these kinds of water price increases on consumption? The 'price elasticity' – the negative impact of a price increase on consumption – for Durban was measured during the doubling of the real (after-inflation) water price from 1997-2004. For rich people, the price hike resulted in less than a 10 percent reduction in use. In contrast, the impact of higher prices was mainly felt by low-income people (the bottom one third of Durban's bill-paying residents, in one study) who recorded a very high 0.55 price elasticity, compared to just 0.10 for the highest- income third of the population (Bailey and Buckley 2005).

Johannesburg and other cities' data are not available but there is no reason to suspect the figures would be much different, and international evidence also bears out the excessive impact of high prices on poor people's consumption (Strang 2004). Hence, ironically, as the 'right to water' was fulfilled through Free Basic Water, the result of price changes at higher blocks in Durban and Johannesburg was further water deprivation for the poor alongside increasing consumption in the wealthier suburbs – with this is in turn creating demand for more bulk water supply projects (including another Lesotho Highlands Water Project dam known as 'Phase 2') which will then have to be paid for by all groups, and which will have major environmental impacts.

Resistance strategies and tactics developed over time. Activists attempted to evolve what

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1. In early 2008, changes to Johannesburg Water pricing policy meant that although there was a higher Free Basic Water allotment, of 10kl/month, the promise of free basic water would be kept only for the small proportion of the population declared 'indigent', instead of on a universal basis to all. Facing the lawsuit, and following the departure of the French water company which set the original prices, there was scope for a slightly more redistributive and conservationist pricing system, and the 2008/09 water price increases included very slight above- inflation rises for higher blocks of consumption.

was already a popular township survival tactic on diverse fronts – illicitly reconnecting power once it was disconnected by state officials due to nonpayment for example (in 2001, 13 percent of Gauteng’s connections were illegal) – to a more general strategy. Thus socialist, but bottom-up, ideological statements of self-empowerment were regularly made by the APF and member organisations such as the Soweto Electricity Crisis Committee. Indeed, within a few months of Johannesburg Water’s official commercialization in 2000, the APF had united nearly two dozen community groups across Gauteng, sponsoring periodic mass marches of workers and residents. And the APF was also the core activist group in the Coalition Against Water Privatisation, which supported the Phiri complainants in a court process that lasted from 2003 through 2009.

The Constitutional Court’s October 2009 ruling, however, vindicated Johannesburg Water, affirming that the original amount of 25 liters per person per day plus pre-payment meters were ‘reasonable and lawful’ because self-disconnections were only a ‘discontinuation’, not a denial of water services: ‘The water supply does not cease to exist when a pre-paid meter temporarily stops the supply of water. It is suspended until either the customer purchases further credit or the new month commences with a new monthly basic water supply whereupon the water supply recommences. It is better understood as a temporary suspension in supply, not a discontinuation.’ The Coalition Against Water Privatization (2009) was disgusted with the Court’s logic, however: ‘We have the highest court in the land saying that those poor people with pre-paid water meters must not think that their water supply has discontinued when their taps run dry... Such “logic,” and even worse that it is wrapped up in legal dressing and has such crucial practical consequences, is nothing less than mind boggling and an insult both to the poor and to the constitutional imperatives of justice and equality.’

There were, in retrospect, many negative lessons about *Mazibuko*. This foundational water rights case could be criticized on grounds it was:

- individualist: private/familial instead of public/political (Brand 2005);
- consumption-oriented, without linkages to production and ecology;
- framed not to resist but to legitimise neoliberalism;
- unable to transcend society’s class structure, and thus in the process it distracted activists from potentially more serious strategies to dismantle class divisions through redistribution and reparations;
- technician, thus alienating the mass base and society in general;
- guilty of making mass-based organisations the ‘client’ which in the process became ‘domesticated’ (Madlingozi, 2007);
- subject to the ‘watering down’ of rights, given SA Constitutional clauses of ‘progressive realisation’, and of ‘reasonable’ measures ‘within available resources’;
- tempting for scholar-activists to follow its legal alleyways, which in turn distracted from a more transformative route to politics;
- dangerous in class-power terms, insofar as judges are amongst society’s most conservative elites; and thus
- reflective of the overall problem that even liberal-democratic capitalism won’t deliver basic-needs goods to poor people.

Elsewhere (Bond 2010) I have delved into these specific problems in more detail, as did a group of critical legal scholars in more general terms, debating whether rights narratives are optimal for progressive South African politics: Danie Brandt (2009), Tshepo Madlingozi (2007), Marius Pieterse and especially Daria Roithmayr (2011). It is worthwhile to follow through the political implications in this contribution, including the relationship of the South African water struggles to the right to the city.

One mistake was the narrowness of the litigant's request for relief partially on grounds of international evidence of minimal water needs, because according to Peter Danchin (2010), the Constitutional Court 'signaled that while international law is relevant and helpful for constitutional analysis (as the Constitution itself requires) it does not intend to adopt the minimum core approach but rather will develop its more flexible reasonableness doctrine in an effort to forge a distinctly South African attitude to the justiciability of economic and social rights.'

But as Dugard (2010b) replied, the way 'reasonableness' was posed ignored the *realpolitik* of Soweto:

First, the Constitutional Court misunderstood the applicants as arguing for a minimum core approach to the right to water. They did not. Rather, the applicants pursued the approach established by the Constitutional Court in *Grootboom* (in its rejection of the minimum core content approach, as being too inflexible), which is that rights and obligations can only be established in context. This is precisely what the applicants did in *Mazibuko*: they asked the Court to determine the reasonableness of the City's Free Basic Water policy in the context of a high-density urban township with waterborne sanitation and no alternative water or sanitation sources. The Court, however, cast this as a minimum core content argument. And, displaying an extraordinary degree of deference, found the City's Free Basic Water policy to "fall within the bounds of reasonableness", which appears to me to be a worrying retreat from the standard of reasonableness and of inquiry set in *Grootboom*.

However, in rebuttal to Dugard it might be argued that the *Mazibuko* plaintiffs (and especially their legal team) did not sufficiently persuade the courts that wealthy white residents had access to plentiful, inexpensive water on credit (not pre-paid), for comparative water consumption across race and class was not a major part of the case, as the effort to win a victory meant narrowing the narrative to a relatively non-contextualised terrain. Dugard (2010b) then points out other areas where the Constitutional Court justices appeared both class- and race-biased:

Second, contrary to the findings of both the High Court and the Supreme Court of Appeal, the Con Court found the City's interpretation of the by-laws as allowing the installation of prepayment meters to be "textually permissible", which seems to be a new form of highly deferent legal interpretation.

Third, in dismissing the applicants' arguments that prepayment meters amount to unfair discrimination based on race – because, despite proven debt across the City, prepayment meters have only been installed in poor black areas – the Court said that the applicants had not proven that prepayment meters were installed in ALL black areas. This is nonsensical and goes against all its previous equality decisions. It would mean that, for example, if I allege that my dismissal on the grounds of my sexual orientation (a listed ground in the Constitution) amounted to unfair discrimination, I would have to prove that my employer had dismissed all other gay employees in the organisation. In South Africa, there is growing concern about the *Mazibuko* judgment and the Court's apparent retreat from enforcing socio-economic rights.

Another critical legal scholar, Marius Pieterse (2007), complained that 'the transformative potential of rights is significantly thwarted by the fact that they are typically formulated, interpreted, and enforced by institutions that are embedded in the political, social, and economic status quo.' Added Daniel Brand (2005), 'The law, including adjudication, works in a variety of ways to destroy the societal structures necessary for politics, to close down space for political contestation.' For Daria Roithmayr (2011), 'The liberal perspective is that when human rights aspirations are not being fulfilled, it is because a sound idea suffers flawed implementation. In contrast, the radical critique of human rights suggested that the whole project is flawed from the ground up in its design. This is because as framed, human rights discourse serves not to resist but to legitimize neoliberalism.'

In sum, the legal-technicist arguments deployed by the Constitutional Court were thus subtly political, in defense of the *status quo* (both political and economic actors). These arguments would lead not only to denial of water to low-income people, but also to a confirmation of segregatory processes in South Africa's cities. It is here that we see the broader merits of a 'right to the city' campaign that avoids *Mazibuko's* pitfalls, through awareness of the simultaneous role of water in politics, accumulation processes and state-society-nature relations. An example of this approach is evident in the struggle to access AIDS medicines.

### **Commoning medicines during the AIDS pandemic**

One solution, both proposed and acted upon, has been the moving of rights talk to that of 'commoning', articulating more clearly and politically the collective claim for public goods. For this, in turn, can represent a more consistent form of sustained resistance to neoliberalism, one potentially ranging from mass protest to micro-level mutual aid. The AIDS victory in the Constitutional Court could not have been achieved without the broader political sensibility won in 1999-2002 by activists who converted AIDS from a personal health stigma into a social cause that required a commoning of medicines that had earlier been privately consumed, at great cost, by only those with class and race privileges.

Because so many lives were lost in the early 2000s, and because the struggle to save subsequent lives of millions of HIV+ South Africans was ultimately victorious, it is worth understanding in detail how a small, beleaguered group of activists with compromised

immune systems had such an extraordinary impact on public policy while also challenging the whole notion of commodified healthcare. The South African government's 1997 Medicines Act had actually made provision for compulsory licensing of patented drugs, and this in turn helped to catalyse the formation in 1998 of a Treatment Action Campaign (TAC) that lobbied for AIDS drugs. In the late 1990s, such AntiRetroviral Medicines (ARVs) were prohibitively expensive for nearly all the five million people who would need them once their blood counts ('CD4') fell below 250.

That campaign was immediately confronted by the US State Department's 'full court press' against the Medicines Act (the formal description provided to the US Congress), in large part to protect intellectual property rights generally, and specifically to prevent the emergence of a parallel inexpensive supply of AIDS medicines that would undermine lucrative Western markets. The campaign included US Vice President Al Gore's direct intervention with SA government leaders in 1998-99, to revoke the law (significantly, in July 1999, Gore launched his 2000 presidential election bid, a campaign generously funded by big pharmaceutical corporations). As an explicit counterweight, TAC's allies in the AIDS Coalition to Unleash Power (ACTUP) began to protest at Gore's campaign events in the United States. The protests ultimately threatened to cost Gore far more in adverse publicity than he was raising in Big Pharma contributions, so he changed sides and withdrew his opposition to the Medicines Act – as did Bill Clinton a few weeks later at the World Trade Organisation's Seattle Summit.

Big Pharma did not give up, of course. The main South African affiliates of the companies that held patents filed a 1999 lawsuit against the constitutionality of the Medicines Act, counterproductively entitled 'Pharmaceutical Manufacturers Association of SA v. Nelson Mandela' (a case which even *Wall Street Journal* editorialists found offensive). It went to court in early 2001, but by April there were also additional TAC solidarity protests world-wide against pharmaceutical corporations in several cities by Medicins sans Frontiers, Oxfam and other TAC solidarity groups. Such public pressure compelled the Association to withdraw the suit and by late 2001, the Doha Agenda of the World Trade Organisation adopted explicit language permitting violation of Trade Related Intellectual Property Rights for medical emergencies.

It is also true that Big Pharma's reluctance to surrender property rights so as to meet needs in the large but far from lucrative African market coincided with the rise of philanthropic and aid initiatives to provide branded medicines. The Bill and Melinda Gates Foundation's parallel health services in sites like Botswana undermined state health services; it was no coincidence that Gates himself stood more to lose than anyone on the planet in the event intellectual property was threatened. Given such prevailing power relationships, the South African government did not invoke any compulsory licensing of medicines even after the 2001 lawsuit was withdrawn. Local generics manufacturers Aspen and Adcock Ingram did, however, lower costs substantially through voluntary licensing of the major AIDS drugs. It is in this sense that not only decommodification, but also deglobalisation of capital was considered vital to expanding access to the ARVs. Similar local licensing arrangements were soon arranged for firms in Kampala, Harare and other sites.

This struggle was one of the most inspiring in the context of Mbeki's neoliberal-nationalist years. Elsewhere in South Africa, independent left movements struggled to turn basic needs into human rights, making far-reaching demands (and even occasionally winning important partial victories): the provision of improved health services (which led to endorsement of a National Health Insurance in 2010); an increase in free electricity from the tokenistic 50 kiloWatt hours per household per month, especially given the vast Eskom price increases starting in 2008; thoroughgoing land reform; a prohibition on evictions and the disconnection of services; free education; lifeline (free) access to cellphone calls and SMSs; and even a 'Basic Income Grant', as advocated by churches and trade unions. The idea in most such campaigns was that services should be provided to all as a human right by a genuinely democratic state, and to the degree that it was feasible, financed through cross-subsidisation by imposition of much higher prices for luxury consumption.

Because the 'commodification of everything' was still under way across Africa however, *decommodification* could actually form the basis of a unifying agenda for a broad social reform movement, if linked to the demand to 'rescale' many political-economic responsibilities that were handled by embryonic world-state institutions. The decommodification principle was already an enormous threat to the West's imperial interests, as in, for example, the denial of private corporate monopolies based on 'intellectual property'; resistance to biopiracy and the exclusion of genetically modified seeds from African agricultural systems; the renationalisation of industries and utilities (particularly when privatisation strategies systematically failed, as happened across Africa); the recapture of indigenous people's territory via land grabs; and the empowerment of African labour forces against multinational and local corporate exploitation.

To make further progress along these lines, delinking from the most destructive circuits of global capital will also be necessary, combining local decommodification strategies with traditional social movements' calls to close the World Bank, IMF and WTO, and with rejection of the United Nations' neoliberal functions and lubrication of US imperialism. Beyond that, the challenge for Africa's and South Africa's progressive forces, as ever, was to establish the difference between 'reformist reforms' and reforms that advanced a 'non-reformist' agenda (in the terminology of Andre Gorz – but also termed 'structural reforms' by John Saul). The latter attempts were to win gains that did not strengthen the internal logic of the system, but that instead empowered the system's opponents. Hence, unlike reformist reforms, non-reformist reforms would not have a co-optive character. Neither would they lessen the momentum of reformers (as did many successful reformist reforms). Rather, they heightened the level of meaningful confrontation by opening up new terrains of struggle. The non-reformist reform strategy would include generous social policies stressing decommodification, exchange controls, and more inward-oriented industrial strategies allowing democratic control of finance and ultimately of production itself. These sorts of reforms can strengthen democratic movements, directly empower producers (especially women) and, over time, open the door to the contestation of capitalism itself.

We have briefly considered how these struggles play out in the realm of AIDS medicines and how they link to broader decommodification agendas. Then how might we return to



debates about the right to the city, especially given the understanding of rights limitations when it comes to water?

### **The right to the city *and* to the water commons in South Africa**

Making hydro-socio-ecological connections within South Africa's cities will be one of the crucial challenges for those invoking the right to water. As Lefebvre (1996:72) put it:

Carried by the urban fabric, urban society and life penetrate the countryside. Such a way of living entails systems of objects and of values. The best known elements of the urban system of objects include water, electricity, gas (butane in the countryside), not to mention the car, the television, plastic utensils, 'modern' furniture, which entail new demands with regard to services.

Indeed, the ecological challenge of mobilizing water has, traditionally, been an important process of more general social and spatial organization (Strang 2004). As Lefebvre (1996:106) explained:

One knows that there was and there still is the oriental city, expression and projection on the ground, effect and cause, of the Asiatic mode of production; in this mode of production State power, resting on the city, organizes economically a more or less extensive agrarian zone, regulates and controls water, irrigation and drainage, the use of land, in brief, agricultural production.

Each different struggle for the right to the city is located within a specific political-economic context in which urbanization has been shaped by access to water. The early 'oriental despotism' that Karl Wittfogel (1957) discovered would follow from this Asiatic mode of production's emphasis on a strong central state's control of the water works gave way, in successive eras of city-building, to the central square role of water fountains in medieval market cities, and to huge infrastructural investments in capitalist cities. Within the latter, the neoliberal capitalist city has adopted a variety of techniques that individualize and commodify water consumption, delinking it from sourcing and disposal even though both these tasks are more difficult to accomplish through public-private partnerships. Given the emphasis on decentralization, as Bakker (2007:436) suggests, 'The biophysical properties of resources, together with local governance frameworks, strongly influence the types of neoliberal reforms which are likely to be introduced'.

The next logical step on a civilizational ladder of water consumption would not, however, be simply a *Mazibuko*-style expansion of poor people's access (and technology) within the confines of the existing system. Acquiring a genuine right to water will require its 'commoning', both horizontally across the populace, and vertically from the raindrop above or borehole below, all the way to the sewage outfall and the sea. But to get to the next mode of financing, extraction, production, distribution, consumption and disposal of water requires a formidable social force to take us through and beyond rights, to the water commons.

Tactically, anger about violations of the right to water has taken forms ranging from direct protests, to informal/illegal reconnections and destruction of prepayment meters, to a constitutional challenge over water services in Soweto. Rights advocates argue that they have the potential to shift policy from market-based approaches to a narrative more conducive to 'social justice', even in the face of powerful commercial interests and imperatives. Yet the limits of a rights discourse are increasingly evident, as South Africa's 2008-09 courtroom dramas indicated. If the objective of those promoting the right to the city includes making water primarily an eco-social rather than a commercial good, these limits will have to be transcended. The need to encompass ecosystemic issues in rights discourses is illustrated by the enormous health impacts of unpurified water use (Global Health Watch 2005: 207-224).

Thus once we interrogate the limits to rights in the South African context, the most fruitful strategic approach may be to move from and beyond 'consumption-rights' to reinstate a notion of the commons, which includes broader hydropolitical systems. To do so, however, the South African struggle for water shows that social protests will need to intensify and ratchet up to force concessions that help remake the urban built environment. As expressed by David Harvey (2009), 'My argument is that if this crisis is basically a crisis of urbanization then the solution should be urbanization of a different sort and this is where the struggle for the right to the city becomes crucial because we have the opportunity to do something different.'

One of the first strategies, however, is defense. The struggle for the right to water entails staying in place in the face of water disconnections and even evictions. Apartheid-era resistance to evictions is one precedent, but another is the moment in which the prior downturn in South Africa's 'Kuznets Cycle' (of roughly 15-year ups and downs in real estate prices) occurred, the early 1990s. The resulting 'negative equity' generated housing 'bonds boycotts' in South Africa's black townships. The few years of prior financial liberalization after 1985 combined with a class differentiation strategy by apartheid's rulers was manifest in the granting of 200,000 mortgages ('bonds') to first-time black borrowers over the subsequent four years. But the long 1989-93 recession left 500,000 freshly unemployed workers and their families unable to pay for housing. This in turn helped generate a collective refusal to repay housing bonds until certain conditions were met. The tactic moved from the site of the Uitenhage Volkswagen auto strike in the Eastern Cape to the Johannesburg area in 1990, as a consequence of two factors: shoddy housing construction (for which the homebuyers had no other means of recourse than boycotting the housing bond) and the rise in interest rates from 12.5 per cent (-6 per cent in real terms) in 1988 to 21 per cent (+7 per cent in real terms) in late 1989, which in most cases doubled monthly bond repayments (Bond 2000).

As a result of the resistance, township housing foreclosures which could not be consummated due to refusal of the defaulting borrowers (supported by the community) to vacate their houses, and the leading financier's US\$700 million black housing bond exposure in September 1992 was the reason that its holding company (Nedcor) lost 20 per cent of its Johannesburg Stock Exchange share value (in excess of US\$150 million lost) in a single week, following a threat of a national bond boycott from the national civic

organization. Locally, if a bank did bring in a sheriff to foreclose and evict defaulters, it was not uncommon for a street committee of activists to burn the house down before the new owners completed the purchase and moved in. Such power, in turn, allowed both the national and local civic associations to negotiate concessions from the banks (Mayekiso 1996).

However, there are few links between the early 1990s civics which used these micro-Polanyian tactics successfully, and the 2000s generation of 'new social movements' which shifted to decommodification of water and electricity through illegal reconnections (Desai 2002). The differences partly reflect how little of the late 2000s mobilizing opportunities came from formal sector housing, and instead related to higher utility bills or forced removals of shack settlements. Still, there are profound lessons from the recent upsurge of social activism for resistance not only to the implications of world capitalist crisis in South Africa, but elsewhere.

The lessons come from deglobalization and decommodification strategies used to acquire basic needs goods, as exemplified in South Africa by the national Treatment Action Campaign (TAC) and Johannesburg Anti-Privatization Forum which have won, respectively, antiretroviral medicines needed to fight AIDS and publicly-provided water (Bond 2006). The drugs are now made locally in Africa – in Johannesburg, Kampala, Harare, and so on – and on a generic not a branded basis, and generally provided free of charge, a great advance upon the US\$15,000/patient/year cost of branded AIDS medicines a decade earlier (in South Africa, nearly a million people now receive them for free). The right to healthcare in the South African city, hence, requires the commoning of intellectual property rights, which were successfully achieved by the TAC by mid-decade in the 2000s after a period of extreme resistance to the United States and South African governments, to the World Trade Organisation's Trade-Related Intellectual Property Rights regime and to global pharmaceutical capital.

The ability of social movements such as in the health, water and housing sectors to win major concessions from the capitalist state's courts under conditions of crisis is hotly contested, and will have further implications for movement strategies in the months ahead. Marie Huchzermeyer (2009:3-4) argues that the Constitution mandates 'an equal right to the city'. However:

It was only in 2000 that the Bill of Rights was evoked by a marginalized and violated urban community (represented by Irene Grootboom) in the Constitutional Court. In what was received as a landmark ruling, the Court interfered with the Executive, instructing the Ministry of Housing to amend its housing policy to better cater for those living in intolerable conditions. It took 4 further years for the policy changes to be adopted into housing policy. Chapters 12 and 13 were added to the national Housing Code: Housing in Emergency Circumstances and Upgrading of Informal Settlements. In the following 5 years, these two policies have not been properly implemented, if at all. Unnecessary violations have continued and marginalized communities have had to resort to the courts. However, the landscape has changed significantly. Whereas the Grootboom case involved an isolated community with

only a loose network of support through the Legal Resources Centre which acted as 'Friends of the Court', today cases reach the Constitutional Court through social movements such as Landless People's Movement, Inner City Tenant Forum, Abahlali base Mjondolo, Anti-Privatization Forum and the Anti-Eviction Campaign.

Huchzermeyer (2009:4) suggests this strategy fills a 'gap in left thinking about the city (the gap derived from the Marxist ideology of nothing but a revolution)' and that the 'Right to the City' movement articulated by Lefebvre and Harvey should include marginal gains through courts: 'Urban Reform in this sense is a pragmatic commitment to gradual but radical change towards grassroots autonomy as a basis for equal rights.' After all, 'three components of the right to the city – equal participation in decision-making, equal access to and use of the city and equal access to basic services – have all been brought before the Constitutional Court through a coalition between grassroots social movements and a sympathetic middle class network' (even though 'this language is fast being usurped by the mainstream within the UN, UN-Habitat, NGOs, think tanks, consultants etc., in something of an empty buzz word, where the concept of grassroots autonomy and meaningful convergence is completely forgotten').

As we have seen, however, critics point to the opposite processes in the water case, and consider a move through and beyond human rights rhetoric necessary on grounds not only that – following the Critical Legal Scholarship tradition – rights talk is only conjuncturally and contingently useful (Roithmayr 2011). Ashwin Desai (2010) offers some powerful considerations about the danger of legalism when building the South African urban social movements:

If one surveys the jurisprudence of how socio-economic rights have been approached by our courts there is, despite all the chatter, one central and striking feature. Cases where the decision would have caused government substantial outlay of money or a major change in how they make their gross budgetary allocations, have all been lost. Cases where money was not the issue such as the TAC case or where what was being asked for was essentially negative – to be left alone – the courts have at times come grandly to the aid of the poor. And even to get some of these judgments enforced by the executive is a story in and of itself. I have no problems using the law defensively but when it comes to constitute the norms by which political advances are determined, it is extremely dangerous. By flirting with legalism, movements have had their demands become infected with court pleadings. We have heartfelt pleas for the observance of purely procedural stuff, consult us before you evict us. We have demands for housing, now become 'in situ upgrading' and 'reasonable' government action.

In addition, the limits of neoliberal capitalist democracy sometimes stand exposed when battles between grassroots-based social movements and the state must be decided in a manner cognisant of the costs of labor power's reproduction. At that point, if a demand upon the state to provide much greater subsidies to working-class people in turn impinges upon capital's (and rich people's) prerogatives, we can expect rejection, in much the same way Rod Burgess (1978) criticized an earlier version of relatively unambitious Urban

Reform (John Turner's self-help housing), on grounds that it fit into the process by which capital lowered its labor reproduction costs. It may be too early to tell whether court victories won by social movements for AIDS medicines and housing access represent a more durable pattern, one that justifies such rights talk, or whether the defeat of the Soweto water-rights movement is more typical. Sceptics of rights talk suggest, instead, a 'Commons' strategy, by way of resource sharing and illegal commandeering of water pipes and electricity lines during times of crisis (Desai 2002, Bond 2002, Naidoo 2009, Ngwane 2009). This is a very different commons, of course, than the more decentralized – and thus potentially neoliberal – strategy proposed for public service provision and smaller, autonomous units by Ostrom (see Harvey 2012:70 for a critique).

The challenge for South Africans committed to a different society, economy and city is combining requisite humility based upon the limited gains social movements have won so far (in many cases matched by regular defeats on economic terrain) with the soaring ambitions required to match the scale of the systemic crisis and the extent of social protest. Looking retrospectively, it is easy to see that the independent left – radical urban social movements, the landless movement, serious environmentalists and the left intelligentsia – peaked too early, in the impressive marches against Durban's World Conference Against Racism in 2001 and Johannesburg's World Summit on Sustainable Development in 2002. The 2003 protests against the US/UK for the Iraq war were impressive, too. But in retrospect, although in each case they out-organized the Alliance, the harsh reality of weak local organization outside the three largest cities - plus interminable splits within the community, labor and environmental left - allowed for a steady decline in subsequent years.

The irony is that the upsurge of recent protest of a 'popcorn' character – i.e., rising quickly in all directions but then immediately subsiding – screams out for the kind of organization that once worked so well in parts of Johannesburg, Durban and Cape Town. The radical urban movements have not jumped in to effectively marshal or even join thousands of 'service delivery protests' and trade union strikes and student revolts and environmental critiques of the past years. The independent left's organizers and intelligentsia have so far been unable to inject a structural analysis into the protest narratives, or to help network this discontent.

Moreover, there are ideological, strategic and material problems that South Africa's independent left has failed to overcome, including the division between autonomist and socialist currents, and the lack of mutual respect for various left traditions, including Trotskyism, anarchism, Black Consciousness and feminism. A synthetic approach still appears impossible. For example, one strategic problem – capable of dividing major urban social movements – is whether to field candidates at elections. Another problem is the independent left's reliance upon a few radical funding sources instead of following trade union traditions by raising funds from members (the willingness of German voters to vote Die Linke may have more than a little influence on the South African left).

By all accounts, the crucial leap forward will be when leftist trade unions and the more serious South African Communist Party members ally with the independent left. The big

question is, when will Cosatu reach the limits of their project within the Alliance. Many had anticipated the showdown in 2007 to go badly for unionists and communists, and they (myself included) were proven very wrong. But by mid-2013, what appeared inevitable – the left being either tossed out of Cosatu or Cosatu splitting profoundly from the Alliance – was in motion. By mid-December 2013 it will be clear whether the largest and most militant union in Africa – the National Union of Metalworkers of South Africa – would take a route towards, firstly, breaking with Cosatu over the more conservative federation leadership’s firing of its leftist secretary general, Zwelinzima Vavi (on the pretext of a sex scandal); secondly, starting a general workers’ union so as to draw in many more members than are available in the traditional metal sectors; and thirdly, sometime (long after the 2014 national elections) launching a leftist party alternative to the African National Congress.

These challenges are not particularly new nor unique, with many leftists in Latin America and Asia reporting similar opportunities during this crisis but profound barriers to making the decisive gains anticipated. It is, however, in South Africa’s intense confrontations during capitalist crisis that we may soon see, as we did in the mid-1980s and early 2000s, a resurgence of perhaps the world’s most impressive urban social movements. And if not, we may see a degeneration into far worse conditions than even now prevail, in a post-apartheid South Africa more economically unequal, more environmentally unsustainable and more justified in fostering anger-ridden grassroots expectations, than during apartheid itself. One of the central questions is whether the core activist cadre persist with rights, or move *through rights to the Commons*, and then travel *beyond Ostrom* to a Commoning that is eco-socialist in character.

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