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# Constitution

of the Republic of South Africa, 1996

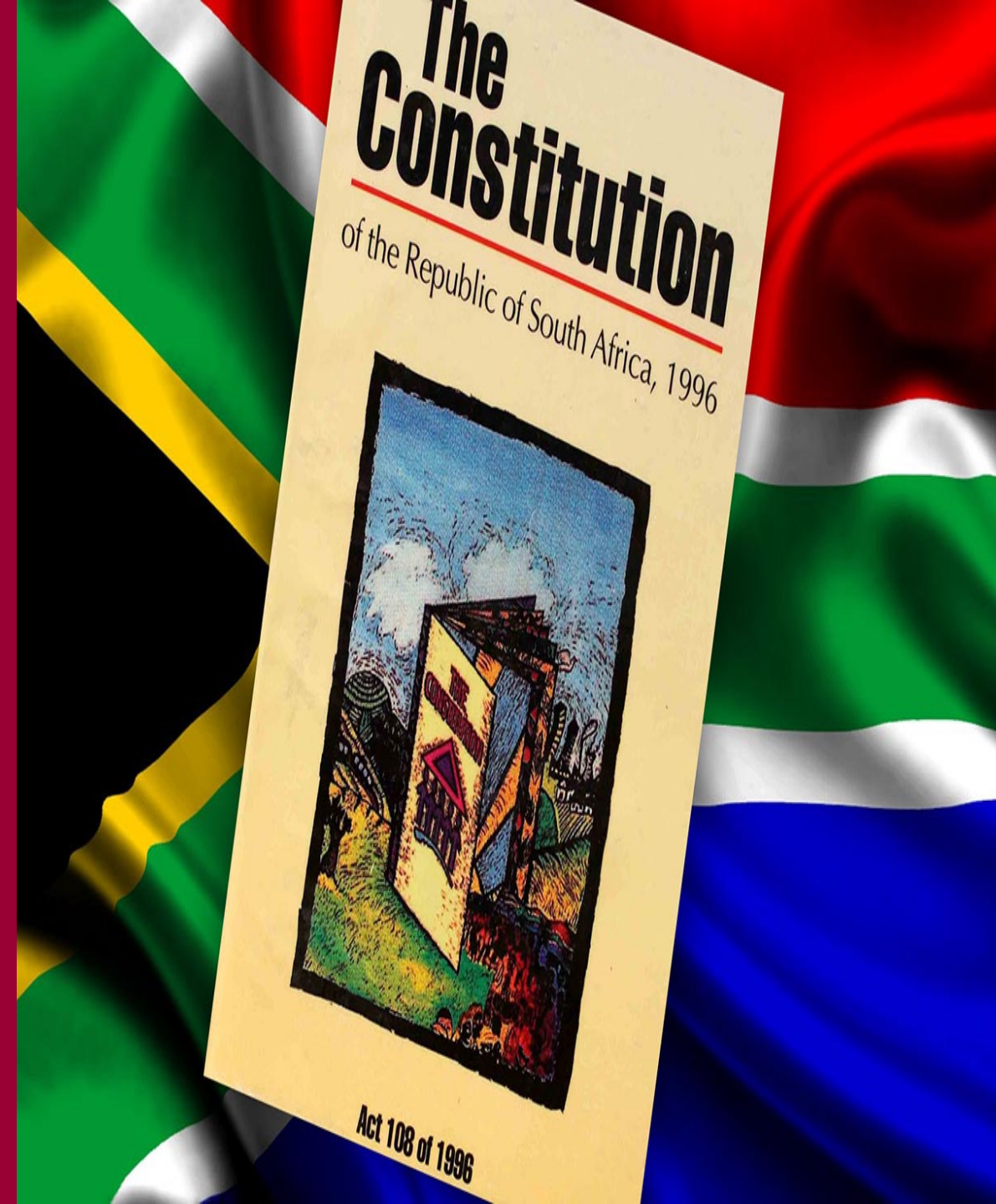
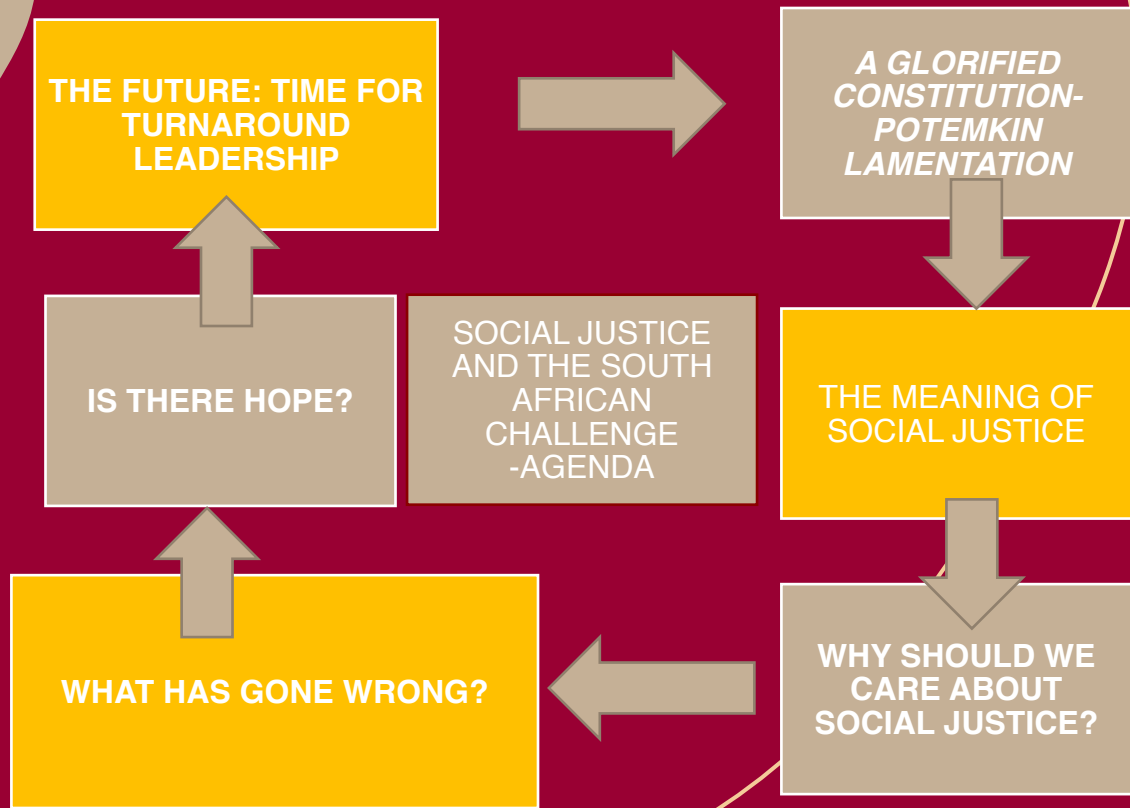
## SOCIAL JUSTICE – THE SOUTH AFRICAN CHALLENGE AND AGENDA

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**FVZS Institute- Leadership For Social Justice Programme: 22 May 2023**

# SOCIAL JUSTICE- THE SOUTH AFRICAN CHALLENGE





# ACKNOWLEDGEMENT AND SYNERGIES

The Centre for Social Justice(CSJ) is a platform that undertakes research, innovative policy tools design, training and stakeholder management to promote social justice scholarship and consciousness, public policy design skills and collaboration, in academia and society, to accelerate social justice reform.

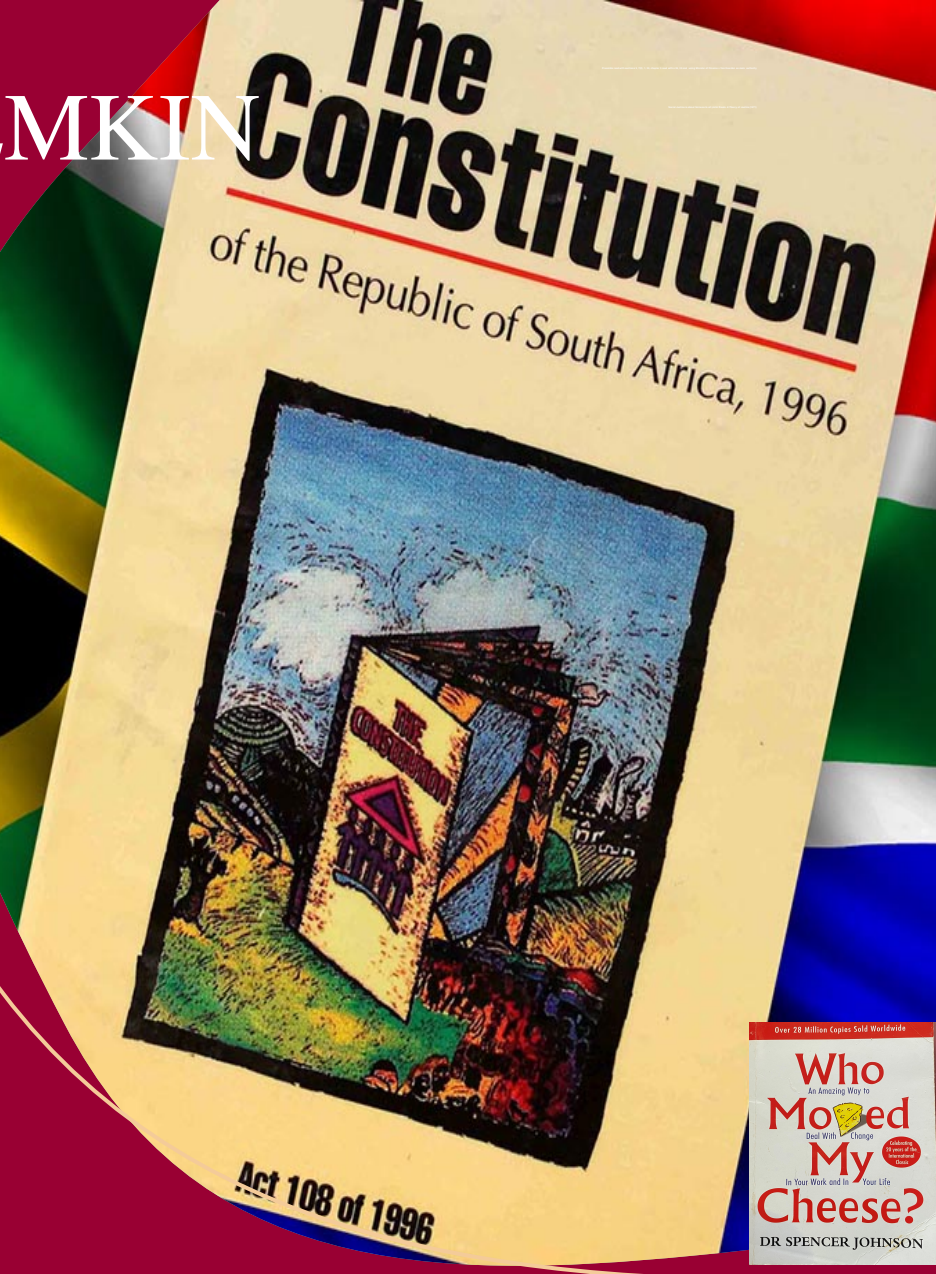
Leadership,

which is the FVZS focus, is essential for the transformative actions needed to advance social justice.



# A GLORIFIED CONSTITUTION- PÖTEMKIN LAMENTATION

Despite having Constitution that is globally venerated as a blueprint for transformative constitutionalism, South Africa is a county of lamentations regarding democratic governance, social justice and human rights, which are paradoxically the cardinal goals of the democracy sought to be established through the implementation of the Constitution adopted in 1996 following an interim Constitution in 1993. Are there bridges of hope that can be leveraged to get “Out of the Maze





# THE MEANING AND THEORY OF SOCIAL JUSTICE

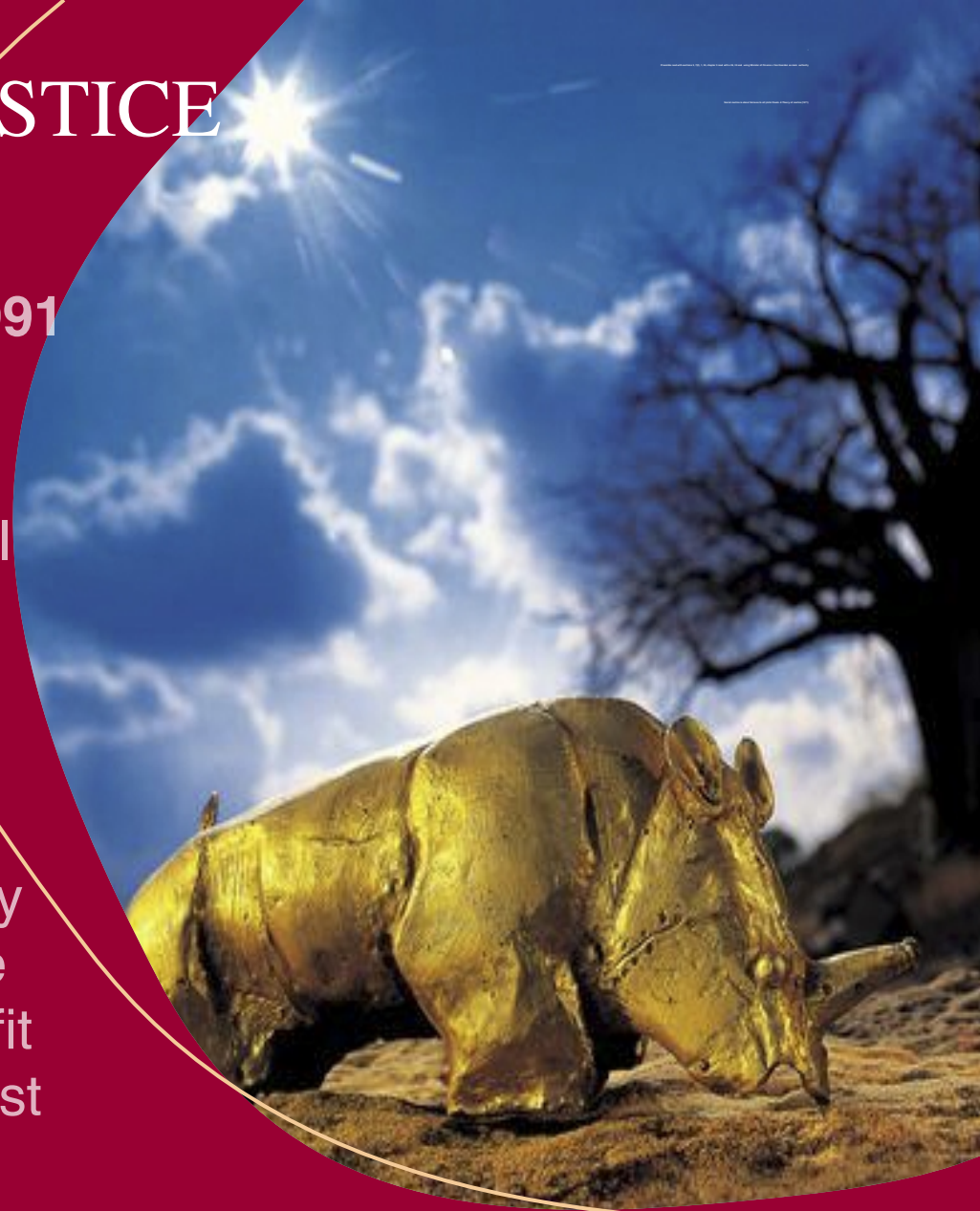
- *Social justice refers to the equal enjoyment of all rights and freedoms by all reflected in just, equitable and fair distribution of all opportunities, resources, benefits, privileges and burdens in a society, group and between societies. (CSJ, 2018)*
- *No group should find it easier or more onerous to exist in a socially just society*
- *Social justice is a human rights issue and a matter of ubuntu.*



# CONCEPT AND THEORY OF SOCIAL JUSTICE

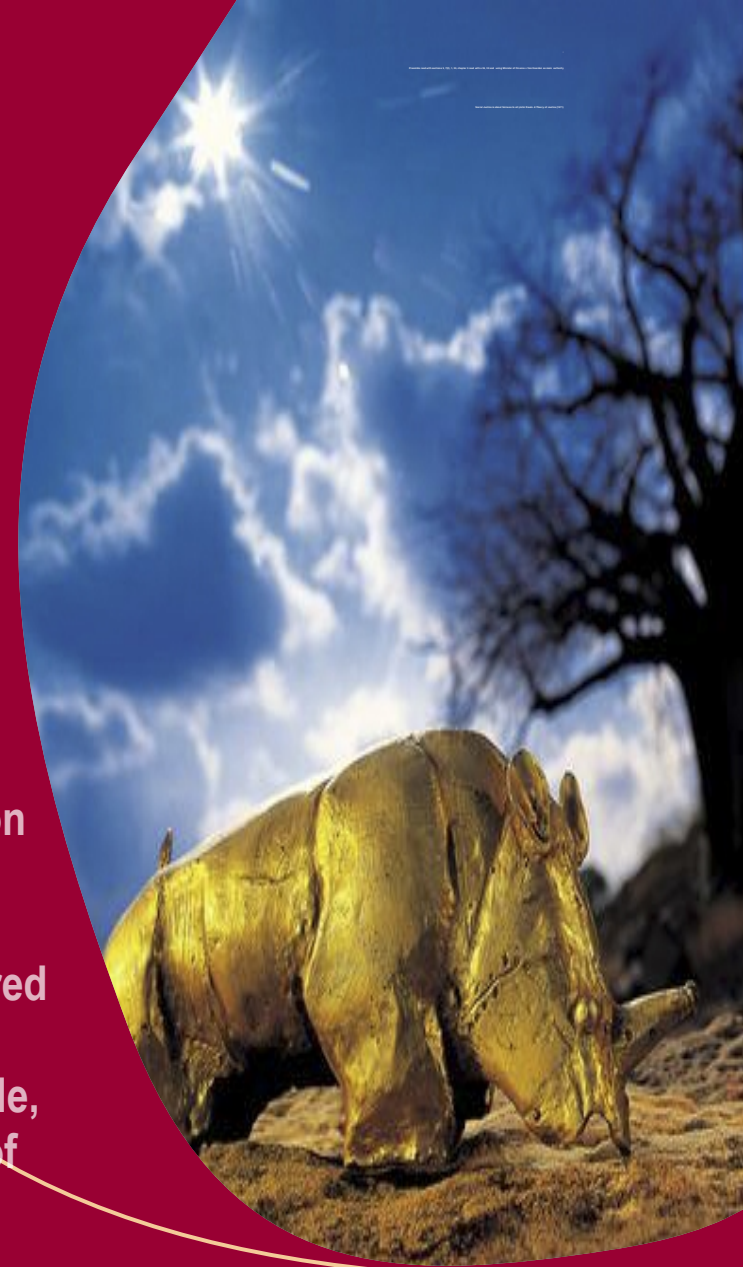
## John Rawls (1971): *A Theory of Justice* as revised in 1991

- Defines social justice as fairness to all. Believes it's an innate instinct that would be revealed in a social contract would be reached by a hypothetical community an Original Position operating under a Veil of Ignorance.
- Posits two defining principles regarding social justice, one being 1) the **principle of equality** which is about equal entitlement to fundamental freedoms and rights and the **difference principle**, which permits deviations from equality that advantage are attached to offices available to all on the basis of fair equality of opportunity and operate to the benefit of the least advantaged provided that does not vitiate the first principle



# CONCEPT AND THEORY OF SOCIAL JUSTICE

1. Plato: Importance of Justice among social classes
2. John Rawls Social Justice is fairness to all. “ *Justice is the first virtue of social institutions*” A *Theory Of Justice* (1971):
3. Nancy Fraser posits three dimensions of social justice (1997):
  - Redistribution
  - Recognition
  - Representation (Parity of Participation)Fraser: Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation
4. Social Justice is a dimension of Ubuntu Madala J in *S Makwanyane*
5. Chair in Social Justice: Social Justice has three dimensions (Prohibited differentiation, Required Differentiation and Restitution) and can be optimized when laws and policies are tailored consciously using the 9 dimensional Social Justice Impact Assessment Matrix (SIAM) and people, particularly leaders operate at the highest level of justice consciousness ( Level 5 on the Scale of Justice Consciousness ( Madonsela 2023)





# EVOLUTION AND PLASTICITY OF THE CONCEPT OF SOCIAL JUSTICE

Social justice is a concept that has displayed enormous plasticity since it was coined by Italian Jesuit philosopher in 1843 concerned about unconscionably skewed distribution of the fruits of the industrial revolution and commercial agriculture .

1843: Luigi Taparelli Coined the concept of social justice (1843) (Thomas Behr, *Social Justice and subsidiarity*

1919 *Treaty of Versailles*

Post World War 1; Associated with Socialism

1945-1948: Implied in UN Charter and Universal Declaration of Human Rights

1965: UN declared antiracism as part of social justice quest

1971: John Rawls, *A Theory of Justice : Social justice as fairness to all and justice as “ the first virtue of social institutions” p 3*

1995: Copenhagen Declaration; Associated with Human Rights and *S V Makwanyane* (Madala J ) saw social justice as a dimension of Ubuntu ( para

1995: *Grootboom: Jacob J said: “The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our Constitution records this commitment.”*

2004: Social justice as Substantive Equality – equal enjoyment of all rights and freedoms incorporating responsiveness to difference and disadvantage as well as restitutive measures in fidelity to constitutional duty to advance equality (equality duty) i.t.o (s) 9 read with s 7(2) (*Minister of Finance and Another v Van Heerden (Cross references to Bato Star.) Also note Harksen, PE Municipality, Zondi, Daniels v Scribante , Brink v Kirchoff and Mahlangu.*





# EVOLUTION OF JURISPRUDENCE ON SOCIAL JUSTICE AND EQUALITY

- **EQUALITY FOR EQUALS: *WOOKEY/ SCHLESIN AND PITJE***
- **EQUALITY AS SEPARATE AND UNEQUAL (*PITJE AND VOTING RIGHTS CASES*)**  
**EQUALITY AS SAME TREATMENT (*WHITEHEAD, MOSENEKE AND JORDAN*)**
- **SOCIAL JUSTICE AS SUBSTANTIVE EQUALITY (*VAN HEEDERN AND HUGO*)**
- **SOCIAL JUSTICE AS A DIMENSION OF UBUNTU (*S V MAKWANYANE AND PE MUNICIPALITY*) BUT CHALLENGES OF JURISPRUDENTIAL DISSONANCE (*BEADICA*)**



# WHY SHOULD WE CARE ABOUT SOCIAL JUSTICE: CONSTITUTIONAL BASIS FOR SOCIAL JUSTICE

In the death the penalty abolishing case, *S v Makwanyane*, Mahomed J reminded that unlike most constitutions, our Constitution does not affirm the status quo but provides a blueprint for transforming the society inherited from past injustices to an egalitarian one. This view of the Constitution is affirmed by Moseneke J in *Minister of Finance v Van Heerden* and by Madlanga, J, Froneman J and Cameron J in the land rights case *Daniels v Scribante*, among others. In *Makwanyane* Madala J further advises that Ubuntu incorporates social justice, fairness and equity

**In part, the preamble says:**

“...We the people of South Africa recognize the injustices of our past...believe that south Africa belongs to all who live in it, united in our diversity, We therefore , through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to- Heal the divisions of the past and establish a society based on **democratic values, social justice and fundamental human rights**

The Constitution further defines:

- Citizen entitlements: Bill of Rights ( Note s25, s27, 28 equality duty in 9(2) and 7(2) read with sections 36 and 39
- The structure of the state ensuring polycentric power sharing and accountability
- The Character of the State ( s 96, 136, 195 and 237)





# WHY SOCIAL JUSTICE - CONSTITUTIONAL BASIS FOR SOCIAL JUSTICE

•In *S v Makwanyane*, the death penalty abolishing case, Madala J, eloquently clarified the link between social justice, the African value of Ubuntu and the transformative ethos of the Constitution when he said:

“The Constitution in its post-amble declares:

“... there is a need for understanding but not vengeance, and for reparation but not for retaliation, a need for ubuntu but not victimisation...”

The concept “ubuntu” appears for the first time in the post-amble, but it is a concept that permeates the Constitution generally and more particularly Chapter Three which embodies the entrenched fundamental human rights. The concept carries in it the ideas of humaneness, social justice and fairness”

(Para 237, This is in reference to the Interim Constitution)

•Ubuntu as a constitutional a concept underpinning the society sought to be established through the Constitution adopted in 1996, has been affirmed in various constitutional court cases including *PE Municipality v Various Occupiers*> Ubuntu’s key principles include affirming the humanity of all and entitlement to treatment with equal consideration and respect combined with considerations of the interconnectedness of humanity and the quest for group survival (Tutu D, *No Future Without Forgiveness*)



# CONSTITUTIONAL BASIS FOR SOCIAL JUSTICE

In *Minister of Finance and Other v Van Heerden* ((6) SA 121 (CC), Moseneke DCJ stated:

“Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework (para 25)”

“Equality before the law protection in section 9(1) and measures to promote equality in section 9(2) are both necessary and mutually reinforcing (Para 31)

“Absent positive commitment progressively to eradicate socially constructed barriers to equality and to root out systemic or institutionalized underprivilege, the Constitutional promise of equality before the law and its equal protection benefit must, in the context of our country, ring hollow”.

This perspective on equality and related social justice was resonant with the reasoning of Ngcobo J in *Bato Star Fishing (PTY) v The Minister of Environmental Affairs and Tourism and Others* [2004 \(7\) BCLR 687](#), where he stated:

“In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.” (Para 37)





# WHY SOCIAL JUSTICE : THE COST OF INJUSTICE

**1. Compliance with constitutional and International human rights normative standards and obligations**

**2. Eschew negative impact on social cohesion and ensures sustainable peace**

*As long as there is injustice somewhere, there cannot be sustainable peace anywhere ( Madonsela T)*

**Renowned American economist, Adam Smith once said:**

**“Justice ... is the main pillar that upholds the whole edifice. If it is removed, the great, the immense fabric of human society ... must in a moment crumble into atoms”**

**3. Combat structural inefficiencies in the economy and development**

- Social injustice in one part can have a systemic impact on the whole**
- Some social justice intervention in one part can have a multiplying effect that disrupts inequality in other areas e,g. income and wealth**

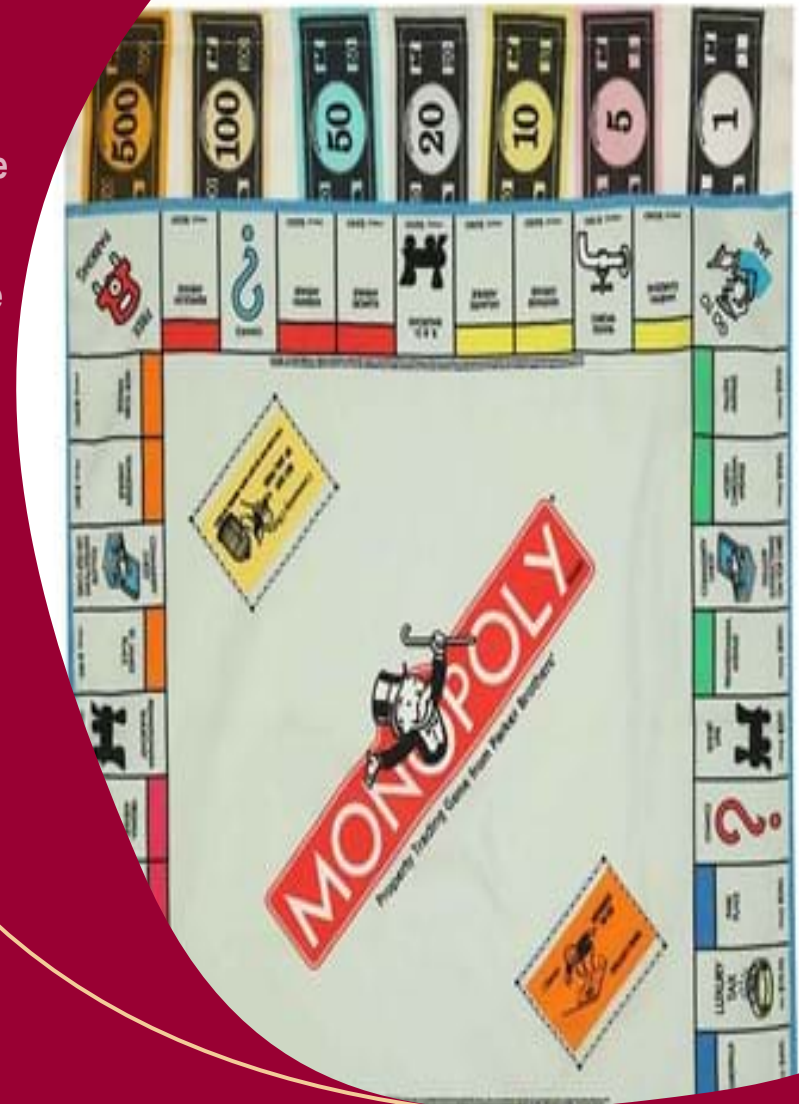


# WHAT ARE WE GETTING WRONG?

## Three Key Challenges:

1. Lack of shared theory of justice ( Social contract): Two dominant flawed theories on why we remain unequal (Past Injustice v Misgovernance whereas the social justice challenges are more complex )
2. Deficiencies in the science of change: Tendency to focus on compensatory / affirmative action special programmes without realizing that it is the ordinary laws that unjustly regulate in ways that exacerbate advantage and disadvantage due to being primarily tailored to the circumstances and needs of the advantaged in society
3. Conscious leadership deficit (Paucity of Ethical Purpose Driven, Impact Conscious and Committed (EPIC) Leadership compounded by leadership at lower levels of Justice Consciousness Theory . Five ( ) Levels of justice consciousness proposed with proposal that those who exercise public power should predominantly operate at level 5)

The Rugged Monopoly Game is an immersive praxis that uses gaming to cultivate social justice awareness on matters involving the legacy of state manufactured inequality through now repealed unjust laws and the futility of assumptions about equality of opportunity and unidimensional strategies such as fixing education, broken families, etc whose essence is to pathologize those who continue to bear the socio-economic deprivations that are a legacy of past unjust laws

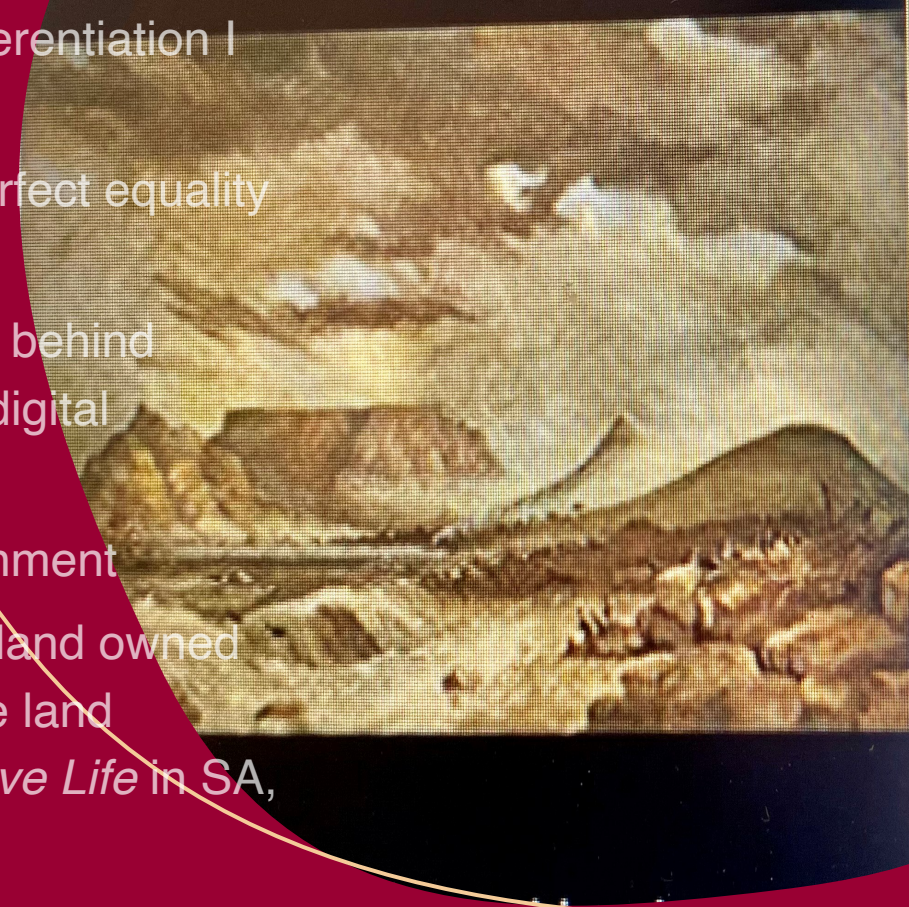




# IS THERE HOPE: Emerging Change Agenda

1. **Constitutional Court Jurisprudence** provides enough guidelines on the constitutional commitment regarding social justice, the equality duty flowing therefrom and interpretation to be attributed to the concepts of social justice and equality, which yields a three-dimensional lens comprising Proscribed hierarchizing differentiation, Difference responsive differentiation and Restitutive differentiation ( appropriate circumstances)
2. **Data Science Integration** into policy making to predict and bend imperfect equality and poverty futures in simulated settings (**Note SIAM**)
3. **COVID-19** lessons regarding the impact on the whole of leaving many behind regarding business ownership distribution, income, education, health, digital inclusion and community infrastructure, among others
4. **Just Energy Transition** lessons inspiring a reflective outlook in government
5. **Land Fallout** due to lack of meaningful progress in nearly 3 days with land owned by Africans, at 4.5% , which is much lower than when Sol Plaatjie' s the land lamentation over the 1913 Natives Land Act about a century ago ( *Native Life in SA*, 1914).
6. **Increase in social accountability** and political accountability through electoral reform
7. The SDG framework and energizing impact of the midterm review

Equality  
in South Africa  
1652-2002

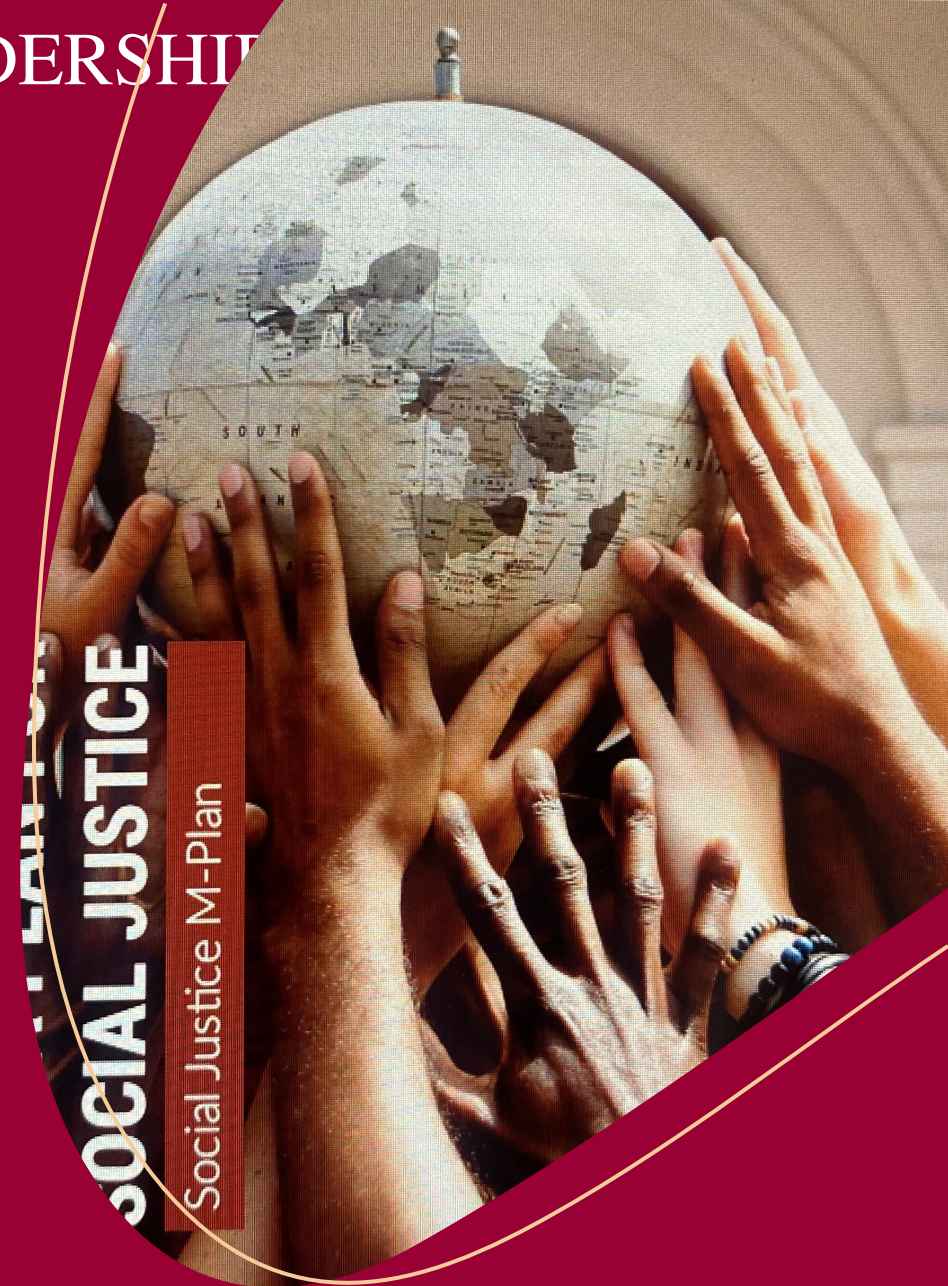




# CONCLUSION: TIME FOR TURNAROUND LEADERSHIP

**Social justice is about equal enjoyment of all rights and freedoms by all reflected in just, equitable and fair distribution of all opportunities, resources, benefits, privileges and burdens. At the core of social justice is fairness to all as highlighted by John Rawls. It is also a dimension of ubuntu as pointed out by Madala J in Makwanyane**

**The difficulty arises regarding determining what is fair. In the past those within proximity to power and control over economic resources deemed it fair to get a lion's share of opportunities, resources, benefits, privileges. The same could not be said of burdens, including those determining access to**





# CONCLUSION: TIME FOR TURNAROUND LEADERSHIP

Today the unfairness lies primarily in inadequate compensation for life's arbitrary lottery and restitution for state manufactured inequality through past legislated injustices. ( Terblanche 2002). The impact is growing inequality in a fractured world characterized by economic plus development stunting and heightened sustainability risks.

Ubuntu principles as espoused in *Makwanyane* could be the bridge of hope on advancing social justice in the manner originally envisaged, which is fairness to all not just regarding economic benefits of social cooperation but also regarding distribution of political power, social goods such as health and education as well as social prestige, incorporating cultural and epistemological validation of all.

Turnaround leadership that is anchored in Ubuntu would automatically operate at level 5 of the Justice Consciousness Scale by giving meaning to ubuntu values as embedded in African proverbs such as “ leaders eat last” thus energizing the quest for SDGs, with emphasis on SDGs 10, 1 and 16.



# GRATITUDE



- Thank you
- Dankie
- E Nkosi
- Asante Sana