Public interest law: its continuing role in South Africa

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- In the 1995 precedent setting case of Rylands v Edros (1996) 4 All SA 557 (C) Muslim marriages gained legal recognition for the first time in South African legal history, when the court held that Muslim marriages could be treated as civil contracts which create reciprocal rights and obligations between the parties.

- In another landmark decision - Government of the Republic of South Africa v Grootboom 2000 (11) BCLR 1169 (CC) - a case concerning approximately 390 homeless adults and 590 homeless children, the Constitutional Court declared that the state has a duty to devise and implement within its available resources “a comprehensive and a co-ordinated programme progressively to realise the right to access to adequate housing.” The court also ordered that the programme “must include reasonable measures such as . . . to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis conditions.” The Grootboom decision is a watershed one in terms of giving meaning to the progressive realisation of social and economic rights in South Africa.

- In Hoffman v South African Airways 2000 (11) BCLR 1211 (C) the Constitutional Court ruled that discrimination on the basis of HIV-status was neither justifiable nor fair in terms of the Constitution or according to available medical research, and ordered that SAA employ the appellant as a cabin attendant on the airline. This case effectively outlawed discrimination on the basis of HIV-status and has enormous social and legal implications for a country like South Africa where at least 4,68 million people are estimated to be HIV positive.

- In yet another landmark decision the Pretoria high court handed down a decision that the state must provide nevirapine to HIV positive women. Judge Botha said: “About one thing there must be no misunderstanding: a countrywide mother-to-child transmission prevention programme is an ineluctable obligation of the State” (Treatment Action Campaign v Minister of Health (T) case no 21182/2001, 14 Dec 2001 – unreported). On appeal, the Constitutional Court agreed with the finding of the high court that “the policy of government in so as it confines the use of nevirapine beyond the research and training sites constitutes a breach of the state’s obligations under section 27(2) read with section 27(1)(a) of the Constitution . . . Implicit in this finding is that a policy of waiting for a protracted period before before taking a decision on the use of nevirapine beyond the research and training sites is also not reasonable within the meaning of section 27(2) of the Constitution” (Minister of Health and Others v Treatment Action Campaign and Others CCT 8/02, 5 July 2002 – unreported).

These cases demonstrate public interest law’s increasing breadth and importance in South African society. Through litigation, public education, community organization and lobbying efforts, public interest lawyers pursue cases that would otherwise go unrepresented. In the words of United States of America Supreme Court Justice Thurgood Marshall about the importance of public interest law in American society: “Public interest law seeks to fill some of the gaps in our legal system. Today’s public interest lawyers have built upon the earlier successes of civil rights, civil liberties, and legal aid lawyers, but have moved into new areas. Before courts, administrative agencies and legislatures, they provide representation for a broad range of relatively powerless minorities – for example, to the mentally ill, to children, to the poor of all races. They also represent neglected interests that are widely shared by most of us as consumers, as workers, and as individuals in need of privacy and a healthy environment. These lawyers have, I believe, made an important contribution. They do not (nor should they) always prevail, but they have won many important victories for their clients. More fundamentally, perhaps, they have made our legal process work better. They have broadened the flow of information to decision-makers. They have made it possible for administrators, legislators, and judges to assess the impact of their decision in terms of all affected interests. And, by helping open doors to our legal system, they have moved us a little closer to the ideal of equal justice for all.”

The commitment and achievement of public interest lawyers in South Africa are resonated in these words some 40 years later. Public interest lawyers in South Africa have increased society’s recognition of the rights of minorities, women, consumers, poor people and other disadvantaged segments of society. They have played a significant role in the evolution of laws protecting, inter alia, the environment, rights of women and workers’ rights. By fighting to make government more accountable
and business more responsible, public interest law in South Africa has carved out a niche for itself in the system of checks and balances that underlie our society.

**What is public interest law?**

Public interest law is the name given to efforts to provide legal representation to interests that historically have been unrepresented or under-represented in legal process. Philosophically, public interest law rests on the assumption that many significant segments of society are not adequately represented in courts, parliament or administrative agencies, because they are either too poor or too diffuse to obtain legal representation in the marketplace.  

The use of the term "public interest law" does not imply that the side represented by the public interest lawyer is always right as a matter of law, policy or even morality. The "public interest" is not necessarily in the cases that are taken, but rather in the belief that the public interest requires all groups to have access to the legal system and not the powerful only. This belief is borne out of a conviction that an efficient legal system is an essential cornerstone of a free society and that the legal system can function effectively only if all persons with grievances or complaints or with the need for legal assistance are adequately represented.

**Where to now?**

The Legal Resources Centre, the Women’s Law Centre and Lawyers for Human Rights, to name but a few, are organizations in South Africa that specialize in public interest law. Public interest organizations in South Africa have succeeded since the late 1970's in providing protection to millions of Black South Africans who were victims of apartheid oppression. Organizations such as the Legal Resources Centre used the apartheid law, with all its limitations, to bring relief to the homeless and the landless. The work of public interest organizations dealt a severe blow to the infamous pass laws system, forced removals, police brutality, employment malpractices and consumer oppression.

Prior to 1994, the struggle was to establish respect for civil and political rights. In view of the erstwhile government’s flagrant disregard for human rights – the struggle was directed at securing the civil and political rights of Black people. In the mid 1990's however great strides were achieved by the country in bringing about respect for human rights. Democracy was installed in South Africa. A supreme and democratic Constitution with an entrenched Bill of Rights was adopted.

The advent of democracy raised questions about the need for the continued existence of public interest law and human rights organizations in South Africa. With the heralding in of democracy, came a country ravaged by apartheid. Hence, the reconstruction and development of the country was foremost on the agenda of all South Africans. The Constitution now created a framework for the protection of civil and political rights. Socio-economic rights were also clearly entrenched as justiciable rights in the Constitution. Within this framework, South African society was faced with the challenge of the ever increasing rate of unemployment, social and economic inequality, illiteracy and the inability of poor Black South Africans to obtain basic resources and more significantly justice.

To sum up – the greatest challenge facing South Africa was the need to alleviate poverty. The first response to this challenge was the government's Reconstruction and Development Programme in 1994. The experience of the public interest organizations since 1994 has shown that the success of development initiatives in South Africa depends on the provision of legal services to the poor.  

In this regard, the role that public interest law organizations play is complementary to the economic growth development and the resultant alleviation of poverty. The “Speak out on Poverty Campaign” of the non-governmental organizations coalition highlights “Access to land, housing, infrastructural services, social, security, health services, education, employment and environmental justice” as the greatest needs of poor people of this country.

The alleviation of poverty and the social and economic transformation of the lives of the poor and marginalised masses in South Africa is dependent, to a great extent, upon the realization of socio-economic rights. Enforcement of socio-economic rights must take place through judicial and other means. Human rights and public interest organizations involved primarily in litigation see judicial enforcement as the crucial weapon in the arsenal against poverty. In this regard, litigation still remains the sine qua non of public interest law. Whilst education, advocacy and lobbying may be effective, it takes lawyers to harness the power of the judiciary in the struggle for social change. In many situations, litigation is the only hope of achieving success – as was so aptly illustrated in the recent case of Treatment Action Campaign v Minister of Justice (supra), where, despite attempts by the TAC to negotiate with and lobby government to provide Nevirapine to pregnant women who are HIV positive in the public health sector, the TAC was ultimately compelled to launch an application against the Minister of Health to enforce the rights of pregnant women to Nevirapine.

**Impact litigation**

In recent years, public interest organizations, due to constraints on funding, chose to focus on impact litigation as opposed to routine litigation in the public interest. Impact litigation is by far one of the most effective strategies at the disposal of any public interest lawyer or law centre. Through impact litigation public interest lawyers seek to obtain court decisions which establish new legal precedents or which impact large numbers of disadvantaged people.

With the adoption of the Constitution in 1993, organizations such as the Legal Resources Centre recognised that there was scope to undertake impact litigation in strategic areas that would assist in defining constitutional rights. Examples of cases in which the courts have begun to define constitutional rights are: *S v Mawanyane* 1995 (3) SA 391 (CC) (the right to life and dignity); *Mgcina v Regional Magistrate, Lenasia* 1997 (2) SARC 711 (W) (the right to legal representation); *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC) (the right
to equality: unfair discrimination on the basis of HIV status).

The constraints on funding were, however, not the only reason for public interest organizations to follow the impact litigation route. More importantly, it was their early recognition, that although the state was now under a constitutional duty to provide legal representation to indigent people in routine matters, it was less enthusiastic to provide such representation to poor people in strategic cases that challenged state power.

Impact litigation, however, has its limitations. Whilst winning a key victory may establish an important new legal precedent, it does not immediately change circumstances for poor people overnight. Often a precedent-setting case is only the beginning of a long path towards building a new jurisprudence changing government’s behaviour or shaping societal attitudes.

The paradox of impact litigation is no better illustrated than in the case of *Rylands v Edros (supra)*. It recognised one piece of the jigsaw puzzle – that Muslim marriages are legally enforceable contracts. It did not, however, recognise the other personal obligations that flow from it. *Rylands* nevertheless created a massive shift in the judicial perception of the relationships – not merely as potentially polygamous unions but as enforceable legal contracts between two individuals. As a consequence of *Rylands*, it is no longer possible to shut the doors in the face of couples married according to Islamic personal law. Whilst setting a legal precedent, *Rylands* is only the opening gambit in a long and arduous battle for equal protection under the law for women married according to Muslim personal law.

With the success of early litigation campaigns in the background, public interest law groups in all fields tried to maintain some degree of planning and control over their litigation activities. These activities, however, can be controlled only to a certain extent. Not all litigation aimed at social transformation is planned or takes the form of a litigation campaign. Nor are all test cases instances of planned litigation. In fact much public interest litigation is a guided response to fortuitous events. The *Grootboom case (supra)* is one such example.

After having been evicted from private land in the area of jurisdiction of the Oostenberg Municipality, the homeless applicants in the *Grootboom* case attempted to erect temporary structures on the Wallacedene Sportsfield. These, however, proved to be totally inadequate and provided no protection against the elements, particularly for the children of the applicants. The applicants brought an urgent application seeking an order directing the respondents (which included the local, provincial and national spheres of government) to provide temporary shelter for applicants and their children, pending their getting permanent accommodation. On 4 June, Acting Judge Josman granted an interim order directing the respondents to make the Wallacedene Community Hall available, free of charge, for the accommodation of the children of the applicants and one parent/adult for each child requiring supervision.

Today, public interest litigation is prompted by client groups, many of whom have developed sophisticated networks to inform lawyers about lawsuits to pursue. The Treatment Action Campaign, an association of organizations, networks and individuals, which has since its inception campaigned for the government to implement a national programme to reduce mother to child transmissions, is one such group. To this end, the Treatment Action Campaign instructed the Legal Resources Centre and the Aids Law Project to, initiate an application to enforce the rights of access to health care services and to reduce mother to child transmission of HIV.

The Treatment Action Campaign’s success in *TAC v Minister of Health (supra)* was instrumental in exposing the flaws and inconsistencies of the state in dealing with mother-to-child transmission of HIV/AIDS. This case, however, is only the beginning of a long and difficult struggle to challenge government policy on HIV/AIDS in South Africa.

**What can public interest litigation accomplish?**

Public interest litigation can spur recalcitrant regulatory agencies, public institutions or businesses into action. It can enforce existing laws and regulations, even when those responsible for their implementation would rather ignore them. By raising constitutional issues, litigation can extend rights to different population groups and establish constitutional norms. Litigation can restructure public institutions by obtaining judicial decrees that demand protection or better care for prisoners, the mentally challenged, and other institutionalized populations. In a complex society, like South Africa where many interests compete, the courtroom provides a forum in which disputes may be compromised or settled fairly. Public interest litigation empowers disadvantaged groups. It provides a community with a way to say “No” to a proposed project – a hazardous chemical plant or a motorway – that it does not like. A court case can strengthen a community and bring concerned parties together and greatly aid in consolidating organizational efforts. Public interest litigation also plays a very important educational function, raising consciousness through discussion of the issues, changing public opinion and making possible progress towards a more just and equitable society.

Over the years, public interest law has gradually won the support of the organized Bar in South Africa. The Bar however only serves a small portion of the legal needs of the poor, minorities and other groups in South Africa. This record must be improved. Insofar as the organized Bar holds the monopoly on the provision of legal services, it has an obligation to help those who need to obtain justice. Public interest law will certainly benefit members of the Bar. It will give them an opportunity to learn courtroom skills and, in some instances, to work with public interest lawyers who are authorities in their fields. The change of pace and different problems presented will, without a doubt, be stimulating, satisfying and provide ample scope for creativity and vision.

Under apartheid, the invidious Group Areas Act was brought to a standstill by the efforts of hundreds of lawyers, attorneys, advocates and academics – each of whom took on just a few cases.

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In the same spirit, let us yield to the challenge of fighting poverty through litigation and by doing so, give meaningful effect to the deep-rooted traditions of the Bar and its Statement of Intent to provide “access to justice for indigent persons” and the commitment to “attain justice for all according to the Rule of Law”. Too few of us are presently doing this.

Endnotes
1 An application for leave to appeal against the order of the high court was heard by the Constitutional Court on 2, 3 and 6 May 2002. The merits of the application were considered at this hearing.
2 At paras 80-81.

Fly on the wall

Fly on the wall was in motion court in Pretoria on Wednesday 7 August. Ginsberg SC was leader in a matter in which Selvan SC was leader against him. Fly on the Wall started listening when Selvan SC submitted to Van der Walt J that the provisions of Law 12 of 1899 of the Transvaal were the kind of thing Selvan SC would have expected to have been the topic of dinner conversation among the Ginsbergs. Ginsberg SC assured Selvan SC and the court that this was not so. Indeed, neither party knew of the existence of the Law until its apparently decisive effect upon the dispute between them was discovered, a week or so before the matter was heard, by some impressive research work. Apparently, or so Fly on the Wall came to understand, the effect of this Law was that a party could not tax a bill of costs without notice to the other party. A certain chief justice promulgated a rule of court in terms of which such an ex parte taxation was competent. This was done at a time when the powers of the chief justice to do so were subject to the dictates of, inter alia, Law 12 of 1899. So, the argument went, the rule of court was promulgated ultra vires. When this was brought to the attention of the party who had availed itself of the (by now well entrenched) opportunity of such an ex parte taxation, the point was conceded to be good. It appeared to Van der Walt J, although he expressly refrained from deciding the issue, that the concession was properly made. Why did Fly on the Wall come to be entertained in the jacaranda city? There was the perennial question of costs. It was a law point, said Selvan SC, and I was entitled to take it without setting it out in the papers. An obscure law point, said Ginsberg SC, and one that ought to have featured in the papers, according to some authority that sounded weighty to Fly on the Wall. Too true, held Van der Walt J, who said he found Law 12 of 1899 difficult to digest along with succulent steaks over dinner, and that it was not the kind of thing one could expect as part of a case to meet unless expressly mentioned. Costs were then ordered to be shared in a manner that was too complicated to retain Fly on the Wall’s attention, which was at that point starting to drift back to the exception he was called upon to argue. Fly did make a note of the fact that one could apparently not tax a bill of costs ex parte any longer. This seemed quite important to Fly.

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2 At paras 80-81.

5 Legal Resources Centre Legal Resources Trust Annual Report 1 April 1998 to 31 March 1999 at p 4.