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‘This is an excellent volume that investigates an area often neglected in contemporary thought. One of the most noticeable qualities of the book is its exploration of suffering and trauma from a local and global perspective and its highlighting of the fact that, although geographically circumscribed, the many conflicts that have disfigured the Great Lakes regions for more than a century, demand a novel reading grid to attend to the epistemological, spatial and temporal complexities of the Central African context.’


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Participants in our colloquium on NGOs and Social Justice

1. **Left**: Kirk Helliker (Rhodes): NGOs and rural movements in contemporary South Africa.


5. **Left**: Lungisile Ntsebeza (UCT): The role of NGOs in democratising rural local governance in South Africa: case studies from the former Xhalanga District, Eastern Cape.

8. **Right**: Tshepo Madlingozi (UP): ‘Social Justice’ in the time of neo-apartheid constitutionalism: assimilationist or decolonial?

9. **Left**: Firoze Manji (Pan-African Baraza): Can NGOs mplay an emancipatory role in contemporary Africa?

11. **Left**: Michael Neocosmos (Rhodes): Navigating the pitfalls of state democracy: thinking NGOs from an emancipatory perspective.
12. **Right**: Ashley Westaway (GADRA): Service delivery as a launch pad into advocacy.
This is Part II of Sally Matthews’s interview with colloquium participant Tšhepo Madlingozi who will deliver a paper “‘Social Justice’ in the time of neo-apartheid constitutionalism: assimilationist or decolonial?” Tšhepo is a lecturer in the law department of the University of Pretoria and co-editor of *Socio-economic Rights in South Africa: Symbol or Substance* (Cambridge University Press, 2013).

**SM:** You have used your legal background to assist groups like *Khulumani Support Group*, which is a social movement aimed at ‘build[ing] an inclusive and just society in which the dignity of people harmed by apartheid is restored through the process of transforming victims of gross violations of human rights into victors’. However, as you acknowledge in a recent book chapter some commentators argue that the use of the law in social justice struggles can result in the demobilisation, co-optation and disempowerment of social movements. Could you explain why some commentators believe this to be the case?

**TM:** The critique against the human rights discourse – not against ‘human rights’ per se – can be grouped into three categories. First, there are Marxists and neo-Marxists critics who claim that ultimately the legal system is an instrument of the ruling class and it can never be used in service of counter-hegemonic goals. Even worse, legalism can induce a false consciousness whereby radical demands are transmuted into ‘human rights’ claims thus changing the overall strategy of the movement and denuding its goals. A second set of critique is directed more at tactical and organisational levels. Briefly, the argument here is that in liberal democracy the human rights discourse has so much currency as the only legible script of emancipation that once deployed, inevitably, it over-shadows other radical discourses that speak to problems of political economy, structural racism, heteronormativity etc. Legal advocacy campaigns and litigation efforts also cost a lot of money and they can end up crowding out and displacing other tactics and campaigns. Related to this is the fact that in many cases, once movements decide to appeal to the human rights discourse, lawyers and other legal researchers end up – by dint of their positionality, class power or in the case of South Africa, whiteness – becoming de facto leaders who not only advise on tactics but also direct the overall strategy of the movement. A final critique is that in historically white supremacist societies, Euro-American modernist constitutions like that of South Africa simply perpetuates whiteness as a system of privilege that invisibilises and illegitimises race conscious strategies and movements. Put more radically, as a product of European modernity, such legal systems constitutionalise societies where the only hope for a black person is to assimilate into the extant white world. Or as Magobe Ramose puts it, in the case of South Africa, the settlement which sired this constitution legitimised historical injustice on the question of land and sovereignty and thus racial inequality; and furthermore its Euro-modernist nature further marginalised traditional African conception of justice. The point is that in such a system movements that are anti-neoApartheid are already disempowered and deradicalised if they embrace the hegemonic human rights discourse.

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SM: You argue that using the law need not have this effect. Can you briefly explain why you believe this to be the case?

TM: In my research I have found that movements have been able to – tactically, not strategically – appropriate legal concepts, procedures and symbols to achieve certain goals. Firstly, movements have used court cases as forums to expose and publicise injustices; for example through the water-meters case (the Mazibuko case) the Anti Privitisation Forum (APF) was able to publicise – beyond its constituency and academic supporters – the fact that rich (mostly white) suburban residents get credit for water usage while poor (mostly black) township residents do not. Secondly, litigation compels evasive and dishonest local politicians and officials to engage with local communities and to disclose details of State policies. Reflecting on a case brought by the Concerned Citizens Group in Durban, Ashwin Desai concluded that: ‘Litigation consumes the energies of the other side, ripping aside the mask of political rhetoric and forcing the council to reveal in sworn affidavits the brutality of its anti-poor policies’.

Thirdly, movements have used court-cases as rallying points and as a way to publicly display some counter-power. This is especially the case for movements that have faced a lot of repression when they deploy radical tactics. Engaging in courtroom battles, even if unsuccessful, can also afford a breathing space to besieged movement activists and can also enable ordinary residents to still be part of the movement without the fear of being caught up in violence. Fourthly, successful anti-eviction cases have at times led to the consolidation of a movement’s support-base and the recruitment of new members. Temporary court injunctions, when combined with other extra-institutional victories, can (re)energise the target community who now see that the State can be defeated. Lastly, successful but very narrow court victories have been given wide interpretations by movement leaders to legitimise counter-hegemonic, extra-legal tactics. Consider the following statements by an APF member upon hearing the news that the High Court has declared the installation of prepaid members unlawful: “as we speak now, members of the community of Phiri are digging up the meters and bridging [by-passing] them, and they are allowed to do so because the court ruled in their favour”. In this reading, the High Court ruling granted legitimacy to the movement’s “Destroy the Meter/Enjoy Free Water” campaign!

Away from the courts, counter-hegemonic movements have mobilised socio-economic rights by appropriating its discourse(s) to legitimise extra-institutional, extra-legal activities. Examples here include invoking claims to ‘rights’ that are not provided for in the Constitution such as ‘right to the city’ (Poor People Alliance), ‘right to electricity’ (Soweto Electricity Crisis Coalition and Anti-Privatisation Forum), ‘right to resist eviction’ (APF), ‘right to home’ (Western Cape Anti-Eviction Campaign), ‘right to land’ (Landless People’s Movement), and ‘right to work’ (Unemployed People’s Movement). In these instances ‘counter-hegemonic’ movements appropriate the language of socio-economic rights to animate and justify extra-legal, counter-hegemonic activities.

SM: What would you say to those who argue that while the law can be used to extract concessions from the state, it cannot be used to bring about more radical social change?

TM: The point is that those hegemonic in the sphere of civil society fetishise constitutionalism and embrace the myth of judicial neutrality. All life in this young South African society is suffused with the human rights discourse. There is no ‘outside the law’. Those who argue that movements should operate ‘outside of the law’ and at distance from this statist discourse are ivory tower...
radicals who never have to take tough decisions; radical purists who can’t organise a piss up in a shebeen. Movements appropriate tools available to them and if used tactically they can indeed extract concessions from the State – and let’s be clear, social justice campaigns are about extracting resources from the State. The challenge is to make sure that the legal tactics and strategies do not become the be-all and end-all; that legal ideology does not over-determine the movement.

Ultimately, my personal opinion is that the law can never ever be an instrument for radical change. In this regard I agree fully with the critiques I outlined earlier, especially the third one about hegemonic legal system(s) being complicit in structural racism and suppression of African way of being-in-the-world. Having said that I can never advise any of the movements I work with to not use the law.

SM: The courts have brought significant victories for the poor and disempowered – think of the Grootboom case (in which the courts found South Africa’s housing policy to be unreasonable in that it did not adequately protect the rights of vulnerable, homeless people who had been evicted without being provided with alternative accommodation) and the social movement Abahlali baseMjondolo’s successful attempt to get the KwaZulu-Natal Slums Act declared unconstitutional. However, critics point out that despite such successes, vulnerable people continue to be evicted, displaced and made homeless. Are such successes in court empty victories?

TM: This is the debate that is taken up in a recent book I co-edited: *Socio-economic Rights in South Africa: Symbol or Substance* (2013). Contributors range from anthropologists to political scientists to lawyers and to activists. If you read the book carefully, you will see that the ‘jury is still out’. My personal sense is that 90% of court victories have been hollow victories. In any case, courts do not have the power to implement their decision and as we saw in the Abahlali case and others local elites regularly ignore them. Similarly at Khulumani we have several court judgements that have not been implemented. This is particularly jarring if you consider the fact that by the time lawyers make submissions to court they have already panel beat movement demands into ‘realistic’ or ‘attainable’ claims in line with the constitutional provisions of affording ‘access’ to various socio-economic goods ‘within available resources’ as per the State macro-economic policies.