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## *South Africa's social contract: the Economic Freedom Fighters and the rise of a new constituent power?*

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Taking the South African constitution as an eminent symbol of the South African social contract, and noting the opinion of many that the contract has failed to deliver, this article explores the concept of the social contract in South Africa by examining two contentions. The first, that the South African social contract, or constitution, was not entirely inclusive to begin with. And the second, that the radical opposition party – the Economic Freedom Fighters (EFF) – represents the rise of a new constituent power from the unemployed and disenfranchised populous: those seen to have been left out of the social contract. Within this article, I follow Negri's work on constituent power, broadly taking the term to denote "the power of the people". Through exploring these contentions, this article comes to an impasse: that South Africa's social contract was, and continues to be, conditioned in advanced by the preceding administration or constituted power, which limits, too, the possibilities of a new constituent power represented by the EFF.

**Key words:** Social contract; constitution; constituent power; Economic Freedom Fighters (EFF); multitude

## 1. Introduction

When the South African Constitution was adopted in 1996, it was imagined to represent a new social contract between all the people of South Africa. In this context, the term 'social contract' can be broadly understood as referring to an implicit agreement between the people to establish a new South African society, founded on the values of universal suffrage, equality, inclusivity, and democracy, designed to benefit all. Yet, more than 20 years later, some have commented that the fruits of the South African social contract are yet to be seen (Quintal 2016; Oosthuizen 2016). Rather more critically, others have argued that the South African constitution was ideologically, politically and philosophically limited from the beginning and, because of this, does not truly hold the potential to fulfil its contractual promise to transform South African society, particularly with regard to race and economic inequality (Modiri 2016 and 2015; Madlingozi 2017; Ramose 2007; Sibande 2011; and Dladla 2017).

In response to these concerns, this paper seeks to revisit the idea of the social contract in South Africa, exploring two contentions in particular. The first – picking up on the critical literature mentioned above – that the South African social contract, symbolised by the constitution, was not truly inclusive to begin with. And the second, after presenting a brief genealogy of the concept of the social contract, and its relationship to thought on constituent power and constitution-making, I explore whether the EFF represents the rise of a new revolutionary power – a constituent power – with the promise of radically reforming South Africa's social contract (EFF Manifesto 2013). By exploring these contentions, this article comes to a ruse in both social contract theory and constituent / constituted power. For indeed, while South Africa's social contract aimed to promote radical transformation, it was conditioned in advance by the constituted power which came before it. Moreover, and in response to the second contention, while a new constituent power may be identified in the EFF, this power is – too – ensnared within an impasse which restricts its actualisation. Indeed, it can remain only a sign of a promise for a new political constitution, or social contract: the EFF can only ever remain an oppositional party, for if constituted as constituted power – as the ruling party – it would lose the essence which marks it out as constituent power, and which gives it the legitimacy of the will of the people. It can, however, and as will be explored below, play another role in ensuring the legitimacy of the democratic order of South Africa.

## 2. The social contract

The idea of the social contract developed in Western thought as a means of conceptualising the constitution of society: that is, the organisation of people into a legitimate polis. For Thomas Hobbes – broadly recognised as the first theorist to compose a full defence of social contract theory – the social contract named a rational agreement between self-interested individuals to submit to a central authority: the sovereign (1981). This sovereign power would enforce a common law, affording rights and bestowing certain duties upon its citizens (Hobbes 1981). The social contract arose decisively from what Hobbes termed a State of Nature – a hypothetical pre-social and pre-political condition where individuals pursued their prerogatives to the point of violence, destruction and utter immorality: *homo homini lupus* ('man is wolf to man') (1981). This 'State of Nature' is the essential precondition which makes necessary the social contract. In short, without a war-like State of Nature there would be no rational need for a social contract. This is Hobbes's theory of the justification of the state.

Writing a century later, and within the context of intellectual France (as opposed to the English civil war of the 17<sup>th</sup> Century out of which Hobbes developed his treatise), Jean-Jacques Rousseau revisited the notion of the State of Nature. Rousseau described an original State of Nature where people lived in harmony with one another, their basic needs satisfied by the natural world around them (1923). But as society became more complex, insofar as the population grew and the relations between different groups became strained and contested in the fight for resources, Rousseau asserts that a kind of naturalised inequality is born (1923: 24–27). Private property – the idea that an individual has rights over acquired material goods – marked the departure within Rousseau's imagined State of Nature to the arrival of a new pre-social society of violence and competition. This created the need for the establishment of a social contract in order to protect those who held property against those who might take it by force (1923). A very different conceptualisation of the constituent relationship between the social contract and equality/inequality emerges. While the Hobbesian social contract assumes a certain equality (later critiqued by Charles Mills (1999) and discussed below) between those who mutually agree to submit to a sovereign power, the Rousseauian social contract binds and legitimises the very inequality – established through the distribution of private property – which made it necessary in the first place. For Rousseau, he observed how this naturalised social contract created the very condition of *homo homini lupus* that the Hobbesian social contract sought to transcend.

Within social contract theory, a temporal schema is then established,<sup>1</sup> from the “before” of the State of Nature, or ‘original position’ (Rawls 1971), which necessitates the establishment of the social contract, to the “after”, which is, the creation of a constitution. This constitution produced by the social contract is a body of laws and principles that together establish the governance of a state or society. In turn, the constitution – as I take it to be in the case of South Africa – stands as a symbol of the social contract, and is bound by its terms (Arato 2017: 63). Indeed, I broadly follow Madlingozi’s position on South African constitutionalism here as both ‘a legal concept dealing with allocation of rights and responsibilities and a politico-ethical theory prescribing how to (re)constitute a political society’ (2017: 126).

But more specifically, within constitutional theory as well as political theology on sovereignty, the constitution is the product of constituent power. In the traditional Schmittian sense, this constituent power animates the establishment of constituted power, which materialises in the form of a constitution (Schmitt 1928). Constituent power – what Negri calls *potentia* (2009) – can be most simply understood as the will of the people. It is this will of the people, as a democratic ideal, that then justifies the creation, and thereafter legitimacy, of the constituted power (*potestas* for Negri (2009)) and constitution. (Significantly, the temporal schema is complicated here insofar as constituent power legitimises constituted power both before the constitution is established and after: it justifies both its creation and its subsequent existence). But, importantly, a constitution does not mark the finality or end of constituent power, but rather, stands as a legitimated apparatus under which constituent power can resurface and change the terms of the constitution if required. Indeed, Loughlin describes a constitution as ‘a juridical instrument which derives its authority from some principle of popular self-determination’, and continues to state that ‘the constitution is, in short, an expression of the constituent power of the people to make and re-make the institutional arrangements through which they are governed’ (2017: 151-152). Moreover, for Michael Hardt, constituted power ‘defines the fixed order of the constitution and the stability of its social structure’ (Negri 2009: vii).

However, some note that the transformation from constituent power to constituted power is reductive (Botha 2010) – an idea that Negri has explored extensively within the framework of what he calls ‘the crisis of constituent power’ (1999: 186). Others, nonetheless, argue that constituent power is not lost in constituted power, but rather is entrenched as a fundamental right to be

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1 In speaking of a temporal schema within social contract theory in the context of the South African constitution, I am aware of the debates from Modiri (2016) and Madlingozi (2017), in particular, regarding the temporal failure of the South African constitution. Although an interesting and important line of enquiry, it is beyond the bounds of this paper to fully examine here.

legitimately claimed at any time: that is, a right to revolution (Skinner 1978: 338–348; Williams 1997). In short, a right to challenge the existing legal order and seek ‘constitutional revision’ (Negri 1999: 2) through exercising, for example, the right to freedom of expression or the right to form a political party (which we will explore in relation to the EFF of South Africa below). In this way, constituent power can be thought of as providing contingency to the apparent finality of a constitutional text.<sup>2</sup> Negri refers to the formal provision for constituent power established within a constitutional framework as the juridical concept of constituent power (1999). Thus, when constituent power rises within a constitutionally established polity, it marks a politically justified form of resistance to the current order, including the social contract, or pactum (Skinner 1978). Moreover, it rises precisely because the current order has failed – through corruption or tyranny – to truly represent the will or power of the people. In other words, constituent power is justified precisely because the pactum or social contract between the sovereign and the people had begun to break down, or was not being upheld (Walls 2013).

Yet, as Negri points out, there is an inherent crisis at play in the notion of constituent power – a crisis which, I argue, is important for understanding the South African constitutional social contract. For Negri, the crisis of constituent power is that it is both inherent *in* constitutionalism, insofar as it is the force which creates it, yet it simultaneously defines the limits of constitutionalism – the limits of the law – as it necessarily goes beyond it, or is in excess thereof (2009). In short, ‘constituent power resists being constitutionalized’ (Negri 2009: 1). Moreover, constituent power arises out of the original position – the warlike condition of the pre-political society. Yet, once this condition is overcome and transcended by the establishment of a social contract, constituent power loses its immanence, its *raison d’être*, unless new tyranny or oppression occurs.

Another concern with the social contract, also relevant for our discussion on South Africa, is that laid out by Charles Mills in *The Racial Contract* (1999). Mills uses the concept of the social contract in Western political thought as a heuristic to expose the workings of white privilege in polities across the world. His use of the term “white” critically names racial and colour relations, but also stands broadly to name the historically constituted political elite. Indeed, Mills refrains from categorically defining whiteness, instead pointing out that ‘whiteness is not really a color at all, but a set of power relations’ (1999: 127). The social contract, therefore, is a contract between whites, or the elite, which constitutes their position as the political elite, and concurrently concretises the inferior social position of the non-elite or non-whites (1999). Decisively, it is a contract not between “we the people” but between ““we the white people”” (1999: 3),

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2 See also Madlingozi (2017) for a critique of the “finality” of the South African constitution.

critiquing, as he does, the assumption Hobbes makes that “the people” are all politically and socially equal. Thus, for Mills the racial contract more accurately describes the existing and dominant social contract ‘between those categorized as white over the nonwhites, who are thus the objects rather than the subjects of the agreement’ (1999: 12). This contract ensures the continuation of the white political order by depoliticising the non-whites who become subject to it (1999: 11-13.). To put it differently, the racial contract ensures that those not of the elite remain in the pre-political state of nature, without access to voicing political concerns, without redress for wrongs committed against them, and without access to the benefits that the elite draw from this racialised arrangement of society. Such groups, therefore, are included within the social contract only insofar as their bodies can be exploited for the accumulation of the wealth of the elite – a critique which, interestingly, the EFF raises toward the current political order of South Africa, discussed below.

### 3. The social contract in South Africa

Within South Africa, the Constitution of the Republic of South Africa (Act 108 of 1996) stands as a symbol of the post-apartheid social contract (National Planning Commission (NPC) 2015). As a social contract, South Africa's constitution is widely considered to be progressive (Murray 2001: 812). Firstly, it enshrines an expansive bill of rights, including civil and political rights, socio-economic rights – such as the right to social security, water, sanitation, and food – and a fundamental right to human dignity. Moreover, the South African constitution binds both the public and private sectors in its application. Section 8 of the constitution provides that the Bill of Rights (set out in Chapter 2) binds not only all organs of state, but further that:

8. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

This clause has been broadly interpreted to stand for the way in which the South African constitution, and, indeed, social contract, specifically encompasses the private sector and businesses (Chirwa 2006: 38). The importance of this clause has further been set out by the courts, for example in the case of *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*, in which the court asserted that where a private body is contracted to perform a public function – in this case the distribution of social security grants – it will be treated as a public body, and therefore will be subject to the same constitutional principles and

requirements. More broadly, however, the South African constitution recognised the need within modern society to include the private sector, together with the state and its citizens, as nodes of the social contract; a point that is emphasised in a later national policy document of 2015 that emphasises the role of business in South Africa's social contract (NPC).

The NPC uses the terms social contract or social compact to refer to 'collective agreements between social partners in society about how to address major issues that require their collective contribution', in its 2015 policy document, 'Toward a Social Compact for South Africa' (2015: 7). This policy document emanates from the National Development Plan (NDP) Vision 2030, the current macroeconomic and social strategy directive, which calls for 'a social contract to develop the country as well as build a more cohesive and equitable society' (2015: 3), and which draws from, like all policy positions, the South Africa constitution. (Indeed, within the context of this article, I include both the NPC and later South African policy documents on the social compact, together with the constitution, in all broader references to the South African social contract discussed here.) The NDP identifies national unemployment levels and the impact of the global financial crisis on the South African economy as two key issues that a social compact should collectively work to address (2015).

Yet, despite the lofty ideals set out in the constitution and later in the policy documents of the NPC, some consider South Africa's social contract to be at 'breaking point' (Calland 2017). In addition, not long before Pravin Gordhan was summarily dismissed as Minister of Finance, he stated that the ruling party has 'moved away from [its] duty to serve our people [...] we have broken that contract' (2016). Marius Oosthuizen, similarly, has stated that 'South Africa's post-apartheid economy is unable to deliver on the social contract', citing low economic growth, poverty, crime, and 'a deep crisis in all levels of education' (2016). Rather more critically, Pieter Labuschagne has commented that the power bestowed to the state through the social contract has turned inward: 'the Leviathan [has] turn[ed] on itself for material and power gains, and to serve its own interest' (2017: 59).

It is outside the purview of this article to qualitatively assess whether or not the South African social contract is in crisis, as well as the validity of the claims quoted in the previous paragraph. Instead, I take this provocation, together with the some of the contemporary thinking on the limitations of the South African constitution (Modiri 2016 and 2015; Madlingozi 2017; Ramose 2007; Sibande 2011; and Dladla 2017), in order to pose the two questions set out above. The first: was the constitution, as a sign or product of the new post-apartheid social contract of South Africa, truly inclusive to begin with? And second: I explore whether the EFF represents the rise of a new constituent power and the possibilities of its reach.

## 4. Was the South African social contract truly inclusive to begin with?

The South African constitution of 1996 states its objectives in the Preamble as follows:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

As the preamble speaks of 'the will of the people', of 'every citizen [...] equally protected', and of 'improv[ing] the quality of life of all citizens and free[ing] the potential of each person' (1996), it makes a decisive commitment both to building an inclusive society and to establishing a social contract which includes everyone and is aimed at the benefit of all.

In addition, the Constitutional Assembly overseeing the process of constitution-making in South Africa in the 1990s, made concerted efforts to include the public through consultative and participatory processes. Murray (2001: 816) describes how:

The Constitutional Assembly's slogan "You've made your mark now have your say" invited the many millions of South Africans who had voted for the first time in 1994 to contribute to the country's first democratic constitution - and over two million did so. The public participation scheme was intended to provide both basic education on democracy and constitutionalism and to elicit the public's opinion on what the constitution should say. To do this it used the press, radio and television, the Web, and its own publicity campaign.

The Constitutional Assembly received over two million submissions from the public on the draft constitution (Murray 2001: 817).

Yet, despite the elaborate and extensive consultative process, the adoption of the constitution in 1996 also bore the mark of a negotiated settlement. Henk Botha describes how the constitution, although adopted as it then was through a



fair election, was bound by the earlier Interim Constitution of 1993 adopted by the final apartheid parliament (2010). Explaining this process, Botha writes:

The interim constitution was the product of the deliberations of the Multi-party Negotiating Forum, a body in which different political stakeholders were represented but which lacked any electoral mandate. It was then adopted, in accordance with the procedural dictates of the 1983 constitution, by South Africa's last apartheid-era Parliament. This democratic deficit was rectified by the adoption of the final constitution of 1996 by an elected Constitutional Assembly. However, far from starting on a revolutionary clean slate, the Constitutional Assembly's options were framed by the interim constitution, which not only prescribed the procedure to be followed in the enactment of a new constitution but also contained a set of 34 Constitutional Principles, which had to be complied with. The text produced by the Constitutional Assembly could only be signed into law once the Constitutional Court had certified that it complied with the Constitutional Principles (2010: 67–68).

Notably, when the constitution was first taken to the Constitutional Court in 1996 it was rather ironically decreed as unconstitutional as the court did not feel it adequately included all 34 Constitutional Principles (Klug 2008). In addition, one of these principles included Principle XXXI which decreed that 'every member of the civil service [read: white minority apartheid government] is entitled to a free pension' (1993) (Murray 2001: 815), a principle that Murray describes as reflecting 'the jitteriness of those about to lose power to a future black government' (2001: 815). Although this principle did not, in the end, pass constitutional muster and was not, therefore, included in the constitution of 1996, there were a number of compromises made in the negotiations between the old apartheid government and the new, democratically elected representatives.

An interesting example is the late amendment of a Constitution Principle in 1994 to include certain rights for traditional groups. The amended Principle XIII read:

1. The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the constitution and to legislation dealing specifically therewith.
2. Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the constitution (1993).

The inclusion of this principle was necessary to promote the participation of the Inkatha Freedom Party (IFP) – a political party representing traditionalist African values which entered into an uneasy coalition with the African National Congress (ANC) in 1994 – in both the elections and in the process of constitution-making. That coalition was largely a political move in order to ensure the legitimacy of the constitution and the new government to all sectors of South African society. Yet, despite the amendment to the Constitutional Principle XIII, the IFP withdrew from the constitution-making process and negotiations due to a disagreement regarding the involvement of international mediators (Murray 2001: 815-816). This, according to Murray, revealed that ‘the Constitutional Assembly’s dream that the new constitution should incorporate the aspirations of all South Africans was undermined at the outset’ (2001: 815-816). And critically, the constitution has gone on to be criticised for limiting the value and legitimacy of indigenous and customary law (Andrews 2009: 308-309). But more broadly, it demonstrates that – as with the attempted inclusion of a pension guarantee for the former apartheid civil service – the 1996 constitution was constrained from the beginning by certain ideals and decrees from the apartheid society. Moreover, although the Constitutional Assembly sought to solicit inputs on the constitution from all members of society, it was not legally obliged to include these submissions in the final constitution in the same way that it was obliged to include the Constitutional Principles that had been adopted by the apartheid-era parliament. Thus, it begs the question, if the 1996 constitution is said to be inclusive, is this inclusivity on the basis of its promise for a better South Africa for all, or on the basis of its ratification of the Constitutional Principles agreed to by the apartheid government and the inclusion of certain protections for this group?

Another limitation of the 1996 constitution, in light of the NDP’s later focus on addressing levels of unemployment through the country’s social contract, was the lack of a constitutionally enshrined right to work. While the constitution provided for a whole host of socio-economic rights, the right to work was not included. In this regard, the South African constitution deviated from international human rights law, for the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides a right to work under Article 6. Although the state was quick to sign and ratify the majority of international human rights treaties in the 1990s (including the Convention on the Elimination of All forms of Discrimination Against Women in 1995, the Convention on the Rights of the Child in 1995, the International Covenant on Civil and Political Rights in 1998, the International Convention on the Elimination of All forms of Racial Discrimination in 1998, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment in 1998), the ICESCR was only ratified in 2015, after domestic pressure from civil society groups and others. It is widely understood that the significant delay in ratification was

primarily because the South African state was unwilling to be bound to a legal duty to realise the right to work (Chenwi 2010). When it did eventually ratify the ICESCR it did so with a reservation that the covenant would be interpreted only insofar as it was aligned to the provisions of the South African constitution, meaning that the right to work became obsolete. Moreover, to date, South Africa has still not signed or ratified the Optional Protocol to the ICESCR which would allow for individuals and organisations to take matters regarding violations of the covenant to the UN Committee on Economic, Social and Cultural Rights.

Another key criticism lodged against the constitution is its protection of property rights set out in Section 25 of the Bill of Rights. The 'property clause' is a central issue within decolonialist constitutional thought. Within the powerful rhetoric on South Africa's historical "right of conquest", is the critique of Section 25 in particular, which constitutionally legitimated the ill-acquired property of those who benefited from apartheid (Ramose 2014; Dladla 2017), thus enshrining a "right of conquest" within the constitution itself. Dladla pertinently questions "Who exactly had property to protect in 1994?", and, "[p]recisely whose property was being protected by the constitution?" (2017: 41). Dladla's rhetoric poignantly returns us to Mills's appraisal of a social contract not between "we the people" but between "we the white people" (1999: 3), but also to Rousseau, whose social contract was established precisely to protect the property rights of those who had gained property through conquest. Of course, the constitutional question of property is central, too, to the politics of the EFF and their call for the expropriation of land without compensation (n.d.), and the removal of the clause 'subject to compensation' from Section 25 of the Bill of Rights (1996).

In short, while the South African constitution symbolised a social contract aimed at creating an inclusive and equal society, it was not without its limitations. Notably, the constitution of 1996 had to comply with the Constitutional Principles adopted by the last apartheid-era parliament, and could not be, in Botha's words, a 'revolutionary clean slate' (2010: 68). In addition, and more critically, its protection of property rights raises questions around whether it is another example of Mills's racial contract. In all, while the majority constituent power was a key player in the production of the constitution, the constitution had been conditioned, in advance, by the constituted power of the old apartheid order. This power was manifested in the protections to property rights and white minority businesses, which were subsequently bestowed with the task of realising the key dividend of the social contract: job creation. The fact that the social contract has failed to achieve this object is perhaps demonstrative of an overriding politico-economic objective (of both state and business) to protect 'investor confidence' at the expense of individual rights. Ultimately, however, the unemployed, like other politically and socially disenfranchised groups and individuals – especially

the poor and black – are simply left out of any kind of social contract, whether or not this social contract was truly geared toward addressing their needs in the first place. Indeed, for Madlingozi, the transformative agenda of the constitution has in fact worked to continue and reproduce what he speaks of as the ‘anti-black bifurcated societal structure’ of South Africa (2017: 125). In effect, black people living in South Africa largely do not belong – or are not included – within the country’s new society.

While Mills’s notion of the racial contract may not fully account for the nuances of the South African constitutional experience, it provides an instructive conceptual framework within which to understand or reconceive the notion of the social contract, and, most importantly, critiques the assumption that a social contract implies equality between all those bound by its covenant (1999: 3). Indeed, the next section proceeds to analyse whether the South African oppositional EFF party represents the rise of a new constituent power, on account of its promise of revolution and its claim of representing those exploited and oppressed by the political elite and capital (EFF 2013). In order to understand this further, I turn to Negri and Hardt’s work on the multitude and constituent power.

## 5. The rise of a new constituent power?

‘The multitude’ is a term coined by Antonio Negri and Michael Hardt to describe an immanent, multiple, unmediated, and radical social collective with the potential to form an organised political alternative (2000). ‘The multitude’ is categorically outside the social contract (2000). According to Thacker’s reading of Hardt and Negri on the concept, ‘the multitude’ stands in opposition to the social contract (2004), insofar as it represents a grouping within the population that was neither part of the social contract agreement, nor can be governed by the sovereign established through it. However, ‘the multitude’ is also defined by its very potential to form a constituent power proper: that is, it is geared towards forming an organised and legitimated oppositional force which, in turn, can ultimately manifest in a new constituted power built on the original legitimacy of the multitude (Negri 1999: vi). In *Empire* (2000: 411) Negri and Hardt describe the moment wherein the multitude becomes a constituent power:

Certainly, there must be a moment when reappropriation [of wealth from capital] and self-organization [of the multitude] reach a threshold and configure a real event. This is when the political is really affirmed—when the genesis is complete and self-valorization, the cooperative convergence of subjects, and the proletarian management of production become a constituent power. [...] We do not have any models to offer for this event.

Only the multitude through its practical experimentation will offer the models and determine when and how the possible becomes real.

Yet, the organisation of 'the multitude' into a constituent power must resist being constituted, it must remain, as Negri and Hardt insist, 'insurgen[t]' (Negri and Hardt 2000: 411), oppositional. It is for this reason that 'only the multitude [...] will offer the models and determine when and how the possible becomes real' as the possible is always something *to come*, always a future potential that has never before been realised: the 'collective imagination in action' (Negri 2000: 311). The point is not moot, and returns us to the very distinction Negri makes between the juridical notion of constituent power as the power to establish a constitution, and constituent power proper, as the power of 'the multitude' and the possibility that power brings of a new politics. Where the juridical concept of constituent power is normatively geared toward becoming constituted power, that is, it is defined by its objective and purpose in becoming constituted within legal and legitimated structures of a nation state, constituent power proper is defined by its resistance to this very ontology, by its insurgency and radical difference, or opposition, to the social contract. For Negri, we must, therefore, find a way of resisting the constitution of constituent power in order to achieve real democracy.

Within the South African context, constituent power has a long and protracted history, most prominently in the dismantling of apartheid and the creation of the new democratic constitutional order.<sup>3</sup> Within this history, John Saul narrates the role of the ANC in the dissolution of the United Democratic Front (UDF) – 'the crucial umbrella organization of active community organizations' (2012: 217) – in the early 1990s, and with it, the possibility of other constituent forces surfacing within the time of transition. The EFF can be understood as arising within this tradition.

The EFF was formed in 2013 by Julius Malema after he was expelled from his position as president of the African National Congress Youth League (ANCYL) (Rule 2017: 3). Despite their very recent formation, the party has galvanised support, securing 6% of the votes early on in the 2014 national election (Rule 2017: 3) with its popularity growing ever since. In its Founding Manifesto, the EFF articulates its fundamental priorities as follows:

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3 For an interesting discussion on the various elements of the constitution-making process in South Africa see Andrew Arato (2017) *The Adventures of Constituent Power: Beyond Revolutions*. Cambridge: Cambridge University Press, and specifically Chapter 3: The Evolution of the Post-Revolutionary Paradigm: From Spain to South Africa (pp.185-256).

- a. Expropriation of South Africa's land without compensation for equal redistribution in use.
- b. Nationalisation of mines, banks, and other strategic sectors of the economy, without compensation.
- c. Building state and government capacity, which will lead to the abolishment of tenders.
- d. Free quality education, healthcare, houses, and sanitation.
- e. Massive protected industrial development to create millions of sustainable jobs, including the introduction of minimum wages in order to close the wage gap between the rich and the poor, close the apartheid wage gap and promote rapid career paths for Africans in the workplace.
- f. Massive development of the African economy and advocating for a move from reconciliation to justice in the entire continent.
- g. Open, accountable, corrupt-free government and society without fear of victimisation by state agencies (2013: 7).

What is interesting about the EFF's commitments is their alignment to the values of the South African social contract as set out under the NDP, in terms of creating jobs and addressing poverty and inequality. But, as noted above, their first and perhaps foremost position on the expropriation of land without compensation, marks a departure from the constitution in its current form which provides only for the expropriation of property 'subject to compensation' (1996: Section 25. 2 (b); EFF, n.d.).

Indeed, the Founding Manifesto rather scrupulously itemises a series of failures with the current system, which the EFF sets out to both respond and provide an alternative to. Specifically, these failures relate to the inability of the current order to create an adequate transformation from the past, particular in terms of the racially bifurcated distribution of wealth. The manifesto describes how, 'while the legalistic forms of colonial-apartheid dominance have been eroded 20 years ago, the economic system that marginalised, oppressed and exploited the black majority is still intact, with a few individuals benefitting' (2013: 2). According to the EFF, this has 'rendered the majority of the people a powerless majority by stripping away all revolutionary power it holds', to whom the ruling party hold 'sheer disregard' (2013: 2). Primarily, this is because of the protection of the interests of capital, which lie, historically, in the hands of South Africa's white minority. Interestingly, the EFF's critique seems to be not that the ruling party has failed to live up to the social contract and promise symbolised by

the constitution, but that they failed to create a new one. In short, they failed to constitute a form of power that would reflect the strategy of the then constituent power to create a truly equal and transformed society. This could be argued differently as suggesting that what was created was in fact a new racial contract, in the terms – set out above – of Charles Mills.

In response, the EFF represents a new and radical political strategy, but one that is deeply situated within the history it seeks to address. In its Founding Manifesto the EFF locates its politics and political ideology as emanating from the thought of Franz Fanon – appropriating his critique of colonialism and anti-black racism (EFF: 2016b) – as well as from the Marxist-Leninist tradition, from which it draws its critique of capitalism and the exploitation of the masses (EFF: 2016a). Accordingly, the EFF describes itself as:

A radical and militant economic emancipation movement that brings together revolutionary, fearless, radical, and militant activists, workers' movements, nongovernmental organisations, community-based organisations and lobby groups under the umbrella of pursuing the struggle for economic emancipation (2013: 6).

The EFF has been seen to carry out its revolutionary politics in a number of ways, notably in its campaign for the expropriation of land without compensation, but also in its reaction and involvement in other political movements, including the events at Marikana in 2012 and the EFF's decision to launch itself as a new party in Marikana in 2013 wearing the uniforms of mine-workers. Another example might include the way in which the EFF harnessed the will of the #feesmustfall student movement, demonstrating a leftist politics which moved fluidly from championing the rights of mineworkers to supporting access to higher education. In these cases, and others (including the coalition between the EFF and the rather more liberal Democratic Alliance party), the EFF has exhibited an illimitable political strategy that inhabits various oppositional spaces and movements. While this may serve as a point of criticism, it too, is reflective of the EFF's essential logic of challenging the hegemonic political elite and exploitative structures of capitalism. Moreover, it is a political strategy that the EFF claimed from the beginning for, as their Founding Manifesto sets out: 'the EFF will, with determination and consistency, associate with the protest movement in SA and will also join in the struggles that defy unjust laws' (2013: 6).

Indeed, despite the EFF having been criticised for lacking political substance and exploiting Marikana and the #feesmustfall movement to their own advantage (Mbetse 2015; Nieftagodien 2015), the party has arisen as a response to the particular political crises of South Africa. While this has been taken as a weakness of the party, it in fact can be understood quite differently as the party's very essence.

That is, the responsiveness and situatedness of the EFF's politics, and its suggestions of an alternative politics and system of governance, marks its very contribution to the South African political debate, and its potential for representing a new constituent power.

But perhaps most poignantly, the EFF's claim to represent the rise of a new constituent power derives not from its revolutionary politics but from its commitment to being a voice of the people. Indeed for Negri, constituent power is a mark of democracy proper insofar as it is an expression, precisely, of the will of the people (1999). In its Founding Manifesto, the EFF articulates that it will be the 'vanguard of community and workers' struggles and will always be on the side of the people' (2013: 6), and further, that as an 'anti-capitalist and anti-imperialist movement' it is 'anchored by popular grassroots formations and struggles' (2013: 6). Indeed, despite being critically labelled as merely a populist party (Cilliers and Aucoin 2016) through 'the adoption of popular language, gestures and fashion [and] populist claims of being the true voice of the people' (Mbetse 2015: 38), the party has rapidly galvanised support from various segments and diverse groups of South African society, and, particularly, has gained a young and black electorate. It is not, then, that the EFF seeks to be populist, but rather, that it seeks to gain its political legitimacy as a representative of the people, in a structural homology to the workings of constituent power.

I offer here only a brief analysis of the EFF, but from that brief analysis it is not unviable to imagine the EFF as representing a new constituent power. Notably, in doing so, the EFF is not claiming to be the one, true, constituent power, but rather, to be a placeholder for its immanent arrival. Yet, as noted above, while constituent power holds the capacity to form a new, revolutionary, political arrangement – a capacity which the EFF seeks to demonstrate, or at least articulate – in order to fulfil this ontological destiny and become a new kind of constituted power, it must be already legitimated. Put differently, constituent power cannot become constituted power unless it is already constituted to being with, and by being constituted it loses its essential constituent nature. Therefore, if the rising constituent power within South Africa must already be constituted in some form in order to change the political order and become constituted power, and if in the precise moment constituent power becomes constituted power it loses its democratic essence and immanency, reduced to the very structures of law it stood opposed to, then 'the multitude' of the supporters of the EFF are ensnared within an impasse. They must conform to the very legal order from which they were excluded in order to gain legitimacy (by becoming a legitimate political party in terms of the political rights set out in Chapter 2 of the constitution), and in doing so, lose the democratic essence which made their position and plight possible. It is for this reason that Negri speaks of constituent power as constantly in crisis, and for this reason, too, that should the EFF represent the rise of a new constituent power, it must remain an oppositional party.



## 6. Conclusion

This article has explored the South African social contract through analysing two contentions: that the South African constitution, or social contract, was never truly inclusive to begin with; and that there is a rising new constituent power represented by the EFF. In so doing, we arrive at an impasse: that South Africa's social contract was, and continues to be, conditioned in advance by the preceding administration or constituted power, which limits, too, the possibilities of a new constituent power represented by the EFF. These impasses further reveal the idea of the social contract, and indeed constituent and constituting power, to represent an inescapable and concatenating political system. Indeed, this is also evidenced in Labuschagne's argument as he calls for the social contract to mend itself: 'Government should be held accountable and the mechanisms in the constitution (the office of the Public Protector, the Auditor General and civil society) must be allowed to function properly. Self-correcting mechanisms in the constitution and in civil society should constitutionally restore the balance.' (2017: 65) Again, a kind of circularity is confronted: the constitutional order becomes a kind of inescapable sovereign. While constituent power can never quite become the ruling power, as Negri explains, 'constituent power must somehow be maintained in order to avoid the possibility that its elimination might nullify the very meaning of the juridical system and the democratic relation that must characterize its horizon' (1999: 3). Indeed, the EFF is not only necessary in order to promote democracy, but is necessary in order to justify the very legitimacy of the constitution, parliament, and even South Africa's social contract itself. Without the multitude which the EFF seek to represent, the South African social contract loses its *raison d'être*, for its specified purpose is to address the very poverty and unemployment which characterises this very group.

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