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A Presumed Equality: The Relationship Between State and Citizens in Post-Apartheid South Africa

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This article uses a dispute between a school and the state in contemporary South Africa to examine the complex nature of the relationship between that state and its citizens. It argues that this relationship is best understood as a set of shifting arrangements of authority between bureaucratic institutions, political personalities, the judiciary and, most significantly, South Africa’s citizens themselves. We suggest that traditional models of the state have underestimated the agency of ordinary citizens and that the dispute we examine reveals how their actions – made possible by the presumption of their equality with the state and its agents – can influence the development of a local or national political order. This article draws upon the detailed documents prepared for the court case that arose from this dispute, as well as upon more recent interviews with teachers at the school. It is influenced by the philosophy of Jacques Rancière, and attempts to interpret his arguments about the nature of politics and equality through a South African experience.

Key words: state and civil society, citizenship, South African state, equality, political agency, political philosophy, BopaSetjhaba Primary School

Introduction

This article is about how assertions of agency and equality destabilise bureaucracies. It is also about how, in failing to account fully for the destabilising impact of assertions of local agency, contemporary political literature – which is substantially based on studies of the institutions of state and civil society, and the interactions between them – cannot fully apprehend the relationship between citizen and state in contemporary South Africa. What is required, it seems to us, is a more grounded study of the occasions on which individuals and communities do (or do not) ‘presume their equality’ to the institutions and imperatives of the South African state. We seek to contribute to such study by considering a single dispute between citizen and state in the northern Free State province of South Africa.

BopaSetjhaba Primary School had for many years shared buildings with another school in the township of Tumahole, near Parys in the northern Free State. When, in 2002, BopaSetjhaba’s School Governing Body (SGB) approved a set of architect’s plans for the construction of a new set of buildings, expectations were high that the school would at last be accommodated on its own.

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However, the construction of the new school was soon delayed, and then erased from the provincial government’s plans altogether without any apparent explanation. In response, BopaSetjhaba’s SGB and parents petitioned a range of authorities, including the state president, for an explanation. Soon thereafter a media article covering the school’s efforts drew a stifling reaction from the provincial bureaucracy. The SGB was disbanded, its principal suspended and then dismissed and the school itself was earmarked for closure. As a result, the school turned to the courts. Through years of protracted legal and bureaucratic struggle, BopaSetjhaba staved off closure, won back its SGB, reversed the dismissal of its principal and finally, in 2010, moved into temporary buildings of its own as a prelude to the construction of permanent buildings due to be completed in 2012.

We argue that what is important about this case is the continued assertion of the BopaSetjhaba SGB’s right to question and argue with the provincial bureaucracy, as its conduct took on many forms – from the blatantly repressive, through the blandly unreasoned, to the abstractly technocratic and rational. Drawing on Jacques Rancière, we argue that the school’s presumption of equality saw it take bold steps, including the engagement of lawyers and the interference with bureaucratic process to insist that they conform to the principles of legality, equality and fairness. These steps, and the presumptions underlying them, ultimately saw BopaSetjhaba succeed in obtaining its own buildings. Reasoning from the case, we argue that presence or absence of a presumed equality may be fundamental to understanding the local bases of civic struggle.

The first section of this article will outline the standard accounts of the contemporary South African state and its relationship to its citizens, before briefly pointing towards the grounds for our alternative approach. The following sections will then provide a detailed description of the development of the dispute, from its origins in 2001 through to its apparent resolution in 2011. The final section will return to the theoretical approach outlined earlier, and attempt to suggest new directions for future research in the area.

The state and its responsibilities

Over the past several decades, a twofold approach to the study of South African politics became standard. Either scholars examined the ways in which the National Party (NP) government sought to use its control over the state to entrench apartheid or – alternatively – scholars examined the ways in which control over the state was contested by the extra-parliamentary opposition, most notably represented by the African National Congress (ANC).

Since the transition to democratic rule, and the establishment of an ANC-dominated political order, this standard focus has shifted only slightly. Scholars now tend to study the ways in which the ANC government is putting the resources of the state to use. This focus on the allocation and use of the resources of the state seems to us important – but, nonetheless, insufficient to explain the diversity
of political experiences in contemporary South Africa. Although many features of our political environment can best be explained by reference to the internal workings of the state, we believe that this focus has led to inadequate attention having been paid to politics outside of the state and its institutions.

This concern is not unique. Other scholars have attempted, in a variety of ways, to expand the study of politics. One set of approaches has been to examine the way in which the state responds to the social, economic and political needs of the citizenry. The call for South Africa to adopt a ‘developmental state’ model – that is, a model of a state which takes an active role in shaping and supporting economic and social development – has been important. This model is often offered in contrast to one of increasing informality and criminality – occasionally identified with other African states (Buhlungu et al 2007).

However, the extent to which this approach succeeds in broadening notions of political agency is contestable. Tom Lodge, in a recent review article, emphasises that this model requires the social and political autonomy of political leaders (‘rulers’). They ‘must be able to resist sectional pressures’. And they must be able to ‘manage popular aspirations with an accent on achieving performative legitimacy through meeting basic material needs efficiently’ (Lodge 2009). This locates political agency in the hands of a set of technocratic experts, independent of the citizenry.

Another important approach, often linked with developmental ideas, conceptualises ‘participatory democracy’ as a central element in South Africa’s political environment. Scholars have noted the difficulties involved in establishing and sustaining popular participation in formal democratic processes such as local and national elections, community meetings, or even ordinary engagement with local ward councillors (Benit-Gbaffou 2008). This approach, however, tends to sideline informal politics and tends to imply that political action can only effectively occur through involvement in representative institutions. Popular protest, for example, is often read as resulting from a failure of institutions rather than as being an alternate form of political action in itself (Atkinson 2007). This, we suggest, limits the usefulness of these approaches.

**Political agency outside the state**

The limitations of these approaches have been highlighted by the resurgence of popular activism and protest outside the parliamentary political system. A growing number of scholars have begun to focus accounts of the political order on non-state actors. The most numerous of these studies have been of non-governmental organisations (NGOs) and newly-formed social movements. Although this literature owes a considerable debt to earlier studies of popular movements – including work on popular organisations in the early 1900s, squatter movements of the 1940s, and youth groups in the 1980s (Van Onselen 2001 (1982); Stadler 1979; Bundy 1987) – the study of social movements is, in this form, a relatively
new topic in South African political studies. Much of this literature has been written over the past decade, and embraces a set of theoretical concerns raised by a new context of political activism that differs, in significant ways, from that in which earlier South African popular movements developed (for example, Mirandaftab and Willis 2005; Zuern 2001, 2002). For example, the relative legitimacy of the post-apartheid state has forced scholars to consider the very different forms of political action that mark groups like the Treatment Action Campaign (TAC) and Abahlali baseMjondolo.

In a recent article, Richard Ballard and several co-authors attempt to survey this new approach and note its defining features. They offer a broad definition: ‘social movements are thus, in our view, politically and/or socially directed collectives, often involving multiple organisations and networks, focused on changing one or more elements of the social, political and economic system …’ (Ballard et al 2005). Later they add: ‘social movements are not spontaneous grassroots uprisings of the poor . . . but are dependent to a large extent on a sufficient base of material and human resources, solidarity networks and often the external interventions of prominent personalities . . .’ (Ballard et al 2005). Although they note other characteristics, an element of organisation is clearly central to their definition of a social movement. The study of social movements is therefore a study of organisations rather than of persons.

This restriction helps to corral the wide range of political, social and economic claims made by these various groups into a broad but comprehensible framework. Within this framework it appears that organised political action outside the state is driven by concerns revolving around rights-based claims to socioeconomic material goods such as the provision of housing, water, electricity, etc and, less centrally, around claims of ‘identity’. The claims are articulated on behalf of a community by an organisation representing them.

However, there have been significant challenges made to this approach. Michael Neocosmos (2006) has led a charge against the tendency of much social movement literature to focus on institutionalised forms of rights claiming. The implication of his argument is that NGOs – and, by extension, at least some social movements – have come to form an intermediary level of bureaucracy that represents a politically ‘passive’ citizenry to the state. The assumption that rights claims are most efficiently expressed by institutionalised experts – whether trained as technocrats, as in many NGOs, or originally from the community themselves, as is often the case with social movement professionals – represents little more than another way of displacing the political agency of ordinary citizens. An emphasis on representative institutions rather than on individual citizens is profoundly disempowering.

Neocosmos and others influenced by his critique have suggested that scholars should turn their attention to the ways in which people can act as ‘political subjects’ and articulate political claims outside of the frameworks either of the
state or of any other mediating institution (for example, Pithouse 2008). They suggest that the politics articulated by institutions that utilise human rights-based claims – primarily NGOs – can be better be understood as petitioning the state for largesse rather than as articulating on-the-ground political experiences – experiences that can lead to the development of a consciously self-empowered citizenry.

These authors accept that such an emancipatory politics ‘is not always in existence and is clearly largely absent at present’. Nonetheless, they would suggest that it is the task of scholars both to identify those moments in which political agency is claimed and, at the same time, to build a theory of politics that emerges from the recognition of unmediated, individual and mass claims to political agency. This, they suggest, is largely absent from most political literature – certainly from the literature that focuses on the contestation for control over the state, and unfortunately too commonly from most NGO-focused accounts.

The equality of speaking beings

Our approach bears significant similarities to that proposed by Neocosmos. Although we do not necessarily accept the full scope of his critique of the human rights-based strategies adopted by NGOs and some social movements, we also seek to emphasise the relatively-unmediated political agency of individuals. In the following case study, we choose therefore to emphasise the agency of the members of the BopaSetjhaba SGB. We show how they continued to act politically and practically in the face of strong pressure from the provincial bureaucracy and its political leadership, both of whom sought to exert their presumed authority over the SGB. This pressure converted an ordinary bureaucratic process into a dispute that continued for several years.

We argue that the SGB’s ability to act and, later, their ability to sustain action over a period of time, derived from their determination to act as equal partners in all phases of this process and the resulting dispute. They did not accept that either the technical expertise or the preferential access to state resources apparently possessed by state’s representatives necessarily entitled these representatives to act on their behalf. Instead, they presumed that their own forms of knowledge were equal in importance. It was this confidence in their own expertise that enabled them to engage the state as equal partners.

In explaining the significance of this, we draw upon the political philosophy of Jacques Rancière (1999 and 2010). Rancière’s political philosophy first developed in reaction to the early influence of Louis Althusser, and his dissatisfaction with the inability of his mentor’s theory to come to grips with the popular protests of 1968. This rejection of Althusser took the form of a series of close analyses of the ways in which workers articulated their political and cultural consciousness in the 19th and early 20th centuries. In a wide ranging body of work – which includes books on a radical educationalist, Jacques Jacotot, on the ways in
which the notion of ‘the poor’ features in the lives of philosophers, on aesthetics and visual arts, on film, and on literary figures such as Mallarme – Rancière has repeatedly emphasised the centrality of notions of equality to political philosophy and practice. There are important similarities between his approach and that of Alain Badiou. Notably, both have recently begun to have a significant impact in English-language translation over the past decade.

Our use of Rancière’s ideas takes as its starting point his argument that the field of ‘politics’ can be distinguished from what he calls ‘the police’. The latter term is related to that used by Foucault, and describes – in Todd May’s helpful exegesis – ‘the broad administration of society, the hierarchy that governs its citizens in the name of their welfare’. May (2009) explains: ‘In a police order, there are those who benefit and those who do not. In addition, and perhaps more important, there are those who have a say and those who do not.’

The disruption of this distinction – between ‘those who have a say and those who do not’ – is central to Rancière’s approach and, indeed, to ours. Rancière restricts the term ‘politics’ to those practices which disturb the police order ‘by implementing a basically heterogeneous assumption … an assumption that, at the end of the day, itself demonstrates the contingency of the order, the equality of any speaking being with any other speaking being’ (Rancière 1999). May suggests that ‘speaking’ is important for Rancière because ‘those who can speak to one another are capable of forming plans for their lives and enacting those plans alongside others’. This has a wider social impact because: ‘the equality of every speaking being with every other one is an equality that undermines the claim of anyone to be entitled to give orders. One may be in a position that permits one to give orders, but that position is never justified by any inequality between those who give and those who receive orders’.

Rancière emphasises that this equality cannot be granted by the representatives of power – in our case, of the state. Nor does it necessarily need to be officially recognised by the representatives of the state. Neither of these approaches would, in fact, unsettle the established distribution of power. Instead, equality needs to be presumed. He elaborates: ‘Equality is not a given that politics then presses into service, an essence embodied in the law or a goal politics set itself the task of attaining. It is a mere assumption that needs to be discerned within the practices implementing it’ (Rancière 1999). Equality can perhaps be best understood as a practice, as a way of acting as if one has always been equal to those possessing power.

This equality, to return to Rancière’s words, ‘gnaws away at any natural order’ (Rancière 1999). Although it is unlikely to lead to the immediate collapse of a police order, the claiming of such equality poses a challenge to the assumption that any given distribution of power – between ‘those who have a say and those who do not’ – is natural and unquestioned. It highlights the contingency of any current distribution of power, and the potential for it to be changed.
We suggest that, building on this base, it is this that gives the claims to equality – of knowledge, of ability, of understanding – made by the members of the BopaSetjhaba SGB their political significance. It is these claims that are at the centre of our account of the dispute that arose in the early 2000s and continued, through various stages, for the remainder of this past decade. We suggest that the presumption of their own equal ability to speak as experts on their own experiences destabilised the ordinary functioning of a bureaucratic (‘police’) order that worked – under normal circumstances – to entrench an inequality based on the assumed superiority of technical expertise to run the school system.

Our focus on the SGB’s claims in the remainder of this article enables us to emphasise aspects of this dispute that are difficult to explain within more traditional interpretative frameworks. In particular, the longevity of the dispute and the school’s apparent intransigence in the face of bureaucratic and political pressures strike us as more interesting than the dispute’s ultimate resolution. It is the school’s ability to deploy various methods of resistance – petitions, press releases and legal challenges – without losing their autonomy and ability to continue acting that requires explanation.

In the following sections we therefore outline the origins of the dispute, emphasising the role played by the school’s presumptions of equality and the state’s responses to it in the escalation of that dispute. We then consider the various ways in which the school was able to resist state pressures over the better part of a decade. Finally, we consider the resolution of the dispute and suggest why this is of less interest to us than the years preceding it.

**BopaSetjhaba**

*The origins and development of the dispute*

BopaSetjhaba Primary School is located in Tumahole, a township of Parys, situated on the northern border of the Free State province. The school was created in 1992 and was, from its first days, ‘platooned’ with another primary school – Lembethe Primary School – in the Old Location section of Tumahole. Each continued to exist as separate administrative entities, with their own principals and teaching staff, parents’ committees, SGB, and student enrolments. They did, however, share physical spaces, most commonly by making use of classrooms to teach in separate shifts. Although much of the literature on platooning seems to assume that the two schools would have approximately equal claims over the classrooms, this was not the case in Tumahole. The facilities being used by both Lembethe and BopaSetjhaba pre-dated the arrangement. BopaSetjhaba was seen – and, indeed, saw itself – as a temporary occupant. Neither school thought that they shared a neutral space; instead, BopaSetjhaba was seen to be using Lembethe’s classrooms, offices, and facilities.

Given this context, it is unsurprising that BopaSetjhaba sought to establish itself on its own site. In 2001, a number of meetings were held between the Department
of Education and the SGB. At these meetings, the practicalities of constructing a set of new school buildings was discussed. It was proposed that BopaSetjhaba be relocated from the Old Location to a site at the edge of the township, neighbouring the ‘Mandela’ informal settlement. A plot of land was then set aside by the municipality for this.

The department brought an architect’s plan of the proposed buildings to these meetings. A draft budget for the construction of the buildings was also drawn up. Meanwhile, on 16 October 2001, the provincial director of works prepared a progress report on the ‘building of BopaSetjhaba Primary School’ for the director of education development. This report stated that the ‘Head of Public Works Roads and Transport’ had already approved the drafting of ‘sketch plans and tender documentation’ for the school. It stated that R600,000 ‘has been budgeted in this regard for this financial year’ and that ‘the project will be advertised for tenders during the 2002/2003 financial year for the construction to commence during March 2003’. It added that ‘if more funds than the preliminary allocation indicates are made available, construction will commence earlier’.1

In January 2002, the SGB signed the proposed plan and returned it to the department. The degree of cooperation between the department and the school is – to this point – remarkable. It appears that the department engaged the school in the process of planning for the new buildings, that it took the school’s concerns and ideas into account – most notably, in the siting of the buildings – and that the school, in turn, felt a significant degree of ownership of the project. However, after they had signed the proposed plan, this period of cooperation reached an abrupt end. It appears that the department’s bureaucracy perceived this act as ending a period of consultation, and thus as ending the school’s involvement in the process. This may explain why, at a meeting with the department’s District Physical Planner, the department unilaterally suggested that the construction would be delayed until 2004. Then, on their own initiative, the school found a copy of the ‘Free State Strategic Plan of 2002 – 2005’ and noted that it made no provision for the school. The principal – Joseph Phutha – therefore wrote to the district director as well as to the physical planner and the director general. He set out the events and asked ‘for clarification’.2

No response was tendered. The SGB then wrote a further letter to the provincial MEC for Education at the time, Papi Kganare. This letter did finally elicit a response from the department, although there was little in it to reassure either the teachers or the parents. Kganare simply stated that the plans approved by the Department of Education made provision for the construction of the school building in three stages: the first, ‘plans for the construction of the building’ would only take place in 2004/2005; the construction would begin in 2005/2006; and the building would be completed and usable in 2006 or 2007.3 This statement made no allowance for the school to query why this series of extensions to the process had taken place. Nor did it explain why – for example – the
drawing up of plans was scheduled to take place in 18 months’ time when, as far as the school was aware, it had already been completed. It was a blunt assertion of the existence of a bureaucratic process significantly different from that which had been communicated to the school earlier in the year. At this point, then, even the appearance of engagement collapsed and the local state imposed its authority on the process – leaving the school with little apparent agency.

**Escalation**

Nonetheless, in December 2002 and January 2003, the SGB sought to appeal the department’s decision. They wrote to the Office of the State President, the National Department of Education, the Office of the Public Protector, the Education Rights Project at the University of the Witwatersrand, and the national Human Rights Commission. Only the last of these responded in a constructive fashion, agreeing to intervene to put the school’s concerns to the department. A brief article to this effect then appeared in the *Sowetan*.

This article – rather than, it seems, any possible intervention by the Human Rights Commission – stirred an immediate response within the department. On 17 January, Kganare said, during a radio interview, that it would be ‘a waste of government funds’ to construct the school’s new buildings. It is notable that this response to the school’s efforts to force a return to an earlier period of direct communication left no room for any engagement: for one, it was addressed to a broad audience, rather than to the school’s representatives. And, in addition, it moved the discourse away from a dispute over the timing of the construction project to a dispute over the appropriateness of the entire project itself. The school struggled to know how to respond to this. As one of the teachers recalled later: ‘when we were trying to talk to him about this thing of the school, he just went straight to the media ... So we were scared thereafter to go to the MEC’. Their attempts to engage with the department had hit a brick wall; if the school had not before considered the state’s potential intransigence they were now encountering it in a strong form – they were afraid to even attempt to reopen direct communication for fear of the response it might now provoke.

This fear was not without foundation. While the school tried to imagine a way forward, the office of the head of education sent a letter to the head of public works instructing that the ‘planning and erection’ of BopaSetjhaba’s new buildings be halted, ‘with immediate effect’. It explained that, ‘the school will be merged with Lembethe Primary School where the learners are currently being accommodated’. In addition, the Superintendent-General instructed the district director to draw up a plan ‘on how to amalgamate the two schools ...’. He also insisted that ‘disciplinary action must urgently be taken against the principal who has brought the department into disrepute ...’. Then, on 10 March, the principal of BopaSetjhaba, Joseph Phutha, received a letter from the ‘Acting District Director’ titled: ‘Re: Meeting for closing down of
school’. It announced, baldly, that ‘it is the intention of the department to close BopaSetjhaba’. It informed the school that it would be ‘visited by a team from the NFS [Northern Free State] District Office on Monday 17 March 2003 to outline the process for consultation and closure’.\textsuperscript{8} Despite the perfunctory mention of ‘consultation’ it was immediately apparent that the decision to close the school had already been taken and was not up for discussion. In the best case, only the process of closure might be discussed with the SGB.

When the department’s team arrived at BopaSetjhaba on 17 March, the school, under advice from a newly-recruited set of lawyers, refused to allow them entry until they could provide written reasons for the decision to close the school. The principal also pressed them to say whether the department had put in place procedures to consult the school on its closure. When they failed to do so, the department’s team left the school – leaving the principal and SGB with what they thought to be some breathing room.

However, the department was continuing its plan to discipline the school’s principal and to close BopaSetjhaba. On 2 April, the school received a faxed ‘Notice of Disciplinary Hearing’ – dated 7 March, and signed on 31 March. On 7 April, a new deputation from the department arrived at the school and informed the principal that he was now suspended. He would be able to defend himself at a disciplinary hearing on 17 April. Meanwhile, the functions of the SGB were withdrawn and its membership dismissed. The running of BopaSetjhaba would now become the responsibility of Lembethe’s principal.

The speed of this process is striking: in the course of eight months the dispute had escalated from a disagreement over the date on which the school’s new buildings would be constructed to a quarrel over the school’s right to exist. The school’s attempt to force the department to reconsider its plan to delay the construction of its buildings by four years prompted the department to respond aggressively. The suspension of BopaSetjhaba’s principal and SGB seemed to be intended – at least, in the school’s eyes – to punish their attempts to protest against the department’s action. There is an obvious sense in which the categories isolated by Karl von Holdt – in particular, the importance of ‘face’ for new bureaucrats – may be used to explain this collapse in the state’s relationship with the school (Von Holdt 2010). There is also a sense in which the school’s attempt to continue to assert its ability to engage with the state was read by the bureaucrats as a form of insubordination. The department’s response to the school’s assertion of equality was, at first, a bare denial of their right to continue to engage – followed, then, by a series of attempts to assert its superior authority.

\textit{The appeal to the courts}

The SGB, however, refused to accept the department’s instructions. Instead, they briefed the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand. The centre’s Education Rights Project had been one of the school’s
earlier contacts; now – with the sudden and unexplained threat of closure looming – the legal section became involved. On 13 March, an attorney at CALS wrote to the district director to alert him to the involvement of the centre and to insist that the department provide ‘BopaSetjhaba’s Governors, staff and parents with the opportunity to make representations before any further action is taken’. In addition, the letter requested the department provide its reasons for its sudden decision to close the school.9 There was no response to this letter.

The disciplinary hearing went ahead and – despite arguing that the charges were groundless or irrelevant – Phutha was dismissed.10 Meanwhile, the school’s legal representatives sought to build a three-fold court case. The primary claim would be for reversal of the decision not to erect the new school buildings, while the secondary and tertiary claims would argue for the cancellation of the closure of BopaSetjhaba and the reversal of the suspension of its SGB. The school’s lawyers based their arguments in administrative law.

Administrative law has been read broadly in the post-apartheid era (Hoexter 2007). Under this reading, judicial oversight may be extended to any decision that affects the provision or administration of public goods or services. It is important to note, however, that even in this broad reading not every action affecting the provision or administration of public goods is automatically subject to judicial oversight. An action has to be more narrowly defined as an ‘administrative action’ to be subject to judicial review – and thus subject to emendation from the bench. This has proved difficult to define, and there is no clear test to distinguish administrative action from legislative or executive actions. As a guideline, however, the determination of specific policies is not generally administrative, while the implementation of those policies may be.11 Thus a judge may not review the decision to adopt a policy, but may review the manner in which that policy is implemented.

It was therefore necessary for BopaSetjhaba’s legal team to assert that the decisions first to delay, then to cancel the construction of the school’s buildings – and, following from that, the decisions to close down or merge the school with Lembethe – constituted administrative action.12 The founding papers set out a number of grounds on which a review could be based. First, that by creating a ‘legitimate expectation’ that the school buildings would be constructed and then by frustrating that expectation without hearings or any other form of engagement, the department’s actions had been ‘procedurally unfair’.13 This was an argument built upon sections 6(2)(c) and 3(1) of the Promotion of Administrative Justice Act of 2000, both of which suggest that substantive procedural unfairness is in itself grounds for the review of an administrative action.14

In addition, the founding papers alleged that the decision to close the school was taken ‘for an ulterior purpose . . . in that the third respondent took it in order to defeat the criticism in the press of the failure to erect the buildings in terms of the original time schedules . . . ’.15 This was supplemented by a third assertion:
that the department had taken its decision without reference to the specific circumstances of schooling in Tumahole. In particular, the papers asserted the department had not taken into account the large number of potential students resident in the ‘Mandela’ settlement. This was of particular relevance as the site allocated by the municipality was adjacent to the settlement.16

Unsurprisingly, the department contested the school’s claims. It dismissed the claim that the decision to ‘build or not to build the school premises’ was administrative action. Instead, it suggested that it was ‘a policy, commercial, economic, or financial decision’ and thus not reviewable.17 This argument was an attempt to elide any distinction between the actions involved in making general policy and the actions involved in the implementation of that policy. Should the court accept this, then it would be unable to exercise its powers of review and would be required to dismiss the school’s application without taking into account any of the matters they had raised. This would include not only any imputation of bias made by the school, but also any of the circumstances raised in the founding papers – notably, the presence of currently unschooled children in the ‘Mandela’ settlement.

However, if the court did not automatically dismiss the school’s case, the department also sought to ensure that the reasoning behind its decision not to build the new school premises was clear. It laid out, in several lengthy paragraphs and an appendix of graphs, its understanding of the contextual circumstances within which that decision had been taken. These circumstances include the increase and then decline of students across the Free State over the last ten years – noting that the number of enrolled students had declined from 807,718 in 1998 to 682,150 in 2003. This trend was replicated in Tumahole: the number of enrolled students had declined from 6,717 in 1999 to 5,822 in 2003. It suggested that part of this decline could be attributed to students from the township attending the HF Verwoerd Primary School in the old white town itself. Likewise, it noted that the number of students at BopaSetjhaba had declined by over 50 per cent from 1995 to 2003; at the same time, the ‘learner to educator ratio in the school’ had declined from 40:1 to 32:1. The department continued to suggest that there was a sufficient number of classrooms available in the township – across all primary schools – to accommodate all currently enrolled students. This was evidenced by reference to the total number of school classrooms, the total number of scholars, the ‘learner/classroom’ ratio and other ideals envisaged by the department.18

Notably absent from this plethora of figures and graphs was any engagement with the specific contextual concerns raised by the school. The department’s analysis was abstract and technocratic: the total number of potential students was measured up against the total number of potential classrooms and teachers. The specificities of the township were not acknowledged; the distances to be travelled between different school sites, for example, played no role in the department’s calculations.
Its response to the question of accommodating new students from the informal settlements was to note that: ‘there are three primary schools closer to the sections referred to herein, which these children can attend. There are also other primary schools which these children can attend . . . ’\textsuperscript{19}

There are a number of points to note in this sequence of events and arguments. First, and perhaps most importantly, the school’s ability to make use of the court system restored a degree of agency to its SGB. If the department’s actions had been taken on the assumption that they would crush the dispute, the school’s actions demonstrated that they were still able to resist the state’s power. The support of CALS meant that the school was able to continue to operate, despite the department’s efforts to close it. Under pressure from the school’s legal team, the department was forced to retreat from its suspension of the SGB; with the aid of legal counsel, the principal was able to contest his dismissal and – ultimately – be reinstated in his old position. Meanwhile, the simple fact of a case having been opened in the High Court meant that the department could not act openly against the school until the case was heard; given the slow processes of the courts, this meant that the school was able to operate for a further 18 months before the hearing.

Second, and more specifically, the involvement of CALS meant that the school was able to force the state to engage with it in a formally constrained context. The language and expertise deployed by the school’s legal advisors required the department to respond in detail. Until their intervention, the department had simply refused to put any explanation for its decisions into writing; after the case began, it had to articulate rational reasons for its actions. These could then be argued with by the school – with the aid and mediation of their legal team. This meant that the school could once again engage with the department, even after the department had attempted to throttle any possible avenue of engagement.

Thus, while it would be an overstatement to say that the school’s recourse to the courts had levelled the playing field, it did nevertheless act to constrain the administrative powers of the provincial bureaucracy. So long as the case continued, the school could not be closed; its personnel were restored to their positions; and the department was required to wait on the courts. To this extent, legal intervention helped shape the development of the dispute.

\textit{The judgment and its aftermath}

The judgment was handed down on 17 March 2005.\textsuperscript{20} First, and most significantly, the judgment held that a decision to build or not to build the new school premises was indeed an administrative action – and thus reviewable. This finding meant that the court was able to proceed to the remainder of the issues before it. It established that the SGB had indeed held a ‘legitimate expectation’. This meant that it had the right to expect ‘at least that before an adverse decision is taken [it] will be given a fair hearing’.\textsuperscript{21} As this hearing had not been held, the SGB’s rights had
been compromised, and, accordingly, the decision not to construct the buildings had not been procedurally fair.

This finding did not dispose of the case. The court still had to decide whether it had the power to order the construction to resume. In the event, the court held that it did not have the necessary expertise to determine whether or not the local need for the school could be integrated in the state’s funding policy. Instead, it held that its powers were limited to ordering the department to reopen the question of building the new premises.\textsuperscript{22}

However, the judgment then set out the requirements it placed on the department. First, it should reopen the question of the school’s new premises without any prejudice. This meant that – in the court’s opinion – it was impossible to include the head of education or ‘any of the officials of the Provincial Administration’. This was due to ‘the highhanded conduct by at least the third respondent to illegally “withdraw” [the] first applicant and illegally “suspend” [the] seventh applicant, merely because they endeavoured to protect their rights . . . ’. Given this, it was clear that the administration’s officials would be prejudiced.

It was therefore necessary to insist that the province’s premier – the first respondent in the case – and the MEC for education – the second respondent – take possession of the reopened investigation. The probability of prejudice on the part of the bureaucratic administration meant that only those elected politicians responsible for educational policy in the Free State were in a position both to make an informed decision on the issue and to enforce the implementation of that decision. A court order was then set out to ensure that this process was followed. The order imposed both a set of positive obligations and a clear negative obligation on the provincial executive and administration: they were positively obliged to reopen the question of providing BopaSetjhaba with new premises, and to involve the premier and MEC for education in this process. They were also obliged to exclude the administrative bureaucracy of the Department of Education from this process.

The granting of the court order did not resolve the dispute, however. Although each of these sets of obligations required a different method of implementation, both were the responsibility of the provincial executive. Neither, however, was implemented without difficulty – and the policing of the terms of the court order often fell on the shoulders of BopaSetjhaba’s teachers and the SGB. From the first weeks after the order was handed down, the school and the state argued over the meaning and extent of the positive obligations ordered. The school, for example, held that they should be able to make oral representations directly to the premier and MEC; their offices, however, insisted that written submissions would be sufficient – and even suggested that the affidavits presented to the court could serve as these submissions. This was not viewed by the school as a genuine effort to engage. The effort to interpret this obligation so that both school and state were satisfied with the process took more than 18 months – and a meeting between the school and the MEC only took place at the end of November 2006.\textsuperscript{23}
Meanwhile, from July 2005 – six weeks after the court order was handed down – administrators from the department’s Northern Free State offices had been attempting to intervene in the process. The SGB was summoned to meetings on 19 July 2005 and, again, on 8 November 2005. At these meetings, they ‘were told that BopaSetjhaba Primary School was to be closed and that there was no question of the construction of new buildings for the school’. This was a clear violation of the court order, not only because these meetings suggested that the decision to close the school had already been taken but also because these meetings were convened by the department’s administrators.

The school’s teachers found themselves under pressure from these administrators. In informal meetings, the school was repeatedly threatened with closure and its teachers with dismissal. More formally, the department also redeployed members of BopaSetjhaba’s staff. Among other examples, the school’s principal was redeployed to the department’s physical planning section, which sparked the suspicion among the remaining teachers that he would be tasked with closing his own school. Christina Matla, a head of department at the time of the court case, was moved to Tumahole’s sole Xhosa-language school. This move was freighted with local tensions, and she was soon isolated as a Sotho-speaker.

On the surface, at least, these redeployments were routine administrative matters. By this time, however, the relationship between the department’s administrators and the school’s teaching staff had deteriorated to such a point that even apparently routine actions were interpreted as continuing harassment. As long as the threat of closure remained, the deployment and appointment of BopaSetjhaba’s staff was fraught with tension and mistrust.

A political resolution

The difficulties faced by BopaSetjhaba in implementing the court’s order should not, however, obscure the ways in which the school was able to use the order to its advantage. Most significantly, the existence of the order enabled the school to frustrate any efforts to pre-empt the court ordered process. Whenever local administrators threatened the school with closure – most probably without explicit authorisation from the province’s political heads – the school was able to produce the court order and insist that they did not have the authority to act openly against them. The court order was used as a shield, as a way of deflecting direct attacks and of enabling the school to continue to exist and to operate.

It is important to note that, in these years, the legal support offered by CALS played no more than a marginal role in the school’s efforts. Although CALS aided in drafting letters to the provincial premier and MEC for education demanding face-to-face meetings, there were no lawyers present when the school used the court order to run various bureaucratic officials off of its premises. Nor did the school seem to feel the need to consult their legal representatives at every turn.
Instead, the school appears to have regarded their legal advisors as representing a resource that could be used – but was not depended upon.

This draws our attention towards the ambiguous role of the legal support offered by CALS: it is important to recognise that the involvement of legal representatives in local disputes such as this need not result in similarly useful outcomes. Although the post-apartheid era has seen a growing number of cases in which legal NGOs provide strategic and courtroom support to local movements, there is no set model within which these work. The continuing alliance between the AIDS Law Project (ALP) and the TAC, for example, blurred the boundaries between the two institutions. The support given by CALS to Abahlali baseMjondolo, by contrast, was practically limited to the period of a particular court case and its hearing in the Constitutional Court. Other cases – such as the Grootboom litigation and the Mazibuko water rights case – saw the development of different relationships. It is dangerous, therefore, to generalise too broadly and conclude, too hastily, that the relationship displayed in this case was either typical or determinative. This case demonstrates the successes and limits of a particular kind of legal intervention; one which may serve as a potential model for other such localised interventions in the future.

The limits of legal strategies are highlighted in this case by its eventual resolution. Suddenly, after several years of continuing struggle, a new political mood swept through the governing party. The ructions within the ANC in 2008 and 2009 are well-known (see, for example, Gumede 2008). Jacob Zuma successfully challenged Thabo Mbeki for leadership of the party and, in the process, built a loose alliance of previously-overlooked political supporters. This undoubtedly provided many localised political agents with new avenues for potential patronage networks (Sitas 2008).

In the Free State, the result of this shift was the appointment of a new premier and MEC for education. Both had been born in Tumahole and had developed their political bases locally. In addition, both were associated with a Northern Free State faction within the provincial ANC – a faction that had been sidelined by the previous executive and one which, therefore, was considered to be opposed to many of their policies. This shift meant that the school now had the possibility of a sympathetic hearing from the new executive.

The first sign of this came when the new MEC for education visited the township, early in 2009. Christina Matla had just been re-transferred back to BopaSetjhaba, this time as its new principal. She, and other members of the SGB, met with the MEC on this occasion and drew his attention both to the school’s situation and to the still-unfulfilled terms of the court’s order. The MEC’s personal assistant, it should be noted, was an old Tumahole-based activist who had been instrumental in introducing the school to CALS several years earlier. The school was thus able to assume that the new MEC would now be able to appreciate the school’s situation – as Matla put it, ‘maybe it’s because he is from Parys so when we talk...
about learners for Mandela he understands everything, the distance that those people were travelling . . . .' 27

On 20 August 2009, the school met with the MEC for education, the head of his department, and the regional district director. At this meeting, the MEC appeared to overrule the local administrators’ objections and stated that he would ensure that the new school premises would be built. A month later, ‘someone came with a temporary structure plan . . . ’. The school was sceptical, but reassured by the visible action: ‘we were not sure, but we were happy’. Then, towards the end of January 2010, builders began to appear and – starting on 15 February – a set of temporary classrooms and other buildings was erected on a site adjacent to the school’s final location. Permanent buildings were promised for 2011. At the time of writing, construction is well underway and scheduled for completion in August 2012.

As soon as the temporary structures were built, the school moved out of Lembethe’s buildings and – for the first time since its foundation in 1992 – occupied its own facilities. This move was accompanied by an increase in the number of students enrolled at the school; it thus seems that the school’s original anecdotal argument in favour of the construction of new premises nearer to the ‘Mandela’ settlement was an accurate reflection of local needs. It is undoubtedly tempting to explain the sudden resolution of the dispute by reference to notions of ‘patronage’ and to thus view the dispute as illuminating only the vacillations of elite politics. There may indeed be a strong case for understanding the conclusion of the dispute in these terms. Nonetheless, it would be stretching plausibility too far to explain the entirety of the dispute only in terms of its end. Our approach here has been to focus on the actions of the school – and, we believe, to explain why it was that the school still existed to take advantage of the change in political climate that took place. In this case, patronage – if that is what it is – could only be granted to an existing institution. For this reason, if for no other, we argue that the temptation to use ‘patronage’ as embracing explanatory tool should be avoided. It is too blunt an instrument to illuminate this dispute.

**Conclusion**

In this article, we have sought to unsettle a model of a strong and bureaucratised state that is associated with South Africa – often in contrast to other states across continental Africa. While recent analyses of the South African state have tended to juxtapose a model of an ideally developmental state with an informal (or criminally) state – with the former representing what the South African state should aspire to become, and the latter representing what it might threaten to collapse into – our argument, by contrast, depicts a state defined by shifting arrangements of authority between bureaucratic institutions, political personalities, the judiciary and, most significantly, South Africa’s citizens themselves. In our approach,
authority is established in local contexts, and in response to contingent events – and is best understood through detailed case studies.

This article argues that this depiction can capture elements of the state that more abstract discussions do not. More importantly, it provides the imaginative space within which an alternative account can develop. The depiction of the state derived from this argument can only, we suggest, be made in the context of the lengthy development of the dispute before and after the court hearing. Such a study emphasises the changing nature of the dispute, and the changing relevance of different interpretive frameworks: whether these be based, as in this case, on the role of legal practitioners or local political patrons. Indeed, more than this, such a study demonstrates some of the ways in which ordinary citizens can act within and upon the state by asserting an agency based upon their presumption of a radical equality. This idea derives from our reading of the work of Jacques Rancière, in particular his insistence that ‘democratic logic ... consists in blurring and displacing the borders of the political. This is what politics means: displacing the limits of the political by re-enacting the equality of each and all ... ’. (Rancière 2010). Politics, he suggests, happens when any group of people presume their equality with the institutions of power – in this case, with the bureaucratic state. This approach points, we argue, in a new direction for the study of the relationship between citizens and the post-apartheid state – one focused not on the actions and powers of the state, but rather on the agency and activities of ordinary citizens. The root of these actions can be found in the school’s determination always to act as if it was an equal partner with the state. The school did not act as if the state had a greater right either to determine whether the school required its new buildings, or to determine the best ways in which those new buildings might be constructed. Indeed, it acted as if there was no disparity in rights or power between it and the state.

The unspoken assumption of the bureaucracy, and indeed of political office-holders, was that the school was either a subject of administrative power or a client of political patronage – but not an equal partner. The bureaucracy thus struggled to know how to respond to the school’s presumption of equality. Nonetheless, it was the school’s presumption of equality that both set the dispute into motion and, later, enabled its SGB to continue acting until external conditions were finally altered.

In this context, Rancière’s ideas are highly suggestive. His emphasis on the ability of ordinary persons outside of the publicly-recognised sphere of institutional politics to reshape the political sphere by expressing themselves – either by dissenting from political norms, or simply by asserting their right to be recognised as political agents – directs our attention away from the institutions of the state and towards the agency of other actors.

This suggests to us that any attempt to describe the relationship between the state and citizens in contemporary South Africa must start from the same presumption of equality made by members of BopaSetjhaba’s SGB. Instead of assuming that
this relationship must always be driven by the state, in response to priorities identified by the state’s bureaucracy, we must ask why it is that this equality is presumed, or not presumed, by citizens and citizen groups in specific, local circumstances – and ask, also, how this presumption of equality can influence and shape the development of a new political order.

**Note on Contributors**

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**Notes**

1. Trial Record and assorted Papers, currently in the authors’ possession (henceforth, Papers, correspondence). Director: Works to Director: Education Development. 16 October 2001.
5. Interview with Christina Matla, Tumahole, 19 August 2010.
10. Papers, correspondence. Free State Teachers Association, 8 May 2003; Papers, correspondence. Superintendent General to Phutha, July 2003. Eventually, the dismissal was appealed to arbitration. At a hearing in May 2004, the arbitrator found that nothing in Phutha’s statements had placed the Department of Education in disrepute; nor was there anything unusual or litigable in his allowing the school’s pupils to disseminate a petition. He also noted that the initial disciplinary hearing had recommended that Phutha merely be given a written warning for speaking to the media. And although he refrained from finding the department’s procedures to have been unfair – that is, to have been irretrievably prejudiced against Phutha – he did note that this discrepancy between recommendation and action ‘does cast some doubt on whether [the MEC] could objectively have made a determination in this matter … it does raise an eyebrow when the recommendations are not followed’. Education Labour Relations Council, Arbitration case no PSES 632-03/04 FS, Sasolburg, 13 May 2004.
11. *Permanent Secretary, Department of Welfare, Eastern Cape vs Ed-U College (PE) (Section 21) Inc.* 2001 (1) SA 1 (CC).
12. Papers, founding affidavit, paragraph 34.
13. Papers, founding affidavit, paragraph 35.
15. Papers, founding affidavit, paragraph 35.2.
16. Papers, founding affidavit, paragraph 35.3.
17. Papers, answering affidavit, paragraph 4.1.
19. Papers, answering affidavit, paragraph 49.1.

22. Paragraph 16.
23. Papers, representations to the MEC, 28 November 2006.
24. Papers, correspondence. 3 August 2006.
25. Interview, Christina Matla.
26. The complexities of these politics have received little serious attention. A survey of local and national newspaper reporting of the ins and outs of factional politics in the area can be found in Twala (2005).
27. Interview, Christina Matla.

References


