Capitalism, the Privatisation of Basic Social Services and the Implementation of Socio-Economic Rights:

Challenges and Advocacy Strategies for Human Rights and Social Justice Actors, Learning from the Johannesburg Water Defeat

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Are rights narratives optimal for civil society's eco-social justice advocacy in contemporary Southern Africa, or do we instead want to go *through* rights strategies and tactics to a commons philosophy and practice that transcends the political and environmental limits of the human rights framework?

The limits of rights talk

Rights discourses applied in South Africa have been accused of the 'domestication' of the politics of need, as Tshepo Madlingozi (2007) puts it. Daria Roithmayr (2009) debates a central assumption in liberal rights analyses:

> The liberal perspective is that when human rights aspirations are not being fulfilled, it is because a sound idea suffers flawed implementation. In contrast, the radical critique of human rights suggested that the whole project is flawed from the ground up in its design. This is because as framed, human rights discourse serves not to resist but to legitimize neoliberalism.
> The discourse of human rights pulls a sleight of hand by giving moral claims a legal form that dilutes them, waters them down, and robs them of any real power. The legalization of human right does this in two ways. First, human rights discourse offers only very limited recognition of moral claims in certain circumstances. Second, even these limited moral claims by design are then converted into bureaucratic, technical legal problems that cannot be solved because legal rights are indeterminate.

In South Africa, every protected right is immediately watered down because, under the Constitution's limitations clause, government can restrict people's rights so long as they are doing so 'reasonably.' Likewise, socio-economic rights are only progressively realizable and only within available resources.

Second, these limited claims become technical problems with no determinate answers. We should not be at all surprised that the right to reparations and access to justice became a technical question over the scope and reach of the TRC. We should not be surprised that a universal moral human right to housing was converted to a technical question over the reach of supervisory jurisdiction, as we see in the Constitutional Court's wrangling over housing in Grootboom. This isn't failure of implementation. This is failure by design.

Maybe more importantly, human rights discourse leaves in place the class structure that reproduces racial inequality in SA.   Human rights discourse bleeds off any real move to dismantle these processes by making change all about consciousness raising and recognition rather than redistribution and reparation.

Marius Pieterse (2007) argues that 'the transformative potential of rights is significantly thwarted by the fact that they are typically formulated, interpreted, and enforced by institutions that are embedded in the political, social, and economic status quo...the social construction of phenomena such as 'rights' and 'the state' legitimize a collective experience of alienation (or suppression of a desire for connectedness) while simultaneously denying the fact of that experience.' He provides a delightful illustration of this alienation in asking us to conceive of

> the South African socioeconomic rights narrative as a dialogue between society (as embodying the social and economic status quo) and certain of its members (a social movement, interest group, or individual seeking to assert herself against the collective of the status quo) over the satisfaction of a particular socioeconomic need. Behold, accordingly, the following three-act drama:
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> ACT 1: On the Streets
> Member/Citizen: I am hungry.
> State/Society: (*Silence*) . . .
> Member/Citizen: I want food!
> State/Society: (*Dismissive*) You can't have any.
> Member/Citizen: Why?
> State/Society: You have no right to food.

Member/Citizen: (*After some reflection*) I want the right to food!
State/Society: That would be impossible. It will threaten the legitimacy of the constitutional order if we grant rights to social goods. Rights may only impose negative obligations upon us. We cannot trust courts to enforce a right to food due to their limited capacity, their lack of technical expertise, the separation of powers, the counter-majoritarian dilemma, the polycentric consequences of enforcing a positive right, blah blah blah. . .
Member/Citizen: (*Louder*) I want the right to food!!
State/Society: (*After some reflection*) All right, if you insist. It is hereby declared that everyone has the right to have access to sufficient food and water and that the State must adopt reasonable measures, within its available resources, to progressively realize this right.
Member/Citizen: Yeah! I win, I win!
State/Society: Of course you do.

ACT 2: In Court
Member/Citizen: I want food, your honor.
State/Society (Defendant): That would be impossible, your honor. We simply do not have the resources to feed her. There are many others who compete for the same social good and we cannot favor them above her. If you order us to feed her you are infringing the separation of powers by dictating to us what our priorities should be. We have the democratic mandate to determine the pace of socioeconomic upliftment, and currently our priorities lie elsewhere.
Member/Citizen: (*Triumphantly*) But I have the right to food!
State/Society (Court): Member/Citizen is right. It is hereby declared that the State has acted unreasonably by not taking adequately flexible and inclusive measures to ensure that everyone has access to sufficient food.
Member/Citizen: Yeah! I win, I win.
Everyone: Of course you do.

ACT 3: Back on the Streets
Member/Citizen: I am hungry.
State/Society: (*Silence*) . . .
Member/Citizen: I want food!
State/Society: We have already given you what you wanted. You have won, remember? Now please go away. There is nothing more that we can do.
Member/Citizen: But I am hungry!
State/Society: Shut up.

(*Member/Citizen mutely attempts to swallow the judgment in her favor.*)
(Pieterse, 2007:816-817)

In a more thoughtful way than 'shut up', a former Black Consciousness movement revolutionary leader, Mamphela Ramphele (a Managing Director at the World Bank during the early 2000s and later a wealthy venture capitalist), argued forcefully against the rights-based strategy, for it soon becomes a classic culture of entitlement:

> The whole approach of the post-apartheid government was to deliver free housing, free this, free the other. This has created expectations on the part of citizens, a passive expectation that government will solve problems. It has led to a 'disengaged citizenry' coupled with a style of leadership in the previous administration that neither accommodated nor welcomed criticism. Thus when people's expectations are not met, they revert to the anti-apartheid mode of protest which is destroy, don't pay, trash. We are yet to grasp the role of citizens as owners of democracy (cited in Green, 2009).

The same week, SA Deputy Police Minister Fikile Mbalula (2009) alleged, 'We have just established recently that in actual fact, there is an element of criminality perpetrated by aboTsotsi [bandits] within our communities who have other intentions not related to service delivery, but use service delivery protests as a tool to commit their intended crime.'

Ramphele and Mbalula were amongst many who criticized South African activists demanding their socio-economic rights. Yet the activists refused to disengage, and instead continued to protest vigorously, at one of the world's highest per capita rates (China's was slightly higher in early 2009, but I know of no other close). Police recorded 6000-10,000 'incidents' under the Gatherings Act (whereby a protest of 15 people or more are recorded) annually from 2005-09. Moreover, the strategy of refusing to pay for water and electricity proved to be effective in pushing the state to make concessions such as the 2000 ANC Free Basic Water promise and the 2008 free water expansion in Johannesburg, Durban and a few other cities.

But the state's overall objective has been to define rights-based protest as illegitimate, and instead to channel the radical language of grassroots activists towards the courts. According to Danie Brand (2007:18-19), 'The law, including adjudication, works in a variety of ways to destroy the societal structures necessary for politics, to close down space for political contestation.' Brand specifically accuses courts of 'domesticating issues of

poverty and need' so that they become depoliticized, 'cast as private or familial issues rather than public or political', a strategy that also entails the 'personalization of need and dependence'.

Karen Bakker (2007:447-447) notes a variety of other problems associated with the application of human rights to water:

> The adoption of human rights discourse by private companies indicates its limitations as an anti-privatization strategy. Human rights are individualistic, anthropocentric, state-centric, and compatible with private sector provision of water supply; and as such, a limited strategy for those seeking to refute water privatization. Moreover, 'rights talk' offers us an unimaginative language for thinking about new community economies, not least because pursuit of a campaign to establish water as a human right risks reinforcing the public/private binary upon which this confrontation is predicated, occluding possibilities for collective action beyond corporatist models of service provision.

'Through' rights to commons

Based on the experiences in the Johannesburg water conflicts, in which Soweto activists initially won, then lost the case in the Constitutional Court (*Mazibuko&Others* 2007; Bond and Dugard 2008), the most logical route through and beyond the limitations intrinsically imposed by rights-based strategies is a 'commons' strategy and indeed an entire culture of sharing, of 'ubuntu'. According to the 'onthecommons' website,

> The commons is a new way to express a very old idea-that some forms of wealth belong to all of us, and that these community resources must be actively protected and managed for the good and all. The commons are the things that we inherit and create jointly, and that will (hopefully) last for generations to come. The commons consists of gifts of nature such as air, oceans and wildlife as well as shared social creations such as libraries, public spaces, scientific research and creative works. (http://onthecommons.org/content.php?id=1467)

For Michael Hardt (2009:1),

> On the one hand, the common refers to the earth and all of its ecosystems, including the atmosphere, the oceans and rivers, and the forests, as well as all the forms of life that interact with them. The common, on the other hand, also refers to the products of human labor

and creativity that we share, such as ideas, knowledges, images, codes, affects, social relationships, and the like.

The difference is not merely that water is demanded as an individualized consumption norm in the one culture (rights) and is 'shared' in the other (commons). Other contrasts between the political cultures of rights and of commons are explicitly analysed by Bakker (2007:436), who insists rights advocates suffer a 'widespread failure to adequately distinguish between different elements of neoliberal reform processes, an analytical sloppiness that diminishes our ability to correctly characterize the aims and trajectories of neoliberal projects of resource management reform.' The rebuttal from Johannesburg activists is that rights discourses – even as purely rhetorical demands for a constitutional entitlement, used to empower ordinary people – can serve as a step towards the culture of the commons.

This debate has recurred over centuries of social resistance to commodification and 'enclosure' (Strang 2004). Today, Bakker (2007:433) suggests, the water sector includes ''alterglobalization' movements engaged in the construction of alternative community economies and cultures of water, centred on concepts such as the commons and 'water democracies''. A crucial missing element in the rights discourses is environmental, Bakker (2007:436) insists:

> The biophysical properties of resources, together with local governance frameworks, strongly influence the types of neoliberal reforms which are likely to be introduced: common-pool, mobile resources such as fisheries are more amenable to marketization, whereas natural monopolies such as water supply networks are more amenable to privatization. In other words, in failing to exercise sufficient analytical precision in analyzing processes of 'neoliberalizing nature,' we are likely to misinterpret the reasons for, and incorrectly characterize the pathway of specific neoliberal reforms.

Does the eco-social critique apply to the South African water-rights activists and does it condemn the human rights discourse as applied to water? In order to make the case, Soweto activists and their lawyers focused centrally upon the consumption needs of low-income residents. Hence several other processes were obscured, ignored or downplayed: the source of a large amount of Johannesburg's water in the Lesotho dams; the manner in which Rand Water – the catchment management agency between the dams and Johannesburg – processed and distributed the water; the financing of the bulk system through the World Bank and other creditors; the extremely high

consumption norms of Johannesburg's wealthier residents and large corporations; and the disposal of water through the system's sanitation grid into a water table and groundwater beset by ecological crises.

Beyond the necessary environmental factors, it is important to recognize potential false steps in jumping scale to micro-level redeterminations of water politics. Bakker (2007:444) warns that

> appeals to the commons run the risk of romanticizing community control. Much activism in favour of collective, community-based forms of water supply management tends to romanticize communities as coherent, relatively equitable social structures, despite the fact that inequitable power relations and resource allocation exist within communities.

If larger-scale norms, values and practices are not more decisively infused into public consciousness and daily life, then a tradition of 'neoliberal populism' may well emerge to recommodify commons processes – for example through faddish techniques of microfinancing and 'self-help' entrepreneurial ideologies drawing on a 'culture of social entrepreneurship'. The damage to a commons of social trust – in the form of schemes that go sour, even in the case of Muhammad Yunus' Grameen Bank (Bond 2007) – should not be underestimated. One of the most influential micro-entrepreneur advocates, Hernando de Soto, rests his vision of property rights upon the collateralization of land, shacks, livestock and other goods informally owned by poor people – all the better to invoke microfinance and in turn an often mythical successful rise to market-based wealth generation. Such capture of commons processes at local level should be contrasted with the changes required at the national scale, and potentially globally to fundamentally redirect our inherited patterns of extraction, production, distribution, financing, consumption and disposal.

For example, in September 2009, the African Union demanded $67 billion per annum from wealthy industrialized countries as reparations for damage done by climate change, and $400 billion/year was the figure adopted by South advocates of climate debt repayment at Copenhagen in December 2009. Numerous other forms of 'ecological debt' could be calculated and paid for by overconsumers in the Global North (Bond 2009, *Guardian* 2008).

In the water sector, activist awareness of the ecological aspects of water as commons is growing especially because of climate change. The Johannesburg region is crucial because it is the most intensive site for electricity usage in

South Africa, its main resource (gold) is nearly exhausted, and its manufacturing base is uncompetitive with imports from East Asia. As a financial and services centre it has thrived, but the sustainability of such activity is limited given the country's vast problems with current account balances, foreign debt and an unstable currency.

Countervailing pressures that can transcend mere consumption-based rights demands, and tackle the full range of practices that undermine water as a commons, as well as so many interrelated eco-social processes, are long overdue. These pressures may emerge through fusions of community, environmental and labour in the alliance-formation that necessarily occurs during eco-social justice struggles, as rights-talk meets its limits, and the commons appears as a new frontier.

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