WHO HOLDS THE SCALES OF JUSTICE IN MATTERS OF 'PUBLIC INTEREST'?

BY CHANTAL TANNER

Since its inception, the Southern African Development Community (SADC) Tribunal has been fraught with controversies. Established as a court of supranational jurisprudence, the Tribunal's mandate was envisioned to hear disputes arising between member states, with an eye towards protecting human rights and monitoring economic integration. The establishment of the SADC Tribunal was encouraged by the European Union's experience of dispute settlement institutions as a means of fostering regional integration.[1]

But for Africa this was not to be the case.

In August of 2010, after hearing its second ever case, a Summit of SADC Heads of State suspended the Tribunal. The suspension came in response to the Court's findings in the matter of *Mike Campbell (Ptv) Ltd and Others v The Republic of Zimbabwe*.[2] The case challenged the violent expropriation of agricultural lands, as ordered by the Mugabe government, which effectively constituted a race-based discrimination against White Zimbabwean citizens.[3] The claimant came before the Tribunal arguing that such discrimination is illegal under both Article 6 of the SADC Treaty and the African Union Charter. The defendant refuted this claim, arguing that the acquisition of farming properties was a remedy to residual colonial imbalances.

When the SADC Tribunal found in favour of Mike Campbell and the adjoining farmers, Zimbabwe immediately withdrew from the Tribunal and mounted a challenge against its authority. What followed was an announcement 'that the Tribunal's role, functions and terms of reference would be reviewed'.[4] Essentially, the functionality of the Court was disbanded for an indefinite period.

Since the Tribunal's suspension, the demise of the Court has been linked to the cases that it heard. By trialling highly contentious public interest litigation, so immediately

after its formation, the Tribunal was thrust into a highly political context. Nicole Fritz, founder of the Southern African Litigation Centre, believes that the Tribunal was placing its legitimacy in jeopardy by hearing such a controversial case at a time so soon after its inception. Fritz argues that the Tribunal's early focus should have been on fostering its credibility and stability, by residing over matters that weren't inherently controversial and political fuelled. This would have encouraged State's to accept the Tribunal's authority, making its suspension far more problematic.[5]

Fritz's proposition about the SADC Tribunal's collapse brings to light key questions about the notion of public interest litigation (PIL). It forces us to consider conceptual issues about who the public are and whether litigants are constructing viable interests for those people that they seek to represent. Indeed, as Fritz has argued in the case of the SADC Tribunal, an inaccurate assessment of the appropriate matter or forum for PIL can lead to an outcome that is not reflective of *any* public's interest.

WHO ARE 'THE PUBLIC'?

Two main themes emerge in relation to the question of who constitutes the public: *the people* and *the unrepresented.*

A common definition of PIL is as a representation of the collective interest of groups of people. According to Edwin Rekosh, founder of the PILnet- the Global Network for Public Interest Law, the term PIL is not intended to describe a particular field of law. Rather, it is used to connote the category of people in which lawyers are representing.[6] Litigating for *the people* is a practice not concerned with a traditional model of lawyering, which focuses on representing the interests of a single plaintiff asserting their individual legal rights. Rather, representing *the people* usually means that a matter is not about a particular plaintiff's private rights, instead it is literally about an interest of the public's. The essential idea is that PIL is required when rights are threatened on mass.[7] Therefore, PIL is defining the concerns of the public as the collective interests of groups of people.

Another description of PIL is to represent the *unrepresented*.[8] Drawing on such a definition it is inferred that 'the public' are the *unrepresented*. This conception of the public is underpinned by the notion that everyone is entitled to equal access to justice. For the rule of law to be achieved, society must be governed by a system in which the unrepresented population has access to mechanisms of justice. PIL is thus underpinned by the concept of giving legal assistance to the 'indigent'. This is rationalised as an interest of society at large as it served to ensure that the rights of marginalised group are protected.[9]

REPRESENTING THE PEOPLE USUALLY MEANS THAT A MATTER IS NOT ABOUT A PARTICULAR PLAINTIFF'S PRIVATE RIGHTS, INSTEAD IT IS LITERALLY ABOUT AN INTEREST OF THE PUBLIC'S.

WHAT CONSTITUTES THE PUBLIC'S INTERESTS?

Indeed, the mere placement of an issue into the public realm can be enough to categorise it as being of 'public interest'. This is why some legal scholars argue that the public's interest is an inescapably political concept which:

> *"directly engages with postmodernist indeterminacy of law and stepping into the political arena... The public interest is a concept used in a number of intersecting areas of public life. Public interest usually denotes the placement of an issue, interest or information in the public realm."*[10]

Today, the field of PIL has come to be understood as encompassing a wide range of objectives such as civil rights and liberties, consumer rights and environmental protection. However, traditionally the public's interest was conceived as an ethical fight for the protection of 'the little guy'. This notion has been understood to mean counteracting the power leveraged by economic interests.

The notion of the common good is another legitimating factor discussed in determining what constitutes a public interest. An issue that is perceived to be for the common good raises broader public concern, by surpassing the interest of the individual in order to encompass a more 'substantive' aspect of the interest at stake. This notion is evidenced in the practice of the Public Interest Law Clearing House in Victoria and New South Wales, which determine whether a matter constitutes a public interest by using the criteria of whether an issue requires addressing *pro bono publico* or 'for the common good'.

WHO CONSTRUCTS THE PUBLIC'S INTERESTS?

The 'gatekeepers' of public interest are those groups constructing the issues that are on the agenda within the public sphere. An explanation of those who are involved in the construction of the public interest is termed civil society.

Philosopher Jurgen Habermas states that:

> *Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere. The core of civil society comprises a network of associations that institutionalises problem-solving discourses of general interest inside the framework of organized public spheres.*[11]

Through these processes, described as civil society, it is hypothesised that all of society is enabled to participate in defining what is (and what is not) determined to be a matter of public interest. If civil society is able to work effectively then the public interests is determined as a result of competing values and opinions. As a result of these processes, the concern is not so much with what the public interest is, rather it is an issue of who the participates are active in these defining processes.

TODAY, THE FIELD OF PIL HAS COME TO BE UNDERSTOOD AS ENCOMPASSING A WIDE RANGE OF OBJECTIVES SUCH AS CIVIL RIGHTS AND LIBERTIES, CONSUMER RIGHTS AND ENVIRONMENTAL PROTECTION. HOWEVER, TRADITIONALLY THE PUBLIC'S INTEREST WAS CONCEIVED AS AN ETHICAL FIGHT FOR THE PROTECTION OF 'THE LITTLE GUY'.

THE VIABLITY OF THE PUBLIC'S INTERESTS

After considering these definitional conundrums, the question arises as to whether these 'gatekeepers' of public interest are accurately assessing the needs of the public and whether there are appropriate ethical boundaries in place around what constitutes a matter of public interest.

At its core, the concept of a viable public interest requires an investment in the notion that we must be actively changing injustice in the legal system. However, as was exemplified with the collapse of the SADC Tribunal, there are inherent complexities inbuilt in challenging the law based on the premise of a public interest. In some contexts, PIL cases threaten to destabilise broader systemic factors. Such destabliation is generally not within the public's best interest.

In South Africa, the Constitutional Court has now set out criteria for what is defined as a viable matter of public interest. In the case of *Lawyers for Human Rights and Other v Minister of Home Affairs and others* [2004], Justice Yacoob affirmed thefollowing approach:

> *that an enquiry would examine whether the application involves a live, rather than abstract issue; the nature of the infringed right and the consequences of the infringement; relief sought and whether it would be of general and prospective application; the range of persons who may be affected by a court order, their vulnerability and whether they had opportunity to present evidence and argument to the Court; and whether there is an alternative, reasonable and effective manner in which the challenge could be brought.*[12]

The Courts of Australia have presented a less definitive construct of what constitutes a viable legal matter in the public's interest.

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Nonetheless, there has been some key commentary on the issue.[13] In the case of *Tobacco Control Coalition v Philiph Morris (Australia) Ltd* [2000] [14] Justice Wilcox emphasised that even when there is an issue of public interest at stake, the broader consequences of litigation must be evaluated beyond simply the good intentions of the litigant. Justice Wilcox's line of argument was further extended upon in an Australian Law Reform Commission conference entitled *Managing Justice*.

At this conference Former Chief Justice of the Australian High Court, The Honourable Murray Gleeson noted that:

> *If we are setting ourselves the objective of making the process of civil litigation available to a substantially wider group of people ... then we need some understanding of how the system would cope if such wider availability were achieved. If we have no plan for this, then all we are doing is creating greater access to an increasingly inefficient system.* [15]

These systemic and societal limitations upon what qualifies as a viable matter for PIL are value judgments. Such judgments are intricately embedded within the context of the particular litigation. There can be no single fundamental identity for the public's

interest. Rather, it is dependent upon a society's philosophical and cultural constructs of justice and the polity's responsibility for the individual. Hence, in certain environments, the context surrounding a case may diminish its utility in serving the public's interest.

CONCLUSION

In the case of the SADC Tribunal, after an elongated review process the Court's jurisdiction has now been reduced to the adjudication of disputes between member states. As such, individuals no longer have a mechanism to bring cases against their governments before the Tribunal. This alteration of the Tribunal's jurisdiction effectively leaves it as a hollowed out instrument in relation to the protection of human rights and public interest.

The collapse of the SADC Tribunal is an illustration of the broader concerns at play when raising matters of PIL. It exemplifies that, with no definitively measureable answer to what constitutes 'public interest', the term can merely be used in an aspirational sense. The meaning of 'public interest' is adjustable to serve the intent of the user. Therefore, the notion of a viable matter of public interest is inherently unstable and bound to change over time and across political borders.

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