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978-1-107-02114-3 - Socio-Economic Rights in South Africa: Symbols or Substance?

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

Excerpt

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## 1

## Introduction

## Civil Society and Socio-Economic Rights

*Malcolm Langford\**

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

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

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

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

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

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

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

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

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

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

<sup>3</sup> This might include the Constitution, legislation, policy, institutions, and even judgments.

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

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

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

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

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

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

and the thorny question of causation. Section 4 provides an overview of the structure of the remainder of the book, and the key thematic conclusions are reserved for the final chapter.

# 1. SOCIO-ECONOMIC RIGHTS IN POST-APARTHEID SOUTH AFRICA

## 1.1. *Transitioning with a Rights Framework*

When Nelson Mandela walked out of prison in February 1990, the trajectory of the development of South Africa’s post-apartheid order was not self-evident. How would the quasi-socialist agenda of the African National Congress (ANC) contend with the demands of white capital? How would the calls for ethnic, linguistic, regional, and legal autonomy from different constituencies sit with a desire by the ANC and its partners for a strong central government to ensure social and economic change? Once multi-party negotiations gathered pace, the answer became quickly clear. In the words of Robins (2008: 3), the “militant language of liberation” gave way to a “new set of liberal democratic keywords” of “rights, citizenship, liberal democracy, nation-building, transformation, black economic empowerment”, and so on. The result was the creation of a constitutional framework that was ambiguous enough to accommodate alternative political and economic trajectories but situated within the strictures of a liberal frame.

With the benefit of hindsight, it has been claimed that such an ideological and constitutional settlement was inevitable. Habib places South Africa in the global context of Huntington’s ‘third wave’ of new democracies: a “‘Janus faced transition’ that embraced political democratisation and economic liberalisation”.<sup>5</sup> Neo-liberal globalisation was on the march, and the fall of Eastern European communism made alternative frameworks less plausible – as demonstrated by the wave of resignations from the ANC’s sister party, the South African Communist Party.

Marais (2010: 2) prefers a more historical explanation. In his narrative, the “end of apartheid is best understood not as a miraculous historical rupture, but as a dramatic phase in an ongoing struggle to resolve a set of political, economic and social contradictions that became uncontainable in the 1970s”. South Africa’s economic model of a cheap and manageable labour supply, protectionist trade policies, and reliance on mineral resources had become unsustainable. Although this economic crisis helped fuel the political crises in the 1970s and 1980s that led to the end of apartheid, it also paved the way for economic neo-liberalism, which the “apartheid regime flirted with in the 1980s” and was embraced more fully, but not totally, by the post-apartheid government in the late 1990s (ibid.).

<sup>5</sup> See Habib, Chapter 5, in this volume.

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These broader systemic factors also revealed long-standing frictions within the liberation movement. The reality of governing exposed traditional divisions over the pace in which South Africa's model of racial capitalism should be tackled (Robins, 2008). This was aided by South African business, which "had created channels of communication [with the ANC] that would allow the second 'hidden transition' – in the economy – to take place without ideological conflict" (Butler, 2009: 111).

Path dependencies aside, the precise features of the constitutional settlement on economic questions and political autonomy still remained controversial as late as 1996, when the final Constitution was adopted by Parliament. In a politically charged and tense atmosphere, agreement was found at the eleventh hour on the inclusion of the right to property, limitations on the right to strike, the right to monolingual schools (a demand of Afrikaner parties), and the subjection of customary law to the Bill of Rights (Ebrahim, 1999).

Whereas the constitutional design was largely a classical liberal product – strongly reflecting the International Covenant on Civil and Political Rights – it was balanced by an emphasis on dignity and equality, the bounding of the right to property by principles of historical and distributive justice, and the inclusion of a number of justiciable socio-economic rights. The latter was initially contentious, with resistance from the Democratic Party, Chamber of Mines, the South African Institute on Race Relations, and the Free Market Foundation (Dugard, 2004: 349; Liebenberg, 2010). It was also relatively novel for a common law country – although rather standard elsewhere in post-1980 constitution making (Langford, 2008; Simmons, 2009b). Arguments that these rights balanced the recognition of more liberal rights appear to have been decisive in garnering ANC support.

The articulation of socio-economic rights in the constitution largely follows the language and jurisprudence of the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The State is required to "respect, protect, promote and fulfil all rights" in the Constitution (Article 7(2)) and to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of" various socio-economic rights (Articles 26, 27, and 29). These rights are housing, social security, health-care services, food and water, and non-basic education. A number of social rights are made immediately realisable – right to basic education and children's socio-economic rights (Articles 28 and 29). Moreover, relatively generous rules on standing and expansive remedial powers for the courts were enunciated, and in 1996, when the Constitution was certified, the Constitutional Court clarified that socio-economic rights were, largely, justiciable.<sup>6</sup>

The period that followed the interim constitution of 1993 was marked by a heady optimism with a raft of rapid legal and policy reforms. A newly elected Parliament

<sup>6</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), at para. 77.

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passed the Restitution of Land Rights Act in 1994 with the ANC and National Party voting in favour, and the rightist Zulu-dominated Inkatha Freedom Party and the rightist Afrikaner Freedom Front voting against.<sup>7</sup> From there followed the Schools Act 1996, Housing Act 1997, Water Services Act 1997, Skills Development Act 1998, Employment Equity Act 1998, Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998, Equality Act 2000,<sup>8</sup> and, later, the National Health Act 2003 and Social Assistance Act 2004. And there were important legislative advances for women's rights with social consequences, such as the right to abortion and protection from domestic violence. One of the distinguishing features of this legislative surge was the influence of socio-economic rights. These rights were often enshrined as a principal statutory objective and helped frame government obligations (e.g. minimum standards, procedural rights, positive duties). More generally, government departments and systems were established in line with human rights commitments, which included departments of housing, social development, education, and health care.

Even before the adoption of the Constitution, social policy was undergoing a seismic shift. From 1990, the residual apartheid social welfare state was opened up to black South Africans, in particular old-age pensions and schooling, and by 1994, explicit racial discrimination had largely been removed from public policy (Seekings and Natrass, 2006: 36–37). The cornerstone of initial policy making was, nonetheless, the comprehensive 1994 Reconstruction and Development Programme (RDP). Adopted by the short-lived Government of National Unity,<sup>9</sup> the document had support and input from the Congress of South African Trade Unions (COSATU), the South African Communist Parties (SACP), and many civil society organisations. The RDP is largely remembered for its focus on social development, but it is arguably a more heterodox fusion of different and potentially conflicting ideas and policies. Mandela's preamble opens with a commitment to addressing "poverty" and "gross inequality", with a strong emphasis on achieving it through a "path of high and sustainable growth" and a stable macroeconomic environment, including "gradual reduction in the fiscal deficit". The RDP was to be a "people-driven" process, but much of the document details the institutional role of different levels of Government. The most striking features of the RDP were its quantitative targets (e.g. building one million houses in five years, supplying twenty to thirty litres of water daily to everyone in two years) and "lead projects" in nutrition, water supply, job creation, land restitution, housing, and health care.

<sup>7</sup> The composition of the first Parliament was as follows: ANC (252 seats), National Party (82), IFP (43), Freedom Front (9), Democratic Party (7), Pan African Congress (5), and African Christian Democratic Party (2). The vote by the IFP against the law should be understood in the context of its political struggle with the ANC.

<sup>8</sup> Promotion of Equality and Prevention of Unfair Discrimination Act (for non-employment issues).

<sup>9</sup> Until the adoption of the final constitution, this included ANC, IFP, and the National Party.

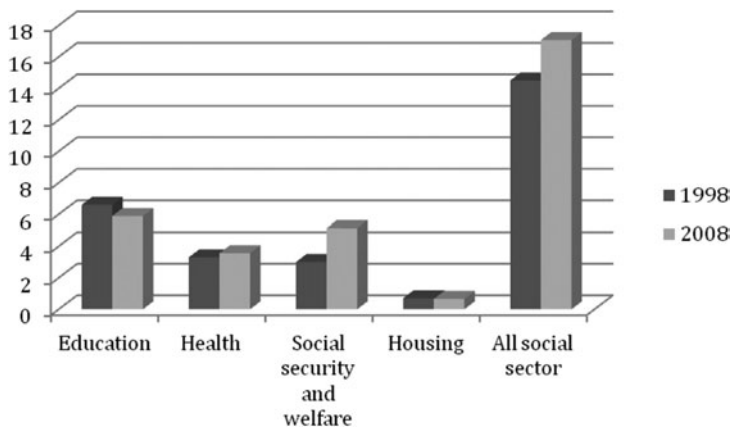


FIGURE 1.1. Fiscal social spending as percentage of GDP. *Source:* National Treasury (1998, 2008).

Since then, the shape of socio-economic policy has been subject to further change and contestation. Three shifts are most notable. In 1996, the ANC Government adopted the Growth, Employment, and Redistribution (GEAR) strategy. This brought a neo-liberal macroeconomic stance into the forefront of economic policy, although Gelb (2006) argues that much of this was implicit in the RDP. Although GEAR had clear economic implications for trade and investment, deficit financing, and interest and exchange rates, it arguably ushered in a neo-liberal mind-set that rippled beyond a strictly defined macroeconomic arena. This could be witnessed in the greater emphasis on cost-recovery principles for utilities at the local level and the drive to establish ‘world-class cities’ to attract foreign and domestic investment.

The second development was a marked increase in social spending. In 1998, expenditure on health, education, social welfare payments, housing, and community development constituted 47 per cent of government spending. By 2008, this figure had risen to 60 per cent, with most of the growth coming in the form of expanded social security and welfare payments, particularly the extension of grants for children ages seven to fourteen. The result was that South Africa was ranked as possessing the ninth-highest ratio of social assistance spending to gross domestic product (GDP) among 74 developing and transition countries.<sup>10</sup> The health budget doubled over two decades, with an expansion of primary and maternal health care and the introduction of a large antiretroviral treatment programme, albeit implemented only after massive pressure by various civil society organisations. This fiscal prioritisation of the social sector is evident from its growing proportion of GDP, which constitutes one way of conceiving a State’s maximum available resources for socio-economic rights. As Figure 1.1 shows, total social spending increased from 14.5 per cent to 17 per cent of GDP between 1998 and

<sup>10</sup> See the discussion by Goldblatt and Rosa, in Chapter 9 of this volume.

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2008,<sup>11</sup> and by 2010, the total budget accounted for 34 per cent of GDP, which is typical of developed – albeit liberalist-corporatist – states rather than developing countries.<sup>12</sup>

Last, institutional reform of municipalities was completed in 2000 with the establishment of ‘wall-to-wall’ municipalities across South Africa. Although the nine provinces had assumed significant responsibilities in terms of largely implementing national policy on education, health, and social security, local authorities are largely or exclusively responsible for key socio-economic rights: the funding and delivery of water, sanitation, local economic development, and housing.

### 1.2. *Socio-Economic Realities*

If we compare the promise of rights with their actuality, the picture is decidedly more mixed. Inequality and poverty stubbornly persist in the post-apartheid period. Whereas the level and depth of income poverty has fallen in the past two decades, the decrease is not that significant. In 2005, 23 per cent of South Africans lived under the lowest conceivable poverty line of 174 rands a month; and 48 per cent lived under a cut-off of 322 rands a month (Hirsch, 2008). Income inequality between racially defined groups has been declining,<sup>13</sup> but the average black worker still earns a quarter of what the average white worker does (Szczepanski, 2008), and intra-racial or class-based income inequality has exploded: Seekings and Nattrass (2006: 308) estimate that ‘between group’ inequality has fallen by around a third between 1975 and 2000 but that ‘within-group’ inequality has increased by this amount. This varied progress extends beyond income: South Africa tumbled down the global rankings on the Human Development Index (HDI), which includes life expectancy and literacy. By 2009, the country was ranked 78th in terms of per capita income, but had fallen to 129th under the HDI (Kegley and Blanton, 2010–2011: 525).

One of the most glaring indicators of sluggish socio-economic progress is employment. South Africa experiences one of the highest levels of unemployment in the world – more than double that in other middle-income and fellow sub-Saharan African countries (Bhorat, 2007). As Figure 1.2 indicates, the official unemployment rate steadily rose from 10 per cent to 20 per cent in the last decade of apartheid and has continued upward. By 2002, it had reached 30 per cent, although it has tapered

<sup>11</sup> If we take social grants, we see a considerable increase, from 2 per cent of GDP in 1994 (Seekings, 2007) to 3 per cent in 1998 and 5.1 per cent in 2008.

<sup>12</sup> For an overview of recent budgetary trends, see Verwey, Lefko-Everett and Mohamed (2009). To take a very specific example, in 2007, public expenditure on education accounted for approximately 5.4 per cent of GDP, amounting to 17.4 per cent of total government expenditure. This is a higher proportion than, for example Germany (South African Institute of Race Relations, 2009: 379).

<sup>13</sup> During apartheid, race was the primary determinant of income inequality, whether through direct discrimination in the form of wage and occupational caps or through indirect forms such as differential education quality and eviction from agricultural lands and livelihoods.



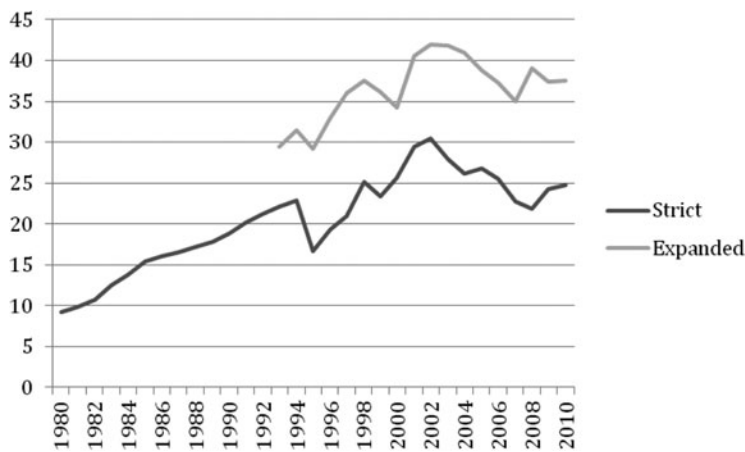


FIGURE 1.2. Unemployment in South Africa. *Source:* International Monetary Fund (2010), Seekings and Nattrass (2006), StatisticsSA Website.

off in the past eight years, hovering at around 25 per cent. If we take an expanded definition of unemployment, which includes discouraged work seekers, the rate is even higher. It peaked at 42 per cent in 2002, with a downward trend towards 35 per cent.

Unemployment is also overwhelmingly<sup>14</sup> racialised and partially gendered. Using the strict unemployment definition, 27 per cent of Africans, 20.7 per cent of Coloured persons, and 10 per cent of Indians were unemployed, whereas this is the case for only 4.6 per cent of whites (South African Institute of Race Relations, 2009). Under an expanded definition, African unemployment reaches almost 50 per cent. Women are overly represented in this category and account for approximately 60 per cent of the unemployed. Thus, since the end of apartheid, the experience of poor South Africans in the ‘productive sector’ has been largely disappointing. Moderate economic growth has largely not translated into jobs, except for a brief period between 2002 and 2006.

Unemployment is not the only contributor to high levels of income poverty in South Africa; wages and assets are also part of the story. For example, one study of Cape Town’s African poor found that 67 per cent of wage earners do not earn enough to raise their households above the poverty line (Swardt, 2004). Therefore, a deeper ‘chronic and structural poverty’ persists, which is evident in the distribution of assets (e.g. land, capital, technology) and the more entrenched dynamics of vulnerability, marginalisation, and poverty (Du Toit, 2005). As to assets, there has been an increase in the distribution of capital through black economic empowerment policies, but the white dominance of capital remains overwhelming and efforts to ensure that

<sup>14</sup> <http://www.statssa.gov.za/keyindicators/keyindicators.asp>

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redistribution was broad-based and did not only benefit a few are relatively recent (e.g., the Broad-Based Black Economic Empowerment Act No. 53/2003, which came into effect in 2007). As to land, the figures are worse: despite a promise to put 30 per cent of commercial farm land in black hands by 2014, the figure stood in 2010 at 4 per cent.

Changes in social security partly ameliorated this situation. The expansion of grants for the non-working population significantly increased household income. By 2005, 34 per cent of households reported that pensions and social grants formed their main source of income. However, there are no direct benefits for working-age individuals who are unemployed, and the campaign for a basic income grant that would have addressed this group, was not successful (see the discussion by Goldblatt and Rosa in Chapter 9). Health outcomes have also visibly worsened (*Lancet*, 2009). Life expectancy has fallen by almost twenty years; maternal deaths remain high; and there are other communicable epidemics, especially tuberculosis, and non-communicable diseases that plague South Africans. Rape and various forms of gender-based violence are common but poorly investigated: for each of the fifty-four thousand rapes reported to the police each year, “another nine are not”.<sup>15</sup> And notwithstanding relatively high expenditure on education, the quality of education remains poor for disadvantaged groups and regions, and most school leavers are unable to find work.

Significant advances have also been made in terms of basic services and housing. The proportion of those without access to water fell from 40 per cent to 7 per cent, and the equivalent figures for sanitation are 51 per cent and 21 per cent.<sup>16</sup> But significant controversies have arisen over the extent of actual ‘progress’, with concerns over the high numbers of disconnections (even if one accepts the official figures), limitations on effective access, and the inability of many urban and rural dwellers to move beyond the most basic level of access given the tardy pace of slum upgrading and land reform (Tissington et al., 2008). In housing, the Government has created ‘two million housing opportunities’, but it faces a backlog of two million housing units (Butler, 2009). And despite the significant extension of infrastructure, access to housing and basic services is still heavily conditioned on apartheid spatial geography, and a significant number of municipalities have been accused of harsh and unforgiving policies on eviction and the pricing of basic services. The *State of the World’s Cities Report*, by UN Habitat (2008 xii), offers the following assessment: “South Africa stands out as a country that has yet to break out of an economic and political model that concentrates resources, although the adoption of redistributive strategies and policies in recent years have reduced inequalities slightly.”

<sup>15</sup> ‘Tackling South Africa’s rape culture’, *BBC News*, 1 November 2007, available at <http://news.bbc.co.uk/2/hi/africa/7072818.stm> (Accessed 1 January 2011).

<sup>16</sup> Government of South Africa (2005); Department of Water Affairs and Sanitation, *Dashboard*, available at [http://www.dwa.gov.za/dir\\_ws/wsnis/default.asp?nStm=introduction](http://www.dwa.gov.za/dir_ws/wsnis/default.asp?nStm=introduction).