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Public Interest Law – The *pro bono* Way: A View from South Africa

Odette Geldenhuys
Pro Bono.Org Johannesburg, South Africa

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Thank you to FLAC for inviting me to participate in this important event. And to The Atlantic Philanthropies which has funded the *pro bono* pilot project in Johannesburg, and which is to embark on a more long-term funding relationship with a full-time clearing house. I also want to thank both Atlantic and FLAC for introducing us to an amazing range of people doing fabulous public interest law work. I have learnt from them in the last few days.

My presentation will be practical, based on my own experiences in South Africa. It is also about a project that is now being developed. I therefore do not bring you a blue print for *pro bono*, nor do I know enough about the local conditions whether any of it can find application here. With this disclaimer I hope to make some contribution today that you may find useful.

My presentation has five broad sections:

- The history of public interest law in South Africa
- The current landscape
- The *pro bono* way to public interest law
- *Pro Bono*.Org: its activities, aims and objectives
- Conclusions

The history of public interest law in South Africa

Those of you who attended the FLAC seminar last October would have had the great pleasure of hearing Geoff Budlender speak about the experience of public interest law in South Africa. Geoff is a former colleague and someone I much admire.

The law has occupied a key space in the South African landscape. It was the instrument which created a regime of discrimination and repression within a rule of law framework. From the earliest days of *apartheid* thus, the law then also became a route or a weapon to fight back with. From the legal challenge by women against the legislation which prohibited them from being admitted as attorneys, to the administrative law challenges mounted to unmask the real reasons for deaths of political prisoners in detention.

From the 1950s onwards, political trials were part of the landscape as concerned lawyers[1] were well aware that the official rule of law approach created a space within which those trials were not mere charades.

In his paper, Geoff dates the practice of public interest law in South Africa to the late 1970s. This is when a more systematic and coordinated approach to using law as an

[1] The term 'lawyer' is used to refer to attorneys (solicitors) and advocates (barristers). South Africa has a split Bar but this is set to change when the Legal Practice Bill is passed. The there will be a single profession, with all referred to as 'legal practitioners'. The Legal Practice Bill seeks to fundamentally transform the legal profession so as to appropriately meet the legal needs of South Africans today. Unfortunately it has not been finalised.

instrument of change was introduced. This was made possible by the creation of public interest law organisations with full-time professional staff, and which were adequately funded by international donor organisations.

The practice of public interest law was thus the domain of a smallish band of professionals working at these NGOs. By and large, attorneys in private practice carried on with their business of providing legal services as fee earners. There was no systematic way for private attorneys to enter the public interest fold, nor did the public interest fraternity necessarily create ongoing opportunities for them to get involved. As Geoff pointed out, this was a shortcoming.[2]

And then came 1994. The new South Africa. A democratic government. Mr Nelson Mandela as the first black President.

The decade post 1994 was an interesting time for public interest law in South Africa.

- There was a lull while public interest lawyers were re-examining their roles and *modus operandi*. Much time and reflection went into considering how to take on the new government – made up of friends and former colleagues and comrades.
- The new democratic Constitution was almost overwhelming in its import and reach. It was an intimidating law for private lawyers, magistrates and the various law enforcement agencies.
- Donor strategies changed. Very quickly donors decided that "all was right" and that their monies were not needed in the same way any longer.
- The new government determined that the receipt and application of funding from foreign donors had to be managed by a central institution created by it.

The current public interest law landscape

There continues to be a massive unmet legal need in South Africa.

Despite it being a more prosperous country, the gap between rich and poor has grown. Unemployment has increased. Education is in a crisis. The majority of South Africans experience a lack of access to justice, which is a right contained in the South African Constitution.

In order to understand the emphasis on *pro bono* legal services as an avenue to do public interest work, there are a number of elements that need to be highlighted: the Constitution and Bill of Rights, the Constitutional Court, the state Legal Aid Board, public interest law firms, and Black Economic Empowerment.

The Constitution and the Bill of Rights

The Constitution[3] and the incorporated Bill of Rights has revolutionised the South African legal framework[4]. It makes provision for among others social, economic and

[2] "An area where public interest lawyers could have done better was through cooperation with lawyers in private practice, who were sympathetic and willing to donate some of their time." (p.7, G. Budlender, Public Interest Law: The South African Experience, FLAC, October 2005)

[3] The Constitution of the Republic of South Africa, Act 108 of 1996.

[4] Section 2: The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligation imposed by it must be fulfilled.

cultural rights legislation; land ownership transformation; access to housing; equality legislation; and freedom of speech. However, despite this glorious Constitution, and for different reasons, poor South Africans have not felt the full benefits of it yet.

The Constitutional Court

The operation of the Constitutional Court has also fundamentally altered the South African legal framework. While all courts, tribunals or forums have the same obligations when interpreting the Bill of Rights, it is particularly the Constitutional Court that has articulated these obligations. As a result, international law and foreign law[5] have been brought into the South African law by the Constitutional Court.

However, as is the experience elsewhere in the world, the majority of the matters heard and decided by the Constitutional Court, are not public interest matters. They have been brought by litigants with the financial means to do so, or by the state.

Legal Aid Board

South Africa has a state funded Legal Aid Board created by statute. The founding Act is not prescriptive. As a result the Legal Aid Board is attempting to provide legal representation for vulnerable groups, including women, children and the landless, in addition to criminal defence that makes up the bulk of its work. In addition, it has a public interest litigation unit, which must still find its feet.

Public interest law firms

With diminished funding in the public interest law sector, there remains a much reduced cadre active in the field to ensure that the Constitution is used to enable poor people to access their constitutional rights.

Black Economic Empowerment and Corporate Social Investment

Transformation is at the heart of everything the government and the majority of the people have been trying to do since the advent of democracy in 1994. Having inherited an essentially authoritarian society and a closed economy, the aim is an open, transparent, democratic and more market-driven South Africa.

Empowerment has come to mean the social and political as well as the economic advancement of previously or historically disadvantaged individuals. The goal is a free and open economy, to be achieved through the empowerment of those previously discriminated against on grounds of race, gender, or disability.

Recognising black economic empowerment as a crucial element of the overall effort towards transformation also assists in recognising the very real opportunities it offers. It has as its departure point the need to redress the imbalances of the past by opening ownership, control, management, and the benefits of South Africa's financial and economic resources to the majority of its citizens. It aims for meaningful participation in the economy by black people as an element of sustainable development and prosperity. It is about making as many blacks as possible economically active at all levels, from the shop floor to the boardroom. It is part of a broader strategy to grow the South African economy by better mobilising the country's human potential.

[5] Section 39(1): When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (3) may consider foreign law.

Empowerment and economic transformation are governed by a number of laws, starting with the Constitution, which lays down the broad principles of an equitable society. Other laws include: the Employment Equity Act, the Skills Development Act, the Preferential Procurement Framework Act, and the Broad Based Black Economic Empowerment Act.

The question is how does achieving black economic empowerment link with *pro bono* legal services.

A system of sector-specific empowerment Charters is being designed, including one for the legal profession. In keeping with its desire to create an open and essentially self-regulated economy, the government has produced a balanced scorecard which sets goals, but does not tell businesses how they must go about achieving them. The scorecard's core measurement areas are: ownership levels; management levels; employment equity; skills development; preferential procurement; enterprise development; and a residual element. In the case of the legal profession, *pro bono* legal services would be such a residual element.

Unfortunately current proposals as to the formulation of professional charters could result in encouraging law firms to engage in corporate social investment activities rather than rendering *pro bono* legal services. This is unfortunate as the implication is that the legal profession may be called upon to make financial contributions rather than contribute their skills and expertise towards Black Economic Empowerment specifically and the transformation agenda more broadly. This is shortsighted as the impact of legal professionals using their skills and expertise in a direct way, can have a much more meaningful and long-lasting impact on transformation than engaging in short-term corporate social investment activities.

On the one hand the legal profession is under a statutory obligation to comply with the Broad Based Black Economic Empowerment Act. This is appropriate and necessary for the economic transformation of the society. On the other, the legal profession also has a peculiar duty to serve the community, in the various ways captured by the range of *pro bono* definitions listed below.

It will be unwise, and perceived as a double burden on legal practitioners, if there is not a clear acceptance that at least the residual element of the balanced scorecard can be achieved by the undertaking of *pro bono* legal work, and more specifically, *pro bono* work that is in the public interest. It will also be a missed opportunity to encourage legal professionals to apply their unique skills towards the public good.

The *pro bono* way to public interest law

Pro bono definitions

There are a number of commonly used *pro bono* definitions, and it is worth noting them here. They range from narrowly providing free legal services to the poor, to participating in broad community activities which require no particular legal acumen.

1. *Pro bono* is the delivery of legal services to the poor and to organisations that serve the needs of the poor.

2. *Pro bono* is the delivery of legal services to individuals, community-based organisations and public interest law institutions in matters in the public interest.

3. *Pro bono* is the delivery of legal services as defined in 1 and 2 above; and in addition also include activities aimed at improving and enhancing the administration of justice and the legal system (e.g. voluntary services to a law society committee, etc.)

4. *Pro bono* is the delivery of legal services as defined in 1, 2 and 3 above; and in addition also include activities which constitute non-legal community service (e.g. non-legal services on non-profit boards, cake sales for the local school, etc).

Motivations

There are at least four reasons why *pro bono* is a good route towards getting public interest law work done.

Firstly, it is internationally accepted that the legal profession has a particular professional responsibility to give back to their communities. To quote Associate Justice Ruth Ginsburg of the US Supreme Court, "... the noblest principles that have defined the legal professions: to assist the poor, disadvantaged, unpopular, and underprivileged, and to perform public service that enhances the common good".[6]

Secondly, the legal profession offers uniquely powerful ways to contribute to the common good. This is also true in South Africa. There has been a growing awareness of the constructive role that the profession can play in the transformation effort. However, the rendering of *pro bono* legal services is not yet a widespread and well-established tradition and practice among South African lawyers.

Thirdly, the large South African law firms are flourishing and turning over extremely healthy profits. By tapping into the services of these firms, can unlock massive resources.

Fourthly, in South Africa, the rendering of *pro bono* legal services can be motivated to be part of the fulfilment of the obligation on all professions and industries to make a contribution towards Black Economic Empowerment.

Voluntary v Compulsory obligation

Part of the debate is how should *pro bono* services be rendered, namely on a voluntary or compulsory basis.

Recently the Cape Law Society adopted a compulsory *pro bono* rule for its members, which stipulates that all attorneys in the Cape provinces must do a minimum of 24 *pro bono* hours per annum. For the Cape Law Society it is important that attorneys take individual responsibility for their community service obligations.

[6] http://www.abanet.org/renaissance

There are two concerns with the Cape Law Society rule: firstly its compulsory nature, and secondly that it does not allow firms to apply a percentage of their total billable hours to *pro bono* work, irrespective of how many of its professionals are involved therein.

None of the other South African Law Societies has followed suit. The Law Society for the Northern Provinces (which covers Johannesburg, the city with the largest number of firms, as well as the most successful firms) has announced a voluntary *pro bono* scheme for its members.

Both the schemes of the Cape and Northern Province Law Societies place the emphasis on *pro bono* legal work for indigent people, with no specific focus on public interest matters.

Of all the Bar Councils in the country, the Johannesburg Bar Council has adopted a compulsory *pro bono* rule for its members, which stipulates that all its members must do a minimum of 20 *pro bono* hours per annum.

Different structures for providing *pro bono* legal services

In Johannesburg there have been three developments as to the provision of *pro bono* legal services by attorneys.

- One firm has established a dedicated unit for undertaking *pro bono* work on a full-time basis.
- Some firms have formed *pro bono* sub-committees to guide and direct the flow of *pro bono* work through the respective firms.
- The pilot clearing house (referred to as 'the Clearing House') commenced in April 2005 with grant funding from The Atlantic Philanthropies. The pilot project is a direct result of the feasibility study which Andrea Durbach had done for The Atlantic Philanthropies about four years ago.

Features of the pilot clearing house

It is administered and managed by one person who works two days per week. Its activities to date can be broadly described as advocacy and clearing house activities, respectively.

The advocacy activities have included: consultative meetings with a range of NGOs and non-profit organisations, supply of information about the pilot project to additional organisations, consultations with the law firms currently participating, meetings with law societies, contact with the Johannesburg Bar Council, and contact with foreign *pro bono* agencies.

The clearing house activities have involved: consulting on matters, "clearing" matters for referral to participating law firms, and meeting with different agencies on matters of broad public interest. The kinds of matters which have been consulted on and dispensed with, or cleared for one of the firms to deal with, have been broad-ranging and have included: different housing-related issues, retirement benefits disputes within the private and public sectors, civil claims, hate speech, the state's obligations in terms of domestic violence legislation, etc.

Pro Bono.Org, Johannesburg, South Africa

Last week The Atlantic Philanthropies took a decision to provide funding for the establishment of a full-time public interest law clearing house in Johannesburg. For the moment we are calling the new organisation *Pro Bono*.Org.

I wish to highlight the following features of *Pro Bono*.Org:

- The public interest law focus
- The criteria to be used to take on matters
- The services to be provided by law firms
- The benefits for law firms
- The benefits for NGOs
- The services to be provided by the clearing house

Public interest law focus

Very broadly, matters in the public interest are defined as matters which raise issues of broad public concern, or which impact on disadvantaged or marginalised groups, or which affect a significant number of people, not just an individual.

As was said earlier, there are decreasing services available for public interest matters. For a country of about 45 million people, there are three organisations that focus on public interest law: Legal Resources Centre, Lawyers for Human Rights, and the Women's Law Centre.

Whether *via* an obligatory or voluntary scheme, lawyers will always have limited hours for *pro bono* work, and therefore it makes sense to focus the application of such hours to achieve a more meaningful impact.

Criteria for taking on matters

The clearing house will refer matters to law firms – for any one of the *pro bono* services listed below, if the following criteria are met:

- ✓ There is a public interest element,
- ✓ The client cannot afford standard legal fees, and
- ✓ The merits are good.

The services to be provided by law firms

What must be emphasised is that public interest law and *pro bono* services are much wider than just litigation. The firms will thus be required to provide *pro bono* legal expertise in any of the following ways:

- Strategic legal thinking
- Advice
- Opinions
- Workshops / seminars
- Policy work
- Legislative drafting
- Litigation

The benefits for law firms

There are a number of benefits for the law firms to receive their *pro bono* work primarily through a clearing house structure, some of which are:

- It avoids the firm having to deal with *ad hoc* requests and responses,
- It eases the administration of *pro bono* matters, thus keeping to the minimum the amount of expensive law firm time required to manage and administer the *pro bono* stream of work,

- Matters are screened for merit, and whether they meet a public interest need, thus saving firms the time to sift through matters,
- Matters are matched with their areas of expertise and/or interest,
- They will receive public recognition for their *pro bono* work,
- It presents a much wider training and practice experience for their staff, and
- They can develop new areas of expertise.

The benefits for NGOs

There are a number of benefits for NGOs and community based organisations to seek *pro bono* legal services through a clearing house structure, which include:

- They gain access to professional legal services which they would not have received otherwise,
- There is the potential of building long term partnerships with a particular law firm around areas of work or campaigns,
- They are able to monitor the impact of legal interventions, more than if legal services are accessed on an *ad hoc* basis, and
- They can make use of legal services in a strategic way.**The services to be provided by *ProBono*.Org**

The services to be provided by *ProBono*.Org can be divided into primary and secondary functions.

The primary functions will be:

- ✓ To maintain and expand relationships with NGOs and CBOs,
- ✓ To maintain and expand relationships with law firms,
- ✓ To maintain relationships with other structures: law societies, bar councils, public interest law centres, foreign *pro bono* organisations and international agencies,
- ✓ To receive, assess and clear requests,
- ✓ To carefully and creatively match members with law firms' expertise, interest, size, and resources,
- ✓ To arrange training/workshops /seminars on relevant public interest topics, and
- ✓ To publicise appropriately positive impact of *pro bono* legal assistance.

The secondary functions will cover:

- ✓ To track developments in public interest jurisprudence,
- ✓ To alert both NGOs/CBOs and corporate law firms of same,
- ✓ To discuss possible *amicus curiae* role with NGOs/CBOs in forthcoming matters,
- ✓ To enable collaborations with research facilities,
- ✓ To access support from foreign and international *pro bono* entities, and
- ✓ To keep a record of the amount and kind of *pro bono* work being undertaken by the participating firms.

Conclusions

We feel that the time is right in South Africa to look to lawyers in private practice to address some of the public interest law needs through *pro bono* services. The factors that give us hope are: the whole issue of access to justice is on the public agenda, the fear that the state may impose a compulsory obligation is some motivation to doing it on a voluntary basis, the large corporate firms are very profitable and would

like to be seen to be giving back to the communities, and there are a few but important *pro bono* champions among the lawyers.

It may be that the conditions and the context here is just so different that it may be inappropriate to even consider *pro bono* as a route to addressing public interest legal issues. But to the extent that all lawyers have a professional obligation to practice justice, this is a good principle where at least to start a conversation on the role of *pro bono* legal services in the public interest.