

Democratising Development

The Politics of Socio-Economic Rights in South Africa

Edited by

Peris Jones and Kristian Stokke



Martinus Nijhoff Publishers

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Preface

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Peris Jones and Kristian Stokke.

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1. Introduction

Democratising Development: The Politics of Socio-Economic Rights

Peris Jones and Kristian Stokke

Human rights discourse increasingly enframes contemporary approaches to development. Previously, “human rights” and “development” lay as if two distinct islands in mutually uncharted waters. Socio-economic issues comprised a vast channel that put great distance between human rights and development. Only vaguely registering on the other’s radar, each “community” lacked the intrepidity required to explore unknown territory. In recent years, however, wherever we turn in development policy, be it at the level of United Nations agencies, bi-lateral donor agendas, international non-governmental organisations, and even state-civil society relations, the situation is changing. Even if they are not exactly integrated fields, then at least bridge-building between these “islands” appears to flourish. The “turn” to human rights and its deployment in the cause of development gives effect to a range of profound discursive, legal and institutional shifts, especially in regard to socio-economic rights. For the best part of half a century, and with only a handful of exceptions, the human rights “community” has ignored socio-economic rights.¹ One of the major outcomes of the growing dialogue therefore has been to place socio-economic rights firmly on both human rights and international development agendas.

Against this background, our point of departure is two-fold. First, we take a starting position in the debates on human rights that accepts that socio-economic rights are as legally and normatively valid as civil and political rights. Second, although socio-economic rights are there-

1 Uvin (2004) makes the observation, for example, that no major human rights watchdog organisations exist for Economic, Social and Cultural Rights. In recent years, however, there is a detectable gravitation in the advocacy and monitoring work of international human rights organisations towards socio-economic rights.

fore justiciable² and integral to a more holistic conception of human dignity, we also recognise that the fulfilment of these rights encounters political obstacles. The development process is prone to contradictory tendencies towards depoliticisation and politicisation. We believe that the former characterises much of the current international and national development agenda. If we are to undo this political deficit in development policy into which so many concepts such as “participation”, “empowerment”, “pro-poor” and, now, “rights-based development” fall and lose their radical edge, then we need to encourage a democratic politics of rights. This is the key concern in this introductory chapter and the book as a whole: the prospects and means of democratising development through a democratic politics of socio-economic rights.

State obligations to respect, protect and promote socio-economic rights are not only concerned with constitutional, legal and institutional frameworks, as important as these can be “for, at the very least, holding government accountable to constitutional commitments imposed upon it” (Davis 2004:6). What also appears to be critical is that upholding state obligations requires that citizens, and their organisational representatives, be considered legitimate participants and active agents in the process. In essence, the real potential lies in the way in which human rights interrogates, and consequently alters, the relationship between citizens and government.

The point, as we shall see in the various chapters, is not only that formal rights are guaranteed and institutionalised in South Africa but that a politics of acquiring and transforming such rights is enabled. The missing link for this transformative potential for human rights in development is not so much about asserting legal claims, again, as catalytic as they sometimes can be. Rather, it lies in “political struggles, in which human rights are tools that crystallize the moral imagination and provide power in the political struggles, but do not substitute for either.” (Uvin 2004:176). Understanding the transformative potential for human rights in this way provides greater nuance to readings of rights-based approaches to development by foregrounding local and national struggles and power dynamics. It also has the potential to substitute the formalised and technocratic approach characterised by minimalist institutional and judicial reform in current donor driven understandings of rights-based development. Instead there is potential for a more dynamic approach that also “at the end of the day forces donors to modify their own struc-

² That is, these rights can be invoked in a court of law.

tures, attitudes, behaviours, and incentive systems” (Uvin 2004:178).

In this chapter we continue by providing an overview of the meaning and position of human rights in international discourses on development. We place emphasis on the concept of rights-based development (RBD) because it represents a particularly prominent intersection between human rights and development discourse, not least in its potential for greater political accountability in development. This is then followed by a conceptual discussion of the significance of the relationship between democracy and socio-economic rights, before a general introduction to the post-apartheid politics of socio-economic rights in South Africa and the contributions to the book that follow.

1. “Placing” Human Rights in Development

After decades of splendid isolation, it is seemingly necessary to explore why there have been increasing bridge-building exercises between the human rights and development “communities” in recent years. Not least because addressing this issue also reveals the significant evolution that has taken place in thinking and practice not just between human rights and development actors but also within their respective “communities”. A starting point is to chart the contours of the separation in thought and practice of both our “islands”.

Whereas the Preamble to the International Covenant on Economic, Social and Cultural Rights (see in UN CESCR 2000), also following the Universal Declaration of Human Rights, accords socio-economic rights equal consideration to civil and political rights, it is undeniable that a bias has existed towards championing civil and political freedoms. The outcome has been to construct a “liberal consensus” which relegates socio-economic rights to the status of mere “aspirations” (Evans 2002). The emphasis upon civil and political rights therefore served to alienate many developmentalists concerned with material improvement, especially economic growth, associated with the project of development. The distinction between so-called “first” generation civil and political rights and “second” generation socio-economic rights is often attributed to issues of resource availability and the need to avoid interference in government decision-making over policy and budgetary allocation. To simplify, the first generation were often regarded as somehow “cheaper” to implement and also less problematic legally because states are obliged to *refrain* from actions that violate civil and political rights. Alternatively, socio-economic rights require positive actions and, hence, resources, in

order to fulfil and promote these rights. Whilst we reject this dichotomy in rights as false, and, indeed, a range of human rights declarations foreground the interdependence of both sets of rights, first generation rights nonetheless became the standard bearer of international human rights.

The Cold War era served to ice over these distinctions and solidified them. Whereas “civil” and “political” freedoms were the domain of human rights, “development” focused upon its post-World War Two mission to eradicate poverty, principally through industrialisation and economic growth. A recipient regime’s promotion of capitalist development often took greater precedence in determining development aid allocations and preferential treatment by donors, than whether it actually respected civil and political rights. An important historical opportunity to fuse the material concerns of development with the democratic content of political and civil rights was lost, with, we would maintain, detrimental effects for both.

When we historicise human rights, a potent reminder of the powerful role played by the geopolitical location of the different ideas and actors in influencing the human rights and development agendas is evident (Cornwall and Nyamu-Musembi, 2004). We can see at least two key examples wherein struggles in the global South challenged prevailing (Western) understanding and codification of human rights discourse. First, struggles for social justice against oppression that so defined the African anti-colonial liberation movements provided an important corrective to prevailing understandings of human rights:

The concept of rights was not something that was ‘God-given’ in its universality, but forged in the fires of anti-imperialist struggles. It was informed by the need to overthrow all forms (not just colonial) of oppression and exploitation, not by constructs that had either been embodied in the UDHR or imported into Africa by those nationalist leaders who had spent periods in exile or study in the imperial homeland. (Manji 1998, no page number).

It was this popular spirit of struggle for social justice that rapidly became dissipated and eclipsed by the prevailing discourse of development and politics of the post-colonial state in post-liberation Africa. This same spirit of struggle also imbued the liberation of South Africa, and, arguably, similarly threatens to be superseded unless a democratic politics of socio-economic rights can be entrenched.

Second, by the 1970s, actors from the global South again sought to give additional meaning and content to the human rights discourse. The

focus was the disenchantment with the New International Economic Order (NIEO). The NIEO was associated with the perception held by many countries in the South that benefits were unequally skewed towards the West. One early attempt to link the human rights and development agendas was found in efforts to realign the meaning of development as something other than economic growth and global inequality. In 1986, even before the end of the Cold War, the UN Declaration on the Right to Development, Article 1, 1 (Office of UN Commissioner for Human Rights, 1986) proclaimed that this right was an “inalienable human right by virtue of which every person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development”. Proponents of the “right to development” projected a human rights preoccupation with dignity and justice upon the inequalities of global development as a means towards achieving a fairer development process. Rather than offering a theoretical approach to a process of change, a “right to development” implies everyone has a right to a process of change which is compatible with the human rights norms listed in international human rights treaties. For all its rhetoric, Marks (2003:15) suggests that “[I]t is unfortunate indeed that after 30 years of scholarly writing and diplomatic efforts to understand the right to development, and 15 years after the Declaration was adopted, the debate remains polarised and confused”. We might ask, why? There was certainly legal ambiguity. But we could also inquire as to whether Western countries perhaps used this ambiguity as a smokescreen to obscure political implications. Article 3, 3, for example, includes “States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights”. The emphasis upon global inequity and commensurate donor obligations was probably much too political for Western states. This would explain why bilateral donors tend to avoid reference to the Right to Development in contemporary debates.³

3 According to Cornwall and Nyamu-Musembi (2004), proponents of a rights-based approach within the United Kingdom’s Department of International Development, for example, were actually advised by their Foreign Office to exclude reference to the Right to Development.

Nonetheless, proponents did contribute to foregrounding human rights within the development process through the principle that all human rights must be respected in development planning and implementation (Marks 2003:15). By implication, proponents of the right to development also contributed to inserting socio-economic rights more prominently into the landscape of human rights itself. By advocating along the lines that the well-being of an entire population can only be improved through “the expansion of opportunities and capabilities to enjoy those opportunities” (Sengupta 2000:566), a significant opening was created for human rights and development to overlap. However, the era of IMF and World Bank initiated Structural Adjustment Programmes (SAPs), for Sub-Saharan Africa in particular, led to erosion of the kind of social and health infrastructure required in creating and enjoying the “opportunities” so conducive to greater well-being.

At the time that criticism against the SAPs heightened, the Cold War was also coming to an end. The apparent collapse of a viable ideological alternative to liberal capitalist development also led to the upsurge of interest by development donors in promoting the “victorious” model of liberal democracy within the developing world. Criticism of SAPs, not least from economists within those multilateral institutions associated with the SAPs who sought explanations for why they had not been as effective as anticipated, overlapped with the triumphalist mood of Western donors to find common focus in the promotion of “good governance” in development cooperation. Although in its narrowest guise concerned with minimalist institutional reform, the rule of law and multi-party elections, the good governance agenda and the associated use of political conditionality was at least extremely influential in reinserting the role of democratisation in the development process. Development aid and preferential trade agreements were linked to the burgeoning agenda of encouraging recipient political and administrative reform. Donors would decrease, or, even cease, development aid to a recipient if it perceived human rights abuses had taken place, or, that democratisation was being openly opposed by the regime. There is not the space here to detail the problematic nature of this agenda, especially in terms of its dubious ethics, double standards, and doubts over its effectiveness (Lumina 2004).

In view of the problems with the donor imposed agenda there was a shift to a more incentive-oriented promotion rather than punitive model of good governance. Human rights also entered development therefore through so-called “positive conditionality”. Specific targeted funds were

provided for administrative reforms and projects promoting the rule of law in particular, such as training for judges, legal reforms, police training, Human Rights Commissions and so on. Furthermore, more and more development aid was being delivered directly as budget support to recipient governments. As a result, donors are promoting the rights-based discourse possibly as a means to encourage accountability over the way this money is spent (Cornwall and Nyamu-Musembi 2004). But whilst development was increasingly associated with human rights and democracy, there was nonetheless a continuing absence of social and economic rights on the good governance agenda, which even downgraded the significance of these rights (Sano and Alfredsson 2002). In view of the deepening poverty globally and growing discontent directed at the model of development promoted by the IMF and the World Bank (Stiglitz 2002),⁴ these institutions and bilateral development agencies (DFID 1997, 2000; Norad 2002) embraced the discursive shift towards “poverty” and “participation”. These shifts were not necessarily benevolent but rather related to the important political pressure generated by NGO lobbying and activism. These NGOs had been influential in promoting social and economic justice at the World Social Development Summit in Copenhagen in 1995. Furthermore, the Vienna Conference on Human Rights in 1993 declared the interdependence of human rights and helped to demarcate something of a sea change in relations between “human rights” and “development”.

One tangible outcome of these shifts was multi-lateral agency promotion of the Poverty Reduction Strategy Papers (PRSP), which combined a focus upon both poverty and a new participatory-oriented discourse. The PRSPs became the new template for future assistance and negotiations over the Heavily Indebted Poor Countries debt relief initiative. The World Development Report for 2006 continues to locate concerns over “equity” in development and human rights further into the World Bank’s historical mission to promote capitalist economic growth. Whilst significant differences undoubtedly continue to separate the Bretton Woods institutions from the UN agencies, there is apparent convergence around and reorientation towards placing human rights more centrally within the development process. It is perhaps Amartya

4 In discussing the policies associated with the so-called Washington Consensus of the IMF and World Bank, Stiglitz (2002:20) suggests that ‘[I]n many cases commercial interests and values have superseded concern for the environment, democracy, human rights and social justice.’

Sen's analysis, which contributed to the UNDP Human Development Report 2000, that best captures the contemporary *leitmotif* of international development in its convergence, rapprochement, even, between neo-liberal economics and rights-inspired institutional architecture:

What is needed is not a rejection of the positive role of the market mechanism in generating income and wealth, but the important recognition that the market mechanism has to work in a world of many institutions. We need the power and the protection of these institutions, provided by democratic practice, civil and human rights, a free and open media, facilities for basic education and health care, economic safety nets, and of course, provisions for women's freedom and rights. ... The real debate associated with globalisation is, ultimately, not about the efficiency of markets, nor about the importance of modern technology. The debate, rather, is about inequality of power, for which there is much less tolerance now than in the world that emerged at the end of the Second World War. (Sen 2000)

No longer regarded as the outcome of development but rather as the critical means to achieving it (UNDP 2000), human rights march ever deeper into the development terrain. The outcome is an elevated focus upon political, economic, social and cultural rights understood as "claims to a set of social arrangements – norms, institutions, laws, an enabling economic environment – that can best secure the enjoyment of these rights" (UNDP 2000:73). The UNDP report (UNDP 2000:73) goes on to say that "[i]t is thus the obligation of governments and others to implement policies to put these arrangements in place". Reciprocally, the human rights treaty bodies of the UN, such as the UN Committee on Economic, Social and Cultural Rights, and the United Nations Office of the High Commissioner for Human Rights, have taken an increasing interest in the PRSP process, and in regarding poverty as inhibiting the enjoyment of human rights (see Nowak 2005 for an overview).

This brief summary of how bridge-building evolved also says as much about how each "community" has sought to respond to intellectual and political critique and challenge. It should therefore perhaps be expected that there will be different gradations of integration and commitment to a human rights based approach to development. Uvin (2004) evokes this as the uneven movement of actors along a spectrum encompassing the human rights approach to development. At one end of the spectrum are the rhetorical positions of some development co-operation actors, still unconvinced, yet, dedicated followers of fashion

who cloak their work in the guise of “human rights”. Then there are intermediate positions, as discussed above, where human rights are introduced into development via the donor driven, good governance agenda. At the other end of Uvin’s spectrum, however, is a more integrated and committed relationship termed the “human rights-based approach to development” (RBD).

2. Rights-based Development

Characterised as iterative and evolutionary, RBD draws on and learns from a broad range of intellectual ideas and policy frameworks (for some of the overlaps and differences with other related approaches, see Marks 2003; Mohan and Holland 2001). It is, however, not merely an add-on to development but rather a fundamental shift in values:

[T]he rights-based approach to development changes the nature of the game not because it edicts rights as fixed properties or legal certainties or because it somehow leads us to discover brand-new actions or services we would never have thought of beforehand. Rather, there are two basic ways in which the rights-based approach to development differs from its predecessors, and they permeate all we do when we “do” development. First, an RBA creates claims and not charity (the *end* of development aid differs, and consequently the whole process of thinking about it, of defining the nature of the problem, changes as well - a new vision emerges). Second, an RBA affects the way development actions are implemented (the *means*, the processes, are different, even if many goals remain the same. (Uvin 2004:129)

“A rights-based approach to development”, according to Frankovits (2005:4-5), “integrates the norms, standards and principles of the international human rights framework into the plans, policies and processes of development.” The approach therefore impacts on national planning priorities by having the ability to redirect resources and to militate against policies that undermine the realisation of economic, social and cultural rights. RBD therefore has unavoidable consequences for development processes. An integral feature of RBD, therefore, is that it provides a cohesive, or, “interdependent” in human rights parlance, normative and legal framework derived from internationally negotiated norms and legal standards (Andreassen 2003). As the main duty-holder, these standards are binding on states and enable scrutiny of state obliga-

tions to respect, protect and fulfil each right. Rights-based approaches utilise the principles embodied through the “right to development” as a “complementary perspective that offers a grid of development norms and goals” (Andreassen 2003:32). The difference between the two might be better understood as relating to the scale of implementation. Whilst the right to development does not preclude national implementation, which is more closely related to RBD, it is more preoccupied with the development process per se, and international development co-operation (Marks 2003). The implication, nonetheless, is that rights are indicators of change, standards for planning and assessment that development actors can use to establish clear objectives, ensure meaningful participation and set appropriate benchmarks and indicators (Frankovits 2003; Andreassen 2003).

There are considerable implications of the growing emphasis upon social, economic and cultural rights – such as the right to work, health, education, and so on, for legitimising human rights approaches in policy dialogues (Frankovits 2003; and see Jones 2003). RBD is particularly relevant when addressing a specific sectoral issue. Talking about health, for example, Yamin succinctly captures some of the key elements of RBD and the implications for state duties:

[A]sserting a right to health means that not only has a government moral or humanitarian responsibilities to attend to the health needs of the most vulnerable and economically disenfranchised of the population, but it also has legal obligations that, at minimum, require it to establish a normative framework consistent with international law, to reflect health as a priority in its budget, and to devise a plan to take deliberate steps to move toward the progressive realization of the right to health. (Yamin 2002:38–39)

A human rights perspective therefore provides normative and legal protection to vulnerable groups in particular, which is further reflected in the principles of “minimum core” and “adequate realisation”. Here, in view of resource constraints placed particularly upon poorer countries, we are concerned with the steps that states take toward the progressive realisation of the right in question to the “maximum available extent of its resources”. Minimum core obligations, are regardless of resources “to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights” (UN CESCR 2000). The approach therefore embraces those most in need as it identifies those whose rights are most denied. The empowerment of the neediest based on the recognition of state