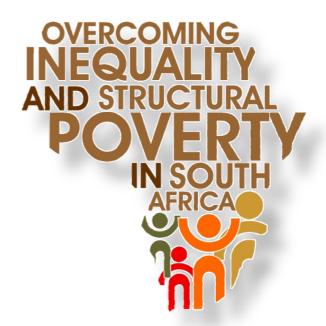# Making rights work: Towards a broader role for rights mobilisation in challenging poverty and inequality in South Africa

Kate Tissington

Socio-Economic Rights
Institute of South Africa

OVERCOMING
INEQUALITY
AND STRUCTURAL
POVERTY
IN SOUTH
AFRICA

PLAAS
Institute for Poverty, Land and Agrarian Studies

studies in poverty
& inequality
institute

isandla
institute

Chronic Poverty
Research Centre

European Union

FORDFOUNDATION
*Working with Visionaries on the
Frontlines of Social Change Worldwide*

Making rights work:

Towards a broader role for rights mobilisation in challenging poverty and inequality in South Africa

Kate Tissington

Research and Advocacy Officer

Socio-Economic Rights Institute of South Africa (SERI)

6th floor Aspern House, 54 De Korte Street. Braamfontein 2001, South Africa.

Tel: 011 358 5862. Cell: 072 220 9125. Fax: 011 339 5950. Email: kate@seri-sa.org

Making rights work: Towards a broader role for rights mobilisation in challenging poverty and inequality in South Africa

Kate Tissington

Research and Advocacy Officer

Socio-Economic Rights Institute of South Africa (SERI)

This paper contemplates a broader conceptualisation/role for socio-economic rights use and mobilisation in South Africa, which not only mitigates the effects of poverty and inequality but also undertakes to address the systemic causes. A brief analysis of poverty and inequality is undertaken which highlights the need for a pro-poor growth path that promotes job creation in South Africa, and the need for public spending to be more effective and efficient. Socio-economic rights are briefly contextualised and a number of critiques of rights discourse and mobilisation are advanced with a view to advocate for a broader conceptualisation of, and usefulness for, a rights-based approach to challenging poverty and inequality. Rights are described as a tactical and political tool, with lawyers having a unique role to play in this regard. Finally, some empirical evidence is discussed around two case studies dealing with litigation in the in the inner city of Johannesburg, and mobilising around informal settlement upgrading in Gauteng.

1.   Introduction

This paper attempts to advance a broader conceptualisation and role for a rights-based approach i.e. rights discourse and mobilisation, so as to highlight opportunities within the rights framework to make social change and address structural poverty and inequality in South Africa. The current context for this analysis cannot be overemphasised. South Africa is a relatively new constitutional democracy still grappling with apartheid spatial, institutional, racial and income inequalities and currently in the throes of political and economic turmoil. The ruling African National Congress (ANC) faces crippling in-fighting and factionalism, while the once thought to be impenetrable Tripartite Alliance is showing serious cracks with an impending split on the horizon. Unemployment is increasing and recent municipal and public sector strikes over wage increases and benefits highlight the dissatisfaction of public servants, most notably in the health and education sectors. Further, there is a crisis at the local government level with corruption and mismanagement of funds in municipalities resulting in many being placed under financial administration. Frequent service delivery protests around the country highlight the alienation of communities from the state, and frustration at their lack of 'voice' in local development issues. More obviously, they highlight the dissatisfaction of those living in informal settlements and townships over poor or non-existent delivery of housing and municipal services.

While South Africa is a middle-income country with resources and infrastructure akin to many so-called first-world countries, it is also one of the most unequal societies in the world, with inequality showing no sign of decreasing in the future. At the same time, it is one of the few countries which has justiciable socio-economic rights, which include access to housing, water, education, health etc. This means that socio-economic rights, together with civil and political rights, are entrenched in the Constitution of the Republic of South Africa and are enforceable by courts.

This paper thus presents a brief 'situational analysis' of thinking around rights discourse and mobilisation. Each of these groups operates within a

particular discourse, methodology and understanding of what socio-economic rights mean, how far we have come in realising them and what needs to be done moving forward. Of course, within these groups there too are differing viewpoints and attitudes. Civil society is no homogenous monolith. Neither is government. Within a municipality, for example, there are different departments often running contrary to each other's goals as well as divisions between policy advisors, technical officials and politicians. Inter- and intra-governmental disputes, confusion or obfuscation over roles and responsibilities, and corruption remain major barriers to effective service delivery, despite attempts to address these.

Socio-economic rights discourse and mobilisation are practical and useful in particular contexts. Criticisms of the rights paradigm (e.g. Pieterse, 2007; Bond, 2010; Roithmayr, 2010; McKinley, 2010) offer valid and useful insights into shortcomings of the paradigm, and will be discussed with a view to move beyond simplistic analyses in order to conceptualise a role for rights discourse and rights-based struggles which lifts theoretic 'paper rights' into real action on the ground leading to social and economic transformation.

The focus of the paper is unashamedly on urban poverty and inequality, and the specific problems and challenges faced in cities with regard to access to housing for the poor. Sixteen years since the first democratic elections and many South Africans, dispossessed during apartheid, still do not have access to land, housing and basic services[1] and do not earn enough to access the 'normal' residential property market. While cities depend on the cheap labour of people living in its informal settlements, backyard shacks and inner city slum buildings, they are excluded in almost all other ways. Legal challenges around access to inner city housing in Johannesburg and the current struggles of hundreds of thousands of people living in informal settlements in Gauteng will be discussed with reference to past and potential roles of rights use and mobilisation in addressing poverty and challenging inequality. The author works at a recently formed non-governmental organisation (NGO) called the Socio-Economic Rights Institute

---

[1] While these rights are rightly differentiated and dealt with separately, they are in fact a function of each other and contribute to an adequate standard of living and quality of life.

of South Africa (SERI),[2] set up to provide socio-economic rights assistance to individuals, communities and social movements, so much of the empirical evidence comes from first-hand experience working in an organisation dedicated to exactly that which this paper attempts to cover – making socio-economic rights work to overcome poverty and inequality.

As for the outline of this paper, section two of the paper will provide a brief overview of debates around structural poverty, inequality, unemployment and social spending in South Africa. Section three will examine socio-economic rights more closely and unpack some of the critiques and challenges of the rights framework. This section will also move beyond the critiques and attempt to advance a broader conceptualisation of rights use and mobilisation. Finally, section three will provide empirical evidence relating to how rights use and mobilisation can be successful, with the introduction of two case studies. The first looks at litigation on evictions in inner city Johannesburg, while the second examines current efforts around mobilising rights in relation to informal settlement upgrading in Gauteng. Section four will provide a set of concluding thoughts.

2. Conceptualising structural poverty and inequality in South Africa

South Africa is a middle-income country with resources and infrastructure comparable to many first-world countries. However, it is also one of the most unequal societies in the world, with pervasive structural poverty[3] and persistent unemployment.[4] In 2008, the richest 10 percent of households in South Africa earned nearly 40 times more than the poorest 50

---

[2] Prior to working at SERI the author was a researcher at the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand, where she was involved in a number of Constitutional Court cases including *Olivia Road*, *Thubelisha Homes* (Joe Slovo), *Mazibuko*, *Abahlali* (Slums Act) and *Joseph*.

[3] It is estimated that 19.2 million people, or 42 % of the population, live below the poverty line according to an absolute measure of poverty pegged at an income per adult of R322 per month (Bhorat and can der Westhuizen, 2008: 4). Poverty is multi-dimensional however, and includes income poverty, asset poverty and human capital poverty.

[4] Using the expanded definition which included discouraged work seekers, unemployment in South stands at approximately 36 % (Statistics South Africa, 2010: xiii).

percent, and nearly 150 times more than the poorest 10 percent.[5] Comparisons between living conditions in Sandton and Alexandra or Constantia and the Cape Flats may well appear superficial, but they effectively highlight the stark inequality present in South African cities. Millions living in acute and persistent poverty – lacking skills, credentials and connections (Seekings, 2007: 17) - exist alongside a relatively small and powerful group which hold immense wealth and social capital. Families experiencing precarious financial situations - bordering on the 'poverty line' and desperate for a job to stem the tide - exist alongside those with unprecedented, newly acquired affluence due to affirmative action and black economic empowerment (BEE). While it is accepted that much of the present situation stems from the apartheid government's national policy of skewed social spending, forced removal, dispossession and segregation, sixteen years on and the situation appears to be getting worse, not better. Why is this, and how do we fix it?

According to Seekings, 'the proximate causes are clear: persistent unemployment and low demand for unskilled labour; strong demand for skilled labour; an unequal education system, and a social safety net that is unusually widespread but nonetheless has large holes' (2007: 1). However, while there may be some consensus on the causes, there appear to be no definitive answers from the policy-makers and experts on the solutions. At a recent roundtable on poverty and inequality facilitated by the Centre for Development and Enterprise (CDE), this topic was discussed, debated and a number of substantive questions were raised (as well as some relating to measurement). These by in large relate to the nexus between inequality, poverty, employment and economic growth. Is a prioritisation on inequality really a focus on the slow pace at which the economy has absorbed the unemployed? Should government be focusing on those living in poverty and the high economic growth needed to do this, or focus on the more equitable distribution of income? Is direct state action to reduce inequality a priority, or the pursuit of

---

[5] There is no consensus with the way in which both poverty and inequality are measured, and the reliance on wage income as an indicator. However, according to Posel, despite problems with the Gini coefficient and debates on whether or not South Africa is the most unequal country in the world with inequality increasing, 'most of the problems with the data would tend to understate the true level of inequality in South Africa' (CDE, 2010: 17; also Seekings, 2007: 11).

rapid economic growth to reduce poverty, irrespective of the impact on inequality? (CDE, 2010: 3). For certain, while 'race is still a major determinant of affluence, it no longer serves as the sole dividing lines between the affluent and the rest of the population' (van der Berg in CDE, 2010: 10). Income inequality remains extremely high, which points to the fact that increased employment does not necessarily lead to a decrease in poverty. According to Naidoo, the problem lies in the fact that in South Africa there are low-skilled and high-skilled jobs but very little in between, with only a small percentage of jobs in the manufacturing sector for example. There is a very small middle-class, and little opportunity created which would 'provide poorer families with an incremental, intergenerational path out of poverty' (CDE, 2010: 14).

2.1. Targetting the system that creates poverty, not just 'the poor'

The problem is not 'the poor' or poverty per se, but rather the system which allows and encourages inequality and a growing gap between the rich and the poor. Thus, in looking for solutions to the so-called 'problem of poverty' it is not enough to merely target those deemed to be poor, but rather to address the fundamental causes of such a system that perpetuates and worsens the status quo. It is disingenuous to differentiate between so-called first pillar interventions that promote the First Economy, 'second pillar' interventions that address the challenges of the Second Economy, and the 'third pillar' of extending the 'social safety net', as these are deeply interrelated. The pursuit of the first pillar – a poor-unfriendly economic growth path – creates the so-called Second Economy, so that simply pursuing the third pillar will not solve the systemic problems inherent in the model. The aim should perhaps not be so much about poverty alleviation, as wealth alleviation. While this may be a controversial idea, it relates more to the need to address the continued skewed distribution of resources (not just income, although this is critical) and functioning of institutions which cause deep-rooted inequality to persist.

South Africa can be described as experiencing the 'trickle up effect', whereby 'benefits of faster economic growth tend[ed] to flow to those at or near the top of the income hierarchy' (CDE, 2010: 34). Simply put, there is no evidence that focusing on economic growth will benefit everyone particularly when South Africa is faced with the phenomenon of 'jobless growth' (Brockerhoff, 2010: 6; Seekings, 2007: 17). According to Seekings, South Africa's growth path has not strayed far from that of the apartheid era and what is needed is a 'pro-poor economic growth path' (2007: 23). South Africa's macroeconomic strategy the Growth, Employment and Redistribution (GEAR) programme and its successor the Accelerated and Shared Growth Initiative for South Africa (ASGISA), which promotes a neoliberal growth path, have failed to create the hundreds of thousands formal jobs promised, and the government has been forced to address poverty more directly through social assistance.

2.2. Pro-poor government spending, but to what end?

Pro-poor government spending has increased over the years with billions pumped into the education and health systems (much of this going to the salaries of teachers and nurses), grants and transfers to local government for rolling out infrastructure and subsidising basic services, and housing for poor beneficiaries. The transfer of social grants has been the most widely spread intervention as it is fairly simple to administer (although not without its problems) i.e. distribution of cash to those who qualify e.g. poor households with children, the elderly and disabled etc. The number of grants being paid has increased from 2.5 million in 1999 to 14 million in 2009, meaning that the social assistance system reaches over 27 percent of the population.[6] However the system does not provide for the millions of unemployed youth in South Africa, who remain a highly marginalised, disillusioned and increasingly angry group. Some ways to address this gap have been mooted in the past, including the introduction of a Basic Income Grant (BIG), promoting artisanal

---

[6] While social assistance eases the hardship of poverty, it does not address the root causes - unemployment and marginalisation – and excludes large parts of the population, particularly the unemployed and the working poor (Brockerhoff, 2010: 6).

schools that link to the skills required to implement longer term industrial policy, introducing a wage subsidy for new job entrants etc, however none have moved past this stage.

While the South African state can be said to be highly redistributive in its social spending, public spending has often been extremely inefficient and ill-targetted. Free basic services (subsidised water, sanitation and electricity) are national policy imperatives, however are a local government competence and are usually targetted through the locally administered 'indigent register' which is often under-representative of those who qualify, highly bureaucratic and punitive. This devolution of power and decentralisation model is compromised by cost-recovery pressures on municipalities, lack of skills/capacity, and the increasing commercialisation and commodification of basic services. Further, the poor have to rely on poorly resourced and capacitated public schools, government hospitals and state-provided legal aid, while those with money send their children to private schools, private clinics and private lawyers. The latter are able to opt out of these public systems, which end up purely servicing the poor. And it is the poor who are the 'most in need of efficient, safe public transport; decent, well-located, well-built public housing; good public schools, training facilities, and healthcare' (CDE, 2010: 36).

Both health and education are critical sites of intervention. Access to and availability of quality health care – particularly prevention and treatment of HIV/AIDS, TB treatment, maternal and child health care etc – are extremely important, as health-related 'misfortunes' can set households back, jeopardise livelihoods and increase vulnerability, regardless of whether free clinics and hospitals exist. Chronic disease, disability and slow death are often preventable, however when experienced by poor households can be crippling (CDE, 2010: 28).[7] Also of critical importance to overcoming poverty and inequality is education and the production of 'human capital'. While improvements in access to and quality of the education system take a while to manifest in changes to the skills and composition of the labour force, this is

---

[7] The Treatment Action Campaign (TAC), Medecins sans Frontieres (MSF) and the newly formed SECTION27 (which conducts public interest litigation around health care, education and rule of law issues) are strong campaigners for reform in health care in South Africa.

imperative for long term planning and eradication of inequality. In the interim, however, creating jobs and ensuring access to housing, health care and basic services is critical.

2.3. The current crisis in South Africa

According to Liebenberg (2010), 'a society such as South Africa which is characterised by deep and pervasive disparities in income levels as well as in access to quality education, health care, housing and land, creates systemic patterns of marginalisation leading to chronic instability and insecurity.' At present South Africa is characterised by collapsing health and education systems; a crippling national strike by underpaid and disaffected public servants in these sectors[8] and growing pressure on the government to reform by trade unions[9]; increasing unemployment; growing backlog in households with access to decent housing and basic services; frequent and increasingly violent service delivery protests; persistence of the spatial impact of apartheid with poverty mapped almost precisely onto former homeland areas; growing urbanisation and urban poverty; lack of skilled, experienced engineers and other skilled professionals in the public sector and increasing migration of these skills overseas; growing political upheaval; corruption and cronyism in all spheres of government; crisis of local government; high levels of crime; unequal access to justice; proposed moves to curtail media freedom and roll back access to information etc.

While policy debates and disagreements about how to most effectively tackle poverty and inequality continue, it is poor individuals and communities on the ground who are suffering. In many cases it is exactly the government programmes, institutions and officials meant ostensibly to improve the quality of life of those living in South Africa, which end up making their lives more

---

[8] At the time of writing, the national public sector strike, which had been waged for three weeks, was suspended pending the outcome of negotiations.
[9] Trade union federation COSATU has come out in strong criticism of the current administration and recently mooted radical economic transformation plans which include a redistributive tax on the country's 'super-rich' to help combat growing social inequalities. Ndlangisa, S, 2010. Tax the super-rich – Vavi. City Press, 5 September.

unbearable e.g. mass forced relocations of shackdwellers to 'transit camps' to make way for housing projects. Development is often top-down and out of touch with the realities of those it seeks to 'develop', with the focus on 'eliminating backlogs' and rapid delivery as ends in themselves, rather than as a means to an end which should start with addressing the needs and priorities of communities living in poverty. The urgent need to address pressing socio-economic hardship on the ground and the daily battles communities are facing, leads us to the entrenched socio-economic rights in the Constitution, which arguably serves as the outline or blueprint of transformation for South Africa.[10] Where do these rights and the transformed or ideal state that the Constitution envisages, intersect with the reality of poverty and inequality outlined above, and are rights useful for making real social and economic change on the ground? Answering these questions will be the subject of the rest of this paper.

3.   Socio-economic rights: false panacea or tactical political tool?

The debate over whether or not to incorporate justiciable socio-economic rights into the South African Constitution culminated in their eventual inclusion and a tacit acceptance that both socio-economic rights and civil and political rights require the state to both refrain from taking action and take action i.e. both impose positive obligations on the state to act. According to Liebenberg, 'it was hoped that these rights would enrich participatory democracy by enabling persons marginalised by poverty to challenge decisions and omissions which have an impact on socio-economic well-being' as well as facilitate the fundamental transformation of South African society (2010: 21-22). The aim being to work towards a deep restructuring of the underlying institutional arrangements which generate various forms of

---

[10] According to Liebenberg, the Constitution does provide a comprehensive blueprint for a transformed society or provide the precise processes for achieving it, but rather 'provides a set of institutions, rights and values or guiding and constraining processes of social change'(2010: 29).

political, economic, social and cultural injustice, and to address the underlying causes of the persisting poverty and forms of inequality in society (Liebenberg, 2010: 27-28). Because of its constitutional protection of socio-economic rights, South Africa is frequently cited both internationally and nationally as the 'gold standard' in the legal protection it offers in the fight against poverty (Donald and Mottershaw 2009: 28).

While some of the pre-constitutional debates remain valid, particularly around courts' ability to deal with budgetary issues and their overly deferential stance when interrogating government policy, these are being played out in courts in the more frequent socio-economic rights cases brought before them. There are, however, broader and more fundamental critiques of the rights framework and discourse which will be briefly discussed in the following section.

3.1.   Unpacking some critiques/challenges of the rights framework

Critiques of the rights framework and rights discourse are important as they raise critical sites of struggle going forward for rights mobilisation and the ability of socio-economic rights engagement to have an impact on the ground. Some of these critiques and challenges include: the articulation of rights within a liberal framework that entrenches the status quo and the problems with this; the possibility of engendering a 'culture of entitlement' where rights are viewed as commodities to be conferred on passive recipients by a benevolent state; the need to look broader than rights to a notion of 'commons' in order to address complex eco-social justice issues; problems with the judicial interpretation of rights and separation of powers i.e. deference towards other spheres of government; empty articulation of rights which leads to the suppression of the physical needs they represent; unequal access to justice and legal representation etc. This section will expand on some of these criticisms directly, while the others will be addressed later in the paper.

3.1.1. Rights discourse is embedded in the status quo

First, there is the critique that rights discourse is typically entrenched within the liberal framework and 'formulated, interpreted, and enforced by institutions that are embedded in the political, social, and economic status quo' so that it serves to reinforce the status quo as opposed to being transformative in nature (Pieterse, 2007: 797). According to Roithmayr (2010), the liberal perspective is that when human rights aspirations are not being fulfilled it is because a sound idea suffers flawed implementation, whereas a radical critique of human rights suggests the entire rights project is flawed from the ground up in its design, because, as framed, human rights discourse serves not to resist to but to legitimise neoliberalism. She believes that the 'legalisation of human rights dilutes them and robs them of any real power', that human rights discourse leaves in place the class structure that reproduces racial inequality in South Africa, and 'bleeds off any real move to dismantle these processes by making change all about consciousness raising and recognition rather than redistribution and reparation'. According to Madlingozi (2006: 8), liberal analyses do not engage in any critical structural analysis of the system that reinforces systemic inequality and structural poverty, and that the latter analysis is important 'in order to bring to the surface the economic, cultural and political dynamics not only shaping the law, but which also are shaped by the law'. Linked to this is the fear that rights discourse and mobilisation in fact demobilises the radical, counter-hegemonic articulation and action of social movements and can have an unwelcome effect on their ability to engage in 'extra-institutional actions' - e.g. direct protest action or civil disobedience (Madlingozi, 2007: 89) -or take time and resources away from other mobilisation, as litigation is lengthy, expensive and intensive (Dugard, 2008: 17-21).[11] This critique is one traditionally articulated by activists and social movements, as well as by some radical legal scholars and practitioners who endeavour to move beyond liberal interpretation of rights.

---

[11] The tactical resort to rights-based litigation by the Anti-Privatisation Forum (APF) in the *Mazibuko* case is explored in detail in Dugard, 2008: 17-21, however this particular observation comes from subsequent discussions with the author.

3.1.2. Rights discourse is individualistic and state-centric

Second, there is the critique that rights discourse is limiting in its individualistic, anthropocentric and state-centric approach to issues which are far more complex and multi-dimensional in nature. Bond (2010: 1) in an analysis of the *Mazibuko* water rights case loss, questions whether rights narratives are optimal for social justice advocacy in contemporary South Africa and advocates for an approach that cuts through rights strategies and tactics to a 'commons'[12] philosophy and practice that 'transcends the political and environmental limits of the human rights framework'. This would be particularly relevant to access to water, where Bond describes how 'countervailing pressures that can transcend mere consumption-based rights demands, and tackle the full range of practices that undermine water as a commons, as well as so many interrelated eco-social processes, are long overdue' (2010: 8). While this critique is fairly recent, and is articulated by a radical and progressive left academic, it has some resonance with the attitudes of technical and government officials who do not view water services provision, for example, as about individual access but as a balancing act of an entire system which involves water resources management, reticulation, cost recovery, operations and maintenance etc. Their argument, however, is not a philosophical one based on 'commons', but rather a technicist one based on managing a highly complex system that has eco-social implications.

3.1.3. What is the role of the judiciary in enforcing rights claims?

Third, there is the fact that rights mobilisation at its zenith often ends up in court where judges must adjudicate on the case and often have to

---

[12] The commons 'is a new way to express a very old idea—that some forms of wealth belong to all of us, and that these community resources must be actively protected and managed for the good of all.' On the Commons website: http://onthecommons.org/about-commons Accessed 20 August 2010.

interrogate government policy and face the prospect of a group of poor people asking them to provide alternative accommodation, more water per month, access to sanitation etc. These all have budgetary implications for the state, interfere with terrain of the separation of power between the judiciary, legislature and executive[13], and often require some kind of 'content judgment' for the judiciary. Courts, particularly the Constitutional Court, have generally been uncomfortable with this role and have implicitly stated that they will not rule on 'minimum core' obligations of the state and prefer to judge the 'reasonableness' of policy and legislation (Liebenberg, 2010: 163-183). The reality is that courts rely on the state for the implementation of its decisions and in the past has been aware of this dependence and arguably been timid and sometimes vague in the definition it has given to these rights (Wilson, 2010: 33). The hesitancy of judges to give content to rights that is of concern to legal scholars and, more importantly, those trying to claim socio-economic relief through the courts. Legal scholars often explain the above by pointing to 'counter-transformative tendencies' of the judiciary (Pieterse 2007: 797) and a dearth of progressive and bold judges, however as Pieterse (2007: 822) writes: 'however empty they may initially be, constitutional, legislative, or judicial articulations of socioeconomic rights, in response to the demands of social movements, create a space for the audible expression of need, and as such have the potential to stimulate legal developments that lead to more encompassing definitions of rights'.

3.1.4. (In)accessibility of the justice system and the role of lawyers

Finally, there is the persistent challenge of access to justice, manifest in the elitist and alienating nature of the court system[14], the difficulties in

---

[13] Emerging jurisprudence out of the Constitutional Court and lower courts has shown that balance can be maintained and that intrusion on the other spheres may well be necessary given the impact of policies or action on those who experience them firsthand and are forced to resort to litigation for recourse and relief.
[14] A recent case heard in the Constitutional Court called *Betlane* highlights this. The case relates to the ill-treatment of a lay litigant by a lower court on several occasions, as he tried to defend himself against an unlawful eviction. See http://www.seri-sa.org/index.php?option=com_content&view=article&id=52:kabelo-betlane-v-shelly-court-cc&catid=12&Itemid=32

accessing affordable, high-quality legal representation in the specialised field of socio-economic rights, the high costs of appeals and lengthy time span of cases. This critique is often advanced by those community-based organisations and social movements who struggle to access the law and engage in litigation, even when they have chosen it as a tactic. Another problem relates to the kind of lawyers or institutions required to facilitate rights mobilisation and access to justice around socio-economic rights. Conflicts between activists, organisers and social movements on the one hand, and traditional legal services lawyers on the other, often are attributed to differing political orientation, understandings of class, social change and analyses of systemic inequality and oppression (Shah and Elsesser, 2010: 1). These issues will be addressed further in the following section, along with the critique that rights discourse engenders a 'culture of entitlement' in passive beneficiaries, with a view to move towards a new conceptualisation of rights mobilisation that addresses the abovementioned critiques.

3.2. Beyond the critiques: towards a broader conceptualisation of rights mobilisation

This paper argues that there is an important space to be shaped for socio-economic rights mobilisation in South Africa so long as it takes into consideration structural problems inherent in the framework as well as procedural issues around access to justice, role of lawyers etc. Indeed, two of the authors articulating the most convincing critiques, are arguably also two of the most nuanced proponents of a broader role for rights mobilisation.[15] According to Madlingozi (2006: 8-9; 21):

> ... any serious analysis that, for example, aims to unpack and propose the role that socio-economic rights can play in alleviating poverty and social hardship; must not only be inter-disciplinary but

---

[15] Madlingozi and Pieterse are on the Board of Directors of SERI and SECTION27 respectively (see note 7 above).

must also try to understand the place and role of human rights discourse in the neoliberal agenda, the limits of law in radical social transformation and indeed the politics of law itself. ... Legal academics can only play a role in progressive politics and social transformation and stay true to their moral convictions and political orientations and thus contribute to the politicisation of the masses, if they become part and parcel of the lives of those who are in the subaltern and periphery. Through participatory action research, legal academics can contribute to the solution by revealing the ideological distortions in society, by debunking assumptions, demystifying the law and human rights and by exposing the contingent and reified nature of inequalities.

He further states that legal academics have the ability to expose the limits of law as a tool for social change by showing that the law imposes — and removes from public scrutiny or debate — limits on the scope of democracy and can serve to depoliticise and remove crucial issues from the public agenda (Madlingozi, 2006: 21). This is clearly a call to arms for legal scholars and practitioners going forward. Critically important to socio-economic rights mobilisation is the recognition that the Constitution, and law generally, is contested terrain that is constantly in flux and shaped by actors, often those with power and access to resources and legal expertise. In this sense, the court is just another 'political venue' (Shah and Elsesser (2010:4) and rights are less 'established facts' than potentially useful 'political resources' (Scheingold, 1974: 85).

According to Shah and Elsesser (2010), who use 'legal advocacy to build the power of communities to challenge and eradicate [these] systems of inequality' in their work at the Community Justice Project in Miami, Florida, there is a model they subscribe to called 'community lawyering' which, rather than viewing lawyers as 'saviours or gatekeepers', regards them as 'tacticians in the struggle for change.' They raise a number of important and pertinent points about the role of lawyers in community and social movement struggles

including: the need for accountability, self-scrutiny and honest reflection around power dynamics between lawyers and communities; the role to be played in ensuring rights are not mobilised in a purely individualistic way but focus on positive collective impact; the need to ensure the law is not viewed as a solution but rather as a 'tactical tool' and to stress that winning is not everything (and often losing can be beneficial as part of a larger strategy); and recognition that lawyers (and legal cases) often take up a lot of space and power can gravitate to lawyers so as to be vigilant about 'managing and passing along power.' Ultimately, much depends on the relationship between activists and community leaders and the lawyers.

For Pieterse, it is critical that the translation of socio-economic rights should not be a one-way, top-down process and he proposes an important role for litigants, activists, and social movements 'in ensuring that conceptually empty socio-economic rights are awarded content "from the bottom up," so as to resonate with the experiences and needs of those for whom their effective vindication matters most' (2007: 829). He states that in South Africa, litigants and activists should view the conceptually empty articulation of socio-economic rights in the constitutional text as an 'opportunity to counter and avoid the sidelining of urgent and compelling needs in the subsequent "top-down" translation of socio-economic rights through judicial interpretation' (Pieterse, 2007: 829). This conceptualisation of rights discourse and mobilisation is an engaged and active one, vastly different from the 'culture of entitlement' model feared by those who worry that rights are simply viewed as commodities to be conferred on passive recipients by a benevolent state. For Wilson, one of the aims of a 'politics of rights' could be to develop McCann's idea of a 'jurisprudence from below' in which constitutional rights become internalised, asserted and defined from below (2010: 33).

In addition to enshrining socially and legally guaranteed entitlements, socio-economic rights can:

- Have symbolic rhetorical force which can be leveraged by communities and social movements outside of court;

- Provide an analytical framework to pursue accountability for poverty, challenge unequal power relationships and recast the relationship between people experiencing poverty and the state;

- Create space to open up for analysis 'the structural causes if poverty, rather than only its symptoms, and the impact of government action or inaction on people living in poverty' (Donald and Mottershaw 2009: 13).

- Promote the dignity and autonomy of people experiencing poverty, because, while 'participation' is woven into the Constitution and most legislation and policies, it has largely been rendered 'hollow and tokenistic'. A human rights conception of participation 'challenges and subverts decision-making monopolies and re-politicises the term', ensuring that participation it is not purely procedural, ad hoc or technical but is rooted in institutions and procedures (Donald and Mottershaw, 2009: 14).

- Provide a lens to view macro-economic policy which identifies policies that are consistent with human rights obligations and those that are not; provides guidance on the sequencing of policies (focusing on the most deprived); makes decision-making processes more transparent, participatory and accountable; and identifies necessary changes to the way social and economic data is collected (Donald and Mottershaw 2009: 22).

However, in order to achieve these results there needs to be an interpretation and mobilisation of rights from below. This requires the developing of relationships between lawyers and activists/communities/social movements based on shared visions of injustice, transformation and social change; popular education and training that moves beyond 'know your rights' presentations to politicisation, empowerment and practical advice on how to use rights given the failure of systems and institutions; access to free legal advice and assistance for 'bread and butter' issues (often around negative infringement of rights) i.e. evictions, services cut-offs etc; strategic public impact litigation grounded in an understanding of persistent structural/institutional problems and failures; applied research to feed into

litigation and influence policy decision-making; translation of 'high-level' legislation, jurisprudence and policy into accessible language and opening up spaces for engagement and action; bringing activists and community leaders into 'spaces of power' and using all opportunities to level the proverbial playing-field; media advocacy to translate the struggles of social movements and communities into the public domain; facilitating cross-class alliances and campaigns; and mobilising and coordinating of civil society around common issues, particularly access to housing and basic services which do not have the middle-class 'buy-in' and resonance that access to health care and education have.

What is required is a holistic, interdisciplinary, integrated and iterative approach to the 'life-cycle' of the fulfilment of socio-economic rights i.e. transformation to a socially and economically just and equal society, which sees collaboration around common issues relating to structural poverty and socio-economic inequality. The following section will examine recent initiatives to drive this kind of rights mobilisation, and will attempt to bridge the gap between empirical evidence and grounded research on the one hand, and policy-making related to poverty and inequality on the other.

3.3. In pursuit of empirical evidence

According to human rights activists engaged in discussions around poverty, inequality and human rights, 'there is a need for empirical evidence to answer the critiques of human rights as a framework for tackling poverty' (Donald and Mottershaw, 2009: 10) and not enough has been brought forward to make a case for the role of rights mobilisation in the struggle against poverty and inequality. Wilson poses the question 'when do rights work?' and states the following (2010: 1):

> It is trite that mere declarations of rights do not necessarily, or even easily, transform themselves into social practice. It has become popular to point to the disjuncture between law and

practice in South Africa. Academics, activists and social commentators have done a great deal of valuable work in exposing the gap and some have gone further to suggest reasons for it. Unfortunately, in all but a few cases, that is where the analysis stops and the hand-wringing begins. Few studies of the post-Constitutional 'rights-reality nexus' in South Africa have analysed the extent to which concrete strategies for realising rights have 'succeeded' or 'failed'.

In South Africa, some evidence is emerging to contradict the sceptics, however much of the real impact of rights mobilisation and socio-economic rights litigation is not quantifiable or obvious (particularly not in the short-term). Longitudinal studies incorporating specially tailored qualitative methodologies that 'capture behaviour change and outcomes' as a result of human rights interventions, are needed (Donald and Mottershaw 2009: 46). In a sense, 'number of cases won' is the most inappropriate indicator of the impact of rights use or mobilisation. There is an important distinction between litigation and rights-based strategies for social change, with litigation often having an 'indirect effect on social change through the mobilisation catalysed in preparation for it, and in its aftermath' (Wilson, 2010: 33). Perhaps more important is community and social movement building and empowerment as well as alliance/network-building, on-the-ground engagement and popular education around critical issues of material importance to people's lives, policy influence and legal reform, attitudinal change in public opinion, setting up research to influence social policy shifts in the future, continued legal challenges to shift the balance of favour around tricky legal issues e.g. the right not to be arbitrary deprived of property vs. the right to adequate housing.

The following two case studies relate to the use of rights in social justice struggles, particularly around access to housing for the poor in cities and the nexus between the struggles of poor communities, the role of legal organisations and lawyers, and the effects of rights use/mobilisation to tackle structural inequalities.

3.3.1. Using rights: litigating on evictions in inner city Johannesburg

The first case study relates to the three year legal battle conducted by the Centre for Applied Legal Studies (CALS) challenging the City of Johannesburg's policy of forced evictions from 'bad buildings' or slum buildings in inner city Johannesburg which had escalated since 2002 with the introduction of the City's inner city regeneration strategy.[16] According to Wilson, 'in order to successfully resist the City's programme of mass evictions, slum dwellers needed two things: access to courts via adequate legal representation and a consciousness of their true position within the inner city social *milieu'* (2010: 17). CALS, a public interest legal organisation based at the University of the Witwatersrand, together with the Inner City Resource Centre (ICRC), an apolitical inner city residents' rights association, embarked on several legal cases for communities resisting the almost daily evictions that were being conducted by the City in terms of its health and safety legislation.[17] One such case was launched in the South Gauteng High Court in 2006, involving two buildings and about 450 people facing eviction.[18] It was appealed to the Supreme Court of Appeal and landed in the Constitutional Court in 2007, with the Court ordering 'meaningful engagement' between the parties around alleviating the plight of the occupiers by installing interim services at the buildings, as well as around the provision of alternative and permanent accommodation.

A settlement agreement was reached and made an order of court in late 2007. In its judgment of February 2008, the Constitutional Court ordered that a municipality must engage meaningfully with people before evicting them

---

[16] Between 2002 and 2006 residents of 122 inner city properties were evicted through urgent court processes, with approximately 10 000 people left homeless as a result (CALS PAIA request, 2006).
[17] For more on the background to this legal intervention see Centre on Housing Rights and Evictions (COHRE), 2005. Any Room for the Poor? Forced Evictions in Johannesburg, South Africa. 8 March 2005: http://www.cohre.org/store/attachments/COHRE%20Johannesburg%20FFM_high%20res.pdf
[18] These cases were taken not only to defend the occupiers under threat of eviction, but also with a bigger agenda to push the City of Johannesburg to consider the importance of adopting a subsidised public housing programme in the inner city.

if they would become homeless after the eviction. It further ordered that while the City must eliminate unsafe and unhealthy buildings, it also has a constitutional duty to provide access to adequate housing. This means that it must consider the potential for people to become homeless when it decides to evict them. Two buildings in the inner city were provided by the City to relocate the occupiers, where they remain till this day. The *Olivia Road* judgment however only dealt with a small proportion of issues raised and most notably did not deal with the issue of location in regard to housing, which is critical for access to job opportunities, social and economic amenities etc. Despite having tangible relief for the 450 occupiers, the judgment did have a larger impact in that the Court set out the principles and procedures that local government must adhere to if it wants to evict unlawful occupiers, and provided substance to the concept of 'meaningful engagement' which has subsequently been developed further by civil society in the wake of the judgment, and utilised by a number of community organisations and social movements.[19]

As a result of the Court's finding that alternative accommodation should be provided if occupiers will be rendered homeless by an eviction, the City has ceased its policy of eviction as it simply does not have any effective plan to deal with all those living in inner city 'bad buildings'. The case has thus had an effect on tens of thousands of occupiers who were potentially at risk of eviction, as well as provoking a limited shift in the City's thinking around the balance between the housing (and basic services needs) of poor inner city occupiers, and their programme of enticing property investors back to the inner city and promoting urban renewal. Further, the case and alliances formed as a result have sparked new avenues for collaborative research[20], advocacy[21] and litigation[22]. Importantly, it has shown the need for sustained

---

[19] See the report from a roundtable discussion on 'meaningful engagement', held on 4 March 2010 by SERI and the Community Law Centre: http://www.seri-sa.org/images/rtd_on_me_report_08.04.2010.pdf and an informational booklet produced on meaningful engagement: http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/ser-publications/Engaging_meaningfully_with_government_SER.pdf
[20] SERI is presently conducting research into supply and demand of low-income rental accommodation in the inner city to be used in future advocacy and litigation.
[21] SERI recently facilitated a roundtable on the situation in inner city buildings together with Paul Verryn from the Central Methodist Church, Medecins sans Frontieres and other legal NGOs to discuss advocacy and litigation strategies as well as strategic partnerships.
[22] The new struggle in the inner city is around the plight of those facing eviction by private owners and landlords, and the obligations of the state to provide alternative accommodation in these circumstances. The *Blue Moonlight Properties* case to be heard in the SCA in 2011 will hopefully provide some clarity on this nexus.

intervention, engagement and monitoring of judgements, as opposed to once-off legal interventions that end when a judgment is handed down.

It could be argued that defensive litigation around evictions does not constitute rights mobilisation per se, however what this struggle shows is how defensive litigation can often be a way 'in' for communities and social movements, as well as a springboard to more proactive mobilisation and engagement on substantive issues around access to affordable housing and basic services close to formal and informal employment opportunities, balancing private property rights and constitutional obligations, improving participatory democracy and consultation between the state and the poor etc . This brings us to the next case study, which examines rights mobilisation around informal settlement upgrading in South Africa, and Gauteng specifically.

3.3.2. Mobilising rights: informal settlement upgrading in Gauteng

The final section of this paper provides an overview of 'work in progress' around mobilising of communities, social movements and civil society in general around the plight of those living in informal settlements. Thus, this case study is more empirical evidence of ongoing mobilisation, rather than how the human rights framework for tackling poverty has been successful. Much of the empirical evidence comes from the author's first-hand experience working at a recently formed non-governmental organisation (NGO) called the Socio-Economic Rights Institute of South Africa (SERI), which was set up to provide socio-economic rights assistance to individuals, communities and social movements in South Africa. SERI aims to address local problems in structural ways through a close interweaving of research, advocacy and litigation, and the organisation conducts applied research, engages with government, advocates for policy and legal reform, facilitates civil society coordination and mobilisation, provides legal advice and litigates

in the public interest.[23] SERI facilitates interaction between communities and the government and communities and courts on a range of socio-economic rights-related issues with the aim to improve service delivery, advance the realisation of socio-economic rights and contribute to public accountability. The organisation was borne out of recognition of the critiques of rights discourse and use in South Africa, and the need to create a dedicated socio-economic rights organisation that could begin to occupy the space envisioned and outlined earlier in section 3.2 of this paper. Ultimately, SERI aims to contribute to a broader project of overcoming structural inequality and poverty in South African.[24] SERI's work on informal settlements is multi-faceted and runs along the lines of its working methodology. Primarily, SERI takes its mandate from its relationship with a number of social movements who are active in Gauteng and Durban including Abahlali baseMjondolo (AbM), Informal Settlement Network (ISN), Landless People's Movement (LPM) and the Anti-Privatisation Forum (APF), and provides an explicit legal platform for them. For SERI, litigation is always a last resort and does not mean that grassroots movements are frozen from continuing with other tactics as per their broader strategy of resistance i.e. protest or civil disobedience.

Those living in informal settlements and inner city buildings are at the coalface of urban poverty, while at the same time they are neglected in terms of access to housing, basic services etc. Further, as urbanisation and migration inevitably increase as people flock to the cities in search of job opportunities (ideally this would occur in the context of jobs and artisanal training opportunities being created in cities linked to industrial policy), the demand for affordable and decent housing will increase. SERI views cities as critical sites for concerted interventions around job creation, provision of health-care and education, as well as promoting integrated living environments that challenge structural poverty and inequality in other ways. In Johannesburg and Ekurhuleni (which alone has approximately 124 informal settlements) SERI has formed strategic partnerships with community-based organisations and social movements not only to assist legally with defensive

---

[23] SERI works in the following thematic areas: housing and evictions; access to basic services (water, sanitation, electricity); and migrant rights and livelihoods.
[24] When devising SERI's logo the exercise was taken to pinpoint what the organisation fundamentally strives to achieve. The resultant was a red equality sign which stands for social justice and equality.

eviction cases or to provide training on how to access courts, organise protests and resist evictions etc; but also to create empowered networks to proactively articulate demands around housing, explore access to urban land and barriers to access; hold local government accountable and engage around implementation of development projects, and lobby national government where necessary around policy and funding.[25] Unlike in the inner city of Johannesburg, the national Department of Human Settlements (DHS) actually has a progressive informal settlement upgrading programme that promotes *in situ* upgrades, as well as a National Upgrading Support Programme (NUSP) which need to be implemented and pushed in a direction that benefits the poor in South African cities.

4.   Conclusion

The challenge is to ensure that all the laws, policies and institutions created in terms of the Constitution, which give effect to the indivisible socio-economic rights contained therein, are working for the people. Where they are not, or others created to protect different interests and agendas are not, they should be challenged through direct action/protest, advocacy and lobbying or litigation. Where the larger macro-economic system and relations are inherently flawed it is true that a 'legalised, rights-based approach/discourse' will be limiting and often only mitigate the injustice and inequality inherent in the system without creating fundamental change in political, economic and social relations (McKinley, 2010). However, according to McKinley, what is required given the current political and economic climate in South Africa is activism that combines a tactical legal approach with strategically defined grassroots struggles for systemic change.

Thus, the law (and lawyers) can be engaged and used tactically to 'open spaces, create awareness and publicity, defend and, if possible, to

---

[25] On 28 September 2010, SERI and the LANDfirst network are holding a workshop on coordinating civil society efforts around informal settlement upgrading where representatives from communities, social movements, legal NGOS, technical NGOS, land experts, consultants, and NUSP amongst others, will discuss ways of increasing communication, collaboration, information-sharing etc.

secure immediate redress' as well as on the organisational front to engage and use the law effectively and pro-actively as a means to strengthen and build broader knowledge and organisation and to prevent political and law enforcement authorities from using the law to 'intimidate, confuse, crush dissent and accumulate' (McKinley, 2010). Finally, on the broader socio-political front there is an important space for a rights-based approach which can provide immediate and meaningful interpretation, and thus realisation and enforcement, of government's socio-economic rights obligations for the vast majority of those who do not enjoy such rights.

References

Bhorat, H and van der Westhuizen, C, 2008. Economic Growth, Poverty and Inequality in South Africa: The First Decade of Democracy. DPRU Conference, University of Cape Town.

Bond, P, 2010. Capitalism, Privatisation of Basic Social Services and the Implementation of Socio-Economic Rights: Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, learning from Johannesburg Water Defeat. Paper presented at the International Commission of Jurists: Southern Africa Socio-Economic Rights Camp, 31 August, Birchwood, Johannesburg.

Brockerhoff, S, 2010. *Monitoring the progressive realisation of socio-economic rights: a review of policy development on social security in South Africa*. Paper prepared for the Studies in Poverty and Inequality Institute (SPII).

Centre for Development and Enterprise (CDE), 2010. *Poverty and Inequality: Facts, trends, and hard choices*. Edited proceedings of CDE Round Table 15, 1 April, Parktown, Johannesburg

Donald, A and Mottershaw, E, 2009. Poverty, inequality and human rights: Do human rights make a difference? Joseph Rowntree Foundation, September 2010.

Dugard, J, 2008. Rights, regulation and resistance: The Phiri water campaign. SAJHR, Submission to the special issue on Rights and Regulation, 28 October 2008.

Liebenberg, S, 2010. Socio-*Economic Rights: Adjudication under a Transformative Constitution*. Juta & Co, Cape Town.

Madlingozi, T, 2006. Legal Academics and Progressive Politics in South Africa: Moving Beyond the Ivory Tower. Pulp Fictions, PULP, Pretoria, 5-24.

Madlingozi, T, 2007. Post-apartheid social movements and the quest for the elusive 'New' South Africa'. Journal of Law and Society 34(1), 77-98.

McKinley, D, 2010. Brief notes for input to Khanya College Winter School workshop on 'Law and Organising. 2 August 2010, Khanya College, Johannesburg.

Shah, P and Elsesser, C, 2010. Purvi & Chuck: Community Lawyering. Organizing Upgrade, 1 June.

http://www.organizingupgrade.com/2010/06/social-justice-lawyering/
Accessed 31 August 2010.

Pieterse, M, 2007. Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited. Human Rights Quarterly 29(3), 796-822.

Roithmayr, D, 2010. What's Wrong with Rights? Rights, Race and Capital. Paper presented at the CCS Colloquium on Water, Rights and Prices, 28 June, Centre for Civil Society, University of KwaZulu-Natal.

Scheingold, S, 1974. *The Politics of Rights: Lawyers, Public Policy and Political Change.*

Seekings, J, 2007. *Poverty and Inequality after Apartheid*. CSSR Working Paper No. 200, Centre for Social Science Research, University of Cape Town.

Statistics South Africa, 2010. Quarterly Labour Force Survey. May 2010.

Studies in Poverty and Inequality Institute, 2010. SPII Talk. Volume 1, 2010, 2-4.
http://www.spii.org.za/agentfiles/434/file/SPII%20Talk%2001%202010.pdf
Accessed 31 August 2010.

Wilson, S, 2009. Litigating housing rights in Johannesburg's inner city. Paper submitted to the South African Journal of Human Rights (SAJHR), July 2010.