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Human Rights in Motion

Perspectives

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ABSTRACT

When it comes to controversial judicial cases, is human rights still an effective language for producing social change? This article sheds light on this question by examining litigation strategies in the African context. The author focuses on three issues: lack of public support to the death penalty case decided by the Constitutional Court of South Africa; loss of States' support to regional courts such as the Southern African Development Community (SADC) Tribunal; and, finally, judicial self-restraint in a case involving customary law in Botswana. By exploring these issues, the author argues counter-intuitively that, as civil society organisations seek effective rights protection and promotion, occasionally such long-term objective requires short-term eschewal of a rights discourse in favour of a more populist approach. While arguing this is not always the case, the author contextualises the potential for social change of public interest litigation vis-à-vis the need to gain and maintain public and States' support to human rights.

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ESSAY

HUMAN RIGHTS LITIGATION IN SOUTHERN AFRICA: NOT EASILY ABLE TO DISCOUNT PREVAILING PUBLIC OPINION

Nicole Fritz

I have been asked to provide some thoughts in response to the question: is human rights still an effective language for producing social change? As the director of the Southern Africa Litigation Centre (SALC), an organisation that seeks primarily to support human rights and public interest litigation in the Southern Africa region, I am principally interested in that question as it relates to litigation. And of course, when we litigate human rights and public interest–related issues we do so chiefly within parameters provided by rights provisions we find in domestic Constitutions and regional and international instruments applicable even in places as undemocratic and seemingly rights-hostile as Swaziland. So one would assume that my answer, necessarily, would be an easy "yes, human rights are still an effective language for producing social change".

Yet I want to argue, counter-intuitively, that as we seek effective rights protection and promotion, occasionally that long-term objective requires short-term eschewal of a rights discourse in favour of a more populist approach. Put differently, social change – in the sense that human rights are advanced and achieved – sometimes requires a reference, even deference, to prevailing social and political mores.

1 Death penalty and public opinion

To begin with, it is worth examining the much acclaimed death penalty judgment, *S v. Makwanyane*, delivered by South Africa's Constitutional Court in 1995. In soaring, poetic language the Court made plain that the death penalty offended a raft of rights provisions contained in the then recently enacted Interim Constitution of 1994. It was, as a matter of principle, unconcerned for the fact that public opinion strongly supported retention of the death penalty. As Judge Chaskalson explained:

> *Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions*

> *without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation 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.*
>
> (SOUTH AFRICA, *S v. Makwanyane and Another*, 1995, para. 88).

Yet while the articulation of the role of the courts is undeniably correct and the judicial reasoning of Chaskalson cannot be faulted, had the Court's judgment and its rejection of public sentiment on this issue triggered an enormous public backlash, the Court and its legitimacy might have been imperilled, and with it the entire constitutional enterprise.

As it was, no such dangerous outrage was directed at the Court and the Court knew that it was unlikely to provoke any legitimacy crisis because while public opinion supported (and continues to support) retention of the death penalty, the African National Congress (ANC), South Africa's majority party, does not. Of course the ANC might have instead legislated on this matter rather than allowing the controversial issue to be tested by the new court. Nevertheless, the court could issue its judgment against the death penalty, secure in the knowledge that it would not incur the enmity of the ruling party.

2 Regional courts and States' acceptance

Another example, in a different context and with a far less happy outcome, is that of the Southern African Development Community (SADC) Tribunal – an issue on which we at SALC have long worked. The treaty was established as part of the regional economic community and intended to resolve disputes between States as well as between States and inhabitants of the region. Unsurprisingly, in the Tribunal's short life-span the only disputes referred to it were those of individuals referred against States.

Some of the very earliest cases filed before the Tribunal concerned the contested land expropriation process in Zimbabwe. In 2007, the Tribunal ruled against Zimbabwe in the case of *Campbell (Pvt) Ltd and Others v. The Republic of Zimbabwe and Others* (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL, 2008), holding that the Zimbabwean law ousting the domestic courts' jurisdiction to rule on the lawfulness of land seizures violated the rule of law in

that it denied claimants the right of access to the courts and the right to a fair hearing. The Tribunal also held that the impugned law, in targeting white farmers alone, regardless of other factors, amounted to indirect racial discrimination and was accordingly unlawful. The Tribunal emphasised that its ruling would have been different had the land expropriations been conducted in a reasonable and objective rather than arbitrary manner (NATHAN, 2011, p. 126).

Zimbabwe refused to comply with the rulings compelling the applicants to bring several applications before the Tribunal – in 2008, 2009 and 2010 – requesting that it hold Zimbabwe in breach and contempt of the 2007 order. The Tribunal ruled for the applicants in all instances, finding that Zimbabwe had failed to comply with its rulings and noting that it would report these findings to the Summit for its appropriate action.

In September 2009, Zimbabwe announced that it did not recognise the Tribunal's jurisdiction – despite having nominated a judge to be appointed to the Tribunal and having appointed a counsel to represent it before the Tribunal. It also circulated a legal opinion arguing that the Tribunal had not been legally established, that its rulings were of no binding force and effect and that member States were under no obligation to observe its jurisdiction. In addition, Zimbabwe undertook intensive lobbying of other SADC member States in an attempt to win their support for this position.

Meanwhile, the SADC Summit had received the Tribunal's report regarding Zimbabwe's non-compliance and the accompanying call that it adopt "appropriate measures" to enforce its compliance. The Summit might have adopted sanctions or suspension. But, instead of suspending Zimbabwe, the Summit preferred to suspend the Tribunal, under the guise of a review process – announcing at its August 2010 Summit meeting that the Tribunal's role, functions and terms of reference would be reviewed, and coupled this announcement with an instruction to the Tribunal not to take on any new cases. It also failed to renew the terms of Tribunal judges, so denying the Tribunal quorum. In a subsequent decision in 2012, the Summit announced that a new Tribunal protocol would be negotiated and that any new Tribunal would only be authorised to entertain disputes as between member States.

With hindsight, it seems clear that the Zimbabwean land cases should ideally never have been among the first cases heard by the Tribunal. All courts will find it difficult to withstand sustained political pressure but new courts – domestic, regional or international – are particularly fragile creatures. They hold neither a sword nor a purse and depend for their survival on something much more ephemeral: an acceptance of their legitimacy and authority. As new courts cultivate, in their early years, this culture of acceptance, they can ill-afford to take on the most politically contentious matters – unless they can be assured, as was South Africa's Constitutional Court, that the backlash provoked will be controlled.

As law scholars Garrity-Rokous and Brescia (GARRITY-ROKOUS; BRESCIA, 1993, p. 560) explain:

> *While negative publicity may influence a State to comply with an adverse judgment, a human rights court or commission can exert pressure on a State only at the risk of*

> *jeopardizing the State's voluntary support for the system itself. Regional systems thus are caught in a tension between maintaining political unity and protecting individual rights.*

For judges of new regional courts, it is not enough to contend themselves purely with the legal domain. They will have to "balance the protection of human rights in individual cases against the potential long-term consequences of their decision, a balancing that requires a constant assessment of the social and political milieu" (GARRITY-ROKOUS; BRESCIA, 1993, p. 562). They will also have to understand how far the rights at issue "can be realised under prevailing conditions" and how best "to encourage the governments and societies of their member States to accept rights – a necessary condition for the effective establishment of any right, regardless of its content" (GARRITY-ROKOUS; BRESCIA, 1993, p. 562).

Because of this conflict between political unity and the protection of individual rights, Garrity-Rokous and Brescia propose that regional human rights tribunals employ procedural mechanisms such as admissibility and standing to abstain from deciding politically contentious cases most likely to puncture political unity, thus preserving the opportunity for the tribunal at a later date, when it is better established or governmental and public support for the right has grown, to issue a substantive ruling on a similar matter (GARRITY-ROKOUS; BRESCIA, 1993, p. 564).

Of course, it is those most politically contentious cases for which access to justice is most difficult to obtain. And, as Garrity-Rokous and Brescia also observe, excessive concern on the part of regional tribunals for political unity may equally undercut long-term legitimacy for the system. This might occur when due process rights, including the right of access to the system's tribunals, are disregarded, leading the public to completely lose faith in the system, "thus vastly reducing the system's ability in the long-term to protect both substantive and procedural rights" (GARRITY-ROKOUS; BRESCIA, 1993, p. 565).

But again this speaks to the need on the part of regional tribunals, and those who seek to utilise them, of undertaking constant assessment of the surrounding political and social milieu. Still if the need for such assessment is most acute in respect of regional tribunals, it is nonetheless an assessment which must be undertaken also by other domestic courts.

3 Customary law and judicial self-restraint

Here then is one final example and happily a more successful one. Recently, the Southern Africa Litigation Centre (SALC) supported a case in Botswana brought by three sisters challenging a customary law rule which allegedly provided only for male inheritance of the family home. At the High Court level, the judge ruled that the customary law rule denying women the right to inherit the family home infringed the right to equality, noting the supremacy of the Constitution over all other law including customary law.

The High Court of Botswana found the consequence of the customary rule was that women had limited inheritance rights in comparison to their male siblings

and that this meant that daughters could be evicted from their family home. The Court held that:

> *[T]he law [at issue] is biased against women […] This gross and unjustifiable discrimination cannot be justified on the basis of culture […] It cannot be an acceptable justification to say it is cultural to discriminate against women […] Such an approach would […] amount to the most glaring betrayal of the express provisions of the Constitution and the values it represents […] [the law at issue] has no place in a democratic society that subscribes to the supremacy of the Constitution – a Constitution that entrenches the right to equality.*
>
> (BOTSWANA, *Mmusi & Others v. Ramantele & Another*, 2012, para. 200-202)

Notably, the Court also unequivocally rejected the view that a declaration of unconstitutionality would be against the public interest as public opinion was not in support of equal rights for women, stating that

> *this court also rejects outright any suggestion […] that this court must take into account the mood of society in determining whether there is violation of constitutional rights as this undermines the very purpose for which the courts were established.*
>
> (BOTSWANA, Mmusi & Others v. Ramantele & Another, 2012, para. 197).

Using language which human rights activists would only applaud, the judge went on to pronounce that "it seems to me that the time has now arisen for the justices of this court to assume the role of midwives and assist in the birth of a new world struggling to be born, a world of equality between men and women as envisioned by the framers of the Constitution" (BOTSWANA, *Mmusi & Others v. Ramantele & Another*, 2012, para. 217).

On appeal, the Court of Appeal of Botswana, like the High Court, ruled in favour of the sisters, finding that they could not be disturbed in their possession of the family home, but they did so by a route very different from that of the High Court. In fact they chided the judge in the High Court for potentially giving the:

> *wrong signal to those who are not cognizant of the primary role of a judge, namely to resolve disputes before him/her and interpret the law to be applied in the dispute before him/her. It is not for the judge to traverse issues that do not directly arise from the case being dealt with however important they may be.*
>
> (BOTSWANA, *Ramantele v. Mmusi & Others, 2013, para. 74).*

They determined that the case might be decided without having to refer to constitutional rights: that among other things, the alleged rule – being unfair, inequitable and unconscionable – did not meet the requirements for recognition as a customary law. Unquestionably, it was a judgment less soaring in its rhetoric than that of the High Court and yet, arguably, it was stronger for it.

Its narrow, conscientious reasoning – concerned more for the particular facts

of the case than was the High Court judgment, less couched in the language of human rights – means the outcome is far less likely to be the subject of attack, is far more likely to meet with social acceptance in still fairly conservative Botswana than had the High Court had the last word.

4 Conclusion

In this short paper, by reference to some examples, I have sought to argue that in the sphere of public interest litigation, the language of human rights is not always the most effective tool for producing social change, or rather that the language of human rights – if inattentive to prevailing social and economic realities – may often fail to produce the social change we seek. That is not to say that we should only look to using the language of human rights when the prevailing political and economic forces are congruent – if that were the case too many people and causes would never receive legal support. But it does require that those of us who undertake public interest litigation are keenly appreciative of the relevant social, political and economic contexts in which we bring legal action, even if ultimately we choose to discount them.

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