

VINODH JAICHAND

Advocate of the High Court of South Africa and Deputy-Director of the Irish Centre for Human Rights at the National University of Ireland

ABSTRACT

In order to advance human rights one needs to approach courts to clarify what the content of the rights are for a group of people. When the international and regional human rights norms are internalised through implementation into a domestic system, you have fertile ground for public interest litigation. The suggested conclusion is that there has been a gradual evolution in terms of the development of a body of law on human rights, moving from the international to the regional system.

The article focuses on the practice of public interest litigation in South Africa as it discusses questions of access to justice, clinical legal education, and legal aid to the population. As an illustration of strategies in a public litigation, the author analyses the suit brought against the government by an action campaign for the treatment of Aids.

PUBLIC INTEREST LITIGATION STRATEGIES FOR ADVANCING HUMAN RIGHTS IN DOMESTIC SYSTEMS OF LAW

Vinodh Jaichand



Based on the theme of the colloquium “The Rule of Law and the Construction of Peace”, this presentation is drawn from the perspective of a national human rights law non-governmental organisation. The observations are based on one presumption: that in order to advance human rights one needs to approach courts to clarify what the content of the rights are for a group of people. This point is developed by referring to certain recent experiences in South Africa, some of which are not necessarily unique to that country.¹

In the course of the past few days, much has been said about the development of international human rights law and the use of regional human rights systems. In summary, one might conclude that there has been a gradual evolution in the development of human rights law, from the international to the regional systems. When the international and regional human rights norms are internalised through implementation into a domestic system, fertile ground for public interest litigation will be found.²

“Public Interest Litigation” has been defined as “a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected”.³

The Durban Symposium on Public Interest Law⁴ took a

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as from page 139.

broader view of public interest law by defining it in terms of what it was not, as a field of law: not public law, not administrative law, not criminal law and not civil law. They used the term as a **way of working with the law** and an attitude **towards** the law. They pointed out that bringing selected cases to the courts is not the only public interest strategy, but it could include law reform, legal education, literacy training and legal services. It is not a field reserved for lawyers because it may involve lobbying, research, advocacy and human rights education. Lastly, public interest litigation is a demonstrated attempt at rights empowerment giving tangible meaning and content to human rights.

The content of the strategy

The law is often a daunting and befuddling business, which never seems to see things from the view of the marginalised, vulnerable or indigent person. Most people think that the law is on their side when courts pronounce on their rights in a positive way that reinforces their belief that human rights are a tangible reality. “Creating this sense of inclusion requires many things including marketing the idea aggressively to the poor” says one critic⁵. In addition, success in the courts goes a long way to bring about positively assertive attitudes, because the marginalised, vulnerable and indigent have grown accustomed to defeat on a regular basis.

A good starting point with regard to strategy in effective public interest litigation may be found in the case of *Minister of Health and Others v Treatment Action Campaign and Others*⁶ in the Constitutional Court of South Africa. An analysis of the strategy employed may assist in formulating a checklist of issues and constituencies that need to be attended to for potential success. A simplistic method of division may be to examine “The Public” as representative of the general opinion, “The Public Interest” as the platform for advocacy and finally, “The Litigation” as the legal issues presented to the court and the results.

The public

The Treatment Action Campaign made the government’s attitude to the treatment of HIV/Aids patients a national

issue.⁷ They mobilised NGO's who had sympathy with the government's indifference to HIV/Aids sufferers by capitalising on the state's inability to articulate a coherent position on the disease.⁸ Concerned citizens took to the streets in large numbers to indicate their impatience with the government's attitude.⁹ People suffering with HIV/Aids were seen as victims of the government's inability to deal with the disease.

As a result, when a Treatment Action Campaign's official smuggled generic HIV/Aids drugs, at a fraction of the usual selling price, into the country, threats of prosecution slowly receded in the face of what appeared to be the act of a courageous individual who was willing to show the hypocrisy of the system.¹⁰ In an earlier action, the Treatment Action Campaign found common cause with the government and opposed the Pharmaceutical Manufacturers Association court action to prevent legislation in support of generic and cheaper HIV/Aids drugs. The Pharmaceutical Manufacturers Association, under pressure, withdrew their application to court. One of the leaders of the Treatment Action Campaign, who is also HIV/Aids positive, refused to take anti-retroviral drugs until they were available in public hospitals and clinics for everyone. The Treatment Action Campaign continued to question the inaction on the part of the government. They now had the "interest of the public" they were seeking.

The public interest

The Treatment Action Campaign then found the ideal legal case they could capitalise on. They found it in the government's policy of failing to provide Nevaripine, a widely-recommended anti-retroviral drug used in reducing mother-to-child transmission, at all state health facilities. They were available at two pilot sites per province. And the victims of this callous state policy were innocent babies. In an application before the Pretoria High Court on 14th December 2001, Judge Chris Botha found that the government had a duty to provide Nevarapine to pregnant women who were HIV positive. The government appealed against this decision on several occasions until the Constitutional Court heard the matter on 2nd and 3rd May

2002. The “public interest” was heightened by what appeared to be the government’s inability to accept defeat gracefully.

The litigation

With regard to the “litigation” aspect, the Treatment Action Campaign assembled the best legal minds on socio-economic rights, which in many countries may not be prosecuted as a right. The Treatment Action Campaign relied on a number of NGO’s: The Legal Resources Centre; the Child Rights Centre; Community Law Centre,¹¹ the Institute for Democracy in South Africa and the Cotlands Baby Sanctuary. The latter three were *amici curiae*, that is, “friends of the Court” who provided clarity on issues before the Court based on their expertise.¹² After the Treatment Action Campaign won before the High Court the government appealed to the Constitutional Court. The Constitutional Court found in favour of Treatment Action Campaign when it held that the government’s program to prevent mother-to-child transmission was unreasonable.

The wider results of the case

A number of other very important principles were stated by the Court in the Treatment Action Campaign case which are equally valuable in this victory for marginalised (HIV/Aids victims), vulnerable (children and mothers) and the indigent (poor people who cannot afford treatment). These principles can be used in a number of cases in the future.

The Constitutional Court, as the highest court in the land, reiterated¹³ that it had the power to adjudicate on socio-economic rights because the Constitution gave them that power. It also said that, within the debate around the separation of powers, it was entitled to examine this issue even if it had a financial implication.¹⁴ The Constitutional Court had previously applied the standard of reasonableness to the socio-economic right in question in *Grootboom*:¹⁵

The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are

reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

The usual thinking on social policy matters is that they are executive functions.¹⁶ The Constitutional Court pointed out that most of its decisions have some financial implication. In the *Grootboom* case¹⁷ it reaffirmed what was said previously:¹⁸ that if it ordered legal aid to an accused individual, as a civil right, that too would have a financial implication.

Mr Justice Albie Sachs, one of the 11 justices of the Constitutional Court, in a lecture entitled “Enforcement of Social and Economic Rights” at the Centre for the Study of Human Rights of the London School for Economics¹⁹ said:

The enforcement of social and economic rights is not based on a disregard for all the queries that are raised because they are legitimate queries. It's not a case of the victory of social and economic rights over a conservative philosophy that sees the role of courts to be simply to defend basic liberties. It's based upon a reconciling of deep fundamental principles relating to the role of the courts in the 21st Century. ...

It might be that the statement made, that I heard in Paris not too long ago, might well turn out to be true. The 19th Century was the century in which the executive took command of the state. The 20th Century was the century in which parliament took command of the executive. The 21st Century will be the century in which the judiciary secures the basic rules and processes and values of functioning of both parliament and the executive. I might mention it was a judge that made that prediction. But I think we are entering a new kind of era now and the question is ceasing to be whether or not one can enforce social and economic rights through the courts and the real question is how can it best be done?

In the Treatment Action Campaign case, the Constitutional Court was mindful of the suitability of courts to adjudicate upon socio-economic rights when it stated: “Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role of the court, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determination of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate balance”.²⁰

The Constitutional Court, in this case, also undertook a useful examination of the jurisprudence of other jurisdictions on the question of remedies granted where a breach of rights, including socio-economic rights, has taken place. The court looked at the United States, India, Germany, Canada and the United Kingdom and concluded that while three had ordered some form of structural injunction, the United Kingdom and Canada were reluctant to do so, preferring declaratory orders because of the custom of their governments to carry out the wishes of the court.²¹

*In the Grootboom case, Mrs. Irene Grootboom was evicted from her shack on land that was earmarked for low cost housing for people like her and her children. She occupied this land together with a number of other people whose homes were often flooded each year by the seasonal rains. Justice Yacoob of the Constitutional Court found the policy of government to be unreasonable. He stated that reasonableness can be evaluated at the level of legislative programming and its implementation: “Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations”.*²²

Justice Yacoob also added in Grootboom:

Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic needs. A society must seek to ensure that the bare necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the rights. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.²³

The principles articulated in the Treatment Action Campaign and the Grootboom cases are applicable in future litigation on economic, social and cultural rights.

The networked approach

Generally, the strategy of combined effort or the networked approach is a beneficial process. And it has the additional benefit of providing a collection area for suitable public interest cases.

Access to justice

Lawyers themselves are not always efficient in mobilising public opinion. Community leaders are better at that. In South Africa, an important player in this respect is the community-based paralegal who is an individual drawn from a community and accountable to it. The legal profession in South Africa may soon include the paralegal as a legal service provider under the proposed Legal Practice Bill.

Although the definition of a paralegal is not clear, and the

attorney profession opposes paralegals representing a client without supervision, they are referred to as “barefoot lawyers” who act as citizens’ bureau advisors on legal and quasi-legal matters. They are given training on the mechanics of a law which they assist members of the public with.

While this broadens access to justice through educating people on their rights, the legal service provision aspect raises questions of quality and equality: the rich afford the best and the poor get paralegals. The poor do not know the difference between a lawyer and a paralegal and the results promised by some paralegals are known to be extravagant.

If, as the draft Legal Practice Bill proposes, most of the paralegals migrate towards the legal profession, a very important link with the community will be severed. That would be a great loss because they have been the source of good cases: the Grootboom case came from a paralegal office.

Non-governmental organizations that provide legal assistance are also vital to the public interest litigation strategy. In South Africa, there are a number of such entities providing this service. Already mentioned is the Legal Resources Centre, which is a highly successful public interest NGO and was the instructing attorney in the Treatment Action Campaign case. Others include the Black Sash, the oldest human rights NGO in South Africa, and Lawyers for Human Rights. If we take the Durban Symposium on Public Interest Law definition, Lawyers for Human Rights meets many of their criteria for public interest law practice. The organisation provides legal advice, litigation, education and advocacy on human rights issues.

Lawyers for Human Rights, too, has been involved in previous landmark public interest cases, including the Makwanyane²⁴ case, which abolished the death penalty, in which it was an *amicus curiae*. Most recently, it was successful in having core aspects of the new Immigration Act concerning the arrest and detention of non-nationals declared unconstitutional.²⁵ Under its Security of Farm Workers Project, it set the precedent that a husband may receive his right to remain on a farm through the right of his wife under the right to family life.²⁶

Clinical legal education

Legal advice and assistance is a vital component of public interest law. But such a service is expensive. For NGO's not dealing with legal questions, it is vital to have in their network access to sound legal advice. Many law students, in many parts of the world, undertake to provide this kind of service in University Law Clinics, under supervision, as part of their training. Apart from the United States, there are not many other countries that have Student Practice Rules that permit this.²⁷ In South Africa, the various law clinics have formed their own association that tender for work for the poor and compete with NGO's for funds to improve their service.

Legal aid

While there is some form of legal aid in most countries, there are difficulties in meeting the demand with specified levels of resources, which limit the work that can be done. The South African Legal Aid Board underwent major transformation from a *judicare*²⁸ system to a salaried model with Justice Centres being set up in all major cities and in some rural areas. The *judicare* model became unworkable as lawyers' claims were not processed on time.²⁹ The system for verifying the claims was cumbersome and time-consuming. Then the Legal Aid Board decided to cut the rates and many lawyers felt betrayed. They thought of the system as a means of supplementing their incomes, not as a service to the poor, marginalized and vulnerable sectors of our society. Jeremy Sarkin³⁰ states that during "the 1997/8 financial year 196,749 people received legal aid at a cost of R210 million. Of these, 193,177 were represented by private lawyers".

The Justice Centres are currently staffed by salaried lawyers and support staff, who undertake legal representation of some types of cases only, at a fixed and predictable cost. Because the threshold of the means test of the Legal Aid Board is so low, many fail to qualify for state assistance. They form the major portion of any group needing assistance and have been referred to as the "gap group".

Pro bono publico

One way to address the dire shortage of quality advice is to introduce, or reintroduce in many cases, the idea of *pro bono* work where it becomes an integral part of the social responsibility of every individual lawyer.³¹ The Deputy Chief Justice of South Africa summarized the need appropriately: “Our society needs to have confidence in our courts and other structures designed for the delivery of justice. That confidence is enhanced by the ability of the courts to reach and come to the assistance of the poorest of the poor and the weakest of the weak. The capacity of the judiciary and the courts to do so will be severely impaired if there is insufficient and ineffective involvement in the interaction between the courts and the people who need legal services”.³²

The practice of *pro bono* work is found in many legal systems, often as an act of charity, but it is seldom institutionalised. It is possible to create the obligation for lawyers to undertake this work as part of their duties. A law society (or any legal governing body) could refuse to issue a certificate to practice in any given year if a requisite number of hours of work are not concluded on behalf of the poor, marginalised and vulnerable people. Another provision could be that a lawyer who tenders for government or municipal work must disclose her/his *pro bono* record.

The legal profession should see *pro bono* work “not as an act of charity, nor as a marketing tool, but as a deliberate step in building the sort of society we want, in which all our people can exercise their rights”.³³ Means must be found to recognise and acknowledge their contribution where they exceed the minimum requirements, through awards or advertisements of their names in the newspapers.

Central to this working is an organised operation with a database of needs and a list of service providers. Linked to this could be the non-legal NGO's, the Legal Aid system, paralegals and legal NGO's who are looking for the right test case for public interest cases. The system must be set up not to excuse the state from its responsibility to provide legal representation, but to supplement the existing system of legal aid. Pro Bono Conferences in Argentina, South

Africa and Chile have already canvassed many of these ideas. A conference for Brazil and one for Australia are currently being planned.

Some concluding remarks

The role of civil society organizations in South Africa combined with the organized legal profession provides a useful illustration of how their contributions to human rights have improved and strengthened the rights of a particular group of people. The impact of legal victories on socio-economic rights in one domestic jurisdiction reverberate around the world in solidarity with other poor, vulnerable and marginalized people. One commentator said the following: “One of the most exciting developments, however, is the justiciability of economic and social rights at the domestic level. Examples of the enforcement of cultural rights exist in Canada and Europe, but economic and social rights have long been seen as matters of policy and thus open to being given low prioritization. Elevating these from the arena of policy to the realms of rights opens a new dimension, which can put substantive meaning in the concept of the indivisibility of all human rights.”³⁴

The challenge in many other jurisdictions is perhaps more fundamental: to create some measure of enforceability of socio-economic rights through constitutional protection. But constitutions are frames in which all rights are supposed to be pictured: the interdependent and indivisible civil and political rights, and economic, social and cultural rights. Let us not be confused into thinking that there is no picture, if there is no frame. States have undertaken obligations under the International Covenant on Economic, Social and Cultural Rights “to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group and appropriate means of ensuring governmental accountability must be put into place.”³⁵

A closer examination of many jurisdictions may reveal that

there is protection for some of these rights in administrative law or in individual pieces of legislation.³⁶ The Committee on Economic, Social and Cultural Rights affirmed this when it said: “The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State have a legitimate expectation, based on the principles of good faith, that all administrative authorities will take into account of the requirements of the Covenant in their decision-making”.

Clarifying the content of the rights requires a strategy not unlike the one just discussed. In this respect, the issue of access to justice is pivotal together with the co-operation from a range of civil society actors which has been illustrated by recent experiences in South Africa. Some may wish to categorize the approach of the Treatment Action Campaign on HIV/Aids as a social movement. Neil Stammers says: “Social movements have typically been defined as collective actors constituted by individuals who understand themselves to share some common interest and who identify with one another, at least to some extent. Social movements are chiefly concerned with defending or changing at least some aspect of society and rely on mass mobilization, or the threat of it, as their main political sanction”.³⁷

He goes on to state that there is a potential role for social movements in the reconstruction of Human Rights³⁸ and finally quotes Richard Devlin: “If human rights are to be understood as a challenge to power, as a mode of resistance to domination, then we must confront power in all its manifestations”.³⁹

NOTES

1. Public interest litigation is well established in the United States, Canada and India, for example. For the Indian experience see Circle of Rights at <<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm>>. Last access on April 15, 2004.
2. It is interesting to note that "the international system has had its greatest impact where treaty norms have been made part of the domestic law more or less spontaneously (for example as part of constitutional and legislative reform), and not as a result of norm enforcement (through reporting, individual complaints, or confidential inquiry procedures)". Christof Heyns & Frans Viljoen, "The Impact of the United Nations Human Rights Treaties on the Domestic Level". *Human Rights Quarterly* 23.3 (2001) 483 at 486.
3. *Black's Law Dictionary*.
4. Held from June 29 to July 8, 1997 under the auspices of the Public Interest Law Initiative, Columbia University, sponsored by the Ford Foundation and the Open Society Institute at the University of Natal, Durban, South Africa <<http://www.pili.org/publications/durban/preface.html>>. Last access on April 15, 2004.
5. Hernando de Soto, "The Economist versus the Terrorist" <http://www.economist.com/people/PrinterFriendly.cfm?Story_ID1559905>. Last access on April 15, 2004.
6. Case number CCT 8/02; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).
7. President Thabo Mbeki was reported to have questioned the link between HIV and AIDS which appears to have had an impact on the Minister of Health's programme of action against the disease.
8. "Health authorities and President Thabo Mbeki have incurred criticism for apparently failing to recognize the magnitude of a problem that could devastate the population according to some medical prognoses." Claire Keeton, "South African government ordered to provide Nevaparine". <<http://www.q.co.za/2001/2001/12/14-tacwins.html>>. Last access on April 15, 2004.
9. Sally Sara of the Australian Broadcasting Corporation reported on one of many demonstrations on 27 November 2001 on the day the High Court of Pretoria was due to hear the matter: "The demonstrators carried white crosses in memory of people who have already died from the epidemic ...".
10. A film on the life of Zackie Achmat was made, titled "It's my Life". See

<<http://www.q.co.za/2001/2001/11/28-STEPSzachie.html>>.

Last access on April 15, 2004.

11. In a press release on April 30, 2002 issued by the Community Law Centre, it stated that they “believed that pregnant women with HIV are entitled to it on the basis of a core right enjoyed by everyone to have access to an essential level of health care service, including reproductive health care, consistent with human dignity. Those who were wealthy automatically enjoy this access, but the poor can only enjoy meaningful access to this right if the State provides it to them free of charge. Every child is also entitled to the basic health care needed to reduce the risk of mother-to-child transmission of HIV”.

12. The Human Rights Commission, originally cited as an *amicus* in the case, “was noted for its absence – indeed amidst allegations that it withdrew as a result of governmental pressure” according to Dr Rachel Murray of University of London’s Birkbeck College. See “Is the HRC Playing Fair?” by Michael Morris: <<http://allafrica.com/stories/200303210601.html>>. Last access on April 15, 2004.

13. *Soobramoney v. Minister of Health, KwaZulu – Natal* 1998 (1) SA; 1997 (12) BCLR 1969 (cc) and *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA (CC); 2000 (11) BCLR 1169 (CC).

14. See note 18.

15. See note 13, at paragraph 41.

16. See Kevin Hopkins, “Shattering the Divide – When Judges Go Too Far”. <<http://www.derebus.org.za/archives/2002Mar/articles/dicide.htm>>. Last access on April 15, 2004.

17. See note 13.

18. *Ex parte* Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC).

19. *Enforcement of Social and Economic Rights*, 27th February 2003. Centre for the Study of Human Rights, London School for Economics. Draft transcript.

20. See note 6, at paragraph 38.

21. See note 6, paragraphs 107 to 111.

22. See note 13, at paragraph 42.

23. See note 13, at paragraph 44.

24. 1995 (3) SA 391 (CC).

25. Press release dated April 22, 2003: *Lawyers for Human Rights and Others v. Minister of Home Affairs and Others*.

26. *Conradie v. Hanekom LCC 8 / RR.*
27. Jeremy Sarkin, "Promoting Access to Justice" 41 *Indicator SA* Vol. 19, n. 3, December 2002 at 44.
28. Lawyers in private practice were hired to represent certain clients who meet the requirements of the means test. They were paid by the Legal Aid Board on a case by case basis.
29. Jeremy Sarkin, note 27 above at 42.
30. See note 21, at 41.
31. Vinodh Jaichand, "A Social and Moral Responsibility", 37 *Indicator SA* Vol. 19, n. 3, December 2002 and "LHR Calls on Lawyers to Embark on Pro Bono Work", *De Rebus*, February 2002.
32. Justice Pius Langa, "Making Rights a Reality", 38 *Indicator SA* Vol. 19, n. 3, December 2002 at 39.
33. Geoff Budlender, "Proposals for a New System", 50 *Indicator SA* Vol. 19, n. 3, December 2002 at 51.
34. Roland Rich, "Solidarity Rights Give Way to Solidifying Rights", *Academy of Social Sciences*, 2002, 25 at 31.
35. Paragraph 2, General Comment Number 9 (Nineteenth Session, 1998). Report of the Committee on Economic, Social and Cultural Rights, UN doc.E/1999/22, pp. 117-121.
36. *Idem*, paragraph 9.
37. Neil Stammers, "Social Movements and the Social Construction of Human Rights". *Human Rights Quarterly*, 21.4 (1999), 980 at 983.
38. See note 37, at 1003/4.
39. See note 37, at 1008.