

**Twenty Years of South African Constitutionalism
Public Interest Law in Post Apartheid South Africa II
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Law Wars: Does public impact litigation advance social justice?**

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On the surface the question ‘does public interest litigation advance social justice?’ seems a large but relatively straightforward one. It is answered simply by no better authority than Deputy Chief Justice Dikgang Moseneke, who in a recent lecture stated:

Courts have, time without count, required the executive to give effect to socio-economic claims of the poor and vulnerable. We have required government to provide appropriate access to health care. Happily so today, our jurisdiction has arguably one of the best public treatment regimes for HIV/Aids patients.

We have reminded the executive of its duty to provide access to housing. We have mediated differences around rampant eviction of homeless, urban and rural occupiers who are said to be unlawful.

We have insisted that landowners must display patience as homeless occupiers find other refuge. Often we have ordered municipalities to engage meaningfully with communities in order to avert inhumane evictions.

We have ordered government to find alternative accommodation should evictions ensue. Courts have insisted that drinkable water be made available to vulnerable members of society.

We have protected learners from being subjected to a medium of instruction they don’t want.

We have required that learners be furnished with study material. Courts have required the social grants to reach all including vulnerable migrants and that grants be paid promptly, particularly in the rural neighbourhoods.¹

The question is also extensively canvassed in a new edition of the Atlantic Philanthropies sponsored report on public impact litigation authored by Gilbert Marcus, Steve Budlender and David Ferreira.² As Marcus et al show, there are a litany of cases that support the argument that it does. There is also much

¹ D Moseneke, Reflections on South African Constitutional Democracy, Transition and Transformation, 12 November 2014.

² S Budlender, G Marcus & N Ferreira *Public Interest Litigation and social change in South Africa: Strategies, tactics and lessons* (Atlantic Philanthropies, 2014)

empirical evidence and academic writing on both individual cases and the genre to support the contention that litigation does advance 'social change'.³

We do not wish to controvert this. However, we would argue that a deeper interrogation of the question is necessary and particularly one that distinguishes between the social goods which public impact litigation has undoubtedly won in relation to a number of rights and social justice which remains elusive in all sphere of life -- except the treatment response to the HIV epidemic.

We argue that when we study public impact litigation, we should look not just at the tangible goods that may be won through a court order, such as anti-retroviral medicines (ARVs) or text-books, but the *method* of public impact litigation and the degree to which it catalyses the development of institutions and organisations that are able to carry the quest for social justice forward within and beyond the courts. This must be a question asked of those whose avowed mission is to use public impact litigation for the purpose of social change, because failure to do so means that public impact litigation might produce only pyrrhic victories or victories that in no way alter the underlying structures that create or perpetuate inequality.

We also ask why public impact litigation should be necessary at all to advance social justice and what are the conditions for its sustenance? Here we examine the debate between Marcus, Dugard and Langford⁴, looking particularly at the inter-relationship between the TAC as a movement and the dialectic of its development through use of law.

But ultimately this paper looks forward in time rather than back. Our argument takes as its starting point Cameron's comment that:

.... the Constitution itself cannot save South Africa from crime, corruption, misgovernance, governmental inefficiency and police brutality. What can save us is the Constitution in a combination with a proud, deeply sceptical population, together with principled lawyering.⁵

³ See for example, M Heywood, South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health", *Journal of Human Rights Practice*, (2009) 1.

⁴ J Dugard & M Langford, Art or Science? Synthesizing Lessons from Public Impact Litigation and the Dangers of Legal Determinism, *South African Journal on Human Rights*, 27, part 1: 2011, pages 39-64.

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The question we aim to reach – and suggest answers to - is what it will take to join the three together to achieve social justice.

Part the First:

At a recent dinner celebrating his being made an honorary member of the Johannesburg Bar, Constitutional Court Justice Edwin Cameron told assembled lawyers that “The significance of the past lies in its lessons for the present. And it is time to take stock”. “Our country is at a cross roads” he stated⁶

Justice Cameron is right. 20 years into democracy there can now be no doubt about the political trajectory ‘our country’ is taking; it appears to be the same one as other post-independence societies, moving ineluctably towards cronyism, corruption and widening inequality. 2013 and 14 might be described as years in which politics in South Africa has been lived dangerously.

As we write, it is arguable that the split in the Congress of South African Trade Unions (COSATU), one of South Africa’s largest forces for social justice, has shattered the 20 year ‘post apartheid consensus’ which the African National Congress (ANC) sought to hold together through its ‘tripartite alliance’. This consensus often worked to marginalise and delegitimize dissent by requiring that the working class and poor should trust that the ANC would improve their lives and thus not use their own agency to do so. The Alliance also held that the ANC had a ‘historical mandate’ to be accomplished and that acts of opposition and protest, including the use of public impact litigation, were driven by hidden agendas coming from a variety of quarters.

Interestingly in this new political environment the courts have become a new site of politics. Trade unions take each other to Court.⁷ Opposition political parties use the Constitution to strike effective blows against the ANC.⁸ The resort to the courts takes place because public institutions and state departments that are controlled by the ANC, including Parliament and the National Directorate of Public Prosecutions, fail to carry out their constitutional mandates. Victory in the courts seems to vindicate the system of separation of powers and the checks and balances created by the Constitution. Constitutionalism appears to be becoming entrenched in practice.

⁶ Edwin Cameron, 1 November

⁷ SAMWU; NUMSA v COSATU

⁸ Spy tapes; Simelane; Vote of No Confidence

In the context of an explosion of dissent Cameron rightly celebrates the free exercise of some of the rights that exist in the Constitution, saying of freedom of speech for example, that “Across two thirds, perhaps even three quarters, of the land surface of the earth, Mr Julius Malema (the leader of the Economic Freedom Fighters) would have been locked up for saying what he did about the head of state. In South Africa, there is no controversy”.⁹

If this were the whole story it would appear that South Africa has grown into a vibrant democracy, with its citizens and civil society taking full advantage of rights in the Constitution to both protect and advance rights. We might be on the edge of a new age of public impact litigation and democracy! However, the argument we make in this paper is that underlying the apparent respect for the bells and whistles of democracy there are more insidious processes at work which do not challenge the constitution frontally but aim at undermining the powers given to citizens by the Constitution and which threaten both the struggle for and the achievement of social justice.

Three examples would suffice to make this claim:

- As a result of individual litigation which had a public impact the state was eventually forced to set up a Commission into the arms deal, now known as the Seriti Commission, after the judge that presides over it.
- The undermining of the Public Protector’s office,
- The Protection of State Information Bill and the media grab.

All this is cause for grave concern. However, as Cameron also notes, South African society differs in several material respects from peer countries whose independence and freedom was achieved in a different historical period.

Firstly, there is the existence of the Constitution, as the supreme law of SA, whose core founding principles (including social justice) require a 75% majority to change, an indelible residue which cannot therefore be easily rubbed out.

Secondly, there is the existence of a robust and Constitutionally empowered civil society, a term which in this context I use broadly to include the media, non-governmental and faith-based organizations.¹⁰

Much of the underlying tension in politics, and its expression in law and litigation, are to do with the gross inequalities that have deepened and widened in post apartheid South Africa. In other words, it is to do with the failure of the state to take the necessary positive measures to advance the Constitution’s vision of a progressive realization of equality towards the attainment of social

9

¹⁰ Note on the meaning of civil society

justice. Social goods may have been provided on a large scale (such as housing, electrification, provision of equal access to schools and health facilities) but this is different from social justice. Social justice means substantive equality – and this is far from being achieved.

Part II: The place and meaning of social justice:

Judging by the frequency with which it is referred to these days you would think that social justice means all things to all people, and is capable of being cast and owned by political parties of all hues. A definition of social justice is rarely given, even by the Constitutional Court which always refers to approvingly but usually in passing.¹¹ However, social justice must have a meaning and the meaning we give it is ‘substantive equality in access to quality public goods, allowing genuine equality of opportunity for participation in economy, politics and culture.’

In the context of this vagueness what often also seems to be missed are the legal and political implications of the manner in which the Preamble to the Constitution expressly says that it aims to:

“establish a society based on democratic values, social justice and fundamental human rights.”¹²

The fact that these three terms are used separately strongly suggests that it is possible to have a democratic society without social justice (the United Kingdom or United States), or even a society that nominally respects fundamental human rights (India) – but is without social justice.

Our Constitution goes further – it embeds the notion of social justice within its very Preamble. And, we would argue, the whole subsequent content and structure of the Constitution, particularly but not exclusively the positive obligations established in the Bill of Rights, seek to propel South Africa towards this end.

This would seem to be all well and good. But the Constitution is not self-enacting and therefore neither is social justice. The drafters of the Constitution, with thousands of years of the history of governance to draw from, understood that governments rarely do what is required of them by law, particularly when it comes to the realization of the rights of the poor. Achieving the vision of the South African constitution to “improve the quality of life of all citizens and free the

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¹² Constitution of the Republic of South Africa, 1996, Preamble

potential of each person”¹³ (another characterization of social justice) therefore depends on citizen agency, or to put it another way, the exercise of political rights, such as the right to campaign for a cause,¹⁴ and the right of “everyone”:

“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.”¹⁵

As well as the right “to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened.”¹⁶

Public impact litigation is not an end in itself; neither is its outcome. It is one of the constitutionally approved means by which South Africans can ensure the continual movement of our society towards social justice. The other means include voting, participating in political parties or causes, assembly, demonstration, picket and petition, being engaged in policy and legislative processes, forming and joining trade unions. Sometimes the process public impact litigation will involve many of these components simultaneously!

Thus far, the contemporary practice of public impact litigation in post apartheid South Africa has been most fully described and explored in the two editions of *Public Impact Litigation in South Africa and Social change: Strategies, Tactics and Lessons*, by Marcus et al. The first edition drew a stinging rebuke from two practitioners.¹⁷ Recently another practitioner, Jason Brickhill, the Director of Constitutional Litigation at the Legal Resources Centre (LRC) has added his voice to the debate, critiquing both sides and attempting to rediscover a common ground.¹⁸

However, we would go further than Brickhill and argue that much of the Dugard critique appears to be setting up a straw man in order to blow it down. There is little that we disagree with in their own ‘model’. Yet, underlying their critique appears to be a worry that the report will entrench in donor minds certain methods of litigation and delegitimize others.

However, there is an aspect of the Dugard/Langford reply that does require serious engagement, in part because it is based on a mischaracterization whose rebuttal is factually necessary, but also because it will deepen the debate on the means by which social justice can be achieved.

¹³ Preamble

¹⁴ s 19(1)©

¹⁵ s 34

¹⁶ s 38

¹⁷ Dugard

¹⁸ Brickhill

Dugard and Langford say that “the TAC model may represent the ‘Rolls Royce’ of litigation strategy, but may not always be affordable, practical, necessary or even desirable” as well as claiming that “the TAC model can distract attention from ensuring judicial and court reform¹⁹.”

Perhaps the first thing to say is that there is no singular model for public impact litigation, including the TAC model. But what is informative about the campaign for a public health programme to prevent mother to child HIB transmission, is to follow its thread into and beyond of litigation to understand the many components that create the momentum towards achieving social justice,

Part III: Law as ‘concentrated economics’

The conclusion reached by both Marcus and Dugard is that ultimately the ability to achieve social justice – and to use public impact litigation as one means to do so – is dependent on politics. The Bolshevik revolutionary Vladimir Lenin correctly asserted that politics is ‘concentrated economics’.

After 20 years of democracy, shorn of our starry-eyed romanticism about the unique nature of our democracy, we have now reached a point where situating public impact litigation in politics and economics, and planning it through this lens, are considerations vitally linked to the ‘how’ questions asked by Marcus et al. To think otherwise is naïve.

In addition to trying to win their cases, progressive public impact litigators now need to litigate with a view to winning hearts and minds. They cannot allow public impact litigation to be portrayed as a narrow, elitist domain of power, the primary purpose of which is to ‘subvert democracy’. It is important that progressive public impact litigation be widely understood for what it is, namely a mechanism for holding power to account in the interests of the powerless.

So as we consider the future of public impact litigation I argue that it is necessary to look critically at the following:

1. Three phases of Constitutionalism: naivety, resistance, opposition
2. Three terrains in the quest for constitutionalism: government, labour and civil society.
3. Constitutionalism/law as politics

¹⁹ Dugard, 61 & 62

Thereafter we can consider the next phase of public impact litigation and its prospect for social justice.

Three phases of Constitutionalism: naivety, resistance, opposition

South Africa's first democratic government clearly did not fully understand what it was doing when it adopted the final Constitution in 1996. This much has been confirmed by one time leading theorist of the ANC and SACP, Mac Maharaj who, in 2009, described how he still felt:

... far .. from understanding the implications of living in a constitutional state. I have to keep asking myself how far we are in internalising the implications. There is a lot of sloganeering about the Constitution, about how advanced it is, about threats to it and loud proclamations about the need to defend it, but there is hardly any discussion about it.²⁰

This is perhaps understandable. Things moved fast between 1994 and 1996 and a range of forces and processes were at work in the Constitution-making process. Unintentionally but fortunately, Western powers' desire to entrench rule of law – and use the Constitution to do this – coincided with the ANC's legitimate desire to have a supreme law that would guarantee freedom and equality.

Mandela at pains to demonstrate that his government respected the Constitution, even when it went against him (SARFU).

However, it is only under Mbeki that we begin to see a largely covert resistance to the Constitution. This surfaces in the TAC case which Cameron ultimately uses as a credit to Mbeki for permitting the implementation of the order of the Constitutional Court. But it is also evident in his neglect of Parliament, chapter 9 institutions etc.

However under President Zuma, and particularly his men, there has emerged a more overt flouting and even contestation of the Constitution.

Sorry to say, but the attitude of the majority party in government to the Constitution will tell us a great deal about the prospects of using public impact litigation to achieve social justice.

Three terrains in the quest for Constitutionalism: government, labour and civil society.

If we accept that social justice is the lode star of the Constitution we should also look at the players in the struggle to achieve social justice and their relative social strengths. I look at three: the government itself, the labour movement and finally that part of civil society that says it is expressly seeking social justice.

Constitutionalism/law as politics

War of law going on in South Africa in which the Constitution is constantly invoked

Yet very little knowledge of the Constitution

FHR study

Anecdotal experience; NUMSA and Limpopo teachers

Conclusion:

Marcus et al provide a detailed and positive study of cases that have brought social change. Nonetheless they still conclude with a cautionary note that:

“We must realize that litigation is just one part of a broader social change strategy that need to be allied with broad-based political activism.”²¹

Prerequisites for a united front for social justice:

Sophisticated civil society, much more deliberate and conscious about how it relates to the Constitution and uses public impact litigation

Much greater access to justice through law and transformation of the legal profession. Law has a vital role to play, but it is by no means a knight in shining armour. Because it is a sword, including one that is frequently waved in the fight for social justice, one tends not to look at its own scabbard. But as Edwin Cameron warns, not to do so weakens the power of law and litigation itself.

For it cannot be right for those who are fiduciaries of a constitutional order that is designed to secure justice and equality to become instead exponents of the extremities of the increasing wealth gap in South Africa and the world.²²

Imagine ourselves in 2034 looking back, the debates will be of a very different order. We have to start to imagine and understand them now.

ENDS

²¹ p 33

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