Public Interest Legal Services in South Africa

Executive Summary

November 2015
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Introduction

Commissioned by the Ford Foundation and the RAITH Foundation, the Socio-Economic Rights Institute of South Africa (SERI) conducted a study about the public interest legal services sector in 2014 and 2015. The study considers the nature of the public interest legal services sector in South Africa; the context in which it operates; how its value and impact can be best characterised and measured; to what ends organisations within the sector coordinate their activities and collaborate with each other; and what role public interest legal services play in expanding access to justice given the high cost of legal services. The full report is available on SERI’s website, using the following link: http://www.seri-sa.org/images/Seri_Pils_report_Final.pdf.

SERI consulted a wide range of people within, and connected to, the public interest legal services sector. These included legal practitioners, researchers, advocates for change, NGO managers, social movement activists, community advice office workers, community-based organisers, donors and judges. In total 79 people participated in key informant interviews and a further 52 people participated in focus groups.

The report first examines the context within which public interest legal services are provided. Second, it discusses what the available literature and our informants say about how to characterise the value and impact of work within the sector. It proposes a multidimensional approach to characterising the value of public interest legal services. This approach focusses on broad “issues” rather than on individual “cases”, while accounting for the direct and indirect material impact of particular interventions, as well as their broader political and symbolic value. Third, the report considers the state of coordination and collaboration within and outside the public interest legal services sector. Fourth, the high cost of legal services is explored as a major obstacle to the public interest legal services sector’s capacity to facilitate access to justice. Finally, the report makes a range of recommendations.
South Africa faces a range of deep and complex social and economic changes: chiefly inequality, poverty, joblessness, discrimination against, or the exclusion of, a range of vulnerable social groups, state incapacity, recalcitrance and corruption, and abuse of private power.

Law and legal services have been assigned a central role in the transformation of South African society because the primary vehicle for social transformation in South Africa is the Constitution – our supreme law. Although public interest legal services, and particularly litigation, may have limits a broad consensus exists that these services, in some form and in the right conditions, remain a powerful vehicle to facilitate social change.

The public interest legal services sector is involved in a wide variety of work across multiple fronts. Virtually every major area of social concern is the subject of some form of public interest legal work, which often meets with real success. Examples include the expansion of access to housing, healthcare services, particularly essential medicines, widened access to social grants, challenging xenophobia, racism and gender-based violence, enhancing youth and educational opportunity, and protecting the environment.

Some of the worst failures of the state and private sector have been corrected by the courts through public interest litigation, which has itself been accompanied by effective legal and non-legal activism. For example, the failure to respond to the HIV/AIDS crisis with effective programmes to provide anti-retroviral medication, the failure to address the needs of those who face homelessness through eviction or disaster, exclusionary and administratively unjust aspects of the social security regime, inadequate provision of water, and unlawful disconnections of electricity, have all been addressed through public interest litigation, as

2. Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC); Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC); City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd 2012 (2) SA 104 (CC).
4. MEC for the Department of Welfare v Kate 2006 (4) SA 478 (SCA).
have unfair banking practices. Beyond socio-economic rights, civil society participation in commissions of inquiry – most notably after Marikana, in Khayelitsha and in connection with the Arms Deal – has lately underscored the need for the renewed defence of civil and political rights.

The sector has a critical but productive relationship with the state and the judiciary. It is sophisticated, self-critical and well-informed. It is keenly aware of the challenges it faces in achieving social transformation through the provision of legal services and has a nuanced understanding of the strengths and weaknesses of its approaches.

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7 Gundwana v Steko Development 2011 (3) SA 608 (CC); Sebola v Standard Bank 2012 (5) SA 142 (CC).
Value and Impact in the Public Interest Legal Services Sector:
A Multidimensional Approach

In South Africa, a debate is emerging between “materialist” assessments of public interest legal services, on the one hand, and “legal mobilisation” theorists on the other. Materialist approaches emphasise that the purpose of public interest litigation is to achieve positive concrete outcomes for particular social groups; that it is a necessary (but not sufficient) condition for such positive outcomes that a court be persuaded to give a favourable judgment; and that the real question is what strategies and tactics are necessary to obtain, and properly enforce, a favourable judgment. Operating at different levels of abstraction, materialist approaches have sought to identify the conditions necessary for expanding the arsenal of legal rights available to vulnerable social groups.

Legal mobilisation theorists, while acknowledging the importance of positive outcomes in particular cases, have criticised the materialist approach for being too narrow, and for lacking the predictive power it sometimes claims. It has been argued that the capacity of public interest legal services to achieve change is far more contingent on judicial temperament and broader uncontrollable social factors than the materialists accept, and that the value of public interest legal services cannot be reduced to a favourable outcome in court. Legal mobilisation theorists urge a more open-ended approach to assessing the effectiveness of public interest legal services. They emphasise a range of indirect and non-material effects of legal interventions that have profound consequences.

These debates about the value and impact of public interest legal services in South Africa often shape the terms on which those active in the sector characterise the value and impact of their work. However, respondents emphasised a wider range of methods and sites of impact than have been traditionally considered. The methods employed by public interest legal services organisations include advisory work, research, public education, scrutinising legislation, policy analysis and advocacy in partnership with the state, and engaging in media campaigns. There was clearly an understanding that social change requires the employment of a wide variety of complementary methods.

9 Dugard and Langford “Art or Science” SAJHR (2011) pp. 57-60.
In addition, the study found that respondents discuss their work in terms of issues and controversies rather than in terms of particular legal cases. Respondents tended not to think of the overall direction and efficacy of their work by considering whether a particular case resulted in a positive legal outcome. Rather, they consider how the totality of their work has affected the form and dynamics of particular social phenomena, including how those phenomena affect public consciousness. Building on this, we offer a multidimensional approach to considering the value and impact of the work being done in the sector. We offer examples of how impact can be measured in relation to particular issues through what we refer to as “sites” of impact. A site of impact is an arena in which the impact of public interest legal services can be affected. Courts are a clear example of such a site, but they are by no means the only site. The sites of impact include:

**Obtaining a positive outcome for particular individuals and groups**: Measuring impact in terms of the actual concrete change to the lives of clients, individuals and communities. For example, the TAC led a struggle to widen access to HIV medication in 2004. The concrete impact of the TAC’s intervention was increased access to adequate treatment, and thus an increase in the likelihood of many people living healthy lives with HIV/AIDS.

**Changes to law and policy**: Measuring impact in terms of changes in policy that have occurred as a result of an intervention. For example the *Grootboom* decision\(^\text{10}\) in 2001 provided a right to emergency housing for those in desperate need. Further interventions have shaped and expanded this right.

**Institutional changes**: Measuring impact as a shift in values and attitudes of government or the way that institutions work or organize themselves. For example the *Jaftha* decision\(^\text{11}\) in 2005 introduced the concept of proportionality into debt execution proceedings. It developed a rule against disproportionate executions against residential property. This has allowed individual debtors greater space to engage and bargain with large institutions.

**Symbolic and discursive changes**: Measuring changes in how an issue is understood and discussed in the public domain. The work of Equal Education has enabled communities in Cape Town to re-conceptualise poor school conditions as rights violations, and to mobilise around them - for example its school library campaign and the campaign to press for the adoption of national norms and standards for school infrastructure.

**Expanding democratic space**: Measuring the impact in terms of access to spaces of democratic participation and the impact on active citizenry and social mobilisation. For example different public interest law organisations have recently participated in commissions of inquiry into policing in Khayelitsha, defence procurement, and the Marikana massacre. This has challenged police and military impunity and has sought to actively shape the political response to state violence and corruption. The commissions themselves have been used as expanded spaces for democratic participation.

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\(^{10}\) *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)

\(^{11}\) *Jaftha v Schoeman* 2005 (1) BCLR 78 (CC)
Strengthening the public interest law sector: Measuring impact as the ways in which interventions enhance the way the sector works strengthen organisations and create new alliances or networks. An example of this is the recent litigation brought by the South African Human Rights Commission with the assistance of the Legal Resources Centre and Lawyers for Human Rights. In challenging the extended and unlawful detention of refugees and asylum seekers for longer than the periods permitted by statute, the Human Rights Commission sought structural relief to ensure that it can access and monitor the Lindela Repatriation Centre to ensure administrative practices that result in unlawful detention are addressed and changed.

Measuring the impact of public interest legal services organisations across multiple sites of impact in relation to particular issues helps emphasise the multidimensional value of the work done in the sector. The multidimensional framework also helps us understand how the sector continually reshapes the terms on which pressing social issues are discussed, while at the same time measuring the extent to which real change takes place on the ground. It helps us chart the institutional reforms achieved, and those still necessary in relation to a particular issue, while also characterising the democratic spaces with which those reforms must interact.

The sites of impact approach, we hope, captures the complexity of the public interest legal sector, while at the same time allowing for a meaningful discussion of progress. It is far from all that needs to be said about measuring the value and impact of public interest legal services, and it must be applied, tested, added to and reshaped by public interest legal services organisations as they proceed with their work. The figure on the following page is a graphic representation of the approach.
Public interest legal services organisations use a range of methods to address these issues. Understanding the value of legal services means understanding how all of these methods work together. This is only possible if one focuses on issues rather than cases.
SITES OF IMPACT

Rather than emphasising a consistent theory of social change, our respondents discussed a large number of what we refer to as sites of impact:

» **Obtaining a positive outcome for particular individuals and groups**: actual concrete change to the lives of clients, individuals and communities.

» **Changes to law and policy**: changes in policy that have occurred as a result of an intervention.

» **Institutional changes**: a shift in values and attitudes of government or the way that institutions work or organise themselves.

» **Symbolic and discursive changes**: how an issue is understood and discussed, in the public domain.

» **Expanding democratic space**: access to spaces of democratic participation and the impact on active citizenry and social mobilisation.

» **Strengthening the public interest law sector**: the ways in which interventions enhance the way sector works, strengthen organisations and create new alliances or networks.

ISSUE

Public interest legal organisations are working on a very broad range of issues. These include: basic services | corruption | education and schools | children’s rights | environmental justice (including mining, climate change, pollution) | gender (including gender-based violence, discrimination, sexual violence, LGBTQ) | health care (including public health systems, HIV/AIDS) | housing and land | public accountability | access to information and open governance | refugee and migrant rights | rural justice (traditional leaders, land) | policing and the criminal justice system | security of farm workers | social security.
our respondents indicated three important practices of coordination and collaboration. These are: collaboration within the sector, collaboration with other civil society organisations outside the public interest legal services sector, and collaboration with donor organisations.

A wide range of collaboration already exists, especially among litigating NGOs. Our respondents stressed that effective coordination and collaboration has to be voluntary and organic. Donors have an important role to play in creating and fostering spaces in which public interest law organisations can come together to discuss matters of mutual concern. However, donors should not adopt an a-contextual approach to coordination and collaboration, or attempt to force it where it is not warranted by the context.

A significant critique emerged in the research about the relationships of law centres to others in the sector, especially community-based advice offices. Community-based advice offices tend to be overlooked and under-funded. There is a need for developing paralegal training structures within community-based advice offices. An appropriate framework for regulation and training for community-based advice office services is needed. Respondents felt that the public interest legal services sector should assist with crafting regulations for paralegals, guiding state provision of resources for community-based advice offices, providing a clear mandate for community paralegals and linking the mandatory community service provisions of the Legal Practice Act and community-based advice offices.
Public Interest Legal Services and the Legal Profession

Public interest legal services organisations facilitate access to justice in two principal ways. First, public interest legal services organisations provide specialised legal services that are not generally available on the commercial legal services market. Second, they do so free of charge to the beneficiaries of those services. The ordinary commercial bar, and most law firms tailor their operations to paying clients. Public interest legal services organisations represent the vulnerable and the excluded, as the inability to afford legal representation is itself a hallmark of social exclusion. These key features of public interest practice mean that public interest legal services organisations have the most to gain from, and are uniquely placed to press for, the regulation of legal fees and the transformation of the legal profession.
Public interest legal services organisations have accordingly been forced to develop a number of strategies to keep the cost of legal services down. These include: negotiating fees on an individual basis, placing caps on the amount of money they are prepared to pay for legal services, employing in-house counsel, encouraging attorneys to do more advocacy, establishing fee flexible fees guidelines and relying on mandatory pro bono work prescribed for private legal practitioners.

A key finding of the study is that a tougher regulatory approach to fees is required. Another key conclusion concerns expanding sector capacity to train and retain legal practitioners. Constraints on retaining staff include negative perceptions about public interest law centres at the bar, the requirement that NGOs have to pay costly door membership at some of the individual bars for in-house advocates and constraints on training advocates at public interest law centres. Many respondents also spoke about the lack of racial and gender transformation in the public interest legal services sector. Finally, the study identifies the Legal Practices Act as a meaningful opportunity for strategic reform of the legal profession.
Recommendations

A MULTI-DIMENSIONAL APPROACH TO VALUE AND IMPACT

In consultations on the draft report, public interest legal services organisations tended to confirm the usefulness of the multi-dimensional approach to characterising their work set out above. We propose, therefore, that donors should consider long term support and investment in recognition of a multi-dimensional approach to impact and to direct support at the development of sustainable organisations in the sector. The organisational focus follows from the emphasis we propose on issues and methods, rather than cases. The multi-dimensional approach reinforces the need for a broad definition of public interest legal services organisations and should encourage donors to take the under-funded community based advice organisations more into account.

COORDINATION AND COLLABORATION

Public interest legal services organisations should continue to grow and develop existing initiatives further. Consultations on the draft report emphasised the need for donors to investigate and recognise the existing networks of communication and collaboration within the sector, preferably without imposing onerous new donor reporting requirements.

A sector mapping exercise should be undertaken by donors in collaboration with public interest legal services organisations to better define the roles and inter-relationships of the full range of legal services organisations. This may contribute to better understanding the role of non-litigating organisations. The exercise will help establish a “pipeline” through which community advice offices can refer issues and cases to specialised organisations capable to dealing with them. Donors should support community-based legal training; especially case-referral systems, training programmes, and the provision of legal supervision. NGOs could play a role in providing to these training needs.

Donors should consider a special fund for reactive litigation in response to urgent or unexpected circumstances. Existing capacity in the legal profession is limited in such circumstances as the existing pool of attorneys on which to draw is too small. Increasing capacity in the sector, addressed below, is only part of the solution as it will take time to achieve.
PUBLIC INTEREST LEGAL SERVICES AND THE LEGAL PROFESSION

Donors should develop flexible fee guidelines in consultation with grantees to address concerns about high legal fees in the sector. Respondents generally support the idea of a flexible and discretionary fees guideline - providing guidance based on shared principles applied with a measure of discretion - as opposed to an inflexible cap on fees that would set a maximum fee for counsel per day. The fees guideline should be informed by the existing practices of Legal Aid South Africa, the land reform sector and the historical examples such as the Defence and Aid Fund. The consultations make it clear that the application of these guidelines should be discretionary.

Another key conclusion concerns expanding sector capacity to train and retain legal practitioners. To specifically address growing and retaining capacity in the sector, we propose that donors should consider the provision of funding for:

- Training and developing the advocacy skills of attorneys in the public interest legal services sector.
- Increasing the employment of in-house advocates in those organisations that deem it appropriate.
- Providing pupillage bursaries or sabbaticals.
- Developing human resourcing plans to address internal racial and gender transformation.
As a result of the constraints on training and retaining staff we propose that donors and public interest legal service organisations should jointly engage the General Council of the Bar, and individual bars, to develop public interest law centres as sites for both training and long term careers and to waive, or at least reduce, door membership fees for in-house advocates in public interest law centres.

Many respondents spoke about the lack of racial and gender transformation in the public interest legal services sector. We propose that public interest legal services organisations should be encouraged to develop and adopt approaches in their briefing patterns that promote racial and gender transformation, where they do not already do so. The development and exposure of junior black and women counsel should be central to these approaches. Donors and grantees should be willing to jointly consider the funding implications that arise.

Finally, the study identifies the Legal Practices Act as a meaningful opportunity for strategic reform of the legal profession. Donors should provide a platform for grantees to advocate to the bars and the law societies on the following issues:

- Representation from the PILS sector on the Legal Practice Council;
- Creation of a long-term strategy for mandatory community service;
- Reform of bar council and law society rules inhibiting effective public interest legal services work;
» Development of government incentives to encourage transformation of the legal profession including the development of training programmes for junior counsel and attorneys; and

» A common strategy on counsel fees.

NEXT STEPS

SERI has been commissioned to undertake a new phase of the project, which is focused on the implementation of the study’s recommendations. The implementation phase of the public interest legal services project rests on four pillars:

» Consultation on and promotion of the multi-dimensional framework for value and impact;

» Mapping the public interest legal services sector to identify and locate the full range of organisations in South Africa;

» Developing a flexible fee guideline in consultation with the sector to address concerns about high legal fees in; and

» Developing a shared sector advocacy agenda to address reform in the legal profession.