

“TRANSFORMATIVE CONSTITUTIONALISM”:

The best tactic to achieve it.

BY

NANZELELO S.L. NDLOVU

**SUBMITTED IN PARTIAL FULFILMENT OF THE DEGREE
LLM IN MULTIDISCIPLINARY HUMAN RIGHTS LAW**

SUPERVISOR

TSHEPO MADLINGOZI

MAY 2014

Table of Contents

CHAPTER 1:	1
<hr/>	
INTRODUCTION	1
1.1.BACKGROUND	1
1.2.STATEMENT OF RESEARCH	4
1.3.IMPORTANCE OF THE STUDY	6
1.4.OBJECTIVES OF THE STUDY	7
1.5.LITERATURE REVIEW	7
1.6.CHAPTER CAPTIONS	11
CHAPTER 2	13
<hr/>	
LITIGATION AS A TACTIC TO ACHIEVE TRANSFORMATIVE CONSTITUTIONALISM	13
1.1INTRODUCTION	13
1.2CHALLENGES TO SOCIAL CHANGE	15
A)KNOWLEDGE OF RIGHTS	16
B)PHYSICAL AND FINANCIAL ACCESS TO COURTS AND LEGAL COSTS	16
C)LENGTHY COURT PROCEEDINGS	20
1.3ROSENBERG’S CONSTRAINED COURT VIEW	20
1.4CRITICAL LEGAL STUDIES (CLS) MOVEMENT	23
1.5CONCLUSION	26
CHAPTER 3	28
<hr/>	
THE IMPACT OF PUBLIC INTEREST LITIGATION IN SOUTH AFRICA	28
1.1 INTRODUCTION	28
1.2.WHAT IS PUBLIC INTEREST LITIGATION?	29
1.3.GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS V GROOTBOOM AND OTHERS	31
A)BACKGROUND	31
B)THE PROGRESSION OF THE GROOTBOOM CASE	32
C)IMPACT OF THE JUDGEMENT	33
1.4.THE TREATMENT ACTION CAMPAIGN (TAC)	34
A)THE MANDATE OF THE TAC	35
B)BUILDING THE TAC	36
C)THE IMPACT OF THE TAC CASE JUDGEMENT	37
1.5.DIFFERENCES DRAWN FROM THE TWO CASES	38
1.6.CONCLUSION	39
CHAPTER 4	40
<hr/>	

SOCIOECONOMIC RIGHTS IN COURT: A COMPARATIVE STUDY OF INDIA AND SOUTH AFRICA	40
1.1INTRODUCTION	40
1.2PUBLIC INTEREST LITIGATION IN INDIA	41
A)CHARACTERISTICS OF SOCIAL ACTION LITIGATION IN INDIA	42
1.3PUBLIC INTEREST LITIGATION IN SOUTH AFRICA	46
A) CHARACTERISTICS OF PUBLIC INTEREST LITIGATION IN SOUTH AFRICA	47
1.4CONCLUSION	49
CHAPTER 5	51
TACTICS THAT SHOULD PRECEDE LITIGATION TO ENSURE BETTER OUTCOMES	51
1.1INTRODUCTION	51
1.2TRANSFORMATIVE MEASURES TO REALISE RIGHTS	51
1.3TACTICS THAT CAN BE USED TO COMPLEMENT LITIGATION	53
A)PUBLIC INFORMATION CAMPAIGNS	54
B)PROVIDING ‘LEGAL’ ADVICE AND ASSISTANCE OUTSIDE THE COURTROOM	55
C)MAKING USE OF SOCIAL MOBILISATION AND ADVOCACY	56
1.4.CONCLUSION	58
CHAPTER 6	60
CONCLUSION	60
1.1INTRODUCTION	60
1.2RECOMMENDATIONS	61
1.3CONCLUSION	62
BIBLIOGRAPHY	65

ABBREVIATIONS

ANC	African National Congress
CBOs	Community Based Organisations
CJ	Chief Justice
CLS	Critical Legal Studies
DoJCD	The Department of Justice and Constitutional Development
NGOs	Non-Governmental Organisations
PIL	Public Interest Litigation
TAC	Treatment Action Campaign
USA	United States of America

CHAPTER 1:

INTRODUCTION

1.1. Background

*“We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights...
Improve the quality of life of all citizens and free the potential of each person;”*¹

The effect of the South African Bill of Rights can only be understood against the historical background of Apartheid. Hartley (1953) quoted by Dugard proclaimed that, “The past is another country. They do things differently there”.² This proclamation was not far from the truth in South Africa. During Apartheid, the South African law was characterized by “discrimination and repression”.³ The White minority had a monopoly over all the formal institutions of power and enjoyed extensive rights, while the Coloured and Indian people had relative privileges bestowed upon them. The Black majority, however, were excluded from all social and political spheres and afforded no rights or privileges. “Coloureds and Indians had some political representation in the Tricameral Parliament but Africans were excluded and were obliged to exercise their political rights through the homelands structures.”⁴ However, it must be noted that Apartheid was not only a struggle for civil and political rights but also a struggle for economic, social and cultural rights of the Black people in South Africa.⁵ Twenty years after Apartheid the democratic government in South Africa remains with the challenge of addressing the

¹Preamble to the Constitution of the Republic of South Africa.

²Dugard (2004) 20 *SAJHR* 345.

³Ibid.

⁴Ibid.

⁵Mbazira (2009) 2.

inequalities and achieving human development and the realization of human rights. Apartheid left South Africa an inheritance of poverty and inequality.⁶

The introduction of the South African Interim and Final Constitutions ushered in Bills of Rights, which introduced a promise and a possibility of social change.⁷ No Constitution can remedy or resolve poverty, but the South African Constitution provided a promise for the improvement of equality of the South African peoples' lives. Mureinik illustrated the democratic transition in South Africa by using the image of a bridge. The bridge takes us from the one side, authoritarianism, to the other, where we have a culture of justification, "a culture in which every exercise of power is expected to be justified."⁸ That was the intended purpose of the Constitution, to facilitate the move towards "a society based on democratic values, social justice and fundamental human rights..."⁹ as stated in the Preamble to the Constitution. Mbazira asserts that, "the constitutional protection of these rights [socio-economic rights] is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform society... from a society based on socio-economic deprivation to one based on equal distribution of resources."¹⁰

Former Chief Justice Langa said that "This conception of transformation reminds me of the old Nissan slogan: 'Life's a journey. Enjoy the ride.' What the slogan tells us is that we should enjoy the driving itself rather than seeing it merely as a means to arrive at a destination... we should promote and sustain transformation itself, rather than view it merely as a means to construct a new society."¹¹ In essence, there has to be a commitment by the government to carry out the goals of the Constitution. Rather than

⁶Dugard (2004) 20 *SAJHR* 353.

⁷Social change for purposes of this dissertation can be defined as the improvement in the provision of basic services by the government and the change in the social welfare of the society and political rights.

⁸Mureinik (1994) 10(31) *SAJHR* 32.

⁹Preamble to the Constitution of the Republic of South Africa.

¹⁰Mbazira (2009) 1.

¹¹Former Chief Justice Langa (2006) Prestige Lecture delivered at Stellenbosch University on 9 October 2006 <http://sun025.sun.ac.za/portal/page/law/index.afrikaans/nuus/2006/Pius%20Langa%20Speech.pdf>.

seeing the Constitution as a means to transformation, a document representing transformation, there must be a commitment to actively drive that Constitution to transformation in South Africa. For example, institutions being created with the aim to encourage, promote and protect rights would be one way of bringing about transformation in a particular area. In *Soobramoney v Minister of Health, KwaZulu-Natal*¹² former Chief Justice Chaskalson also alluded to the fact that a commitment to address the past's inequalities needed to exist for South Africa to be transformed into a society in which human dignity, freedom and equality would be present. He continued to say that if this did not happen, the aspiration of a new South Africa would remain as such, merely an aspiration, and would ultimately leave a 'hollow ring'.¹³

This leads to the motivation of this dissertation. The history of the South African freedom struggle shows that tactics such as public marches, lobbying, political protests as well as litigation were employed to achieve equal rights. Today these tactics are still being employed however the effectiveness of the tactics is what is debated in this dissertation. What is the best means to achieve success?

During Apartheid, the marginalised poor experienced discrimination of all kinds. Given the outline above, with the inclusion of socio-economic rights in the South African Constitution, an expectation of their fulfillment was placed on the hearts of the affected South Africans. However, unemployment continues to rise, housing conditions are still poor and the poor are still exposed to deplorable living conditions and poor health facilities. Unemployment rate rose from 23.9% in 2011 to 25.2% at the end of the first quarter of 2012 in South Africa.¹⁴ In a report published by Stats South Africa it was found that Black African households are still the poorest in the country and their positions have not improved significantly. In 2005/2006, 24.8% of Black households fell into the poorest quintile and that figure increased in 2008/2009 to 25.0%.¹⁵

¹²*Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC). This case dealt with the right to access to health care and emergency treatment under section 27(3) of the Constitution.

¹³*Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at Para 8.

¹⁴Labour Force Survey: Historical Revision September Series 2000-2007
www.statssa.gov.za/keyindicators/keyindicators.asp (accessed 29/07/2012).

Social groups, NGOs and public interest litigators have all used various tactics, such as public marches, lobbying, litigation and political marches to achieve one goal; that is to achieve the goals of the Constitution set out in the preamble. The aim of this dissertation is to analyse the tactics used in South Africa in a bid to transform the society, transforming it to one where human dignity, equality and freedom truly exist.

1.2. Statement of research

After 1994, transformative constitutionalism has been made a key project to redress the legacy of apartheid. Klare described transformative constitutionalism as “a long term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.”¹⁶ The South African Constitution was praised worldwide as it included socio-economic rights and they are now considered as justiciable rights just as were civil and political rights¹⁷. The South African government asserts, and rightly so, that “South Africa’s Constitution is one of the most progressive in the world and enjoys high acclaim internationally.”¹⁸ The enactment of the new Constitution was a clear indication that there was a shift in government. Enforceable legal mechanisms were set up to allow people to claim the various rights that they had been deprived of. Transformative Constitutionalism was meant to deal with the injustices of the previous regime and bring about a change to the institutions in place and in the power relations. Various tactics were employed by social movements to ensure that transformation of the society was achieved. Examples of these tactics were lobbying, marches and legal mobilization and social mobilization.

¹⁵Statistical release P0310 Living Conditions of Households in SA 2008/2009.
www.ecdlc.org.za/images/stories/downloads/STATSA_LIVING_CONDITIONS_HOUSEHOLDS_SA_2008-2009_SEPT_%202011.pdf (accessed 29/07/2012).

¹⁶Klare (1998) 14 *SAJHR* 150.

¹⁷Mbazira (2009) 2.

¹⁸<http://www.info.gov.za/documents/constitution/index.htm> (accessed 30/03/2010).

One tactic commonly used is litigation. The Constitutional Court made headlines after its groundbreaking decision in *The Government of the Republic of South Africa v Grootboom*¹⁹ case. It was the first successful socio-economic rights case to be heard by the Constitutional Court. Litigation had proven successful. Success is defined as “the accomplishment of an aim or purpose” in terms of the Pocket Oxford English Dictionary.²⁰ There were two outcomes from this case. The successful outcome was the fact that it was evident that socio-economic rights were now justiciable.²¹ An order had been given in favour of their implementation. The first step towards reaching the goal of transforming society, eradication of poverty and inequality and promoting and protecting South African citizens’ fundamental rights was achieved, however with regards to the second outcome, the provision of adequate housing, this case was clearly not successful. That goal was not achieved. As Mbazira states “litigants in socio-economic rights litigation expect their victories to be followed by immediate amelioration of their socio-economic conditions. However, this may sometimes not be the case; court victories may either be followed by very minimal improvements or no improvements at all.”²² Other cases such as the *Minister of Health and Others v Treatment Action Campaign*²³ also showed a move to transform the society where an even more ‘successful’ judgment was given. However, as will be seen later in this dissertation, more resources and different tactics were also used to further achieve a successful outcome. Litigation is merely part of the equation and the burden of eradicating poverty or transforming society and institutions cannot be placed on the legal system alone. This will be illustrated throughout this dissertation.

Today the legacy of apartheid still lingers on. The grim reality on the ground, as highlighted earlier, is that the poor still suffer and live in squalid conditions, half of the

¹⁹2000 (11) BCLR 1169 (CC). This case dealt with the right to access adequate housing in terms of section 26 of the Constitution.

²⁰Pocket Oxford English Dictionary 9th Edition.

²¹ That is to say that litigants can now have audience before the courts in instances where they have been deprived of their socio-economic rights.

²²Mbazire (2009) 3.

²³2002 (5) SA 721 (CC). This case dealt with the right to health care. They looked at sections 26 and 27 of the Constitution.

population living under the poverty line,²⁴ unemployment statistics are still high²⁵ and women are still being oppressed in society. The BWA South African Women in Leadership Census shows that “While women make up 51.6% of the adult population in South Africa, only 44.6% of working South Africans are women. Even more telling is that women constitute only 19.3% of all executive managers and as low as 16.6% of all directors in the country.”²⁶ South Africa can boast of a “transformative constitution”, but as stated by Madlingozi, there has been little change for some South Africans who are still struggling with unemployment, poverty, landless and living with HIV and AIDS.²⁷ These statistics illustrate that South Africa still has a need for social transformation. The question that remains, is how does South Africa successfully achieve social transformation and make that difference in the lives of South Africans who are still marginalised?

Socio-economic cases that have been brought to the courts have unfortunately not always managed to bring about significant changes or improvements, more so when the only tactic used has been litigation. More often than not, the results attained by litigation alone are not effective because of a failure to implement or follow up the judgment. This dissertation will show that the use of several tactics allows for a more effective result and greater reward for the litigants or the marginalised citizens most affected. This will allow us to reach socio-economic transformation. Several writers, particularly Marcus and Budlender, have discussed this and I wish to further emphasize that point.

1.3. Importance of the study

This dissertation is motivated by the need to caution against using one tactic to achieve transformation. The importance of the study is to highlight how the promises made in

²⁴Madlingozi (2007) 34(1) *Journal of law and Society* 78.

²⁵Statistical release P0210 Labour Force Survey Historical Revision September Series 2000 to 2007 <http://www.statssa.gov.za/publications/statsdownload.asp?PPN=P0210&SCH=4359> 23 March 2009 (accessed on 02/04/10) Also see - Reuters “SA unemployment rate increases” <http://www.mg.co.za/article/2009-10-29-sa-unemployment-rate-increases> 29 October 2009 (accessed 02/04/10).

²⁶BWA South African Women in Leadership Census 2010 in partnership with Nedbank and InWEnt <http://www.bwasa.co.za/Portals/4/docs/BWACensus2010Report.pdf> (accessed 11/12/10).

²⁷Madlingozi (2007) 34(1) *Journal of Law and Society* 78.

the Constitution, that is to “Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights” and to “Improve the quality of life of all citizens and free the potential of each person,”²⁸ can be further achieved. I intend to illustrate that litigation is indeed a very useful tactic, however with the use of additional tactics it can achieve the best results.

No tactic or approach can be considered in isolation. Throughout this dissertation, I will investigate various tactics available to enforce the rights that are enshrined in the Bill of Rights to bring about greater social transformation.

1.4. Objectives of the study

The objectives of the study are to;

- a) To demonstrate that the rights in a Bill of Rights cannot be realised through litigation alone or one tactic²⁹ alone;
- b) To evaluate the efficacy of other strategies to achieve the realization/implementation of the rights enshrined in a Bill of Rights;
- c) To interrogate whether litigation and court victories have given a wrong sense of achievement, for example, in instances where court cases that were successful in court failed to yield actual improvements in the lives of the litigants.

1.5. Literature review

The literature on the topic whether litigation alone can produce significant change with regards to socio-economic rights is wide ranging, from those who advocate for the use of litigation as the best means to produce socio-economic transformation, to those who suggest that it is probably not wise to rely solely on litigation alone. This debate is not new and has taken place between American scholars as well as South African scholars.

²⁸Preamble to the Constitution of the Republic of South Africa.

²⁹For purposes of this paper, tactic is defined as the method used to achieve the goal of transformation.

In *The Hollow Hope: Can Courts Bring About Social Change?*,³⁰ Gerald Rosenberg interrogates the premise that courts play a decisive part in the United States of America's political system in the sense that "court decisions produce change."³¹ Courts were seen to produce change as they were instrumental in certain areas and made decisions where the government refused to or could not make decisions and failed to act timeously. This was in the era when civil rights groups and other groups advocating for social reform approached the courts for significant social reforms. Issues specifically dealing with civil rights and women's rights, political rights as well as environmental rights were brought before the courts, and the American courts seemed to have played a large role in the political and social reforms at that time. Rosenberg describes this as the "Dynamic Court" view. It is a view formed by the experiences of the time and the courts are seen as "powerful, vigorous and potent proponents of change."³² However, Feeley points out that there is a "great gap between great hopes and puny consequences."³³ Rosenberg does not dispute this fact and quickly asserts that we must "guard against uncritical acceptance"³⁴ of the Dynamic Court view. Rosenberg states that because of the historical past of the courts people are under the impression that litigation is the best way to pursue the promises contained in the Bill of Rights. However, as Feeley points out Rosenberg fails to inform us who these people are and that Rosenberg is setting up a straw man.³⁵

Rosenberg then goes on to describe the second view of the American courts, the "Constrained Court" view. Like the Dynamic Court view, he states that this view has a long history. Rosenberg informs us that Alexander Hamilton described courts as the 'least dangerous' branch of government.³⁶ Therefore, in terms of this view, courts are said to have no power to bring about social change and courts are seen as ineffective

³⁰ Rosenberg (1991) *The Hollow Hope: Can Courts Bring About Social Change?*

³¹Rosenberg (1991) 1.

³²Rosenberg (1991) 2.

³³Feeley (1992) 17(4) *Law & Social Inquiry* 760.

³⁴Rosenberg (1991) 2.

³⁵Ibid.

³⁶Rosenberg (1991) 3.

and useless.³⁷ Three constraints are outlined; “the limited nature of constitutional rights, the lack of judicial independence, and the judiciary’s inability to develop appropriate policies and its lack of powers of implementation”.³⁸ These are explained further in Chapter 2 and it is illustrated how the combination of these three constraints disables courts and makes them seemingly ineffective when making decisions regarding social change.

Rosenberg notes that, “while each view captures part of the truth, neither is fine-grained enough to capture the conditions under which courts can effectively produce significant social reform.”³⁹ Rosenberg is correct in saying that both views are the extremes. One idolises the courts and makes the courts seem all powerful whereas the other has complete disregard for the courts. Rosenberg’s concluding remarks are that American courts are not helpful or powerful and they have great limitations and imperfections. He states that it cannot be expected of them to be effective in light of these facts.⁴⁰

McCann argues against Rosenberg’s claim, dismissing it as hinging “on assumptions about comparative institutional capacity that are not well demonstrated.”⁴¹ This is merely because Rosenberg fails to give adequate examples and explanations for his theories. As pointed out earlier, Feeley also had this objection referring to Rosenberg’s failure to state which people he referred to in his book. The failure to state who these people are makes his research questionable, as we do not know why the said people were chosen and further why their views matter. McCann agrees that courts have limited capacity to handle the more difficult social problems however this should not justify the court’s inefficiency. He argues that many institutions, dealing with domestic policy are also limited in their capacities.⁴² He goes even further to state that there is “an overwhelming consensus that executive and legislative institutions at all levels have trouble translating

³⁷Ibid.

³⁸Ibid.

³⁹Rosenberg (1991) 30.

⁴⁰Rosenberg (1991) 343.

⁴¹McCann (1992) 17(4) *Law & Social Inquiry* 727.

⁴² Ibid.

their will into effective social change.”⁴³ McCann takes issue with Rosenberg’s conclusion as Rosenberg fails to explain why people still choose to litigate and use the court system to achieve social change today.⁴⁴ McCann argues that Rosenberg does not research all factors related to his case studies, for example, the reform movements, activist lawyers, policy analysis or other tactics used along side litigation and merely considers facts that push his conclusion. McCann is of the view that Rosenberg’s conclusion that “anyone who uses legal tactics must be a prisoner of the ‘myth of rights’”⁴⁵ is made too quickly.

On the other hand, Klarman, in reference to the Supreme Court in the United States of America, seems to support Rosenberg by asserting that, “Courts act incrementally and rarely, if ever, appear at the vanguard of social reform movements.”⁴⁶ Klarman states that the view that the Supreme Court is a ‘heroic defender of oppressed minorities’ is a myth⁴⁷ and the actions of the judges of the Supreme Court were proof of that. The judges of the Supreme Court did not do anything to protect the various minority groups’ rights, until there were civil rights movements, for example, protection of the rights of black people, rights of women and rights of gay people.

Heywood is of the view that litigation should not be left to lawyers, but rather used as a “tool to strengthen and empower a social movement and backed up by marches, media, legal education, and social mobilization.”⁴⁸ His reasoning is that, “without an accompanying social mobilization, the use of the courts may deliver little more than pieces of paper, with latent untapped potential.”⁴⁹ An example of this is in the case of Grootboom, the Constitutional decision was made in 2001 and it was ordered that a new housing policy be drafted to accommodate urgent situations. The policy was

⁴³ Ibid.

⁴⁴ McCann (1992) 17(4) *Law & Social Inquiry* 728.

⁴⁵ McCann (1992) 17(4) *Law & Social Inquiry* 729.

⁴⁶ Klarman (2009) 32 *Harvard Journal of Law & Gender* 287.

⁴⁷ Ibid.

⁴⁸ Heywood (2009) 1(1) *Journal of Human Rights Practice* 22.

⁴⁹ Ibid.

drafted, however, by the time Mrs. Grootboom (First Applicant) died she still did not have a house.⁵⁰

Epp states that, “the effects of a Bill of Rights therefore depend on the extent of organised support for mobilization of the law.”⁵¹ In essence Constitutional reform alone, in the absence of resources in civil society for legal mobilization, is not likely to produce significant change, only promises.⁵² Heywood and Epp illustrate that it is necessary to have social mobilization before litigation. The social movement will allow or aid the victories attained in the courts to be victories in the community.

Dugard, is of the view that “if the judiciary does not adapt to the demands of becoming an institutional voice for the poor, it will continue to lose legitimacy and recede further away from the lives of the majority of South Africans.”⁵³ Dugard says this because the judiciary is one of the critical institutions of the post-apartheid order and because of that it needs to act in a manner that shows that it considers and includes an understanding for the past inequalities and injustice. If the judiciary fails to act in such a manner, it will not gain public trust and as such, it will be disabled from producing significant social change.

1.6. Chapter captions

Chapter 1 is an introduction of the topic. The dissertation looks into what the best tactic or tactics are to pursue the achievement of the rights in the Bill of Rights. This chapter outlines the critical debate around this question. A brief background is given on South African history and the Bills of Rights.

Chapter 2 will expose the problems of relying on litigation alone. It will highlight the effect that a reliance of litigation has on litigants. It will also illustrate the greater impact

⁵⁰ Ibid.

⁵¹Epp (1996) 90(4) *American Political Science Review* 777.

⁵²Epp (1996) 90(4) *American Political Science Review* 777.

⁵³Dugard (2008) 24(2) *SAJHR* 238.

that relying on litigation alone has on those indirectly affected by the judgment, or those in similar situations to the litigants.

Chapter 3 will discuss two cases in South Africa, the Grootboom case and the TAC campaigns. It will be a comparison of the results achieved in the two cases and an illustration of how to achieve the best results in the process of achieving the rights found in the Bill of Rights.

Chapter 4 will then illustrate what effect other tactics used to pursue the achievement of the rights in the Bill of Rights have on the litigants. These tactics include lobbying, political participation and involvement of the communities through awareness campaigns to name but a few. I will compare cases where other tactics were used along with litigation, to cases where only litigation was used to see the difference that these cases made in the respective societies. A comparison of India and South Africa will be made in this discussion.

Chapter 5 will discuss the various tactics often followed by public interest litigators, NGOs and civil society organisations that often assist in socio-economic cases. It shall look at the successes and some failures and give suggested practices that have worked well for certain organisations and campaigns.

Chapter 6 will be the concluding chapter where I will adduce whether or not litigation alone is the best way to pursue the achievement of the rights in a Bill of Rights. I will then give my concluding remarks and suggestions of what needs to be done in the future to try to achieve the best results in any Bill of Rights based case.

CHAPTER 2

LITIGATION as a tactic to achieve transformative constitutionalism

“The judiciary is untransformed to the extent that it remains institutionally unresponsive to the problems of the poor and it fails to advance transformative justice... the post-apartheid judiciary has collectively failed to act as an institutional voice for the poor... the courts in South Africa have not adequately realised their potential to promote socio-economic transformation in the interests of materially-disadvantaged South Africans.”⁵⁴

1.1 Introduction

This chapter aims to highlight the problems of relying on litigation as a sole means to achieve the rights in the Bill of Rights. It aims to highlight the limitations of relying solely on one tactic; specifically the difficulties faced with using litigation, such as affordability, disempowerment of the litigants and the constraints faced by courts themselves. It must be emphasized, however, that this chapter is not intended to discourage the use of litigation, but rather to show the need to complement litigation with other methods and tactics.

In *Government of RSA & Others v Grootboom & Others*⁵⁵ the right of access to adequate housing was being sought. In the Bill of Rights, Section 26 sets out the right as

“(1) Everyone has the right to have access to adequate housing.

⁵⁴Dugard (2008) 24(2) *SAJHR* 215.

⁵⁵(CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (4 October 2000).

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

The respondents had been evicted from the informal homes they had erected on private land. They were seeking an order from the Court to have the government provide adequate shelter or accommodation until such a time that they could find permanent accommodation. The Court found that in terms of the Constitution the State was obliged to act in such a manner that would improve the lives of those living in appalling conditions. That meant, providing access to water, housing, healthcare, food and social welfare to people who were not able to support themselves. However, this did not oblige the State to go beyond its reasonable means or to provide the various commodities immediately. It was found that the Court must give effect to the rights in the Bill of Rights and where necessary the Court was to and would be able to enforce such rights. In this case it was found that the respondents were not entitled to housing immediately but that the state was ordered to develop and initiate programmes to cater for those desperate people who had not been catered for.

This judgment was found, as I have mentioned earlier, to be a groundbreaking decision in South Africa, as it was seen as a step towards development in the jurisprudence of socio-economic rights.⁵⁶ However there has been little change for the community who were involved. Their living conditions are not much better after this decision and there are many other homeless people in South Africa. The judgment given failed to live up to the expectations of the litigants as well as

⁵⁶ Pillay (2002) 3(1) *ESR Review* 13.

those who were looking for a change in the State's housing policy.⁵⁷ As stated earlier, by the time the First Applicant, Mrs. Grootboom, died she had not been awarded a house. This is believed to be as a result of the nature of the decision handed down by the Constitutional Court.

In Chapter 1, Hamilton was quoted as describing courts as the 'least dangerous' branch of government. He believed they lacked "power over either the 'sword or the purse'," he also felt that they were not able to give effective decisions that would bring about great political and social change.⁵⁸ When one considers the judgment given in Grootboom, they can understand why Hamilton would believe the courts are ineffective. When considering the effectiveness of courts in their role to transform society, it would be necessary to consider the questions asked by Rosenberg in his book. He asked the following questions; "To what degree, and under what conditions, can judicial processes be used to produce political and social change? What are the constraints that operate on them? What factors are important and why?"⁵⁹ These questions are very important to fully comprehend how social change can best be brought about in South Africa. I shall attempt to answer them throughout the paper.

1.2 Challenges to Social Change

There are several challenges to using law to achieve social change. The challenges to social change are all linked and affect each other and ultimately affect the end result for the potential litigant.⁶⁰ The challenges that must be considered are the litigants' knowledge of rights, physical access to courts, financial access, delays in the court proceedings, and respect for court orders as well as mechanisms to assert the rights outside courts.

⁵⁷Ibid.

⁵⁸Rosenberg (1991) 3.

⁵⁹Rosenberg (1991) 2.

⁶⁰ It must be noted that social change is affected by various other factors, such as, but not exhaustive of patriarchy, income inequality, racism, xenophobia and heteronomy.

a) Knowledge of Rights

A major challenge in South Africa is that many people are unaware of the opportunities that they have and the rights afforded to them through the Bill of Rights. In a study conducted in 2002 by the Human Sciences Research Council, it was found that 69.5% of South Africans were unaware of the existence of the Bill of Rights or they were further unaware of its purpose.⁶¹ A lack of knowledge of rights has proven to hinder the citizens from approaching the courts for their enforcement. Various programmes have been implemented to curb this problem.

The Department of Justice and Constitutional Development's (DoJCD) objective is to improve access to the courts through public communication and education of the communities, particularly the vulnerable and rural communities. In a bid to increase awareness of the rights enshrined in the Bill of Rights, the DoJCD has published numerous publications in the form of brochures, pamphlets or booklets explaining the courts system and the Constitution and what it means to South Africans. The DoJCD has published information on family advocates, domestic violence issues, children's rights and courts, equality as well as human rights and their contact details. In addition to this, videos have been developed to explain human rights and educational seminars and workshops have been hosted in various communities. The DoJCD have also included two additional citizen advice desks in every court in each province. Other non-governmental organisations have also assisted in educating citizens on human rights and the Constitution.⁶²

b) Physical and Financial Access to Courts and Legal Costs

⁶¹http://www.soros.org/sites/default/files/afrimapreport_20060223.pdf (accessed 24/09/12).

⁶²Ibid.

“The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed as that they can understand and appreciate it. The more they understand it the more they love it and the more they prize it.”⁶³

According to section 34 of the Constitution, “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”⁶⁴ Section 34, gives the ideal scenario that should be allowed to everyone in South Africa, but in practice, this right is not enjoyed by many people who wish to be able to enforce it.

Firstly, for many, physical access to the courts is not possible. Courts are often located in areas that are inaccessible to the poor and to access them implies further costs for those individuals, such as travel expenses to the courts, accommodation and upkeep whilst the case is being heard in court.

Secondly, access to the courts is not often financially viable. Former CJ Langa states that, “the biggest obstacle to attaining a truly transformative constitutionalism is the continuing disparities of wealth and power that pervade our country... Legal representation remains beyond the financial reach of many South Africans and it is true that more money ensures better representation.”⁶⁵

Access to justice, as Dugard states, means more than just “physical access to the courts”, it also includes the “ability to be effectively heard.”⁶⁶ That is, she continues to say, “without legal representation, already disadvantaged people are

⁶³Kesavanandra Bharti v State of Kerala 1973 SCC 225 at 947 para 1947.

⁶⁴Constitution of the Republic of South Africa, section 34.

⁶⁵Former CJ Langa (2006) Prestige Lecture delivered at Stellenbosch University on 9 October 2006 at 6-7.

⁶⁶Dugard (2008) 24(2) *SAJHR* 216.

further disempowered when confronted with complex legal issues and proceedings.”⁶⁷ Legal services are also very expensive, and litigants must include the cost of attending the court proceedings for the duration of the trial and the costs involved, for example accommodation and transport costs making the poor even more disadvantaged. Former CJ Langa states, “the Constitution should not become a tool of the rich. Equal justice means that the fruits of justice are there for all to enjoy.”⁶⁸

In 1984, South Africa introduced a small claims court system ensuring more accessibility to courts. The court's jurisdiction is limited to claims for damages of R12000 or less and legal representation is not allowed in these courts. This was an attempt to make justice more accessible to the people of South Africa. The Legal Aid Act 22 of 1969 established the Legal Aid Board in South Africa. The Legal Aid Board has since included civil cases to its portfolio.

There are various other public interest litigation organisations such as Centre for Applied Legal Studies and other organisations that can either give legal advice or assist with legal proceedings. There are non-governmental organisations, University Law Clinics, The Legal Resources Centre, Community Law Centre, Lawyers for Human Rights and Black Sash, which is the oldest Human Rights NGO in South Africa,⁶⁹ however, the problem that exists here is that these organisations need funding and volunteers and both are often hard to source. The financial cost of litigation remains an obstacle to accessing the courts and further realising social change. Further, the organisations end up competing for funds to be able to adequately provide their services to the various communities and individuals in need.⁷⁰

⁶⁷ Ibid.

⁶⁸ Former CJ Langa (2006) Prestige Lecture delivered at Stellenbosch University on 9 October 2006 at 7.

⁶⁹ Jaichand (2004) (1) *SUR Int'l Journal on Human Rights* 134

⁷⁰ Ibid at 135.

Legal aid at the states expense is now afforded to civil cases, however the Legal Aid Board focuses on criminal matters.⁷¹ Further, the judges in courts, excluding the Constitutional Court, can give the applicant an opportunity to apply to the court to appoint legal representation on a pro-bono basis. This procedure is called the *forma pauperis* procedure in the High Courts and in the Magistrates' Court referred to as *pro deo* applicants.⁷²

The costs that are involved in any trial proceeding are not cheap; hence, skilled attorneys are often reluctant to take on socio-economic rights matters. Only disbursements incurred by the litigant are generally recoverable. There is uncertainty regarding attorney fees and there have been several debates around this issue. However, in the past it was the general rule that attorneys did not attempt to recover fees in pro bono matters, as it would jeopardise the pro bono status.⁷³ Budlender was quoted as saying that the legal profession should not consider pro-bono work as charity work or a marketing strategy for themselves but rather as “a deliberate step in building the sort of society we want, in which all our people can exercise their rights”.⁷⁴

Many people who have their rights infringed upon cannot take the ‘infringer’ to court as they cannot afford to pay the legal fees and instruct attorneys and advocates on their case, so they are disadvantaged. As a result settlements are often agreed upon but they do not always benefit the litigants who had their rights infringed or were demanding enforcement of rights from the courts, such as the litigants in the Grootboom⁷⁵ case. This is a considerably large problem that is

⁷¹Marcus and Budlender (2008) 101.

⁷²Supreme Court of Appeal Rules Rule 15, Uniform Rules of Court (pertaining to High Courts) Rule 40, and Magistrates' Courts Rules of Court Rule 53, as collated in Juta's Statutes Editors (2006) The Supreme Court Act and the Magistrates' Courts Act and Rules (6ed).

⁷³<http://www.nortonrose.com/knowledge/publications/67952/the-recovery-of-fees-and-disbursements-in-successful-pro-bono-litigation> (accessed 11/11/12).

⁷⁴Geoff Budlender, “Proposals for a New System”, 50 Indicator SA Vol. 19, n. 3, December 2002 at 51. Cited in Jaichand (2004) (1) *SUR Int'l Journal on Human Rights* 135.

⁷⁵Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (4 October 2000).

encountered with the litigation process. In this case, the Court issued a declaratory order requiring the state to devise and implement a programme that included measures to provide relief for the desperate people who had not been catered for. This was after the government had failed to fulfill the settlement agreement with the community.

c) Lengthy Court Proceedings

Another challenge to achieving social change is the length of the court procedure. It can take up to as long as a year for a civil trial to appear before a judge.⁷⁶ It was found that in the Cape High Court the “ordinary roll for civil matters is full for close to a year.”⁷⁷ The time taken for a matter to be heard and completed is a deterrent for the potential litigant. For example, the Grootboom case arose in 1998. The final judgment in the case was given in 2001.

1.3 Rosenberg’s Constrained Court View

The examples above are limitations of using litigation to achieve social change. The courts, as institutions, have several limitations as Rosenberg illustrates. Rosenberg’s Constrained Court view maintains that “courts will generally not be effective producers of significant social reform for three reasons: the limited nature of constitutional rights, the lack of judicial independence, and the judiciary’s inability to develop appropriate policies and its lack of powers of implementation.”⁷⁸ Despite the fact that Rosenberg is writing about American courts, this view still applies to South African courts. Like in America, South African courts cannot draft policy. The government drafts policy, further the constitutional rights are not self-activating. Epp states that the problem is that, “Bill of Rights...are not self-activating because...they provide individuals with no

⁷⁶http://www.soros.org/sites/default/files/afri-map-report_20060223.pdf (accessed 24/09/12).

⁷⁷Ibid.

⁷⁸Rosenberg (1991) 10.

direct control over institutional resources...although Bills of Rights create legal interests (rights), they create no corresponding institutional resources to actualise those interests.”⁷⁹

The supporters of the Constrained Court view state four consequences that advocates of using litigation, as a tactic for social change, should be aware of. Firstly, they argue that litigation “limits the sorts of claims that can be made, for not all social reform goals can be plausibly presented in the name of constitutional rights.”⁸⁰ This links closely with the CLS critique of rights. Michelman (quoted by Pieterse, 2007:801) is of the opinion that “rights discourse, through its tendency towards abstraction and proceduralisation, may have the effect of removing the focus of rights-based, socio-economic litigation from the concrete experiences of material deprivation that belong at its center.”⁸¹ Secondly, “social reformers must often argue for the establishment of a new right, or the extension of a generally accepted right to a new situation.”⁸² Thirdly, Scheingold points out “that to claim a right in court is to accept the procedures and obligations of the legal system. These procedures are designed, in part, to make it difficult for courts to hear certain kinds of cases.” Further, it is believed that litigation “seldom deals with ‘underlying issues and problems’ and is ‘directed more toward symptoms than causes.’”⁸³ The fourth consequence is that “framing issues in legally sound ways robs them of ‘political and purposive appeal’.”⁸⁴

Rosenberg argues that these consequences hinder the ability of courts in the United States of America to be effective drivers of significant social change. He specifically defines three constraints. Constraint 1 states that “The bounded

⁷⁹Epp (1996) 766.

⁸⁰Ibid.

⁸¹Pieterse (2007) 29(3) *Human Rights Quarterly* 801.

⁸² Ibid.

⁸³Rosenberg (1991) 11.

⁸⁴Ibid.

nature of constitutional rights prevents courts from hearing or effectively acting on many significant social reform claims, and lessens the chances of popular mobilization.”⁸⁵

With constraint 2 Rosenberg means that, “The judiciary lacks the necessary independence from the other branches of the government to produce significant social reform.”⁸⁶ It is for this reason that supporters of the Constrained Court view believe that the courts made decisions that were politically popular, and perhaps not what would have been most fitting.⁸⁷ “Judicial independence requires that court decisions, in comparison to legislation, do not invariably reflect public opinion... however, that Supreme Court decisions, historically, have seldom strayed far from what was politically acceptable.”⁸⁸ In South Africa after Apartheid one of the conditions for the final Constitution was that there had to be a separation of powers, separating the judiciary, the executive and the legislative branches of Government. One of the principles included in the 1993 Interim Constitution that the final Constitution had to comply with in terms of the Constitutional Court Act (200 Of 1993) was that “there would be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.”⁸⁹ It also stated that the judiciary had to “be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights”.⁹⁰ This was to prevent the abuse of power over the judiciary by the other branches of Government and to ensure the best results from the various court proceedings.

⁸⁵Rosenberg (1991) 13.

⁸⁶Rosenberg (1991) 15.

⁸⁷Rosenberg (1991) 21.

⁸⁸Rosenberg (1991) 13.

⁸⁹<http://www.csvr.org.za/docs/transition/3.pdf> (accessed 20/09/2012).

⁹⁰Ibid.

Constraint 3 is that the “Courts lack the tools to readily develop appropriate policies and implement decisions ordering significant social reform.”⁹¹ This we have seen in South Africa where although the Grootboom case led to the development of new housing policy, Breaking New Ground policy, the implementation and enforcement of the policy has not been as effective due to resource availability. The Constitutional Court can only do so much when it comes to enforcement. “Lacking powerful tools to force implementation, court decisions are often rendered useless given much opposition. Even if litigators seeking significant social reform win major victories in court, in implementation they often turn out to be worth very little.”⁹² In South Africa, we see this where the Grootboom community did not receive adequate housing even seven-eight years after the decision in 2001. However, in other cases for example the *Minister of Health and Others v Treatment Action Campaign*⁹³ (TAC cases) which will be discussed in the next Chapter we see that the litigants (TAC) were able to have their decision enforced through following up with the courts and the Government Departments concerned.

The Constrained Court view is similar to the view of the scholars of the Critical Legal Studies Movement (CLS). The CLS movement believed “that society in general is characterized by inequality and oppression, and that the law plays a part in perpetuating this by maintaining and promoting the *status quo*.”⁹⁴ Both the supporters of the Constrained Court view and the CLS movement felt that the use of the law or courts was an ineffective way to achieve social change.

1.4 Critical Legal Studies (CLS) Movement

The USA Critical Legal Studies (CLS) movement began in 1976 at the Conference on Critical Legal Studies at the University of Wisconsin Law School.

⁹¹Ibid.

⁹²Ibid.

⁹³2002 (5) SA 721 (CC).

⁹⁴Johnson, Pete, du Plessis (2001) 246.

It was made up of a group of diverse scholars who were “like-minded critical academics on the left of the political spectrum gathered to build social and professional links.”⁹⁵ Tushnet was one of the organisers of the movement and he explained the diversity of their approach as having been attributable to the fact that “critical legal studies is less an intellectual movement in law (though it is that too) than it is a political location.”⁹⁶ A defining characteristic of the CLS is its openness to all intellectual approaches. The CLS Movement was influenced by American realism and neo-Marxism. It followed principles of “American realism in its scepticism of formalist approaches to law, and in its conviction that what was really at stake in the legal system was to be found in personal or political factors unexpressed in the official language of the law.”⁹⁷ The difference between the CLS movement and American realism is that the American realists were “sceptical about legal formalism” and they believed that they could develop the legal system by helping lawyers and students understand how the law really worked.⁹⁸ The Realists were a group of people who believed that “the indeterminacy of formalistic legal rules should be replaced by a form of policy science that drew informally upon the wisdom of the social sciences to inform legal judgment.”⁹⁹ In contrast, members of the CLS movement believed that “society in general is characterized by inequality and oppression, and the law plays a part in perpetuating this by maintaining and promoting the status quo.”¹⁰⁰ Said differently it believed that the logic and structure that is attributed to law, is a result of the power relationships in that society.¹⁰¹

The CLS movement has had limited direct influence in South Africa. It must be noted, however, that academics and lawyers have on their own, come to the

⁹⁵Johnson, Pete & du Plessis (2001) 245.

⁹⁶Ibid.

⁹⁷Ibid.

⁹⁸Johnson, Pete, du Plessis (2001) 246.

⁹⁹Ibid.

¹⁰⁰Ibid.

¹⁰¹http://www.law.cornell.edu/wex/critical_legal_theory (accessed on 23/11/12).

same or similar conclusions made by the CLS movement.¹⁰² Boyles’s arguments, which are based on his observations of the many defeats of progressive lawyers in the USA who were attempting to use the Bill of Rights which is over 200 years old, warns South Africans of the “dangers of relying too heavily on the rights and freedoms contained in the Bill of Rights... South Africa has even more dramatic economic and social inequalities than the USA, and the experiences and conclusions of the CLS movement in this area are therefore, if not decisive, at least instructive.”¹⁰³

During the early and mid 1980s, a central feature of the CLS movement was its critique of rights. Scholars of CLS movement argued that;

*“the nature of rights discourse as relative, indeterminate, abstract, and unstable (in the sense that significant but relatively small changes in the social setting can make it difficult to sustain that a right remains implicated) causes it to convert into an empty abstraction (reifies) real experiences that we ought to value for their own sake and impedes advances by progressive social forces.”*¹⁰⁴

It is further argued that because of the nature of rights discourse, those powerful members who enjoy certain privileges are more likely to manipulate this discourse to keep their positions of power. Consequently, rights that are more liberal are likely to be favoured in an attempt to prevent and silence vulnerable sectors in the society from complaining and also to prevent social distribution efforts by the state.¹⁰⁵

Tushnet said it would be more beneficial to steer away from rights-talk and rather focus on “real experiences” that trigger rights-claims than to “attempt to develop

¹⁰²Johnson, Pete, du Plessis (2001) 254.

¹⁰³Johnson, Pete, du Plessis (2001) 255.

¹⁰⁴Pieterse (2007) 29(3) *Human Rights Quarterly* 800.

¹⁰⁵Ibid.

a theory of rights that avoids the counter-transformative consequences of their tendencies toward abstraction and reification.”¹⁰⁶ He states,

“People need food and shelter right now, and demanding that those needs be satisfied - whether or not satisfying them can today persuasively be characterized as enforcing a right - strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced.”

Critical race theorists have then argued that for these needs to be considered by society, they need to be dressed in a manner that will be noticed, that is in the form of a political tool, an effective tool, in essence a right. ¹⁰⁷ “Rights-terminology may accordingly be instrumental in reconceptualising needs as entitlements rather than aspirations and in ensuring that the satisfaction of such needs becomes and remains a societal priority.”¹⁰⁸ However to achieve fulfillment of these rights, one must still approach the courts, in spite of their failings. “It has been shown that mere articulation of a need...is insufficient to satisfy such need.”¹⁰⁹

1.5 Conclusion

In conclusion, as the discussion has shown there are several challenges to using litigation as a primary tool to achieve social change; accessibility of courts, expenses, and an over reliance on lawyers who are unaffordable for most. The challenges spoken of by Rosenberg and the CLS movement are still present today.

However we cannot dwell on these, rather we must look to how we over come them. Marcus and Budlender believe that “litigation strategies must be coupled

¹⁰⁶Ibid.

¹⁰⁷Ibid.

¹⁰⁸Pieterse (2007) 29(3) *Human Rights Quarterly* 802.

¹⁰⁹Ibid.

with community-based activism and popularisation of legal advocacy to allow a deepening of public engagement with the issue of socio-economic rights.”¹¹⁰ This would in turn bring about unity in communities who understand each other’s problems. It would also allow for an opportunity of reconciliation to take place at a quicker pace, so that the country would ‘not walk with a hobble’ but instead walk faster across the ‘historical bridge’ to a place of transformation. If communities were to rally together and form active social movements against rights deprivation, those challenges might easily be overcome allowing societies needs to be fulfilled.

¹¹⁰Ibid.

CHAPTER 3

THE IMPACT OF PUBLIC INTEREST LITIGATION IN SOUTH AFRICA

1.1 Introduction

The term public interest litigation (*actions publicae populares*) can be dated back to the Roman Empire. During the Roman Empire this form of litigation was “litigations seeking to safeguard public interests of the society and could be submitted by any citizen unless stipulated otherwise by law”¹¹¹ as opposed to private litigations (*actions privatae*) which were “aimed at protecting individual rights and could only be submitted by certain individuals.”¹¹² In the United States of America, public interest litigation began in the twentieth century during the 1960’s. It was a reaction to the social changes taking place at the time, in the context of struggles around the Civil Right’s Movement and the Vietnam War. Public interest groups were formed with the aim to safeguard the rights of women, black people, minors as well as consumers and the environment to name a few causes.¹¹³

In South Africa, public interest litigation began in the late 1970s as a means to address the inequalities that arose out of the Apartheid regime. It was a means to end the Apartheid regime and the unequal treatment of citizens. South Africa is a country that had developed under unequal conditions for almost three hundred and fifty years, under a white minority rule. Discrimination was rampant, from land ownership to resource distribution. It is through these severe harsh living conditions that community organisations were set up in both formal and informal

¹¹¹Public Interest Litigation and the Development of Human Rights
http://www.china.org.cn/china/human_rights/2009-10/29/content_18792628.htm (accessed 20/04/2011).

¹¹²Ibid.

¹¹³Ibid.

settlements during the 1970s to “fight for access to urban land and bolster the democratic movement’s struggle for equality.”¹¹⁴ These organisations were started to fight for equal rights. There were organisations such as the Legal Resources Centre, Lawyers for Human Rights and several other strong civil society movement groups, community based organisations (CBOs) and NGOs.

1.2. What is Public Interest Litigation?

There are numerous definitions of Public Interest Litigation. The definitions are dependent on the circumstances and environment in which it was developed. Black’s Law Dictionary gives a narrow and very technical definition of Public Interest Litigation. It defines it 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.”¹¹⁵

In Northern Ireland Public Interest Litigation is defined as

“The use of litigation, or legal action, which seeks to advance the cause of minority or disadvantaged groups or individuals, or which raises issues of broad public concern. It is a way of using the law strategically to effect social change.”¹¹⁶

In the case of *People’s Union for Democratic Rights v. Union of India*,¹¹⁷ it was said that Public Interest Litigation is

¹¹⁴Wickeri (2004) 5 Centre for Human Rights and Global Justice Working Paper 10.

¹¹⁵Black’s Law Dictionary (7thedition) 1229, 1990 Cited in V. Jaichand ‘Public interest litigation strategies for advancing human rights in domestic systems of law’ (2004) (1) *SUR Int’l Journal on Human Rights* 127.

¹¹⁶ The PILS Project in Northern Ireland <http://www.pilsni.org/about-pil.html> (accessed 11/09/2012).

¹¹⁷1982 AIR 1473, 1983 SCR (1) 456.

“Brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and un-redressed.”¹¹⁸

Justice P. N. Bhagwati went on to define Public Interest litigation in the same case. The judge held that,

“Public interest litigation, is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the Court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them.”¹¹⁹

In South Africa Public Interest Litigation is understood as a means of promoting social justice.¹²⁰ During the 1980’s some of the key public interest litigation centres were Legal Resources Centre, Lawyers for Human Rights and the Black Sash. The people who were actively involved were people like Former Chief Justice Chaskalson, Jody Kollapen as well as George Bizos, to name a few.

This Chapter will discuss the success and the pitfalls of public interest litigation using two cases – *Grootboom* and *TAC*. The two cases were both successful in the litigation stage but had overall very different and lasting results and impacts on the communities affected. The discussion will be around the differences in the results despite their success in litigation.

¹¹⁸Ibid at p457.

¹¹⁹Ibid at p458.

¹²⁰http://www.flac.ie/download/pdf/gbudlender_flac_061005.pdf (accessed 30/09/2012).

1.3. Government of the Republic of South Africa and Others v Grootboom and Others¹²¹

“Housing for all.” A slogan commonly known as that of the ANC.¹²² Housing was promised to all and yet, 20 years after Apartheid, people still live in deplorable conditions, while others are homeless and the battle for government housing continues. This all in spite of the Grootboom case being proclaimed as the most ground breaking case heard by the South African Constitutional Court. Academics, lawyers and activists internationally regard it as the landmark case demonstrating the justiciability of economic and social rights.¹²³

a) Background

When the new government led by the ANC came into power, it set out to eradicate the housing problem with ambitious goals. They wrote “the time for delivery has arrived”¹²⁴ and in the Election Manifesto¹²⁵ they declared that they intended to build one million homes, as well as provide running water to over one million families and also to provide electricity to over two and a half million rural and urban homes within the first five years of taking office. Minister Joe Slovo, at the time also went on to say,

*“It is our task to give millions of South Africans an essential piece of dignity in their lives, the dignity that comes from having a solid roof over your head, running water and other services in an established community.”*¹²⁶

¹²¹2000 (11) BCLR 1169 (CC).

¹²²Wickeri (2004) 5 Centre for Human Rights and Global Justice Working Paper 5.

¹²³Wickeri (2004) 5 Centre for Human Rights and Global Justice Working Paper 6.

¹²⁴New Housing and Policy Strategy for South Africa: White Paper, Para 1, GN1376 in GG16178 of 23 Dec. 1994.

¹²⁵ African National Congress (“ANC”), Election Manifesto, 1994 <http://www.anc.org.za/show.php?id=262> (accessed on 23/04/11).

¹²⁶Wickeri (2004) 5 Centre for Human Rights and Global Justice Working Paper 12.

Mrs. Irene Grootboom, from the Wallacedene informal settlement in the Western Cape, was living in deplorable conditions in a very large community. The residents of this community had been on the municipal waiting list for housing and in light of this, Mrs. Grootboom, along with 510 children and 390 other adults¹²⁷ decided to move to a vacant plot, which was privately owned and had been allocated for low cost housing. Three months after the move, the owner of the property obtained an eviction order and they were forcefully removed from the property, their shacks were pulled down and their property burnt with no warning. At this point, they could not go back to their Wallacedene informal settlement as their previous accommodation had now been occupied. They decided to set up on the Wallacedene sports field and the local community hall. The municipality did not take their situation seriously and so the community decided to approach the Cape Good Hope High Court seeking an order for adequate housing as well as basic nutrition, shelter, health and care services as well as social care until they were able to provide for themselves.¹²⁸

b) The Progression of the Grootboom Case

The High court found that in terms of s26 of the Constitution the government was not in violation of the Constitution, as the Constitution only required the government to take progressive measures to fulfill the right to basic shelter. The Constitution only required that the government take measures “within its available resources” to “progressively implement” the right of access to adequate housing.¹²⁹ However, it was found that there was a direct breach of the s26(2)(c), the right for every child to have basic shelter. The Court ruled that where parents were not able to provide shelter for their children, the state was obliged to do so. It was ordered that national and provincial government, the Cape Metropolitan

¹²⁷ Explanatory note Government of the Republic of South Africa and Others v Grootboom and Others <http://internationalhumanrightslaw.net/wp-content/uploads/2011/01/Government-of-the-Republic-of-South-Africa-and-Others-v-Irene-Grootboom-and-Others.pdf> (accessed 20/05/14).

¹²⁸ Ibid

¹²⁹ S26 (2) Constitution of the Republic of South Africa 1996.

Council as well as the Oostenberg Municipality were to provide tents, latrines as well as a regular water supply for those families until the parents were able to provide for their children. An appeal of the judgment was made to the Constitutional Court, but before the matter could be heard in the Constitutional Court, the Western Cape Provincial government and Oostenberg Municipality made an offer for settlement to the community and they accepted it. It was agreed that the local and provincial government would provide temporary accommodation, sanitation and water until sufficient housing could be provided, however four months later, this agreement had still not been met, so the community in an urgent application to the court, alleged that their agreement had been breached. It was in this court proceeding that the Court gave its first judgment in favour of the community claiming for the realization or achievement of their socio-economic rights.

c) Impact of the Judgement

The Court ordered that the government had “to devise and implement, within its available resources, a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing.”¹³⁰ The Court also advised government that the programme had to have measures that made provision for people who needed immediate relief, such measures also had to be reasonable.

Marcus and Budlender noted that the government’s attitude to socioeconomic rights cases changed significantly after the decision from this case. It was now clear to government that when they fail to act reasonably, they will be taken to court and based on the precedent, they will be required to account for their inability to provide services to the citizens of South Africa. The judgment served as “reinforcement of the fact that economic/social rights are justiciable.”¹³¹ This

¹³⁰Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) para 2(a).

¹³¹Wickeri (2004) 5 Centre for Human Rights and Global Justice Working Paper 22.

was the first time that the Government was challenged on its own policy.¹³² A chief researcher from the South African Human Rights Commission has also stated that this meant that the “government could no longer pay lip-service to the housing crisis by telling the homeless to join the queue for a brick house in ten years’ time.”¹³³

However, in spite of the judgment, the homeless were told to ‘join the queue’. In 2000, there was a backlog of between two and three million houses reported and in 2001 the Director-General of Housing was quoted as saying “it would be impossible for the government to address that backlog in the near future.”¹³⁴

On 30 July 2008, Irene Grootboom died in a shack, still waiting for the government of South Africa to meet her right to housing. She died 8 years after the judgment had been given.¹³⁵ It was recorded that “after the judgment R200 000 was made available to the community from which zinc sheets, windows and doors were purchased.”¹³⁶ The Court had also ordered the Oostenberg Municipality to supervise the improvement of that community but that did not happen and the conditions continued to deteriorate.¹³⁷ The Court’s orders were implemented to a certain extent, in that the housing policy was amended, but it was clearly not enough for significant change or to maintain ‘temporary’ reasonable living conditions.

1.4. The Treatment Action Campaign (TAC)

¹³²Ibid at 21.

¹³³Ibid at 21.

¹³⁴Ibid at 21.

¹³⁵The ANC and the passing of Irene Grootboom Western Cape Anti-Eviction Campaign, 2008-08-13, issue 13 <http://pambazuka.org/en/category/letters/50086> (accessed 21/4/2011).

¹³⁶Wickeri (2004) 5 Centre for Human Rights and Global Justice Working Paper 22.

¹³⁷Ibid.

The discussion around the TAC will be different to that of the Grootboom case, as I want to highlight the manner in which the TAC built up their strategies for all the cases that they were involved with. This is to help illustrate the differences between the TAC and the Grootboom cases.

The TAC deals with all cases related to the provision of treatment and assisting those suffering from HIV/AIDS to access it. Unlike some campaigns, the TAC had a goal to assist an on going problem and to continue assisting those affected by HIV/AIDS through awareness campaigns and various other programs. Through its actions the TAC has “shifted the debate firmly to one of fundamental human rights and utilised the human rights machinery established by the same government to force its hand on the ARV issue.”¹³⁸

a) The Mandate of the TAC

The TAC was established on 10 December 1998. It was launched by a group of political activists on International Human Rights Day. The objective of the TAC is to,

“Challenge by means of litigation, lobbying, advocacy and all forms of legitimate social mobilization, any barrier or obstacle, including unfair discrimination, that limits access to treatment for HIV/AIDS in the private and public sector.”¹³⁹

The founders of TAC intended to “popularise and enforce what was loosely described as ‘the right of access to treatment’.”¹⁴⁰ They intended to do this by combining a number of different methods to work together, these being protests, mobilization and legal action.

¹³⁸Heywood (2009) 1(1) *Journal of Human Rights Practice* 14.

¹³⁹Heywood (2009) 1(1) *Journal of Human Rights Practice* 15. (As described in their Constitution)

¹⁴⁰ Ibid.

b) Building the TAC

In 2007, a national survey estimated that in South Africa 5.4 million people were infected with HIV.¹⁴¹ Those who could not afford medical treatment were prejudiced. Initially when the TAC was formed, they thought the problem was with the pharmaceutical companies that were charging exorbitant prices and making medical treatment impossible for many people. They started by insisting that the high price for essential medicines was a violation of a range of human rights. They also argued that the government had a responsibility to “protect and promote human rights in countries that have made them justiciable.”¹⁴² TAC discovered that in “developing countries that governmental neglect of public health, even by democratic pro-poor governments such as the African National Congress (ANC) ... can be as much of a barrier to the right to health as profiteering by pharmaceutical companies.”¹⁴³

The TAC chose to work directly with the people who were affected by HIV/AIDS. This was ultimately empowering the people, making them their own advocates. Part of their rationale was

“a distrust of the professional ‘AIDS and human rights movement’ which often seems part of the global industry spawned by the epidemic, articulate but ineffective... unlike academics or professional who take up human rights issues out of conscience, for poor people human rights are a personal necessity. These needs do not disappear when NGO employees change jobs, or NGOs change priorities jobs, or NGOs change priorities.”¹⁴⁴

¹⁴¹Heywood (2009) 1(1) *Journal of Human Rights* 14.

¹⁴²Heywood (2009) 1(1) *Journal of Human Rights* 16.

¹⁴³ Ibid.

¹⁴⁴Heywood (2009) 1(1) *Journal of Human Rights* 17.

TAC had to build a team and they decided to adopt a method that was used successfully in the United States of America. In the United States, the idea of ‘treatment literacy’ was introduced among people with HIV. “Treatment literacy recognises that in order to fight for rights effectively, people also are required to understand the science of HIV, what it is doing to their body, the medicines that might work against it, the research that was needed etc.” TAC was the first organisation in South Africa to initiate something like this. Treatment literacy is “the base for both self-help and social mobilization. Armed with proper knowledge about HIV, poor people can become their own advocates, personally and socially empowered.”¹⁴⁵

c) The Impact of the TAC case Judgement

In *Minister of Health and Others v TAC*¹⁴⁶ the government’s health policy regarding HIV/AIDS was under contention. It was unanimously decided by the Constitutional Court judges that “the government’s policy on the provision of health care to those with HIV/AIDS had not met its constitutional obligations to provide people with access to such services in a manner that was reasonable and that took account of pressing social needs.”¹⁴⁷ The judgment also insisted on the Court’s right to “ensure that effective relief is granted”¹⁴⁸ and exercise “supervisory jurisdiction.”¹⁴⁹ When the government failed to implement the Court’s order, the TAC took several actions to ensure that the order was implemented. They held meetings and marches and this made the government take action.

¹⁴⁵Heywood (2009) 1(1) *Journal of Human Rights* 18.

¹⁴⁶2002 (5) SA 721 (CC).

¹⁴⁷ Varney 2011 ICTJ Briefing 7.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

Marcus and Budlender conclude that the TAC¹⁵⁰ case clearly showed how to successfully combine social mobilization with litigation. “It is without doubt a shining example as to how litigation-when run properly and as part of a series of broader strategies-can achieve social change.”¹⁵¹

TAC had a large impact on different communities through the way it carried out its goal. It impacted the way the community thought and worked, for example, local clinics handling patients with HIV began taking up cases of crime and violence against women too, as a means of assisting those in their community. The TAC model did two things. Firstly, “it created a national social mobilization capable of unifying people to demand the right to health from government and pharmaceutical companies.”¹⁵² Secondly, “it created an empowered citizenry at a local level who assisted and demanded the delivery of healthcare services within poor communities as a matter of right and law.”¹⁵³

1.5. Differences drawn from the two cases

What distinguishes the TAC from other South African movements, is that

“It framed its demands not simply as ‘better pro-poor policy’ but as policy alternatives based on legal entitlement. The TAC did not leave litigation to lawyers but instead used it to “strengthen and empower a social movement... backed up by marches, media, legal education and social mobilization.”¹⁵⁴

Grootboom however was not the same. Despite housing having been an ever-present problem that had been recognised by government, I am of the view that

¹⁵⁰2002 (5) SA 721 (CC).

¹⁵¹ Marcus and Budlender (2008) 91.

¹⁵²Heywood (2009) 1(1) Journal of Human Rights 19.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

there was not as much social mobilization as there was with the TAC case. It clearly made a significant difference with the results, as the TAC would return to court when government had not followed through judgments handed down. Heywood's statement holds true, "without an accompanying social mobilization, the use of the courts may deliver little more than pieces of paper, with a latent untapped potential."¹⁵⁵

1.6. Conclusion

Why was the TAC so successful? The TAC took a different stance, a different route to the normal route followed by NGOs. The TAC had social mobilization and social movement backed with street protest. Heywood states that many,

*"human rights organisations are very effective at shaming and exposing violator governments, and shaping international public opinion... they base themselves on advocacy for ideas via an apparatus and a handful of professionals, gaining their strength from their media and modern communications –rather than working with a social movement where poor people become their own advocates."*¹⁵⁶

The TAC went to change a community and empower them, and the use of litigation was merely a tool to strengthen the groundwork they had already started. Where as with the Grootboom case, it merely changed the courts' view or approach to socio-economic rights but the lives of the community remain largely unchanged today. The case studies show clearly how a large emphasis on litigation, as opposed to litigation in conjunction with a social movement will not yield a truly successful outcome.

¹⁵⁵ Ibid.

¹⁵⁶ Heywood (2009) 1(1) *Journal of Human Rights* 17.

CHAPTER 4

SOCIOECONOMIC RIGHTS IN COURT: A COMPARATIVE STUDY OF INDIA AND SOUTH AFRICA

1.1 Introduction

“Socio-economic rights compel societal awareness of and political sensitivity to the needs and experiences of society’s vulnerable and marginalised sectors, which tend otherwise to be overlooked or be denied in everyday social and political discourse...The consistent pursuit of socio-economic rights can overtime create a space for more meaningful structural transformation by expanding the possible avenues for affirmative relief and by providing leverage for popular mobilization around more structural reforms.”¹⁵⁷

This Chapter will analyse socio-economic rights discourse in India and South Africa. I chose India as a comparison to South Africa as like South Africa, India is plagued with a vast number of poor people living in squalid conditions and who are fighting for equal rights.

As was shown in the previous chapters, litigation, “although a necessary strategy of social change, it is never sufficient; it cannot effectively work in isolation from other mobilization efforts. Secondly, money matters: how public interest law is financed affects the kinds of cases that can be pursued and their likely social impact...Only through more reflective assessments of the impact of litigation can

¹⁵⁷Pieterse (2006) 50(2) *Journal of African Law* 119

we realise its full potential in pursuit of social justice.”¹⁵⁸ Reflective assessments of impact of public interest litigation give us a better understanding of what is necessary or what needs to be changed in ones’ style of pursuing such cases. This Chapter will be an assessment of two different countries and each country’s style of public interest litigation.

In this Chapter, I will briefly look at India and South Africa and discuss the ways that these countries dealt with public interest litigation. I will look at the different styles and highlight the benefits of their methods and if it could realistically work in South Africa.

1.2 Public Interest Litigation in India

India, like South Africa, is a middle-income country. It also has a high poverty rate. Further, there are many inequalities that the Indian people have suffered similar to those that South Africans have suffered and can relate to. Meer describes public interest litigation in India as characterized by “bold, creative and imaginative rights litigation.”¹⁵⁹ In India the phrase ‘public interest litigation’ is rarely used, rather ‘social action litigation’.¹⁶⁰ Public interest litigation has been deemed to be associated with American public interest law, and American public interest litigation is seen to differ significantly from Indian public interest litigation. Upendra Baxi¹⁶¹ describes American public interest litigation as “being concerned with civic participants in government decision-making rather than state repression or governmental lawlessness.”¹⁶² It also does not focus on the rural poor. Baxi believes that American public interest litigation is part of a “legal liberalism ‘within an advanced industrial capitalist society.’”¹⁶³ Whereas Indian

¹⁵⁸ Cummings & Rhode (2009) XXXVI *Fordham Urban Law Journal* 605.

¹⁵⁹ Meer (1993) 9 *SAJHR* 359.

¹⁶⁰ *Ibid* at 360.

¹⁶¹ According to Meer, Baxi is India’s foremost jurist and commentator on social action litigation.

¹⁶² Meer (1993) 9 *SAJHR* 360.

¹⁶³ Meer (1993) 9 *SAJHR* 360

social action litigation is “aimed at making justice accessible to those who are denied their constitutional rights and are unable themselves to apply to court for legal relief.”¹⁶⁴ Singh puts it as follows,

*“Public interest litigation activism is propounding the notion that the Constitution of India can be used both symbolically and substantively, as a medium of non-revolutionary struggle against domination and abuses of power. Public interest litigation is thus seen as empowering the victims to use the courts to enforce the government to fulfill its commitments.”*¹⁶⁵

a) Characteristics of Social Action Litigation in India

Social action litigation has been characterized by various factors, such as judicial activism, different use of certain legal strategies, that is; fact finding commissions, the press, widening the doctrine of standing, epistolary jurisdiction, that is, a public interest litigation suit which is initiated by writing a letter to court or judge¹⁶⁶, flexible remedies and interim orders as well as monitoring by the courts. All these strategies have assisted India in their plight for effective social action litigation. I will illustrate how a few of these strategies worked and how they were successful. Some of these methods might aid South Africa in its fight for social change.

i. Judicial Activism

The judges mainly headed public interest litigation in India. Two judges who were known for this were Justices VR Krishna Iyer and PN Bhagwati (later Chief Justice). It is said that “activist judge [was] bold, creative and imaginative enough to mold the existing legal game rules into a new specifically Indian legal culture

¹⁶⁴ Ibid

¹⁶⁵ Singh (1988) Annual Survey of Indian Law 123

¹⁶⁶ Meer (1993) 9 *SAJHR* 363.

with the goal of making law accessible to India's poor and giving effect to the aspirations of the Constitution."¹⁶⁷ From the judgment's given in India, it appears that judges did not "simply follow legal text when they [were] aware that their actions [would] perpetuate inequality and injustice."¹⁶⁸ Judge Krishna Iyer insisted, "that the law is meant for the people and not the people for the law."¹⁶⁹ A downside to this however is that judges might possibly start to venture out of the scope of the duties in order to accommodate the people and in so doing fall out of the actual scope of their mandate

ii. Doctrine of Standing

Social action litigation methods are often seen to be "innovative, unorthodox and unconventional strategies."¹⁷⁰ Justice Bhagwati introduced the widening of the Doctrine of Standing. The traditional rules were that only the person, who has suffered harm, may approach the court, but with the move to widen the doctrine, it now allowed for any person who felt moved to apply on behalf of a person or group of persons who had had their rights violated and because of their circumstances, they cannot approach the court. This happened in the judgment of *Gupta v President of India*.¹⁷¹

iii. Epistolary Jurisdiction

Epistolary jurisdiction is the initiation of a social action litigation suit by merely writing a letter to the judge. This allows the underprivileged aged and vulnerable in the society who do not understand the technical legal proceedings to enforce their rights in court. In 1987, Justice Bhagwati, who was then Chief Justice,

¹⁶⁷Ibid at 360-361.

¹⁶⁸Ibid at 361.

¹⁶⁹Ibid.

¹⁷⁰Ibid.

¹⁷¹AIR 1982 SCC 149 at 189.

stated that the mere writing of that letter could automatically be converted into a writ petition, and it would not have to be verified either.¹⁷² In another case in India, it was held that the newspaper clipping, that showed great atrocities being suffered by labourers who worked in a stone quarry, could be used as a basis for a petition as well.¹⁷³

iv. Burden of Proof

In cases of social action litigation, the litigant no longer has the burden of proof. Finding evidence for the cases is often a costly process and it requires money that the litigants rarely have, so by removing the burden of proof, the litigant had more success in proving their claims. Fact-finding commissions were introduced for this reason. These commissions are appointed by the court and are used extensively and effectively.

v. Creeping Jurisdiction

Baxi refers to “creeping jurisdiction”¹⁷⁴ as another practice in India. Interim orders are awarded and the court then monitors the enforcement of such orders. The court “seeks improvement in the administration making it more responsible than before to the constitutional ethics and law. Creeping jurisdiction takes over direction of administration in a particular arena from the executive.”¹⁷⁵

The practice of using interlocutory orders has been used in South Africa in the Grootboom case and the TAC case mentioned in Chapter 3. The difference, however, is that in South Africa, the court does not monitor the enforcement of the orders and it is the duty of the litigant. As said above, in Grootboom there

¹⁷²Bandhua Mukti Morcha v Union of India (1984) 3 SCC 161.

¹⁷³Mukesh Advani v State of Madhya Pradesh AIR 1985 SC 1368.

¹⁷⁴Meer (1993) 9 SAJHR 364.

¹⁷⁵Ibid.

was no one actively ensuring the order's enforcement. Whereas in the TAC case, the TAC would approach the courts when they found there was a breach or government was not fulfilling its duties.

In India, the most heard criticism is that the courts are taking over the function of the administration and involving themselves with policy determination. The complaint is that they are neither qualified nor justified in taking control under the guise of "correcting governmental error or excesses."¹⁷⁶ However in spite of the court's involvement in the running of the administration "the lines separating governmental institutions" have not been erased, "nor has it diminished the credibility of the judiciary. Activist judges themselves recognise and respect their limited roles vis-à-vis policy making."¹⁷⁷

vi. The Media

The media plays a very important role in social action litigation. The media has on numerous times acted as and been used as a catalyst in most social litigation matters. What is of particularly great importance is investigative journalism; this form of journalism has managed to highlight many instances where the government has acted chaotically.

In India, social action litigation was largely criticised by traditional lawyers and politicians, however the public "welcomed the intercession of the Court through PIL [Public Interest Litigation]."¹⁷⁸ The public welcomed this as this form of litigation actually made a difference in their lives and the failings of the legislature as well as the executive were exposed. The mere fact that the executive took

¹⁷⁶ Meer (1993) 9 *SAJHR* 369.

¹⁷⁷ Meer (1993) 9 *SAJHR* 370.

¹⁷⁸ Desai and Muralidar (2000) 18 <http://www.ielrc.org/content/a0003.pdf> (accessed on 10/08/2010).

time to change their circumstances increased the public's support of the judiciary.¹⁷⁹

1.3 Public Interest Litigation in South Africa

During Apartheid, judges were often regarded as instruments of the executive.¹⁸⁰ Further the “judiciary was widely seen to be part of the apartheid state and incapable of interpreting the law in a purposive manner in favour of human rights.”¹⁸¹ So to challenge the apartheid system and judges, organisations like Legal Resources Centre and Lawyers for Human Rights along with other law firms engaged in public interest litigation focusing on civil and political rights cases.¹⁸² Foreign donors funded these groups. Public interest litigation then became the “critical tool to attack apartheid legislation.”¹⁸³

When the first case was heard by the Constitutional Court, the case of *S v Makwanyane*¹⁸⁴ the judge, Judge Ismail Mohamed said this,

*“The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break...”*¹⁸⁵

From the onset, the aim of the new Constitution was to change the past of South Africa, and to create an environment free from all the inequalities and limitations of the past. Apartheid legislation was deemed to be a “cancer in the body of a fundamentally sound legal system”¹⁸⁶ and it was because of that cancer that the South African legal system could not be called a liberal system of law. Therefore,

¹⁷⁹ Ibid.

¹⁸⁰ Dugard (2004) 20 *SAJHR* 347.

¹⁸¹ Dugard (2004) 20 *SAJHR* 347-348.

¹⁸² Marcus and Budlender (2008) 8-9.

¹⁸³ Ibid.

¹⁸⁴ 1995 (3) SA 391 (CC).

¹⁸⁵ Davis (2010) 26 *SAJHR* 85.

¹⁸⁶ Davis (2010) 26 *SAJHR* 99-100.

the aim was to remove the cancer and bring the legal system back to one that is liberal.¹⁸⁷

a) Characteristics of Public Interest Litigation in South Africa

As stated in Chapter 2, courts in South Africa are often limited in making certain judgments. They do not want to be seen as taking over functions and roles of the executive. Secondly, it might appear as a rerun of the past. Meer states that (with reference to India) “the most oft heard criticism is that the courts are taking over the function of the administration and involving themselves in policy determination, an arena best left to the executive.”¹⁸⁸ Meer continues to say that the activist judges defended their actions by saying “the court can exert some pressure and influence the use of power, but assert that it is beyond them to supervise the executive functions, improve the channels of administration or initiate a particular ameliorative or social legislation.”¹⁸⁹ In spite of the courts concerning themselves with the functions of administration, they have managed to keep a clear separation of powers in India. The credibility of the judiciary has not deteriorated either.

An analysis of the way public interest litigation is implemented in India shows that South Africa needs to use other tactics alongside litigation to realise the rights in the Bill of Rights more effectively. South African public interest lawyers must realise that litigation should not be and is not an end in itself, but rather a complimentary tactic. It can be viewed as though “reforms that come through the legislative process may appear more legitimate than those that come through courts.”¹⁹⁰ However, as Dugard rightly states it is significant to note that “we have a Constitution that seeks to protect social and economic rights; that the courts

¹⁸⁷Ibid.

¹⁸⁸Meer (1993) 9 *SAJHR* 369.

¹⁸⁹Ibid.

¹⁹⁰Cummings & Rhode (2009) XXXVI *Fordham Urban Law Journal* 612.

are empowered to review legislative and administrative practices to ensure that they comply with these constitutional provisions; and that the courts have, however cautiously, exercised this power.”¹⁹¹ We cannot separate the different tactics as they all play an integral part in assisting to change the socio-economic rights situation in South Africa.

i. Political Mobilisation

Political mobilization is one of the most effective ways to bring about social reform. This was seen in South Africa when the drafters of the 1993 and 1996 Constitutions were being persuaded to include a “constitutional prohibition on unfair discrimination on grounds of ‘sexual orientation.’”¹⁹² Cases dealing with gay and lesbian rights are a clear indication that litigation was only successful due to the “mobilization and advocacy strategies adopted by gays and lesbians from the outset –at the stage of constitutional development.”¹⁹³ Political pressure was also involved from the ANC members and this created public awareness of gay and lesbian issues and brought about academic discussion on these issues.¹⁹⁴ The first case that dealt with gay and lesbian rights issues was in 1998. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,¹⁹⁵ the Constitutional Court confirmed the decision given by the High Court to “declare unconstitutional statutory and common law criminal prohibitions on sodomy.”¹⁹⁶

ii. Community based Activism

“Litigation strategies must be coupled with community-based activism and popularisation of legal advocacy to allow a deepening

¹⁹¹Dugard (2004) 20 *SAJHR* 348.

¹⁹² Marcus and Budlender (2008) 30.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ 1999 (1) SA 7 (CC).

¹⁹⁶ Marcus and Budlender (2008) 30.

*of public engagement with the issue of socio-economic rights. Rights are not won through the courts, for they are only as lasting and meaningful as the extent to which they can be accessed.*¹⁹⁷

Litigation cases dealing with gay and lesbian rights issues are an example of this fact. Even in cases where the litigants are successful in court, sufficient social change will not automatically be achieved if there have been no social mobilization and advocacy strategies.¹⁹⁸

The Grootboom case, which is seen as one of South Africa's landmark cases, illustrates this fact. It had a two-fold impact. In spite of the limits of the case for social change in the Grootboom community, Marcus and Budlender argue that, "it presents a remarkable and valuable victory that has and will continue to play a key role in achieving tangible social change for other plaintiffs in a variety of areas."¹⁹⁹ The second impact is that lessons were learnt from Grootboom. Awareness of rights is necessary for communities to be able to enforce them, secondly advice and assistance should be available to communities, including legal representation. Further, it is important that communities become "socially mobilised, structurally organised and actively involved."²⁰⁰ Furthermore, follow-up is probably the most important strategy if social change is to take place.²⁰¹ It does not matter what type of judgment is given, but for actual change to be experienced, those judgments must be followed-up the social movement.

1.4 Conclusion

"It has been recognised that the suffering of the disadvantaged cannot be relieved merely by the issue of progressive writs of certiorari, mandamus or the

¹⁹⁷ Marcus and Budlender (2008) 42.

¹⁹⁸ Ibid.

¹⁹⁹ Marcus and Budlender (2008) 66.

²⁰⁰ Marcus and Budlender (2008) 67.

²⁰¹ Ibid.

granting of damages or injunctive relief.”²⁰² Instead, active measures need to be taken and the use of the strategic rights litigation and social mobilization need to be applied more effectively.

Pautsch said, “‘Experience is what you get when you didn’t get what you wanted.’ If public interest litigation has not always delivered all that we desire, it has surely provided no lack of experience.”²⁰³ Looking at the experiences in India and South Africa, there are certainly points and lessons from these countries that can impact the South African way of public interest litigation when put together. It can help bring us closer to reducing the size of the gap created by what the South African Constitution declares and what is actually happening in South Africa. In conclusion, our focus must shift from one aiming to attain successful judgments from the court, to one aiming to have significant social change in the communities.

“In the American struggle for social justice, public interest litigation has played an indisputably important role. Yet, over the past three decades, critics...have challenged its capacity to secure systemic change. The critiques have varied... The first is that litigation cannot itself reform social institutions. The second related concern is that over-reliance on courts diverts effort from potentially more productive political strategies and disempowers the groups that lawyers are seeking to assist. The result is too much law and too little justice.”²⁰⁴

²⁰²Meer (1993) 9 *SAJHR* 365.

²⁰³Cummings & Rhode (2009) XXXVI *Fordham Urban Law Journal* 651.

²⁰⁴Cummings & Rhode (2009) XXXVI *Fordham Urban Law Journal* 604.

CHAPTER 5

TACTICS THAT SHOULD PRECEDE LITIGATION TO ENSURE BETTER OUTCOMES

1.1 Introduction

The achievement of one's rights, that is, one being able to access health care or housing for example, is dependent on an actual awareness of those rights. Marcus and Budlender state that "awareness of rights is an 'absolute precondition if communities are to enforce their rights in a manner that leads to social change.'"²⁰⁵ Throughout the dissertation, I have emphasized the need to use different measures alongside litigation. I have suggested through case examples, how this has happened and the successes and shortcomings of other strategies. My aim in this chapter is to shift the focus on to other tactics that could precede litigation. It must be noted that my intention is not to dismiss the impact that can be achieved through litigation; I intend to show how powerful public interest litigation can be, when it is used in combination with these other tactics.

1.2 Transformative Measures to Realise Rights

Former CJ Langa said, "Transformation is not something that occurs only in courtrooms, parliaments and governmental departments. Social transformation is indispensable to our society."²⁰⁶ It is a mind-set of the people, the litigants and the litigators, which needs to change; a bottom-up approach needs to be followed, rather than the top-down where emphasis is laid more on the judiciary rather than on the people. This approach will show that it is not only about litigation but also rather about other influential factors that all come together to make a greater

²⁰⁵Marcus and Budlender (2008) 67.

²⁰⁶Former CJ Langa (2006) Prestige Lecture delivered at Stellenbosch University on 9 October 2006 at 10

impact. This could be achieved through “conducting public information campaigns to achieve rights awareness,” (education) by “providing advice and assistance outside litigation to assist persons in claiming their rights and making use of social mobilization and advocacy to ensure that communities are actively involved in asserting rights inside and outside the legal environment.”²⁰⁷ The late Chief Justice Mahomed said “both the victims and the culprits [of apartheid] who walk on the ‘historic bridge’ described by the epilogue [to the interim Constitution] will hobble more than walk to the future with heavy and dragged steps, delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge.”²⁰⁸ In response to the above statement, experience would suggest that the gap should be dealt with to create a society in which the promise of emancipation becomes a reality rather than merely a promise.

Douzinas states that,

“At no point in human history has there been a greater gap between the poor and the rich in the Western world and between the north and the south globally. ‘No degree of progress allows one to ignore that never before in absolute figures, have so many men, women, and children been subjugated, starved, or exterminated on earth’.”²⁰⁹

However, it is clear that the problem is deeply engrained in our communities, in people’s mind-sets and cultures and more needs to be done if an effective change is going to be seen. From the Former CJ Langa, late CJ Mahomed and Douzinas’s words, it is clear that for there to be true and whole transformation, the society needs to be reconciled first and transformed before effective rights realization can take place.

²⁰⁷Marcus and Budlender (2008) 5-6.

²⁰⁸Former CJ Langa (2006) Prestige Lecture delivered at Stellenbosch University on 9 October 2006 at 10-11.

²⁰⁹Douzinas (2000) 2.

After discussing and analysing the cases around Gay and Lesbian rights, particularly, *National Coalition for Gay and Lesbian Equality v Minister of Justice*²¹⁰ in which the “Constitutional Court confirmed the High Court’s decision to declare unconstitutional statutory and common law criminal prohibitions on sodomy,”²¹¹ it was said by a member of the gay and lesbian community that “rights are not only won through the courts, for they are only as lasting and meaningful as the extent to which they can be accessed.”²¹² This is simply because “there is a massive gulf between [the] legal recognition and the attitude of many ordinary South Africans on these issues.”²¹³ This again emphasizes the need for community engagement and reconciliation of people so they can live together in unity.

1.3 Tactics that can be used to Complement Litigation

There are a number of tactics that can be used together with litigation to bring about significant social change and results that are more effective for the citizenry. Marcus and Budlender highlight three tactics that can be used together with public interest litigation to achieve “maximum success in advancing social change.”²¹⁴ These are “conducting public information campaigns to achieve rights awareness; providing advice and assistance outside litigation to assist persons in claiming their rights; and making use of social mobilization and advocacy to ensure that communities are actively involved in asserting rights inside and outside the legal environment.”²¹⁵

A respondent in Marcus and Budlender’s evaluation of public interest litigation said,

²¹⁰1999 (1) SA 6 (CC).

²¹¹Marcus and Budlender (2008) 30.

²¹²Marcus and Budlender (2008) 42.

²¹³ Ibid.

²¹⁴ Marcus and Budlender (2008) 5.

²¹⁵ Ibid.

“The ‘successful’ combination is not a paint-by-numbers one, but very much depends on the issue. However, the history of social change has proven many times over that a single action strategy – whether litigation on its own or activism on its own will always fail.”²¹⁶

a) Public Information Campaigns

Public information campaigns inform those who have been deprived of certain rights that they can challenge such deprivation of rights. Public information campaigns are necessary as it is a way of informing communities of their rights. This is the first step in starting social mobilization. In other instances, it informs people of other minority groups’ way of life and why they desire to have certain rights. Examples here include gay and lesbian communities and other marginalised communities. Public information campaigns help to dispel rumours and myths about certain facts. Many people are, for example, unaware of what HIV/AIDS is, and these campaigns help garner support and change people’s mind-sets as well as empower individuals.²¹⁷

The Grootboom cases emphasized the point of how necessary public information campaigns are. The “magistrate of his own accord referred the community to a lawyer, they apparently had no idea that they had legal rights which might be available to assist them in preventing the eviction.”²¹⁸ As a result of their lack of knowledge, they had not sought legal advice and their ability to claim the correct rights was prejudiced. Awareness of rights is an absolute precondition if we are to expect any societal change or achievement of rights in the Bill of Rights. Another example where knowledge is necessary is when children are threatened with expulsion from the school, by school authorities or heads when their school

²¹⁶ Marcus and Budlender (2008) 94.

²¹⁷ Marcus and Budlender (2008) 96.

²¹⁸ Ibid.

fees have not been paid. The South African Schools Act²¹⁹ provides protection for children who find themselves in such situations, but parents are not aware of these laws and hence cannot take procedures against these schools.

Public information campaigns also directly help the litigation process. When those involved with the litigation need facts to build their cases, fact-finding missions, are much easier in a community that is aware of what is happening. People are more willing to assist and cooperate, as they understand what is happening and the implications of a success. In the event of successful litigation process, that same community can then approach the courts again, when the government or affected people fail to act in accordance with the judgment given. Unfortunately, in the Grootboom case, again because of a lack of knowledge, no follow up was ever conducted, and the community still lives in squalid conditions.

b) Providing 'Legal' Advice and Assistance Outside the Courtroom

Once people have been informed about their rights and the rights of other people regarding various issues, they need to know what to do with this knowledge. Having organisations that inform people what to do and how to go about claiming these rights is essential. These organisations would essentially assist people with filling out claim forms, directing them to the correct institutions and simply advising them with the next steps. All this is possible without necessarily using litigation as a tactic at this point.

During Apartheid, the Black Sash gave advice to the people, helping them fight the discrimination. They did not litigate, but they gave legal assistance where it was required and referred people to lawyers who could assist them when litigation was necessary.²²⁰ Organisations, such as the Black Sash who have people capable of giving legal advice, would benefit the South African community

²¹⁹ Act 84 of 1996.

²²⁰ Marcus and Budlender (2008) 99.

greatly and would prevent unnecessary deprivation of resources due to a lack of knowledge.

As was discussed in Chapter 3, the TAC tactic was to teach and inform citizens about what they were fighting for and what they were actually fighting, both in the bodies of the HIV/AIDS sufferers, and with the government. Heywood said, “Treatment literacy is the base for both self-help and social mobilization. Armed with proper knowledge about HIV, poor people can become their own advocates, personally and socially empowered.”²²¹ The treatment literacy programs were informative for the people affected with HIV/AIDS. The poor people were disadvantaged in that they did not have the advantage of receiving legal advice. The TAC always had the benefit of a legal organisation advising them and their members. The TAC worked closely with the AIDS Law Project.

Heywood also stated that in cases such as these, the need for the right to health is more likely to be able to create greater national mobilization when the campaign is driven by the people who actually need it rather than from lawyers who have not experienced the lack of such a right. Through the TAC campaign, the affected people were no longer just “silent victims” they were now “political agitators for their human right to treatment.”²²²

These organisations that provide advice and assistance also complement litigation in that when cases do go to court, these organisations can inform the community of the judgments and when there has not been significant change, can also follow up on the state institutions and the court. This would make a substantial difference for the communities that have such organisations.

c) Making use of Social Mobilisation and Advocacy

²²¹Heywood (2009) 1(1) *Journal of Human Rights Practice* 18.

²²²Heywood (2009) 1(1) *Journal of Human Rights Practice* 19.

As discussed in Chapter 4, in the Indian context there is greater emphasis on the fact that social mobilization is necessary to bring about social change as litigation on its own is insufficient. Former Chief Justice Bhagwati of the Indian Supreme Court said

*“We must always remember that social action litigation is a necessary and valuable ally in the cause of the poor, but it cannot be a substitute for the organisation of the poor, development of community self-reliance and establishment of effective organisational structures through which the poor can combat exploitation and injustice, protect and defend their interests, and secure their rights and entitlements.”*²²³

In certain instances, litigation serves as a distraction, removing the focus from the social movement and the on goings of the group. Heywood when discussing the TAC strategy mentioned this. Heywood says that despite treatment literacy being the TAC’s largest part of their machinery, it has been the most overlooked by researchers and writers on TAC. The treatment literacy was the foundation of community-based human rights advocacy.²²⁴

In instances where social mobilization was not used, the communities felt the effects. For example in the gay and lesbian community, gays and lesbians are still stereotyped and discriminated against, because of people who do not understand their preferred way of life. A respondent in Marcus and Budlender research stated that, despite the law changing, the impact on the ground is minimal because of social attitudes. The respondent went further to say that “Implementation is key and human factor mediates here, so unless we engage with the social attitudes and perceptions that make up this human factor, the effects of law in action will be limited.”²²⁵ The gay and lesbian litigation cases were always well-argued and thought out tactics. However, their lack of social

²²³ Marcus and Budlender (2008) 104.

²²⁴ Heywood (2009) 1(1) *Journal of Human Rights Practice* 18.

²²⁵ Marcus and Budlender (2008) 110.

mobilization illustrates that litigation is not enough to change society significantly. Litigation should be used as a secondary tactic alongside mobilization. Another respondent from the research conducted by Marcus and Budlender, added that “Litigation can only catalyse mobilization that is already taking place, it cannot create a movement where there was none.”²²⁶ This is very true, as was seen in with the TAC cases litigation was a secondary tool.

In cases where it is an individual litigant, the lack of mobilization also has great consequences. Women in South Africa suffer violent and brutal attacks at the hands of the public, and despite the victories in court for individual women, it has not had an impact on the society in general. Speaking about the landmark cases²²⁷, where the state was held accountable and the women received large sums of money for damages, a respondent asked, “where has this [victories in court and the compensation distributed to the abused women] had any impact on the way in which ordinary women are treated in general or by the state in particular?”²²⁸ There has been little impact where litigation is the only tool used in such instances.

1.4. Conclusion

Marcus and Budlender both concluded that the TAC case demonstrates exactly how to “combine social mobilization on the one hand, with litigation on the other ... it is without a doubt a shining example as to how litigation, when run properly and as part of a series of broader strategies, can achieve social change.”²²⁹

²²⁶ Marcus and Budlender (2008) 112.

²²⁷ Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC); K v Minister of Safety and Security 2005 (6) SA 419 (CC).

²²⁸ Marcus and Budlender (2008) 111.

²²⁹ Marcus and Budlender (2008) 89.

Litigation, as we have seen above, cannot be seen as an end in itself. At the same time though, the three methods I have described above, cannot be used without litigation if all parties concerned expect a permanent change. So in essence, public interest litigation affords those marginalised and previously disadvantaged people with a better opportunity to claim and achieve the rights in the bill of rights, which ordinarily using only the three methods I have spoken of or litigation alone, would not have managed to do that.²³⁰

In conclusion to achieve more effective results, one needs to have public information campaigns, secondly one needs to start up advice centres, that can give correct advice and information to those who require it and thirdly, social mobilization is a key tool to changing the societies attitudes or informing the public about how grave the particular situation is. Once that is in place, litigation can strengthen the work that has been started but it must be organised, properly structured and conceptualised, and after the court has made a ruling, there must also be effective follow-up procedures in place as has been clearly illustrated.

²³⁰ Marcus and Budlender (2008) 114.

CHAPTER 6

CONCLUSION

1.1 Introduction

“The very reason for establishing the new legal order, and for vesting the power of judicial review... in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.”²³¹

Dugard asserted, “A constitution cannot operate in isolation from the society it serves. It must be seen to represent the character of its people; to act as a contract between those who govern and those who are governed.”²³² For a contract to be enforceable both parties must have an understanding of what it means and entails. Hence, the South African community must understand the rights found in the Constitution and what they mean and entail for each specific individual for them to be able to enforce their rights. It must however be noted that the “more concrete articulation of a socio-economic right will not in itself enable that right to bring about a tangible improvement in the living conditions of its subjects... it will be necessary that mechanisms through which this right maybe enforced are readily accessible and that they are practicably capable of tangibly delivering the content of the right.”²³³

As discussed throughout the dissertation, accessing rights does not mean one must only go to court to have their rights achieved. There is a process to be followed and the notion that litigation is the best means to achieve the rights in the Bill of Rights must be

²³¹S v Makwanyane, 1995 (3) SA 391 (CC) para 88.

²³²Dugard (2004) 20 SAJHR 344.

²³³Pieterse (2007) 29(3) *Human Rights Quarterly* 820.

dispelled to prevent further disappointments, as in the Grootboom case. If South Africa is to come to a place, where they have truly crossed over the bridge, that Mureinik speaks of, we are to realise that more action needs to take place in order to successfully achieve these rights. Klarman is of the view that “courts are never at the vanguard of social reform, litigation victories depend on social change that has already occurred.”²³⁴ Furthermore, Houston is quoted as stating that “we cannot depend upon judges to fight... our battles... the social and public factors must be developed at least along with and if possible before the actual litigation commences.”²³⁵

1.2 Recommendations

Dugard highlights that there are “state institutions supporting constitutional democracy’ under the Constitution but they cannot be expected to adopt an activist approach to their task.”²³⁶ He refers to the Constitutional Court as the “great arbitrator”²³⁷ and as such, the Court “needs public interest law groups to bring cases before it... Secondly, it needs to be comprised of judges with the intellect, independence and proper values for interpreting the Constitution to meet the needs of evolving society.”²³⁸ He then goes on to mention that for the court to be able to accomplish its task successfully, the legal wing of civil society need to present constitutionally sound arguments that are thoroughly researched. Steps need to be taken to ensure that “properly qualified”²³⁹ people are appointed to both the High Court and Constitutional Court.

Rightly so, concerning litigation all the above is necessary and highly essential for successful litigation to take place. However as I illustrated in Chapter 5, there are certain requirements that should precede litigation for a successful change in society to take place and for the achievement of rights. Public campaigns need to be held in the

²³⁴Klarman (2009) 32 *Harvard Journal of Law & Gender* 290.

²³⁵ Ibid.

²³⁶Dugard (2004) 20 *SAJHR* 353.

²³⁷ Ibid.

²³⁸Dugard (2004) 20 *SAJHR* 354.

²³⁹ Ibid.

affected communities. Secondly advice and assistance centres need to be set up to advise the communities of possible legal recourse, who to approach on specific matters and if litigation is truly necessary. Thirdly, social mobilization and advocacy needs to be employed in the affected communities, and once all these steps have been implemented, there is now a stronger case for the courts. In some instances litigants will find that there is no need to even have to litigate, if they had approached the correct departments before hand. This will also save on vexatious litigation suits, time, and money.

Meer believes that because of the similarities between India and South Africa “the diversities of race, religion, language and culture, the contrast between wealth and massive poverty, as well as vibrant freedom struggles which characterize both societies, make the Indian social action litigation model all the more compelling and relevant.”²⁴⁰

However “judicial activism cannot be a substitute for executive efficiency and the social and economic change in a society organised around privilege, patronage and power, cannot be brought about just by a few public interest litigation actions, however well intentioned’.”²⁴¹ Despite this, as the TAC showed, when one has a vision it can be achieved and it will take time and dedication to the cause, but change will start happening and rights will begin to be achieved. Pieterse said “socio-economic rights, if purposively interpreted and consistently enforced, are nevertheless capable of making invaluable contributions to the pursuit of social justice.”²⁴² One must always keep in mind that “while social justice is obviously not achievable through litigation alone... litigation involving enforceable socio-economic entitlements is a potentially invaluable tool for the construction of an ultimately more just society.”²⁴³

1.3 Conclusion

²⁴⁰Meer (1993) 9 *SAJHR* 372.

²⁴¹Meer (1993) 9 *SAJHR* 371.

²⁴²Pieterse (2006) 118-119.

²⁴³Pieterse (2006) 120.

Pieterse states that the achievements that one may make through litigation, that is, the individual pursuit of socio-economic rights may not appear as having an effect on social justice as a whole, and may sometimes appear counterproductive. However as Liebenberg (as quoted in Pieterse, 2006:120) illustrates that, there can sometimes be positive results from it.²⁴⁴ Liebenberg (as quoted by Pieterse, 2006:131) states that, “The winning of affirmative social benefits through litigation can create a favourable terrain for broader mobilization around deeper reforms. A substantive jurisprudence on social rights can facilitate ‘non-reformist reforms’ and advance transformation.”²⁴⁵ This would encourage those living in poverty to participate in the campaigns and expose their dire states. At its best it should be a reminder to us of our dedication to creating a society based on social justice, equality and assist the society in understanding the needs and hearing the complaints of those most marginalised in the society.

This was seen in the Grootboom and with the gays and lesbian rights cases with the involvement of the community. After looking at practices and experiences in South Africa as well as those in India and in the United States of America, it is clear that litigation needs to be supplemented with other tools to truly give the best result. It is believed that “political mobilization, such as organising and social activism, is more effective in producing long-term change.”²⁴⁶ Political mobilization creates an atmosphere for community engagement, which is “crucial to sustain, consolidate and build on victories.”²⁴⁷ If we are truly to reach the ideal spoken of in the constitution, we need to learn from the experiences of public interest litigators who have tried different methods and seen what does make a difference. We should not take litigation for granted as has been stated, and in that way we will be able to bring about true social change.

In conclusion, litigation is not the best method to achieve the rights in the Bill of Rights. It nevertheless, has a significant role and as such we must strive to use the available

²⁴⁴Pieterse (2006) 131.

²⁴⁵Ibid.

²⁴⁶Ibid.

²⁴⁷Ibid.

methods described to their best and begin to positively transform and change the lives and communities of South Africans. Former CJ Langa states that “transformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal.”²⁴⁸ The society needs to continually to work towards that.

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”²⁴⁹

²⁴⁸Former CJ Langa (2006) Prestige Lecture delivered at Stellenbosch University on 9 October 2006 at 5.

²⁴⁹Soobramoney v. Minister of health, KwaZulu Natal 1998 (1) SA 765 (CC) para 8.

Bibliography

- An-Na'im, A (eds) *Cultural Transformation and Human Rights in Africa* (2002) Zed Books: London & New York
- Benedek, W, Kisaakye, E.M, Oberleitner, G (eds) *The Human Rights of Women: International Instruments and African Experiences* (2002) Zed Books: London & New York
- Cummings, S.L and Rhode, D.L "Public Interest Litigation: Insights from Theory and Practice" (2009) XXXVI *Fordham Urban Law Journal* 603
- Currie, I "Judicious Avoidance" (1999) 15 *South African Journal on Human Rights* 138
- Desai, A.H, and Muralidhar, S "Public Interest Litigation: Potential and Problems" B.N Kirpal et al. eds, (2000) Oxford University Press: New Delhi
- Douzinas, C *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000) Hart Publishing: Oxford & Portland, Oregon
- Dugard, J "Twenty years of Human Rights Scholarship and Ten Years of Democracy" (2004) 20 *South African Journal on Human Rights* 345
- Dugard, J "Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court" (2006) 22 *South African Journal on Human Rights* 261
- Dugard, J "Courts and the poor in South Africa: A Critique of systematic judicial failures to advance transformative justice" (2008) 24(2) *South African Journal on Human Rights* 214
- Epp, C.R "Do Bill of Rights Matter? The Canadian Charter of Rights and Freedoms" (1996) 90(4) *American Political Science Review* 764
- Feeley, M.M "Hollow Hopes, Flypaper, and Metaphors" (1992) 17(4) *Law & Social Inquiry* 744
- Fredman, S *Human Rights Transformed: Positive Rights and Positive Duties* (2008) Oxford University Press: Oxford

- Gargarella, R, Domingo, P and Roux, T (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor* (2006) Ashgate: England and USA
- Gloppen, S “*Public Interest Litigation, Social Rights and Social Policy*” (2005) *New Frontiers of Social Policy* Arusha Conference
- Heywood, M “*South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health*” (2009) 1(1) *Journal of Human Rights Practice* 14
- Humby, T “*Reflections on the Biowatch dispute – Reviewing the Fundamental Rules on Costs in the Light of the Needs of Constitutional and/or Public Interest Litigation*” (2009) 1 PER 95
- Jaichand, V “*Public interest litigation strategies for advancing human rights in domestic systems of law*” (2004) 1 SUR Int’l Journal on Human Rights 127
- Johnson, D, Pete, S, du Plessis, M *Jurisprudence: A South African Perspective* (2001) Butterworths: Durban
- Klarman, M.J “*Social Reform Litigation and its Challenges: An Essay in Honour of Justice Ruth Bader Ginsburg*” (2009) 32 *Harvard Journal of Law & Gender* 251
- Klare, E.K, “*Legal Culture and Transformative Constitutionalism*” (1998) 14 *South African Journal on Human Rights* 146
- Langa, P “*Transformative Constitution*” (2006) *Prestige Lecture delivered at Stellenbosch University* 9 October
- Liebenberg, S and Goldblatt, B “*The Interrelationship between Equality and Socio-Economic Rights under South Africa’s Transformative Constitution*” (2007) 23(2) *South African Journal on Human Rights* 335
- Madlingozi, T “*Post-Apartheid Social Movements and the Quest for the Elusive ‘New’ South Africa*” (2007) 34(1) *Journal of Law and Society* 77
- Marcus, G and Budlender, S (2008) *A strategic evaluation of public interest litigation in South Africa*. The Atlantic Philanthropies
- Mbazira, C *Litigating Socio-Economic Rights in South Africa* (2009) Pretoria University Law Pulp: Pretoria, South Africa

- McCann, M.W. *“Reform Litigation on Trial”* (1992) 17(4) *Law & Social Inquiry* 715
- Meer, S. *“Litigating Fundamental Rights: Rights Litigation and Social Action Litigation in India: A Lesson for South Africa”* (1993) 9 *South African Journal on Human Rights* 340
- Mureinik, E. *“A Bridge to Where? Introducing the Interim Bill of Rights”* (1994) 10 *South African Journal on Human Rights* 31
- Neier, A. *Only Judgment: The Limits of Litigation in Social Change* (1982) Wesleyan University Press: Middletown, Connecticut
- Pieterse, M. *“The Potential of Socio-Economic Rights Litigation for the Achievement of Social Justice: Considering the example of Access to Medical Care in South African Prisons”* (2006) 50(2) *Journal of African Law* 118
- Pieterse, M. *“Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited”* (2007) 29(3) *Human Rights Quarterly* 798
- Posipišil, L. *Anthropology of Law: A Comparative Theory* (1971) Harper & Row Publishers, New York, Evanston, San Francisco, London
- Rosenberg, G.N. *The Hollow Hope: Can Courts Bring About Social Change?* (1991) The University of Chicago: Chicago and London
- Rosenberg, G.N. *“Hollow Hopes and Other Aspirations: A Reply to Feely and McCann”* (1992) 17.4 *Law & Social Inquiry* 761
- Singh, P. *“Judicial Socialism and Promises of Liberation”* (1985) 21 *Annual Survey of Indian Law* 171
- Van Marle, K. *“Transformative Constitutionalism as/and Critique”* (2009) 2 *Stellenbosch Law Report* 286
- Varney, H. *“Breathing Life into the New Constitution: A new constitutional approach to law and policy in Kenya: lessons for South Africa”* (2011) *ICTJ Briefing*
- Wickeri, E. *“Grootboom’s Legacy: Securing the Right to Access to Adequate Housing in South Africa?”* (2004) 5 *Centre for Human Rights and Global Justice Working Paper: Economic, Social and Cultural Rights Series*

Legislation

Constitution of the Republic of South Africa 1996

Supreme Court of Appeal Rules Rule 15, Uniform Rules of Court (pertaining to High Courts) Rule 40, and Magistrates' Courts Rules of Court Rule 53, as collated in Juta's Statutes Editors (2006) *The Supreme Court Act and the Magistrates' Courts Act and Rules (6ed)*.

Cases

Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC)

Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (4 October 2000) (also Media Summary www.constitutionalcourt.org.za/site/the_court/history.htm#cases)

K v Minister of Safety and Security 2005 (6) SA 419 (CC).

Minister of Health and Others v Treatment Action Campaign and Others (No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002)

Motsepe v Commissioner for Inland Affairs 1997 (2) SA 898 (CC), 1997 (6) BCLR 692

Mazibuko v City of Johannesburg Case CCT 39/09 [2009] ZACC 28

S v Makwanyane 1995 (3) SA 391 (CC)

Soobramoney v. Minister of health, KwaZulu Natal 1998 (1) SA 765 (CC)

TAC v MEC for Health, Mpumalanga and Minister of Health TPD Case No 35272/02
[unreported]

Internet

"Human Development and human rights report in south Africa"

<http://hdr.undp.org/en/reports/global/hdr2000/papers/sandra%20liebenberg.pdf>

(accessed 2012/04/10)

"A Bill of Rights: what for?"

http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/FK_SmithInstitute_07.pdf

(accessed on 2012/04/10)

“Social Change since 1982 http://www.charterofrights.ca/en/28_00_03 (accessed 2012/04/10)

Briefing Paper: *The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights* Centre for Reproductive Rights (2006) www.reproductiverights.org (accessed 2009/06/18)

Creamer, K “*Implication of socio-economic rights jurisprudence for government planning and budgeting: The case of children’s socio-economic rights*” www.kennethcreamer.co.za/attachment_view.php?pa_id=8

McKinley, D.T. “*South Africa’s Social Conservatism: A Real and Present Danger*” <http://www.sacsis.org.za/site/article/440.1> 9 March 2010 (accessed 10/08/2010)

BWA South African Women in Leadership Census 2010 in partnership with Nedbank and InWEnt <http://www.bwasa.co.za/Portals/4/docs/BWACensus2010Report.pdf> (accessed 11/12/10)

Statistical release P0210 Labour Force Survey Historical Revision September Series 2000 to 2007

<http://www.statssa.gov.za/publications/statsdownload.asp?PPN=P0210&SCH=4359> 23 March 2009 (accessed 02/04/10)

Reuters “*SA unemployment rate increases*” <http://www.mg.co.za/article/2009-10-29-sa-unemployment-rate-increases> 29 October 2009 (accessed 02/04/10)

“*Public Interest Litigation and the Development of Human Rights*” http://www.china.org.cn/china/human_rights/2009-10/29/content_18792628.htm (accessed 29/09/2010)

“*Public Interest Litigation: Social Change and Public Interest Litigation in India*” http://www.ngosindia.com/resoucrs/pil_sc.php (accessed 29/09/2010)

http://www.soros.org/sites/default/files/afrimapreport_20060223.pdf (accessed 24/09/12)

<http://www.nortonrose.com/knowledge/publications/67952/the-recovery-of-fees-and-disbursements-in-successful-pro-bono-litigation> (accessed 11/11/12)

http://www.law.cornell.edu/wex/critical_legal_theory (accessed on 23/11/12).