

9-22-2010

Essay: Can Human Rights Practice Be a Critical Project - A View from the Ground

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Recommended Citation

Lucie White and Jeremy Perelman, *Essay: Can Human Rights Practice Be a Critical Project - A View from the Ground*, 44 Loy. L.A. L. Rev. 157 (2010).

Available at: <http://digitalcommons.lmu.edu/llr/vol44/iss1/7>

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ESSAY: CAN HUMAN RIGHTS *PRACTICE* BE A CRITICAL PROJECT? A VIEW FROM THE GROUND

*Lucie White & Jeremy Perelman**

Critics have condemned human rights advocacy as being a deeply problematic solution to the sub-subsistence poverty that plagues the post-colonial Global South. This Essay discusses the efforts of four economic and social rights advocates working in Africa. Each succeeded by working within, but unconfined by, the approaches of the traditional human rights advocacy framework. The innovative strategies the advocates deployed may promote progressive institutional innovation in the provision of social welfare benefits. Still, single instances of innovation may not have an enduring impact on either extreme poverty or global inequality, the problems facing the Global South.

* The authors wish to thank the Stanford University Press, as well as their editor, Kate Wahl, and all of the other editorial staff at the Press, for facilitating the publication of the *Stones of Hope* volume, on which this Essay is based. They also wish to thank all the contributors to *Stones of Hope*, who wrote the case studies to which this Essay refers. They wish to thank the African lawyers and activists whose work inspired this Essay—and the *Stones of Hope* volume—for the creativity and courage that has engendered hope around economic and social justice throughout Africa and the globe. And finally, they wish to thank the institutions, including the Rockefeller Foundation, the Harvard University Center for African Studies, the Harvard Law School, and the Harvard Law School Center for European Legal Studies' Institute for Global Law and Policy for their invaluable support on the project.

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I. INTRODUCTION

The following affidavit was taken by student lawyers in the course of a “Right to Health” campaign in Accra, Ghana.

My name is Abdullah Abdul Muman. I am thirty-five years old. I live in Nima, in house number E 501/15. My house is right next to the big gutter. I have lived there for almost eleven years. It is very unhealthy next to the big gutter—there is always disease. My three children (aged fourteen, seven, and three) play around the gutter, which brings them sickness and disease. They get rashes, fever, and colds from the gutter. They also get cut by broken bottles in the gutter. It worries me to live where I do. It affects my mood every day—day and night. . . . I can go into my room, but the wind brings it all in—the diseases and the smell that is so bad that I can’t breathe. There are also a lot of flies that come when we eat. . . . The gutter is especially dangerous during the rainy season. This past rainy season has damaged the bridge and made it difficult to cross the gutter. There is also a problem with erosion; houses fall into the gutter when it rains. I think my house is in danger, and I worry about my family. I worry that my house will collapse, and I fear for my children.¹

A. Why Not Human Rights? The Recurring Critiques

We offer the story of Abdullah Abdul Muman as an example of the radical sub-subsistence poverty that affects at least a billion people, mostly in the post-colonial Global South.² Increasingly, especially in the Global North, governments and conglomerate philanthropies have promoted human rights advocacy—specifically in the economic and social rights domain—as a panacea that would wipe out the problem of sub-subsistence poverty over time.³

1. LUCIE E. WHITE & JEREMY PERELMAN, STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY 1 (2010) (affidavit taken in Nima, Accra, Ghana, in January 2003).

2. See generally Thomas Pogge, *Why Inequality Matters*, in GLOBAL INEQUALITY: PATTERNS AND EXPLANATIONS 132, 132, 134 (David Held & Ayse Kaya eds., 2007) (“With well over a billion people in poverty, experts offer that geographical factors, among others, contribute to the persistence of poverty on such a large scale.”).

3. See WHITE & PERELMAN, *supra* note 1, at 2–3.

For good reason, this move—throwing human rights at the Third World’s “poverty problem”—has been resoundingly condemned by critical theorists, particularly Third World critics, as a deeply problematic enterprise.⁴ The distrust of human rights ideology and advocacy tends to cluster around four themes: liberal, imperialistic, demobilizing, and pornographic—or, some would say voyeuristic—all at the same time.⁵

Human rights is said to be *liberal* because it is in denial about its own particular history in Enlightenment capitalist expansion and because it announces itself as a set of foundational values that should be embraced by—or forced upon—all peoples.⁶ Furthermore, these values happen to configure their “liberal subjects” as so “autonomous”—or self-bounded—that those subjects are structurally incapable of solidaristic connection with other human beings or of participation in socialist socio-political formations.

Human rights is said to be *imperialistic*, both historically and ideologically, because it pursues a program of imposing those values across the Third World through missionary penetration and military invasion.⁷ Thus, not only is this brew of liberal universalism, religious zeal, and military conquest the *modus operandi* of colonial expansion, it is on the level of advocacy its imperialist force tends to crowd out social-change practices animated by other political ideologies or normative orientations.⁸ As such, it locks in a certain pattern of inequitable distribution, deflects attention from that pattern’s analysis, and undermines redistributational political projects.

4. See generally DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 3–35 (Princeton Univ. Press 2005) (2004) (listing hypotheses about the risks, costs, and unanticipated consequences of human rights activism); MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* 1–9, 10–41 (Univ. of Pennsylvania Press 2008) (2004) (questioning the deployment of human rights to advance or protect norms and practices that may be detrimental to Third World societies); Makau Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L L. 589, 600–01 (1996) [hereinafter Mutua, *Ideology of Human Rights*] (balancing competing objectives makes states “unreliable, unprincipled, and manipulative proponents of the human rights corpus”); Makau Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 202, 207–08, 210 (2001) [hereinafter Mutua, *Savages*] (suggesting that “the globalization of human rights fits a historical pattern in which all high morality comes from the West as a civilizing agent against lower forms of civilization in the rest of the world”).

5. See KENNEDY, *supra* note 4; Mutua, *Ideology of Human Rights*, *supra* note 4, at 589–601; Mutua, *Savages*, *supra* note 4, at 201–10.

6. See WHITE & PERELMAN, *supra* note 1, at 155–57, 175.

7. See Mutua, *Savages*, *supra* note 4, at 204–07.

8. See WHITE & PERELMAN, *supra* note 1, at 175.

Human rights is said to be *demobilizing* not only because it crowds out campaigns for socialist reconstruction, for instance, but also because it also sucks up activists' time and passion into legal technicalities, distracting them from more disruptive and transformative approaches to working with radically disenfranchised populations for deep social change.⁹

Finally, human rights is said to be *pornographic* because it frames the suffering subject as a martyr to be fetishized and worshipped rather than addressed and accompanied.¹⁰ If that object speaks, it is in tropes that have been carefully scripted by the lawyer to elicit pity and provoke disgust. That, of course, is the figure of Abdullah Abdul Muman with which this Essay began.

B. The Response? Creative Practice

In the face of this damning critique, Third World anti-poverty advocates have several options. They can renounce human rights altogether, at the risk of being left out of the game of global "poverty alleviation" and the funding streams that go with it. They can take the plunge into human rights practice and try not to drown. Or, they can take on the discourse, wrestle with it, and reclaim it as their own. Let us look at the third option and consider what economic and social rights (ESR) practice might look like if transformed by such subversion.

This Essay will now turn to a project through which we, working with several others, sought insight into that question. This project was a collaboration among a small group of sub-Saharan ESR activists and distinguished human rights scholars. Its goal was to document and interpret what the activists had done in ESR campaigns on the ground. None of these activists were willing to give up on human rights advocacy entirely; yet, at the same time, none of them considered themselves to be confined to the dominant approaches to human rights practice that have been subject to widespread critique. This Essay will describe how the activists were actually *using* human rights on the ground through ESR language, strategies, and values, always with their eyes wide open. They claim

9. See *id.* at 149–71.

10. See *id.* at 2.

to believe in what they are doing, without the sort of tortured self-critique that some Northern human rights scholars attribute to them.

II. THIS ESSAY

In this Essay we will address three issues. First, we will explain the method we used in the research. Second, we will describe each of the four ESR campaigns on which we focused our attention. Lastly, we will address some of the recurring themes that we identified across the four case studies—themes that might be relevant to *other* ESR activists' work, both North and South.

A. *Why Sub-Saharan or Southern Africa?*

Before addressing the issues, we want to note briefly why all of the activists who took part in the project came from sub-Saharan¹¹ or Southern Africa.¹² Several reasons guided this choice. First, Southern Africa presents a global poverty challenge of the first rank¹³ that is being only partially addressed by liberal governance technologies like the Millennium Development Goals,¹⁴ and the benchmarks and indicators through which each nation's progress in reaching those goals is measured. Second, a new cohort of activists who work both with and against conventional human rights rhetoric, strategies, and norms is emerging in this region. Many of these new activists have honed their capacities for using human rights *both* creatively and critically. This work has been enhanced through their networks with one another, as well as their study in Northern universities. Third, the activists and scholars who were invited to come together for this project were already familiar with one another through prior North/South collaborations and on-going learning networks in which both groups had participated.¹⁵

11. Nigeria, Kenya, Tanzania, and Ghana.

12. South Africa and neighboring regions.

13. See, e.g., PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 3, 6–8, 13 (2007).

14. See generally United Nations Millennium Development Goals, U.N.ORG, <http://www.un.org/millenniumgoals/bkgd.shtml> (last visited June 14, 2010).

15. See WHITE & PERELMAN, *supra* note 1, at 3–4.

B. The Method

The scholars and activists joined together to consider four ESR campaigns that had been launched by the activists. On the basis of multiple readings, conversations, and scholar/activist dialogue and debate, the group, working closely together, identified several cross-cutting and contested themes.

C. The Four Case Studies

The first case featured in the project took place in South Africa in the 1990s. There, several lawyers joined with activists working with a strong social movement—the Treatment Action Campaign (TAC)—to force a government that had denied the viral causation of HIV/AIDS infection to provide antiretroviral treatment for HIV-positive pregnant women so as to prevent mother-to-child transmission of the virus.¹⁶

The second case featured Ghanaian lawyers and activists who teamed up with international law students to challenge the extortion of wealth used to finance a grossly underfunded health care system. The method for this extortion represented a *de jure* violation of core human rights values, i.e., that governments cannot imprison people for debt.¹⁷ More specifically, indigent people would be detained in public hospitals after medical discharge for life-threatening treatments. The rationale for these detainments was to shame the patients' extended kin networks into finding the money to "bail out" their relatives by selling grain or livestock, for instance, in order to pay their bills.¹⁸

In the third case, Nigerian activists and lawyers combined grassroots human rights education and complex litigation to "empower" the residents of informal urban communities to block their eviction from rapidly appreciating land.¹⁹

Finally, in the fourth case, Tanzanian human rights activists organized aggrieved pastoralists to appeal to a government human rights commission when the government used violence to clear the

16. *Id.* at 10, 152. See generally TREATMENT ACTION CAMPAIGN, <http://www.tac.org.za/community/> (last visited Aug. 27, 2010).

17. See WHITE & PERELMAN, *supra* note 1, at 1–2, 123, 127–36, 157.

18. See *id.* at 2.

19. *Id.* at 31–41.

pastoralists from their land in order to establish game reserves catering to wealthy, foreign tourists.²⁰

These are the four cases in which African lawyers, activists, and the people they worked with had the courage to directly challenge violent development policies. Like David wielding stones against Goliath, these activists adapted human rights values, language, and tools in their fight. They did this knowing full well the double-edged quality of these advocacy tools. Human rights can be called on to protect amassed wealth more readily than that discourse can be called on to force its transfer into disenfranchised peoples' hands, much less to frame radical transformation of the up-front dynamics of wealth creation and distribution.

D. So What Happened?

As we analyzed the four case studies, we saw four *different* justice campaigns. Each deployed a different combination and sequencing of human rights tools. Each campaign led to a different outcome. And yet, in spite of these different outcomes, as we continued to reflect on the four case studies, we identified several cross-cutting themes. These themes are explored at much greater length in our recently published book, *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty*,²¹ which addresses the project, the case studies, and the outcomes of our joint deliberation about them.

1. The Cross-Cutting Themes

In brief, the cross-cutting themes that we found can be described as follows. First, we identified two strategies of engagement: a dogged, game-changing pragmatism and the use of human rights tools to help in the production of public performances of (in)justice. Second, we saw that the activists had all subscribed to three non-foundationalist normative commitments described as critical left liberalism; reflexive pluralism; and overtly partisan, redistributive politics and institutional innovation. Thus, the activists sought to shape their work so as to *prefigure* methods of social welfare delivery and system design that were at once more effective—in

20. *Id.* at 115.

21. *Id.*

pragmatist terms—at “getting food on the table” and at the same time infused with core human rights values like inclusion, non-discrimination, the promotion of a baseline of material security and the conditions for human thriving, and democratic participation, or “voice.”

2. Strategies of Engagement

The two strategies of engagement that we identified were pragmatism and performance. By pragmatism we mean a style of human rights advocacy that breaks the usual rules of the human rights advocacy “game.” The activists featured in the project broke those rules in three overarching ways.

First, they did not privilege litigation or other win/lose procedures.²² Traditional human rights advocates tend to start from the black letter law, look for violations, and then seek those remedies that the law allows. That is why they are so upset that human rights laws are typically said to be “soft” with no “teeth.”²³ In the ESR campaigns we worked with, the lawyers positioned themselves with people living in the sort of *everyday* radical poverty rather than discrete acts of malevolent violence. They used whatever tactics they could come up with—including litigation—when those moves could marshal power.

When they did go to court, they did so to create a public spectacle, or to put in place a structural remedy that would frame more adequate practices of housing or food delivery in under-resourced settings.²⁴ At the same time that these advocates sometimes deployed litigation, however, they also used all of the other formal human rights tools, such as coalition building, grassroots organizing, community development, policy advocacy, and global networking.²⁵ They also used the media,²⁶ and they typically orchestrated such tactics in sequence so as to mobilize social movement and leverage momentary power.²⁷

22. *Id.* at 150.

23. *See id.* at 138, 167.

24. *Id.* at 150.

25. *Id.*

26. *Id.*

27. *Id.*

The second feature of the activists' pragmatism was to engage with multiple "public" actors in every domain of state power.²⁸ They used ESR language to draw attention to the nation-state's failure to target "enough" of its resources to address the most extreme forms of material deprivation.²⁹ At the same time, though, they tracked the global contexts, micropractices, and development pathways in the shadow of which exchanges between the individual and the nation-state take place. This multiplex analysis was critical, because colonial histories and neo-colonial political economies have left many sub-Saharan and Southern African nations without the fiscal and administrative capacity to transform their social welfare systems on their own. This challenge did not stymie the activists in the case studies, but rather, they aimed human rights claims at rich nations while tracking down state of the art innovations in social welfare system design.

Thus, these lawyers, particularly the Nigerian activists, challenged and negotiated with the World Bank.³⁰ They both defied—and lobbied—the governments of rich nations at the same time that they petitioned local forums like chieftaincy courts and human rights commissions.³¹ In short, they continually mapped out the flows of state power—above, within, and through the national state's colonially imposed borders.

The third dimension of their pragmatism was to challenge and recruit "private" as well as state actors.³² As they mapped flows of power, they did not confine themselves to the field of the state. Rather, they located all technologies of oppressive—and potentially enabling—power, from formal state institutions, to multinational conglomerates, to family patriarchs, to the people they worked with, and to those they invited to join their campaigns.³³ They rejected the idea that only the formal state and other sites of "public" power could be targeted—or called on—in their human rights campaigns.³⁴

28. *Id.* at 151.

29. *See id.*

30. *See id.* at 152.

31. *See id.* at 151–52.

32. *Id.* at 152.

33. *Id.*

34. *Id.*

Their practice challenged the public/private divide by simply sidestepping it when the work demanded.

Thus, in a campaign for workers and residents in Ghanaian mining communities, the advocates targeted both Canadian mining conglomerates and the government's industry-captured Chamber of Mines.³⁵ In the South African HIV case, the activists worked with and against both the national state and multinational drug companies; they could go before a national commission as well as negotiate with global pharmaceutical conglomerates.³⁶ In short, these pragmatic moves, when woven together into savvy ESR *campaigns*, occasionally mobilized political will and shifted material resources in ways that made space for institutional innovation.³⁷

In addition to being pragmatic, these advocates choreographed public performances that enacted the injustice they were fighting while enlisting the solidarity of their audiences. These performances evoked all of the usual expressive effects that legal scholars have described. But more striking were the ways these performances could sometimes disrupt or reverse entrenched power hierarchies. Because of the penetration of those hierarchies into the subjectivity of those at the bottom, however, such disruptions rarely lasted for long except through how the performances were remembered and repeated over time.

In the Ghanaian case of the hospital detainment, for example, the community's collective remembrance of the detainee's release and subsequent public appearance inspired community members to challenge other injustices after his case was resolved.³⁸ And another performance had the same sort of lingering effects on a community's political identity. The scene was the northeast coast of Kenya, where salt-farming poses a threat to the livelihood of workers and residents of small communities.³⁹ In this case, an activist organized public hearings on the salt farms' sites.⁴⁰ In the hearings, both community members and the salt-farming corporation's representatives

35. *Id.*

36. *See id.* at 152–53.

37. *See id.* at 152–55, 183–84.

38. *Id.* at 154.

39. *Id.*

40. *Id.*

testified.⁴¹ These performances leveled the power gap between the two groups and gave the workers a fleeting sense of power.⁴² At the same time, the corporate representatives, through their own testimony, revealed their position to be implausible.⁴³ For a moment, the community members were in command of the situation and could forthrightly assert their common sense of injustice.⁴⁴ Their experience of power, however, did not last long. Yet, replaying that moment in people's shared memories infused it, over time, with an empowering force.⁴⁵ These pragmatic and performative strategies of engagement were threaded through the ESR campaigns.

3. Normative Commitments

Our interpretation of the case studies also revealed how these strategies were guided by three *normative and political commitments*, none of which were embraced by the activists on foundationalist grounds. These commitments were what we call edgy left liberalism, reflexive pluralism, and distributive politics.

a. Left liberalism

By left liberalism, we mean a critical but also engaged stance toward core liberal values and thus human rights norms.⁴⁶ It identifies itself with a partisan redistribution of power from rich toward the most disenfranchised of social groups as well as the structural shifts that will lock in this distributional tilt over the long term.⁴⁷ This approach promotes the idea that material goods such as food, health care, and education anchor any person's active engagement in a socialist democracy.⁴⁸ However, those "goods" are recognized to have embedded within them capitalist agendas for development on the levels of both the individual subject and society as a whole.⁴⁹ In addition, left liberals know that their version of

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 154–55.

45. *Id.* at 155.

46. *Id.*

47. *See id.* at 155–56.

48. *Id.* at 156.

49. *See id.*

liberal practice will hit up against its own limits when redistributive tactics go too far, because if the wealth of the rich is threatened too much, the troops will be called to protect it.⁵⁰

Nonetheless, the activists *believed* in the power of liberal values such as security, equality, dignity, inclusion, voice, and, most of all, *solidarity*, to chart a path toward justice.⁵¹ They believed that ESR struggles can be seen as battles to vindicate justice rather than squabbles over rents, and that it is a good thing for disenfranchised peoples to organize themselves in ways that enhance their political agency and political “citizenship.” These ideas may be taken for granted by liberal advocates, yet for the activists engaged in the project, these values were always in contest. In every campaign that they launched, the normative sense of using these values to guide the work was tested anew. In every campaign, they pushed the envelope of liberal values as far as they could to the left without ungluing that envelope entirely. This commitment to left liberal values is manifest in every one of the case studies. The Nigerian activist, for instance, did not merely exploit rights-talk in organizing members of the threatened communities.⁵² He also deeply *believed* in the values that the talk conveyed.⁵³

b. Reflexive pluralism

The second normative commitment that we identified is called reflexive or deliberative pluralism. By this we mean a commitment to respect and negotiation among the multiple legal orders and normative worlds that the activists encountered among the people they worked with.⁵⁴ From a pluralist perspective, law figures profoundly in people’s consciousness.⁵⁵ But their take on “law” is not accounted for by state-sanctioned, formal rules alone.⁵⁶ Rather, multiple legal and normative orders coexist in people’s minds and worlds.⁵⁷ Taken together, this kaleidoscope of legal orders creates

50. *See id.*

51. *See id.* at 156–57, 175–76, 195.

52. *Id.* at 44, 151–52.

53. *See id.*

54. *Id.* at 157.

55. *See id.*

56. *Id.*

57. *Id.*

patterns of constraint and openings for progressive institutional innovation.⁵⁸

The reflexivity comes in, however, because while the activists in our project *respected* multiple legal norms and cultural practices, they did not defer to those practices as sacrosanct. Rather, they recognized that those cultural practices and normative orders had been shaped and reshaped over time. In the case of sub-Saharan Africa, much of this shaping took place in the caldron of a violent colonial past. Customary law, for instance, was reshaped and endorsed by colonial authorities to keep its subjects down.⁵⁹ Thus, the activists could not side-step those tensions entirely because they had to work through the claims of authenticity or indigeneity that they encountered in customary law *along with* community members in light of the activists' *own* politics.

Each chapter in our book offers its own account of an activist's pluralist negotiation. For instance, in the Ghanaian case, the activist could legitimately defy a court's injunction against a planned demonstration because some community members concluded after debate that the "illegal" march would respond to a *different*—though not "higher"—legal order, one that they subscribed to *along with* the state's "official" law.⁶⁰ And in the Tanzanian case, the activists' understanding of pastoralists' "customary" forms of land use suggested solidaristic legal frameworks for land occupancy in the here and now.⁶¹

c. Redistributive politics

In addition to left liberalism and reflexive pluralism, the activists were also committed to ESR practice as redistributive politics. Thus, the activists did not pretend that ESR practice could be a neutral endeavor.⁶² Rather, they understood the "issues" on which they were working as *political* contests.⁶³ They understood "pragmatism" as breaking out of formalist chains and "performance" as a way of tapping into the passion of the people they worked with—and of

58. *Id.*

59. *See id.* at 101–02, 157–58.

60. *See id.* at 159–60.

61. *See id.* at 160–61.

62. *Id.* at 164.

63. *Id.*

their own.⁶⁴ They viewed pluralist deliberation as an opportunity to confront brutal colonial histories and the histories' present-day legacies.⁶⁵ Finally, they understood "equitable" social welfare institutions to be partisan—tilted toward some groups over others in their process and design.⁶⁶

They expected judges to reflect their social positions in their rulings.⁶⁷ They did not expect courts, without substantial social-movement pressure, to make distributional decisions that they would endorse.⁶⁸ And although they believed in liberal values at their left-wing limit, they did not expect to build a left-wing social movement on the basis of liberal values in their vacuous, formalist, neo-liberal guise.⁶⁹ In short, the activists saw an ESR campaign as a cluster of practices that could build political pressure while also opening up political debate on how to allocate, when to expand, and how to best renew limited resources so as to enable the most disenfranchised people to be brought into solidaristic connection with one another, and thus—as far as it as humanly possible—to thrive.⁷⁰

Finally, their commitment to redistributive politics signaled a normatively informed analytical approach that searches for distributional effects of legal rules and policy frameworks not apparent on a first reading. Thus, in the Tanzanian case, seemingly innocuous government policies like titling traditional lands were, in the light of astute distributional analysis, shown to be likely to result in land loss for pastoral people.⁷¹ Similarly, this analytical method repeatedly showed how "rights" could be seized upon by elites to protect "their" property and thus buttress their power over the poor.

d. Institutional innovation?

Pragmatic and performative strategies of engagement combined with edgily liberal, reflexively plural, and overtly redistributive normative commitments—such are the cross-cutting themes that

64. *Id.*

65. *Id.*

66. *See id.*

67. *Id.* at 165.

68. *Id.*

69. *See id.*

70. *See id.* at 165–66.

71. *See id.* at 101, 160.

emerged from our investigation. Beyond teasing out these common features, however, our inquiry posed a further question: Could these habits of practice promote progressive institutional innovation, particularly in the domain of ESR-guaranteed social provision?

We have analyzed some hints in that direction in the forthcoming book. In some cases, these embryonic innovations took on an “experimentalist” turn. In a nutshell, experimentalism in social welfare provision refers to a current school of sociolegal thought with multiple dimensions to its project.⁷² Its most direct relevance to the cases we worked with is that it offers a critique of large-scale social welfare bureaucracies that claims those institutions to be so rigid, so hierarchical, so “Fordist,” and so prone to capture or corruption that they cannot deliver social goods across wide populations in either effective or “democratic” ways.⁷³

e. Experimentalist innovation

In response to this critique, experimentalists propose novel practices for the democratic delivery of social goods. These are innovations that typically draw “stakeholders” of a particular delivery system into a process that addresses specific delivery challenges in deliberative, team-based ways.⁷⁴ Multiple circles of local innovations are then networked across wide geographical areas.⁷⁵ This problem-solving process is guided by pragmatist values such as learning through experience, cross-learning across networked local sites, and continual reflection on the quality of the interim outcomes and the deliberation itself.⁷⁶ Experimentalist scholars suggest that both legislatures and courts can, and should, bring experimentalist frameworks into social provisions like health delivery when such reforms might decrease what they see as “structural” injustice.⁷⁷

Critics have challenged this experimentalist faith, however, in the context of sub-Saharan ESR work.⁷⁸ These critics insist that the

72. *Id.* at 167.

73. *Id.*

74. *Id.*

75. *See id.*

76. *Id.*

77. *Id.*

78. *See id.* at 168–69.

primary obstacle to equitable social provision is not that the delivery systems are broken—it is that the money is not there.⁷⁹ Second, critics point to the huge differences of social and political power between government bureaucrats and other elite stakeholders, and the impoverished clients that they “serve.”⁸⁰ Additionally, critics claim that given this power difference, it will be impossible to get vigorous, inclusive deliberation across the different stakeholder groups. Then there is the added problem of who appoints the stakeholders in the first place. Experimentalists have their responses to these critiques, and African activists, not necessarily schooled in the intricacies of high theory, chart paths between the terms of this debate.⁸¹ Through this process, their practice sometimes throws forth what the lawyer activists call *prefigurative* institutional innovations.⁸² Thus, in the Ghanaian case, the lawsuit to release the detainee—though filed for multiple tactical reasons—included a claim for a structural remedy. This remedy would mandate an open-textured process for participatory “democratic” guidance from the Ministry of Health on programmatic goals and distributive rules.⁸³

Another example of prefiguration occurred in the South African case. Here, a “Treatment Literacy” initiative was spun off by the TAC to aid in the enforcement of the court’s decree.⁸⁴ The goal of the Treatment Literacy initiative was to enable low-income patients to comply with complex antiretroviral regimes.⁸⁵ The method was to reform primary health clinics to bring health providers, community health workers, and patients into a participatory alliance to enable patients’ compliance, deliver primary care more effectively, decentralize and democratize clinic policymaking, and organize clinic constituents to seek greater resources and support from the national state.⁸⁶ There was also some cross-learning among clinics linked through the Treatment Literacy initiative.⁸⁷ Eventually, the

79. *Id.* at 168.

80. *See id.*

81. *See id.* at 168–69.

82. *Id.* at 149.

83. *See id.* at 169–70.

84. *See id.* at 170–71.

85. *Id.* at 170.

86. *See id.*

87. *See id.*

South African government backed off its “denialist” position and began to roll out HIV treatment on a wider scale than the litigation with respect to pregnant women had mandated.⁸⁸ More to the point, though, was the *redesign* of the entire primary health system that was prefigured by this litigation-linked innovation.

In short, prefigurative ESR strategies can incubate innovative systems of welfare delivery in the here and now through the advocacy process itself. Grassroots mobilization around those experiments can, in turn, embed them in the state and thus disseminate and sustain them for a moment. Thus, the institutional experiments can become beachheads for further mobilization and innovation.

III. CONCLUSION

The reading we gave to the activists’ habits of practice was unquestionably *normatively* tilted. We were explicitly reading for signals of *hope*—hope that critically grounded, explicitly left-leaning ESR advocacy could help to move us toward a less imperfect world. In chasing after hope, though, we asked a lot of questions. And in the end, we found that the gains we had identified never lasted very long.

The South African HIV activists won the battle to obtain the right to antiretroviral treatment for pregnant women but may have lost the war of preventing mass deaths among the most geographically isolated, politically marginalized South Africans, over the long term.⁸⁹

The Ghanaian activists secured the release of one detained patient and a moratorium on detainments in the largest coastal city. However, this interruption of the detainment policy did not penetrate the rural areas where the poverty was most intense and the detentions were most systemic.⁹⁰

The Nigerian activists achieved a temporary block on the eviction and a partnership with the World Bank to support urban upgrading, but may not have prevented further eviction attempts—even in the course of that supposedly benign partnership with the World Bank.⁹¹ And the Tanzanian activists achieved one victory in

88. *Id.* at 171.

89. *See id.* at 68–90.

90. *See id.* at 144.

91. *See id.* at 34–41.

the Human Rights Commission, but without significant disruption of the development policy that had caused the problem in the first place.⁹²

In all cases, however, these human rights campaigns produced a moment's break in the overwhelming pressure of global capital expansion. Should we count this respite a victory? Did it create a space for regrouping, or even, the potential for the creation, within a Lagos "slum," of a mini-developmental state?⁹³ Or did the way the cases played out bode recurring defeat? So, even if a creative *and* critical human rights practice might be possible, does it make any difference?

92. *See id.* at 91–98.

93. *Id.* at 41, 49.

