



SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

Symbols or Substance?

Edited by Malcolm Langford, Ben Cousins,
Jackie Dugard and Tshepo Madlingozi

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Socio-Economic Rights in South Africa

SYMBOLS OR SUBSTANCE?

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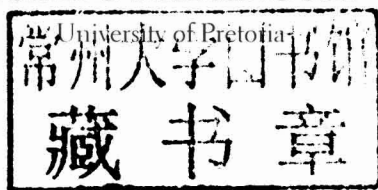
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SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

The embrace of socio-economic rights in post-apartheid South Africa has featured prominently in scholarship on constitution making, legal jurisprudence, and social mobilisation. But it has also attracted critics who claim that this turn towards rights has not generated substantive social transformation in practice. This book sets out to assess one part of the puzzle. It asks what has been the role and impact of socio-economic strategies and tactics used by civil society actors. Focusing on a range of rights and national trends in law and political economy, the book's authors show how socio-economic rights have influenced civil society discourse and action. The evidence suggests that some strategies have achieved positive (and occasionally negative) material and political impacts, but this is conditional on the nature of the claims, the degree of mobilisation and alliance building, and the underlying constraints.

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Preface

The origins of this book are diverse. The kernel of the idea was born in a discussion in 2009 about the impact of the South African Constitutional Court's landmark *Grootboom* judgment.¹ Was it an illustration of everything positive or everything negative about the uptake of socio-economic rights in post-apartheid South Africa? Was the judgment and its various impacts a vindication of the housing rights for highly marginalised urban dwellers, facilitating emergency assistance and protection from eviction? Or was it Exhibit A of the danger that relying on socio-economic rights might narrow the frame of political struggle and leave communities and individuals without any remedies of substance.

The discussion itself occurred in the context of a meeting of South African civil society organisations and university centres that benefitted from Norwegian government support for work on human rights, particularly on socio-economic rights.² As this decade-long programme of support came to an end in 2010, it was pertinent to ask: what have these and other organisations achieved through their turn to socio-economic rights as a means to address poverty and inequality in the post-apartheid era? What is the actual evidence and how should we assess it?

The result is this volume of fifteen contributions, which draws together scholars and some advocates from a range of disciplines. Together, the authors analyse the effects of different socio-economic rights and strategies employed by civil society

¹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (*Grootboom*).

² Since 1998, support for human rights was included in development cooperation between South Africa and Norway as part of the human rights and democracy portfolio. The support was coordinated by the Royal Norwegian Embassy and administered by the Norwegian Centre for Human Rights, University of Oslo. In the period 2005–2010, these organisations were supported: PLAAS (The Institute for Poverty, Land and Agrarian Studies, University of Western Cape), Rape Crisis, Community Law Centre (University of Western Cape), Open Democracy Advice Centre, Women's Law Centre, Centre for Applied Legal Studies, Tshwaranang Legal Advocacy Centre, Legal Resources Centre, Church Land Programme, Centre for Human Rights (University of Pretoria), International Center for Transitional Justice, Coma Care, and Lawyers for Human Rights.

formations and organisations, and more broadly assesses the relevance of socio-economics rights as a political and legal resource for tackling poverty and inequality and strengthening social mobilisation and action. We are deeply grateful to all the authors for their willingness to grapple with the objectives of the book – we hope all have benefitted as much from the process as we have. We thank the authors particularly for new insights and perspectives shared.

This book would not have been possible without generous and sustained support from the Norwegian Embassy in South Africa. Special thanks go to Ingrid Skølass and Mai-Elin Stener at the Embassy for facilitating this process. Thanks also go to the University of Western Cape and the Legal Resources Centre, which together organised the first workshop in 2010 at which the themes for the book were partly discussed and to Tara Smith who organised a follow-up authors' workshop in 2011. At the Norwegian Centre for Human Rights, Cheryl Lorens and Tara Smith provided invaluable editorial assistance and Siri Skåre and Kristin Høgdahl provided helpful guidance on the process; at SERI, Katherine Drage and Elisabeth Koek carefully read and proofed each chapter. In the production of the book, we are very grateful to John Berger at Cambridge University Press for his deep support in driving the project forward; Shana Meyer at Aptara, Inc., for shepherding the book through its various phases; and Katherine Faydash for her painstaking copyediting of the entire manuscript.

Ultimately, we express our gratitude to our various 'research objects', the organisations and individuals who have struggled in different ways to improve the situation in South Africa. We hope that the pages of this book contribute to a critical and informed approach to the question of rights and social change in the cauldron of practice. Socio-economic rights still represent a relatively new paradigm and should be subject to more experimentation and ongoing reflection rather than hard and fast conclusions. The essential message of this book is that these rights can be a lever for change but that their potency is dependent on underlying factors and strategic choices.

Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi

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Introduction

Civil Society and Socio-Economic Rights

*Malcolm Langford**

In the English-speaking world and beyond, South Africa is habitually held up as the poster child of socio-economic rights. The Constitution and subsequent legislation contain a panoply of justiciable socio-economic rights; court jurisprudence has offered supportive and intellectually robust interpretations; and post-apartheid social mobilisation has been fused with rights-based discourse and headline-grabbing victories. One consequence is that the case of South Africa figures prominently in comparative discussions of constitution making, legal jurisprudence, policy development, and social mobilisation (see Porter, 2009; Sunstein, 2004: 159; UN Development Programme, 2006). Alston (2008: ix) notes, for example: “Rarely have the developments in the field of comparative constitutional law been so dominated by the jurisprudence not only of a single country but in this case of a single court.”

However, the failure of South Africa to match this narrative with social transformation in practice has generated a counter-narrative. Calls for rights-based strategies can be equally met with scepticism on the basis of the South African experience. It is not uncommon to hear the bivariate complaint that poverty and inequality remain persistent despite the legalisation of socio-economic rights. Although significant progress has been made on selected socio-economic indicators, unemployment is rampant; life expectancy has fallen (principally due to HIV/AIDS); and access to housing, basic services, affordable food, and quality education remains highly unequal on the basis of race, class, sex, and location. The critiques can be more specific and focused on socio-economic rights discourse and practice itself: that landmark judgments remain unimplemented or that the ‘rights culture’ has hindered the development of alternative paths for social change. Such complaints are diverse and not necessarily unidirectional or unispatial. But they certainly demand investigation

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if socio-economic rights are to be championed as “integral components of poverty reduction strategies” (UN OHCHR, 2002).

This book sets out to assess one part of the puzzle of the contrasting narratives on South Africa: what has been the role and impact of socio-economic rights strategies by civil society actors?¹ With a focus on the period 2000–10 and a range of socio-economic rights, we ask a series of interrelated questions. How have a diverse group of actors, from marginalised local communities and social movements through to highly professionalised non-governmental organisations (NGOs) and trade unions, used the linguistic and strategic resource of socio-economic rights? What have been the direct and indirect impact of ‘rights-based’ strategies (or tactics)?² in light of feasible alternatives? And what theoretical and practical conclusions can we draw from the strategies that will be of relevance in South Africa and globally – are particular approaches more effective than others under particular conditions?

It is important to distinguish these objectives from several connected questions in law and social science. For instance, we are not asking whether South Africa is complying with socio-economic rights from a legal or normative perspective or seeking to map out the current state of law, policy, or jurisprudence. We are not exploring, in one variant of social science literature, whether a rights framework *per se*³ positively affects the realisation of human rights (e.g., Simmons, 2009a) nor, in another variant, attempting to explain the rise of social movements that have embraced socio-economic rights (Chong, 2010; Thompson and Tapscott, 2010).

By necessity, the book does cover some of the ground that is embedded in these alternative inquiries. Civil society discourse and strategy are triggered by the belief that there is a compliance failure: the renaissance of oppositional civil society action in post-apartheid South Africa is driven by a deep sense of injustice over perceived violations and dashed expectations. As civil society organisations employ the opportunities offered by institutional architecture for socio-economic rights, the evidence generated in this book on impact (or lack of impact) adds to the separate debate on the effects of establishing rights-based frameworks. Equally, the case studies contribute to a broader social movement literature of how “citizens mobilize to claim their rights, protect their resources, and gain recognition for their identities” (Gaventa, 2010: xi).

Nonetheless, our purpose is different. It takes a clearer departure point in the ‘politics of rights’. As Scheingold (1974: 7) puts it:

The political approach . . . prompts us to approach rights as skeptics. . . . Instead of thinking of judicially asserted rights as accomplished social facts or as moral imperatives, they must be thought of, on the one hand, as authoritatively articulated

¹ By non-State actors our focus is on civil society organisation that has some organised or associational form: principally social movements, NGOs, faith-based groups, and community-based groups or associations (formal or informal).

² On the extent to which we are referring to strategies or tactics, see the discussion in Section 3.1.

³ This might include the Constitution, legislation, policy, institutions, and even judgments.

goals of public policy and, on the other, as political resources of unknown value in the hands of those who want to alter the course of public policy.

This approach is tackled in two ways. We wish to ontologically understand the rights discourse of a particular set of actors and explore the effects of the choice of particular rights strategies. To put it in a circular fashion, our focus is on the impact of socio-economic rights on civil society, and vice versa. And in this sense, the book shares more in common with a longer tradition of American literature on non-State action and civil rights (Epp, 1998, 2009; Handler, 1978; Lobel, 2007; McCann, 1994).

There is, of course, a growing South African literature on this topic. The edited volume by Jones and Stokke (2005) interrogated the political impact of emerging strategies in labour, health, and land rights, and Robins (2008) presented a rich and synthesised analysis of a 'rights revolution' through an anthropological lens that focuses on a number of NGOs and social movements. A number of articles and book chapters have focused on particular case studies (e.g. Wilson, 2011), some book chapters have analysed the impact of judgments in particular fields like health and education (e.g. Berger, 2008) while Handmaker and Berkhout (2010) contribute case studies on some recent struggles.

Whereas this study bears some similarity to this literature, it broadens the frame in various respects. The analysis is conducted across a wider range of socio-economic rights, which results in the inclusion of many under-studied rights and organisations. To this is added a broader array of rights-oriented strategies and tactics – from protest and litigation through to policy research and awareness raising. As much as possible, the time period for the analysis is also extended beyond the standard few years, potentially avoiding some of the dark side of 'evaluation culture' (Gready, 2009).⁴ A final distinguishing feature is that we take a sceptical approach to any received wisdom of claims of success or failure. As some chapters demonstrate, we may need to revise prior conclusions on the effectiveness of particular strategies in both directions.

The remainder of this introduction sets the scene and framework for the book. Section 1 sketches the recognition of socio-economic rights in the legal, policy, and institutional frameworks of post-apartheid South Africa; the degree to which these rights have been realised in practice; and debates over the causes behind the mixed progress. The revival of 'oppositional' civil society activity over the past decade is described in Section 2, with a particular focus on its rights character and the subsequent critiques. Section 3 establishes a skeletal methodology for the book: after setting out different ways of identifying possible 'socio-economic rights-based' strategies, it attempts to untangle the different concepts behind measuring 'impact' – including its content, baselines for assessment, constraints on civil society action,

⁴ Gready (2009) notes that impact assessments commissioned by donors of their grantee human rights organisations risk promoting a technocratic understanding of human rights practice, together with an unrealistic demand for short-term and verifiable results. This problem can also be seen in academic analyses: see Hirschl's (2004) treatment of South Africa for a case in point.