

Mobilising Social Justice in South Africa

Perspectives from Researchers and Practitioners

Jeff Handmaker & Remko Berkhout (editors)

Pretoria University Law Press
PULP

2010

Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners

Published by: Pretoria University Law Press (PULP)

The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa. This book was peer reviewed prior to publication.

For more information on PULP, see www.pulp.up.ac.za

ISBN: 978-0-9869857-0-6

First published in June 2010 by the Hivos/ISS Civil Society Building Knowledge Programme

www.hivos.net

www.iss.nl

ISBN: 978-90-812200-8-8

This book is based on the results of a conference held in South Africa in November 2009. Its basis is a number of research projects that mostly took place under the banner of the Hivos/ISS Civil Society Building Knowledge Programme. The conference discussions have been addressed by the authors of the chapters, and by the editors, in the introductory and concluding chapters.

This book should be cited as:

Handmaker J. and R. Berkhout (eds) (2010) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners*. The Hague: ISS and Hivos.

Printed and bound by:

ABC Press
Cape Town

Cover:

Cover Photo © Jacob van Garderen. Taken on 12 May 2006, depicts the Constitutional Court of South Africa, taken from the perspective of the Old Fort Prison, which is located directly next to the Court in Johannesburg. Historical figures such as Mahatma Ghandi, Nelson Mandela, Joe Slovo, Albert Luthuli, Robert Sobukwe and Bram Fisher were all detained at this prison.

The contents of the book are available on the internet and on recycled paper.



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About Hivos – www.hivos.nl

Hivos is a Dutch non-governmental organisation inspired by humanist values. Together with local organisations in developing countries, Hivos seeks to contribute to a free, fair and sustainable world: one in which citizens – both women and men – have equal access to opportunities and resources, and can determine their own future. Hivos has been active in South Africa since the 1970s, and currently supports programmes and organisations working on community empowerment, governance, HIV/AIDS, gender and sexual minority rights.



About The International Institute of Social Studies – www.iss.nl

Erasmus University's International Institute of Social Studies (ISS) is a graduate school geared to critical social science through research, teaching, capacity development and public debate. ISS deals with issues such as globalisation, development, poverty, inequality, human rights, human security and the environment. Participants in ISS Postgraduate Diploma, MA and PhD programmes come primarily from the Global South. More than 11 000 students from all over the world have studied at ISS. Founded in 1952, the Institute is one of the world's leading centres of higher education and research in this field. Since 1 July 2009, ISS has been a University Institute of Erasmus University Rotterdam. ISS provides a national and international platform for public debate and critical reflection on development, for the sake of greater public understanding.

The ISS has a long history of involvement with South Africa and the Southern African region in general, having hosted many students, visiting scholars and members of staff from this part of the world. Throughout the past decades, and especially during the 1980s, faculty and staff supported critical debates on the political situation in the country and region, and the anti-apartheid struggles in opposition to the government of the time's racist policies.

About the Hivos-ISS Knowledge Programme – www.hivos.net

Hivos and the ISS have been working together since 2005 in a joint effort to contribute to the debate on Civil Society Building (CSB). At the core of this collaboration is the interaction between practitioners and researchers to facilitate knowledge development, dissemination and application.

The rationale for this collaboration is the potential for academic-practitioner collaboration. The academic world can help to provide a platform for learning and improving the analytical capacities of NGOs. Working with development practitioners linked to NGOs gives the academic world access to practical expertise; and an opportunity to test ideas and theories, or to gather case material.

The three specific objectives of the Programme are the following:

- (1) To foster new and innovative research on CSB in the academic and development sectors.
- (2) To intensify the links between practitioners and researchers in order to stimulate dialogue and debate on CSB.

- (3) To contribute to improving policy and programmes aimed at strengthening the capacity of civil society organisations.

The Civil Society Building Knowledge Programme explores various research themes. Partners and researchers in Central America are focusing on the theme 'social movements and citizenship'. How do social movements develop and evolve? How does the influence of external actors play out? What is the role of social movements in processes of emancipatory change? The key theme in Southern Africa is 'civic action for responsive governance'. This theme encompasses questions concerning civil society development, power relations, roles of donors and NGOs, elite dynamics, political society, government accountability, and citizen initiatives beyond the realm of the aid chain.

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FOREWORD AND ACKNOWLEDGMENTS

On 23 and 24 November 2009, more than 70 people, including activists, NGO practitioners and academics, met at the Chalsty Centre of the University of Witwatersrand, to reflect on civic mobilisation for social justice. Five research projects on South Africa, led by a group of researchers that naturally straddle the academic-practitioner divide, formed the backbone of the conference. Through different lenses, these projects have analysed the dynamics of civic strategies for change, and have served as the basis for a wide range of discussions and workshops.

Under the umbrella theme of Mobilising Social Justice, the conference dealt with a variety of topics, ranging from the question of how citizens can influence state policy and parliamentary actions, to explaining the underlying interests behind community efforts to advocate for rights to basic services and freedom of expression. The conference also addressed the interests underpinning civic mobilisation – or rather, the lack thereof – by migrant communities. We felt it was useful to devote critical attention to the under-explored relationship between civic actors and state institutions – not only the police and unaccountable government officials, but also what Professor Peter Alexander refers to as the more ‘cosy aspects of the state’: the courts, local government, and parliament.

The conference marked an important milestone for the Civil Society Building Knowledge programme, a joint initiative by the Dutch Humanist Institute for Development Cooperation (Hivos) and the Institute of Social Studies in The Hague.

The primary purpose of this book is to provide an account of the research findings, and some of the key conclusions and questions that emerged from the conference. Many of the contributions of the conference participants in the debates, presentations and workshops have also been included.

In many ways, our conversation is just beginning. There was much critical discussion generated at the conference itself, which is to some extent also captured by the facilitators in their preface to this book. The knowledge programme has been a process of ‘weaving’: weaving past with present, academics with activists, the personal with what we might call the sectoral, and weaving identities and experiences. The process has given us access to new insights, new connections, new questions, new energy, and perhaps also some new answers. In addition, it gives us insights into gaps in our thinking that we need to address in the future – indeed a valuable process.

There are people we wish to thank especially for their contributions to the conference. First of all we would like to thank the Christian family of K’s Catering, for the halaal coffees, snacks and lunches. We would also like to thank Rachid Adams of AR tours, who picked up people from the airport and gave everyone a very warm welcome, and Andrew Geldenhuis of DV8 micro and digital in Cape Town, for printing the programme, the folders and the posters. The Josephine Mumbaing family produced the beautiful conference bags. Abdul Whahid, Bilal Houssain and their colleagues from Africa Real Time Productions

organised the video recording and photography. Michael Powers helped with the registration of the participants. Rudi Baarsens, Sweetness Mubantu and all the staff from the Sunny Side Park Hotel welcomed us with patience and friendliness.

We offer a special thanks to the Mandela Institute of the School of Law at the University of the Witwatersrand, and especially Magda van Noordwijk, who helped us with some key logistical issues and booked this wonderful space for us, thanks to an institutional link between the Wits Law School and the Institute of Social Studies. The Mandela Institute also hosted a preparatory meeting that took place in July 2009.

Of course, we also offer deep thanks to all the researchers, participants and discussants, and everybody who has shared their experiences and their work with us.

There are a few more people to whom we are especially grateful; first of all, Ghadija Vallie, who has been part of our process since July 2009; her very personal touch has been profound. We are also grateful to Lee Mondry and other staff from the Hivos South Africa office, who have been working alongside Ghadija.

We wish to also warmly thank the editors and staff of Pretoria University Law Press (PULP), and in particular Danie Brand, Lizette Besaans and Yolanda Booyzen, for their enthusiasm in and flexibility with this project and agreement to publish through PULP.

Finally, we wish to thank those colleagues at ISS and Hivos who provided much-valued feedback on earlier versions of this manuscript, including Kees Biekart, Ria Brouwers, Rosalba Icaza, Marlieke Kieboom, Josine Stremmelaar, as well as independent consultants Helen Moffett and David Buchanan. Of course, any remaining errors or inconsistencies remain ours alone.

Our weaving process will now pause for a while; but we assure the reader that it will continue in the future.

Jeff Handmaker and Remko Berkhout

The Hague, April 2010



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A CRITICAL HISTORICAL CONTEXT ON *MOBILISING SOCIAL JUSTICE*

Liepollo Lebohang Pheko and Edward Sebastien¹

The conference on *Mobilising Social Justice*, which took place at the Chalsty Centre at the University of Witwatersrand on 23 and 24 November 2009, was envisaged as an open and critical forum for discussing academic investigation and activism, as well as other forms of social justice practice. This offered an exciting opportunity to rigorously examine some of the contradictions and tensions between theory and practice.

The Hivos-ISS Knowledge Programme, which organised the conference, intended to develop a knowledge-based methodology, while also encouraging research into responsive governance. In addition, the organisers aimed to interpret and create material for activists to work more optimally with by-passed and vulnerable communities. Lastly, the process was intended to encourage knowledge sharing, in order to enable processes for enhancing civil society and its struggles through academic, activist and other practitioner circles.

The five research projects provided excellent intersections and offshoots for continuing study and investigation into various social phenomena, political contexts, and legal instruments; for example, the use of force, limitations of the rights agenda, and the posture of the state towards its citizens and in relation to the global governance and finance architecture. Definitions of citizenship, gendered experiences of citizenship, and access and rights within the neo-classical state, were also investigated, among many other topics.

It was significant to note that all researchers whose work is contained in this volume made a strong case for continued exploration and development, and the sharing of experiences with neighbours in the region, on the continent, and further afield. The conference created space for this, but needs to broaden its

¹ Conference facilitators, *Mobilising Social Justice*.

horizons and strengthen its leverage if it is truly to succeed in its quest to explain social justice.

But the path ahead is a thorny one. Continual conflict between state authority and those that challenge the current course is inevitable. The choice of partners and cohorts will be critical in devising strategies and modalities of engagement.

The history of South Africa is a critical component in understanding the social justice issues addressed at the conference. South Africa's liberation struggle, in common with others across Africa, was based on the right to self-determination. This was originally conceptualised both as a programme of action for reconstruction and development, and as an instrument for consolidating the country's programme of nation-building. While this has, unfortunately, become a defining characteristic of one-party states, it has also been the driving force behind aggressive education and development programmes. Many of Africa's developmental problems may be traced back to European colonialism, and Western hegemony continues to constrain Africa's development. A long history of colonisation has led to a situation in which the continent has been forcefully absorbed into the global capitalist order. These brutal colonial experiences have been identified by Ihonvbere as:

including the experience of slavery; the termination of endogenously driven patterns of state and class formation; the imposition of colonial rule; the balkanisation of the continent and imposition of alien values, tastes, and institutions; the domination of the African economy by profit-and-hegemony-seeking transnational corporations dedicated to making profit at all cost; the total denigration of local cultures, values, and institutions; and finally, the structured integration of the African economy into the periphery of the global division of labour and power as a vulnerable, dependent, underdeveloped, weak, and largely raw material-producing region, to mention a few.²

South Africa is no exception to the ravages of the colonial project, and the social and political landscape in the country is increasingly beginning to show signs of the perilous nature of the post-independence African state. This has been illustrated by recent and ongoing struggles at both community and political level. In the words of an African proverb, it is the grass that suffers as the elephants – in this case, narrow, Western-led capitalist interests and political elitism – dance upon it. The requirement for survival is the ability to do new things, and to do them in a different way. It is indeed time to consider the lean, mean, fighting machine of civic action, and to recall Kwame Nkrumah's words: 'We prefer self-government with danger to servitude in tranquillity.'

Recent developments in South Africa may be traced back to the actions of Nelson Mandela, the country's first democratically elected president. To some, Mandela is a superhuman, iconic statesman, who dragged a nation from the brink of annihilation to international statehood. To others, he represents a moment missed, and the collective suppression of national outrage in the name of instant

² Ihonvbere, 2003: 3–4.

reconciliation. Even between the writers of this preface, different streams of thought prevail; the exciting thing is that we have the freedom and opportunity to wrestle with each other's arguments and to forge ahead, despite our contradictory viewpoints. This spirit of fraternalism has shown us that we are more similar in our pursuit of light and truth in this world than we might think.

Mandela was by no means the only South African leader to champion the poor and the marginalised. Many others, such as Robert Sobukwe, Mothopeng and Masemola, have almost been forgotten, their Herculean courage mere footnotes in history. Some heroes – women such as Elizabeth Sibeko and Victoria Mahlemakhulu – are remembered once a year at Women's Day events, rather than being venerated as national icons. A nation without complete remembrance of itself is like a person who does not know his or her own face. However, it has also been said in some quarters that this is South Africa's first phase of liberation; the second is in the making.

Reversing the country's historical colonial legacies (one of which is massive, one-sided accumulation of wealth) and assisting the country in re-constructing a cohesive society goes beyond the promotion of socio-economic rights. It is going to be a daunting task to weave a new tapestry from our diverse nation. South Africa has been blessed with a population that is racially and ethnically heterogeneous, despite apartheid's efforts to divide us forcefully; it has religious and cultural diversity; in short, it is a unique microcosm of the world.

However, the nation now needs to summon its vision, courage and determination. This is a process that must be stimulated by social conscience and the need for moral regeneration. We need to mobilise people of good will in state institutions, religious organisations, and in corporate and civil or civic society, both nationally and internationally. The movement has begun in a small way, but how and when it will gain momentum and progress is anyone's guess.

At the conference, there was excellent representation from many within the sectors covered by the presentations; some of the best qualified in these sectors made themselves available, bringing their academic and experiential knowledge and inspiring others. However, the voices of the dispossessed were not loud enough. There was a notable absence of representatives from certain sectors, particularly the 'foot-soldiers' of civic society: students (though a few were present), policy-makers, cultural experts and traditional leaders.

Consequently, the findings of the various research papers were typically not spoken of by the subjects themselves, but by observers. The presence of several community activists proved to be limited in the ability to present other perspectives and challenge the methodology (and even the findings) of research.

Another critical observation is that, as at many such gatherings, the vast majority of presenters were white. In terms of creating a new and alternative vision and exchange of knowledge, certain epistemological questions should be taken into account: who is answering, why questions are asked and why the

respondents respond in a particular manner, what the intention and understanding is between the researcher and the respondent. All these factors are key to the success of the Knowledge Programme. These issues are not value-free, just as research itself is not neutral, but driven by agendas, passions, choices, biases and even prejudices. As a result, experiences, perspectives and perceptions – of women and men, Africans and white researchers, young and middle-aged respondents – will all have different nuances and consequences.

On the other hand, the conference organisers' aim was to make all present relaxed and at ease with each other, and to create an inclusive mood. The venue of the Chalsty Centre, and the creative African bead- and other artwork in brilliant colours on its walls, accompanied by African music flowing through the entrance hall during the breaks, helped set the tone. Further enhancing this feeling was the park-like setting of the west campus of Wits University, with its trees and green lawns.

Cultural symbols carry a very profound message. South Africa, in spite of 16 years of democracy, is still in its infancy in terms of building a non-racist (as opposed to non-racial), plural, cohesive and caring society. At a similar colloquium, at which many pre-eminent scholars were present, debate raged around what and who could be termed African, and more specifically South African. Participants grappled with the concept for hours, yet nothing definitive emerged. We still yearn for an inclusive national identity; one that encapsulates sisterhood and brotherhood; one that defines the inner and outer self; one that affirms a positive self-image of our Africanness; a single value system, shared by all those who embrace it in contributing to nation-building for a cohesive society.

As Robert Sobukwe, first president of the Pan Africanist Congress, noted:

'We are fighting for the noblest cause on earth, the liberation of mankind ... there is only one race the human race'.

INTRODUCTION TO *MOBILISING SOCIAL JUSTICE*: CRITICAL DISCUSSIONS ON THE POTENTIAL FOR CIVIC ACTION AND STRUCTURAL CHANGE

Remko Berkhout and Jeff Handmaker

In October 2009, the Constitutional Court of South Africa delivered its final verdict in the Mazibuko water case. The judgment marked the end of a struggle by a group of residents from Phiri, a poor suburb in Soweto, against the installation of pre-payment water meters. After other forms of protest had been crushed (often violently) or exhausted, the community took the legal route to demand adequate access to water, provided for in South Africa's constitution. This strategy, which saw social movements, human rights NGOs, lawyers and local communities working together in support of citizen action, had previously been followed with some success. Although the Constitutional Court failed to support the complaint of the Phiri community, an earlier 2008 High Court ruling had declared the water meters to be unlawful, signalling that South Africa's emerging 'culture of constitutionalism' had something to offer to the poor. The Mazibuko case showed that the road ahead would be long and difficult, but it did help to further define the terms of the social justice struggle for affordable water; and it served as a positive impulse for activists and movements around the country involved in other struggles for basic human rights.

The Mazibuko case illustrates what this book is about. Drawing on contemporary events in South Africa, the chapters reflect critically on various civic strategies to promote social justice. The results of five research projects (four of which were supported by the Hivos-ISS Civil Society Building Knowledge Programme) examine different dynamics of civic action, ranging from the nature of community protests to civic participation in the national budget process. The findings engage directly with the main questions of the Programme: What are the dynamics of civil society formation? What is the (potential) role for outside actors? And how can civil society-building contribute to structural social change?

The Knowledge Programme focuses on issues concerning civil society, defined as 'the sphere of ideas, values, institutions, organisations, networks located between the family, the state and the market and operating behind



the confines of national societies, politics and economies'.¹ It aims to study the roles of citizens and organisations in processes of societal change. The subtitle of this book reveals our contention that much of the potential of civic action remains to be unlocked. The Programme has recognised that the many dimensions of academics' and practitioners' work on civil society-building require further clarification and research. It aims to fill these knowledge gaps by fostering joint research and critical reflection by academics and practitioners.

We believe that exploring various forms of knowledge – academic knowledge, activist knowledge, educational and cultural expressions of knowledge – can generate new insights and reveal dynamic strategies for civic action. Furthermore, and echoing many of the reflections raised by Pheko and Sebastien in their Preface, we are convinced that in doing so, we must be very conscious of the socio-cultural, historical and political context in which these issues are being discussed.

1 THE CONTEXT

South Africa, sometimes referred to as 'a world in one country', provides a fertile context for reflection on these issues. Its history of civic action is still very evident. The country's broad-based civic struggle against apartheid serves as a point of reference for social movements the world over. By common consent, the early years of South Africa's post-apartheid record, following the country's first democratic elections in 1994, were nothing short of impressive, with milestones such as the Truth and Reconciliation Commission, strong macro-economic performance (albeit not sufficiently evenly distributed), a rich and still-expanding record of progressive legislation, and an emerging culture of constitutionalism.

In the early post-apartheid years, civic actors were at the forefront of these change processes. But by the turn of the millennium, optimism had started to wear thin. The South African elite, both in the private and public sectors, had firmly embraced a (neo-)liberal ideology. The optimistic vision of the rainbow nation began to fade against the reality of slow social progress amid persistent poverty, high crime rates, and the devastating and well-publicised effects of the HIV/AIDS pandemic. The ANC government struggled under the weight of its own ambitions and expectations, hampered also by debilitating internal power dynamics and the limited delivery capacity of the state apparatus it had inherited.

As Yasmin Sooka has argued in the epilogue to this book, civil society organisations have struggled as well. The end of the anti-apartheid struggle left a strategic vacuum and generated a civic brain-drain as many former activists and civil society leaders moved into government and politics. Civic actors found themselves negotiating complex problems, while searching for new niches

¹ Kaldor, 2009: 1.



and confronting difficult dilemmas: service delivery or advocacy? Maintaining old loyalties or adopting a critical distance? Walking the road less travelled, or succumbing to the comfort zone of the aid chain?

Fast-forwarding to 2009, we have found that these questions and dynamics are still at play, the dilemmas still relevant. The country's vigorous efforts to celebrate a democratic South Africa with the staging of the 2010 World Cup in the country have been tarnished by xenophobic violence, violence against women, record levels of socio-economic inequality, unprecedented restrictions on informal traders and police violence against social justice campaigners protesting the lack of basic services. The ANC's massive victory in the country's last national elections cannot obscure a continued erosion of public trust in politics and governance, and debilitating constraints such as corruption and official abuses of power. A marked increase in public protests vividly illustrates the growing impatience of ordinary South Africans who have seen too little progress. High levels of state repression, police violence, and unresponsive courts are extremely frustrating for those who fought against similar abuses during the apartheid era. As one of the conference participants remarked bitterly: 'South Africa currently finds itself in a situation where the people have turned against the state, the state has turned against the people, and the people have turned against the people as well.'

2 CIVIC-STATE INTERACTIONS: CO-OPERATION OR MAINTAINING A CRITICAL INDEPENDENCE?

If the future of South Africa rests upon both active citizens and an accountable state, then it is the interplay between the two that merits further investigation. Based on the analyses of a broader study, Handmaker's contribution in chapter 2 reflects on civic-state interactions to protect the rights of refugees in South Africa and to enhance their potential for structural change. Central to this research is a recurring tension faced by many human rights organisations in the context of an emerging culture of constitutionalism. At what point does it make sense for civic actors to provide active support to the government, and under which circumstances is it preferable for civic actors to maintain their critical independence?

Reflecting on more than a decade of civic advocacy for government accountability to protect and promote refugee rights, this chapter explores how the dynamics of civic advocacy in this context may be strengthened. Under what circumstances do civic state interactions lead to structural change, and what do these interactions have to say about the potential and pitfalls of realising rights in general?

The chapter, which is based on a larger study,² analyses the results of three critical studies of co-operative and confrontational civic-state interactions in the context of refugee rights. The importance of context, the primacy of the state for the realisation of rights, and the notion of social distance emerge as important ingredients for explaining the potential for strategic civic action. Civic actors are encouraged to reflect more often upon their roles and actions, in order to make strategic use of the limited yet significant space in which civic action can flourish.

3 PARTICIPATION IN THE BUDGET PROCESS: WHY BOTHER?

According to Frank Jenkins, a law advisor to the South African parliament, the budget process presents an important, yet under-utilised space for civic influence. As he argues in chapter 3, at the end of the day, it is the state budgets that reveal the true priorities and choices of the government. Therefore, civic actors who aim to influence government policy should seriously consider participating in the early stages of the budget process.

This is reinforced by the second part of Jenkins' argument, namely that the South African constitution firmly enshrines the right to participate in public processes. The constitutional obligation to guarantee this lies with parliament. This obligation also includes preserving transparency of parliamentary processes, openness towards the media, and public meetings. Parliament can and should be held accountable in terms of this obligation.

Jenkins sounds a wake-up call to activists, while also unravelling the complexity of parliament in action. He sets out the technical workings of the budget cycle and specific provisions for civic intervention. Clearly, the technocratic complexity of the budget process presents great challenges for civic involvement. Jenkins readily admits that interventions offer little guarantee of tangible results. So why bother? Despite the limitations of budget participation, Jenkins argues that it is a form of democratic development in action that, alongside other peaceful civic interventions, may be a constructive alternative to violent expressions of civic anger, which risk spiralling out of control and further deepening the polarisation of South African society.

4 LEGAL MOBILISATION: AN OPTION FOR THE POOR?

The existence of laws and spaces allowing for participation are no guarantee of the realisation of rights, especially for the poor, as discussed in chapter 4. Jackie Dugard, founder of the Social and Economic Rights Institute (SERI), and formerly a senior researcher with the Centre for Applied Legal Studies (CALS) at the University of Witwatersrand, documents the struggle of the residents of Phiri,

² Handmaker, 2009.

a poor township in Soweto, against the instalment of pre-payment water meters (PPMs). This struggle first took the form of direct protests, accompanied by concerted efforts to negotiate with local government and the water company, but when these efforts proved unsuccessful, the community turned to rights-based litigation.

The starting point for this litigation is the South African Constitution, which guarantees the right of access to sufficient water. But in 2001, the city of Johannesburg introduced a project to limit water consumption in Soweto by installing PPMs. These meters automatically disconnect the user once the (inadequate) supply of free water is exhausted, forcing very poor citizens to go through a complicated and often unaffordable process of purchasing additional water credits.

Community resistance, which has been supported by the Anti-Privatisation Forum, has ranged from meetings and marches to attempts to physically obstruct the digging of PPM trenches. These efforts were met by a combination of legal action, arrests, and harassment of activists, and ultimately, by disconnecting households that continued to refuse PPMs. By 2005, resistance had virtually been crushed.

It was at this low ebb of the struggle that rights-based litigation emerged as an additional route for activism. This strategy changed the game. In 2008, the High Court in Johannesburg declared PPMs unlawful. The Court's ruling was an unprecedented victory for the poor, and one that attracted widespread national and international media attention.

Just before the conference, in what Dugard terms a 'shock decision', the Constitutional Court overturned the findings of two previous courts. Does this defeat imply that legal action has little to offer the poor? Was it all in vain? Dugard concludes that the process reverberates in unanticipated ways. Such collaborative interventions help to clarify the terms of a social justice struggle; they confront lawyers and academics with the harsh realities of the social justice issues they advocate in the court rooms, or speak about at academic conferences; and in many other respects, they re-energise social activism in South Africa.

5 RESISTANCE AND REPRESSION

Budget participation and legal action may be viable strategies for some civic actors. Yet they require skills, resources and connections that are well beyond the reach of most South African citizens. In chapter 5, Marcelle Dawson from the Centre for Sociological Research at the University of Johannesburg reflects on the increased incidence of community protests, and the police response to these protests. The mainstream media have been quick to define the protests in terms of 'bread and butter issues', fuelled by the global financial crisis. However, critical observers have pointed out that the voices of the dissenting communities were absent in the analyses, and that deeper, more complex causes were often at the

heart of the protestors' dissent. It is crucial to find out what the real motivation was for the people's mobilisation, and why they chose protest (which often turned violent) over other strategies.

Dawson suggests that an over-exaggeration of the service delivery element of popular resistance runs the risk of solving the problems with piecemeal or 'band-aid' remedies that are short-lived, and often glosses over the underlying causes. Yet basic needs cannot be ignored.

For many demonstrators, involvement in popular protests has been met with unreasonably forceful responses from the police. Whatever the drivers behind resistance and repression, the interplay between these factors provides a dangerous cocktail for social unrest. Heavy-handed repression seems to fuel rather than deter violent resistance.

Furthermore, repression of resistance may be used as a mirror to reflect on the state of democracy. A certain measure of stability has been achieved since democratic elections in 1994, but apartheid's legacy of immense social problems remains a grave threat to social order. Beyond the content of rights as contained in the Constitution, and in particular the right to vote, what do these problems say about the quality of South Africa's democracy?

6 MOBILISING BELOW THE RADAR

In chapter 6, Zaheera Jinnah and Rio Haloday from the Forced Migration Study Programme at the University of Witwatersrand turn to the mobilising of rights by and for migrants. How do migrants claim their rights in a context where, despite the guarantees contained in South Africa's Constitution, citizenship is not acknowledged in society, and where the threat of xenophobic violence looms large?

Group interviews in Johannesburg confirm notions from social movement theory that, for some groups, there are benefits in not mobilising. Fears of deportation, self-exclusion and time constraints lead some migrants to accept, rather than protest, infringements of their rights. Migrants tend to rely on social networks, privately funded help and small, community-based organisations such as churches and credit associations. Furthermore, levels of rights awareness are low, which also hinders mobilisation; and xenophobic tensions have exacerbated the low levels of trust between migrants and South Africans.

The overwhelming feeling among migrants is that there are not sufficient institutions to turn to when help is needed. There is a disconnect, confirmed by interviews, between migrant realities and the agendas of NGOs and international organisations. With a few exceptions, national NGOs seldom work exclusively with migrant groups. Migrant-led organisations are better connected, but struggle to maintain stable levels of funding and to establish working relations with other groups. Finally, faith-based organisations tend to provide relief and material

assistance without advocacy. These organisations seem to be the best-connected, and enjoy high levels of credibility among migrants.

Jinnah and Haloday conclude that migrants have not mobilised significantly to close the gap between their constitutional entitlements and the actual realisation of their basic rights. There are several issues that require mobilisation, including protection from police harassment and access to basic services. But civic actors need to develop strategies and co-operate to ensure that the basic human rights enjoyed by citizens also come within reach of migrants who wish to make South Africa their home.

7 WEAVING THREADS

The research projects described in the core chapters of this book served as the backbone for a two-day dialogue on mobilisation and social justice. Sooka's contribution in the epilogue includes the hopeful notion that civil society in South Africa is entering a new era of social activism, illustrated by some of the cases in this book, and including well-known initiatives such as the Treatment Action Campaign and the Abahlali shack dwellers' movement. This is good news for millions of South Africans and others resident here, but these examples can also serve as an inspiration for other social justice movements in the rest of the world. If South Africa's 'world in one country' label also extends to its social dynamics, then these positive signs may (as Handmaker describes) be able to travel across other spaces and time, and once again inspire civic actors around the world to end the macro-structural dimensions of global apartheid.

Unlocking the potential for structural change will not be easy. This book adds to a growing body of critical voices that call upon civil society organisations, and their donors, to become more self-critical and reflective, more analytical and strategic. Good intentions, commitment and the moral high ground of civic action, while crucial, are insufficient on their own. Civic action requires resolve and strategic responses. As one conference participant remarked, civil society spends too much time shouting about what's going wrong, instead of analysing what's going on.

This brings us back to the key questions of the Knowledge Programme. How can we understand the dynamics of civil society formation, and the role of local actors in this process? How does civil society-building as a process contribute to structural changes in the unequal balance of power in society? And how do external actors – donors as well as support or solidarity organisations – contribute to this process?

The concluding chapter also addresses knowledge integration. The findings of the research projects discussed here suggest that the strategies of donors and the organisations they support should be far more knowledge-based than they are at present. Such strategies may indeed hold the key to deeper insights, especially if further research can strengthen grass-roots perspectives and citizen narratives.

In their preface, Pheko and Sebastian suggest that this conference is merely a beginning. Their words demonstrate the extent to which the research projects and the conference together succeeded in creating an inclusive space, and we welcome their critical reflections.

The concluding chapter of this book reflects on all three of these research questions. And yet a grand theory on civic action remains elusive, and may not even be necessary. While some mobilisation strategies (ranging from peaceful marches to civic education) have not been covered by the conference or this book, the studies show that successful collective action lies in combining several mobilisation strategies. Moreover, conference participants rightly remarked that some important perspectives, such the role of traditional authorities in rural areas, did not feature prominently enough in the discussions. There was also a marked lack of gender analysis. This we acknowledge. However, the studies never intended to provide an exhaustive or conclusive analysis of mobilisation strategies. Rather, they offer an opportunity to appreciate the complexity of social processes and civic action.

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Jeff Handmaker¹

On 31 January 2008, South African police officers raided the Central Methodist Church in Johannesburg. Employing heavy-handed tactics, allegedly including pepper spray and dogs, the police proceeded to round up suspected undocumented migrants, who they claimed had no permits to stay in South Africa.² Among those arrested were Zimbabwean asylum-seekers who had fled growing violence in Zimbabwe, and had managed to avoid detention at a notorious detention facility in Musina on the South Africa-Zimbabwe border, before seeking refuge in Johannesburg.³ These asylum seekers had a legitimate right to stay in terms of national and international laws that the South African government was legally obliged to respect.

In the months that followed the January raid, a growing number of reports in the media highlighted widespread abuses of asylum-seekers and refugees by the police and the Department of Home Affairs (DHA). Civic organisations stepped up their advocacy and launched a series of further public and legal challenges.⁴ Civic organisations insisted upon the government's accountability to migrants and asylum-seekers in general, and condemned the police raids on the Methodist church.⁵

¹ This chapter is adapted from Handmaker (2009) 'Conclusion', in *Advocating for Accountability: Civic-State Interactions to Protect Refugees in South Africa*, pp. 191–211. Antwerp: Intersentia.

² 'Raid Highlights Migrant Abuse', 2008.

³ As explained by Hermes (2008) and others, the growing number of asylum-seekers from Zimbabwe was due to growing state-organised violence by Mugabe's authoritarian regime, which peaked in 2005, in the context of Operation Murambatsvina, and again in April 2008, following the Zimbabwe government's rejection of the 29 March 2008 elections.

⁴ Lawyers for Human Rights (LHR) and the Consortium on Refugees and Migrants in South Africa (CoRMSA) issued a series of press releases condemning the behaviour of the South African police and the DHA. Later, this series of public challenges was posted on their websites: <http://www.lhr.org.za/news> and <http://www.cormsa.org.za/press/>. Last checked on 31 December 2008.

⁵ Burger, 2008.



In May, local and international media began reporting a wave of attacks against foreigners, mainly in township areas. Houses and shops were looted. People were beaten and even set on fire in the street. By 31 May 2008, at least 62 people had been killed, and many more forced to flee.⁶ The violence was so widespread that the government was compelled to establish emergency relief centres to protect the victims of xenophobic violence. However, in August 2008 the government threatened to close the relief centres,⁷ while at the same time, the government refused to close the detention centre in Musina, which had developed a reputation for widespread abuses, including allegations of torture.⁸

Civic organisations responded to these developments with co-ordinated responses and legal challenges that illustrated a growing sophistication in advocating for accountability. Lawyers for Human Rights (LHR) – supported by numerous other civic organisations, including the Treatment Action Campaign (TAC), Consortium on Refugees and Migrants in South Africa (CoRMSA) and others – launched constitutional challenges to the closure of the relief centres.⁹ After South African civic organisations repeatedly appealed for the closure of the Musina immigrant detention facility – run by the South African Border Police, in co-ordination with the DHA – LHR found itself supporting the Director-General of the DHA, who eventually agreed that the facility should be closed. LHR issued a press release on 20 November 2008:

[LHR] supports the call by the Director-General of the Department of Home Affairs for the closure of the detention facility in Musina for foreign nationals ... The facility is run by the South African Police Service with no safeguards to prevent unlawful detentions, the deportation of refugees or independent monitoring of the conditions of detention.

LHR described the conditions at the Musina detention facility, making extensive reference to international law and South African law:

We have found large numbers of children, often unaccompanied, detained along with adults in contravention of both the Constitution and the Children's Act ... South Africa has been cited for its mistreatment of detainees in immigration detention by the United Nations Working Group on Arbitrary Detention ... [including] abusive handcuffing, beatings with hosepipes and in one incident, detainees were forced to roll in urine on the floor. Such treatment is not only a criminal offence, but a violation of South Africa's obligations under the UN Convention Against Torture.

Reflecting on a lengthier study that looked at more than a decade of civic advocacy for government accountability for refugee rights in South Africa,¹⁰ this chapter will revisit the following research question: how can the dynamics of civic interactions to advocate state accountability to promote, protect and fulfil refugee

⁶ 'Xenophobic Attacks Plague the Country', 2008; 'Xenophobia Death Toll Hits 62', 2008.
⁷ Bell, 2008.

⁸ Mbelle and Dissel, 2008.

⁹ IRRI, 2008.

¹⁰ *Ibid.*, footnote 1.

rights in South Africa be strengthened; under what circumstances do civic-state interactions lead to structural change; and what do these interactions teach us about the potential and pitfalls of realising rights in general?

Discovering answers to this question will help to explain the emergence of civic capacity, the strategic importance of recognising the structural boundaries of the state, and the role of civic actors in mediating the translation of global rules into local contexts, which can lead to structural change.

This chapter presents the findings of a study of civic-state interactions to protect the rights of refugees in South Africa, conducted between 2004 and 2008, which explains how civic actors have interacted with governments through both co-operation and confrontation. Secondly, it explains the context in which civic actors have acquired capacity to advocate for government accountability, and how this has shaped the possibilities for realising refugee rights in South Africa. Thirdly, the chapter explains the importance of respecting structural boundaries in a culture of constitutionalism. Fourthly, it explains how civic actors translate global rules into their locally relevant contexts. Finally, this chapter explains how civic capacity to realise rights travels across time and space: across time, in terms of the ongoing relevance of social justice strategies from one historical period to the next; and across space in terms of the global relevance that social justice strategies in one country have for similar struggles in different countries.

1 CIVIC CAPACITY, STRUCTURAL BOUNDARIES AND THE SCOPE FOR STRUCTURAL CHANGE

Civic-state interactions in the fourteen years that have passed since the South African government ratified the international refugee conventions have reaffirmed the capacity of civic actors to hold states accountable for their human rights obligations, clarified the structural boundaries of civic-state interactions, and revealed the scope for these interactions to lead to structural change.

In seeking to better understand the potential for civic action to lead to structural change, I have tried to explain the dynamics of civic interactions to advocate state accountability in promoting, protecting and fulfilling refugee rights in South Africa; the circumstances under which civic-state interactions lead to structural change; and the potentials and pitfalls of these interactions in realising rights in general. Civic interventions to promote the South African state's accountability for its human rights obligations are principally understood through the country's culture of constitutionalism. Carefully honed in the struggle against apartheid, civic actors – including lawyers and legal advocacy organisations in the post-1994 democratic era – have wielded both 'shield' and 'sword' in their advocacy of new human rights issues (including refugee rights), advocating a new kind of 'politics by other means'.¹¹

¹¹ Abel, 1995.

In contrast to the pre-democracy era, in which challenges to a government decision were almost unthinkable, administrative law has proven to be a dynamic mechanism, available to challenge a government directly on the content of its policies. It has been a powerful shield against ill-informed, biased or arbitrary decisions made in individual applications for refugee status. It has also become an effective sword, both in halting restrictive policies for admission to the country, and in advocating for economic and social rights, such as the right of refugees to study, receive social grants, and work in particular employment sectors.

Beyond explaining the civic potential for realising refugee rights, I have questioned how such a role could be strengthened. Further, I have asked what this has taught us about the potential of civic interventions in realising rights in general. Civic advocacy for refugee rights in South Africa demonstrates how state accountability can be promoted, or in more limited circumstances enforced, by way of co-operative and confrontational interactions between government and civic actors. The principal means of explaining the nature of the relationship between civic actors and the state in these interactions is what Kidder has referred to as social distance, as measured by divergences in interests, meanings and political positions; in other words, the externally grounded reasons for participating in a given civic-state interaction.¹²

Civic-state interactions in refugee policymaking

The first example of civic-state interactions discussed in the longer study involved civic actors engaged in the development of national policies to protect refugees in South Africa. These interactions revealed various opportunities and challenges for civic actors. In many respects, South Africa is a model of participatory democracy, in which the government has a duty to ensure that there has been some level of civic involvement in the policymaking process. While the courts in South Africa have determined that some specific civic involvement duties are enforceable, it is generally a matter of discretion as to what form this public involvement takes.¹³

Where a process was too one-sided in terms of the dominant role played by civic actors, the South African government questioned the legitimacy of the process, as was shown by its reluctance to follow-up on the Refugees Green Paper. Similarly, when the government neglected to consult civic actors, as was the case in the development of the Regulations to the Refugees Act, civic actors contested the outcome of that process, labelling it illegitimate. By contrast, where civic actors participated actively in a government-led policy initiative – as was the case in the Refugees White Paper process – the legitimacy of the process, as well as the possibilities for its implementation, was correspondingly enhanced.

¹² Kidder, 1979.

¹³ Hoexter, 2007: 75–76, commenting on the Doctors for Life case (2006) and the Matatiele case (2007).

Broadly speaking, government and civic actors alike welcomed the outcome of the White Paper process – the Refugees Act.

Clarity regarding the respective roles of civic and state actors has made it possible to explain the motivations for the participation of each in a policymaking or implementation process at a particular historical moment. This has in turn illustrated how the presence of social distance, at that moment, defined the strategic possibilities for a desirable outcome at a particular time, at least from the perspective of civic actors participating in a given policy or implementation process.

In the formation of the Refugees Act of 1998, it was notable that both civic and government representatives in the White Paper Task Team (as well as most observers of the process) recognised the need for the Department of Home Affairs (DHA) to set policy, as long as appropriate consultation also took place. In other words, the opportunities for exercising civic agency were conditioned by administrative and legal structures already in existence. Furthermore, there was a common understanding that the South African government was obliged to give effect to its ratification of the international refugee conventions. However, this common understanding did not mean that the views of all civic actors were the same. Indeed, there were many differences of opinion as to the extent to which the Refugees White Paper and Bill needed to make explicit reference to the rights of asylum-seekers and refugees, and to the obligations of the government.

And yet it was still possible to advocate structural change (in Archer's terminology, 'elaboration') in the DHA's legal and administrative structure. The legal structure that emerged from the White Paper process incorporated international law principles regarding the status determination procedure, as well as due process principles contained in South Africa's constitution. The administrative structure included various possibilities for internal appeal, as well as for oversight by the Standing Committee and Refugees Appeal Board.

Civic-state interactions in refugee policy implementation

Unlike in the refugee White Paper policymaking process, the possibilities for civic actors to influence the direction of the DHA's policy were more limited in the context of the second example, namely civic involvement in an ostensibly government-led project to regularise the legal status of former Mozambican refugees. This second example of co-operative civic-state interactions was informed by South Africa's historical involvement in the violent civil war in Mozambique, and the legal and administrative structure that had denied these refugees a formal status.¹⁴ By the same token, the desire of the South African

¹⁴ According to Rupiya and others (1998), the previous South African government's support for the right-wing, opposition RENAMO forces that were fighting the once-Soviet-backed, left-wing FRELIMO government forces formed part of South Africa's regional destabilisation campaign. The civil war in Mozambique generated millions of refugees, many of whom sought refuge in countries throughout the region, including South Africa.

government to *repair* this injustice to the government and people of Mozambique meant that it was possible for civic actors to promote a *correction* of this injustice, and to elaborate the legal and administrative structure by granting these former refugees legal residential status. Unfortunately, the actual implementation of this project severely constrained the possibilities for civic agency due to the role of the leading civic actor, a Dutch NGO known as AWEPA.

As far back as the early 1990s, a Tripartite Commission consisting of the governments of Mozambique and South Africa, together with the UNHCR, aimed to resolve the situation for the hundreds of thousands of Mozambican refugees who ended up in South Africa.¹⁵ The commission's two main commitments were to repatriate those who wished to return to Mozambique, and to regularise the legal status of former Mozambican refugees (FMRs) who wished to remain in South Africa.

When civic actors (and particularly AWEPA) expressed an interest in facilitating the implementation of the regularisation project, it was clear that the structural conditions favouring administrative due process were hardly in place for this to happen. The marked lack of political will on the part of the DHA, and the shaky legal and administrative structure that finally emerged to implement the project (which involved extensive closed-door involvement by AWEPA) created a situation in which the ability of local civic actors and FMRs to exercise their agency was highly circumscribed.

Particularly uncomfortable for local civic actors was the role that AWEPA played in conflating its interests with that of the South African government. The AWEPA co-ordinator's lack of distinction between his organisation's interest and the interests of the DHA – coupled with AWEPA's central co-ordinating role – artificially reduced the social distance between the DHA and local civic actors. This situation made it extremely difficult for local civic actors to challenge the behaviour of DHA officials, and ensure that administrative due process was being respected.

Furthermore, the significance of a credible monitoring presence was under-emphasised, as were concerns about 'survival fraud'. Finally, a moratorium on deportations was first downplayed and then sidelined altogether by the government, with no objection from AWEPA. To make matters worse, when civic actors eventually did raise concerns about the project's implementation, AWEPA openly undermined them. This combination of factors both compromised the independence of local civic actors and had catastrophic results for thousands of FMRs, who were denied regularised status in structural circumstances that failed to comply with basic standards of administrative due process.

¹⁵ The forming of the Tripartite Commission followed a 1992 peace agreement in Rome between the two main parties to the Mozambican conflict.

Litigation and shaming by civic actors

While co-operative interactions represented something relatively new to civic actors, emerging as they did from political struggle, and later from a negotiated constitutional transition that led to an accountable government, confrontational measures – through litigating and shaming the government into fulfilling its obligations to refugees – have been far more familiar territory for civic advocates.

The history of the anti-apartheid struggle mapped out two specific directions for civic actors, which to some extent continued in the post-1994 dispensation, although the experience of advocating refugee rights has tended to stress one particular direction over the other. As civic actors accustomed to litigating refugee rights took advantage of expanded opportunities for judicial review of administrative decisions, as provided for in the constitution, there have been correspondingly fewer efforts to publicly shame government. On one level this is surprising, given that advocacy efforts that have combined litigation with a civic mobilisation campaign (and strategic use of the media) have tended to lead to more favourable outcomes. On another level, this might be explained by the facts that (1) the DHA was obliged to radically transform its administrative structure; and that (2) the opinions of the general public – and the media – were generally unsympathetic to refugees and migrants.

The potential for structural interdicts to precipitate concrete and lasting improvements – or structural elaboration, in refugee protection standards – remains to be seen. Structural interdicts create a special relationship between the court, government and civic actors in which this elaboration can take place. However, this relationship also contains underlying tensions. The first (and more obvious) source of tension is between the government and civic actors, as acutely observed in the case of *LHR (2001)*, in which the credibility of civic actors and their ability to challenge government decisions were explicitly brought into question. The second source of tension is between government and the courts; civic groups and individuals have only recently been permitted to comprehensively challenge decisions of the government on the grounds of whether they have acted in a ‘reasonable’ manner. Hoexter sums up the problem well:

More than any other ground, review for reasonableness exposes the tension between two conflicting judicial emotions: the fear of encroaching on the province of the executive arm of government by entering into the merits of administrative decisions, and the desire for adequate control over the decisions of administrative authorities.¹⁶

In other words, the courts in South Africa have faced the structural dilemma of maintaining what Klaaren has referred to as a ‘delicate balance’ between, on one hand, allowing government to fulfil its role in determining the content of policy

¹⁶ Hoexter, 2007: 293–294.

and its implementation, and, on the other, acting as a constitutional check on government abuse of power.¹⁷

From structural conditioning to structural change: translators, social distance and public law

These three examples of civic-state interactions explain how the opportunities for civic agency have specific historical roots – which have conditioned civic agency to promote, protect and fulfil human rights, but have also allowed for structural elaboration (or structural change). Civic actors have fulfilled an important mediating role in the translation of global rules into the development, implementation and challenges of national policies. This study of civic advocacy for refugee rights in South Africa has also emphasised the importance of social distance as a strategic factor for civic actors, when assessing the possibilities for interacting with government in promoting state accountability towards refugees. Finally, this study highlights the usefulness of public (administrative and constitutional) law as a means of translating global rules into their local, vernacular contexts, and enforcing state accountability to international human rights norms.

As the following sections explain, civic interactions to advocate state accountability for respecting refugee rights can be explained through three theoretical propositions. Firstly, the capacity of civic actors to promote and impose state accountability is shaped by structural changes in the normative international and national legal frameworks. Secondly, boundaries which define the structural relationship between civic actors and the state shift in very specific ways; these must be understood by civic actors (agents) if they want to be strategic and successful in their advocacy efforts. And finally, civic actors play a crucial role in mediating the translation of international legal norms into local contexts.

2 CONTEXT SHAPES THE POSSIBILITIES FOR CIVIC-STATE INTERACTIONS

The social and political context from which civic actors have emerged has shaped both the nature of civic organisations and the possibilities for civic actors to influence state policies, mobilise for their enforcement, and hold states accountable. In South Africa, two distinct types of civic actors emerged from a long political struggle against racist governmental policies. The first mobilised in strategic, proactive ways to resist the apartheid regime. The other type of civic

¹⁷ Klaaren, 2006b.



actor supported this resistance, mainly by engaging in ‘politics by other means’¹⁸ through a range of legal interventions, from providing protection to those facing potential torture in the course of police interrogations, to challenging forced removals by blocking the implementation of the Group Areas Act.

Since the country’s first democratic elections in 1994, civic actors have operated in a rapidly shifting context that has challenged civic actors, and especially legal advocates, to develop new strategies. With the emergence of a constitutional culture, and a correspondingly accountable government in South Africa, civic actors have not only had to challenge government in order to hold it accountable; they have also been obliged to engage in policymaking and implementation programmes, supporting government when it has demonstrated a willingness to move in a progressive direction.

Where co-operative interactions have failed, confrontational strategies by civic actors have tried to fill the gap in legal protection. However, litigation on its own tends to provide little guarantee of a productive outcome. Well co-ordinated civic advocacy strategies, combining public shaming and mass mobilisation with legal interventions, have produced the most successful outcomes.

The process of developing refugee policy in South Africa has drawn upon global policy discussions on refugee protection. In particular, the refugee policy discussion in South Africa has engaged in debating whether refugee law ought to be ‘reformulated’ in order to correspond better with state interests, or, alternatively, ‘reinvigorated’ in order to correspond better with its original intentions. The dominant position advocated by civic organisations in the process of refugee policy formulation in South Africa has more closely reflected Goodwin-Gill’s view that mechanisms to encourage compliance need strengthening, and that NGOs play an important role in this respect.¹⁹ Refugee rights are the product of contestation, and civic actors have endorsed the need for institutional strengthening to ensure state compliance. Furthermore, the process of forming a refugee policy has demonstrated that the principal medium through which these rights are realised is the field of administrative law.

Pressures on the DHA to produce a new refugee policy came both internally and from outside, partly because of its ratification of the UN and OAU Refugee Conventions in 1996. With the ratification of these documents, and South Africa’s increasing prominence in international relations, the DHA came under particular pressure both from the UNHCR and other arms of government, including the Ministry of Foreign Affairs and ANC parliamentarians, to give

¹⁸ Abel, 1995, *passim*.

¹⁹ Goodwin-Gill, 1999.



permanent effect to these international commitments. However, the opportunities for civic interaction were constrained by structural factors from within the then-Government of National Unity. Buthelezi, of the opposition Inkatha Freedom Party, remained Minister of Home Affairs for some years, and openly clashed with the ANC on the government's policy towards refugees and migrants.

Consequently, as Crush and McDonald argued, 'progressive immigration reform was ultimately held hostage to the broader politics of IFP appeasement' in the Unity government.²⁰ In some cases, civic actors used this to their advantage, as when lawyers challenged the DHA's crude 'safe third country' policy.

Furthermore, the DHA (following the advice of US government officials who drafted many of the Regulations to the Refugees Act) has appeared to follow the mantra of 'irregular migration', which holds that explicit provisions to protect refugees lead to abuse of the procedure. If this assessment is correct, it explains the reluctance of the DHA to engage civic actors in the development of the Regulations. Whatever the reasons, this proved to be a strategic miscalculation on the part of government. While civic participation in the development of the Refugees Act created a basis for co-operative civic-state interactions, the DHA's lengthy and non-consultative development of the Regulations, set the Department on an inevitable path of confrontation with civic actors.

The contextual challenges faced by civic actors in promoting a comprehensive administrative law regime (by way of co-operative interactions that translate South Africa's global human rights obligations appropriately) have been considerable. As Klaaren has noted,²¹ the asylum-determination procedure in South Africa – and the rule of law in general – have operated for some time in a climate in which opportunities to claim rights have been decidedly limited – particularly prior to 1994. Although structural shifts have been noted with regard to the policy itself, implementation of the asylum procedure has become steadily more restrictive since its introduction in 1993.

Civic-state interactions must be seen as a cumulative process demanding ongoing reflection, possible co-operation, and (potentially) confrontation as well. By explicitly translating South Africa's international obligations and the rights contained in the constitution into the Refugees Act, civic actors have promoted a situation in which the DHA is obliged to correct its own behaviour. Where this has not succeeded, civic participation has advocated government accountability through a string of legal challenges to the DHA's policies.

²⁰ Crush and McDonald, 2001: 9.

²¹ Klaaren, 2006b.

3 RESPECTING STRUCTURAL BOUNDARIES IN A CULTURE OF CONSTITUTIONALISM

The strategic importance of civic actors in respecting structural boundaries is especially important in a country that respects a culture of constitutionalism. As mentioned earlier, this creates a primary tension in which civic actors may (1) support government as it expresses a desire to move in a progressive direction, but in addition (2) would want to maintain their critical independence. In this section, the structural conditioning of civic actors is explained in relation to the possibilities for structural elaboration, followed by a discussion of the circumstances in which civic actors make strategic choices on the basis of their assessment of the state-created structural boundaries with which they interact.

Structural conditioning of civic actors and the possibilities for elaboration

It has been possible to explain the outcome of civic refugee rights advocacy from a structure-agency view that draws on Archer's approach of analytical dualism. This approach assumes that specific historical events determine state-created structures, and that the exercise of civic agency has been conditioned by these structures. This approach also assumes that civic actors are able to elaborate these structures through a strategic assessment, thereby contributing to structural change.

On one hand, the three main illustrative examples of this study have demonstrated that civic advocacy interventions have played a significant role in holding states accountable. On the other hand, these same examples have confirmed that state accountability is by definition state-centred; civic actors that place themselves too centrally in a civic-state interaction – such as in the Refugees Green Paper policymaking process, or the AWEPA-led regularisation project – risk eclipsing this essential role of the state or government. Consequently, while the role of civic actors in promoting legal and social normative compliance is important, it should not be over-emphasised. The principal responsibility for realising rights always remains with the state.

Civic actors played key roles in the process of negotiated transition, and continue to fulfil multiple roles in South Africa's participatory democracy by making oral and written contributions to parliamentary hearings, participating in policy task teams, and even engaging in joint civic-state implementation projects. As Arnstein argues, assessment of whether this participation is 'meaningful' and 'likely to have an impact' depends from which rung of the ladder the civic actors make contributions. These range from the state avoiding civic participation

altogether, through forms of manipulation, to 'token' consultation, and finally to 'partnership, delegated power and citizen control'.²²

In navigating the narrow but significant channels for advocating state accountability, civic actors have assessed and made strategic decisions, based on their growing knowledge of global standards of refugee protection, to interact with government on the basis of structural boundaries on which civic actors believe the government might be prepared to compromise. A strategic consideration of this principal conditioning factor increases the likelihood that a civic-state interaction will lead to structural change.

Civic agencies' capacity to interact with and elaborate the country's legal and administrative structure providing for the reception of refugees and the determination of their legal status arises from specific historical events. In the context of refugee rights protection in South Africa, these events were related to a long-fought social justice struggle for dignity and self-determination, which was ultimately overtaken by a process of negotiated transition, during the course of which the state abandoned minority rule, and a democratic, accountable government came into being.

As South Africa has emerged from international isolation and begun to re-engage with the international legal and political order, the new government has been obliged to change its approach to refugees. Even during the apartheid era, the government demonstrated a willingness to allow applications for refugee status on an individual basis, beginning with the Russian applicants. Post-1994, the democratic government also welcomed critical civic voices in the elaboration of a comprehensive refugee policy through a new legal and administrative structure – at least initially. This openness changed as government took a more defensive stance against civic criticism; but as the White Paper process illustrated, possibilities still remained for structural elaboration of the refugee policy and its implementation.

Structural boundaries and strategic choices

Successful civic-state interactions depend on the strategic choices made by civic actors on the basis of a sober appreciation of state-created structural boundaries that not only condition their agency, but also allow for structural elaboration. By extension, the roles and responsibilities of both civic and state actors must be clear. This applies to any such civic-state interaction, whether it is the development of a nationally enforceable human rights policy, participation in an implementation project to realise human rights, or the enforcement of human rights obligations against a state. In all instances, the principal responsibility lies with the state and its government, although civic actors often play a complementary role as 'translators' of global rules in local contexts.

²² Reference to Arnstein in Hoexter, 2007: 79–80.



By drawing on the knowledge of the specific historical circumstances surrounding a government department that is the focus of a civic interaction, a variety of strategic responses can be made. In Archer's assessment, taking time to assess the structural challenges in which a civic interaction will take place is essentially about 'being human', not least because civic agency itself produces structurally conditioning factors. As Archer claims: 'people are indeed perfectly uninteresting if they possess no personal powers which can make a difference.'²³ This entails a careful consideration as to who is representing a government department, what particular issue is at stake, how the government has handled itself in the past, what resources are available to the government to respond to the claims against it, and why government may be motivated to take action at all.

For example, individual government officials may have particular views or experiences that shape their interpretation of a particular policy. The issue of asylum-seekers' right to work will be an especially sensitive one for the DHA, which also represents the interests of South African citizens. This is just one example of the kinds of meanings, interests and/or political positions that shape how government officials frame, interpret and enforce a particular policy. Civic actors must always bear these in mind when formulating strategy.

In making strategic choices, civic actors may (and should) assume that it is always primarily government's task to develop policy, not just as a matter of good governance, but in order to facilitate greater *buy-in* to that policy. Of course, this is not to say that civic organisations should not play a role. Indeed, governments often consult civic actors as experts or as concerned stakeholders. In some cases, there may even be a legal obligation to consult. Civic actors also participate in policymaking processes by confronting the state with their obligations during a legislative process.

Just as it is primarily government's responsibility to make policy, it is also primarily the responsibility of government to implement it. Civic actors can (and often do) participate in policy implementation projects. They train officials, advise on implementation frameworks, and even provide services on behalf of government. Civic actors do this in order to encourage and support government when it has displayed a willingness to move in a progressive direction. Such interventions ought not to be conducted uncritically, since there is always the danger of governmental and civic responsibilities becoming blurred. While civic actors have recognised the utility of supporting government in carefully defined circumstances, they have also learned the pitfalls of becoming unwitting apologists for maladministration.

Finally, enforcement of policy is (or ought to be) also primarily the responsibility of government, through self-corrective mechanisms. These may be components of the *trias politica*, with the elected legislative and independent judicial branches of government holding the executive accountable without the

²³ Archer, 2000: 19.

need for civic intervention. Enforcement may also take place through an independent, constitutionally protected institution such as an ombudsman, semi-autonomous commission, or auditor-general. Unfortunately, more often than not, such mechanisms are inadequate, and so the roles of civic actors have become crucial complements in national and global efforts to hold states accountable to their international obligations. These may include initiating a claim through judicial review in the courts, appealing to a global institution such as a human rights treaty body, publicly shaming the government through generating attention in the media, or communicating a strong, collective message by way of mass mobilisation.

The elaboration of the legal and administrative structures that define South Africa's refugee policy also illustrates how these structures are cultural systems that are susceptible to change. As the next section explains, civic translators have played an important role in the process of elaborating these cultural systems.

4 MEDIATING THE TRANSLATION OF GLOBAL RULES INTO LOCAL CONTEXTS

In this study I have tried to illustrate how civic actors have contributed to a culture of constitutionalism, which has both national and international dimensions that highlight the utility of administrative law as a principal medium for translating global rules into local contexts. Furthermore, the examples provided in this study of civic advocacy for refugees have shown how civic actors can mediate the translation of global norms into local contexts, critically engaging within the external relationship – as measured by social distance – that always exists between civic actors and the government, represented by divergent interests, meanings and political coalitions. From different disciplinary perspectives, these illustrative examples have shown how civic actors could have an influence – at least in a modest way – on the content of laws and policies to protect refugees in South Africa, and on the manner in which they are implemented.

Legal culture and civic translators

As socio-legal scholars maintain, legal culture is itself an object of investigation. This can be either the 'internal legal culture'²⁴ of legal academics and practitioners, courts and other institutions, or how the legal culture is shaped by external factors. As Cotterrell has put it:

participants in law are not just lawyers but all those who seek to use legal ideas for their own purposes, to promote or control the interests of others ... understand legal ideas in practical terms ... legal ideas are a means of structuring the social world.²⁵

²⁴ Friedman, 1975.

²⁵ Cotterrell, 1998: 192.

Evaluating the role of civic interventions to enhance state accountability for promoting and respecting refugee rights in South Africa entails a critique of many different variables that characterise the legal culture in which civic actors operate. This study has considered the approaches and means, as well as the mechanisms, adopted by civic actors to promote the South African government's accountability to refugees in terms of its global and constitutional legal normative obligations. As already shown, the government had clear interests, demonstrated by its inviting civic participation in the White Paper Task Team. Clear – though distinctly different – interests motivated civic actors' participation in the refugee policymaking process. Consequently, the task team became a highly productive mechanism through which the competing interests of civic actors, the state and other bodies such as the UNHCR and Section Nine institutions (most notably the South African Human Rights Commission) could be mediated.

A less productive mechanism was employed by AWEPA and the DHA to regularise the status of FMRs, in which the interests of civic actors were far less clear – and in some cases, inextricably linked with those of the government. As a result, the potential of South African civic actors to exercise their agency was not only attenuated, but the due process of FMRs themselves became dangerously compromised, as there was no critical monitoring presence or independent mechanism of appeal.

Moore determined three decades ago that semi-autonomous social fields exist in which social actors are affected by legal norms, but that they also adapt by establishing their own social norms. In other words, each semi-autonomous social field is capable of producing its own rules, but is also vulnerable to external forces.²⁶ Merry's development of Moore's ideas into a theory that explains how global norms become translated or 'vernacularised' into local contexts provides a useful explanation for how rights translators have emerged, translating global rules through contributions towards policymaking processes, including (in South Africa) co-operation in refugee policymaking and implementation projects.²⁷

By participating in global refugee protection discussions, a number of South African NGOs and academics became familiar with international rules designed to protect refugees; in other words, they became trans-national elites. However, their participation in the refugee policymaking process in South Africa remained conscious of local realities, which included the manner in which the refugee policy had been implemented since 1993. Consequently, they possessed what Merry terms a 'double consciousness'.²⁸ This made them effective translators of global rules, drawing on human rights as a resource both in terms of their substantive content (as a tool) and in the possibilities for the realisation of these rights (their consciousness). In addition, these legal translators had access to various legal enforcement institutions. Furthermore, by employing extra-legal

²⁶ Moore, 1978.

²⁷ Merry, 2006b.

²⁸ Merry, 2006b: 217.

mechanisms, such as using the media to shame government when necessary, they created more space to engage with government on a critical basis.

Appreciating the value of social distance

Evaluating interactions in terms of social distance is another means of assessing civic participation, for the purpose of understanding the potential of civic interventions in realising refugee rights in South Africa, and in realising rights in general. As this study of civic advocacy for refugees has illustrated, the corresponding social distance between government lawmakers and civic actors has narrowed or widened according to the strategic decisions taken by civic actors, with various consequences.

The externally grounded reasons for civic participation in the process of refugee policy reform in South Africa diverged from those of the government, in terms of interests and meanings, but there were important areas of convergence in terms of political positions. During the refugee policymaking process, there were disagreements on the explicit wording of entitlements that refugees would be given as protected persons, in accordance with the country's constitutional and international obligations. On the other hand, the government generally agreed to implement refugee status determination through a hearings-based procedure, as proposed by civic actors. Therefore, the degree of social distance created by whether or not civic actors and government diverged or converged in their political positions on a particular policy issue varied considerably throughout the policymaking process, although convergence of political positions was clearly necessary before government would be willing to adopt a particular measure. Government always had the last word.

During the implementation of a status regularisation project for former Mozambican refugees (FMRs), the social distance or externalisation between AWEPA and the South African government was initially very great, as civic actors raised multiple concerns about how the project ought to be implemented. However, the interests, meanings and political positions of civic actors and the government became almost indistinguishable as the project took final shape and a critical monitoring presence was abandoned. What began as an ostensibly government-run project became known as the AWEPA project. In the absence of a credible monitoring presence, this social distance remained narrow throughout the project's implementation, resulting in limited space for critical responses by civic actors, and an administrative justice deficit for the FMRs.

Where refugee rights have been litigated, the social distance between civic actors and the government (as measured by their respective interests, meanings and political positions) has remained substantial, as civic actors have affirmed their role as an independent critical voice. And yet, even in these circumstances, it has not always been possible to hold the government accountable.

The courts have often proven reluctant to question the merits of a government's policy or exercise of discretion. But even where judges have found against the government, lawyers have often had to return to the courts, sometimes repeatedly, in order to secure compliance with an order or to argue a virtually identical case to one litigated earlier. In short, a high degree of social distance, or independent critical voice, has not been a reliable indicator of success. Not all legal challenges necessarily produce results.

However, a distinction should be made between litigation aimed at restraining government behaviour, in which more social distance exists, and cases aimed to promote good behaviour, which tend to involve a narrowing of the social distance. Put simply, the first type of case negatively insists that a certain policy be stopped, and tends to be more likely to succeed, while the other positively encourages the government to improve itself, which has proven to be more problematic. As one lawyer has argued:

confrontations are necessary ... [and] it is easier to engage in public interest litigation when trying to stop something from happening; for example, seeking to stop the deportation of an asylum-seeker by way of an urgent interdict. It is not so easy to insist that something happens.²⁹

Structural interdicts may offer new possibilities in the latter type of case. Where structural interdicts have been ordered to encourage good government behaviour, social distance has narrowed, as competing interests and political positions between government and civic actors have been replaced by structural undertakings by government to the court that it will take deliberate steps to improve a situation. Civic actors in such cases have made contributions in helping the government to improve its behaviour. In the access cases, for example, process engineers who were hired by the DHA, on the basis of a consent order, to improve management and procedures at the Refugee Reception Offices, spent considerable time interviewing the civic actors who had brought the case against the government. While it is still too early to assess its lasting impact, the structural interdict may yet prove to be a significant tool to ensure positive compliance, since the process of reporting back to the court recognises both the legitimate interests of both civic actors and the government, and the essentially voluntary nature of human rights implementation.

²⁹ Interview with S. Magardie, 2006.



Ultimately, social distance can explain the potential for civic interactions to lead to structural change within the government by assessing the extent to which government has conceded to demands by civic actors in sharing their meanings, interests or political positions. This deserves further empirical study. In recent years, the DHA has faced persistent demands for reform from civic organisations, which have grown more sophisticated in their advocacy. Civic actors representing various groups and interests have protested – often simultaneously – to the media, parliament and courts about abuse by government officials, departmental inefficiency, corruption and mismanagement.

The DHA has responded to a considerable extent to these demands from civic organisations, and has initiated a consultative process to amend the Refugees Act. A draft bill was released for public comment in 2007.³⁰ Following public hearings in South Africa's parliament that involved several civic organisations,³¹ and responding to long-standing criticisms from civic organisations about gaps in the refugee policy and its implementation, the government released a further draft bill in March 2008.³² The government has also responded to the concerns raised by civic actors by calling for the closure of the Musina detention facility, as described above. Furthermore, the DHA initiated a 'turnaround strategy' that has involved participation from a number of civic actors, and the Minister has responded directly to questions regarding mismanagement of the DHA.³³

With these acknowledgements from the government – to some extent, in response to the demands of civic actors – the social distance between civic actors and the government has narrowed as their respective interests in refugee protection and meanings about what this protection entails have converged, but not to the point that civic organisations have abandoned their critical monitoring role. Drawing on specific obligations contained in international and South African law, CoRMSA's June 2008 Annual Report comprehensively addresses the obligations of South Africa's local and national government to protect refugees and migrants, from the role of government in addressing the root causes of xenophobic violence to its role in facilitating access to employment and basic services.³⁴ As the report confirms, while to some extent the interests and meanings of civic actors and the government may have converged, their respective political positions continue to diverge, as civic actors remain focused on holding the South African government – and especially the DHA – accountable for its legal obligations to protect refugees and migrants.

³⁰ Government of South Africa, 'Publication of the draft Refugees Amendment Bill 2007', General Notice 730 of 2007, Government Gazette No. 29976, 7 June 2007.

³¹ Parliamentary Monitoring Group, 'Refugees Amendment Bill: Public Hearings', Audio and written transcripts available at: <http://www.pmg.org.za/print/11282>. Last checked 29 August 2008.

³² Government of South Africa, 'Refugees Amendment Bill', Government Gazette No. 30835, B11-2008, 4 March 2008. Available at: <http://www.pmg.org.za/files/bills/080313b11-08.pdf>. Last checked 29 August 2008.

³³ 'DHA Turnaround Strategy', 2007.

³⁴ CoRMSA Annual Report, 2008.

5 CIVIC CAPACITY TO REALISE RIGHTS IN GENERAL

The interactions explored in this study concern the role of South African civic actors in developing the government's refugee policy, implementing policy, and, in certain cases, forcing government to comply with its policy through litigation. However, these civic-state interactions hold universal lessons for realising rights in general, across time (at different points in South Africa's history) and space (in other countries and as part of other human rights struggles). In applying these generalisations, the notion of the state in terms of its more formal institutions, such as the courts and Parliament, might need to be distinguished from the 'less cuddly', less caring and occasionally violent aspects of the state, such as the police and municipal governments that directly threaten civic action and fail to provide public services.³⁵ At the same time, one must be cautious about over-essentialising these aspects of the state; not all police officers are violent, and not all municipal government officials are necessarily uncaring towards refugees and migrants.³⁶

Realising rights across time (in South Africa)

This study of civic advocacy for refugees provides vivid illustrations of the interplay between civic actors and the state in promoting a culture of constitutionalism for *all persons* (in the language of the Constitution) and not just South African citizens. Refugees and asylum-seekers who demonstrated in front of Union Buildings in 1996, demanding that the UNHCR and South African government respond to their predicament, did not merely generate interest in the media. Just as the defiance campaigns in South Africa from the 1950s mobilised thousands of South Africans to re-examine their position and resist apartheid, the July 1996 demonstration critically engaged South Africans in re-examining their relationship with refugees; and it precipitated a response from civic organisations.

The July 1996 refugee demonstration took place at a historical moment. Having just brought into being the country's final constitution, South Africa was at a crossroads. Other external factors certainly also played a role, particularly the government's obligations acquired as the result of having assented to international refugee conventions. Rather than only holding government accountable, the demonstration spurred on South African civic actors, mobilising them not just to provide assistance, but also to advocate wide-ranging improvements in the way refugees were received and integrated at that time. In the months and years following the demonstration, South African lawyers, churches and other civic organisations were eventually instrumental in achieving a good refugee policy, sound implementation and a more accountable government.

³⁵ As observed by Peter Alexander at the *Mobilising Social Justice* conference in Johannesburg on 23 November 2009.

³⁶ As observed by Darshan Vigneswaran at the *Mobilising Social Justice* conference in Johannesburg on 23 November 2009.

South Africa now has a government policy that has translated international human rights obligations towards refugees, joint refugee-NGO initiatives that have secured key rights for refugees, and a number of landmark legal challenges through the South African courts, with which to confront the government with its obligations towards non-South Africans in general, and refugees in particular.

Of course, the picture has not always been so positive. As legal advocates have paid more attention to this issue, reports have emerged of arbitrary detention and ill-treatment at the hands of the police and immigration officers, poorly motivated refusals to grant refugee status, and allegations of corruption and abuse of power.

Ten years after South Africa became party to the international refugee conventions and the country's final constitution came into being, the government faced another crossroads. Building a culture of constitutionalism has demanded responses at multiple levels. At the local level, municipalities have begun to see migrants from other countries, including asylum-seekers and refugees, as *citizens* of Cape Town, Durban and Johannesburg. Confronted by lawyers and as-yet-unfulfilled obligations created by structural interdicts, national government has begun to respond seriously to technical, process and management-related problems in implementing a fair and efficient status-determination procedure. Most notably, the government has accepted the need to develop and improve policy through amendments by way of parliamentary process rather than through *ad hoc* administrative regulations.

Finally, at a global level, South Africa has been actively engaging in global policy discussions on migration that are edging towards containment, with so-called irregular migration as their centrepiece.³⁷ On the other hand, South Africa has noted the highly unproductive and even violent consequences of maintaining a restrictive policy that unduly prioritises national interests over its international obligations to protect migrants in general, and refugees in particular.

Realising rights across space (other struggles in different countries)

Recalling the measures used to hold the government accountable in the past on the basis of international human rights norms also resonates with other social justice struggles in different countries. The importance of clear roles and responsibilities and strategic recognition of structural boundaries both have global application beyond the South African scenario. The strategies and moral resonance of South Africa's anti-apartheid struggle have motivated accountability advocates around the world, and not necessarily because what happened in the country was unique. South Africa's struggle against racial injustice, and the efforts

³⁷ Ghosh, 1998, *passim*.

that have been made to achieve social transformation, reflect universal principles that define any social justice struggle engaged in advocating for accountability.

For example, civic actors in Eastern European countries, many of whom are recent member-states of the European Union (EU), have mobilised for better protection standards for refugees and migrants by recognising EU-determined structural boundaries, and by translating global refugee protection standards into national advocacy efforts to protect refugees.³⁸ Civic actors in Eastern Europe, whose activities prior to the early 1990s were highly constrained, have also participated in the development of refugee policies.³⁹

In the Middle East, civic actors also play important roles in refugee protection. A deeply problematic geo-political situation and ongoing military occupation prevent a local, rights-based solution to the plight of Palestinian refugees, and serious structural constraints make it virtually impossible to advocate for the accountability of Israel, especially concerning Palestinian refugees. Consequently, civic actors around the world – including academics, lawyers, church leaders and pressure groups – have managed to generate widespread global awareness concerning the issue of historical, and continuing, dispossession of Palestinians. Furthermore, many of these groups have responded to a call by Palestinian civil society organisations for the economic, social, cultural and political isolation of Israel through boycotts, divestment and sanctions (BDS).⁴⁰ Furthermore, by recognising structural limitations and shifting to supra-national mechanisms instead, civic actors have advocated strategically for recognition of Palestinian residency and refugee rights to particular UN agencies' international legal processes. Lacking impact at the local level, civic actors have translated Palestinian rights to UN organisations and treaty bodies, including the UN Committee on the Elimination of Racial Discrimination.⁴¹ Third states have also become an important forum for civic actors, making legal claims against companies that participate in violations of Palestinian refugee and residency

³⁸ As Lavanex (1999) has argued, refugee rights advocacy and policy development in Eastern European countries has been intrinsically linked with their desire to become part of the European Union. With the possibility of gaining admission to the EU taking on greater momentum, countries such as Bulgaria have steadily brought their country's policies into line with EU expectations, including the European Union's human rights requirements, while simultaneously having to contend with great political uncertainty regarding the gradual harmonisation of asylum policies at the level of the EU. Much of this work has been conducted together with the European Council on Refugees and Exiles. See <http://www.ecre.org>. Last checked on 29 August 2008.

³⁹ UNHCR, 'Summary report of the Varna joint meeting', Bulgaria, 28 February 2002. Available at: http://www.unhcr.bg/events_records/2002/varna_workshop/summary_report_varna.pdf. Last checked on 29 August 2008.

⁴⁰ For example, the Badil Resource Centre on Palestinian Residency and Refugee Rights has worked with grass-roots activists and solidarity partners around the globe to advocate respect for international law towards Palestinian refugees. See www.badil.org. Last checked on 6 September 2008.

⁴¹ Committee on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Racial Discrimination, Consideration of reports submitted by states parties under Article 9 of the Convention Israel, Seventieth session 19 February–9 March 2007, CERD/C/ISR/CO/13, March 2007; Badil Resource Centre on Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons 2006–2007*, Bethlehem, 2007.

rights,⁴² and against individuals who have committed war crimes against civilians in refugee camps.⁴³

Whether in South Africa, Eastern Europe or Palestine, and regardless of whether civic actors are engaged in a political struggle or a process of social transformation in co-operation with government, all these events can be seen as various forms of social justice struggle. In any social justice struggle, the key to civic actors being able to hold states and governments accountable for their human rights obligations lies in civic actors making strategic choices.

Making strategic choices has various implications for civic actors, as this study of realising refugee rights in South Africa has illustrated. First, civic actors must appreciate the social, political and legal context in which they operate; this historical appreciation reveals certain structural boundaries to realising rights that are nearly always imposed by the state. Second, civic actors must critically assess the structural boundaries that condition their behaviour, but also have the potential for structural change or ‘elaboration’, through civic interaction with the state in formal (and also informal) interventions. Third, civic actors must appreciate the social distance that always exists between themselves and the government, measured by divergences in meanings, interests and political positions. Through a critical engagement in this ‘external’ relationship, it is possible for civic actors to capitalise on these divergences in advocating a state’s accountability for realising human rights. Whether the social distance ought to be narrowed or broadened at a particular moment depends on (1) the context in which this takes place, (2) the structural boundaries that exist, and (3) the desired outcome.

A critical engagement with the government allows civic actors, including legal advocates, to take advantage of that narrow, but significant space for achieving structural change. In this social, political and legal space, the potential for advocating the accountability of a state to promote, protect and fulfil human rights can flourish.

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⁴² In 2007, a lawsuit was brought against the French company Veolia for their participation in the construction of a light-rail system in Palestinian territory that had been illegally annexed by Israel. See McCarthy and Chrisafis, 2007.

⁴³ Machover and Maynard, 2006.

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CHAPTER 3

THE BUDGET PROCESS AND STRATEGIC CIVIC INTERVENTIONS

Frank S. Jenkins

1 INTRODUCTION

At the time of writing this chapter, negative reports continue to trickle in regarding respect for and protection of the rights of refugees in South Africa. The socio-economic effects of xenophobia, coupled with ineffective and weak administrative procedures to determine applications for asylum, are well documented.¹ At the same time, the majority of people in South Africa live in poverty;² as Ajam notes, '[p]overty and inequality are among the major challenges facing South African society, and the major thrust of policy in all spheres of government.'³ Civil society's engagement with the policy priorities of government in respect of these issues forms the basis of this chapter. My hypothesis is that civil society should be strengthened in order to participate in the processes of a democratic government, as this deepens democracy.

¹ See Landau and Segatti, *Human Development Impacts of Migration: South Africa Case Study*, Human Development Research Paper 2009/05, UNDP; Doctors without Borders, *No Refuge, Access Denied: Medical and Humanitarian Needs of Zimbabweans in South Africa*, June 2009; Handmaker, De la Hunt and Klaaren (eds), *Advancing Refugee Protection in South Africa*, Human Rights in Context, Volume 2, 2008; Centre for the Study of Violence and Reconciliation – Consortium for Refugees Proceedings of the Seminar: 'Why do we fear and hate the "other"?' Understanding xenophobia in the South African context and migrants in South Africa', Heinrich Böll Stiftung, 26 May 2008.

² 'New estimates of poverty show that the proportion of people living in poverty in South Africa has not changed significantly between 1996 and 2001. However, those households living in poverty have sunk deeper into poverty and the gap between rich and poor has widened. The Human Sciences Research Council (HSRC) in collaboration with Mr Andrew Whiteford, a South African economist, has generated these estimates. Approximately 57% of individuals in South Africa were living below the poverty income line in 2001, unchanged from 1996.' Craig Schwabe, Fact Sheet: Poverty in South Africa, Human Sciences Research Council, 26 July 2004, <http://www.sarpn.org.za/documents/d0000990/>.

³ Ajam, 'Budget oversight and poverty alleviation: opportunities and challenges', in *Parliament, the Budget and Poverty in South Africa: a Shift in Power*, Len Verwey (ed.), 2009: 43.



This chapter is premised on the assumption that the budget reveals the true priorities of the government, and reflects government's choices and planning in respect of revenue and expenditure. One cannot influence priorities – such as those relevant to the protection of marginalised communities and poverty reduction – without participating in the budget process. In the constitutional structure of allocating state authority between the executive, legislature and judiciary, civic interventions on the issue of refugee protection or poverty reduction in South Africa must take cognisance of the different functions of the three constituent parts of the state. Although the Constitution of the Republic of South Africa, 1996 ('the constitution') does not define 'state', it is certain that parliament and the executive are constituent parts thereof.⁴ The constitutional obligation or function of parliament is to provide a national forum for the public consideration of issues when legislating, and to maintain oversight of the exercise of national executive authority.⁵ Both the legislative and the oversight functions are relevant in the parliamentary phase of the budget process.

This chapter focuses on public participation in the budget process before parliament and the provincial legislatures. It analyses relevant procedures of parliament and (to a lesser extent) the provincial legislatures; the right to participate in these; and the opportunities for strategic civic interventions in order to enhance state accountability for the protection, promotion and respecting of refugee rights and the reduction of poverty in South Africa.

In writing this chapter I received much input suggesting that participation in the processes of parliament and the provincial legislatures (together referred to here as 'legislatures') yields few (if any) results that are reflected in legislation. Considering this, it seems the major concern in presenting this chapter is the creation of unrealistic expectations. The argument that civil society should use the spaces created by the constitution, legislation and the legislatures themselves to participate in the processes of the latter must therefore address the question 'Why?' – given that the results are not always tangible. I try to do this without suggesting that the civic spaces for lawful organisation and protest action outside the institutions of the state should be neglected in the process.

This chapter analyses the constitutional right to participate in the processes of parliament, which is framed as an obligation on each of the two Houses – the National Assembly and the National Council of Provinces – to facilitate public involvement in their legislative and other processes and those of their committees.⁶ The right to participate in the legislative processes has been

⁴ See *Women's Legal Centre Trust v President of the RSA and Others*, 2009 (6) SA 94 (CC) para [19]: 'These provisions suggest that 'the state' includes all those actors who derive their authority from the Constitution, including Parliament, government at national, provincial and local levels, state institutions supporting constitutional democracy created by Chapter 9 of the Constitution, 'state departments and administrations', as well as bodies created by statute.'

⁵ Constitution of the Republic of South Africa, 1996, sections 42 & 55.

⁶ The constitution provides that parliament consists of the National Assembly and the National Council of Provinces, section 42(1).

considered by a number of courts, and I discuss this in some detail.⁷ I also refer to the parliamentary perspective on public participation, which was clarified earlier this year when parliament resolved, through the adoption of its Oversight and Accountability Model,⁸ that public participation is critical for the success of its oversight function.

Parliament has drafted, considered and passed the Money Bills Amendment Procedure and Related Matters Bill.⁹ This chapter analyses the Money Bills Amendment Procedure and Related Matters Act, 2009, which was signed and promulgated on 16 April 2009.¹⁰ In addition to creating the necessary procedure to amend money Bills, the Act also gives effect to the constitutional requirement for public involvement, specifically in the parliamentary phase of the budget process.¹¹ Potentially, policy priorities (as articulated by government) are open for scrutiny in parliament, and can result in amendments to the budget. Strategic civic interventions should thus use the budget cycle as a way to bolster efforts to protect, promote and respect constitutional rights in South Africa.

Against this background, the chapter looks at specific opportunities for interventions aimed at promoting the rights of asylum-seekers and refugees; and, more broadly, at poverty reduction. In this context, the following two questions are addressed:

- (1) What has been the role of civic interventions in enhancing state accountability to protect, promote and respect refugee rights in South Africa?
- (2) How can these efforts be strengthened, and what does this teach us about the potential of civic interventions in realising rights in general?

⁷ *King and Others v Attorneys Fidelity Fund Board of Control and Another* 2006 (4) BCLR 462 (SCA); *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC); and *Matatiele Municipality and Others v President of the RSA and Others* 2007 (1) BCLR 47 (CC). See also *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (1) BCLR 1 (CC); and *Merafong Demarcation Forum and Others v President of the RSA and Others* 2008 (10) BCLR 968 (CC).

⁸ Parliament's Oversight and Accountability Model, published in the Announcements, Tablings and Committee Reports (ATC), 27 January 2009, 64, was approved by the National Assembly on 17 February 2009, and by the National Council of Provinces on 19 March 2009.

⁹ [B 75–2008] passed on 19 February 2009.

¹⁰ Act No. 9 of 2009. *Government Gazette*, No. 32137, 16 April 2009 (Government Notice No. 426). The Money Bills Amendment Procedure Act came into operation on this day. At the time of writing, parliament was in the process of establishing the procedures and structures necessary to give effect to the Act.

¹¹ Sections 8(2), 9(5), 10(8), 11(4) and 13(2). Section 77(3) of the constitution requires that an Act of Parliament must establish a procedure to amend money Bills. Prior to this Act, parliament could only accept or reject money Bills. The concept of 'money Bills' is defined in section 77(1) of the Constitution as follows: 'A Bill is a money Bill if it:

- (a) appropriates money;
- (b) imposes national taxes, levies, duties or surcharges;
- (c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or
- (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.⁷

The Appropriation Bill, which includes the budget votes of all government departments, is a money Bill. In this regard, see the Public Finance Management Act, 1999 section 27.

2 THE RIGHT TO PARTICIPATE

From 2006 onwards, both the Supreme Court of Appeal and the Constitutional Court considered the right to participate in parliamentary processes. These considerations placed this right within a rich historic and international context. However, in determining the nature and purpose of the right, the courts focused on the constitution.

One of the founding values of the Republic of South Africa, as set out in the constitution, is a system of democratic government to ensure accountability, responsiveness and openness.¹² The Supreme Court of Appeal in *King and Others v Attorneys Fidelity Fund Board of Control and Another*¹³ found that the abovementioned value is contained in the constitutional requirement that the rules and orders of the National Assembly for the conduct of its business must be made with due regard, not only for representative democracy, but also for participatory democracy.¹⁴ Furthermore, the Court found that

[i]t also finds expression in the National Assembly's power to receive petitions, representations or submissions from any interested persons or institutions,¹⁵ its duty to facilitate public involvement in its legislative and other processes and of those of its committees,¹⁶ its duty generally to conduct its business in an open manner and hold its sittings and those of its committees in public,¹⁷ and its duty, generally, not to exclude the public or the media from sittings of its committees.¹⁸

The value of accountability, responsiveness and openness also finds expression in the constitution in relation to the National Council of Provinces and provincial legislatures, in much the same manner as set out above.¹⁹ Public participation therefore includes the duty to facilitate public involvement in legislative and other processes; the duty to conduct parliamentary business in an open manner, and to hold plenary sittings and those of committees in public; and the duty not to exclude the public or the media from sittings of the House or committees 'unless it is reasonable and justifiable to do so in an open and democratic society.'²⁰

The content of the concept is less exact, as the Court found in the *King* matter:

'Public involvement' is necessarily an inexact concept, with many possible facets, and the duty to 'facilitate' it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its

¹² Section 1.

¹³ See note 7 *supra*, at para [19].

¹⁴ Section 57(1)(b).

¹⁵ Section 56(d).

¹⁶ Section 59(1)(a).

¹⁷ Section 59(1)(b).

¹⁸ Section 59(2). At para [19].

¹⁹ Sections 70(1), 72(1)(a) and (b), and 72(2); and, 116(1), 118(1)(a) and (b), and 118(2).

²⁰ Sections 59(2), 72(2) and 118(2).



content. The public may become ‘involved’ in the business of the National Assembly as much as by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it. Whether or not the National Assembly has fulfilled its obligation cannot be assessed by examining only one aspect of ‘public involvement’ in isolation of others, as the applicants have sought to do here. Nor are the various obligations section 59(1) imposes to be viewed as if they are independent of one another, with the result that the failure of one necessarily divests the National Assembly of its legislative authority.²¹

The concept of ‘public involvement’, as discussed by the Supreme Court of Appeal, was followed by the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly and Others* and in *Matatiele Municipality and Others v President of the RSA and Others*.²² Although these judgments specifically consider it the duty of the National Council of Provinces to ‘facilitate public involvement in its legislative and other processes of the Council and its committees’,²³ it is certainly of value for the entire legislative sector, as identical duties are imposed on the Assembly and on the provincial legislatures.²⁴

The Court in *Doctors for Life* found that the plain and ordinary meaning of the words ‘public involvement’ or ‘public participation’ refer to the process by which the public participates in something. ‘Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a).’²⁵ In other words, the duty to facilitate public involvement in the processes of a legislature envisages action on the part of the legislature that will result in the public participating in the law-making and other processes: ‘Participation is the end to be achieved.’²⁶

The Court in *Doctors for Life* indicated that legislatures have ‘a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement’ in its processes.²⁷ Furthermore, although the measures required by the constitutional obligation may vary from case to case, a legislature must act *reasonably*.²⁸ ‘What is ultimately important is that a legislature has taken

21 At para. [22].

22 See note 7 *supra*.

23 Section 72(1)(a).

24 Sections 59(1)(a) and 118(1)(a). The provisions of sections 59(1)(a), 72(1)(a) and 118(1)(a) clearly impose a distinct duty on the National Assembly, National Council of Provinces and the provincial legislatures to facilitate public involvement in their respective legislative processes. In other words, each legislature must comply with the applicable provision.

25 At p. 1443D. [not clear from here onwards whether p. refers to para. or page. If page, then delete p. throughout.]

26 At p. 1449C.

27 At p. 1444D.

28 At p. 1444E.

steps to afford the public a reasonable opportunity to participate effectively in the law-making process.²⁹

The standard of reasonableness in discharging the duty to facilitate public involvement in the legislative processes of a legislature depends on a number of factors, including:

- the nature and importance of the legislation, and the intensity of its impact on the public;
- practicalities such as time and expense, which relate to the efficiency of the law-making process (although the saving of money and time in itself does not justify inadequate opportunities for public involvement); and
- what a legislature itself considers to be appropriate public involvement, in the light of the legislation's content, importance and urgency.³⁰

The courts therefore expect a legislature, acting reasonably:

- to provide meaningful opportunities for public participation; and
- to take measures to ensure that people have the ability or capacity to take advantage of the opportunities provided.³¹

By analogy, in the context of oversight processes, a legislature is required to act reasonably in effecting its duty to facilitate public involvement; and the factors influencing this standard are the nature and importance of the specific action, issues of time and costs, and what the legislature considers to be appropriate. It is critical that the public is afforded a reasonable opportunity to participate effectively. Effective participation implies that a legislature must take measures to empower the public to make use of these opportunities.

The constitutional duty discussed above means that the public (including civil society) has a right to attend the business of a legislature, unless the circumstances envisaged in the constitution, justifying the exclusion of the public, exist.³² Furthermore, civil society can expect proactive steps to be taken to inform the public of the processes of legislatures, and has a right to participate meaningfully in these processes.

Be that as it may, in the circumstances in existence at the time, a legislature may determine whether it is appropriate to facilitate public involvement through written or oral proceedings.³³ An affected person or group 'would have to show that it was clearly unreasonable for Parliament or a provincial legislature not to

²⁹ At p. 1445D.

³⁰ At p. 1445B.

³¹ At p. 1445D-E.

³² See sections 59, 72 and 118.

³³ The Court in *Doctors for Life* (at p. 1467G) said that 'Where Parliament has held public hearings but not admitted a person to make oral submissions on the ground that it does not consider it necessary to hear oral submissions from that person, [the Constitutional] Court will be slow to interfere with Parliament's judgment as to whom it wishes to hear and whom not.'

have given them an opportunity to be heard.³⁴ A court would give considerable respect to parliament's judgment on this issue. More often than not, if the public has been given the opportunity to lodge written submissions, then parliament will have acted reasonably in respect of its duty to facilitate public involvement, whatever may happen subsequently at public hearings.

3 OVERSIGHT AND ACCOUNTABILITY MODEL

During the first quarter of 2009 – i.e., at the end of the Third Democratic Parliament, and just prior to the election of the Fourth Democratic Parliament – parliament adopted its Oversight and Accountability Model.³⁵ ‘The model’s primary objective is to provide the framework that describes how Parliament conducts oversight. It seeks to improve existing tools of parliamentary oversight, streamline components of the new oversight model with existing components, and enhance Parliament’s capacity to fulfil its oversight function in line with Parliament’s new strategic direction.’³⁶ Pertinent issues highlighted in the model include the following:

- tools for oversight and accountability;³⁷
- facilitation of public involvement;³⁸ and
- procedures to amend the national budget.³⁹

The adoption of the model is a milestone in the organic development of parliament’s fulfilment of its duty to maintain oversight of the exercise of national executive authority. Specifically in the area of public participation in the oversight processes, it states:

Two critical factors for ensuring the success of this model is [sic], firstly, the need to integrate Parliament’s public participation function within its overall oversight mechanism and, secondly, to provide the appropriate capacity, especially human resources, to committees and members for its execution. It is vital that all public participation processes become inputs to the work of appropriate committees.⁴⁰

It is thus clear that parliament considers public participation to be a key element in fulfilling its oversight function. In fact, the model considers this aspect of oversight important enough to suggest that a separate (but interlinked) public participation model for parliament be developed, based on the Constitutional Court judgments referred to above.⁴¹ Naturally this is consistent with the constitutional obligation on the National Assembly and the National Council of

³⁴ At p. 1468A.

³⁵ See fn. 8.

³⁶ ATC, p. 68.

³⁷ At p. 89.

³⁸ At p. 95.

³⁹ At p. 100.

⁴⁰ At p. 108.

⁴¹ ATC p. 95.



Provinces, respectively, to facilitate public involvement in the legislative and other processes of the House and its committees.⁴² It is also appropriate in light of the purpose of public participation, as espoused by the Constitutional Court:

All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws. An appropriate degree of principled yet flexible give-and-take will therefore enrich the quality of our democracy, help sustain its robust deliberative character and, by promoting a sense of inclusion in the national polity, promote the achievement of the goals of transformation.⁴³

Public participation, as both a right and duty, applies to both the legislative and oversight functions of parliament and provincial legislatures.

4 THE BUDGET PROCESS

There is a multitude of processes in parliament and the provincial legislatures. The budget process is central to these.⁴⁴ Essentially about choices and planning in respect of revenue and expenditure, the budget process ‘reveals the true priorities of the Government.’⁴⁵ It ‘encompasses government’s economic policy priorities, macro-economic position, revenue intake and all appropriations of public funds.’⁴⁶

As indicated above, public participation in the budget cycle is considered critical to the successful implementation of the budget. Fubbs concludes that ownership of the budget depends on ‘the right of participation of civil society’ in all committee meetings relating to the budget process.⁴⁷ In this respect, Verwey writes that it is necessary to ‘demystify’ debates on the budget to encourage broader participation in a way that is amenable to democratic discussion, as this ‘can play a decisive role in its impact on well-being and the alleviation of poverty.’⁴⁸

⁴² Sections 59 and 72.

⁴³ Judge Sachs in *Doctors for Life International v Speaker of the National Assembly and Others* at p. 1473B-D.

⁴⁴ Fubbs, 1999, 10.

⁴⁵ Parliament of South Africa, 2008, 10. See also Fubbs, 8.

⁴⁶ Lefko-Everett and Zasmisa, ‘Public participation in budgeting: opportunities presented by new amendment powers’, in Verwey, 2009, 79.

⁴⁷ Fubbs, 8, 14 and 15.

⁴⁸ Verwey, 2009, 12.

The inherent budget cycle is founded on the concept of a multi-year budget process.⁴⁹ Since 1997, the Department of Finance has tabled a medium-term budget policy statement (MTBPS) in parliament and the provincial legislatures, which includes a medium-term expenditure framework (MTEF). The MTBPS provides a framework for the upcoming budget and the following two so-called ‘outer’ years: ‘The MTBPS is an important medium-term policy statement that sets out national economic policy priorities, responses to economic trends, revenue forecasts and adjustments to spending priorities for the coming three fiscal years.’⁵⁰ The tabling of the MTBPS thus provides an opportunity for parliament to prepare for the forthcoming budget, and to consider and influence government spending plans over the medium term.

The parliamentary phase of the budget process starts with the introduction of the MTBPS during October each year. The process in the provincial legislatures is similar, and the MTBPS for the province is introduced a few weeks after the MTBPS in parliament. Parliament and the provincial legislatures scrutinise the future spending of government or medium-term expenditure framework – as contained in the MTBPS – against the monthly reports of actual revenue and expenditure published by the National Treasury in terms of the Public Finance Management Act, 1999.⁵¹ The adoption of the reports on the MTBPS by the legislatures serves as an indication of their views on the future spending of government.

The second part of the parliamentary phase of the budget process consists of the annual tabling of the national and provincial budgets by way of the introduction of the Division of Revenue Bill and the Appropriation Bill in the National Assembly, and the various appropriation bills in the provincial legislatures, as required in terms of the constitution⁵² and the Public Finance Management Act.⁵³ Together with the Division of Revenue and Appropriation Bills, the Minister of Finance must submit an Estimates of National Expenditure (ENE) report, which provides data and contextual information for each national department, and a Budget Review Statement supplying consolidated analysis of budget policy. In accordance with the recently introduced Performance Information Framework, the ENE now includes quantifiable objectives and performance indicators for each department. This is an important development, as it will provide the foundation for results-based budgeting, and will thus improve oversight. Treasury Regulations also stipulate that each department must table a strategic plan, setting out the department’s objectives, at least ten days prior to the debate of the particular department’s budget in parliament.⁵⁴

⁴⁹ Wehner, in Verwey, 2009, 31.

⁵⁰ Verwey and Lefko-Everett, 2007: 3–4.

⁵¹ Act No. 1 of 1999, section 32.

⁵² Section 214.

⁵³ Section 27.

⁵⁴ Treasury Regulations for departments, trading entities, constitutional institutions and public entities, March 2005, as amended in February 2007, item 5.2, *Government Gazette* No. 29644, 20 February 2007.

The third part of the parliamentary phase of the budget process involves oversight of the implementation of the budget. Government departments and public entities are required to report monthly, quarterly and annually— either for publication in the *Government Gazette*, or for tabling directly in parliament and the relevant provincial legislatures – in terms of the Public Finance Management Act, which effectively establishes a framework for ‘in-year’ reporting and monitoring.⁵⁵ This framework serves as an early warning system, and allows for the tracking and management of government expenditure, revenue, cash flows and movements in bank balances. These reports are utilised by legislatures to maintain oversight of the implementation of the budget, and may be used to feed into the scrutiny of the MTBPS. The former entails the preparation by committees of oversight reports on the performance of government departments, which the relevant Houses debate and adopt. Reports from the Auditor-General on the financial statements of government departments are specifically considered by the National Assembly’s Committee on Public Accounts, or public accounts committees of the provincial legislatures.⁵⁶ With the commencement of the Money Bills Amendment Procedure and Related Matters Act, the various oversight reports are consolidated into a single report for each government department.

In fact, the Act creates a comprehensive framework for parliament to process the budget, whether in an amended form or not. Understanding this framework is critical to demystifying the budget process.

5 MONEY BILLS AMENDMENT PROCEDURE AND RELATED MATTERS ACT⁵⁷

The Money Bills Amendment Procedure and Related Matters Act provides the procedure for amending the fiscal framework underpinning the budget, as well as the budget itself. Therefore the Act requires that the Minister of Finance submits a multi-year fiscal framework, with the Bills giving effect to the budget.⁵⁸ The ‘fiscal framework’, defined in the Act, is the relationship between revenue,

⁵⁵ Section 32 requires that monthly and quarterly reports on revenue and expenditure across government are published in the *Government Gazette*. Section 40, read with section 65, requires that government departments submit an annual report to the National Assembly, which must include audited financial statements and the audit report of the Auditor-General on those statements.

⁵⁶ Also referred to as the Standing Committee on Public Accounts or SCOPA.

⁵⁷ Section 16 of the Act, read with the Schedule to the Act, provides for norms and standards for provincial legislatures, which, in terms of section 120(3) of the constitution, must pass provincial legislation to set out a procedure to amend provincial money Bills. The norms and standards will ensure that provincial legislation is aligned to parliament’s Act. However, as such provincial legislation is not yet passed, this part of the chapter applies only to parliament.

⁵⁸ Section 7. Section 14 of the Act also provides for amendments to any money Bill proposed by the Minister of Finance to a House or committee. Such proposals are limited to amendments in order to make technical corrections to a money Bill. This provision was used for the amendments to the Appropriation Bill [B5-2009]. This section of the Act is not relevant for the purpose of this chapter.

including borrowing, and expenditure, including cost of financing.⁵⁹ The budgetary Bills are mostly money Bills, and the annual Division of Revenue Bill required for the equitable distribution of national revenue among the national, provincial and local spheres of government,⁶⁰ and those taxation bills that deal with matters incidental to imposing taxes or creating revenue. A money Bill is defined in the Constitution as a Bill which appropriates money; imposes national taxes, levies, duties or surcharges; abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or authorises direct charges against the National Revenue Fund.⁶¹ Current money bills are the annual appropriation Bill and the revenue Bills, such the annual Taxation Laws Amendment Bill.

The procedure for amending the fiscal framework or the money Bills hinges on the constitutional obligation of parliament to maintain oversight of the exercise of national executive authority.⁶² Therefore, the annual assessment of national departments by the National Assembly through its committees provides the starting point for the procedure. In this respect, the Act requires committees of the Assembly to submit annual budgetary review and recommendation reports (BRRR), after the adoption of the Appropriation Bill and prior to the adoption of the reports on the MTBPS.⁶³ This period is usually between June and November. The Minister of Finance and the relevant member of Cabinet are then informed of the assessment.

The purpose of a BRRR is to provide an assessment of the department's service delivery performance, given available resources; to assess the effectiveness and efficiency of the department's use and forward allocation of available resources; and to allow an opportunity for the Assembly to make recommendations on the forward use of resources.⁶⁴ To do all this, the Act requires that a BRRR must refer to:

- the medium-term estimates of expenditure of each national department, and its strategic priorities and measurable objectives, as tabled in the National Assembly with the national budget;
- the prevailing strategic plans of the department;

⁵⁹ Section 1 of the Act defines the fiscal framework to mean 'the framework for a specific financial year that gives effect to the national executive's macro-economic policy and includes: (a) estimates of all revenue, budgetary and extra-budgetary specified separately, expected to be raised during that financial year; (b) estimates of all expenditure, budgetary and extra-budgetary specified separately, for that financial year; (c) estimates of borrowing for that financial year; (d) estimates of interest and debt servicing charges; and (e) an indication of the contingency reserve necessary for an appropriate response to emergencies or other temporary needs, and other factors based on similar objective criteria'.

⁶⁰ Section 216 of the Constitution.

⁶¹ Section 77.

⁶² See Preamble and section 2.

⁶³ Section 5.

⁶⁴ Section 5(3).

- the expenditure report relating to the department published by the National Treasury in terms of section 32 of the Public Finance Management Act;
- the financial statements and annual report of the department;
- the reports of the Committee on Public Accounts relating to a department; and
- any other information requested by or presented to a House or parliament.⁶⁵

The BRRR is thus a consolidated account of the view of the National Assembly on the performance of government departments.

Parliament's reporting on the MTBPS is the next oversight element in the procedure.⁶⁶ The Act requires the Minister of Finance to submit the MTBPS to parliament at least three months prior to the introduction of the national budget, and sets out its required contents. These include a revised multi-year fiscal framework, the spending priorities of national government for the next three years, and a review of actual spending by each national department and each provincial government between 1 April and 30 September of the current fiscal year.

The MTBPS is referred to the respective committees on finance and committees on appropriations of the National Assembly and the National Council of Provinces for consideration, before these bodies report back to the respective Houses.⁶⁷ The Houses may require their committees on finance or appropriations to consult with any other committee in considering matters referred to it. Committees must report within 30 days from the date of the tabling of the MTBPS, and the reports may recommend amendments to the fiscal framework or the division of revenue, should these remain materially unchanged when submitted with the national budget. The reports from the committees on finance and committees on appropriations must be submitted to the Minister of Finance within seven days of their adoption by the respective Houses.

The BRRR and the reports on the MTBPS serve as indicators as to whether amendments might be proposed to the fiscal framework and the budget Bills when these are introduced the following year. In fact, the Minister of Finance must submit a report to parliament setting out how the Division of Revenue Bill and the national budget give effect to (or the reasons for not taking into account) the recommendations contained in the BRRR and the reports on the MTBPS when the national annual budget is introduced in the National Assembly.⁶⁸ The

⁶⁵ Section 5(1).

⁶⁶ Section 6.

⁶⁷ Section 4 of the Act requires that each House establish a committee on finance and a committee on appropriations, with all the powers and functions conferred by the Constitution, legislation, the standing rules or a resolution of a House. Most of the functions of these committees are set out in sections 4, 6 (MTBPS) and 15 (Parliamentary Budget Office). Section 6(3) requires that the revised fiscal framework and related documentation is referred to the respective committees on finance, while section 6(8) requires that the spending priorities, proposed division of revenue between spheres of government and substantial adjustments to conditional grant allocations are referred to the respective committees on appropriations. The referral of the review of actual spending remains within the discretion of the Houses in terms of the respective rules.

context for amending the fiscal framework, and thereafter the Division of Revenue Bill, is now set. At this point it must be noted that the issue of public participation (in this phase of the budget process before parliament) is left to the constitutional provisions referred to above, and is not specifically provided for in the Act.

In addition to including the procedure established within the oversight function of parliament, the Act requires parliament to follow a certain sequence when passing the budget. Firstly, parliament must adopt the fiscal framework, with or without amendments.⁶⁹ Any amendments to the Division of Revenue Bill, the Appropriation Bill or the revenue Bills must be consistent with the adopted fiscal framework.⁷⁰ Secondly, the Division of Revenue Bill must be adopted. Any amendments to the Appropriation Bill must be consistent with the adopted fiscal framework and the Division of Revenue Bill passed by parliament.⁷¹

The next phase of the budget process is the introduction in parliament of the budget, including the fiscal framework, the Division of Revenue Bill, the Appropriation Bill, and tax and other revenue proposals, during the first half of February each year.⁷² The fiscal framework and revenue proposals are referred to the committees on finance, who are required to hold joint public hearings.⁷³ Although this provision entrenches the constitutional right to participate in the budget process, the time-frame for such participation is particularly short in light of the significance of the subject matter. The entire process of referral, consideration, hearings, comments from the Minister (if amendments are proposed to the fiscal framework), reporting and adoption by the respective Houses must be done within 16 days of the introduction of the fiscal framework.⁷⁴ This highlights the fact that meaningful participation should focus on the MTBPS process.

After the adoption of the fiscal framework, the Division of Revenue Bill and the Appropriation Bill are referred to the committees on appropriations of the Assembly, to follow the legislative procedure as set out in the Constitution. In this instance, the Act requires parliament to pass the Division of Revenue Bill ‘no later than 35 days after the adoption of the fiscal framework’;⁷⁵ and the Appropriation

⁶⁸ Section 7(4).

⁶⁹ Section 8(4).

⁷⁰ Sections 8(9) and 9(4). Section 2 also requires that the application of the Act must “take into account the relevant fiscal framework submitted to and adopted by Parliament.”

⁷¹ Section 10(4).

⁷² Section 7.

⁷³ Section 8(2).

⁷⁴ Sections 8(3) and 8(7). Section 8(6) provides that the Minister of Finance must be given at least two days to respond to a committee report recommending amendments to the fiscal framework, and such comments must be included in the report.

⁷⁵ Section 9(3).

Bill within four months of the start of the financial year to which it relates.⁷⁶ In considering these Bills, the respective committees must conduct public hearings, consult with other parliamentary committees, and allow affected members of Cabinet, provinces and local governments to respond to the proposed amendments, as provided for in the rules.⁷⁷ The Act requires various items to be included in the committee reports on the Division of Revenue Bill and the Appropriation Bill, particularly in respect of service delivery.⁷⁸ Again it is significant that the Act entrenches the right of the public to participate, through public hearings, in the processing of these two important Bills.

Specifically in respect of the Appropriation Bill, the Act provides that another committee may advise a committee on appropriations that a sub-division of a main division within a vote should be appropriated conditionally; or that an amount must be appropriated specifically and exclusively for a purpose mentioned under a main division within a vote.⁷⁹ In the case of a conditional appropriation, the proposal must be aimed at ensuring that the money requested for the main division will be spent effectively, efficiently and economically. Strategic civic interventions could focus on these powers highlighted in the Act.

Revenue Bills, such as taxation Bills, are referred to the committee on finance of the National Assembly and, after approval, to the National Council of Provinces, for consideration by its committee on finance.⁸⁰ As is the case with the other Bills giving effect to the budget, the Act requires that committees on finance must hold public hearings on the revenue Bills – thereby entrenching the public's right to participate in such hearings – and consult with other committees.⁸¹

The Act provides for the procedure to amend the adjustments budget, which is introduced in the beginning of the second half of the financial year.⁸² The adjustments budget aims to balance the annual budget based on the actual revenue and expenditure of the first half of the financial year. In other words, it is used to re-align the revenue and expenditure between departments. It also provides an opportunity to appropriate funds for unavoidable and unforeseen expenditure. The adjustments budget includes the adjustments appropriation Bill, a revised fiscal framework if the adjustments budget effects changes to the fiscal framework, and a division of revenue amendment Bill if the adjustments budget

⁷⁶ Section 10(7).

⁷⁷ Sections 9(5) and 10(8). Specifically, the Minister of Finance must be given at least three days, in the case of the Division of Revenue Bill, and at least ten days, in the case of the Appropriation Bill, to respond. The responses from the members of Cabinet must be included in the committee report; see sections 9(8) and 10(11).

⁷⁸ Sections 9(6) and 10(10).

⁷⁹ Sections 10(5) and (6).

⁸⁰ Sections 11(1) and (2).

⁸¹ Section 11(4).

⁸² Section 12.



effects changes to the Division of Revenue Act for the relevant financial year.⁸³ The referral of these instruments follows the same sequence as the budget process; namely, the revised fiscal framework to a joint sitting of the committees on finance; the division of revenue amendment Bill to a joint sitting of the committees on appropriations after the adoption of the revised fiscal framework; and, in the event of a revised fiscal framework, an adjustment appropriation Bill to the committee on appropriations of the National Assembly, only after the Division of Revenue Amendment Bill is passed by parliament. There is no specific requirement for public hearings, as there is in the case of the main budget, and the timeframes set out in the Act are particularly tight.⁸⁴

The Act also provides for the procedure to consider amendments to money Bills other than the Appropriation Bill, Revenue Bills, and the Adjustments Appropriation Bill.⁸⁵ These Bills must be referred to the respective committees on appropriations, who are required to conduct public hearings on the Bill.⁸⁶

As indicated above, the Act entrenches the public's right to participate through public hearings. Civil society therefore has a legitimate expectation in this respect, but must tailor any intervention to suit the principles of fiscal discipline outlined in the Act. Failure to do so would render such interventions meaningless, as parliament would be wasting time and resources considering submissions outside the boundaries of the Act.

These principles apply when parliament and its committees take any decision in terms of the Act: in other words, any report pursuant to parliament's oversight function, report on the MTBPS, amendment to the fiscal framework, or amendment to a money Bill or the Division of Revenue Bill.⁸⁷ In this respect, parliament and its committees must:

- ensure an appropriate balance between revenue, expenditure and borrowing;
- ensure reasonable debt levels and debt interest cost;

⁸³ At the time of writing the practice is not to introduce a Division of Revenue Amendment Bill if the adjustments budget requires this, but rather to effect changes to the schedules published by Treasury in terms of the Division of Revenue Act. The latter Act provides for such mechanism, which is tantamount to delegated or subordinate legislative authority. See section 101 of the Constitution and section 24(2)(b) of the Division of Revenue Act, 2009 (Act No. 12 of 2009). Section 12(4) of the Money Bills Amendment Procedure and Related Matters Act requires the introduction of a division of revenue amendment Bill if the adjustments budget effects changes to the Division of Revenue Act for the relevant financial year.

⁸⁴ The committees have nine days to report on either the revised fiscal framework or the Division of Revenue Amendment Bill. If amendments are proposed, the Minister of Finance has two days to respond to the proposed amendments to the fiscal framework and four days to proposed amendments to the division of revenue. The reports must include the comments from the Minister. The report on the adjustments budget must be submitted within 30 days after the tabling of the national adjustments budget. This report must follow the same format as the report on the Appropriation Bill set out in section 10(10). In the case of a report recommending amendments to the Adjustment Appropriation Bill, the Minister of Finance must be given at least four days to respond, which report must include the comments. Provision is also made for consultation between committees.

⁸⁵ Section 13.

⁸⁶ Section 13(2).

⁸⁷ Section 8(5).

- ensure that the cost of recurrent spending is not deferred to future generations;
- ensure adequate provision for spending on infrastructural development, overall capital spending and maintenance.
- consider the short-, medium- and long-term implications of the fiscal framework, division of revenue and national budget on the long-term growth potential of the economy and the development of the country;
- take into account cyclical factors that may impact on the prevailing fiscal position; and
- take into account public revenue and expenditure, including extra-budgetary funds, and contingent liabilities.

In addition to the general principles mentioned above, when considering amending revenue Bills, parliament and its committees must:⁸⁸

- ensure that the total amount of revenue raised is consistent with the approved fiscal framework and the Division of Revenue Bill;
- take into account the principles of equity, efficiency, certainty and ease of collection;
- consider the impact of the proposed change on the composition of tax revenue, with reference to the balance between direct and indirect taxes;
- consider regional and international tax trends; and
- consider the impact on development, investment, employment and economic growth.

6 OPPORTUNITIES FOR STRATEGIC CIVIC INTERVENTIONS

The broad constitutional right of the public to participate in the legislative and oversight processes of parliament referred to above is given specific meaning in the Money Bills Amendment Procedure and Related Matters Act. As indicated above, while the general right to participate applies to the annual assessment of government departments by the committees of the National Assembly and to the consideration of the MTBPS, the procedures prescribed in respect of the consideration of the fiscal framework, Division of Revenue Bill, Appropriation Bill, revenue Bills and other money Bills include peremptory public hearings.⁸⁹ In these instances, the meaning given by the Constitutional Court to the duty to facilitate public participation – namely, that a legislature must act reasonably by providing meaningful opportunities for public participation, and take measures to ensure that people have the ability or capacity to take advantage of the opportunities provided – must be understood in the context of public hearings. In other words, the public hearings envisaged by the Money Bills Amendment Procedure and Related Matters Act must be of such nature that a court would find

⁸⁸ Section 11(3).

⁸⁹ Sections 8(2), 9(5)(b), 10(8)(a), 11(4)(a), and 13(2)(a).

them reasonable. Both the logistics and the substantive issues – such as capacitating people to participate meaningfully in the hearings – must be reasonable. The expected support from parliament is also an issue on which civil society could engage parliament.

The table below provides a brief overview of the opportunities for public participation created by the procedures prescribed in the Money Bills Amendment Procedure and Related Matters Act. Where the Act is silent in respect of public hearings, reference must be made to the constitution.

Opportunities for civic interventions in accordance with the procedure in the Money Bills Amendment Procedure and Related Matters Act			
Empowering provision	Subject matter	Responsibility	Timeframe
Sections 59(1)(a) & 72(1)(a) Constitution	Budgetary review and recommendation report	Portfolio committees of the National Assembly	September – October
Sections 59(1)(a) & 72(1)(a) Constitution	MTBPS	Committees on Finance and Committees on Appropriation of both the National Assembly and the National Council of Provinces; other committees of the National Assembly	October – November
Section 8(2)	Fiscal framework and revenue proposals	Committees on Finance of both the National Assembly and the National Council of Provinces	First half of February
Section 9(5)(b)	Division of Revenue Bill	Committees on Appropriations of both the National Assembly and the National Council of Provinces	February – March
Section 10(8)(a)	Appropriation Bill	Committees on Appropriations of both the National Assembly and the National Council of Provinces	February – June

Section 11(4)(a)	Revenue Bills	Committees on Finance of both the National Assembly and the National Council of Provinces	June – July
Sections 59(1)(a) & 72(1)(a) Constitution	Adjustment budget	Committees on Finance and Committees on Appropriation of both the National Assembly and the National Council of Provinces	October – November
Section 13(2)(a)	Other money Bills	Committees on Appropriations of both the National Assembly and the National Council of Provinces	As programmed

From the table above, it is evident that opportunities for strategic civic interventions in the budget process bridge the oversight and the legislative functions of parliament. Committee oversight processes present opportunities for interventions during the consideration of a department's annual report, in-year expenditure reports – such as the monthly and quarterly reports – or area specific reports on the implementation of legislation, as well as during the consideration of the audit report on the financial statements of the department by SCOPA. The aim of such interventions would be to influence the committee's budgetary review and recommendation report.

The consideration of the MTBPS provides significant opportunities for interventions in the oversight processes. The committees on finance and committees on appropriation of both the National Assembly and the National Council of Provinces consider the MTBPS.

Parliament's consideration of the fiscal framework, Division of Revenue Bill, Appropriation Bill, revenue Bills and the Bills giving effect to the adjustments budget present opportunities for strategic civic interventions in the budget process *vis-à-vis* the legislative processes.

With the exception of the procedure for the adjustments budget, the Money Bills Amendment Procedure and Related Matters Act creates 'dedicated avenues for public participation'.⁹⁰ As these dedicated avenues represent new opportunities for interventions in the budget process before parliament, it is not possible to do an evaluation at this time. Nevertheless, research suggests that

⁹⁰ Lefko-Everett and Zasmisa, 87–88.

opportunities for interventions in the budget process before parliament have not been taken up by civil society.

A recent study tracking ten years of public submissions made to the Assembly's finance committee indicates a significant number of submissions made *vis-à-vis* the legislative processes of the budget process, despite the absence of parliament's amendment powers during this time.⁹¹ An analysis of the sources of these submissions indicates that the majority come from industrial bodies, professional/sector associations, and the private sector.⁹² The study concludes that opportunities for public participation in the processes of the finance committee were above average compared to other committees of parliament. However, the use of these opportunities by non-governmental organisations and community-based organisations (among others) was 'often sporadic and outnumbered.' The study suggests that 'civil society should actively use the available channels of participation that private interests consistently use.'⁹³ Participation in the MTBPS process was particularly limited.

7 STRENGTHENING STATE ACCOUNTABILITY

Strengthening efforts to enhance state accountability for protecting, promoting and respecting refugee rights and reducing poverty in South Africa begin with participation in the prioritisation of policy reflected in the budget process. Participation creates respect between all stakeholders – community and government – and provides government with the 'benefit of all inputs that will enable them to produce the best possible laws.'⁹⁴ These fruits of participation are also referred to as 'ownership' and 'credibility' of economic policy.⁹⁵ Bringing the grassroots perspectives of marginalised communities to the attention of legislators addresses the qualitative aspect of their disposition, as well as empowering legislators to transform specific situations.

Part of the intervention by civil society in 2003, during the consideration of the Children's Bill,⁹⁶ took this form. The Children's Institute initiated a project called *Dikwankwella – Children in Action*. The aim of the project was to facilitate the participation of children in the process, which resulted in children making direct input into the final provisions of the Children's Bill.⁹⁷ An evaluation of the project indicated that the children perceived that they had made an important contribution to the legislation through their submissions to parliament, and

⁹¹ *Supra*, 82–87.

⁹² Although the study indicates that the labour union, Fedusa, made the most submissions.

⁹³ Lefko-Everett and Zasmisa, 87.

⁹⁴ Judge Sachs in *Doctors for Life International v Speaker of the National Assembly and Others* at p. 1473B-D.

⁹⁵ Verwey, 23; and Lefko-Everett and Zasmisa, 87.

⁹⁶ [B 70-3003].

⁹⁷ Mükoma, 2007.

expressed ‘tremendous personal growth as a result of their participation in the project’.⁹⁸

As indicated above, the participation of civil society in the parliamentary phase of the budget process is weak. This requires change. The opportunities created by the Money Bills Amendment Procedure and Related Matters Act should be explored and used. The use of these opportunities requires capacity. In this regard, it might be necessary to create dedicated funding models to ensure that the necessary capacity to ask the right questions in respect of allocation of public resources is institutionalised in civil society. However, linking funding to the level of participation in the budget process – in other words, ensuring that all the opportunities are explored – would not be enough. To evaluate the impact of participation, one must measure the impact on grassroots communities. Therefore, the relationship between civil society and marginalised communities must facilitate direct communication of life experiences to legislators. If this does not occur, it is difficult to understand how participation has the potential to address the qualitative aspect of marginalisation.

Lastly, legislatures must embody responsiveness – one of the founding values of the constitution. Meaningful participation demands this. In the same manner that one cannot expect marginalised communities to feel empowered if they are not given direct access to legislators, so it would make little sense to anyone, including well-capacitated civil society organisations, to participate in legislative and other processes if legislatures do not respond to such submissions.

8 TOWARDS A RIGHTS-BASED MODEL FOR MAKING SUBMISSIONS TO THE BUDGET PROCESS

Chapter 2 of the constitution contains the Bill of Rights, which is a cornerstone of democracy in South Africa, and which requires the state to respect, protect, promote and fulfil the rights contained therein.⁹⁹ Included in the Bill of Rights are justiciable socio-economic rights pertaining to housing, health care, food, water, education and so on.¹⁰⁰ According to the constitution, ‘The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.’¹⁰¹ The Constitutional Court found in *Government of the Republic of South Africa and Others v Grootboom and Others*,¹⁰² firstly, that ‘[t]he question is ... not whether socio-economic rights are

⁹⁸ Ibid. See also Child Rights in Focus, March 2007, <http://www.ci.org.za/depts/ci/enews/March2007/evaluating.htm>.

⁹⁹ Section 7 of the Constitution.

¹⁰⁰ Sections 26 and 27. The Constitutional Court recognised that these rights are enforceable, at least to some extent. The Court found that these rights can at the very minimum be negatively protected from improper invasion. *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)* at para 78.

¹⁰¹ Sections 26(2) and 27(2).

¹⁰² *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

justiciable under our Constitution, but how to enforce them in a given case.¹⁰³ Secondly, the Court found that the rights in the Bill of Rights are inter-related and mutually supporting, and that ‘human dignity, freedom and equality, the foundation values of our society, are denied those who have no food, clothing or shelter.’¹⁰⁴ Lastly, although the issue of nationality was not before the Court, it did make a comment that ‘[a]ffording socio-economic rights to all people ... enables them to enjoy the other rights enshrined in Chapter 2.’¹⁰⁵ The latter comment is consistent with the constitution, which explicitly provides that socio-economic rights accrue to everyone.

In addition to the rights that asylum-seekers and refugees are entitled to in terms of the Bill of Rights, the 1998 Refugees Act recognises further rights.¹⁰⁶ Included in these rights are the right of *non-refoulement*,¹⁰⁷ administrative justice in determining the application for asylum,¹⁰⁸ and the right to seek employment.¹⁰⁹ The Act, consistent with the constitutional requirement to consider international law,¹¹⁰ further requires interpretation and application with due regard to:

- (a) the Convention Relating to the Status of Refugees (UN, 1951);
- (b) the Protocol Relating to the Status of Refugees (UN, 1967);
- (c) the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969);
- (d) the Universal Declaration of Human Rights (UN, 1948); and
- (e) any other relevant convention or international agreement to which the Republic is or becomes a party.¹¹¹

¹⁰³ At para 20.

¹⁰⁴ At para 23.

¹⁰⁵ Ibid.

¹⁰⁶ Act No. 130 of 1998. In respect of the Refugees Act, Klaaren *et al* document the various consultative processes pertaining to the formulation of the policy and the drafting of the Act in which civil society participated effectively. See Klaaren, Handmaker, De la Hunt, ‘Talking a New Talk: Legislative History of the Refugees Act 130 of 1998’, in *Advancing Refugee Protection in South Africa*, 47. They conclude that ‘the civil society involvement in the drafting of the Refugees Act has provided refugee rights advocates with a number of legal and rhetorical resources to use in these current and ongoing conflicts’, 56.

¹⁰⁷ Section 2.

¹⁰⁸ Section 24.

¹⁰⁹ Section 27. Chapter 5 of the Act provides for the rights and obligations of refugees. Section 27 also affirms the protection of refugee rights by the Bill of Rights. Certain sections of the Act will be amended by the Refugees Amendment Act 33 of 2008, which was not yet in operation at the time of writing. These amendments, among others, relate to the dissolution of the Standing Committee for Refugee Affairs and the Refugee Appeal Board and the establishment of the Refugee Appeals Authority, revision of procedures relating to refugee status determination, and, importantly, provide for the rights and obligation of refugees and asylum-seekers. A discussion of the amendments is beyond the scope of this chapter. For a discussion on the Refugees Act, see Jenkins, 1999.

¹¹⁰ Section 39.

¹¹¹ Section 6.

To facilitate the realisation of socio-economic and refugee rights, the Bill of Rights guarantees access to information; as well as administrative action that is lawful, reasonable and procedurally fair.¹¹² A submission to a committee of parliament or a provincial legislature, attempting to assist the legislature to give effect to its constitutional obligations, should use rights provided for in the constitution and legislation as a basis. Below is a brief discussion on how such submissions or interventions in the budget process may be compiled.

A submission or intervention focusing on the oversight processes could compare the grassroots experience with the information in the annual report of a department or the expenditure reports, as well as analysing the impact of the spending patterns reflected in the monthly and quarterly reports. A submission can also focus on the implementation of legislation or the audit report on the financial statements, which is considered by SCOPA. The aim of such interventions would be to influence the committee's budgetary review and recommendation report, which must be completed between September and November each year. The main issue in these submissions is whether the measures taken – in other words, the policy or programme and its implementation – to give effect to the rights in the Bill of Rights, or to implement legislation, are reasonable.¹¹³

Interventions in the oversight processes could be supported during the process of the MTBPS. The committees on finance and committees on appropriation of both the National Assembly and the National Council of Provinces all consider the MTBPS. Submissions to the committees on finance would be more general, as these committees are tasked with considering the overall fiscal framework and macro-economic projections. The respective committees on appropriations consider, among other issues, the spending priorities over the MTEF, the proposed division of revenue between spheres of government, and the proposed conditional grant allocations. These issues are more specific, and a submission could focus on areas of rights protection for refugees and asylum-seekers, or on addressing issues of poverty. Even more focused interventions could be made in respect of the review of actual spending during the first six months of the financial year submitted with the MTBPS.

Submissions on the fiscal framework require technical expertise of the long- and short-term effects of different fiscal positions. The Money Bills Amendment Procedure and Related Matters Act requires compliance with principles of fiscal discipline.¹¹⁴ Depending on the scope of the submission, it might be necessary to make this type of submission, although submissions on the specific budget votes

¹¹² Sections 32 and 33. See also the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) and the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

¹¹³ The 'reasonableness' of a policy has been the subject of many cases before the Constitutional Court. A good summary of these appears in the latest judgment of *Mazibuko and Others v City of Johannesburg and Others*, (CCT 39/09) [2009] ZACC 28 (8 October 2009) <http://www.saflii.org/za/cases/ZACC/2009/28.html>, paras [46]-[68].

¹¹⁴ Section 8(5).

or programmes within each budget vote would not necessarily require such broad analysis.

Submissions on the Division of Revenue Bill (which contains, among other figures, the allocation of revenue collected nationally to individual provinces), as well as those on the Appropriation Bill, and the Bills forming part of the adjustment budget, require some form of budget analysis. The key issue in this regard is to identify the programmes and sub-programmes within the vote that are relevant to the specific subject matter of the submission.¹¹⁵ Cognisance must be taken of the functional areas of concurrent national and provincial competence.¹¹⁶ Issues pertaining to poverty reduction are transversal, and – to a large extent – a concurrent function between national and provincial spheres of government. Migrant and refugee matters are national competencies. A submission focusing on a concurrent area (such as health, welfare or housing) should therefore also analyse the provincial departments' budgets to find the relevant programme or sub-programme of the vote.¹¹⁷ Once the relevant programme or sub-programme is identified, the question of whether the budget allocation is appropriate must be considered, within the parameters of 'available resources' and 'progressive realisation'. Assuming the policy underpinning the programme or sub-programme is reasonable, an appropriate budget allocation should ensure effective and efficient implementation. Furthermore, the budget allocation should show a progression over the medium term, in addition to accommodating the rate of inflation. The submission may make recommendations to appropriate certain funds conditionally or specifically for a purpose, bearing in mind the principles of fiscal discipline.¹¹⁸

Submissions on the Revenue Bills would require technical skills, especially in light of the requirement to comply with the principles set out in the Money Bills Amendment Procedure and Related Matters Act.¹¹⁹

9 CONCLUSION

This chapter has argued that the efforts of civil society to enhance the protection of the rights of refugees and asylum-seekers, as well as the challenge of poverty reduction, can be strengthened through a strategy of participation in the oversight and legislative processes of parliament and provincial legislatures pertaining to the budget. The premise throughout is that the budget represents policy priorities being implemented; and we cannot influence priorities without participating in

¹¹⁵ This part of my chapter is based on the work of Budlender and Proudlock, 'Children's Institute analysis of the 2009/10 budget for the Gauteng Department of Social Development', 2009; see also Budlender and Proudlock, 2009, both available at www.ci.org.za.

¹¹⁶ Schedule 4 of the Constitution. Constitution, sections 44 and 104, read with Schedules 4 and 5.

¹¹⁷ Section 1 of the Public Finance Management Act defines a 'vote' as one of the main segments into which an appropriation Act is divided, and which specifies the total amount usually appropriated per department in an appropriation Act; and is separately approved by parliament or a provincial legislature. A programme is a main division of a vote.

¹¹⁸ Section 8(5) of the Money Bills Amendment Procedure and Related Matters Act.

¹¹⁹ Section 11(3).

the budget process. Furthermore, by focusing on spending patterns, the effectiveness of policy relating to the protection, promotion and fulfilment of fundamental rights (including socio-economic rights) may be analysed. The issues of poverty reduction, as well as the protection of vulnerable groups – such as asylum-seekers and refugees – could be addressed by such strategic interventions.

The efforts of civil society can be strengthened further by evaluating the level of participation in the range of processes that present opportunities to make strategic interventions. In this regard, my chapter proceeds from the viewpoint that the aim of participation is to create ownership of policy. Tracking strategic interventions in the budget processes in parliament and provincial legislatures therefore provides a model for measuring the level of participation of civil society organisations (in terms of consistency), as well as the responsiveness of government.

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CIVIC ACTION AND LEGAL
MOBILISATION: THE PHIRI
WATER METERS CASE*Jackie Dugard¹*

In South Africa everyone will say that life is not fair for the poor. Even the rich will say ... this when they are just finding more and more excuses to give more of the country's money to themselves to build all these very expensive things ... so they can feel themselves to be 'world class'. Meanwhile our children, who, like the children in Haiti and Kenya and Zimbabwe are ... burning in shack fires and dying from diarrhoea around the corner. One of the truths that people want to hide from is that in this country where everything is done in the name of the suffering of the poor, life is good for the masters of the poor but it is very unfair for the servants of the poor ... But for the dawn of justice for all to come we must accept the truth that in our country, a country where ... the law gives everyone the right to gather and to speak, in reality the poor have to make their choices from no choice. Business and politics ... are all united in their demand for our silence ... [yet] everyday we are maturing in our struggle. We were always many but every day we are more. The red river that carried me will carry us all on and on through the shooting and the lies and the unfairness and all the choices that we will have to make without choice.

Excerpt from 'When Choices Can No Longer Be Choices' by S'bu Zikode, president of *Abahlali baseMjodolo*.²

¹ This chapter is based on a contribution submitted to Palgrave as a chapter for *Social Movements and/ in the Postcolonial* and builds on two previous articles by the author (Dugard, 2008; Dugard, 2009).

² S'bu Zikode (28/02/2007) 'When Choices Can No Longer Be Choices': <http://www.abahlali.org/node/841>. Zikode is president of *Abahlali baseMjondolo* (meaning: we who live in the shacks, in isiZulu). *Abahlali* is one of the growing social movements in South Africa. Like the Anti-Privatisation Forum – the social movement dealt with in this chapter – *Abahlali* is skeptical about the overall function of law in shoring up privilege in South Africa. Yet *Abahlali* has always seen a role for law as a tactic in their broader struggle. In contrast, for the Anti-Privatisation Forum, the *Mazibuko* case was the first instance of proactively taking up litigation.



1 INTRODUCTION

In 1996 the South African post-apartheid legal order was consolidated with the enactment of the final Constitution.³ Among the constitutionally guaranteed rights is the right of access to sufficient water (section 27(1)(b) of the Constitution). The insertion of socio-economic rights, including the right to water (alongside other, more traditional civil and political rights), underscored the understanding that apartheid was as much a system of socio-economic subjugation as of civil and political tyranny. Part of this recognition was an acknowledgment of the need to redistribute water resources and services more equitably. To this end, there is a progressive legislative framework for water services that includes a national Free Basic Water (FBW) policy aimed at ensuring a lifeline amount of water per property per month,⁴ as well as a range of laws advancing a rights-based approach. However, notwithstanding such recognition and intention, when it comes to implementation, contemporary water service delivery is fraught with problems of non-participation, non-connection, disconnection and restriction. One of the main reasons for the disjuncture between frameworks and reality is the ascendancy of a neo-liberal thrust towards cost-recovery, in terms of which national government has devolved responsibility for water services to municipalities, and has steadily decreased its financial and technical support for such services. As a result, municipalities are under considerable fiscal pressure to maximise profits from water services, resulting in a preoccupation with recovering service-related costs from all areas, including poor communities. At the same time, there is no national regulation to enforce basic water standards or to ensure the protection and fulfilment of water-related rights, which adds to the perverse incentives for municipalities to view water more as a commodity than a public service.

Thus, in 2001, the City of Johannesburg formulated a project to limit water consumption in Soweto by means of the mass installation of prepayment water meters (PPMs). Called Operation *Gcin'Amanzzi* (meaning 'conserve water' in isiZulu), the project was premised on the mass rollout of PPMs across Soweto, starting with a pilot in one of the poorest suburbs – Phiri. Unlike the conventional meters available throughout Johannesburg's richer suburbs, which provide water on credit with numerous procedural protections against disconnection, PPMs

³ During the period of multiparty negotiations, South Africa had an interim constitution, the Constitution of the Republic of South Africa Act 200 of 1993. It was finalised as the Republic of South Africa Constitution Act 108 of 1996 (constitution).

⁴ According to national FBW policy, each household – or at least, each poor household – should receive 6 kilolitres (6 000 litres) of free water per month. This figure is based on a calculation of 25 litres per person per day in a household of eight people. Space does not allow me to deal with all the problems of this FBW policy, save to mention two. First, there is no national regulation or enforcement of the policy, and there are many municipalities that do not provide FBW at all. Second, for those municipalities that do provide FBW, such as Johannesburg, the allocation is often insufficient to cover the basic needs of low-income households. This is particularly the case in poor township areas such as Phiri, where there are multi-dwelling households (one main house and several backyard shacks) on one property, but only one water connection. On such properties, everyone has to share the same 6 kilolitre monthly FBW allocation, which means that each person receives a woefully inadequate amount.

automatically disconnect once the (largely inadequate) FBW supply is exhausted, unless additional water credit is loaded. PPMs therefore fundamentally compromise low-income households' rights of access to water *and* equality (because PPMs are only installed in poor areas), contradicting the promises of the post-apartheid state and undermining the hopes of the residents of Phiri to become full participants in the socio-economic order. The contrast between the right to water in the constitution and the limitation of that access by means of a PPM could hardly be starker, especially in the context of the hedonistic water consumption in Johannesburg's richer, swimming-pooled (and predominantly white) suburbs. For the residents of Phiri, this apparent betrayal was too much, and, as the first trenches were being dug for the installation of the PPM infrastructure in August 2003, they embarked on a resistance campaign against PPMs. From the outset, their resistance was supported by the Anti-Privatisation Forum (APF), a socialist social movement.

In Phiri, the struggle first took the form of direct protest rather than 'legal mobilisation' (defined by Frances Zemans as the point at which 'a desire or want is translated into a demand as an assertion of one's rights'.⁵ This was not surprising, given the influence of the APF and the political left's historical antagonism to the law and rights as legitimising privilege. However, as detailed below, such resistance only managed to delay the installation of PPMs. But, at the lowest moment, when it looked as though community resistance had failed, the APF took a strategic decision to turn to rights-based litigation, despite its ideological aversion to rights and the law. Nevertheless, not much hope was vested in the litigation process, which was viewed as a last resort. Yet, following victory in the first stage of the legal battle – the Johannesburg High Court, declared PPMs unlawful and unconstitutional on 30 April 2008 – there has been a remarkable demonstration of support for the law from the APF and others traditionally sceptical of the legal process. This is in spite of the fact that (pending the outcome of the appeals process), the order against PPMs has been suspended, suggesting that there might be more value to even contingent legal mobilisation than *de facto* outcomes alone. As Michael McCann concluded in his seminal study of the 1980s wage equity campaign in the United States, 'litigation provided movement activists an important resource for advancing their cause'.⁶ I suggest the same is true for the Phiri campaign against PPMs, in which the uptake of rights-based litigation has empowered water activists in ways that I suspect will continue to reverberate and shape struggles for water in Phiri and beyond.

In this vein (and in the same year that the City of Johannesburg formulated its plan to install PPMs in Phiri), Daria Roithmayr wrote an article entitled 'Left Over Rights', responding to Duncan Kennedy's articulation of a 'post-rights' position. Roithmayr's article advances the argument (in line with Critical Race Theory, itself an offshoot of Critical Legal Studies) that rights can be pragmatically useful 'for particular communities of colour at particular moments

⁵ Zemans, 1983: 700.

⁶ McCann, 1994: 4.

in history'.⁷ In this chapter, I develop Roithmayr's thesis, arguing that rights can be useful to the left, regardless of the ultimate outcome of litigation per se. Advocating a pragmatic approach to rights, I suggest that in contemporary South Africa, with its extreme socio-economic and racial inequalities, while in the normal course of events the law does indeed serve the interests of elites, rights-based legal mobilisation can have a predominantly positive impact on social movements representing disempowered groups, including the poor. I conclude, as Roithmayr did, that, if strategically used, rights-based legal mobilisation may in certain circumstances offer the left an additional tactic in a broader political struggle. In some instances the additional tactic might be a last resort, but it remains a useful one. Indeed, in Phiri, rights provided what S'bu Zikode has referred to as 'choice from no choice'. Nevertheless, even where litigation emerges as a tactic of desperation rather than hope, 'since rights carry with them the connotations of entitlement, a declaration of rights tends to politicise needs by changing the way people think about their discontents', legitimating claims, thereby contributing to political mobilisation and, ultimately, to political change.⁸

This chapter documents and analyses the struggle against PPMs in Phiri, focusing particularly on the uptake and utility of rights-based legal mobilisation by the APF as an ordinarily rights-adverse social movement, manifesting in the *Mazibuko* water rights case.⁹ At the time of writing, the *Mazibuko* appeal had just been heard in the Constitutional Court. The judgment was handed down on 8 October 2009. In a shock decision, which overturned the findings of two previous courts, the Constitutional Court ruled against the applicants, finding PPMs to be lawful. However, notwithstanding the final judgment, the Phiri water campaign provides an interesting case study of an impoverished community's struggle against neo-liberal policies, which has involved, but has never been dominated by, the uptake of litigation based on a human rights framework.

2 COMMERCIALISATION AND CORPORATISATION

When the post-apartheid government was swept into power by the vast majority of South Africans in 1994, its political mandate involved righting historical wrongs. One of these was the legacy of vastly unequal basic services, particularly water. As recognised by the African National Congress (ANC)'s first, expansionist economic development strategy, the Reconstruction and Development Programme (RDP), in 1994 an estimated 12 million South Africans

⁷ Roithmayr, 2001: 113.

⁸ Scheingold, 1974: 95, 131, 132, 147.

⁹ The *Mazibuko* case was heard in the Johannesburg High Court between 3 and 5 December 2007; in the Supreme Court of Appeal between 23 and 25 February 2009; and in the Constitutional Court on 2 September 2009. For the sake of ease of reference, unless otherwise indicated, I refer to the case in the cumulative sense, as *Mazibuko*. The citation of the High Court case is *Mazibuko and Others v City of Johannesburg and Others* 2008 (4) All SA 471 (W); in the Supreme Court of Appeal it is *City of Johannesburg and Others v Mazibuko and Others* 2009 (3) SA 592 (SCA); the Constitutional Case is *Mazibuko and Others v City of Johannesburg and Others* CCT 0039/09.



(approximately a quarter of the population) did not have access to piped water.¹⁰ There was an expectation that equalising water services would be prioritised, and that water would be recognised ‘as a public good whose commodification would inherently discriminate against the majority poor’.¹¹

Undoubtedly, commendable progress has been made in connecting previously unconnected households to the water grid.¹² However, in recent years such gains have been fundamentally eroded by a growing neo-liberal preoccupation with cost-recovery, which results in poor households being disconnected for inability to pay for water services. The catalyst for the increasing focus on cost-recovery and the concomitant escalation of water disconnections was the consolidation of the local government sphere of government in the 2000 municipal elections. The arrangement of three spheres of autonomous government – national, provincial and local – was itself a product of political compromise – a concession by the ANC to the other main parties (notably the Inkatha Freedom Party, with its support base in KwaZulu/Natal, and the then-Democratic Party, with its support base in Cape Town) to afford them some zone of political dominance. Part of this devolution was a constitutionally entrenched division of functions, in which water services became a local government mandate (Schedule 4B of the constitution).

Within this arrangement, national government has always exerted relatively tight fiscal control over municipalities. In particular, municipalities are under pressure to become financially self-sufficient, and they are precluded from any deficits on their operating budgets (Section 18(1)(c) of the Local Government: Municipal Finance Management Act 56 of 2003). At the same time, national government has steadily withdrawn central financial support and, following the advice of the World Bank and the International Monetary Fund, decreased grants and subsidies to local government.¹³ The effect has been directly felt on municipal services. Because basic services are one of the main sources of revenue for municipalities – electricity and water services together account for approximately 50% of aggregated municipal revenue¹⁴ – municipalities are driven to pursue a commercialised approach to water services, in which water is viewed as a source of revenue rather than a public service.

Proper implementation of the RDP mandate would have required ‘a national redistributive water pricing policy with higher unit amounts for higher-volume water consumers, especially large firms, mines and (white) farms’, as well as intervention in the ‘functioning and autonomy of local government to ensure equitable tariffs, including regulation of appropriate cross-subsidies between rich and poor consumers within a municipality’.¹⁵ Instead, social equity regulation has

¹⁰ ANC, 1994: para. 2.6.1.

¹¹ McKinley, 2005: 181.

¹² In the decade after 1994, 3.37 million households were connected to water services (South African Institute of Race Relations, 2006: 385, 422).

¹³ McKinley, 2005: 182.

¹⁴ Seidman, 2006: 8.

¹⁵ Bond and Dugard, 2008b: 6–7.

been sacrificed on the altar of neo-liberal cost-recovery and decentralised government autonomy. While the commercialisation of water services gained momentum in the wake of the consolidation of local government (2000–2001), there were ominous signs of a more neoliberal approach to water services as early as 1994: the 1994 Water Supply and Sanitation White Paper stipulated ‘where poor communities are not able to afford basic services, government may subsidise the cost of construction of basic minimum services *but not the operating, maintenance or replacement costs*’ (emphasis added).¹⁶ Similarly, the 1997 White Paper on a National Water Policy for South Africa stated: ‘to promote the efficient use of water, the policy will be to charge users for the full financial costs of providing access to water, including infrastructure, development and catchment management activities’.¹⁷

In the South African context, the commercialisation of water has entailed highlighting its role mainly as an economic good and attempting to reduce price distortions, while pursuing a limited form of obligatory means-tested subsidy – the FBW allocation.¹⁸ Crucially, it has also involved harsh enforcement of credit control (aimed at curtailing water revenue losses in poor communities), including by means of water disconnection and restriction through physical mechanisms such as flow restrictors and PPMs. At the municipal level, this has meant that almost as fast as poor households are connected to the grid in terms of the extension of infrastructure, they are disconnected because they cannot pay their monthly water bills.¹⁹

¹⁶ DWAF, 1994: 19.

¹⁷ DWAF, 1997: 4.

¹⁸ Bond and Dugard, 2008a: 5. Most municipalities pursue a means-tested approach to FBW allocation, using a registration process known as indigency registration, in terms of which poor households must prove their poverty in order to receive FBW. Initial research indicates that such indigency registers typically capture only about a fifth of formally qualifying low-income households (Tissington et al, 2008: 34–39).

¹⁹ Beyond direct observance of this phenomenon, as well as feedback from affected communities, it is hard to quantify the scale of water disconnections. This is because most municipalities, along with national government, do not keep data on disconnections or are reluctant to share such information. Furthermore, in those municipalities that have installed PPMs in poorer residential areas, any disconnection is ‘outsourced’ as a private disconnection in the person’s own home, and not part of the municipality’s administrative record (such disconnections are referred to by community-based organisations as ‘silent disconnections’). Nevertheless, some authors have managed to track water disconnections for specific periods. For example, in Smith’s 2005 study of the Cape Town and Tygerberg administrations, 159 886 households had their water disconnected for reasons of non-payment between 1999 and 2001; most of these households were in poor areas where people struggle to pay water bills. And, using national household data and data collected in a 2001 national survey, McDonald (2002) estimated that between the years 2000 and 2001, 7.5 million people experienced both water and electricity disconnections. Such data suggest that ‘the introduction of free water and electricity policies in 2001 in urban South Africa had little impact on the affordability of services for many households’ (McInnes, 2005: 21). Finally, former DWAF Director General Mike Muller conceded that in 2003 alone, 275 000 *households* were disconnected at least once from water services due to an inability to pay (Muller, 2004), which, based on a national average of around five or six people per household, amounts to approximately 1.5 million people – and this number excludes prepayment water meter disconnections for the reasons outlined above (Bond and Dugard, 2008a).

And, although the South African version of the commercialisation of water services has not entirely echoed the global trend of privatisation per se, as pointed out by Bakker,²⁰ it is possible to commercialise water services without privatising them. This has certainly been the case in South Africa, where most water services remain publicly owned, but where water is viewed primarily (and even ideally) as an economic good. In some instances, this commercialisation of water services has also entailed their corporatisation. In 2001 in the City of Johannesburg, for example, water services were corporatised under the auspices of Johannesburg Water (Pty) Ltd. (Johannesburg Water), which is a ring-fenced corporation whose only shareholder is the City of Johannesburg.

Furthermore, although there are very few outright private water concessions – mainly due to popular resistance after initial attempts at private water concessions²¹ – many of the global agents of privatised water services have played pivotal roles in South Africa. For example, the French multinational (and one of the world's largest privatised water management firms), Suez (now called GDF Suez), was awarded a five-year management contract in 2001 – the first year of the corporatisation of Johannesburg's water services – under the Johannesburg Water (Pty) Ltd. management subsidiary, Johannesburg Water Management (Jowam). The result was a regressive interpretation of social equity standards, including the structure of the rising block water tariff.²² In 2003, instead of choosing the ideal structure (which would have a convex curve, starting with low-priced tariff blocks and rising very steeply at the luxury end of consumption) that would have better served lower-income households, the City adopted a relatively steep-rising concave tariff curve for water. In addition:

In 2003, the second tier of the [rising] block tariff (7 to 10 kilolitres/ household/ month) was raised by 32%, while the third tier (11–15 kilolitres/ household/ month) was lowered by 2% (during a period of roughly 10% inflation, which was the amount by which higher tier tariffs increased) ... Moreover, the marginal tariff price for industrial/ commercial users of water, while higher than residential, actually declines after large-volume consumption is reached.²³

In such domestic water tariff structures, where the lower block tariffs are dramatically increased, this impacts negatively on low-income households, making water bills unaffordable, escalating municipal debt and resulting in

²⁰ Bakker, 2007.

²¹ Bond and Dugard, 2008b: 9.

²² Although set at the local level, municipal water tariffs are meant to comply with national regulations – set out in the Norms and Standards in Respect of Tariffs for Water Services: Regulations under section 10 of the Water Services Act 108 of 1997 (20 July 2001). One of the prescribed requirements is that tariffs for metered water connections must reflect a rising block structure with three or more tariff blocks 'with the tariff increasing for the higher consumption blocks' (section 6(2)(a)). A rising block tariff structure, particularly one with a convex curve with low prices at the low levels of consumption and very high prices at the luxury end of consumption, is meant to promote social equity by cross-subsidising between the high consumption of wealthy households and the relatively lower consumption of low-income households.

²³ Bond and Dugard, 2008: 7.



increased disconnections.²⁴ And in Johannesburg, at the top end of the domestic consumption spectrum, luxury residential water consumption is not overly penalised, because such an environmental and social justice rationale might irritate wealthy users into consuming less water, thereby reducing municipal revenue. Indeed, the head of Jowam between 2001 and 2005, Jean Pierre Mas, has indicated that it would be foolish for Johannesburg Water to raise the price at the top end in an attempt to pursue more progressive cross-subsidies and ‘to promote water conservation’ among affluent households ‘who pay their water bills’, as this might reduce the company’s revenue.²⁵

Within this corporate model, water services are managed largely along commercial lines, albeit with some nationally legislated (though rarely enforced) concessions to social equity (such as the FBW allocation). Indeed, across South Africa and gaining ground particularly in bigger metropolitan areas, water has become more of an economic *product* and less of a public health-related *service*.²⁶ In many respects, the City of Johannesburg has led this trend, not least in its use of PPMs to limit access to water in poor households, starting with Phiri.

3 THE CITY OF JOHANNESBURG

Johannesburg has been characterised by infrastructural inequalities almost since its birth. In the early days of the gold rush, wealthy Rand-lords and the mining middle classes lived in leafy suburbs to the north of the city, and the budgets of the fledgling municipality were largely channelled towards these residents.²⁷ By the 1970s, these northern areas were well serviced and residents enjoyed lifestyles similar to those of the wealthy in many of the world’s richest countries. In stark contrast, hidden behind the mine dumps or to the south-west of the City, were townships such as Soweto (the name deriving from South Western Township). Such areas were under-serviced and predominantly poor, and essentially functioned as labour camps to service mines and industry with cheap black labour, which became part of the apartheid project from 1948, resulting in the expansion of Soweto during the 1950s and 1960s.

By the 1970s the large numbers of oppressed people in Soweto had formed an explosive mix, which was set alight by the Black Consciousness movement and the student uprisings of 1976. In an attempt to co-opt and pacify rising militancy, the city extended municipal services infrastructure to Soweto households, albeit using inferior water piping and low-amperage electricity. For water, a ‘deemed consumption’ system was operated, which meant that households were not charged according to consumption, but were rather billed a flat rate regardless of

²⁴ Bond and Dugard, 2008b: 9.

²⁵ Quoted in Smith, 2006: 29. In fact, the evidence indicates that South African luxury water users are not very responsive to price changes, suggesting that water tariffs at the top-end could be significantly raised in order to better cross-subsidise low-end usage, without resulting in rich households drastically cutting their consumption.

²⁶ Hemson, 2008: 30.

²⁷ Beavon, 2000.

how much water was consumed. From the apartheid administration's perspective, the deemed consumption system held the benefit of not requiring municipal officials to undertake monthly readings, which might expose officials to politically motivated reprisals. Moreover, despite widespread non-payment of water bills, the city rarely disconnected water supplies, fearing this would stoke militancy. Because neither credit control nor water disconnection was practiced, household arrears mounted, until by 2000, most households were deeply in debt.

When Johannesburg's first non-racial municipality – the Greater Johannesburg Metropolitan Transitional Council – was established in 1995, it almost immediately faced a fiscal crisis, related in the first instance to the enormous challenge of incorporating township and informal settlement areas into the city's administrative system, and equalising services across the city. Moreover, from 1996, residents in the rich northern suburbs (notably Sandton) had organised a rates boycott because they were 'resistant to redistributive policies which meant that wealthy areas would subsidise poorer parts of the City'.²⁸ By 1997, these financial pressures had culminated in a looming 'fiscal crisis',²⁹ which prompted a shift in municipal governance towards a more commercial cost-recovery oriented model, in line with the broader trend outlined above. Beall et al have argued that in fact the 1997 'fiscal crisis' was 'talked up' as a way of justifying metropolitan restructuring to suit market-driven demands.³⁰

Regardless of the motivation, the ultimate result was a corporate model of governance manifested in 'iGoli 2002' (launched in December 1999),³¹ a turnaround strategy for municipal financial recovery that involved the corporatisation of municipal services. In line with this strategy, and along with Johannesburg Water, City Power (Pty) Ltd. was established in 2001 as the City's electricity service provider, and Pikitup (Pty) Ltd. became the City's waste management and refuse service provider, all under the newly named City of Johannesburg Metropolitan Municipality. The new corporate governance paradigm entrenched a technocratic attitude towards municipal management, in terms of which class (still commonly overlapping with race) became the dominant determinant of marginalisation.³²

From the city's perspective, it was essential to minimise inefficiencies and revenue losses in municipal services. One of the main areas identified for attention was Soweto. Yet at the same time, the city was aware of the national FBW policy. So, while households in the rich suburbs continued to access as much water as they liked – for their gardens, swimming pools and so forth – without any direct pressure to conserve, in mid-2001 the city devised its plan to physically restrict water consumption in Soweto to the obligatory FBW allocation,

²⁸ Wafer, Dugard, Ngwenya and Sibanda, 2007: 14.

²⁹ Tomlinson, 1999: 1–39.

³⁰ Beall, Crankshaw and Parnell, 2002: 94.

³¹ *iGoli* is a colloquial word for Johannesburg (meaning place of gold in Sesotho). For an overview of the iGoli 2002 policy, see www.joburg.org.za/content/view/92/58 or www.joburg-archive.co.za/city-vision/AnnualReport02Ch3.pdf.

³² Bond, 2000.

unless the household could purchase additional water credit by means of PPMs. The high-density suburb of Phiri, one of the poorest in Soweto, with high unemployment and multi-dwelling properties (a small house and several backyard shacks per property), was chosen as the pilot project for Operation *Gcin'Amanzi*.³³

4 PREPAYMENT WATER METERS AND PHIRI

According to an undated Operation *Gcin'Amanzi* Report included in the minutes of Meeting of the Operations and Procurement Committee of Johannesburg Water (27 November 2002),³⁴ Operation *Gcin'Amanzi* comprised an 'immediate, intensive and comprehensive intervention on a number of fronts' that sought to remedy the problems of 'over-supply', lack of 'ownership' of water consumption by residents and a 'non-payment paradigm amongst consumers' in Soweto (Johannesburg Water, undated: 1). Whereas other municipalities had remedied deemed consumption through conventional metering, Johannesburg was determined that Soweto residents would not access more water than the FBW amount without first paying for it. According to the same undated Operation *Gcin'Amanzi* report, the City was 'intent on adopting prepayment water metering as the preferred service delivery option to be implemented in deemed consumption areas of supply' because 'prepayment can be considered to be a water management tool'.³⁵

Such demand management was perceived by the city to be critical to the objective of promoting 'savings in water purchases by Johannesburg Water',³⁶ and to the broader goal of improving the 'financial positions' of the city and Johannesburg Water.³⁷ Seeking to 'reduce demand' for water among Phiri residents, as well as to improve the city's financial position, Johannesburg Water began the bulk infrastructure construction work for the installation of PPMs in Phiri on 11 August 2003. The first phase of individual house connections began in Phiri Block B in February 2004.

Lindiwe Mazibuko (the first applicant), an unemployed single mother living on a small property with 20 people, first became aware of Operation *Gcin'Amanzi* on 17 March 2004, when a Johannesburg Water employee came to her house to tell her that her water supply system was old and rusty and needed replacing. The employee gave Mazibuko a letter entitled 'Decommissioning of the old secondary mid-block water supply system', which made no mention of PPMs. Later that day, Johannesburg Water workers started digging trenches in the pavement outside

³³ In fact, Phiri was not the first poor residential area in Johannesburg to receive prepayment water meters. Prior to Phiri, PPMs had been installed in Orange Farm informal settlement.

³⁴ This report formed part of the *Mazibuko* record, found at Bundle B vol 2 pages 439–82 of the court files, which are available at CALS.

³⁵ Johannesburg Water, undated: 3.

³⁶ *Ibid.*

³⁷ First and Second Respondents' Heads of Argument, 16 November 2007: para 17.8, Mazibuko High Court case.

her house. When she asked the workers what they were doing, they told Mazibuko that they were digging trenches to install PPMs. She had heard about PPMs from activists, and told the employees that she would never accept such a method of water delivery. At the end of March 2004, without any further notification or warning, the Mazibuko household's water supply was abruptly disconnected. It remained disconnected until October 2004, when she capitulated and asked for a PPM. Many other Phiri residents experienced a similar process around the same time, although some households were given a choice between a PPM and a standpipe (a cold water yard tap, which is not connected to the household water and sanitation supply).³⁸

From the outset, PPMs compromised Phiri residents' access to water in very tangible ways. With an average number of 13 or more people living across multi-dwelling households,³⁹ the standard FBW allocation (6 kilolitres per property per month) has always been insufficient to meet the basic needs of Phiri residents. This means that in the context of high unemployment and endemic poverty, Phiri residents are forced to make undignified and unhealthy choices. For example, people living with HIV/AIDS must choose between bathing or washing their soiled sheets, and parents must choose between washing their children before they go to school, or flushing the toilet. Even so, households such as Lindiwe Mazibuko's regularly go without water for days at a time because the FBW supply usually only lasts until mid-month, and there is often insufficient money to buy additional water credit:

The free 6 kilolitres of water per month has never lasted the entire month, since it was installed on 11 October 2004. It usually finishes any time between the 12th and 15th of each month. We can often not afford to buy further water. This means that our household is without any water for more than half of every month.⁴⁰

For the many large households in Phiri that exhaust their FBW supply before the end of the month, and are too poor to afford additional water credit, the ultimate

³⁸ For example, when her deemed-consumption water supply was discontinued, Grace Munyai (the third applicant in the *Mazibuko* case) accepted a standpipe rather than a prepayment water meter because she wanted to ensure that she would always have access to water, even if it was outside. However, with a standpipe, whenever household members need water (including for flushing the toilet – Phiri toilets are designed to be part of a waterborne sewerage system), they have to fill buckets and carry them inside. Moreover, if a household violates the conditions of a standpipe, which includes not connecting the tap to a hose, the standpipe is removed and a prepayment water meter is installed. As Grace attests, the authorities conduct regular surprise checks to ensure that she does not 'misuse' her standpipe (affidavit of Grace Munyai, 28 June 2006: <http://web.wits.ac.za/NR/rdonlyres/D3CF86E1-961F-4216-A346-70A93059A005/0/Munyai20affi.pdf>).

³⁹ Typical Phiri properties have a main brick house, which has one room, a living room, a kitchen and usually an outside toilet – title to these small 'matchbox houses' was transferred to the occupiers in the post-1994 period. Most Phiri properties also have backyard shacks, for which low monthly rentals are levied. Such shacks are generally cramped. Because the backyard shacks are not formally recognised by the city, they are not allocated separate FBW allocations. This means that all people on one property must share the one FBW allocation of 6 kilolitres per month.

⁴⁰ Founding affidavit of Lindiwe Mazibuko, 3 July 2006 para. 101: http://web.wits.ac.za/NR/rdonlyres/789545BC-025F-4046-8B82-69A63E7497D2/0/MAZIBUKO_Founding_affidavit_Final.pdf.

punishment is the PPM's automatic and sudden disconnection, which often takes households by surprise. The continuous infringements to dignity and health are serious, and a direct risk to life is posed in the event of fire. This was tragically demonstrated in a shack fire on the property of Vusimuzi Paki (the fifth applicant in the *Mazibuko* case), on 27 March 2005, which resulted in the death of two small children when there was insufficient water to put out the fire.⁴¹ More routinely, PPMs exacerbate already difficult lives by adding the stress of trying to manage with insufficient water for basic household and hygiene needs. PPMs represent the ultimate technicist solution to poverty, delegating the administrative burden of access to water to the individual household, thereby individualising 'the relationship of people to the resources necessary for life'.⁴² And yet, despite the potential for PPMs to individualise struggle, in Phiri, this blatant attempt to ghettoise poor households served to collectivise resistance, at least initially.

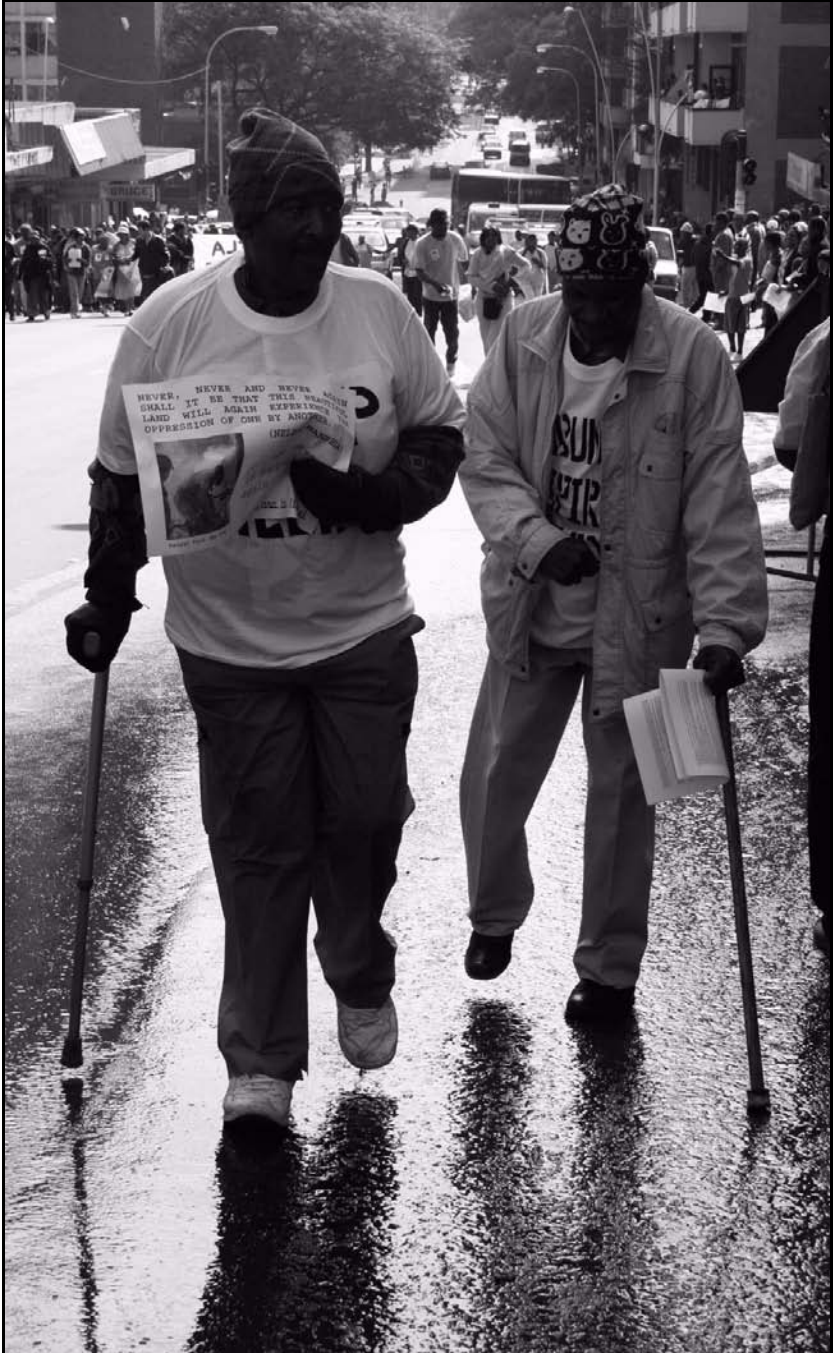
5 RESISTANCE AND RIGHTS

In delineating between resistance and rights, I do not mean to suggest that there was either a linear chronology or a separation between the two. From the onset of the legal campaign, there was a continuous dialectical relationship between the two tactical endeavours.⁴³ The legal campaign did not suspend the resistance campaign. On the contrary, one of the points of this chapter is to demonstrate that the legal campaign and the resistance campaign were always intertwined; far from detracting from each other, they served to reinforce and reinvigorate each other. I have written the sub-sections separately only because my point of entry and lens is the legal campaign, and it is difficult to merge the narratives. However, for the sub-section on rights – where I have relied on personal retrospective narratives (including my own, as part of the legal team from the outset of the legal campaign) – I have attempted to interweave my narrative with that of the APF's. The APF voice is that of Dale McKinley, and was documented in the course of a series of discussions during early July 2009, and a focused interview on 10 July 2009 (five years after taking a Phiri water rights case forward was first contemplated).

⁴¹ Two-year old Katleho Tamane and nine-year old Dimpho Tamane, who died in the blaze, had been left sleeping in the shack by their mother who had to work a night-shift and was unable to get anyone to look after her children.

⁴² Naidoo, 2007: 62.

⁴³ My ability to research the impact of the *Mazibuko* legal mobilisation on the APF was significantly limited by the fact that one of my two long-term APF interlocutors (P) – was suspended from the APF in the wake of a rape charge during early 2009. He remained suspended for the duration of my research. In discussions with other APF members, I decided not to try to pursue any research questions with P. This meant that I had to rely on written statements of the APF, as well as interviews with Dale McKinley (my other long-term intermediary), to document the APF's perspective of the *Mazibuko* journey. Fortunately, as a founding member, treasurer and de facto figurehead of the APF, McKinley was an excellent source of critical analysis. However, this limitation means that the activist perspective is not as rich as it should have been. Particularly in view of the disappointing Constitutional Court judgment, this suggests the need for further research that delves deeper into the activists' accounts and perspectives.



For Critical Legal Studies (CLS) scholars such as Mark Tushnet, Peter Gabel and Duncan Kennedy, rights are part of the machinery of law that reflects and reinforces the exercise of power by elites.⁴⁴ Consequently, the law works to domesticate poverty and need,⁴⁵ while leaving class and racial structures in place. Yet, as appreciated even within the CLS critique of law, rights have radical as well as conservative potential.⁴⁶ In Stuart Scheingold's words, 'rights, like the law itself, do cut both ways – serving at some times and under some circumstances to reinforce privilege and at other times to provide the cutting edge of change'.⁴⁷ So, while law 'in the aggregate surely tends to support hierarchical power relations', it also provides 'the opportunity or space for creative challenge'.⁴⁸ It is not necessary – as the CLS school might suggest – that law (and legal ideology) 'either straightjackets citizen imagination or disarms critical understanding'.⁴⁹ Indeed, as played out in Phiri's struggle against PPMs, reform-oriented rights mobilisation can build on and yet 'remain relatively independent of, or even defiant toward, the official, state-sanctioned legal order'.⁵⁰

Resistance

In August 2003, even before the first PPMs were installed, the initial digging of trenches for the bulk construction work met with widespread resistance. Residents such as Lindiwe Mazibuko had heard about PPM problems from residents of Orange Farm informal settlement, where such meters had recently been installed (many of which were subsequently destroyed by activists). As it became clear that the City was determined to roll PPMs out in Phiri, opposition mounted, and gained momentum through support from the APF. Established in 2000, the APF is a left-wing social movement alliance comprising affiliated community-based organisations, activists and movements, the latter group including the Soweto Electricity Crisis Committee (SECC). It was formed during the struggles against the City's commercialisation and corporatisation agenda, and brought together political activists and nascent community movements committed to the de-commodification of all basic needs. Among the APF's core objectives are: 'a halt to all privatisation of public sector entities and return of public control and ownership; the co-ordination and intensification of anti-privatisation struggles in communities'.⁵¹ The APF's stated modus comprises:

various forms of mass, direct action at local, provincial and national levels; regular mass community meetings; alliance-building and solidarity activities with community organisations outside of Gauteng as well as with organised labour; door-to-door campaigning in communities; submission of memoranda of demands and policy

⁴⁴ Tushnet, 1984; Gabel, 1984; Kennedy, 1986.

⁴⁵ Brand, 2007.

⁴⁶ See especially Tushnet, 1984.

⁴⁷ Scheingold, 1989:76.

⁴⁸ McCann, 1994: 9.

⁴⁹ *Ibid.*, 12.

⁵⁰ *Ibid.*

⁵¹ McKinley, unpublished draft: 3.

alternatives to all levels of government; and regular, community-based report-back meetings.⁵²

Deeply rooted in community struggles against the commercialisation and corporatisation of public services such as water, the APF was well placed to take up the struggle and become the vehicle for community resistance against PPMs in Phiri. Indeed, an APF-affiliate, the SECC (which had already campaigned against electricity prepayment meters elsewhere in Soweto), played a pivotal role in mobilising resistance. In the early months of the resistance campaign, increasing numbers of residents joined the struggle, swelling the numbers at APF/SECC meetings in Phiri and at the APF's office in Johannesburg's inner city, and participating in mass marches to city and Johannesburg Water offices. In addition, direct resistance involved attempting to physically prevent Johannesburg Water employees from digging trenches. Under the auspices of the APF/SECC, spontaneous protests morphed into mass action, with residents refusing to allow Johannesburg Water to continue its work. As described by activist and APF member Prishani Naidoo:

Residents came together to physically prevent the work of Johannesburg Water. They were supported in their actions by members of the Soweto Electricity Crisis Committee and the Anti-Privatisation Forum. Several altercations ensued between the police and private security hired by Johannesburg Water, and the residents.⁵³

Such altercations held the potential to derail the entire project, and, in a drastic response to the rising number of incidents of direct action, the city and Johannesburg Water successfully applied to the Johannesburg High Court for an interdict, which was granted on 22 August 2003. In terms of the interdict, any interference with Operation *Gcin'Amanzi* was banned, and activists (as well as all members of the APF and SECC) were interdicted from coming within 50 metres of any physical work undertaken by the project. The interdict also authorised the sheriff of the court to engage the services of a private security company to assist with any violations of the terms of the interdict. The APF responded in early September 2003 by establishing a Coalition Against Water Privatisation (CAWP), to re-focus activism against PPMs under a newly configured affiliation. However, the city followed up the interdict with a concerted effort to crush any opposition to PPMs, including arresting and harassing activists. By the end of September 2003, 14 residents of Phiri and activists supporting them had been charged with 'public violence', 'malicious damage to property' and 'incitement' for handing out flyers. The APF and its affiliate organisations, especially the SECC and CAWP, had to divert much energy and funding to securing bail and defending those charged. In the end, almost all charges were dropped, but battling against state repression took a heavy toll on the organisation, and effectively undermined its ability to halt the City's operations in Phiri. In turn, this failure to stop the rollout of PPMs fundamentally weakened the overall campaign.

⁵² Ibid.

⁵³ Naidoo, 2008: 58.

Although many households continued to resist the installation of PPMs on their properties, without further disruption of the Operation *Gcin'Amanzzi* operations the structural work went forward, and the first PPMs were installed in February 2004. For those households that refused to accept PPMs, the city deployed a new weapon: total water disconnection, which left households such as Lindiwe Mazibuko's without water for months until they capitulated. Having tried to live without direct access to water, and enduring intimidation by the city, by the end of 2004 most households in Phiri had been forced to accept either PPMs or standpipes. All were forced to relinquish their previously unlimited water supply, which was discontinued. By 2005, the last remaining households had given in, 'choosing' PPMs or standpipes over no water at all.

The ultimate failure to stop the installation of PPMs was perceived by the APF/SECC/CAWP alliance to mark a low point in the resistance campaign. According to a research report by the APF and CAWP:

While large numbers of families came together to physically resist the installation of the meters in the early days of [Operation *Gcin'Amanzzi*] ... over time, arrests, fines, intimidation and threats have resulted in a decline in resistance. The very threat of being cut off from water completely for refusing to sign onto the system led to many residents signing onto the system begrudgingly ... Today, activists bemoan the fact that it is difficult to call a successful mass meeting in Phiri.⁵⁴

At the time, the interdict, arrests, intimidation and water disconnections clearly struck a near-fatal blow to the campaign. Yet in retrospect, it is apparent that by cutting off one line of activism, the interdict sowed the seeds for the uptake of another line – that of rights-based litigation.

Rights

On a dreary mid-winter day in July 2004, Hameda Deedat (an activist researcher) phoned former CALS colleague Mike Nefale⁵⁵ to tell him that in the course of her research into municipal services in Soweto, she had encountered households whose water supply had been disconnected because they had refused to accept PPMs. Mike and I immediately drove to Phiri, where we met some of the future *Mazibuko* applicants. Over subsequent weeks, Mike and I went back to Phiri several times to document household stories. It soon became apparent that there was a legal case to be made. We tentatively raised this possibility with our Phiri householders, who turned out to be very keen to pursue litigation. Aware that the APF was active in Phiri, we then contacted APF co-founder Dale McKinley to discuss the litigation option. In line with APF policy, Dale took the issue back to the APF for deliberation. Recent interviews with McKinley have clarified that around this time, the APF had been contemplating defensive litigation to try to overturn the interdict. Nevertheless, according to McKinley, the idea of proactive

⁵⁴ APF and CAWP, 2006: 21.

⁵⁵ Mike was killed in a motor vehicle accident on 19 April 2009.

utilisation of the law had not been contemplated until it was raised by CALS. This is because, in line with CLS critiques, the APF viewed the law as entrenching inequality and protecting privilege. Until that point, the APF's only engagement with the law had been through the arrest of members and their defence against criminal charges, as well as the banning of marches.

When the question of proactive use of the law was put to the APF, several options emerged. First was an outright rejection of the legal route, accompanied by a proposal to escalate the resistance to 'all-out war'. However, when it was pointed out that many of the proponents of this option did not live in Phiri and were less likely to be exposed to the full brunt of the ramifications, this option was collectively abandoned. The second option was to continue a low-intensity resistance campaign, which in discussion appeared to be compatible with the third option, litigation. The consensus position was a strategic decision to pursue litigation, but not to suspend other forms of resistance: in other words, to utilise rights as one tactic within the broader struggle against PPMs (and more broadly, against the commercialisation and corporatisation of water services). This position was put to the residents of Phiri at a mass meeting in September 2004, at which it was agreed to pursue a case.⁵⁶

The conscious resort to litigation as 'another terrain of struggle' is evident in the language of the APF and CAWP's 2006 research report, which explains how the APF and CAWP 'prepare for another terrain of struggle in this war against water privatisation, that of the courts ... As activists look to the court case as a means to revive struggle at the local level'.⁵⁷ Similarly, APF and CAWP member Prishani Naidoo writes: 'Earlier this year, the Coalition Against Water Privatisation launched a constitutional case against the Johannesburg City Council, challenging its rollout of prepaid water meters in Phiri, in the hope that some of the losses made in struggle could be won through courts'.⁵⁸ Clearly, the decision to take forward the litigation was not taken lightly. According to McKinley:

[t]he battle of Phiri marked another new watershed in post-1994 water struggles. It served to not only further focus South African and international (critical) attention on the practical character and consequence of the ANC government's neo-liberal (water) policy onslaught, but also opened the door to testing the stated water service delivery commitments of relevant state policies/legislation and South Africa's constitution. For left/anti-capitalist activists, it is never an easy thing to adopt tactics that do not appear to fit into pre-configured, historically located understandings and

⁵⁶ On the legal side of things, we appealed to and were very fortunate to secure – on a contingency basis (meaning that legal fees would only be paid to counsel in the event of us ultimately winning and advocates' costs being awarded in our favour) – two outstanding advocates for the duration of the litigation, Wim Trengove, SC and Nadine Fourie. In the initial stage, when we were building the case, the Freedom of Expression Institute (FXI) were the attorneys of record for the applicants and CALS provided the socio-legal research. As such, FXI launched the case in the Johannesburg High Court in July 2006. However, from March 2007 onwards, CALS took over as the attorneys of record.

⁵⁷ APF and CAWP, 2006: 4.

⁵⁸ Naidoo, 2007: 34.

approaches to such struggle ... And so, it was in 2005–2006, with a great deal of trepidation and initial half-heartedness, that the APF and CAWP (with the assistance first, of the Freedom of Expression Institute and subsequently, the Centre for Applied Legal Studies) entered into the institutional-legal terrain of class struggle, assisting five representative Phiri residents to prepare and file a case in the Johannesburg High Court challenging the legality and constitutionality of Operation *Gcin'amanzi*'s limitation of the free basic supply of water and the installation of pre-paid water meters. The case was seen as a tactic, part of a larger, long-term strategy seeking to use all means available to ensure that water itself is seen and treated as a public resource, that water service providers remain publicly owned, managed and run and that water service delivery provides adequate, accessible and quality water to all.⁵⁹

The tactical resort to rights-based litigation indicates recognition by the social movements of the contingency of law. Evidently, the failure of traditional forms of mobilisation in Phiri hastened the APF's decision to take up a legal campaign – undoubtedly, as did the fortuitous advent of human rights lawyers from the Freedom of Expression Institute (FXI) and CALS.⁶⁰ What is perhaps more surprising than the recognition of the contingency of law among legal sceptics, is the *celebration* of law by such actors since the legal victory in the High Court. For example, referring to the judgment as 'historic and groundbreaking', McKinley writes:

The judgment ranks as one of post-apartheid South Africa's most important legal victories for poor communities and all those who have been struggling against unilateral and profit-driven neo-liberal basic service policies ... Judge Tsoka, however, went beyond the legal points, recognising the racial, class, administrative and gender-based discrimination underlying the City of Johannesburg's water policy. The judge explicitly rejected the arguments for restricting the water usage of poor communities: 'to expect the applicants to restrict their water usage, to compromise their health, by limiting the number of toilet flushes in order to save water, is to deny them the rights to health and to lead a dignified lifestyle.' The judge labelled the so-called 'consultation' with the Phiri community as 'more of a publicity stunt than consultation' and criticised the City's 'big brother approach'.⁶¹

There was further endorsement following a public condemnation by Johannesburg Mayor Amos Masondo, in which Masondo criticised the *Mazibuko* judgment at a Johannesburg press conference, attacking Judge Tsoka as follows: 'Judges are not above the law ... We cannot have a situation where a judge wants to take over the role of government. Judges must limit their role to what they are supposed to do. If they want to run the country they must join political parties and contest elections. In that way they can assume responsibilities beyond their

⁵⁹ McKinley, 2008.

⁶⁰ The role of lawyers in advocating the legal mobilisation course should not be ignored. Nevertheless, throughout the years, the *Mazibuko* legal team has attempted to ensure that legal mobilisation is driven by the clients and their support movements, rather than by ourselves.

⁶¹ McKinley, 2008.



powers' (Mabuza, 15 May 2008). In a surprisingly pro-rule of law rebuttal, on 16 May 2008, the international anarchist website *anarkismo.net*⁶² carried a press release by CAWP (entitled 'Attack on High Court judgment and Judge Tsoka is unwarranted, dangerous and betrays a complete ignorance of how democracy works: This is not Zimbabwe, Mr Masondo, and you are not Robert Mugabe') in which Masondo's attacks on the judiciary were described as 'unprecedented', 'vicious', 'unwarranted' and 'dangerous'. The press release continued:

Mr. Masondo – unless you made your statements while dreaming that you were in a country like Zimbabwe where there is no meaningful democracy, where the judiciary is treated with contempt and where the government thinks that it is the law, then you would know that a democratically elected government (at whatever level) like we have in South Africa has no power beyond that given to it by the people themselves. No one has given the government the right to unilaterally interpret and determine any right contained in the Constitution. No one has given the government the right to unilaterally pronounce that any law it passes is sacrosanct.

Yes Mr. Masondo, we still have a functioning democracy in our country (as weak as it might be at times). One of the benefits of that democracy, underpinned by the Constitution, is that laws and government action can be challenged through the courts by any individual citizen or collection of citizens and, if such a challenge is successful, those laws and action can be reviewed and changed. That is one of the key essences of the democratic principle of the limitation of powers.

Mr. Masondo, your right to appeal Judge Tsoka's ruling is a component of that limitation process but you can claim no unilateral right to limit Judge Tsoka's ruling simply because you are an elected politician. The ruling might, or might not be overturned/changed, but any outcome is for the Constitutional Court to decide, not you or the government you claim to represent. You show your contempt for our hard-won democracy, Mr. Masondo, when you make dangerous claims that you and your government are above it.⁶³

Finally, in an apparent new-found endorsement of litigation as a tactic, and a surprising optimism regarding its potential to affect socio-economic change, McKinley concludes:

While the judgment has already been appealed by the respondents, and will most probably go all the way to the Constitutional Court, this does not detract from the political and social significance of this victory. It is a case which does not only have applicability to South Africa but which, by its very character, enjoins the attention and direct interest of billions of poor people around the world who are suffering under neo-liberally inspired water policies, alongside the governments that are implementing such policies and their corporate allies who seek to turn water into nothing less than another profit-making stock market option.

⁶² *Anarkismo.net* describes itself on the website as follows: 'We identify ourselves as anarchists and with the 'platformist', anarchist-communist or *especificista* tradition of anarchism.' In terms of its objectives, according to the website, 'Anarchism will be created by the class struggle between the vast majority of society (the working class) and the tiny minority that currently rule. A successful revolution will require that anarchist ideas become the leading ideas within the working class': <http://www.anarkismo.net/about>.

⁶³ CAWP, 16 May 2008.

The CAWP and its allies are confident that the High Court judgment will be upheld and that water provision will now no longer be delivered in a discriminatory, patronising and inhumane manner.⁶⁴

6 CONCLUSION

Although it is not possible yet to assess the full impact of the *Mazibuko* legal mobilisation, it is clear that in Phiri, the tactical resort to rights-based litigation was premised on recognition of the contingency of law. The APF decision to mobilise legally following the failure of traditional forms of leftist resistance is consistent with Scheingold's proposition that rights are 'less established political facts' than potentially 'political resources' (Scheingold, 1974: 84). Given this proposition, the uptake of litigation should not be isolated and compared in zero-sum terms, but should be considered in a dialectical and potentially cumulative relationship with other tactics in the political struggle (McCann, 1994: 292).

On this basis, it is possible that the rights-based legal mobilisation has already impacted the movement activists and their fight against the commercialisation of water, through dramatising the issues and energising the struggle. While further research is necessary to properly evaluate this proposition – particularly in the light of the ultimate judgment – it seems to be supported by the APF's own analysis. According to McKinley, the APF is currently considering further proactive litigation. In his words, *Mazibuko* provided 'something to organise around; hope and recognition after having been fucked over by the police – it became the centre of mobilisation and reinvigorated the struggle, as well as catalysing political discussions and refining strategy'.⁶⁵

Indeed, it is apparent that the case has played a fundamental role in reinvigorating water-related struggles around the country. For example, during May 2008, the South African Municipal Workers' Union (SAMWU) used the High Court judgment to mobilise against the City of Cape Town's attempts to install a different kind of water-limiting meter.⁶⁶ It has also provided erstwhile sceptics with a platform for viewing at least some manifestations of the law as potentially progressive. Indeed, *Mazibuko* has quickly achieved almost mythical status, and the High Court judgment reverberates in unanticipated and overtly political ways. For example, on 19 July, the *Mail & Guardian* online carried a story by Matuma Letsoalo entitled 'Masondo Next to be Axed?', in which the author suggested that Amos Masondo may be the next mayor to be fired (following the 'abrupt departure of Ekurhuleni mayor Duma Nkosi'). According to the author,

⁶⁴ McKinley, 2008.

⁶⁵ Interview with McKinley, 10 July 2009. When asked to list the drawbacks of the legal route, McKinley noted the length and complexity of the process, as well as the potential to alienate activists (there is no doubt that over the five years it has taken to mount the case and to get a final hearing in the Constitutional Court, many activists have withdrawn their initial interest). McKinley and I agree that if we could relive the process, we would try to spend more time communicating with the residents of Phiri and allied activists to keep them informed about each step of the legal process.

⁶⁶ Foster, 12 May 2008

the writing on the wall in Masondo's case has come in the form of accusations from the regional ANC that Masondo 'undermin[es] the region when taking important decisions', specifically 'for failing to inform the regional leadership of his decision to challenge a Johannesburg High Court ruling on pre-paid water meters'.⁶⁷

While cautioning that legal mobilisation is not a linear or predictable process, McCann notes that it can 'matter for building a movement, generating public support for new rights claims, and providing leverage to supplement other political tactics' (McCann, 1994: 10). As understood by Karl Marx, consciousness develops out of, rather than precedes, mobilisation, if it develops at all (McCann, 1994: 307). Given this theory, even if rights-based litigation represents a 'choice from no choice' for impoverished communities and associated social movements – or perhaps precisely because it does – it has the potential to contribute tangibly to the broader struggle for socio-economic emancipation by the left.

7 POSTSCRIPT: THE MAZIBUKO JUDGEMENT FROM THE CONSTITUTIONAL COURT

On 8 October 2009, in a profoundly conservative judgment, the South African Constitutional Court overruled the findings of the High Court and the Supreme Court of Appeal and ruled against the *Mazibuko* applicants, finding the city's policies reasonable and PPMs lawful.⁶⁸ Clearly it is too soon to assess the effect of the judgment on the APF, but initial feedback suggests that the judicial defeat has neither deterred the campaign nor discouraged further uptake of proactive litigation by the APF.⁶⁹ Moreover, as tentatively concluded in this chapter, the *Mazibuko* rights-based mobilisation has already indirectly impacted, and continues to impact, broader struggles in South Africa. The full extent of this impact can only be determined by future research.

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⁶⁷ Letsoalo, 19 July 2008.

⁶⁸ Judgment available: <http://web.wits.ac.za/NR/rdonlyres/CEA91684-DF24-40B1-BE5A-25CB66DC289E/0/CCT3909MazibukoandothersvCityofJohannesburgandothersFINAL.pdf>.

⁶⁹ Interview with McKinley, 9 October 2009.

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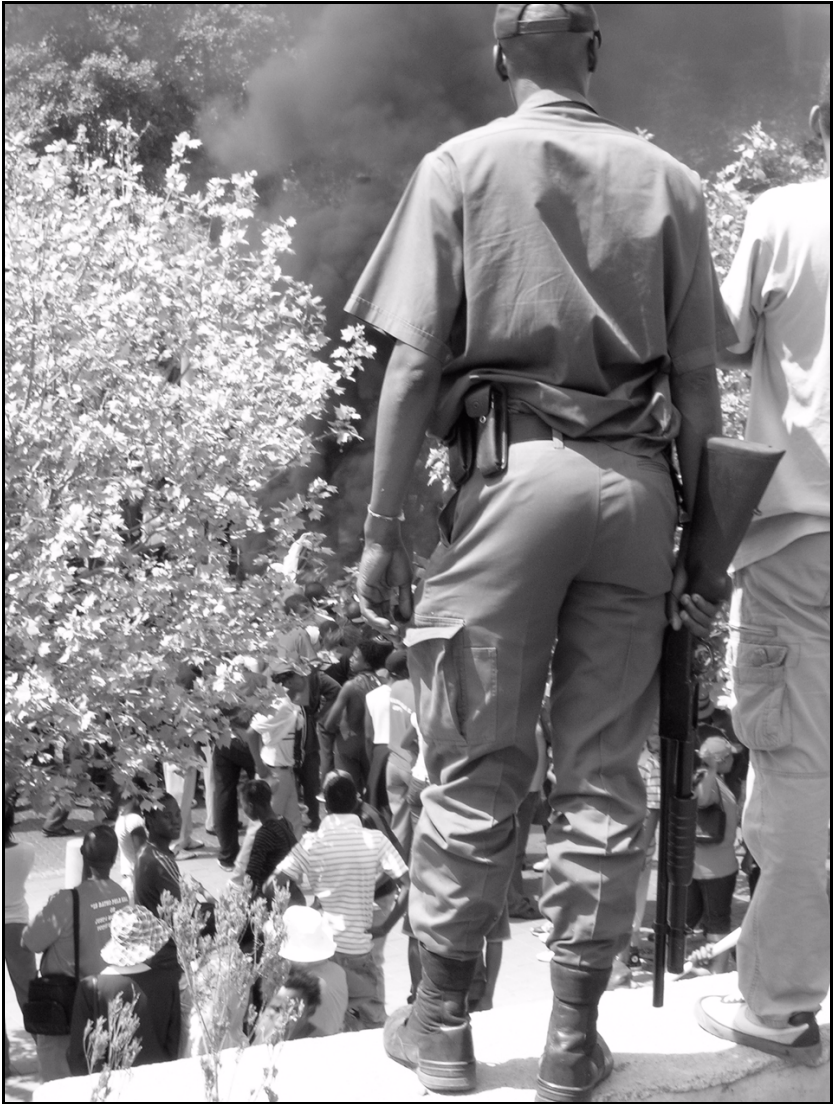
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RESISTANCE AND REPRESSION:
POLICING PROTEST IN
POST-APARTHEID SOUTH AFRICA*Marcelle C. Dawson¹*

1 INTRODUCTION

The policing of dissent has captured the attention of social movement scholars in the global North for well over a decade, but this area of enquiry remains relatively under-researched in the south. This chapter attempts to shed light on this issue in the South African context. It addresses the policing of protest primarily from the viewpoint of demonstrators.² In order to understand how the relationship between police and demonstrators plays itself out in a South African context, it is necessary to take a step back and examine the content of the actual demonstrations. Empirically, this chapter examines two themes: the nature of popular protest in democratic South Africa; and experiences of the control of dissent. To address these issues, the chapter provides a brief discussion on the struggles faced by an array of communities, concentrating on the issues of service delivery and participation. The discussion then considers protest action, paying particular attention to the Regulation of Gatherings Act (No. 205 of 1993), the techniques used by the police to squash dissent, and experiences of repression from the viewpoint of local activists.

To contextualise these themes, the chapter begins with an account of post-apartheid restructuring as far as local government and the South African Police Service are concerned. The purpose of this part of the discussion is to question the nature and extent of democratic practices within these two state bodies. The chapter then addresses the issue of the repression of resistance as discussed in the

¹ Gathering the data for this research would not have been possible without the assistance of Tendayi Sithole (Freedom of Expression Institute), Kgopotso Khumalo (University of Johannesburg), Ole Maboya (University of Johannesburg), Bongane Xeswi (community activist) and Morgan Thaba (University of Johannesburg).

² At the outset of this project, the intention was to interview police as well as demonstrators, but gaining access to the police proved unsuccessful. The research proposal was turned down by the legal department of the SAPS in Johannesburg. At the time of concluding the project, the proposal was being considered by the Management of the Gauteng Provincial Head Office. As result, the original material in this paper is drawn only from interviews with community activists.



literature, but also as experienced by community activists in contemporary South Africa. In closing, the chapter returns to the discussion on democracy, reflecting on oft-repeated claims by community activists that democracy does not exist in South Africa. The limitations of representative democracy are highlighted, and the possibilities of what a participatory democracy would entail are examined.

The empirical material cited in this chapter is derived largely from original field research conducted between August and October 2009 with community activists in Gauteng, Limpopo, the Western Cape and the Eastern Cape. Data from a previous study in Johannesburg (conducted between April 2006 and March 2007) have also been incorporated where necessary to substantiate certain claims. In fact, some of the data from the earlier study informed some of the questions that were posed in this investigation. Observations of community meetings have also helped to frame the argument.

The data-gathering process relied largely on qualitative techniques such as in-depth interviews and focus groups, which allowed interviewers a certain amount of flexibility in probing responses more thoroughly and seeking clarification on issues that were not adequately explained. Moreover, this method allowed respondents to digress, raising issues that were important to them and their struggles, and which may not have been apparent to the interviewers at the outset of the project. In this investigation, one focus group and eight in-depth interviews were carried out in the Eastern Cape in and around East London (Vincent, Scenery Park, King William's Town, Mdantsane, Ginsberg and Amalinda). In Gauteng, one focus group and 13 in-depth interviews were conducted in Diepsloot, Kensington, Khutsong and Soweto. In the Western Cape, one focus group and six in-depth interviews were carried out in Athlone, Khayelitsha, Gugulethu, Kuilsrivier, Hout Bay and Mowbray. Finally, six focus groups and five in-depth interviews took place in Makopane in Limpopo, in the villages of Sekhuruwe, Chokoe, Ga Pila, Armoede, Ga Chaba and Skimming. Thus in this investigation, 32 in-depth interviews and nine focus groups were conducted with community activists.

2 POST-APARTHEID RESTRUCTURING: LOCAL GOVERNMENT AND THE SAPS

When the ANC came to power in 1994, it sought to centralise the political system,³ aiming to integrate local and metropolitan governments, which had been left racially and geographically fragmented by the National Party; this was accompanied by a restructuring of the South African Police Services (SAPS). This move was in stark contrast to what was happening internationally, as the decade between the 1980s and 1990s was characterised by 'a marked trend ... towards decentralisation'.⁴ Governments of the south – excluding South Africa, but

³ Beall *et al*, 2002: 17.

⁴ Devas, 1999: 3.

including several other countries in the rest of Africa, Asia and Latin America – were gripped by ‘decentralisation fever’.⁵

The Local Government Transition Act (LGTA), passed in 1993, laid the foundation for the creation of a new, centralised system of local government and for consolidating the tax base. Many of the fundamental premises in the LGTA were later captured in the Reconstruction and Development Programme (RDP), which championed meeting basic needs as a priority of the newly elected ANC government. The document spelled out numerous ways of improving infrastructure and services, including a more progressive form of local taxation, cross-subsidisation, and granting lifeline supplies of water and electricity to the poor.⁶ Importantly, the RDP envisaged that the state would play a leading role in transformation and development.

In 1996, however, in a shift away from its plan for state-led socio-economic reform as embodied in the RDP, the ANC adopted Growth, Employment and Redistribution (GEAR) as its new macro-economic policy, which emphasised (among other things) ‘public sector asset restructuring; the sale of other state assets and the creation of public-private partnerships’.⁷ Inherent in GEAR’s formulations was the notion that the state would no longer play a leading role in development; instead, it would facilitate the necessary conditions that would enable other parties (such as the private sector) to promote economic growth.⁸ As a consequence of the adoption of GEAR, local government was no longer ‘the arms and legs of the Reconstruction and Development Programme’,⁹ and service delivery came to be facilitated through cost recovery strategies and adherence to market principles.¹⁰

Despite not succumbing to rampant decentralisation, policymaking in South Africa at the level of local government has had similar outcomes compared to countries in which decentralisation has occurred. As Beall *et al* pointed out, ‘With or without an explicit decentralisation policy, deracialised and democratic local government in South Africa has had to take on a dramatically expanded role, albeit on terms that are driven by national legislation, regulations and funding.’¹¹ For a country such as South Africa, which is characterised by high levels of uneven development, local government has the potential to play a key developmental role.

However, it is possible for central government to destroy this potential by offloading its responsibilities onto local government.¹² As Lemon cogently argued, ‘The central state may attempt to pass on the costs of providing public

⁵ Beall, 2000: 2.

⁶ RSA, 1994.

⁷ RSA, 1996.

⁸ Ibid.

⁹ RSA, 1994.

¹⁰ Parnell and Pieterse, 2002: 82.

¹¹ Beall *et al*, 2002: 18. See also Oldfield, 2001.

¹² Lemon, 2002: 18.

goods and services to local government without sufficient adjustment of either state transfers to local level or the revenue-raising powers of local government.¹³ In the absence of sufficient financial resources and adequately trained personnel, several municipalities across South Africa have not been able to meet the demands of local residents.

Such deficiencies at the level of local government have serious consequences for state-civil society relations. For Zuern, conflict between civil society and the state 'is most acute at the local level due to the clear shortcomings of municipal government as well as the demands placed upon this level of government by citizens and community organisations that argue for their right to participate in decision-making processes, along the lines idealised during the anti-apartheid struggle.'¹⁴ Hence, in the post-apartheid period, it is not uncommon to hear local government structures being criticised variably as incompetent, ineffective, undemocratic, unresponsive and corrupt.¹⁵

Equally disparaging remarks have been directed at the South African Police Service (SAPS). More recently, the SAPS has been criticised for its use of excessive force, and police officers have been labelled as 'trigger-happy', savage and brutal. What has changed within the police service to bring South African citizens to the point of referring to police as 'criminals in police uniforms'?¹⁶

In the 1970s, when political violence against the apartheid state was on the rise, Riot Units were established to suppress dissent. By the 1980s, South Africa boasted a fully-fledged riot squad that was capable of controlling and dispersing crowds. However, as political opposition increased in the early 1990s, the state put harsher measures in place to quell dissent. The Internal Stability Division (ISD), established in 1992, was tasked mainly with the policing of political unrest. It operated in a paramilitary fashion and 'was implicated in cases around the abuse of power (through the use of discretionary powers), misconduct and intimidation of the members of communities'.¹⁷

With the demise of apartheid came a new approach to policing, and restructuring efforts were directed at transforming the police force into a service.¹⁸ Along with the shift from the Ministry of Law and Order to the Ministry of Safety and Security, and under the newly named SAPS, other terminological changes occurred. Crowd *control* became crowd *management*, and the term 'riots' made way for 'protests'. In 1995, the ISD and the Riot Control Units merged under the SAPS, and in the following year, in line with international policing standards, Public Order Police (POP) Units were established to take over

¹³ Ibid: 21.

¹⁴ Zuern, 2002: 80.

¹⁵ See also Ibid: 78–79.

¹⁶ Own notes, CSR workshop, 30 October 2009.

¹⁷ Ngubeni and Rakgoadi, 1995.

¹⁸ See Shaw, 2002 for a detailed examination of police transformation in post-apartheid South Africa, particularly as far as the policing of crime is concerned.

the responsibility of crowd management.¹⁹ In response to the decreased levels of protest action – between 2001 and 2002 the number of ‘crowd management incidents’ dropped from 7,913 to 6,757²⁰ – and the increased incidence of criminal activity, the early part of the new millennium saw yet another change being introduced in this arena of policing. Area Crime Combating Units (ACCUs) took over from the POP units in 2002 to ‘deal with bank robberies, cash-in-transit heists and the hijacking of vehicles, as well as taxi and gang violence’.²¹

With crime control rather than crowd management as their central activity,²² the ability for ACCUs to respond effectively to public disorder was diminished. Omar points to two examples in which ACCUs bungled.²³ In 2002, 43 soccer fans were killed and about 160 injured at the Ellis Park stadium when a fight broke out between supporters of the opposing teams, Kaiser Chiefs and Orlando Pirates. The report from the commission of inquiry set up to look into the disaster identified the slow response of the ACCUs and the use of teargas, which exacerbated the situation, as two of the reasons why the situation descended into chaos and ended in tragedy. In another incident, during a service delivery protest in Intabazwe near Harrismith in 2004, Teboho Mkonza (a 17-year-old demonstrator) was killed by the police and about 20 youths were injured by birdshot when the police opened fire and continued shooting as the protestors fled the scene.

From 2002 onwards, popular protest was once again on the rise, particularly in Gauteng. Based on data from the SAPS Operational Response Services, Omar reports an increase of 50 per cent in crowd management incidents between 2002 (6,757 incidents) and 2005, when a total of 10,162 were recorded.²⁴ These numbers account for all ‘gatherings’, while data from the Incident Registration Information System, Business Intelligence System (IRIS-BIS, or IRIS) breaks the data down into ‘peaceful’ and ‘unrest-related’. Most (92 per cent to 93 per cent) of the crowd management incidents captured in the 2001 to 2008 IRIS statistics were ‘peaceful’, i.e., not requiring the involvement of POP units or ACCUs. The remaining 7 to 8 per cent of these incidents were identified as ‘unrest-related’, and required police intervention.²⁵ Among these unrest-related events, many required minimal action from the police to restore order, but some of the incidents included ‘taxi violence, gang violence, ideologically, ethnically and racially motivated violence, revenge attacks and damage to property by small groups of persons. These incidents usually involve ... actions such as shooting, the detonation of explosive devices, stone-throwing, petrol-bomb attacks, arson, and

¹⁹ Omar, 2006: 9; Omar, 2007: 5.

²⁰ Omar, 2007: 18.

²¹ Nqakula, 2002.

²² Omar, 2006: 8.

²³ *Ibid.*: 11.

²⁴ Omar, 2007: 17.

²⁵ Bruce, 2007: 30.

malicious damage to property'.²⁶ Such actions were witnessed in some of the occurrences of community and labour unrest since 2004.²⁷

In spite of the increase in social unrest, and despite early warning signs that 'relying too heavily on ordinary police officials for public order policing'²⁸ was not an effective way of managing crowds, in 2006 ACCUs were transformed into Crime Combating Units (CCUs). This change was indicative of the centralisation of the crowd management function. As Omar points out, '[a]lthough reduced in size in comparison to the ACCUs, and operating from a smaller number of more centralised locations, the CCUs were still required to service the same population and overall geographical area.'²⁹ Moreover, as Duncan and Vally argue, the additional burden placed on the police as a result of the 2006 phase of restructuring had implications for the recording of incidents.³⁰ IRIS yearly statistics show a marked drop in peaceful gatherings, from 8,486 for the 2006–2007 financial year to 6,364 for 2007–2008, and a marginal increase in unrest-related incidents, from 680 to 699 for the same years. Commenting on the reliability of IRIS data, the head of the Visible Policing Unit, Director Chipu, admitted, 'If it comes to exact numbers it might be misleading. Sometimes we didn't have control over crowd management [POP] units so we didn't record everything'.³¹

In 2009, Jacob Zuma threw his weight behind proposed amendments to Section 49 of the Criminal Procedure Act, which would effectively allow the police more leeway regarding the use of firearms. Prior to the amendments, police were not allowed to shoot at fleeing criminals. The changes – purportedly part of the government's tougher stance on crime – have been dubbed a shoot-to-kill campaign by the media, and have been criticised as 'a return to apartheid-era brutality'.³² While Zuma and Police Commissioner Bheki Cele insist that the changes to the act do not mean 'a licence to kill for trigger-happy officers',³³ the reality on the ground suggests otherwise.

Kgothatso Ndobe, a 21-year old resident of Atteridgeville (Pretoria) was gunned down by police on 1 November 2009. He was at his home, relaxing with friends, smoking marijuana and polishing his shoes. When he saw the police, he fled. 'The only reason he ran away was because he was smoking dagga,' said his friend. He was shot in the back of the head. Another friend asked the policeman whether he had attempted to fire a warning shot or whether he had intentionally fired at the boy. The inspector allegedly replied that he 'did not care, because that's how they were told to operate'.³⁴ Countless similar incidents and concerns

²⁶ SAPS, 2003: 56, SAPS, 2004: 35.

²⁷ Bruce, 2007: 30.

²⁸ Omar, 2005: 11.

²⁹ Omar, 2007: 8.

³⁰ Duncan and Vally, 2009: 8–9.

³¹ Quoted in *Ibid*: 13.

³² Brown, 2009: 3.

³³ Mkhulisi, 2009: 4.

³⁴ Motsepe, 2009: 2.

about the implications of the amendments to the Act have been reported in the media over the past few months.³⁵

This latest shift towards a zero-tolerance approach to policing suggests a return to a police *force*, as opposed to a police *service*. While increasing the capacity of the SAPS³⁶ may be a necessary step, the concomitant increase in police powers in the absence of specialised training for crowd management does not bode well for ordinary citizens who – in their quest to claim their democratic right to engage in protest – are being confronted by the same policing units that are being encouraged to use maximum force in the fight against crime, and are being dealt with in a brutal (sometimes inhumane) manner. This chapter returns to the issue of police harassment and brutality, supplying original evidence to support its claims. Before addressing this matter, the chapter turns to a discussion of the kinds of social unrest in which the respondents in this study are engaging.

3 COMMUNITY STRUGGLES IN DEMOCRATIC SOUTH AFRICA: SERVICE DELIVERY OR PARTICIPATION?

Across the four provinces where this research took place, community struggles ostensibly centred on bread-and-butter issues, such as unemployment and access to basic services, housing, healthcare and land. Such struggles have been well-documented in an array of post-apartheid writings.³⁷ Much has also been penned on participation in development in South Africa.³⁸ As many of these authors note, people's frustration – with lack of services, and with limited or ineffective means to influence the decisions that directly affect their daily lives – tends to be targeted at the level of local government.

The popular media have tended to dwell on service delivery as the issue, while some scholars and political analysts have urged for community resistance efforts, which appear to be about resources, to be understood as a struggle for the right of community residents to participate in decision-making about the kinds of resources and services that are appropriate to their needs. The evidence in this chapter suggests that an over-exaggeration of the service delivery element of popular resistance runs the risk of solving the problem with piecemeal or 'band-

³⁵ See, for example, Barron, 2009: 13; Foss, 2009: 1; Hlatshwayo, 2009: 5; Kotolo, 2009: 4; Majova, 2009: 8; Matlala, 2009: 4; Motsepe and Masombuka, 2009: 2; Ndlovu, 2009a: 6; Ndlovu, 2009b: 7.

³⁶ See Brown, 2009: 3.

³⁷ Ballard *et al.*, 2006; Benjamin, N., 2004; Benjamin, S., 2004, CAWP, 2004; CAWP and APF, 2006; Dawson, 2008; Desai, 2002a, 2002b; Gibson, 2006; McKinley, 2003, 2006a; McKinley and Veriava, 2005; Naidoo and Veriava, 2005; Sinwell, 2009; see also special issue of *Development Update* 2004, 5(2).

³⁸ Ballard, 2008; Benit-Gbaffou, 2008; Harrison *et al.*, 2003; Khosa, 2003; Lyons *et al.*, 2001; Mirjam *et al.*, 2008; Mohone and Edigheji, 2003; Parnell *et al.*, 2002; Pillay *et al.*, 2006; Staniland, 2008; Zuern, 2002. These lists are not exhaustive. They merely represent a sample of the scholarly work that has been done on the respective issues of social movements and participation in development in post-apartheid South Africa.

aid' remedies that are short-lived, and often gloss over the real issue. Often, as a result, stop-gap measures are interpreted as evidence of development.

However, too narrow a focus on the right to participate ignores the urgency of the struggles. For the most part, these local actors are people who do not know where their next meal will come from, or cannot be certain that they will have a roof over their heads tomorrow. In dwelling on the desire to influence and participate in local government decision-making, there is an underlying assumption that community residents will stop taking to the streets if they are given the chance to be heard, or are informed of government plans – regardless of whether certain exigencies that are linked to appalling socio-economic conditions are met as a matter of urgency.

Thus, exclusive focus on either service delivery or limited participation obscures key aspects in the debate on the nature of popular protest in democratic South Africa. The service delivery bias, on one hand, assumes that democratic channels exist and that people can and must use these avenues (including the right to peaceful protest) to gain access to basic services. Participation-dominated debates, on the other hand, suggest that the actions of community residents are being informed by higher-order needs that exist at a more abstract level than the basic requirements of life.

This chapter argues that the myriad post-apartheid popular struggles, which tend to be lumped together uncomfortably (and perhaps inappropriately) as 'service delivery protests' are being waged at different levels. On one level, people are making demands for material things. People do not only want to talk about the kind of sanitation that suits their requirements – they urgently need a place to relieve themselves. At another level, however, people are saying that they do not want prepaid water meters or the bucket system, and that they cannot be expected to sign a delivery note for goods and services they did not order. The quest for more participatory forms of democratic engagement is thus mounted alongside struggles for basic services. Thus, in trying to understand and explain the roots of popular protest, the right to basic services is just as crucial as 'democratic voice'; i.e., the ability of people to articulate their own needs, directly influence policies and actively participate in the practices through which these needs can be satisfied – or, in Saul's words, 'genuine empowerment of the entire mass of the population from the bottom up'.³⁹

The demand for basic services

For the most part, the people who participate in the kinds of community resistance struggles that are discussed in this chapter are the same people who lacked access to municipal services (or were recipients of substandard services) under apartheid, and who continue to be marginalised under democratic rule. When probed about the kinds of changes they had witnessed since the end of

³⁹ Saul, 2009: *passim*.



apartheid, very few people who participated in this study spoke about grand, macro-level political changes. Without being primed by the interviewers, responses centred on local concerns: living conditions in immediate surroundings, which for most community residents had not changed very much since the end of apartheid. Granted, their responses were probably influenced by the current social context; at the time of conducting the interviews, popular protests (mostly around the issue of service delivery) in several townships across South Africa were making headline news. Perhaps South Africa's political transition 15 years ago was a distant memory; or perhaps it was so surreal for many of the respondents that it did not enter their consciousness as a meaningful turning point in their lives.

In July 2009, violent protests in Diepsloot made headline news.⁴⁰ The sprawling township, located approximately halfway between Johannesburg and Pretoria, comprises bond housing, RDP houses and informal settlements. Residents of Extension 1 were told that some of them would have to move to make way for the laying of sewerage pipes. Expecting that they would be relocated to RDP houses, they attended a public meeting on service and housing upgrades to find out more. The councillor, Jan Mahlangu, allegedly informed residents that there were no plans for relocation to RDP houses at that time. Urgently seeking clarity on the situation, residents sought the assistance of other local leaders, and were told by SANCO leaders that they would have to move to Brits in North West. Extension 1 descended into chaos. Angry residents went on the rampage, demanding services and better living conditions. They also complained about the poor communication between the councillor and local residents. While the protests were restricted to Extension 1, conditions in Extension 2 were no better.

Eric Mashamplani, an elderly shack-dweller in Extension 2, claimed very little had changed for him and his family since they moved from Alexandra to Diepsloot in 1996:

There are no services here. The only service we have is the one by Pikitup,⁴¹ and they are the ones who try to help us. As you can see [pointing to and counting the number of toilets next to the shacks] there are one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve. There are only twelve toilets used by all of these people [pointing to the surrounding shacks].⁴²

Violet, a middle-aged community development worker in Extension 2, whose shack was located about 500 metres away from Eric's, commented on the situation in Extension 1:

⁴⁰ Ndaba and Tromp, 2009: 1.

⁴¹ Privately managed company responsible for providing refuse-collection services.

⁴² Interview, 27 July 2009, translated from Sesotho. Violet, interview, 27 July 2009, another resident of Diepsloot Extension 2, estimated that three or four families, or about 15 to 20 people, are expected to use one toilet.

Diepsloot 1 is even worse because they only have eight toilets, but there are more people. And that side down there [pointing to an area in Extension 1], they only have pit toilets, which are not safe for one, and it is also unhealthy. When it rains the toilets sink in, which is not safe.⁴³

Residents from informal settlements elsewhere in Gauteng expressed similar concerns. Moses Thebula, a 25-year old activist in the Landless People's Movement, who has been living in Protea South (Soweto) for five years, complained:

The place that we live in does not make us happy, we live in shacks and the shacks that we live in are not in good condition. We have no electricity, no services like water. We steal water from the old houses because the old houses had water and the electricity. We steal from those who have it, like those who live in the bond houses. The conditions that we live under are very bad, especially when you live in a shack.

We expect [Zuma] to serve people without wasting of time. With that he must stand for what people want, like houses, electricity, basic services. That is what we expect from President Zuma.⁴⁴

Mans van Viek, who has lived in Protea South for about 20 years, also struck a comparison between the experiences of those in formal housing and those in informal settlements. While families living in bond houses in Protea South would not necessarily be classified as rich, this is certainly the perception of those living in informal settlements. According to Van Viek,

[t]here is only development for the rich people who are owning those houses ... That is the kind of development we are seeing, but from the side of the council themselves, we don't see any development. Infrastructure is supposed to be done for all the community of Protea [South], but it's like the only development is for the people with houses, those bond houses. Water, sanitation, lights and flushing toilets. You can walk around there; they have everything there and we have nothing. No lights here in the informal settlements; there is no development.⁴⁵

Expressing his frustration with the cost-recovery approach to the provision of services, Van Viek continued:

We expect the government to deliver things like water. There is a basic need for water. You have to wake up in the morning and you must wash clothes. You need water to drink ... We need to get water free. They can't come and sell water to us because it is a natural resource ... The roads are not proper ... and even though my family visits, it is difficult for them to come to my house. They must leave their cars by the roadside far away from me ... We don't have lights ... [and] sometimes you don't even have money to buy a candle or paraffin.⁴⁶

⁴³ Violet, interview, 27 July 2009, translated from Sepedi.

⁴⁴ Moses, interview, 14 August 2009.

⁴⁵ Van Viek, interview, 16 August 2009.

⁴⁶ Ibid.

The remarks above emphasise that people living in informal settlements are in dire need of basic services, and that they expect the government to make these services available. However, there are certain limitations to explanations that grant service delivery primacy. The service delivery approach ‘seek[s] to produce *things* that address the problems that people face because of their poverty ... such as piped water, houses or improved sanitation, or non-physical things, such as knowledge of rights or improved skills’.⁴⁷ The emphasis on ‘outputs’ tends to be ‘profoundly disempowering for communities’, because even when they are consulted about their needs, the planning and implementation is carried out by ‘professionals’.⁴⁸ The miscommunication that occurs between the poor and professionals is often the result of a lack of understanding of each other’s frames of reference.⁴⁹ Evidence of the ‘broken telephone’ between community residents and local authorities was painfully apparent in comments made by respondents.

Demanding to Hear and be Heard: Consultation and Participation at the Local Level

While delivery of services was indeed an important matter for respondents, a more significant theme that emerged during the research process centred on the issue of participation. Not only are people demanding services, they are also fighting for the right to be included in the decisions that affect their daily existence. These sentiments were clear in the following comments by Mzonke Poni, a community activist in Khayelitsha who was involved in the Western Cape Anti-Eviction Campaign and more recently in the shack-dwellers’ movement, Abahlali BaseMjondolo (Western Cape):

In as much as you [the government] need to deliver services, you cannot do that without engagement, or direct engagement. You know that’s the term that they like to use a lot ... If people were engaged and consulted about development, then people become a vital tool in their own development and such developments will also be owned at a community level, you know? And there would be some kind of partnership, as people will be able to take part in their own development. And people will be able to protect their services that they are given. But because of the arrogance, and in Khayelitsha for example, there are no services, and the only toilets that are available are being vandalised. In some places toilets have been brought to the people but people still destroy them, because of the ways in which they have been brought to the people.⁵⁰

The democratic state has facilitated the creation of several institutionalised spaces, sometimes referred to in the literature as ‘invited spaces’,⁵¹ which are intended to be used by community residents to enter into discussions with state representatives on a range of issues that affect them. These spaces (at least,

⁴⁷ Baumann *et al.*, 2004: 208, emphasis added.

⁴⁸ Ibid.

⁴⁹ Valla, 1999.

⁵⁰ Poni, interview, 10 September 2009.

⁵¹ Cornwall, 2004: *passim*.

rhetorically) provide an opportunity for community residents to be consulted and participate in the decision-making process. However, community activists have not viewed these arenas for participation in a favourable light. For APF activist John Appolis, *imbizos* represent an '[attempt] to generate that kind of image of democracy and participation of the people, consultation with the people'.⁵² Appolis regarded these efforts as an important cornerstone of the façade created by the government to generate faith in democratic institutions among the people, thereby maintaining legitimacy and hegemony:

They [the people] maybe believe that there is hope in these processes that the government is setting up. They think that maybe these institutions of democracy can assist us in dealing with our problems. Those are important ideological and political devices to ensure that your rule continues and that there is general support for your rule, particularly if your rule is based on democracy.⁵³

These sentiments were shared by Thabang Maseko, a community activist in Mdantsane (East London), who argued that while *imbizos* may be good in theory, the practice of these meetings leaves much to be desired:

Imbizo is a right channel. It's a right and good channel, but the people who are conducting the *imbizos* are not doing it properly ... One thing that people are looking at is the questions of accountability, is a question of informing the public [of] the full information ... These people are lacking, especially the councillors ... So the *imbizo* is correct, but the councillors are not doing it, in terms of addressing the masses and in terms of giving information to the masses [and] in terms of ... trying to accommodate what the society is saying ... These processes [*imbizos*] normally take place ... annually. There is an IDP [Integrated Development Plan] that they [present] to the people and tell them how does it work, and other things. But you find when you go to these meetings you don't get the conducive information ... I'm no longer attending the *imbizo* because they don't address what people are looking for, you see?⁵⁴

Similarly, Poni criticised the *imbizos* as 'some kind of window-dressing exercise' He heatedly voiced his dissatisfaction with the ineffectiveness of the *imbizos*:

I have participated in these imbizos you know? And ... even the comments that we make in these imbizos are not taken into consideration ... They are doing it for the media so that they can go back and say that they have consulted with the people and this was the outcome. But in reality ... you find that the decision-making process takes place behind closed doors and the decisions that are taken [go] against the will of the people.⁵⁵

Much of the disdain for the government's attempts to invite participation was directed at local councillors. Brenda Ngwenya, a resident of Protea South who lives in a household of eight people in which no-one is employed, expressed her

⁵² Appolis, interview, 30 March 2007.

⁵³ Ibid. For an extensive critique of 'invited spaces' in Alexandra, see Sinwell, 2009.

⁵⁴ Maseko, interview, 17 August 2009.

⁵⁵ Poni, interview, 10 September 2009.

exasperation in this regard: 'All the councillors that have been here, they are not good. They are not doing their jobs, and eating the money and lying to people.'⁵⁶ Moses Thebula, echoing some of Poni's views, was equally disenchanted with the councillor:

[H]e does not give the community a chance to participate in ... development. When he comes he has already made the decisions, like the one that they took for relocating people to Doornkop.⁵⁷ Other people come up with the suggestion that they would rather go somewhere than there, but he does not respect those views. At the time he would tell us that whether we like it or not we are going to Doornkop.⁵⁸

Martha, a resident of the village of Sekuruwe in Mokopane (Limpopo), and a member of the Sekhuruwe Development Forum, had this to say about her councillor:

He had never wanted to hear out the community of Sekuruwe. I believe a councillor has to hold community meetings for him to understand the needs of the community, but he has never done that. I do not know how he gets to know about community needs, since he does not make consultation with them.⁵⁹

Another bone of contention regarding councillors, and one that is clearly related to councillors being unfamiliar with the needs of their constituencies, had to do with the fact that many councillors, once elected, physically moved out of their wards. For Alfred Mululeki Mangca, a seasoned activist based in Mdantsane, the relocation into more developed areas 'create[d] a gap between the councillors and the people'. He legitimately asked the legitimate question, 'How can he [the councillor] have the vigour to solve the problems of this area while he is not affected by the same problems?'⁶⁰ Fellow activist Nkosohlana 'Nko' Mkhondlo agreed: 'It's a challenge, and I can vouch that our councillor has never visited this area ... so it's a question of being far removed. Now people start developing perceptions, and that creates problems.'⁶¹

Moreover, many community activists were in agreement that councillors abused their positions of power. Some experienced this maltreatment in the form of being sidelined in community meetings, excluded from them altogether, or being victimised by councillors. For instance, LPM activist Thebula, who likened his councillor to a 'dictator', revealed that:

the councillor is able to identify us because he knows which movements we affiliate [with]. He is not able to open his organisation [so] that everybody should participate ... so now we [LPM activists] think that it's useless for us to go to meetings, because we are not allowed to participate in the development ... The councillor said as social movements, especially me, that I should not attend his meetings ... He says I'm

⁵⁶ Ngwenya, interview, 14 August 2009.

⁵⁷ Area south-west of Johannesburg, close to Krugersdorp on the far West Rand.

⁵⁸ Quoted in Poni, interview, 14 August 2009.

⁵⁹ Martha, interview, 27 September 2009, translated from Pedi.

⁶⁰ Mangca, interview, 18 August 2009.

⁶¹ Mkhondlo, interview, 18 August 2009.

against him, like it's a personal issue if I ask about the issues that affect us as a community ... If you ask the councillor some question, the same people who live in this community, they turn against you, and they say you are being negative and that you are against the government, so you create an enemy in the area that you live in.⁶²

Maseko had experienced a similar backlash in a meeting called by the councillor of his ward:

All councillors are defending themselves in terms of their position. They are there for themselves, not in terms of serving the community ... You sometimes confront the councillor who is in charge, and they turn back and say, 'This person is a problem.' They will come to you and say, 'We have a problem with you.' They are doing this because they don't want people to listen to you in the meeting situation.⁶³

Comparable problems were raised by Freedom Park Concerned Residents activist, Funi Gogo:

We are not having a good relationship with the councillor. Our councillors don't respect us and they ignore our ideas. They don't have proper consultation with us, and when we attend their meetings they are always identifying us as problems to make the community see us as problematic people, and that is why we don't have a good relationship with him.⁶⁴

Andile M'Afrika, a local activist in Ginsberg in King William's Town (Eastern Cape) compared the power wielded by his local councillor to that exercised in a monarchy. '[H]is understanding of power,' remarked M'Afrika, 'is that he can do anything, and the most thing [sic] that he is capable of doing is to abuse.'⁶⁵ Interestingly, the power relations at the local level played out quite differently in the rural villages of Mokopane, where traditional authorities played a significant role in decision-making. Chiefs and their headmen exert a considerable amount of control over elected ward councillors and their associates.⁶⁶ According to Sekgale Maake, an activist in Skimming in Mokopane:

The councillor's CDWs [community development workers] ward committee members, even though we have tried to engage them, we are not fully satisfied on how they respond to our engagement because these people are marginalised. They are working on the traditional authority's land. Everything that they are supposed to do, they must report to the traditional authority or the chief.⁶⁷

Complicating matters even further was the influence of the Anglo-Platinum mines that are in operation in Mokopane. Mining undertakings in the area have fragmented the community and have robbed people of their ploughing fields – the only source of livelihood for many. Scores of residents are suffering severe

⁶² Thebula, interview, 14 August 2009.

⁶³ Maseko, interview, 17 August 2009.

⁶⁴ Gogo, interview, 18 September 2009.

⁶⁵ M'Afrika, interview, 19 August 2009.

⁶⁶ The issue of the relationship between traditional authorities and local government councillors is too complex to be explored here.

⁶⁷ Maake, interview, 26 September 2009, translated from Sepedi.

health problems as a result of the dust and other by-products generated by drilling activities. Communities and their heritage have been destroyed, as a result of forced relocations and the obliteration of graves brought on by the expansion of the mines.⁶⁸ Martha (from Sekhuruwe) admitted that the traditional authorities had been bought off by the mines and that the community had lost faith in them because of their ‘imbalanced loyalty to the community’. The disappointment was clear in Martha’s voice: ‘The mine knows very well that if they win the trust of the tribal authority, they will have things done their way. That is why even our councillors had joined hands with mine.’⁶⁹ Maake’s comments are equally unsettling:

The local government is also depending on the money from the mine ... Ninety per cent of the IDP budget comes from the mine. Now it is a very serious problem we are encountering. They are claiming to be representing the community, but practically, they are failing to deliver. There is no dog that can bite its feeder.⁷⁰

From the discussions, it was clear that the respondents wanted more responsive councillors who listened to them and who did not disregard their concerns. For Brenda Ngwenya, being a good councillor meant having a ‘working relationship with people, and call[ing] meetings and hear[ing] what we as the community want, and not tell us what to do but listen to what we want’.⁷¹ For other activists, like Freedom Park’s Nthando, the frustrations with local councillors ran unbearably deep:

Respondent: ‘I don’t have working relationship with the councillor.’

Interviewer: ‘Why?’

Respondent: ‘That is more sensitive. It involves emotions and bad memories [that] I will wish not to talk about here.’⁷²

Considering the intolerable conditions under which scores of residents of informal settlements and impoverished villages are forced to live, coupled with unapproachable, dismissive and sometimes self-interested councillors, whom local actors expect to be able to turn to as a first port of call to raise issues about unsatisfactory living conditions, it is unsurprising that community residents have taken their struggles to the street. For many demonstrators, involvement in popular protest – a vehicle for the expression of democratic voice – has met with heavy-handed responses from the police. The control of dissent is the focus of the next section, which begins with an assessment of the key theoretical contributions in this regard. The discussion draws on empirical evidence from the South African context to challenge and contribute to debates on the policing of protest. In the final sections, the chapter explores some of the implications of the

⁶⁸ It is impossible to do justice here to the hardships faced by the mining communities in Mokopane. The dynamics of the struggles in these communities require further investigation in order to historicise, contextualise and analyse the key issues.

⁶⁹ Martha, interview, 27 September 2009, translated from Sepedi.

⁷⁰ Maake, interview, 26 September 2009, translated from Sepedi.

⁷¹ Ngwenya, interview, 14 August 2009.

⁷² Nthando (not his real name), interview, 10 October 2009.



modes of repression for the ways in which democracy is understood and experienced by local actors in post-apartheid South Africa.

4 TAKING TO THE STREETS: RESISTANCE AND REPRESSION

Much has been written about the relationship between resistance and repression. Early research on collective action⁷³ – and certainly the approach of certain states – suggests that increased repression deters mobilisation. In some cases, the fear of being arrested or beaten is enough to discourage people from engaging in protest action. Maureen Mnisi, chairperson of the Landless People's Movement (LPM), was well aware of the deterrent effect of repression on resistance: 'Some people are scared of prison ... When they think of the repression of the police they just decide to stay at home with their poverty.'⁷⁴

Other authors propose that heightened repression leads to a concomitant ratcheting up of protest action.⁷⁵ For example, Ondetti shows how the massacre of *Movimento Sem Terra* activists in Brazil on two separate occasions in the mid-1990s, which was most certainly aimed at squashing dissent, in fact served to inflame mobilisation and land occupation. He explains that '[t]hese two episodes outraged domestic and international public opinion, mobilised civil society, and focused attention and concern on the land issue; they thereby obligated Brazilian authorities to accelerate the pace of reform and exercise greater caution in repressing the movement'.⁷⁶

In one of the very few pieces of writing on resistance and repression in post-apartheid South Africa, McKinley and Veriava discuss the brutality that supporters of some of the social movements have faced at the hands of the police. In relation to the repressive measures applied to the Orange Farm Water Crisis Committee (OWCC), they note that:

[r]ather than quieten the OWCC, such attacks spurred the organisation to intensify and broaden its community activism and strengthen its view that the politics of the ANC, its local representative and the policies flowing from the state institutions it controls had become the main 'enemy' of the community.⁷⁷

Commenting on police response to their mobilisation efforts, the OWCC proclaimed that 'the actions of the police are only working to strengthen the resolve of residents to fight on'.⁷⁸

⁷³ Hardin, 1982; Oliver, 1980; Olson, 1965.

⁷⁴ Mnisi, interview, 16 August 2009.

⁷⁵ Fransisco, 2005; Granovetter, 1978; Gurr, 1970; McAdam, 1982; Oberschall, 1994; Olivier, 1991; Ondetti, 2006; Goldstone and Tilly, 2001.

⁷⁶ Ondetti, 2006: 62.

⁷⁷ McKinley and Veriava, 2005: 41–42.

⁷⁸ Indymedia South Africa, 2006; OWCC, 2006.

Thus, instead of repression leading to movements being squashed, as the state may have wished, it seems to have encouraged demonstrators to keep up the struggle. Histories of resistance – in South Africa and elsewhere – are replete with examples of this trend. The results of a ‘rapid response’ investigation by the Centre for Sociological Research at the University of Johannesburg into the spate of service delivery protests that swept across South Africa in the middle of the year (and which continue to simmer in townships across the country) show that police brutality provoked violent and destructive behaviour by the demonstrators.⁷⁹ In other words, peaceful protests turned violent when the police used excessive force during incidents that required crowd management.

Studies in other contexts, however, have shown that the relationship between resistance and repression is far more complex than a linear correlation, whether positive or negative. Several scholars have suggested that there is a threshold, or tipping point, at which the relationship between the two variables is reversed. If one were to plot this relationship on a graph, an inverted U-shaped curve would result. Opp and Roehl, whose work endorses the inverted U curve, point out that the key question regarding this relationship is not about whether repression increases or decreases resistance. Instead, they suggest that research should take cognisance of the conditions under which repression either halts or escalates mobilisation. Importantly for this study, Opp and Roehl asserted that repression is likely to fuel resistance when it is regarded as ‘illegitimate’, that is, when there are attempts by the state to shut down legal protest.⁸⁰

In the South African context, the issues of the legality of protest and illegality of repression are tied in closely with the Regulation of Gatherings Act (RGA). This piece of legislation stipulates that ‘every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so’ insofar as ‘the exercise of such right ... take[s] place peacefully and with due regard to the rights of others’.⁸¹ It goes on to say that the organiser of the march or protest rally must give notice of the gathering to an officer of the relevant metropolitan police department at least seven days prior to the planned event, unless prevented from doing so for a valid reason, but not less than two days before the event. The officer responsible then has 24 hours to call a meeting (Section 4 meeting) with the organiser to discuss the gathering or inform him or her that the gathering has been banned, clearly outlining the reasons for the banning. The organiser then has the opportunity to make an appeal to the magistrate’s court for permission to go ahead with the gathering. Many of the respondents in this study felt that the authorities abused their powers by manipulating the RGA, or disregarding it completely. According to Mapotha, a young activist in the Merafong Demarcation Forum in Khutsong (Gauteng):

⁷⁹ CSR, 2009.

⁸⁰ Opp and Roehl, 1990: 527.

⁸¹ RSA, 1993.

[W]hen applying for the marches the government official will always test your knowledge regarding the Gatherings Act, and there would be intimidation to stop you by involving police within those section 4 meetings, whereby the police play that role of intimidation. 'As the organisers, do you know ... if one, two, three happens we are going to hold you responsible for the whole damages?' Such things, such tactics, they always use them to intimidate you, and that's how those tactics are used to suppress you from exercising your rights.⁸²

Through her involvement with the Freedom Park Concerned Residents, Lindiwe Dubaza learned about the stipulations of the RGA:

When we arrive in Pretoria⁸³ the number of people was smaller than the number of police that were there. They came to us and told us that we must go back; our march is not allowed. Our leaders had a private discussion with them. While our leaders were talking to them the people started to sing, going towards the police. It then created a big argument between our leaders and the police. Our leader kept on saying, 'It is our right to protest! The Gatherings Act says if you did not reply to us within 48 hours we should assume that our march has been approved.'⁸⁴

Among other things, these remarks serve to strengthen Opp and Roehl's claim that resistance will be stepped up if activists consider the repressive activity of the police to be illegitimate. These authors also argued that illegitimate repression is likely to cause outrage, and set in motion 'micromobilisation' processes among activists aimed at garnering more support for their movement, which can potentially 'neutralise' repression.⁸⁵ Emery supports the idea of micromobilisation processes and, using the Anti-Apartheid Movement as a lens through which to study the relationship between resistance and repression, stresses that influencing international opinion is a critical factor in shifting the balance of power in the favour of the movement:

To increase MM [micromobilisation], movements increasingly framed their goals in terms of international norms of 'non-racial democracy' that had become universal in the context of growing decolonisation and deracialisation. Successful MM and frame alignment shifted the balance of (domestic and international) state-versus-movement legitimacy in favor of the movement.⁸⁶

Moreover, Opp and Roehl made the assertion that illegitimate repression causes 'system alienation', by which they mean that demonstrators are likely to become sceptical of how the political system operates.⁸⁷ Mobilisation efforts may then be expanded beyond the issue or cause that brought a group of protestors together in the first place. Donatella della Porta – arguably the most renowned author on the policing of protest in Europe – emphasises the importance of moving beyond the protest issue, and argues that a shift in focus to the very right to protest goes

⁸² Mapotha, interview, 13 August 2009.

⁸³ Freedom Park Concerned Residents had organised a march to the Union Buildings in Pretoria in mid-May 2007.

⁸⁴ Dubaza, interview, 18 September 2009.

⁸⁵ Opp and Roehl, 1990: 541.

⁸⁶ Emery, 2005: 213.

⁸⁷ Opp and Roehl, 1990: 527.



to the heart of democracy.⁸⁸ In the following quote by Maureen Mnisi, chairperson of the Landless People's Movement, it is clear that when repressive behaviour is not exercised within the bounds of the law, in this case the RGA, community movements begin to question the democratic system:

[Approaching] the Metro police ... does not mean you are asking for permission. We got our permission when we voted in 1994, when voting for the black government, but when you go there they will turn down your application and tell you that you don't have permission and you would not know the reason it was turned down ... At that time you would be very frustrated and at the end you will end up marching and the police will come with guns and shoot at you and come with pepper spray and they will tell you your march is not legal, so we fail to understand what has changed in the apartheid and democratic government, if we still need to get permission to march. The law says we should march and demonstrate [for] our demands as long as the march will be peaceful. The only thing that makes us to apply with the Metro police is because of the roads that we will be using.⁸⁹

Some authors have addressed regime type as an important variable in the relationship between resistance and repression.⁹⁰ Challenging previous research that indicates a negative correlation between democracy and repression, Regan and Henderson argue that an inverted U relationship exists between democracy and repression. They also claim that the perceived or actual level of threat is a stronger indicator of the likelihood of repression than regime type. Where the demands of the opposing group do not fit in with the broader ideological-political framework within which the ruling party exists, it becomes more difficult to negotiate and reach a compromise; and it is more likely that the ruling party will not give into the demands, which could then result in resistance, which is sometimes dealt with in a repressive fashion.⁹¹ The post-apartheid state, regardless of its formal democratic content, 'is primarily the guardian and protector of [the] dominant economic interests [of the political elite] and the guarantor of capitalist property relations',⁹² and it will do whatever it takes to secure these interests.

Like Brazil's MST, South Africa's Landless Peoples Movement (LPM) is no stranger to state repression. Resistance to the ANC government's policy on land redistribution has been harshly dealt with by the state. On 21 August 2002, around the time of the World Summit for Sustainable Development, a group of about 3,000 supporters of the LPM marched to the office of then-Gauteng premier, Mbazhima Shilowa, to present him with a memorandum calling for an end to forced evictions and to 'end the brutal campaign of terror being waged by ... the police against poor and landless people in the province'.⁹³ In a display of their support for the government's commitment to 'a zero-tolerance approach to

⁸⁸ Donatella della Porta, 1999.

⁸⁹ Mnisi, interview, 16 August 2009.

⁹⁰ Davenport, 1995, 1999; Poe and Tate, 1994; Regan and Henderson, 2002.

⁹¹ Regan and Henderson, 2002: 122.

⁹² Vally, 2002: 23.

⁹³ LPM statement cited by Environment News Service, 2002.

protest activity appearing to be related to the WSSD',⁹⁴ police arrested 72 LPM supporters and leaders.⁹⁵ Similarly, the Western Cape Anti-Eviction Campaign, which claims to have a distinctly anti-capitalist stance⁹⁶ has been subjected to extremely harsh measures of repression. The movement's chairperson, Ashraf Cassiem, had his teeth kicked in by the police.⁹⁷ Martin Legassick, an elderly activist-intellectual and ardent supporter of the Western Cape AEC, was arrested by the police for taking photographs of the brutal actions of the police during a land occupation at Macassar Village (near Cape Town). 'I wasn't charged,' said Legassick, 'maybe because I'm old ... but I had bruises for a couple of weeks'.⁹⁸ Several other LPM and AEC activists shared their stories of police brutality.

On the issue of regime type, Regan and Henderson (2002) concur with Fein (1995) that countries with intermediate levels of democracy often exhibit the highest levels of repression. By and large, fully-fledged, well-established democracies boast effective channels above and beyond the electoral system, which act as safety valves to relieve frustration and as mechanisms through which citizens can make their voices heard.⁹⁹ Under such conditions, the policing styles would probably follow a pattern of 'negotiated management'.¹⁰⁰ In autocracies, these channels do not exist; and any attempt to challenge the state is dealt with disproportionately. Under these circumstances, the threat of repression deters resistance.¹⁰¹

In semi-democracies, however, 'the institutional infrastructure is usually not sufficiently developed to efficiently channel the demands of the opposition into the political arena'.¹⁰² Moreover, demands on the state are perceived as a threat to its 'fragile legitimacy' and, in the absence of channels with which to deal effectively with the demands, it is likely that the state will respond harshly to avoid 'political usurpation'.¹⁰³ Under this type of regime it could be argued that the policing of dissent conforms to a model of 'escalated force', meaning that police adopt a zero-tolerance approach to disruption and that they display little or no regard for the rights of the protestors. Under such circumstances, the channels of communication between the police and protestors are unclear; seemingly innocuous actions have the potential to trigger public disorder and violence; and mass arrests and the use of excessive force are not uncommon.¹⁰⁴

Does the South African state fit this mould? Almost a decade after the first democratic elections, Southall commented that:

⁹⁴ *Mail & Guardian*, 27 August 2002.

⁹⁵ Parker, 2002; Environment News Service, 2002.

⁹⁶ Legassick, interview, 15 September 2009.

⁹⁷ Cassiem, interview, 12 September 2009.

⁹⁸ Legassick, interview, 15 September 2009.

⁹⁹ Regan and Henderson, 2002: 123; see also Carey, 2006: 4.

¹⁰⁰ McCarthy and McPhail, 1998; McPhail *et al*, 1998; Schweingruber, 2000.

¹⁰¹ Regan and Henderson, 2002: 123; Carey, 2006: 4.

¹⁰² Regan and Henderson, 2002: 124; see also Carey, 2006: 9.

¹⁰³ Regan and Henderson, 2002: 124.

¹⁰⁴ Schweingruber, 2000; Waddington *et al*, 1989.

South Africa's dominant party system seems embarked on the road to 'low-intensity' democracy. This implies that the formal requirements of democracy are met, yet under conditions of decreasing competition and declining popular participation. ANC domination of the political arena is being extended increasingly, challenges to its rule being steadily overwhelmed, and its own internal democracy eroded.¹⁰⁵

Activist-intellectual Dale McKinley has also used the adjectives 'low-intensity' and 'truncated' to describe the nature of democracy in post-apartheid South Africa.¹⁰⁶ Beall *et al* argue that since the dawn of democracy in South Africa a certain measure of stability had been achieved. However, this claim is qualified in their assertion that South Africa is characterised by a 'fragile stability', meaning that 'society is stable in that the non-racial regime is fully accepted as legitimate, but the immense social problems which were apartheid's legacy remain a threat to social order'.¹⁰⁷ The source of fragility is located in persistent problems in the areas of HIV/AIDS, poverty and inequality, land reform, unemployment, and indeed service delivery, which are indicative of a weak connection between state and society.

Stability, on the other hand, is brought about by the fact that 'the social forces and political organisations needed to move the society to a different position – either crisis or thoroughgoing consolidation – have not yet emerged'.¹⁰⁸ I argue in this chapter that the mobilisation efforts of grassroots organisations to expand rights and freedoms to marginalised communities constitutes a particular social force, one with the potential to fundamentally alter state-civil society relationships in post-apartheid South Africa, and to deepen and strengthen the quality of the country's democracy.

In addition to the societal problems mentioned above, crime is regarded by many as one of the key areas for concern in South Africa. The Zuma administration has made crime control one of its priorities and, as discussed earlier, it has addressed the issue by legitimising the use of increased violence by the police. Moreover, police restructuring has resulted in a situation in which the 'do whatever it takes approach' to crime control has spilled over into the arena of crowd management. A central argument in this chapter, then, is that the clamping down on community resistance and political protest cannot be examined in a vacuum. Connections must be drawn between the control of 'ordinary' crime and the repression of dissent. In so doing, research would begin to address the literature gap that exists currently in social movement studies.

Oliver (2008) points out that as a consequence of the study of collective behaviour and social movements becoming a sub-field within the discipline of sociology, the study of dissent has been distinguished from scholarly inquiry into crime. As a result, social movement scholars miss the links between repression and crime control, and fail to show how the crackdown on criminal activity serves

¹⁰⁵ Southall, 2003: 74–75, emphasis added.

¹⁰⁶ McKinley, 2001: 185, McKinley, 2006b.

¹⁰⁷ Beall *et al*, 2005: 681.

¹⁰⁸ *Ibid*: 681.

to repress political resistance. Nowhere is the relationship between these two phenomena more clear than in Kuilsrivier (Western Cape), where a Rasta community is fighting for their right to practice their religion. Drawing on literature and original field material, the next section examines specific forms and experiences of repression, linking these issues back to the weakness of democracy in South Africa.

Much of the work on the policing of protest in the global North deals with the concept of repression.¹⁰⁹ Some of the research focuses on hard-line models of policing, which involve arrests, beatings, torture, shooting and so on, which are characteristic of the escalated force model mentioned earlier.

Several of the community activists interviewed in this study had experienced this kind style of policing. During a discussion with LPM activist Brenda Ngwenya about a road blockade organised by the LPM, it emerged that 'the police came shooting with rubber bullets, and other people got shot and some ran, but some others stood there, whether the police would shoot or not they are not going anywhere, and so they stood there, because when the community has decided to do something they do it. The police kept on shooting and there was huge fight between the police and the community.'¹¹⁰ Commenting on her experience of resistance and repression, Maureen Mnisi, chairperson of the LPM, claimed:

We are exposing that we are living in bad conditions [but] the police are on the government's side. They are not on the poor people's side, so at the end you end up facing rubber bullets and being tortured by police. They take you and arrest you and when you get there they torture you and do all the hurting things and that makes people, when they are released, they come back having lost all hope in the struggle. It's just a punishment the state is giving poor people because the state does not protect the poor but only the rich.¹¹¹

Similar stories were relayed by AEC activists. Comparing the apartheid period to contemporary experiences of police action against political dissent, Professor Martin Legassick claimed that there has been very little change:

They're about the same in terms of police action. For example, I was there when the Joe Slovo¹¹² people occupied the N2 [highway]. The police were around the N2, telling people to get off the N2. People eventually got off [and] then for no apparent reason police just opened fire with rubber bullets, and a lot people were wounded there. When people who occupied the N2 gateway houses in Delft were evicted, police all of a sudden opened fire. For example, there was a three-year-old child who was hit with three rubber bullets, so the police are very indiscriminate with their actions.¹¹³

¹⁰⁹ See for example Della Porta, 1999; Earl, 2003; Earl *et al.*, 2003.

¹¹⁰ Ngwenya, interview, 14 August 2009.

¹¹¹ Mnisi, interview, 16 August 2009.

¹¹² Informal settlement in Langa Township in Cape Town.

¹¹³ Legassick, interview, 15 September 2009.

The Rasta community in Kuilsrivier has also experienced the heavy-handedness of the police. According to members of the community, their demands to have their own church or piece of land on which they can build a church and practise their religion have been brutally dealt with by the police. Residents argue that the police use the seizure of marijuana as a pretext for meting out rough treatment.¹¹⁴ Sarah Fabie, a feisty and well-known activist in the area, recounted a very disturbing story of police brutality in the name of crime prevention. For Sarah and her fellow Rastas, their way of life is not harmful, and their struggles were waged around the right to practise their religion:

They will come where we are staying, they will watch what we do and even when we as Rastas come together to give our Saturday prayers, they will come there, they will bulldoze everything. They will come and break everything and destroy the wires [of the music system]. Two weeks ago they searched my daughter. They were searching for my husband, but my husband was not around ... By the time I returned to the house, I found my daughter only in her bra and her panties because they were searching her. They were looking for *ganja* in her panties and she doesn't even smoke. She's pregnant and they were scratching in her vagina looking for *ganja*.¹¹⁵

Similar harrowing tales were heard across the country where the research was conducted. Faced with these realities, we cannot ignore hard-line forms of social control, even though they are sometimes viewed as remnants from a bygone era, especially in democracies. In a study on social control and the anti-globalisation movement, Fernandez argues that hard- and soft-line forms of social control co-exist.¹¹⁶ For him, the latter includes 'more indirect forms of oppression, such as the control of dissent through legal regulation, negotiation of protest, and self-monitoring'.¹¹⁷ Earlier it was shown how the manipulation of legislation – in the form of the RGA – is perceived by activists as a means of oppression. It was also pointed out that the fear of being imprisoned or hurt by the police, which stems from the increased militarisation of the police, is sufficient to keep people from taking to the streets.

In an account of the day-to-day work of street-level police in South Africa, Altbeker (2005) explains that the police are criticised from all corners, either for being too aggressive or not being tough enough. He points out the work of the police is not exclusively about combating crime or apprehending criminals; much of what they do entails resolving instances of social disturbance, and crime prevention is just one aspect of this job. He suggests that doing a society's 'dirty work', particularly in a country like South Africa, sometimes requires an aggressive and confrontational approach, as part of which the threat or use of coercive force is necessary. His research with police officers reveals a very human side to the officers who risk their lives on a daily basis to ensure greater levels of safety in the country. However, as this research has shown, this is a side that is rarely (if ever) revealed to demonstrators, whose efforts arguably also aim at

¹¹⁴ Focus group, 10 September 2009.

¹¹⁵ Fabie, interview, 10 September 2009.

¹¹⁶ Fernandez, 2008: 15–16.

¹¹⁷ Ibid: 9.

bringing about a better quality of life. A key recommendation from this research is that greater efforts must be made to speak to police officers who are called in to restore public order, and to understand the policing of protest from their point of view.

5 CONCLUDING REMARKS: ‘THIS IS NOT DEMOCRACY! THIS IS DEMOCRACY!’¹¹⁸

The topic of repression of resistance has been used in this study as a looking-glass to reflect and understand the meaning and content of democracy in post-apartheid South Africa. For most of the community activists interviewed, democracy is experienced as very shallow, or non-existent. Attempts at democratic restructuring within the police and local government have not been successful at a practical level, because these changes have occurred within the confines of liberal democracy. This study has shown that what communities really want is more participatory forms of democracy, in which they can play a meaningful role in the decisions that affect their lives.

Talking about the repression of protest in narrow terms that only focus on the modes of repression (or the consequences thereof for mobilisation) does very little to insert this issue into public opinion. However, linking the issue to crime control, and to democracy more generally, broadens the scope for debate and analysis. While formal democracy exists in South Africa, it is the everyday experience of democracy that really matters to people. This study is replete with examples of low levels of participation at local level as a result of ineffective government initiatives, and dismissive councillors who distance themselves from communities. Many activists felt that there was no space for their voices to be heard, and that the use of other channels – protest, in this case – would be squashed by heavy-handed police. These are signs of ‘truncated’, ‘low-intensity’ democracy.

Moreover, by focusing on crime reduction as one of its priorities, the Zuma-led government has deflected attention away from other factors that gnaw at an already fragile democracy, such as unemployment and stark socio-economic inequality. Amendments to the Criminal Procedures Act have placed an enormous burden on the police. As the title of Antony Altbeker’s book suggests, the police have been tasked with doing ‘the dirty work of democracy’ (2005). When firing indiscriminately at crowds or at the backs of those fleeing the scene, the police are ‘just doing their jobs’.

Finally, while reporting on a service delivery protest here and a strike there is an important task for any scholar working on the issue of social unrest and resistance, the reach of such contributions is limited, in that it does very little to

¹¹⁸ Themba Mooko, a soldier who was interviewed (7 September 2009) shortly after violent clashes between soldiers and the police in August 2009.

draw the attention of a critical mass or shift international opinion. What this study has tried to do is to highlight the links between resistance efforts, and relate these struggles more broadly to the failure of real, lived democracy in South Africa. This is not necessarily anything new, but by saying it again, and again, each time with new and more convincing evidence, we might tip the scales in favour of those community organisations fighting for social justice.

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MIGRANT MOBILISATION: STRUCTURE AND STRATEGIES FOR CLAIMING RIGHTS IN SOUTH AFRICA AND KENYA

Zabeera Jinnah with Rio Holaday¹

1 INTRODUCTION

The ability of migrants to successfully move, work, and seek protection depends on their ability to access rights, and the strategies they adopt. This study documents and explains migrants' individual and collective efforts in mobilising for their rights, and the attempts of organisations to do so on their behalf, in three cities in South Africa, and in Nairobi, Kenya.

This chapter is comprised of six sections. After a short introduction, section two describes the methodology and scope of this study, and section three reviews the literature on migrant mobilisation. Access to resources, social networks and political opportunities all play a key role in migrant mobilisation. In South Africa, there appear to be benefits in not mobilising, which include avoiding deportation and not having to assume the reciprocal responsibilities that come with rights. Although South Africa has an active civil society sector, migrant issues do not occupy a visible part of the national agenda, with the exception of a number of litigation cases on behalf of refugees. Furthermore, there is a key gap in advocacy-oriented organisations at national level. The fourth section presents the findings regarding individual mobilisation among migrants in South Africa. Migrants generally do not mobilise for rights, citing lack of documentation, discrimination, and language barriers as key obstacles to claiming rights. Migrants also have minimal interaction with state institutions, NGOs and migrant-led organisations.

The fifth section discusses collective mobilisation in South Africa. Most organisations may be placed into one of four broad categories: international agencies and non-governmental organisations (NGOs); national South African-led NGOs; smaller, migrant-led NGOs; and community-based organisations

¹ Fieldwork was undertaken by Teresa Le, Rio Holaday and Zabeera Jinnah in South Africa, and Leonida Odongo in Nairobi. Aurelia Kazadi Wa Kabwe-Segatti and Tara Polzer are thanked for their comments and contributions to this study. Finally, thanks to the individuals and organisations who participated in this study.



(CBOs) and faith-based organisations (FBOs). These have different resources, target groups and mandates. Almost none of these organisations have a clear mobilisation strategy or target, citing limited funding for migrant-related work, language problems, lack of resources, and insufficient platforms for mobilising as key reasons for not mobilising. Collaboration in the migrant sector is limited; a lack of trust between stakeholders and the unclear role of the state and international agencies have created a fragile and fragmented sector.

The sixth section presents selected findings of individual and collective mobilisations in Nairobi. Similarly to the migrants in the South African study, most migrants in Nairobi have minimal trust in and reliance on institutions and organisations. Collectively, most organisations have a different understanding of mobilisation from each other, and have limited resources to mobilise. Most of the organisations' work is limited to refugee camps, hindering the integration of migrants' rights within a broader discourse on development and human rights.

2 METHODOLOGY AND SCOPE

This study, by the Forced Migration Studies Programme, looks at the structures and strategies for claiming migrant rights in Southern Africa. It is a regional study, focusing on three South African cities (Durban, Johannesburg and Cape Town) and Nairobi, all urban centres with significant non-national populations. The study attempts to document and explain migrants' individual and collective mobilisation for rights, and the attempts of other groups to mobilise on their behalf.

This study covers the following main research questions:

Migrant mobilisation:

- How do migrants mobilise?
- What are the aims of and strategies adopted by migrants in mobilising?
- How do migrants access rights and services?
- What informal ways of accessing rights can be identified?
- What is the relationship between migrants and organisations working on their behalf?
- Why are migrants not mobilising?

The role of civil society:

- What role do organisations play in enabling migrants to access rights and services?
- What types of organisations are working with which groups of non-nationals in each city, and to what end?
- What is the capacity of these organisations?
- What services are they providing?



- What success have they had?
- Why are migrant organisations not visible and active?
- How do the organisations working on migrants' behalf understand mobilisation and migrants' rights?
- What are the gaps in the sector?
- What is the level of collaboration between organisations?

This study is based on interviews with organisations, run by migrants and those working on their behalf, in Durban, Cape Town, Johannesburg, and Nairobi, conducted between July and October 2009; individual, open-ended interviews with a small group of migrants in Johannesburg; and an analysis of two existing Forced Migration Studies Programme data sets, which are the African Cities Dataset (ACD) and the Vulnerability Study (VS). The bias toward the South African context is recognised.

3 BACKGROUND AND CONTEXT

This section reviews the relevant literature on migrant mobilisation. It comprises three parts: first, a review of migrant mobilisation theory and action in South Africa, Kenya and elsewhere, which examines the nature, form and target of migrant mobilisation; thereafter an analysis of the nature of the civil society sector in South Africa and Nairobi, including gaps and challenges; and lastly, an institutional analysis which identifies who allocates rights in the South African context, and how the main state and non-state actors relate to each other.

The nature and target of migrant mobilisation: theory and experiences from South Africa, Kenya and elsewhere

Social movement theory identifies four key factors in individual and collective action: resource availability, political opportunities, collective identity and social inequalities (Chazan, 2006: 9). Looking specifically at migrant mobilisation, Odmalm (2004) identifies four similar factors that affect migrant mobilisation: resources, national and institutional opportunities, modes of incorporation by institutions, and migrants' socio-economic class. These analyses provide a convenient starting point for a discussion on mobilisation literature, as they demonstrate that similar and overlapping factors play a role in different types of mobilisation. Much of the reviewed literature focuses on four similar themes: resources, political opportunity, social and ethnic networks, and social, economic and political inequalities as targets of mobilisation. The following section will address these four areas, along with the benefits of inaction.

Resources

Resources play a key role in individual and collective action. As Tilly (1978) notes, migrant mobilisation – which is defined as collective action to promote or protect

a group's interests – is dependent on resources and relationships. The group's effectiveness is impacted by its ability to acquire, manipulate and use resources; the relationships it creates with those around it; and the context within which it functions (Tilly, 1978). Resources include people, money and legitimacy (McCarthy and Wolfson, 1996).

Resource mobilisation theory emphasises the relationship between the amount and type of resources available, and the success of collective action (Cress and Snow, 1996 and Jenkins, 1983). Resource mobilisation is a key influence on the emergence, growth, impact and form of movements (McCarthy and Wolfson, 1996: 1071). In particular, agency, strategy and organisation affect the success of mobilisation. Agency is defined as the volume of effort; strategy as the choice of action or inaction within the three key spheres of public education, direct services and structural change; and organisation as the form of leadership and work undertaken (McCarthy and Wolfson, 1996).

Political opportunity

Migrant mobilisation may also be affected by the political context within which it occurs. Koopman (2004) demonstrates that migrants are more likely to claim rights from their host countries in environments with high rates of naturalisation and integration; conversely, migrants remain involved with homeland politics when there are fewer opportunities for naturalisation and integration. Additionally, a political opportunity approach to collective action asserts that political mobilisation can occur in three areas: participation in public debates on issues of migration; involvement in politics of home countries; and claims for rights in host countries (Koopman, 2004).

Favourable political environments are those in which migrants are considered a powerful stakeholder. In Southern Europe, for example, the reliance of the national economy on migrant labour has favoured migrants in their demands, as industries have placed their weight behind migrants' calls (Poros, 2008: 16-20).

Social networks

Social networks are central to migrant mobilisation. Massey et al. (1998) define migrant networks as “sets of interpersonal ties that connect migrants, former migrants and non-migrants in origin and destination areas through ties of kinship, friendship and shared community of origin” (42). These ties serve as a rallying point for migrants to organise and claim rights. Networks are also useful because they often rely on non-formal sources for functioning (McCarthy and Wolfson, 1996: 9), meaning that they are often more flexible than traditional channels of organisation.

Studies have shown that migrants organise informally along kinship and ethnic lines, and that such networks and contacts are useful sources of

information, support and protection. The most comprehensive study on migrant organisations in South Africa looked at Congolese associations (Amisi, 2006). This study found that Congolese organisations have formed along ethnic and tribal lines which replicate the political and ethnic ideologies back home, and are largely concerned with political affairs at home rather than with issues of rights and integration in South Africa. As with Congolese associations in Durban, migrants in Europe have organised along ethnic lines.

Although ethnicity is used initially in forming associations, the future of such collaborations is uncertain. On one hand, collective action and political mobilisation tend to have broader notions of inclusion. In Spain, for example, Moroccan workers formed an Immigrant Workers Union that included both interpersonal and ethnic ties. On the other hand, a shared ethnicity does not necessarily make for shared goals. Though British Asians have mobilised for migrant rights largely along ethnic lines, Statham (1996) found that the lack of a common political interest and opportunity among different migrant groups could have a negative impact on long-term mobilising. More information is needed on how this may be done, and to what extent it is successful.

In some cases, migrant communities are too fractured to organise along ethnic lines. Hopkins (2006) found that despite there being a large Somali community in London, collective mobilisation has been limited, primarily because of tension between different clans. Although there are numerous Somali organisations in the city, some Somalis distrust and avoid them because these organisations prioritise clan and political interests over service delivery and care (Hopkins, 2006).

Targets of migrant mobilisation

Studies have shown that mobilisation tends to focus on inequalities in the host country. Socio-economic self-sufficiency and political protection are primary targets of migrant mobilisation. In a study on Somali organisation and livelihoods in Nairobi, Campbell (2006) found that Somali migrants organised specifically to protect their economic interests and to ensure that their livelihoods were secure, using social networks as a strategy for support. In her work on the experiences of urban refugees, Jacobsen (2006) emphasises the action that urban refugees and economic migrants take in order to create spaces for work. She (2006) also argues that the state needs to foster the self-integration of migrants by facilitating access to documentation and protection. Finally, a study on Somali organisation in London and Toronto suggests that migrants organise as a defence mechanism against the state (Hopkins, 2006). This finding challenges the perception that Somalis only go to Somali organisations for help, raises the issue of political dynamics and divisions within migrant organisations, and questions how these fissures lead to mistrust and a weakening of the collective voice (Hopkins, 2006: 370).



Migrant inaction

Finally, there are benefits to a lack of mobilisation. First, self-exclusion from the political arena can benefit migrants who wish to fly under the radar of immigration officials. If migrants do not visibly organise, they avoid skirmishes with state agents over documentation and deportation (Amisi, 2006; also see Landau and Haupt, 2007: 12, and Landau and Monson, 2008: 315). Second, with rights come responsibilities. By not claiming rights, migrants avoid being obligated to their host countries. Both Amisi and Ballard (2005) and Landau and Haupt (2007) suggest that in South Africa, migrant organisation tends to be strategic and purposeful rather than committed to obligations and responsibility.

Dynamics of civil society in South Africa

The 2006 Hopkins report indicates that the post-apartheid civil society sector in South Africa is both large and active. The report shows that there are some 58 000 organisations in the country, of which 32 000 or 55% are informal and voluntary CBOs. Formal NGOs account for just 17% of the sector. The study did not specify migrant organisations. Despite its active presence and participation, however, the civil society sector is fragmented. Uncertainty over the exact role of civil society *vis-à-vis* a democratic government, competition for funding (given that many foreign donors have either pulled out of South Africa or opted for bilateral agreements with the government), and a shortage of skills and resources have all contributed to the fractured state of civil society. The migrant-focused organisations operate under similar constraints (Amisi and Ballard, 2005: 2).

In South Africa, social movements have mobilised to claim rights with varying degrees of success, through targeted lobbying, protests and litigation (Amisi and Ballard, 2005: 2). The Treatment Action Campaign has perhaps been the most successful in this regard, in claiming the right to health care for people who are HIV-positive (see Greenstein, 2003). It is difficult to understand why this has not happened in the migrant sector. Three propositions are put forward: firstly the lack of a single unifying body under which the diverse migrant groups can organise; secondly, the lack of awareness of rights, and changes in policy which have made claims difficult; and thirdly, the reciprocal responsibilities which these rights can give rise to have been embraced by all.

Over the past decade, there have been a number of strategic litigation cases with and on behalf of refugees in South Africa, by national NGOs such as Lawyers for Human Rights, the Wits Law Project and others. These cases have focused on issues of arrest, detention and deportation, refugee status determination and socio-economic rights.

Apart from litigation, mobilisation for migrants' rights has remained largely absent from the national agenda. Palmary (2006) identifies two main gaps in the migrant sector: a lack of a focus on advocacy, and migrants' access to socio-

economic issues. Furthermore, there are a relatively small number of organisations working for, with or on behalf of migrants. Amisi and Ballard (2005: 25) identify different types of NGOs that work with migrants in South Africa, including: service providers; refugee forums, networks and co-ordinating bodies; and small civil society organisations and political parties that are self-run and formed on ethnic lines.

One exception to the lack of representation of migrant groups in the civil society sector is the Consortium for Refugees and Migrants in South Africa (CoRMSA), a consortium of migrants' organisations tasked with promoting and defending the rights of migrants in South Africa. There are currently 18 members, including FBOs, legal firms, research units and NGOs.² Two of the members (Tutumike and Durban Refugee Service Providers) are, in turn, networks of refugee service providers in Cape Town and Durban, and have 11 and four members respectively.

Institutional analysis: who allocates rights in the South African context

Only 10 to 15% of the one million non-nationals in South Africa seek protection from the state because of violence, oppression or persecution (Palmary, 2006: 10). In a country that has seen violent instances of xenophobic attacks, the absence of state protection is significant. How do the majority of migrants protect and defend themselves? Similar arguments can be made for nationals, but issues of documentation and discrimination further impede access to formal protection for non-nationals.

Civil society organisations do not appear to be the answer. The African Cities Survey by FMSP shows that NGOs play a small role in migrants' lives in Johannesburg and Nairobi. Most migrants do not go to the police in the event of a crime, and many feel that there is no recourse. FBOs seem to be providing immediate services and care to migrants – this occurred particularly in the aftermath of the May 2008 attacks – but their role, resources and mandate are not clear.

There is a notion that citizenship enables an individual to make claims from the state. However, this reasoning is somewhat idealistic, as the state has failed in basic service delivery, such as the provision of housing, water and health care, to both South African citizens and migrants. The situation is similar in Kenya. In a context in which the state has not protected migrants within its borders, what does citizenship mean, and is it desirable for migrants? Although documentation is important in order to access services, and the power of the Departments of Home Affairs (DHA) and Refugee Affairs – who are responsible for issuing such documents in South Africa and Kenya respectively – remains strong, studies in

² CoRMSA: www.cormsa.org.za

Johannesburg, Cairo and Nairobi show that documentation does not improve conditions for migrants or refugees (Jacobsen, 2006).

Despite the lack of service delivery, the state remains an important player in migrant affairs. At a national level, immigration policy determines the type of documentation a migrant can obtain, and the level of services he or she may receive from the state. Consistent and clear migration policy is needed at national level, to manage migration better and to ensure that migrants' rights as outlined in the Constitution and international treaties are protected.

However, it is at a local level that migrants, the state and other actors interact within and outside policy to obtain such documentation and claim other social and economic rights. In South Africa, local-level relations between the state, civil society and migrants are key in any discourse on migrant rights. Although the national DHA regulates migration, local municipalities exercise power over the everyday lives of migrants. The strategies adopted by migrants in negotiating with these gatekeepers of power are important in understanding how rights are claimed. The local power dynamics, levels of knowledge about rights and degree of protection that migrants feel in local communities affect their ability to claim rights from local-level institutions and structures. Evidence from Tanzania shows that Burundian refugees drew on their common ethnic identity to identify and integrate with their Tanzanian hosts (Malkki, 1995). Mozambiquans who settled in Shona-speaking regions of South Africa similarly used their common ethnic and language identity to settle, integrate and eventually claim some sort of protection (Polzer, 2008). Drawing on kinship, ethnic or religious ties can thus be a means to negotiate access to spaces where rights can be claimed.

Local power dynamics influence how migrants access services (Polzer, 2008). In her paper promoting local integration of refugees, Polzer argues that refugees claim rights through a multitude of identities including ethnic, kinship and political ties, and that those claims are rooted in a local context of power. It is at a local level that this is most profound and contested. Some assert that local-level identities are more easily adopted by migrants than national identities (Koopman, 2004). Polzer (2008: 9–12) identifies key local actors as those who have an active presence in the area, and who can influence the local conditions in which refugees live (2008: 10), which includes the state and international organisations.

The relationship between state and migrant organisations rests on the presence of an active civil society sector to raise and promote the rights of excluded groups. This is particularly relevant in the context of xenophobic and ethnic violence, which has plagued South Africa and Kenya recently. However, the level of autonomy, authority and legitimacy that civil society has and claims affects its ability to perform these tasks.

Another key player in the civil society sector is the donor. Access to adequate funding and negotiating the conditions that this imposes is critical in shaping the effect of civil society. In Sweden, the Chilean Victor Jara Association and (to a lesser extent) the Iranian-Swedish Association are migrant-led, but the direct

funding provided by the state allows the government to influence the agendas of these associations. The role of donors and the relationships between donors and civil society need more attention.

Preliminary conclusion

Migrant mobilisation is referred to as collective action to protect and promote a group's interest. Globally, migrants have mobilised along ethnic and national lines, using social networks as a means to reach and organise more people. In South Africa, migrants have not mobilised significantly to claim rights. The different levels and branches of state and donors shape the context within which migrants move.

4 DISCUSSION OF FINDINGS: INTERVIEWS WITH MIGRANTS IN JOHANNESBURG

This section is based on five group interviews with 20 migrants in Johannesburg (the interview guide appears in Appendix A), an analysis of the African Cities Survey data set (which surveyed 867 migrants and locals in Johannesburg, in 2006) and an analysis of the Vulnerability Study. It is important to note that all interviews were held at a specific institution, referred to in the study as the "Centre", which biased the findings to an extent as there were more opportunities for interaction with service providers, given the high levels of activity at the Centre. Nevertheless, the perceptions of mobilising and reflections on the relationships with organisations provide interesting material.

Target of mobilisation

Interviews show that migrants define mobilisation in two ways. On the one hand, mobilisation can be seen as unifying migrants and providing channels of support for each other, in which case it is viewed favourably. One respondent described the benefits of mobilisation as follows:

if they [migrants who have mobilised] get problems, they quickly help each other or they quickly not fight each other ... because you have an organisation. [If] I get in trouble, I know that I can quickly phone to somebody so that that group can come and help me.³

On the other hand, mobilisation can also be seen as an aggressive or political act, in which case it is viewed unfavourably. As one respondent explained, migrants are seeking peace, not conflict, in South Africa: 'The idea of coming to South Africa is not for war, but for refugee' [sic].⁴

³ Interview with a Zimbabwean migrant, Johannesburg, 1 October 2009.

⁴ Interview with a Zimbabwean migrant, Johannesburg, 28 September 2009.

In other words, migrants recognise that peaceful organisation can benefit them in South Africa, while aggressive mobilisation may make a precarious situation even more so.

Despite favourable attitudes towards mobilisation, migrants have not initiated or engaged in acts of mobilisation. According to interviews, there are three main challenges to migrant mobilisation. The first challenge is time; migrants are forced to prioritise employment over mobilisation. As one respondent noted:

People don't spend their time searching for help, they spend their time searching for jobs, searching for money instead. So there could be some help outside there, but unfortunately, people, they don't have that time to look for that help.⁵

Another challenge is that undocumented migrants face the risk of deportation. One respondent explained that the fear of deportation leads some to accept, rather than protest, rights infringements: 'So because of that fear, we tend to just keep quiet and say like, okay, I can just let this pass.'⁶This finding supports Amisi and Ballard's argument that refugees tend not to mobilise, for fear of deportation.

The third challenge to mobilisation is that many migrants believe that 'The only way to solve problems is to go home.'⁷

Considering that very few migrants have mobilised, this defeatist attitude does not seem to stem from negative experiences with mobilisation as a problem-solving tool. Instead, it seems to be an ingrained attitude that is in direct contrast to – and a direct challenge to – the positive view most respondents have of mobilisation. This might be seen as a 'discourse of self-exclusion' professed by urban migrants (Landau and Monson, 2008).

When asked what they would mobilise around, hypothetically, respondents listed issues such as police harassment and lack of knowledge of the laws or their rights, suggesting that access to protection and basic services are the key issues facing migrants in South Africa today.

Means to achieve objectives

Migrants interviewed tend to access rights through organisations that either have an established presence at or make regular visits to the Centre where they stay. For example, respondents have access to free shelter, primary education provided by the local school, and health care provided by a mobile clinic run by an international NGO. Furthermore, respondents noted that there are organisations that come to the Centre and distribute items such as blankets, food, toiletries and clothing. It is important to note, however, that access to services is not equivalent

⁵ Interview with a Zambian migrant, Johannesburg, 28 September 2009.

⁶ Interview with a Zimbabwean female migrant, Johannesburg, 1 October 2009.

⁷ Interview with a Zimbabwean migrant, Johannesburg, 28 September 2009.

to satisfactory receipt of services. Many respondents cited the overcrowded and unsanitary conditions at the Centre, the inability to pay for school uniforms, and discrimination faced when referred by an international NGO to larger hospitals, based on nationality and documentation status.

Organisations that respondents mentioned are listed below, in alphabetical order. It is important to note that the majority of respondents were unable to recall the names of organisations from which they had received help. Several mentioned that in addition to the organisations listed below, help had also come from churches, a soup kitchen, and locals who owned shops nearby.

- Coalition Against Xenophobia
- First National Bank
- International Organisation for Migration
- Jesuit Refugee Services
- Médecins Sans Frontières
- Methodist Church
- Refugee Fellowship
- Sangoco
- Sawema
- Solidarity Peace Trust
- United Nations Children's Fund
- United Nations High Commissioner for Refugees

Respondents identified five main disadvantages to their methods of accessing rights. First, money is a large factor in accessing rights such as housing outside of the Centre and schooling. For example, although children can attend school without paying, respondents explained that they still needed items such as uniforms: 'They could go to school without uniforms but then you will feel like a fish out of water if you don't have uniforms.'⁸

Second, documentation is necessary for housing, schooling, opening a bank account, employment, medicine and more. But even with documentation, it is easy to be harassed. As one respondent explained, 'Even if you do have papers, you can still be arrested. Whereas if you have 200 rand, you won't be arrested. So papers help sometimes and don't help other times.'⁹

A third disadvantage is that response time is very long. According to respondents, five or six months can pass before an organisation provides aid to an applicant. This also affects employment; many migrants end up taking jobs for which they are overqualified because it takes government a long time to assess their qualifications. A fourth disadvantage is discrimination based on documentation status and nationality, especially in hospitals. For example, many respondents explained that if they called for an ambulance in English or gave the Centre's location, then the ambulance would take three or four hours to arrive.

⁸ Interview with a Zimbabwean migrant, Johannesburg, 28 September 2009.

⁹ Interview with a Zimbabwean migrant, Johannesburg, 29 September 2009.

Thus, some migrants have taken to calling for an ambulance on a different street, or enlisting a Zulu-speaker to call for them. Finally, respondents said that a lack of awareness of rights is a large challenge to accessing rights. As one respondent explains, 'Three-quarters of the people, they don't know their rights, they don't know where to run when they have problems. So all of us, in fact, three-quarters of the people, they tend to accept each and every thing that comes towards their way.'¹⁰

It is interesting that respondents identified issues outside of their control as disadvantages to their methods of accessing rights. From an outside perspective, one of the most dangerous shortcomings is over-dependence on the Centre, its Head and the organisations that actively seek out migrants. Many respondents stated that the Head and the Centre were their first and last lines of defence against rights infringement: '[My protection] is him only. If I have some big problem, if whatever, I go to the [Head].'¹¹

Furthermore, respondents seem to have accepted that their contact with organisations is in the form of organisations visiting the Centre; migrants do not seem to initiate contact with organisations that exist outside of the Centre. As one respondent says, 'Myself, I haven't received any enlightenment as to who I should approach if I need help.'¹²

Furthermore, few respondents could name the organisations that visited the Centre and provided items, as mentioned above. This implies that a lasting relationship between such organisations and the migrants at the Centre has not been created.

Collaboration and mobilisation

According to respondents, collaboration in the migrant sector does not exist, whether between migrants and South Africans or between migrants and other migrants. The majority of respondents attributed the lack of collaboration to a lack of trust, based on both economic and safety reasons. Some respondents claimed that South Africans took advantage of migrant workers, while others said that the police beat migrants for no reason. Citing the 2008 xenophobic attacks, one respondent said, 'We trusted them, they betrayed our trust.'¹³

Others believe that South Africans are not inclined to collaborate with migrants because other South Africans will be angered if it seems as though migrants are receiving more assistance than South Africans. It is also important to note that some migrants refused to make a blanket statement about whether or not they trusted South Africans. One respondent cited the humanitarian response from some South Africans during the 2008 xenophobic attacks: 'Not all

¹⁰ Interview with a Zimbabwean migrant, Johannesburg, 29 September 2009.

¹¹ Interview with a Zimbabwean migrant, Johannesburg, 1 October 2009.

¹² Interview with a Zimbabwean migrant, Johannesburg, 1 October 2009.

¹³ Interview with a Zambian migrant, Johannesburg, 30 September 2009.



South Africans are bad. Other ones they are nice, other ones they are not nice. Because if you see like that time of xenophobia, other people they bring us food here and clothes, so I – what can I say, it's only half-half.¹⁴

As for other migrants and other Zimbabweans, the lack of trust seems to be based solely on a competition for money. One respondent describes the attitude among migrants as 'I'm here to look for money for my family, leave me alone.'¹⁵

As another respondent explains:

It's getting to be so difficult to trust anybody. From what I've seen happening to other guys and, like I was saying, I have seen Zimbabweans robbing other Zimbabweans, Zimbabweans stealing [from] other Zimbabweans, and I've seen some encounters between South Africans and Zimbabweans. So it's just not easy to trust anybody so far.¹⁶

Some migrants felt that organisations are not able to help or interested in helping with long-term solutions; they view these organisations as resources for assisting with immediate problems. 'There are a lot [of organisations], they come, and they give their help, they go. When they see that they need to come, they come and they give their help and they go.'¹⁷

However, the distrustful attitude towards both fellow-migrants and South Africans seems to disappear in a different context. As one Zimbabwean respondent says, 'Myself, I'd always trust South Africans when I was at home.'¹⁸

Thus, it seems that the economic desperation of migrants, combined with the scarcity of jobs in the city, is one reason for the lack of trust – and thus, lack of collaboration – among migrants in Johannesburg.

Preliminary conclusion

The respondents to this study are failing to mobilise as a result of issues of trust and fear of deportation. Due to the specific context in which they live, there is an over-reliance on established organisations to provide basic services. There does not appear to be any significant desire to self-mobilise or to seek out other avenues to meet their needs. Language barriers, lack of trust and documentation were listed as key issues for migrant survival, integration and mobilisation.

Statistics from the African Cities Database (ACS) show that migrants in Johannesburg neither approach, support nor receive significant help from organisations designed to aid migrants, refugees and inner city residents.

¹⁴ Interview with a Zimbabwean migrant, Johannesburg, 29 September 2009.

¹⁵ Interview with a Zimbabwean migrant, Johannesburg, 29 September 2009.

¹⁶ Interview with a Zimbabwean migrant, Johannesburg, 1 October 2009.

¹⁷ Interview with a Zimbabwean migrant Johannesburg, 1 October 2009.

¹⁸ Interview with a Zimbabwean migrant Johannesburg, 28 September 2009.

- 100% of migrants surveyed report that they do not receive food, aid or other forms of support from international organisations, churches, locals or other sources;
- 98% of migrants do not support police or security committees;
- 98% of migrants do not support organisations run by migrants, refugees and/or inner city residents;
- 97% of migrants do not support organisations that work with migrants, refugees and/or inner city residents (it is interesting that twice as many South Africans support these organisations, though this is still a low number);
- 98% of migrants have not visited UNCHR offices;
- 92% of migrants do not support cultural organisations; and
- 77% of migrants have not been to an NGO or church group that works with migrants.

In light of these numbers, it is interesting that a higher percentage of migrants support religious organisations, rotating credit associations/*stokvels* and sports clubs. The number of migrants who support rotating credit associations/*stokvels* and sports clubs is small, but it is still higher than the number of migrants who support migrant-oriented organisations.

- 50% of migrants support a religious organisation. There is an interesting variation between national groups: only 10% of Somalis support a church or mosque group, compared to 59% of Mozambiquans and 70% of Congolese;
- 15% of migrants give money to rotating credit associations/*stokvels*;
- 11% of migrants give money to sports clubs.

A significant percentage of migrants feel that they have no place to turn when they are in need, while a smaller percentage of migrants rely on social networks, such as family and friends, as well as privately funded sources of help, such as lawyers. Less than 5% of respondents indicated that they would approach either a domestic or an international NGO or aid organisation, religious organisation or organisation run by migrants from their home country for help.

- To borrow R500:
 - 36% of migrants would approach a friend;
 - 55% of migrants either feel that there is no place to find help, or do not know where to find help.
- To borrow R5000:
 - 17% of migrants would approach a friend;
 - 75% of migrants either feel that there is no place to find help, or do not know where to find help.
- For legal advice:
 - 42% of migrants would approach a private lawyer;
 - 29% of migrants either feel that there is no place to find help, or do not know where to find help.

- If there was trouble with the police:
 - 36% of migrants would approach a private lawyer;
 - 45% of migrants either feel that there is no place to find help, or do not know where to find help.
- For accommodation:
 - 42% of migrants would approach a friend;
 - 36% of migrants either feel that there is no place to find help, or do not know where to find help.

Migrant networks are small and do not effectively address migrants' needs once they are settled in Johannesburg. Most migrants access social networks before and during their move to the city, and some approach friends for small loans or help with accommodation after they are settled. However, few receive help finding employment, which is the main impetus for migration to Johannesburg.

- 15% of migrants work for a migrant of the same country of origin;
- 18% of migrants received help with employment when they first arrived;
- 24% of migrants received help buying tickets or with travel arrangements to Johannesburg;
- 24% of migrants provide loans to others in South Africa, which is over twice the number of South Africans who loan money to others (there is also a significant breakdown along national lines; 52% of Mozambiquans provide loans, compared with an average of 25% of other migrants);
- 35% of migrants received help with transportation money to Johannesburg;
- 57% of migrants received help with accommodation when they first arrived in Johannesburg;
- 61% of migrants received general information about Johannesburg.

From the ACS, it appears that migrants are not seeking help from organisations or social networks upon arrival in Johannesburg. The overwhelming feeling among migrants is that there are no institutions to turn when they need help.

5 DISCUSSION OF FINDINGS: SOUTH AFRICAN ORGANISATIONS

This section is based on organisational interviews with 24 South African-based organisations that are working on migration-related issues. A table of organisations that consented to being identified in this study appears in Appendix B, and the questionnaire in Appendix C was structured around five parts: a history of the organisation, its organisational structure and capacity, main activities, collaboration activities, and perception and experiences of mobilising.



home affairs

Department:
Home Affairs
REPUBLIC OF SOUTH AFRICA

**Johannesburg -
Refugee Reception Centre
Tollfree Number: 0800 733843**



Who are the main organisations working in the migrant field?

The civil society sector that is working on refugee and migrant issues in South Africa is relatively small. Broadly, they can be divided into four groups, with the exception of one government office: 1) international donors and NGOs; 2) national NGOs formed and run by South Africans who have migration or refugee issues as one of their programmes; 3) migrant-formed and led CBOs or smaller NGOs which are less established and formalised than Group 2; 4) FBOs, some of which also have NPO status, and one local government office. The very different levels at which these organisations work have created structural limitations for collaboration.

The activities, structure, focus and resources of these organisations differ. A discussion will follow, based on these groupings. A total of 24 organisational interviews were conducted with a range of organisations in South Africa.

**Table 7:
Composition of respondents South Africa (organisational)**

Group	Type of organisation	No. of organisations
1	International donor, organisation ^a	3
2	National NGO	7
3	Migrant-led CBO/NGO ^b	8
4	FBO	7
	Local Government	1
	Total	26

- a. Two of these organisations failed to respond to numerous requests for interviews therefore information is based on desktop research only.
- b. Six of these organisations were interviewed by colleagues from FMSP for another project.

GROUP 1: INTERNATIONAL DONORS AND ORGANISATIONS

History of organisation

Organisation	Year of starting operations in SA
1	1980
2	1997
3	Not known

Of the three organisations, two are international agencies and the other is an FBO. All have offices in most continents, and two of the three have operated in South Africa for more than a decade.

Organisational structure and capacity

The structure of the agencies differs; generally, international offices are either regional or country offices with different levels of authority and budgets. The number of staff and level of skill varies from 50–75 and includes administrative, financial professional and support staff.

Main activities, target group, geographical location

All organisations are working nationally and based in Gauteng. Two of the three work through local implementing partners and provide technical assistance to the national government. The main activities are centred on emergency relief, research, voluntary repatriation and integration and access to services. The FBO has a specific mandate to work with the poor and vulnerable and provides emergency and material relief for up to two months to those in need. It has a community-oriented approach, whereas the international agencies work more at a national level. Two of the organisations work only with refugees, the other with migrants and refugees.

Collaboration and mobilisation

None of the organisations appear to have close relationships with FBOs, local NGOs and CBOs. There is a sense that national level collaboration between themselves and government is good, but this has not translated into close working

relationships on the ground. One organisation feels that the discrimination and the daily fight for survival amongst migrants on the one hand and scarce resources amongst organisations on the other has pushed large scale mobilisation into the background. The external agenda setting of these organisations coupled with senior staff who are often do not have extensive experience in the South African context, has impeded the legitimacy and impact of these organisations and isolated them from many local NGOs, FBOs and CBOs .

GROUP 2: SOUTH AFRICAN-RUN NGOS

History of organisation

The vision and founding rationale of these organisations is rooted in particular areas of social and political justice which also form their core focus. These areas include anti-apartheid struggles, gender violence and access to legal protection. Most of these organisations have been established for more than 20 years although they have only begun working in the migrant and refugee area since 1998. All have formal NGO status.

Table 9: Group 2: number of years in operation		
Organisation	Year of establishment	Year began working on migrant issues
4	1989	1998
5	2006	2007
6	1955	2005
7	1921	Not known
8	1979	Not known
9	1979	Not known
10	1998	1998

Organisational structure and capacity

Generally, organisations falling in this sector are better funded and resourced than migrant-led organisations. Five of the seven organisations have international funders, while the other two rely on private donations and smaller grants. The organisations have functioning boards, clear structures, defined programmes,

more staff with higher skills and rely less on volunteers. They also have stronger links with existing government and NGO forums than migrant-led organisations.

Main activities, target group, geographical location

The main activities of these organisations include working toward the eradication of gender violence, trauma counselling, disaster management, home-based care for HIV sufferers, advocacy and lobbying, capacity-building of service providers, and legal assistance and litigation. None of these organisations work exclusively on migration issues; rather, migrants and refugees are mainstreamed into the organisations' overall programme and target groups.

Most of the organisations work at a national level, with field offices across the major cities in South Africa. They work with South Africans and non-nationals. Two of the seven work only with refugees and asylum-seekers, due to donor conditions.

Collaboration and mobilisation

Most organisations work actively with local and national government departments and local FBOs and NGOs in their area of locality to refer clients for support and services. Most find such relationships useful as these allow them to stretch resources and reach more people. In most cases, collaboration has not extended beyond the referral system.

Some of the challenges identified for mobilising in the migrant sector include insufficient resources and funding; lack of national co-ordination among organisations; high levels of distrust among migrants, organisations and government; language barriers; the difficulty of working with large and diverse groups of people; the relatively short time that migration issues have been on the national agenda and the corresponding lack of awareness or knowledge on how to deal with them; and a lack of strategic partnerships with media and churches.

Migrant mobilisation is understood in different ways; some organisations see it as a government-supported initiative, while others feel civil society or even migrants themselves need to take the lead. However, most agree that the target of mobilisation should include a clear and consistent national policy on migration, easier access to documentation, and efforts to foster awareness and understanding of the rights of migrants.

GROUP 3: MIGRANT-LED ORGANISATIONS

History of the organisation

All the organisations interviewed were started by migrants in response to the social, economic and political inequalities facing them in South Africa. Many were

spearheaded by one or two individuals who did not find assistance from NGOs or the state and felt a need to establish a body that would represent their interests. All, with the exception of one, which was started earlier, were established between 2005 and 2009. Six of the eight organisations were formed on national and ethnic lines. The other six have a broader Pan-African base. Six of the organisations are registered as non-profit organisations (NPOs)¹⁹. The status of the other two is not known.

Organisational structure and capacity

Most of these organisations have a weak organisational structure and weak and limited capacity. All have less than 15 staff, many of whom have multiple roles, with the founder often acting as chairperson or director. All claim to have boards, but their function is not well articulated. Seven of the eight organisations do not have stable or long-term funding from recognised donors. Most rely on membership fees to sustain their activities, and have short-term partnerships with other NGOs or government to implement specific projects. One organisation has an international funder.

Main activities, target group, geographical location

The range of activities is diverse and includes the following:

- Skills training for entry into business and employment;
- English classes;
- Peace-building and integration by integrating migrants and locals in community groups;
- Emergency and material relief;
- Marches, learning-sharing dialogues, advising South African government on Zimbabwean issues;
- Protesting against the xenophobic attacks;
- Mobilising all migrant organisations;
- Working toward a non-xenophobic South Africa by promoting African culture, education and cultural exchanges;
- Promoting the interests of the Somali community in South Africa in relation to protection and documentation;
- Working toward development in the DRC.

Broadly, the range of activities can be summarised into three themes: contributing to national interests in the home country; facilitating access to services and protection in South Africa; and working toward integration in host communities.

¹⁹ NPOs exist to serve some public interest and do not operate to make a profit. NGOs are non-governmental bodies that include NPOs.

Most organisations are based in Johannesburg; some have satellite offices and/or representatives in other cities in South Africa. Most claim to be reaching thousands of migrants either through direct membership or via church activities, internet groups and community forums.

Collaboration and mobilisation

Most organisations have had negative experiences in working with government and civil society in South Africa, citing issues of legitimacy and distrust as the major stumbling blocks in establishing working relations. Some are outwardly hostile toward the United Nations High Commissioner for Refugees (UNHCR):

‘For them [UNHCR], a refugee is an imbecile.’²⁰

‘Many international organisations employ people who have no knowledge of the context on the ground, and many have hidden agendas.’²¹

‘UNHCR is a corrupt body which benefits its “cronies” only.’

Others sense a feeling of being taken advantage of by government to satisfy public opinion:

Yesterday, a member walked into Luthuli House [ANC Headquarters in Johannesburg] and told people he represented the Malawian community in SA. They treated him like a big man and gave him ANC posters to distribute. He just went in to see what would happen.²²

It is evident from the interviews that relations between the government, civil society and migrant communities are strained. Although there are cases of collaboration, these are at local levels and are mostly isolated and not formalised. What is encouraging, though, is the greater degree of collaboration within and among migrant communities, particularly following the May 2008 attacks.

Most concede that collective mobilisation has not occurred in South Africa on the scale to which it should, due to insufficient collaboration because of competition for resources and status among stakeholders, lack of funding, inconsistent policies and bureaucratic and uncommitted practices from government. Some of the key challenges to mobilising migrants include language barriers, distrust in the communities and lack of resources.

Some of the successes in mobilising have occurred through strategic partnerships with the media. This has led to increased publicity and credibility, and access to funding and other crucial resources such as office space and access to telephones and the internet.

²⁰ Telephonic interview with the director of organisation A, Cape Town, 15 July 2009.

²¹ Telephonic interview with the director of organisation C, Cape Town, 24 August 2009.

²² Interview with a project co-ordinator, organisation B, Johannesburg, 10 September 2009.

GROUP 4: FBOs

History of the organisation

Table 10: Group 3: history and organisational structure			
Organisation	Years in operation	Number of staff	Status
11	2006	5 staff, 11 volunteers	NPO, FBO
12	1998	Not known	NPO, FBO
13	1996	7 staff, varying numbers of volunteers	NPO
14	Mid 1990s	13	Started as an FBO now NPO
15	1994	11	FBO now NPO
16	2002	5	NPO, FBO
17	More than 40 years	Not known	Church and NPO

All but one of the organisations were established after 1994 by various churches and other FBOs to respond to the needs of migrants and refugees who approached these institutions for assistance. All have NPO status, and a further six identify themselves as FBOs as well. Most are Christian, although one is interfaith.

Organisational structure and capacity

The size of each organisation is small, with all having less than 15 staff. The typical structure includes a board or committee which has an oversight role, a director who is responsible for management and fundraising, an administrative and financial officer and programme staff made up of social workers, auxiliary social workers, community workers and paralegals. Most state that they are under-staffed and do not have sufficient professionals, particularly social workers.

Funding is a key challenge for all organisations; two of the seven are UNHCR implementing partners, and the remaining five are funded through a combination of private church donations, specific church funds and private donations. One has additional funding from the Department of Social Development. All cite lack of funding as the main obstacle to implementing their programmes.

Main activities, target group, geographical location

The main activities and target groups of the organisations may be distinguished by the principal funder. The UNHCR implementing partners target only refugees and asylum-seekers, and focus their activities on:

- weekly orientation sessions where information on the rights of refugees and access to services is given;
- limited material support, based on need and availability of resources; and
- psycho-social assessments of all applicants, and referrals to relevant service providers.

The other five organisations target all non-nationals, regardless of status (one focuses exclusively on migrant women and children), and most offer one or more of the following services:

- English language classes;
- direct intervention with service providers and state institutions to facilitate access to services such as documentation, child support grants, education, health, etc.;
- direct service provision, mainly in the form of shelter, primary school education and material relief;
- specialised services such as trauma counselling; and
- assistance with job placement.

In addition to the above, one organisation has a specific focus on integration; its activities include children's groups and youth groups, and community workshops which target non-nationals and locals.

Despite limited funding and insufficient staff, organisations seem to have a wide reach, and most would like to expand their activities to reach more people, given additional resources.

**Table 11:
Group 3: main activities and target group**

Organisation	Average number of people receiving direct services monthly	Geographic location
11	230	Johannesburg and Pretoria
12	Estimates 1000	Cape Town
13	Shelter to 40 women	Cape Town

14	700	Durban
15	800	Cape Town
16	500	Durban
17	More than 3500	Johannesburg

Collaboration and mobilisation

Most of the organisations seem to enjoy credibility among migrants, and sound working relations with local government and other local NGOs. Many work closely with each other at a local level, and with other NGOs through informal referral systems, in order to stretch resources. At a national level, collaboration is weaker. Many do not work with national NGOs or government departments. The non-UNHCR funded organisations do not have a positive view of the situation, with many stating that they are uncertain of the UNHCR's exact role. CoRMSA is seen to have an information function only, with no substantive organising role. Several organisations discussed how repeated funding proposals to the Department of Social Development have been unsuccessful, and there is a general feeling that bureaucratic hurdles exist in dealing with national government departments such as DHA and the Department of Labour.

All organisations, with the exception of one, feel that there is insufficient collaboration between stakeholders on migration issues. Most organisations have found it difficult to mobilise migrants due to language barriers, ethnic and national divisions, insufficient knowledge, skills and funding to mobilise, and the lack of a common mobilising factor. All agree that the key challenges facing migrants in South Africa are documentation and access to basic services such as housing, shelter and work.

Generally, there appear to be more challenges than opportunities to mobilising, with practical and structural problems identified as key obstacles.

Preliminary conclusion

The organisations interviewed for this study fall into four broad groups. Firstly, the international donors and development organisations that have global agendas, bigger budgets and more resources. Their main activities differ, from international relief to resettlement and establishing partnerships with government agencies.

The second group are the more established South African-based and run NGOs, many of which work on a range of developmental and human rights issues, of which migrant and refugees' interest is one. Some of the challenges that they face include lack of adequate funding and scarcity of skills. Their main focus is on access to rights and service provision, and includes raising awareness of and

facilitating access to specific rights such as health or education, and providing specialised and in-depth services such as legal assistance and trauma counselling. In most instances, services are available to all residents of the geographic area in which they operate, including locals and all categories of non-nationals.

The third group consists of migrant-led organisations. These have been established mostly in the past ten years, and are marked by weak institutional capacity and limited, unstable funding. Some work with specific national groups while others work more broadly. Most have a local focus, and have not had good relations with key state and national players.

The final group consists of FBOs that have more of a relief and material assistance-approach to their work. They work with all categories of migrants, and seem to have credibility and a wide reach.

6 DISCUSSION OF FINDINGS: NAIROBI

This section is based on an analysis of the African Cities Dataset, which surveyed 755 migrants and Kenyans in Nairobi in 2007, as well as organisational interviews and/or desktop research regarding six organisations working on migration issues in Nairobi.

What is known about individual mobilisation and collective action

Statistics from the Nairobi ACD show that migrants have slightly more contact with state institutions and NGOs than those surveyed in Johannesburg, but that most do not seek assistance, support or information from these bodies.

The majority of migrants in the Nairobi survey (83%) have refugee status, which is higher than the 48% in the Johannesburg survey; yet only 57% have visited the local UNHCR office, and 88% have not been to the local Department of Refugee Affairs. Despite recognised legal status, migrants are reluctant to approach the institutions set up to assist them. Most would seek support for work, advice, shelter and money from religious organisations, friends and family, or feel that there are no available options.

- 58% have not been to an NGO;
- 99% do not support any NGO for migrants;
- 97% do not support any NGO run by migrants;
- 97% do not contribute to social or sports clubs;
- 98% are not part of any police forum;
- 95% are not part of any community forum.

As was the situation with migrants in the Johannesburg survey, respondents are more likely to approach FBOs or religious institutions when in need.

- 37% would go to a religious group for legal advice;

- 53% support a religious organisation;
- 60% would ask a friend for assistance if they need accommodation, 16% a religious organisation, and 2% a migrant-run NGO.

Social networks

Ninety-eight per cent of migrants have been encouraged by family or friends to come to Nairobi, or have been supported through the provision of accommodation, general information on Kenya, or money for purchasing a ticket. Almost three-quarters of those sampled used money from family and friends to pay for their trip. For most, family or kin were their first contact in Nairobi.

Table 12: First contact for migrants in Nairobi

First contacts Nairobi	Frequency	Percent
Did not know/did not respond	4	0.57
Local Kenyans	151	21.42
Kin or family member already in Kenya	319	45.25
Members of pre-migration community	84	11.91
People from country of origin	62	8.79
Kenya aid workers/NGO	28	3.97
Kenyan government officials	3	0.43
Religious leaders	6	0.85
Chiefs/village heads from home country	1	0.14
Chiefs/village heads from Kenya	1	0.14
Employer	12	1.70
Education institution	2	0.28
Other	32	4.54
Total	705	100.00

Most migrants would go to a friend if they needed to borrow a small amount of money such as R500 (81%). For a larger amount of R5000, 34% would go to a bank and only 11% to a friend, while 20% feel there is nowhere they can go.

Work

Seventy-two per cent of migrants could not find work upon arrival in Nairobi. This improved somewhat after time, but 67% were still unemployed at the time of the survey, and a small number (17%) were self-employed. If they did not work, 59% of migrants used their savings to support themselves, suggesting that self-sufficiency was a more significant resource than organisations or networks.

Identity

Ethnic, tribal and religious identity was strong among the respondents, and most would fight to defend these:

- 96% are proud to identify with their ethnic group identity;
- 95% would fight to defend their home country;
- 91% would fight to defend their tribe or ethnic group;
- 83% would defend their religion;
- 51% would defend Kenya.

Collective action

A total of six organisational interviews were conducted in Nairobi, and were supplemented by internet-based research. A breakdown of these appears below. A complete list of consenting, participating organisations appears in the Appendix Due to the small number of respondents, findings will be summarised and analysed as a whole.

Type of organisation	Number
International NGO or agency	2
NGO	1
FBO	2
Migrant run NGO	1

Total	6
International NGO or agency	2

**Table 14:
History, mandate and legal status – Nairobi**

Organi- sation	Year established	Mandate	Legal status
1	1951	Foster positive migration management that benefits migrants and locals	International NGO
2	1999	Entertain and educate refugees through film and media	International NGO
3	1996	Provide trauma counselling to refugees	FBO
4	2004	Missionary	FBO
5	1998	Promote and protect rights of refugees	Migrant-led NGO
6	1973	Facilitate access to the legal system for the poor	NGO

History of organisation

With the exception of one organisation, the respondents have been working on refugee issues for less than 15 years. This is higher than in the South African cases. Generally, the FBOs have less of a developmental or human rights perspective in their mission than the other organisations. This is reflected in their mandate and activities.

Organisational structure and capacity

With the exception of one of the international NGOs, all the respondents have between 5 and 20 staff and make use of a varying number of volunteers. The FBOs are the least resourced in terms of staff, capacity and funding. Both FBOs have a staff of five, who are skilled in theology. Their main funding is from member contributions and other churches. In contrast, the NGOs have skilled

staff of between 11 and 20, comprising lawyers, advocates, paralegals, sociologists and communication specialists, and draw funding from international donors such as the UNHCR, US Government and other development-oriented donors.

Main activities, target group, geographical location

The main activities of the organisation can be grouped into three broad categories: material relief, personal intervention and public interest. All organisations work in the two main refugee camps in Nairobi: Daadab and Kakuma.

Material relief

This includes the work of mainly the two FBOs, and consists of feeding schemes, visits to the sick, motivational talks and emergency aid packages.

Personal intervention

All the organisations have some component of this in their programmes. Activities range from legal advice, assistance in obtaining documentation, and scholarships for education, to psycho-social intervention, including trauma counselling.

Public interest activities

All the organisations work on public interest issues at some level. These include increasing awareness among refugees on their rights, interfaith dialogues to foster understanding and tolerance, intervention with police on arrest and detention issues, training of police and judiciary on the rights of refugees, policy reviews, monitoring the implementation of the Refugee Act 2006, and public interest litigation.

The number of people reached each month ranges from 150 to 400. In a city with a population of 96 000 legal refugees, most recognise that this is insufficient. Most organisations cite lack of funds and language barriers as the main obstacles to increasing their reach.

Collaboration and mobilisation

Mobilisation is understood in different ways; for some organisations, mobilising migrants means educating or empowering them. For others, mobilisation is about joint co-ordination and collaboration in the sector. For the latter, this appears to occur mainly for events, rather than for systematic, long-term change on migrant issues.

There appears to be some collaboration between the NGOs, relevant government departments and international agencies on facilitating access to documentation and services. There is very little collaboration between FBOs and other actors. They do not seem to share the same platforms or work from the same mandate.

All organisations felt that more funding was needed to mobilise properly, and that language barriers and ethnic divisions among migrants prevent proper collaboration. Working in camps is also challenging, as people have restricted spatial movement and are reluctant to seek solutions for themselves.

All organisations felt that lack of documentation, social support and security were the key issues affecting migrants in Kenya, and called for state-led self-settlement and integration schemes to improve conditions for migrants and locals.

7 FINAL CONCLUSIONS AND RECOMMENDATIONS

Migrants have not mobilised significantly in South Africa or Nairobi, at a collective or individual level.

Individual mobilisation

- Many migrants in South Africa fear deportation if they claim public spaces for protest, whilst others feel that addressing immediate needs such as shelter and food is more of a priority.
- In Nairobi, living in refugee camps, with restricted movement and active service providers, hinders the opportunities for mobilisation, and one questions whether camps foster a dependency mindset. The interviews with migrants in Johannesburg who live in a closed, “camp-like” context where agencies provide many free services has also raised similar concerns regarding a lack of agency on the part of migrants.
- In both countries, language barriers, documentation, lack of awareness of their rights, and lack of trust of state officials, donors, NGOs and migrant-led organisations are listed by migrants as key barriers to claiming rights.
- Migrants in South Africa cite the long response time for organisations to assist them, and discrimination, as additional factors that impede their claims to rights in South Africa.
- Migrants in Nairobi and South Africa are accessing services through a variety of sources, which include social networks and FBOs. A limited number claim rights from NGOs and the state. More information is needed on how migrants access these channels, and what strategies they adopt to survive.
- Previous studies on migrant mobilisation show that migrants tend to organise along ethnic lines. However, the Zimbabweans interviewed in this study saw other Zimbabweans either as competitors for jobs, or as potential

criminals. This ‘every man for himself’ attitude overrides any sense of shared ethnic or national background. Most respondents shared the attitude that if they wanted to solve problems, they needed go home.

- It appears that respondents are not mobilising because they do not have adequate resources (time), lack strong networks (trust within the ethnic or national group), and do not enjoy a political environment that is conducive to mobilisation. This relates to popular mobilisation theories, which cite these three factors as important considerations in mobilising.

Collective mobilisation

- The absence of a common agenda to mobilise behind, limited funding, and fragmentation in the sector have contributed to a weak and fragile civil society in South Africa.
- The migrant sector in SA – comprising migrants, NGOs, donors, migrant-led organisations and government – is plagued by power dynamics, mistrust and politics, which impede effective and comprehensive collaboration
- Collaboration between the different organisations working in the migrant sector in both countries appears to be ad hoc, and largely confined to referrals, information-sharing and participation in joint public events. There appears to be no clear strategy or target for collaboration in the sector. Collaboration across different levels and with different stakeholders is limited.
- NGOs in both countries, whether migrant-led or not, are not reaching enough migrants. The capacity of organisations to meet the needs of migrants is inadequate. Services are not well co-ordinated, skilled staff and resources are scarce, and collaboration is not formalised. Institutional relationships need to be built and personal relations strengthened in the sector.
- Migrant-led organisations are formed largely along ethnic and/or national lines, and their targets of mobilisation are social/economic/political inequalities. This may have contributed to a lack of mobilising across migrant groups.
- Migrant-led organisations have had some success in collective mobilisation when they have used the media as a strategy to mobilise. Identifying such local sources and having the knowledge, time and funds to access them is critical in realising the potential of this resource.
- In South Africa, migrant issues are addressed at four levels: international donors and agencies, South African-led NGOs, migrant-led NGOs and FBOs. Better collaboration among and between these levels, and with government, is needed.
- In Nairobi, the main activities of the organisation may be grouped into three broad categories: material relief, personal intervention and public interest. All organisations work in the two main refugee camps in Nairobi. Addressing

migrant issues within a broader human rights and development agenda would increase opportunities for mobilisation, and migrants' access to rights.

- National-level NGOs appear to have significant potential in mobilising for migrants' rights in both countries. They have more resources, better institutional capacity, and experience in advocacy and mobilising. Ensuring that migrant issues are integrated into national discourses of development is a key part of tapping into this potential.

Institutional analysis

- The absence of a clear and consistent national migration policy, which provides for effective migration management systems and structures, and ensures that the rights of migrants are protected, together with the absence of implementation by various levels and branches of the state hampers local-level efforts at improving services and relationships for and among migrants.
- Migrant issues in South Africa are not integrated into the overall developmental agenda of civil society and government. Only a small number of South African NGOs have a migrant focus in their programmes. With their greater resources and organisational strength they are ideally situated to reach more migrants.
- Awareness of and funding for migrant-related programmes within government departments, national NGOs and migrant-led organisations is needed to integrate and prioritise migrant issues within the broader civil society agenda.
- The level of mistrust in the sector in South Africa needs to be addressed. Competing political and personal agendas, and confusion and suspicion over the role of the state and international donors, need to be discussed. Crucially, several common objectives for migrants' rights must be identified in order to create inclusivity and collaboration in the sector.
- Mobilisation is understood in different ways among NGOs in both countries. Some see it as collaboration, and others as empowerment or education of migrants. Most identify different *types* and *levels* of stakeholders as key players in any mobilisation efforts. A clear understanding of the meaning and target of mobilisation and the responsibilities of different stakeholders is needed, before any successful co-ordination can take place.

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Appendices

List of organisations which participated in this study and agreed to be identified: South Africa	
Organisation	Geographical location
Black Sash	Johannesburg, works nationally
Bonne Esperance	Cape Town
Cape Town Refugee Centre	Cape Town
Central Methodist Church	Johannesburg
Centre for Study of Violence and Reconciliation	Johannesburg, works nationally
Legal Resources Centre	Johannesburg, works nationally
Refugee Pastoral Care	Durban
Refugee Social Services	Durban
Scalabrini Refugee Services	Cape Town
Sonke Gender Justice Network	Johannesburg, works nationally
South African Red Cross Society	Johannesburg, works nationally
Xaveri Movement	Johannesburg
Zimbabwe Solidarity Forum	Johannesburg

List of organisations which participated in this study and agreed to be identified: Nairobi	
Organisation	Geographical location
Africa Refugee Programme-Great Lakes	Nairobi
Deeper Life Restoration of East Africa	Nairobi
Filmaid International	Nairobi
Kituo Cha Sheria (Urban Refugee Program)	Nairobi
Norwegian Refugee Council	Nairobi
Legal Resources Foundation	Nairobi
Refugee Council of Kenya	Nairobi
UNHCR	Nairobi

UNLOCKING THE POTENTIAL FOR CIVIC ACTION AND STRUCTURAL CHANGE: REFLECTIONS ON MOBILISING SOCIAL JUSTICE

Jeff Handmaker and Remko Berkhout

The situation of backyard-dwellers is a ticking time bomb waiting to explode ... if it remains unattended to. We are hopeful that as we pursue the matter in higher courts, a precedent, compelling positive action on the part of all duty-bearers to the right to housing in relation to backyard-dwellers, will be set.¹

1 CAPTURING THE SPIRIT OF SOCIAL JUSTICE

This book has attempted to capture the spirit of an international conference on *Mobilising Social Justice* in Johannesburg in November 2009, where complex issues around social justice were discussed in the framework of the Hivos-ISS Knowledge Programme on Civil Society Building. Inspired by similar experiences, the citation above by a South African human rights lawyer confirms that social and economic inequalities continue to undermine stability and democratisation issues in South Africa. These inequalities are indeed reaching boiling point; and social movement activists are working together with lawyers, faith-based and traditional leaders and community mobilisers to try and address massive and growing disparities between rich and poor. In trying to address these inequalities, the country's formal democratic institutions are being seriously tested, and there is a growing fear that the institutions are fast losing the legitimacy they acquired in the wake of democratic dispensations during the early to mid-1990s.

In this concluding chapter, we unpack the main objectives and questions of the Knowledge Programme. We take account of various reflections to the preceding chapters. We also suggest some areas for further reflection.

¹ South African attorney Louise du Plessis, reacting to the decision of the North Gauteng High Court in Pretoria to confirm the eviction of several hundred poor people living in shacks on a corporate-owned farm, 'High Court rules against Itireleng evictees', Press Release, Pretoria: Lawyers for Human Rights, 1 March 2010.



Drawing on our own experiences and extensive stakeholder consultation, and after consulting with numerous colleagues in Latin America and Southern Africa, ISS and Hivos developed a set of objectives for the knowledge programme in 2008. The objectives of the knowledge programme served as the starting point for a process that took almost two years to unfold. These were (1) to support innovative research, which led to the choice of the research projects that are reflected in this book; (2) to translate this research and generate useful material for dissemination among various audiences; and (3) to promote the exchange of knowledge to stimulate both a debate and dialogue, which led to the organising of this conference. The five research chapters that were developed and collected in this book, one of which was accompanied by a documentary film, still have much more to contribute. This book is merely the latest phase in a process that will continue to unfold as the emerging insights find their way into dissemination events, civil society deliberations, and follow-up projects for further research.

The programme was also informed by a number of research questions that framed the choice of research projects that would be supported and affected the organisation of the conference. How can we understand the dynamics of civil society formation and the role of local actors in this process? How does civil society-building as a process contribute to structural changes in the unequal balance of power in society? And how do external actors – donors as well as support or solidarity organisations – contribute to this process? This concluding chapter will reflect on all three of these research questions.

2 DYNAMICS OF CIVIL SOCIETY FORMATION

The dynamics of civil society formation is a multi-dimensional topic that cuts across every chapter that is included in this book. Power is clearly a central element in understanding and explaining these dynamics. In theorising the dynamics of civil society formation, it is important to understand *why* civil society or civic actors, of all descriptions, decided to embark on a particular campaign or other strategy. How did they go about doing so, and did this end up leading to structural change?

As one participant commented, civic strategies are essentially about ‘the art of the possible’. However, there is some dispute regarding how to define what civil society is. Is it any civic actor? Must they have a direct relationship with the state? Can it be, as some participants argued at the conference, those who set themselves apart from the state? Can it be *uncivil* society, which may decide to be confrontational in relation to the state? Are these even worthwhile questions, and does civil society simply define itself in relation to particular circumstances?

Notions of citizenship will also differ. For example, migrants are often missing from such discussions, even when these discussions concern the discrimination seen against them. Do civic actors include the ‘untouchables’, as Sharukh Alam asks in the epilogue? Do they include, in the South African

context, those who cannot access basic services, such as water? Although Dugard discussed the issue extensively in chapter five of this book, the quality of a poor person's citizenship remains a point of bitter contention.

The dynamics of civil society also speak to interactions with the state, as argued in chapter two in this book, especially in relation to legal activism advocating the accountability of the state. However, there are other forms of civic expression within the state, such as in cultural life. Some argue that civil society can also be seen to act *outside* the structures of the state; civic-driven change or action from below.² This also begs the question: what *is* the state? Is it, in the words of one conference participant, the 'vicious, uncaring state' or the 'cuddlier picture' of the state, as represented by courts, parliament and other, more formal features of the state? Jenkins' contribution reminds us that the institutions of the state are also a work-in-progress, and that there are spaces for constructive engagement that are underutilised.

Whatever one's relationship with the state, it is clear that the state, or features of it, has turned against the people, as confirmed by Dawson in chapter five and Dugard in chapter four. Police have stifled protest, often in violent ways. The city of Johannesburg has failed to deliver to the people of Phiri, and the constitutional court has failed to provide a remedy. Furthermore, as was mentioned in the conference debate, the people – especially social movements such as the Anti-Privatisation Forum – have turned against the state. Worse, people seem to be turning against each other in South Africa, with the outbreak of violence against migrants in Johannesburg being an especially horrifying example. Understandably, the dynamics of struggle still relate very much to interactions between different sections of society.

Jinnah's contribution illustrates an observation echoed widely among conference participants: that NGOs and social movements may be perceived as elitist in their representation of issues and communities. They may not necessarily possess the legitimacy that they claim in their relations with state institutions. On the other hand, this dynamic of representivity and legitimacy forces one to consider the politics of elites, as it is clear that the relationship between certain prominent representatives of civil society and representatives of the state can often lead to things getting done in a way that confrontational interactions cannot do them. At the same time, one must remain connected with the interests and demands of communities directly affected by social justice issues, and failing to do so is what often leads to charges of elitism.

Finally, there is a need to examine the rights consciousness of individuals and officials, both in government and in civil society, or as Sharukh Alam mentions, a 'cultural consciousness' which may transcend rights-based approaches. Alam elaborates on this theme in an afterword to this book, explaining the subtle but

² See, for example, Fowler and Biekart, 2008.

highly persuasive influences of culture in approaching social justice mobilisation in India.

3 STRUCTURAL CHANGE

As the conference revealed, the contributions of civic actors to structural changes in the unequal balance of power in society relate notably to gender inequalities, but also ethnic disparities, religious differences, and differences of class.³ Clearly, 'structural change' is a concept to be unpacked further, and social consciousness is an important part of this.

Some argued that structural changes were incremental, accomplished over a long period of time, while others argued that there was a need for a rupture, a dramatic event that gets the state's attention, the company's attention or broader society's attention. Therefore it is also important to reflect further on the nature of (and timeframes in which one wants to see) structural change taking place. Is civil society's participation in a government-led process, which may take several years, giving effect to a right? Is it better to focus on legal process in the courts, to participate in the budget process in parliament, or to contribute to a policy-making process led by a government department? What is the quality of civic participation in a government-led process? Does this participation advance rights, or does it amount to co-option? When is it appropriate to change one's strategy?

It is clear is that civil society organisations implicitly understand the dynamics of the processes they engage with, but it can be helpful, from a strategic point of view, if organisations articulate these dynamics more explicitly. The budget process in chapter four, for example, is complex and multi-layered, and requires careful analysis and timing at an early stage in the process for civic interventions to be successful.

There was much scepticism expressed at the conference about legal interventions, and in particular, their lasting effect. In some cases, government – whether represented by the police, or by administrative officials – simply fails to comply with a court order. In the case of non-compliance, the prospects of a legal remedy can feel rather hollow. Even worse, the goal of legal interventions, which have tried to promote respect for (and compliance with) economic and social rights contained in South African constitutions, can be felt to be rather meaningless.

However, quantifying the cost of delivering economic and social rights can be productive; not only for litigation purposes, but also in defining the position one might take in the budget process, and in explaining the costs of litigation in relation to an early, government solution to a problem. For example, the cost of producing a court record can be close to a million rand, money that – it could be

³ See also Crenshaw, 1991.

argued – should rather be spent on social service delivery. Yet, as Dugard’s contribution reveals, legal interventions should not only be evaluated by courtroom outcomes, but on their relationship to the broader struggles from which they originate.

A number of interventions at the conference highlighted concerns that the Constitutional Court was failing the people in a number of key decisions, especially in the area of economic and social rights; although as mentioned, the visibility that such high-profile trials gain in the media contributes to a public consciousness about such issues. This echoes studies from social movement theory, which suggest that the impact of collective action is as much about influencing the *climate of ideas* in the efforts of social movements to construct a collective identity and contribute to associational life, as it is about realising concrete policy changes.⁴ In South Africa, there are many relevant institutional frameworks beyond the courts and parliament with which one can interact, including ANC branches, ward councillors, local and national government-appointed committees, and others that filter much information through the ranks to local, provincial and national government. This is especially the case with the ANC, which has a broad, democratic structure. However, there are also co-operative platforms between municipalities and civil society groups, such as migrant groups, who have been included in broader notions of *city citizenship*.⁵

4 EXTERNAL ACTORS

Several of the chapters – and many contributions from participants – focused on the nature and quality of interventions from external actors. What defines an external actor? Some expressed concern as to whether there is an over-emphasis on impact. NGOs are often said to be mirrors of the external donors who support them. Such general statements may overlook the potential for more constructive engagement, and underestimate the genuine willingness to learn displayed by many donor agencies. Prominent representatives from major donors in the South African social justice sector, such as the Ford Foundation and the Foundation for Human Rights, attended and supported the conference.

As discussed (especially in chapter two), civil society organisations must contend with a constant tension between supporting the progressive policies and practices of government on the one hand, and maintaining their critical independence on the other. It is important to make certain processes accessible

⁴ Warren, M. (2001) *Democracy and association*. Princeton, Princeton University Press; Diani, M. and D. McAdam (eds) (2003) *Social movements and networks: relational approaches to collective action*. Oxford: Oxford University Press; Tarrow, S.G. (ed.) (1998) *Power in movement: social movements and contentious politics*, Cambridge: Cambridge University Press; Meyer, D.S., N. Whittier, et al. (eds) (2002) *Social movements: identity, culture, and the state*. Oxford: Oxford University Press.

⁵ Examples include the Local Government Working Group on migration issues, established in Johannesburg by the Forced Migration Studies Programme at the University of the Witwatersrand as a platform for organisations, local government officials, police and experts; and Tutumike, a civic-municipal government working group in the Cape Town area.

and transparent, both to donors and to the organisations and constituencies they support, as well as to development practitioners in general. These would include the legal process, the budget process and other processes for claiming rights.

Above all, one cannot adjust social justice issues effectively without bringing people to the process, a point remarked upon earlier. In other words, it is not only NGOs who ought to be part of these processes, but also people in the communities who are experiencing water cut-offs, who are experiencing xenophobic violence. They can speak directly to the policy-makers, with the potential for a much stronger impact than the NGOs. The attempts of the Civil Society Knowledge Building Programme to adopt an inter-disciplinary approach to addressing these issues was remarked upon by conference participants as a step forward, yet the studies discussed at the conference and reflected in this book merely scratch the surface of community dynamics at grass roots level. For example, the question: 'What was really behind the protests?', discussed by Dawson, continues to make headline news in South Africa as this book goes to press; but there is still a dearth of in-depth analyses of the realities experienced by ordinary citizens in South Africa.

5 UNLOCKING THE POTENTIAL FOR STRUCTURAL CHANGE

As we stated in the introduction, this book cannot offer a conclusive analysis of civic mobilisation strategies for social justice. The preceding chapters have offered various perspectives on civic strategies for change, to serve as food for thought for practitioners and as academic reflection on the dynamics of civic action. The next section shares additional reflections on civic strategies for social justice.

First, the studies seem to indicate that successful civic action requires a certain level of *long-term, strategic thinking*. Jenkins' research demonstrates that in-depth knowledge of governance processes may be a necessary ingredient for civic actors striving for more responsive governance. Handmaker argues that civic action requires thorough context-analysis, and a sound appreciation of the conditioning nature of structural boundaries, which is itself defined by a specific historical context. In the Mazibuko water case, civic actors combined broad-based social mobilisation with engaging the state in court through a long and expensive process – which offered few tangible results, but much inspiration to the activists; and considerable media attention. Not all NGOs involved in the complex dynamics of migrant rights seem to be getting this message, judging by the disconnect between migrants' realities and NGO programmes revealed by Jinnah and Haloday in chapter six.

In addition, the studies show that successful civic action most often involves a *combination of different strategies*. Dawson's impression, in chapter five, is that community protest on its own does not seem to have led to much progress. Dugard clearly illustrates the shifts that can occur as a result of a strategic



portfolio of strategies, including legal action, peaceful protest, public shaming, media and international networking, a conclusion echoed by Handmaker's case studies, discussed in a larger study that is summarised in chapter two. NGOs trying to influence the long-term cycles of the budget process risk a disconnect with the issues and people that they are working for, but also create opportunities for influencing the content of government budgets in a meaningful way.

The studies also reveal that *strategic networking* is a key ingredient for civic action. The Mazibuko case is a notable example: communities, social movements and specialised human rights NGOs joined forces with successful results. According to Jinnah and Haloday, a reason for the lack of progress on human rights accountability for migrants and refugees might be a relative lack of co-operation in the migrant sector. The strong implication of this is that organisations should avoid being too exclusive; linkages between existing networks, and the swapping of experiences and strategies, could be very productive. NGOs that tend to be wary of social movements and other broad-based civic groupings could potentially do more to engage with a broader sector of civil society that works outside of the formal structures to which NGOs are more accustomed. For example, Lawyers for Human Rights (LHR) and the Centre for Applied Legal Studies (CALS) have both demonstrated that it can be very productive to build partnerships between their NGOs and more informal community structures.

The cases discussed in this book also force us to *(re)think conventional conceptions of change*. Was the final ruling of the constitutional court in the Mazibuko case simply a defeat for the Phiri community, or a building block for the long-term process of constructing a more just society through law? Are violent protests random eruptions of irrational civic unrest, as the mainstream media tend to suggest, or do they reveal underlying patterns of civic energy that are not being drawn upon by civil society? There might be a need to explore new methodologies for supporting civil society groups working in the area of social justice, including groups that often fall *outside the radar* of most donor organisations.

In short, long-term, complex struggles may require different kinds of resources and connections. This is where donor institutions come in. The arguments in this book serve as a plea for long-term, flexible donor strategies that balance predictable funding with other sources of support, such as capacity development and international networking. However, with the exception of a few donors, donor practice points in a different direction; making persistent use of logical frameworks, adopting apolitical approaches to 'alleviate poverty' – in short, a tendency to aim for short-term results and a desire for quick, tangible benefits.

The processes that set external agendas could be critically questioned. Are agendas set in The Hague? In South Africa? Do these processes involve NGOs? Local communities? Social movements and other broad-based civic structures? Is this a meaningful involvement in setting an agenda?



The contents of this book suggest that a critical and pragmatic perspective is needed; and that new partnerships could be forged, not only between donors and the organisations they support, but also horizontally, between other external actors. One can listen to (and, potentially, involve oneself in) local debates – and in this regard, support for locally based and generated research is both necessary and valuable in the spirit of true solidarity, which is always a dialogic process. Well-grounded academic research is important as a starting-point, but it also needs to be *translated* for use by practitioners. It cannot merely be what Dr Patrick Matlou of the Africa Institute has termed *blue-sky research*, which serves little purpose on the ground.

6 KNOWLEDGE INTEGRATION OR CO-PRODUCTION OF KNOWLEDGE?

In promoting knowledge integration (or, in some instances, the co-production of knowledge), we acknowledge that there is often a *slippage* or overlap in relationships and agendas between development practitioners and researchers. Whatever the nature of these relationships, it is important to critically question *who* benefits from this knowledge, and what these supposed benefits are.

Researchers are always concerned with practice, even when their research is at an abstract level. Furthermore, it can be difficult to draw a line between the different roles one plays as an individual. There is not necessarily anything wrong with an activist working in an academic environment; but it is necessary for one to be clear where one is coming from in taking a particular position, and academics are under a greater obligation to argue the basis for coming to a particular conclusion, conceptually and empirically. Of course this does not mean there is no need to bridge the gap between the activism and academia.

The problem of research fatigue often arises within communities who are tired of being the subject of study, without being engaged in setting the research agenda, and seeing at least the limited impact of that research in the community's long-term welfare. There are numerous examples of students (as well as senior researchers) coming to a community, asking many probing questions, and then leaving to write up their findings without sharing them afterwards. Even worse, a different researcher may arrive in the same community a year later, asking the same questions and coming to similar conclusions, leading to little visible impact on the community.

Over-theorising is also a problem. For example, a great deal of time is spent on determining what *the people* actually are, without asking *what* they are doing, let alone *why* they are doing it.

In order for the goals of researchers to be meaningful to those outside the world of academia, those goals may need to be questioned; in particular, the terms and conditions under which knowledge is produced and disseminated. For example, knowledge is often trapped in a prestigious publication that few people



ever read, let alone understand. This speaks to the problem of career-oriented research. Does the involvement of small numbers of academics reading an article, or commenting at an academic conference, necessarily achieve a social justice objective? Should that be the sole purpose of research? Sharing one's research with others (especially development practitioners, and others in civil society) is part of the solution; but making it accessible in a relevant way, and in what another colleague of ours refers to as *human English*, is a far greater challenge, and a crucial one. Even more fundamental is the need to build strong, respectful and critical relationships with communities, from the setting of research agendas right through to their implementation and the dissemination of findings. The next step in this process, therefore, is to further demystify and share the findings contained in this book and in other academic studies of civic mobilisation and social change.

Methods and ethics of research are just as important as (more philosophical) ontological and epistemological questions that are asked with the aim of making research more objective.⁶ As Landau and Jacobsen have argued, also of concern is the way in which the 'dual imperative' is addressed, relating to, on one hand, producing research in a sound, objective manner and, on the other hand, being policy relevant.⁷ This is especially crucial when one is researching communities that are especially vulnerable or having a marginal existence. The Wits Forced Migration Research Programme, Centre for Sociological Research and CALS, whose researchers produced three of the chapters in this book, have set a good example in this regard, being doubly conscious of not only paying careful attention to ensuring high standards in their data-gathering and analysis, but also ensuring that the results of their research feed into public debates and especially policy discussions. In this way, one can hopefully contribute to changing or even eliminating the structures that lead to injustice.

7 GIVING DEVELOPMENT A MORE HUMAN FACE

This book cannot capture the total flow of ideas and the richness of the conference proceedings. Indeed, as noted in the preface, there is room for criticism of the conference itself, especially in terms of the stark challenges Pheko and Sebastien observe in transcending deep-seated racial, class and gender divisions in the country. The fact that the majority of presenters and participants at the conference were white is a discouraging representation of the face of academia and even of activism, not only in South Africa, but worldwide. We certainly agree that there needs to be far more effort in the future to ensure greater diversity. As Pheko and Sebastien argue, one must have a keen eye on history, but the old divisions of the past also need to be transcended.

National and global struggles for social justice are no longer exclusively framed by relations between the North and South, race or gender, although these

⁶ Ontology refers, generally, to the philosophical nature of being, while epistemology refers to the manner in which knowledge is gathered.

⁷ K. Jacobsen and L. Landau, 2003.

certainly remain as critical factors, as Crenshaw and others have written. Contemporary struggles relate so much more to the current economic and political world order.

As contemporary debates on development co-operation in The Netherlands have revealed, there are noted divisions between those who define the world order on the basis of interdependence, and others who are stuck with nationalist sentiments of isolation from the world order. These isolationists also advocate the exclusion of others (including refugees and other migrants) from the national community. Isolationists also reinforce crude and deliberate forms of legal and political exceptionalism, including a deliberate undermining of international law and the United Nations institutions. A more interdependent perspective may foster new alliances and strategies in the struggle against global apartheid.

At the same time, it is impossible to ignore the remaining vestiges of social and economic apartheid remaining in South Africa. As we were finalising this book, Eugene Terreblanche, the South African white supremacist leader and founder of the Afrikaner Resistance Movement (AWB) was allegedly murdered by two of his farm workers (one of whom was a 15-year old child), purportedly over a pay dispute, amid numerous allegations of exploitation and abuse by Terreblanche. Meanwhile, the South African courts and the ANC leadership have censured the ANC youth leader, Julius Malema, over his chanting of the anti-apartheid struggle song *Ayesab Amagwala*, which includes the line 'shoot the boer' (farmer). From another perspective, it was pointed out at the conference that, in a country with one of the highest incidences of rape in the world, issues involving gender relations did not receive enough attention.

Clearly, issues concerning race, class, gender and other power relations continue to permeate socio-cultural relations in South Africa. They also frame the public debate, including discussions about *Mobilising Social Justice*. And yet it is also encouraging that such issues are openly confronted in the public discourse, rather than being deemed irrelevant and simply ignored.

Ultimately, we believe that in order to be meaningful and relevant to development practitioners and civil society in general, both development research and development practice need to have a quality that sociologists such as Margaret Archer have humbly argued is simply part of *being human*.⁸ Her sentiments as a scholar are shared by Yasmin Sooka in the epilogue to this book. These sentiments are also shared by another well-known figure in South Africa, who fought for social justice at a time when it was difficult to be optimistic about the prospects for toppling the racist apartheid policies and regime of the day. And yet this man – Stephen Biko – managed to find inspiration, both for himself and for so many others; and so we close with his words:

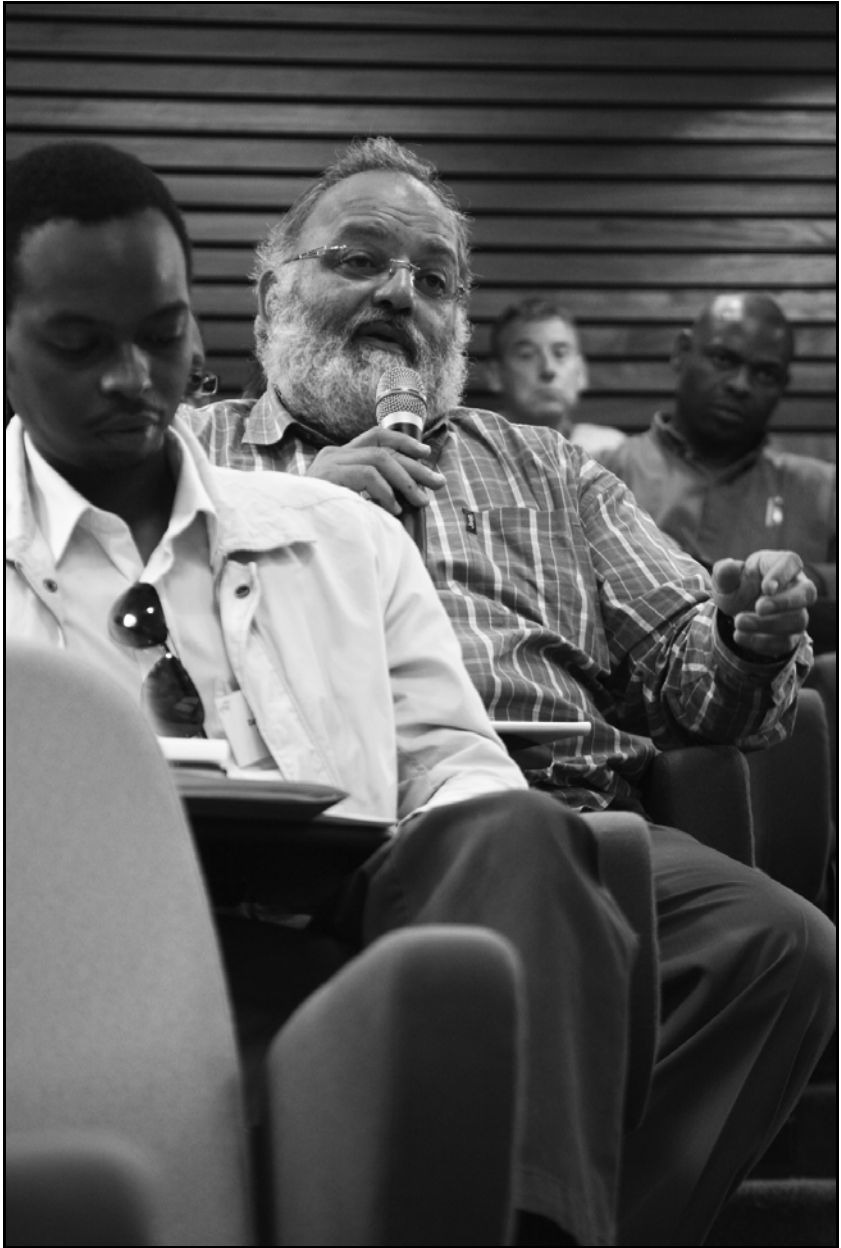
⁸ M. Archer, 2006.

We have set out on a quest for true humanity, and somewhere on the distant horizon we can see the glittering prize. Let us march forth with courage and determination, drawing strength from our common plight and our brotherhood. In time we shall be in a position to bestow upon South Africa the greatest gift possible – a more human face.⁹

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⁹ S. Biko, 1996: 98.



TRANSFORMING
OUR SOCIETY

Conference address by Yasmin Sooka¹

As South Africans, we are incredibly fortunate to have a constitution that is not merely a formal document regulating public power, but embodies the constitutional imperative to remedy South Africa's apartheid past and to transform our society into one in which there is respect for human dignity, freedom and equality; a *just society*.

The constitution envisions the transformation of South Africa as a collaborative process involving the state, the executive, the legislature and the judiciary, as well as civil society. The constitution's Bill of Rights represents a social contract between the state and society to build a better life for all South Africans. Our constitution also provides for a participatory framework in which it is envisioned that civil society will play a role in framing policy and legislation.

WHAT IS 'SOCIAL JUSTICE'?

Listening to the use of the term 'social justice' throughout the conference, it became clear that we all understand this quite differently. A recent study conducted by the Carnegie Trust in the United Kingdom, which looked into the role of civil society in this area, found that many civil society organisations define social justice as a framework of political objectives pursued through social, economic, environmental and political policies; based on the acceptance of difference and diversity; and informed by values concerned with achieving fairness, the equality of outcomes, and treatment recognising dignity and equal worth, and encouraging the self-esteem of all. The meeting of basic needs is defined through cross-cultural consensus and reducing substantial inequalities in

¹ Yasmin Sooka is Executive Director of the Foundation for Human Rights in South Africa. The editors offer special thanks to Marlieke Kieboom for producing a first compilation of Ms Sooka's conference presentation.



wealth, income and life chances; and above all the participation of all, including the most disadvantaged.²

The report also went on to say that social justice should give groups and individuals fair treatment and a share in the benefits of society. Everyone in that society should be given a fair chance in building a society which is fair and just, in which everyone has equal opportunities and full representation in all aspects of life.

WHAT IS 'CIVIL SOCIETY'?

Defining civil society is a little more difficult. In some of the definitions, people talk about the political space that is inhabited by a heterogeneous public comprising a contradictory political project (with ideological orientations) and a variety of voluntary associations and networks, including trade unions, social movements, NGOs, CBOs, religious organisations, academics and the media.

One challenge is: where do we place business, given its important role in the politics of a nation? If we consider further the way in which business influences both the state and civil society, this is an important consideration. The assumption one makes is that in an undemocratic society, civil society is a safeguard against undemocratic state power, with the notion that its participatory role provides a basis for the limitation of state power. And even in a democratic state, civil society's participation in governance is considered essential, as it provides a means for individuals and groups to mitigate majoritarianism. This is especially crucial for marginal groups that are not otherwise able to win sufficient backing to see their values reflected in the policies and laws of the state. The burden has, in fact, shifted to civil society as the new custodian and protector of human rights, particularly in this region where there is an increasing tendency to discourage direct government involvement in economic activities, and instead to turn to private companies to boost economic growth.

A further assumption that we make is that civil society is synonymous with democracy. Our experience in South Africa over the last 15 years demonstrates that civil society often *reproduces* the democratic deficits within civil society, and this is particularly true in terms of race, class, ethnicity, and gender. It is not enough to combine participation with top-down democracy. Civil societies are often identified in a development discourse as a vehicle for extending democracy. This has not always been so, but it is really a participatory notion of citizenship, one that is active, engaged and grounded, that really produces social change.

Of course, citizenship itself is a contested concept, and often lacks coherent meaning. Participatory citizenship is identified as a product of peoples' concrete

² Gary Craig (2009) *Civil society associations and the values of social justice*. London: Carnegie Trust. Also available at: http://www.carnegieuktrust.org.uk/publications/civil_society_associations_and_the_values_of_social_justice.

political and social struggles against political and economic exclusion, rather than as an offshoot of formal democracy. It seeks to expand the political meaning of citizenship and to relate it to the everyday political realities of ordinary people. By extending the scope of citizenship rights beyond the legal acquisition of civil liberties, ordinary people can claim citizenship and rights through their own political actions and processes. Participation is often linked to the struggle to extend democracy and to deepen the construction of alternative power relations.

However, citizen participation is also characterised by power struggles and conflicts between various social interests. The notion of participatory citizenship is realised not only through the formal channels of participation – we’ve seen many of them in South Africa – but also in the streets, in neighbourhoods, in squatter camps, and in many other spaces in everyday life. Participatory citizenship offers prospects of a higher democratic and substantive outcome, since it recognises the dynamic way in which people exercise agency within the public sphere. However, it’s important to consider the evolution of civil society in post-transition South Africa.

The ruling African National Congress’ (ANC) conceptualisation of South Africa’s post-apartheid state-society relations has been rooted in the notion of a liberal citizenship project; for example, the ANC’s radical talk of popular democracy and people-driven transformation actually espouses a hierarchical and highly institutionalised relationship between the rulers and the ruled. In line with the liberal paradigm, representative democracy is seen as the high point of political achievement. In this country, particularly since 1999, leadership and representation has been privileged over the spontaneous actions of the masses. The masses and the ANC membership in general are expected to follow the party line, and not to be too critical of leadership and party decisions. In fact, the word ‘deployment’ has become the new term that is used. Meanwhile, although citizens are encouraged to participate in state-provided spaces for participation, decision-making power resides within elected bodies.

The state is also conceived as the producer of knowledge, endowed with a professional expertise and competency to make rational policy decisions, while civil society has been reduced to the apolitical role of implementing directions from above. Civil society organisations have also been encouraged to move out of the political arena, and to engage in voluntary and self-help activities and assist the government in service delivery. The liberal paradigm has been the philosophy of the ruling party. Consequently, the state has had a contradictory impact on the evolution of civil society in this period of democracy.

THREE KEY POLITICAL OUTCOMES

The evolution of civil society in post-transition South Africa has been captured by three key political outcomes. The first is co-option, the second bureaucratisation, and the third is the rise in insurgency and the emergence of social movements. This is interesting if you consider that the South African

liberation movement was one of the most broadly developed and well-organised civil societies of any democratic transition, and probably produced, institutionally at least, one of the most robust democracies, particularly on this continent. While the ANC was in exile, a vibrant, mass-populated democratic movement under the banner of the United Democratic Front emerged inside the country, made up of the trade union movements, civics, NGOs and religious bodies. So when one looks at that history from the present, one is obliged to ask questions.

Co-option

In terms of co-option, I think the first fissures emerged in the structures of the democratic movement shortly after the ruling party obtained state power. Following the post-independence path of other national liberation movements, particularly in the Southern region, the ANC's political strategy promoted greater power for the ruling party, and government autonomy. Power came to be centralised in the state, allowing the regime to assert its hegemony and control over the direction of the country's nation-building project. In addition, senior civil society leaders were co-opted into the bureaucratic and political apparatus of the state. This caused a dilution in the institutional capacity of numerous civil society organisations, and certainly left them vulnerable to state influence. This has been demonstrated by changing capacities, particularly in two ANC-alliance society formations in the post-apartheid period. Who can forget the work of the Women's National Coalition, particularly in driving an agenda for advancing women's rights?

And yet, today, where is the women's coalition? Where have they been on issues of sexual violence? Where have they been in the struggle against HIV/AIDS? One also has to look at the case of the South African National Civics Organisation (SANCO), in which local activists made the organisation so hierarchical and bureaucratised that its internal democracy became a sham. Branches of the civics lost their autonomy. Today, the national office of SANCO has little or no capacity to co-ordinate events, leaving local activists uninformed about the activities and positions of the organisation.

Bureaucratisation

Bureaucratisation has also become a major challenge. After having listened to the budget process in Frankie Jenkins' presentation, one must ask how a small CBO somewhere in the rural areas could possibly know about these formal processes. While participation is an institutional obligation, state-civil society relationships have become incredibly bureaucratised. Many critics of South Africa's system of participatory governance argue that these spaces tend to be occupied by civil society actors who are considered to be close to the ruling party, and who have established collaborative relations with the regime, leaving opponents without a voice. The institutional environment of *invited spaces* has also been identified as a barrier to popular grassroots participation, especially for marginalised groups who lack the necessary vocabulary and the rhetoric that are endemic to South Africa's

state-provided, bureaucratic spaces for participation. Further, not all groups have the logistics or the funds to put forward their constituencies' perspectives in these spaces.

Take the case of Zimbabwe. Here, COSATU has been the most vocal critic of the government's *silent diplomacy* role. When arms from China arrived in South Africa, destined for Zimbabwe, we saw COSATU emerge as one of the main role-players to stop the shipment of arms to Zimbabwe, in the face of government intransigence on this issue.

The rise in insurgency and of social movements

In the post-transition phase, we have witnessed the rise of insurgency in the townships, and of course the emergence of a number of *new* social movements. This is not unsurprising, of course, as South Africa's liberation movement consisted of a mass mobilisation and a robust civil society. However, we need to accept that the first two outcomes – co-option and bureaucratisation – contracted civil society in the immediate aftermath of 1994, and decimated radical grassroots activism born of the 1980s and early 1990s. As a result, many communities were left without the organisational mechanisms that had become their vehicles of struggle in the pre-1994 period. Soon the situation became untenable, particularly after the post-1999 government, which increasingly took on a neo-liberal agenda, as articulated in its Growth, Employment and Redistribution (GEAR) strategy. It also became very clear that the approach of GEAR was going to privilege profits over people, as opposed to the re-distributional thrust of the Reconstruction and Development Programme (RDP). The ANC government became increasingly intolerant of opposing voices, fearing that they would unsettle the nation-building project.

Paradoxically, this situation gave rise to an assortment of social movements, the most notable being the Treatment Action Campaign (TAC), the concerned Citizen's Forum, the Anti-Privatisation Forum and the Soweto Electricity Crisis Committee, to name a few. These movements began to assert the constitutional rights of poor and marginalised communities which had struggled against political and economic exclusion. The TAC is cited as one of the best examples of participatory citizenship that has been mobilised for social justice. Their combined strategies of research, advocacy, lobbying, and litigation have really pushed the boundaries, using the constitution and protest as tools. When the TAC litigated against the state, challenging government policies on anti-retroviral drugs to reduce mother-to-child transmission of HIV – and won their case – one of the lawyers said that: 'The judgment was simply the conclusion of a battle that the TAC had already won outside the court, but with the skilful use of the courts as part of a broader struggle'.

While the TAC case focused mainly on health issues, the focus of social movements generally has been on distributional issues and democratic politics. A main goal of their struggle has been to reduce the delegation of power vested in

the political elite, and to place it in the hands of the people, giving them more control and decision-making power, particularly over issues of public policy and basic services. The engagement of these movements in mass action has usually been triggered by disenchantment with the formal channels of participation.

In a study of the Mandela Park Anti-Eviction Campaign (MPAEC), it was observed that members of the campaign were disenchanted with the main, formal channels that were offered to them for voicing their concerns and making demands. The local government and its councils – and much of the hope they had established in these recently formalised decentralised structures to facilitate greater participation in decision-making and inclusive government – have withered with the past.³

The political practices of social movements have often been condemned as illegal by the ruling party and the state. We need to take this objection to participatory actions chosen by citizens themselves much more seriously. It is important for civil society to oppose any notion that the only citizen participation allowed is in officially sanctioned channels. We must challenge the notion of citizenship that is state-centred, with the state not only becoming the *granter* of citizenship but also, absurdly, defining the spaces for citizenship participation.

We must note the work of groups such as the APF, and of course Abahlali, that have been struggling and mobilising within a wide range of spaces.⁴ These more recent movements present demands and deploy actions that are contextually effective in gaining results. They've used protest action. They've used courts. They've used laws. They've gone to the local councils. Abahlali engages in mass mobilisation. It has done incredible media work and pursued court action in its struggle against evictions and forced removals. It has also used the promotion of access to information with great success, to force the city of Durban to reveal its removal plans.

In the example of anti-eviction campaigning, activists have received additional training in video communication and basic journalism as a means to document their community suffering and to disseminate information. More importantly, people's concrete social struggles to realise socio-economic rights have become a political school for collective learning and consciousness-raising. Knowledge production has begun to be *owned* by communities. Their knowledge originates from the everyday reality of people, and in this way, citizenship has acquired a more substantive meaning, transcending the notion of legal or civil citizenship.

³ Rebecca Pointer (2004) 'Questioning the Representation of South Africa's "New Social Movements": A Case Study of the Mandela Park Anti-Eviction Campaign', *Journal of Asian and African Studies* 39(4): 271–294.

⁴ For more information on these social movements, see: <http://apf.org.za/> and <http://www.abahlali.org/>.

One must also note that the emergence of the early movements has been heavily influenced by the role of specific actors, notably Zachi Achmat, Patrick Bond and Trevor Nguane. We have to acknowledge that concerns have been raised about the way differences have been accommodated in social movements. This is particularly true when we look at the question of gender, and why most of the women who have been at the centre of their campaigns are not present in leadership positions. We need to acknowledge the ambiguity of civil society, which often contradicts the liberal notion that civil society is synonymous with democracy.

The evidence shows that the organisational mechanisms of civil society that are used to express participatory democracy can themselves fall victim to the strictures of representative democracy, which often replicates the inert, bureaucratic, institutional norm of participation. Many critics argue that there's nothing in civil society that automatically ensures the victory of the democratic project. All that civil society does is provide actors with values, the space, and the inspiration to battle for democracy. However, the work of social movements in South Africa illustrates the changing patterns of citizen participation and political participation.

In this new, participatory paradigm, citizens are using a mixture of direct and indirect forms to engage with the state. This new style not only changes the level of participation, but seeks to place more control in the hands of the people, and in this way their participation becomes linked to citizen influence. Conceived in this way, civil society can involve and encapsulate a plurality of voices.

A MORE RADICAL CONCEPTION OF CITIZEN PARTICIPATION

Civil society can also promote a more substantive and radical conception of citizen participation. Firstly, it becomes a product of political struggle. Secondly, it includes a more inclusive notion of rights, which extends not only to the decision-making power of socio-economic rights, but also becomes the terrain where citizens and non-citizens can establish solidarity ties or networks.

A statement that really illustrates this is the response of the Abahlali movement to the recent attack on non-citizens that erupted in different townships of South Africa. Part of the statement they made reads:

There's only one human race. Our struggle in every real struggle is to put the human being at the centre of society, starting with the worst off. An action can be illegal; a person cannot be illegal. A person is a person, wherever they may find themselves; if you live in a settlement, you are from that settlement, and you are a neighbour and a comrade in that settlement. We condemn the attacks, the beatings, the rape and murder in Johannesburg against people born in other countries. We will fight left and right to ensure that this does not happen here in Kwazulu.

This is important, because as we begin to move beyond the notion of our own rights, we extend this to other people whom we recognise as also being *human*. As civil society, we must be conscious of how we will respond to the new challenges we are facing, such as migration, xenophobia, food insecurity, threats to housing, lack of access to water, lack of access to electricity, and unemployment. These new challenges will define whether civil society can in fact be an instrument of change. As one writer puts it:

To enjoy liberty is not only to enjoy equality before the law, but also to have the capacities and the material and resources to be able to pursue desired causes of action. Political equality can then not be obtained without a measure of economic equality, and without it democracy is likely to become a vehicle for the maintenance of elite dominance.

This is the challenge to all of us. The challenge is for civil society: how can it truly become a participatory citizen?



A JOURNEY OF
PERSONAL DISCOVERY

Conference address by Shabrukh Alam

As a political being, I can identify five distinct phases. I'm mutant like that. Each of these phases tells a story, which I want to share with you.

A LIBERAL SECULAR CITIZEN

I started off as a liberal secular citizen, because I grew up as a Muslim in India in the 1990s. The Muslim identity in India is a peculiar one, because following its independence in 1947, India was divided into India and Pakistan. The Muslims claimed a separate nation for themselves, and got it. Some Muslims remained in India, and they had to deal with that historical baggage. As is the case with remainders usually, the Muslim identity clubbed together – across class and caste and gender – and they are all considered as *one*, with similar experiences.

Other than that, the Muslim identity in India has always been suspect. The Muslim loyalty to the Indian nation itself has also been suspect. I grew up experiencing this, and this Muslim identity almost felt like a burden. I wanted to shed it. The Indian state was inviting. It was offering the promise of *neutral* citizenship, so I grabbed it with both hands. Other people also did, and all that was required was to shed visible symbols of one's identity in the public space, to decry any religious identity, and be a liberal, secular citizen. That was easy, and we did it.

But, in the late 1990s a Hindu right-wing party came to power, and there were widespread communal riots. As usually is the case, the poorest Muslims suffered, the poorest Muslim women suffered the most, and the state looked the other way. It then fell upon civil society to negotiate with the state, and to talk about minority rights and human rights and to ask the state what it was doing. That was also the time that a lot of people like me realised that being secular and being a liberal citizen was not so much a function of progressive politics as it was of privilege.



There are people who can afford visible images of identity and there are people who *cannot*, and those people were the ones who were killed in the communal riots.

POLITICAL MUSLIMS AND CULTURAL MUSLIMS

So we took a deliberate decision to locate ourselves as political Muslims or cultural Muslims in the public sphere. We weren't practising Muslims, but we wanted to voice the Muslim identity. So, with other peace workers and civil society actors, we started negotiating with the state, using the vocabulary of minority rights and human rights, and it all went really well until one day I was invited to debate a Hindu right-wing fundamentalist.

This man was sitting in a panel and was making it clear that India was a Hindu state and all Muslims should leave India and go to Pakistan or Arabia or wherever they wanted to go to. Then it was my turn to speak, and I sang a little poem by a respected Muslim poet, which is about how the Muslims came to India from Arabia. They came to stay. They came and burnt their boats, because they wanted to make India their homeland. As I was singing, a young man got up in the audience, and he was in a rage. He was very angry and he started shouting.

At first I thought it was my singing that had caused his rage, but then I assumed he was a right-wing fundamentalist, and I said, 'Yes, yes. I know you have a problem with my position.'

And he said, 'No, sit down, you fool. I'm a Muslim too.'

And so I asked: 'So if you are a Muslim, what is your problem then? Why are you so angry?'

He said that I didn't come from outside. He said I was always Indian, that I was an indigenous person, and at some point had converted to Islam. He said:

That doesn't make my identity and your identity similar, just because we are Muslims. We are ethnically different. You are urban and an authoritative working-class Muslim, and I am indigenous, organic and Muslim! When you talk about minority rights, and when you negotiate with the state on minority rights, you collapse all internal differences within the Muslim community. You present us as one monolith, which we are not. You are negotiating for entitlements and privileges with the state, using minority rights, for your own interests; you voice that vocabulary, but you serve the upper-class, upper-caste male Muslim.

I responded: 'Well at least I'm not a man, but a Muslim woman!'

CONFUSED

This was the third phase of my political being; I was confused. I went from being a secular liberal citizen, to an evolved secular citizen, to just being confused.

I then fled India, and arrived in Cape Town, South Africa. That was a liberating moment for me. Maybe it had something to do with the history of Islam in Cape Town. But I was amazed at the way Capetonian Muslims had been able to use faith as a means of resistance. That might have had something to do with a particular history of Islam in Cape Town. Islam came to South Africa through oppressed people, through aborted people, so therefore faith for them had to be necessarily resistant. By contrast, Islam in India came through the rulers. It came through the occupying forces of the subcontinent. I had never seen Islam in the same spirit in India as I saw in South Africa.

The second very important encounter and experience I had in Cape Town was with an activist of the Black Consciousness movement. And again, I was struck by the fact that alternative, normative frameworks are possible; that alternative histories and imaginations can be created; that other ways of living are possible. I felt enriched, and went back to India, trying to do something back in India.

LOOKING FOR SITES TO ARTICULATE ALTERNATIVE CONCERNS

That's when the idea of the Patna collective came about; we wanted to look for sites where alternative concerns could be articulated, using different vocabularies. The first thing I learned was to rethink what was happening on the ground in India. I felt that I had been very dismissive of all groups, all people who didn't use a vocabulary of human rights. I considered them communal, regressive. I started to rethink that.

I will give you a brief example. There was this medieval mosque, which had become a contested site between Hindus and Muslims. The Hindu right-wing group claimed that when the Muslims came to India, they razed every important Hindu worship place to the ground, and built mosques on those sites, and they claimed that this mosque was on such a site, and they wanted it back. They wanted to build a temple on it. The Muslim version was that it was just an ordinary mosque; it hadn't been constructed on a Hindu site of worship, so it had to remain with them.

Earlier, I had dismissed this as an irrelevant conflict over a site of worship, which didn't matter at all. But it was much more than that. It was a claim to the nationhood of the Indian nation. The Hindus said that Muslims did not have a claim to the Indian nation, because they were outsiders; they were invaders. When

the Muslims were pushing for an alternative version of history, they were actually staking a claim to the Indian nation.

We at the Patna Collective spent the first few months after we set up looking for sites related to faith or religion that would possibly give us the space to be activists, to project concerns or ideologies, but in a different kind of way. I did a lot of travelling to find these sites, and I spoke to people. One person told me to visit the shrine of an Islamic warrior. I didn't know why he was asking me to do this, because these were just the people I wanted to avoid; self-appointed warriors of Islam who conquered land and people in the name of Islam. But I went nonetheless, expecting to find a huge monument to some Islamic warrior. Instead, I found a small town, a small shrine and a huge open courtyard, and reached it late in the evening.

The courtyard was full of people, lots of colour. Some kind of festivity seemed to be happening. There were people wearing colourful clothes, preparing a feast. Most people seemed to be Hindu, from the way they were dressed. I thought I had reached the wrong place, but the people said: 'No, this is the right place, join in!'

I asked, 'What is happening?'

They said: 'A wedding.'

'Whose wedding?'

Then they said, 'The saint's wedding!'

I was amazed. This was a medieval saint. I assumed he had passed on. But they sang and they feasted through the night. Just before dawn, there was a Hindu priest who was supervising the festivities. He rushed outside and he looked skywards, and he said, 'The stars are not aligned evenly this year. All of you go back home and come back next year.' And so I asked, 'Please explain, what is happening.' And this is what happened.

The story goes that there was this young Islamic warrior who was getting dressed for his own wedding when he heard the sound of women wailing outside. He rushed outside and he saw a community of Hindu cow-herders who had come to him, and who were saying that the local King had asked for an increase in taxes. When they refused, he arrested all the men in that community and slaughtered all the cows. These women were now going to fight the King and they had come to ask the Islamic warrior to help and fight with them. So he left his own wedding to help them, and he was martyred.

To this day, the Hindu cow-herders celebrate this each year, in this particular way. I spoke to some of them and asked them why they celebrated the feast of an Islamic warrior. The Hindu priest said that Islam, to him, represented an open kind of ideology. It was the Islam of the oppressed; it meant resisting all kinds of

oppressive forces. I asked one of the Muslim visitors there what it meant to them that the Islamic saint had a reason to defend cows, which are symbols of Hinduism in India. They said: 'These were not the cows of the Brahmins; these were the cows of the oppressed, and we identified with that.'

THE PATNA COLLECTIVE

And with that story, I rediscovered a site for activism. The Patna collective works from this particular shrine, trying to build on those imaginations and ideas.