



ZIMBABWE • LAW • REVIEW

Volume 7-8

1989-90

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THE ZIMBABWE LAW REVIEW

VOLUME 7

1989-90

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TOWARDS GROUP LITIGATION IN ZIMBABWE

Lawrence Tshuma¹

... before the law stands a door-keeper on guard. To this door-keeper comes a man from the country who begs for admittance to the Law. But the door-keeper says that he cannot admit the man at the moment. The man on reflection, asks if he will be allowed then to enter later. It is possible answers the door-keeper, but not at this moment. Since the door leading into the law stands open as usual and the door-keeper steps to one side, the man bends down to peer through the entrance. When the door-keeper sees that, he laughs and says if you are so strongly tempted try to get in without my permission. But note that I am powerful. And I am the lowest door-keeper. From hall to hall, keepers stand at every door, one more powerful than the other. Even the third of these has an aspect that even I cannot bear to look at. These are difficulties which the man from the country has not expected to meet, the Law, he thinks, should be accessible to every man and at all times, and when he looks at the door-keeper in his furred robe, and his large pointed nose and long thin Tartar beard, he decides that he had better wait until he gets permission to enter.²

Introduction

- (i) A bus overturns. A number of passengers are injured and others lose their lives. The injured persons and dependants of those killed wish to sue the bus operator.
- (ii) Many infants are born deformed. It is established that the cause of their deformity is a drug that their mothers have taken, and which was manufactured and marketed by a large company. Their parents wish to sue the company.
- (iii) A multi-national corporation dismisses all contract workers from its countrywide agricultural estates. It is established that the workers, who are not members of any trade union, have been working for the company for two years on three monthly contracts which have been renewed at the end of each three monthly period. The workers wish to sue the company.
- (iv) A group of residents wish to sue a local mining company for environmental degradation. They wish to sue on behalf of themselves and future generations who, they claim, will be deprived of the beauty of the locality.
- (v) A large group of squatters who have been living in an area for two years wish to sue the Ministry of Health for failure to provide them with medical facilities. They seek a *mandamus* against the Ministry.
- (vi) A group of peasants wish to obtain a *mandamus* against the Ministry of Water Development. They allege that the Ministry has failed to provide them with clean water despite the government's policy to supply clean water to all by the year 1989.
- (vii) The Child Protection Society wishes to sue a certain religious sect for failure to have children of the members of the sect vaccinated.

Is the door to the law open to the above groups? If so, how many door-keepers stand guard before the law? Will the door-keepers admit any of the above groups to the law? If so, on what conditions?

This article seeks to look at the problems that are likely to be encountered by a group that seeks to vindicate the rights of its members, or those whose interests it represents through litigation. There are two types of groups contemplated:

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² Kafka; *The Trial*; Penguin Modern Classics, 1987, at 235.

- (a) Standing groups, that is groups with permanent structures which are set up to promote or fight against certain government policies, or to promote or fight against certain private interests.
- (b) *Ad hoc* groups which are set up for purposes of pursuing specific litigation.

Some groups may litigate not only because they want to win in court, but also for other objectives, for example, publicity. Litigation may be perceived as one element in the group's campaign strategy. Whatever strategy is adopted and whatever objectives are pursued, these groups have to jump several hurdles that the legal system has placed in front of them, before they can successfully vindicate the rights of their members or those they represent. The problems that face groups which seek to litigate arise mainly from the essentially individualistic nature of Zimbabwean civil procedural law.

This article discusses:

- (a) The nature of Zimbabwean civil procedural law,
- (b) Provisions in Zimbabwean civil procedural law which permit representation of group interests and their shortcomings, and
- (c) How representation of group interests may be used to facilitate the extension of democratic rights to those, who as individuals, have no access to courts and have no other ways of realising and enforcing their rights.

The nature of Zimbabwean Procedural Law

Zimbabwean civil procedure is modelled on English procedure. On colonising Zimbabwe, the British provided that, save for the provision for the application of customary law in certain limited and defined instances, the law to be administered in the then colony would be the law in force at the Cape of Good Hope on 10th June 1891 as modified by subsequent legislation.³ The substantive law of the Cape in 1891 was basically Roman-Dutch law with a certain degree of English influence. It has been said that in the area of procedural institutions, English law left an unmistakable impression on Cape Law.⁴

An analysis of Zimbabwean civil procedural law would be incomplete and inadequate if it failed to take cognisance of the influence of English law. English procedural law is predicated on, or derives from, the classical division between private and public law.⁵ According to the division, private law governs interpersonal relationships. It covers the domain of contract, tort (delict) and property. In their daily intercourse individuals bargain in the shadow of the law which they may choose to modify or abandon through contract.⁶ The laws of contract, delict and property define the substantive rights and remedies which individuals have between themselves. Civil procedural law provides individuals with a machinery for activating or mobilising substantive law for the purposes of asserting their private substantive rights. The state has no concern whether individuals enforce legal rights available to them, much less whether they invoke the procedure of the law.⁷

In contradistinction to private law is public law. Public law describes those rights and interests which are perceived or deemed to be so general and pervasive as to require state protection. The state does not generally leave it to those individuals who suffer as a result of an

³ Section 19 of the High Commissioner's Proclamation of 10th June 1891, s 26 of the Matebeleland Order In Council 1894, s49 of the Southern Rhodesia Order In Council 1898.

⁴ Herbstein and Van Winsen, page 3.

⁵ Cappelletti and Garth, "Finding An Appropriate Compromise" 1983 Civil Justice Quarterly, 115.

⁶ Cappelletti and Garth, *op. cit.* 115.

⁷ Cappelletti and Garth, *op. cit.* 115.

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infringement of public rights or interest to invoke or mobilise the law. Rather, the state arrogates to itself the right to bring to book those infringing public rights.

The private law - public law distinction found justification in the *laissez-faire* theories which were current in nineteenth century Europe. According to the theories, the state had an important role to play in the maintenance of law and order in the interest of the general public. The maintenance of law and order justified state intervention in the interest of the general public once a public right was infringed. Furthermore, it justified state provision and initiation of procedures to remedy any public wrong. In private affairs, the state was perceived as having a limited role to play. That limited role did not go beyond providing a machinery or a procedure for the vindication of private rights. The decision to initiate proceedings or to mobilise the machinery of justice for the vindication of private rights was left to the individuals or parties concerned.

The perceived limited role of the state in legal matters was consonant with the *laissez-faire* economic theories of the day which advocated non-intervention by government in economic affairs. In the legal sphere, *laissez-faire* theories advocated the freedom and sanctity of contract and the freedom to use and deal with property as the owner saw fit. Any infringement of the freedom and sanctity of contract and the freedom to use and deal with property was therefore outside the scope of government obligations. It was left to the aggrieved party to mobilise the machinery of justice to remedy the infringement. Thus the right to initiate proceedings to remedy the infringement of a private right became a right akin to a property right. The person in whom the right vested had the freedom to choose either to initiate proceedings to remedy the infringement or to turn a blind eye to it.

In theory, any individual whose right had been infringed could invoke the machinery of justice to uphold his rights. In this manner was the liberal myth of equality before the law born. This ideological cloak served the interests of the *bourgeoisie* who had overthrown the feudal landlords and feudalism. Feudalism institutionalised inequality before the law. Inequality before the law under feudalism was one of the rallying points of the *bourgeois* revolution. To the bourgeoisie, equality before the law meant formal and procedural equality. The machinery of justice was available to anyone with the means to mobilise it. And not everyone had the means to do so.

Thus an individualistic civil procedural system was born. Substantive law rights also are individualistic. Only individuals with infringed rights can seek redress using traditional civil procedure as the remedy is linked to the individual right. Under an individualistic system, litigation is perceived as a bipolar affair with two parties locked in a winner-take-all controversy.⁸ Such a system has no room for groups that seek to use litigation to further their ends. As Shivji observes:

.....the law and the legal system disarticulate, disorganise and demobilise actual and potential opposition/resistance to the dominant social order. In particular atomisation and individualisation of class opposition are built in the law form, legal formalities and techniques and legal institutions.⁹

The bourgeoisie developed a system of civil procedure that excluded groups from the courts. In this way they ensured that the dispossessed and disadvantaged would not mobilise and organise themselves using the legal system.

The individualistic nature of private law rights and traditional civil procedure is underscored by the purpose served by private law remedies. Contractual and delictual remedies

⁸ Chayes, "Public Law Litigation And The Burger Court"; 1982 *Harvard Law Review*, 4-5.

⁹ Shivji IG. " Within And Beyond Legal Radicalism", in Shivji IG Ed, *Limits of Legal Radicalism*, 120

are linked with an individual's socio-economic circumstances in the sense that they seek either to ensure the realisation of what would have resulted from the performance of a contract or the re-establishment of the *status quo* disturbed by the commission of a delictual act. Traditional legal remedies are therefore not designed to facilitate the improvement of a litigant's socio-economic circumstances but simply to restore his or her position to what it was before the contractual or delictual wrong was perpetrated.

Attempts have been made to reform traditional civil procedure with a view to accommodating groups that seek to use it. In developed capitalist countries the view is that these reforms are part of a whole package of reforms made necessary by the welfare state.¹⁰ Unlike the state in *laissez-faire* economic theories, the welfare state is seen as having a role to play in economic affairs. The state intervenes in the economy and regulates the activities of the economically powerful in favour of the weak. New economic, political and social rights which favour the weak are created. By their nature, these new rights are available to groups of dispossessed and disadvantaged victims of discrimination, consumers of defective products, etc. It thus became necessary to have a civil procedural system that permits the representation of group interests.¹¹ Several procedural devices were introduced to cater for the new rights.¹² An example of such procedure is the American Class Action. It developed in response to the demands of organisations such as Civil Rights movement. This brave and pioneering procedure has run into problems.¹³

The welfare state was not a result of capitalist philanthropy or magnanimity. Rather, it was a result of serious class struggles between capital and labour. The welfare state represents concessions by capital at a time when labour was very strong. Of late, state intervention in the economy has been perceived as overregulation by capital. There is now a backlash against rights introduced during the heyday of the welfare state.¹⁴ Civil procedural devices introduced in the height of the welfare state have not been very successful in practice.

Attempts have also been made to create and develop group-oriented rights and remedies and to transform and transcend traditional civil procedural requirements in some developing countries. Social action litigation developed by the Indian Supreme Court immediately comes to mind when group litigation in developing countries is discussed. Social action litigation derives from the revolutionary and brave interpretation of human rights adopted by the Indian Supreme Courts. (Social action litigation is briefly discussed in the section on reforms).

Zimbabwean civil procedural law has neither been touched by reforms associated with the welfare state nor by social action litigation. As a result, Zimbabwean civil procedure still retains the hallmarks of a bipolar and individualistic procedure.

Representative proceedings in Zimbabwe

(a) *The common law position*

Under Roman - Dutch common law, it is not possible for a number of plaintiffs with separate causes of action against the same defendant to join in one summons unless joinder can be justified upon considerations of convenience, which is a court to decide.¹⁵ Thus under common law the court has a discretion in deciding whether or not to permit a number of plaintiffs to sue as a group. In exercising its discretion, the court is guided by considerations of convenience.

¹⁰ For a discussion on this, see Cappelletti and Barth, *op. cit.*

¹¹ Cappelletti and Garth *op. cit.* 112.

¹² For a discussion on these, see Cappelletti and Garth, *op. cit.*

¹³ For a very interesting discussion, see Chayes, *op. cit.*

¹⁴ Cappelletti and Garth *op. cit.* 112.

¹⁵ Herbststein and van Winsen *op. cit.* 163-164.

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(b) *Order 13. Rule 89*

The Common law position has been modified by the Rules of Court. The particular rule in question is Rule 89 (1) of the Rules of the High Court.¹⁶ Order 13, Rule 89 (1) provides that:

Where numerous persons have the same interest in any proceedings, the proceedings may be begun, and, unless the court otherwise orders, continued, by or against any one or more of them as representing all except one or more of them.

This rule received judicial consideration in the case of *Wakefield v A.S.A Seeds (Private) Limited*.¹⁷ Citing, with approval, the judgment in the English case of *John v Rees and Ors*.¹⁸ Goldin J said Rule 89 (1) is a flexible rule of convenience which enables and permits a representative suit when a plaintiff represents those who have a common interest and a common grievance and seek the same form of relief.¹⁹ He went on to say that representative proceedings provided for by Rule 89(1) are not the subject of principle but a tool of convenience in the administration of justice.²⁰

What is important to note is that Rule 89 (1), like common law, is predicated on considerations of procedural convenience. Since there is no principle of law which requires the court to order joinder of parties, it means that it is left to the discretion of the court to determine whether or not convenience requires joinder. This poses the first problem for groups which seek to litigate. They cannot demand as a matter of legal principle, that the court should permit joinder.

The second problem is that in Zimbabwe there has been very little litigation turning on the interpretation of Rule 89 (1). This fact is an indication that the procedure, limited as it is, has not been tested. Reference will be made to English cases which are based on Rules of the Supreme Court Order 15 Rule 12 (1) which is worded in exactly the same way as Rule 89 (1). In *Smith v Cardiff Corporation (Number 1)*²¹ it was held that to enable an action to be constituted as a representative action, the plaintiff must show that all members of the class on whose behalf they sued had a common interest in a common subject matter, that all had a common grievance and that the relief was in its nature beneficial to them all.²²

Thus to satisfy the requirements of procedural convenience, the representative plaintiff must show:

- (i) a common interest in a common subject matter. and
- (ii) a common grievance: and
- (iii) an interest beneficial to all concerned.

By imposing the three requirements, the English courts have adopted a restrictive interpretation to the Rule. Since Rule 89(1) is based on R.S.C order 15 Rule 12 (1) and since the English interpretation of the rule was accepted in *Wakefield v A.S.A Seeds* (supra), it seems reasonable to suggest that the English interpretation in *Smith v Cardiff Corporation* (supra) will be followed by Zimbabwean courts. The requirements of a common interest and a common grievance would restrict the representative action to situations where the parties have the same cause of action. Thus the action would be available in situations where the causes of action arise out of the same breach of contract or the same commission of a delict. As Uff points out, the most

16 SI No 1047 of 1971

17 1976(2) RLR 63.

18 [1970] Ch D 345 at 370-2.

19 1976 (2) RLR at 71

20 1976 (2) RLR at 71

21 [1953]2 ALL ER 1373.

22 For a similar formulation, see *John v Rees* supra at 370-2.

appropriate case under the Rule is an action by or against an unincorporated association such as a members' club.²³

The requirement that the relief sought must be beneficial to all whom the plaintiff proposes to represent imposes a further restraint on the representative procedure. It follows that if the relief sought is only beneficial to a section of the group, then the procedure is not available. Furthermore, in *Market and Co Limited v Knight Steamship Co Limited*,²⁴ it was held that damages cannot be awarded to a representative on behalf of the whole class as they are personal. It is submitted that damages can and should be separated from the issue of liability. The representative action could then focus on establishing the issue of liability.

On the basis of judicial interpretation of the equivalent section in English law, Rule 89 is not of much use to groups which seek to use litigation to further their own ends or the ends of their members. It is of limited use to *ad hoc* groups of litigants whose actions arise from the same cause of action. It is of limited use to pressure groups that may seek to use the law as part of their campaign strategy. Such groups may wish to sue in their own name and not in the name of a representative. The limitations of the representative action are understandable if the context in which it arose is taken into consideration. For group litigation to succeed, either Rule 89 would have to be interpreted in a liberal manner or a new procedure would have to be introduced.

(c) *The lead action/test case*

The lead action or test case procedure is a procedure whereunder the group does not bring individual actions together. Rather, it picks a case or cases that are representative of the rest of the cases and brings an action on that or those cases. It stays action on the rest of the cases. The aim is to determine liability on the case or cases so chosen. The procedure is appropriate for cases which have the same cause of action or where the causes of action arise out of similar fact situations. Once liability has been established, the group can then proceed with the rest of the cases against the defendant on the issue of damages or whatever remedy is sought. A word of caution should be added; the group should ensure that it separates the general issue of liability from the particular case. If this is not done there is a danger that the particular case may fail for reasons other than merit. This may prejudice the chances of success for the remaining actions.

The lead action/test case procedure is also of limited value to groups that seek to sue in their own name. The group may wish to have recourse to the courts to vindicate a right which it enjoys as a group. In such a case, the procedure would be of no practical value to the group.

Problems that groups are likely to face

(a) *The Issue of Justiciability*

A group seeking to vindicate its rights or the rights of members through litigation needs to establish whether or not the rights are justiciable. In simple terms, the group needs to establish whether or not the breach of the right is capable of being resolved legally through the application of legal rules and principles. The interests which the group may seek to vindicate through the legal system may not lend themselves to traditional legal methods of dispute resolutions. According to Jolowicz;

the approach of the courts is essentially to try to avoid the broader issues of policy by concentrating on the conduct actual or prospective, of the defendant in order to see whether it offends against some rule or principle of law.²⁵

²³ Uff K; Class, "Representative and Shareholders Derivative Actions in English Law"; 1986 Civil Justice Quarterly 54.

²⁴ [1910] 2 KB 1021.

²⁵ Jolowicz; "Protection of Diffuse, Fragmented and Collective Interest" (1983) 42 Cambridge Law Journal 222.

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Therein lies the rub. The interests that the group may wish to protect or vindicate through litigation are more often than not likely to involve broader issues of policy. Take for example a group of squatters or peasants which seeks to compel a government department to provide it with services. The dispute is likely to involve issues of policy and not law. According to Jolowicz:

Where no directly applicable legal framework exists such conflicts of interests can be resolved only at a political level if indeed they can be resolved at all.²⁶

The legal system thus discriminates against certain conflicts of interests. Through substantive law requirements, some conflicts of interest are removed from the legal domain and are left to be resolved politically. Courts perceive themselves, and are perceived, as individual dispute resolution fora. However, disputes or conflicts of interest which come before them must be capable of being resolved through the application of some rule or principle of law. Unfortunately, most group interests may not be amenable to legal protection. An extension of substantive law rights becomes necessary if groups are to use litigation effectively.

(b) *Costs*

As regards costs, the general rule is that costs follow the event. This is what is generally called the indemnity rule of costs. In simple terms, it means that the loser pays the winner's costs. Thus assuming a group finds a representative plaintiff who satisfies the requirements of Rule 89 and he loses the action, he will have to bear the costs. The same applies to the lead action/test case. The plaintiff in the lead action will have to bear the burden of costs in proving liability.

If group litigation is to be successful a way will have to be found around the indemnity rule. A fund could be established to assist those groups that pursue public interest litigation. Alternatively, contributions could be made by all those affected and interested organisations such as non-governmental organisations.

(c) *Locus Standi*

A group seeking to use litigation to further the interests of its members has to satisfy the requirements of standing, that is, it has to show sufficient interest in the subject matter of litigation to convince the court that it is the proper party to the proceedings. The interest which needs to be shown is a legal one. In *Nasionale Party SWA v Konstitusionele Raad*²⁷ it was held that the test for standing is sufficient interest. This is a threshold requirement that has to be satisfied before a party can proceed with an action.

In *Wood and Ors v Ondangwa Tribal Authority and Another*²⁸ it was held that under Roman - Dutch Law, no private person can proceed by a popular action (*actio popularis*). It was further held that the *actiones populares* has become obsolete in the sense that a person is not entitled to protect the rights of the public or champion the cause of the people. On the same subject, it was held in *Nasionale Party, SWA v Konstitusionele Raad (supra)* that a person asserting the rights of the general public has to show a personal interest, that is personal prejudice to satisfy the requirements of standing.

Establishing the required interest is likely to pose a significant problem to groups seeking to litigate. In *Standard General Insurance Company Limited v Gutman No and Ors*²⁹ it was held that an indirect interest in the right sought to be asserted will not suffice. In *Christian League of*

²⁶ Jolowicz; op cit. 227.

²⁷ 1987(3) SA 544.

²⁸ 1975(2) SA 294.

²⁹ 1981(2) SA 426.

*Southern Africa v RALL*³⁰, an application for the appointment of a *curator ad litem* to represent the interests of an unborn child of the respondent's daughter, which unborn child had been conceived when the respondent's daughter was raped, was made. The applicant was an organisation whose objects included the promotion of the Christian faith, morals and ethics. It was alleged that the protection of the unborn child was pertinent to Christian morals and ethics. The court found that the applicant had not shown any link with the unborn child in whose interests the application was brought. It was held that the applicant had shown no legal interest on the grounds on which it had *locus standi in judicio*. This case typifies the problem that a group seeking to litigate is likely to encounter. Establishing sufficient interest where the group is representing the interests of a member is likely to prove problematic.

An interesting formulation of the standing requirement was made in the case of *Deary N.O. v The Acting President of Rhodesia and Ors.*³¹ Section 3 (2) of the Emergency Powers (Special Courts Martial: Martial Law) Regulations, 1978 authorised the execution outside areas subject to martial law of persons condemned to death by special courts martial within those areas. Applicant who represented an organisation connected with the Roman Catholic Church applied for an interdict prohibiting such executions. It was argued that Applicant had no *locus standi*. It was held that Applicant had *locus standi* to bring the application in view of the seriousness of the abuse alleged by him, the financial and other circumstances of the condemned persons and their relatives and the fact that some of these persons were probably Roman Catholics. At page 203, Beck J as he was then, had this to say:

The non-frivolous allegation of a systematic disregard for so precious a right as the right of life is an allegation of an abuse so intolerable that the court will not fetter itself by pedantically circumscribing the class of persons who may request the relief of these interdicts. In the matter now before me the people in whose interest the applicant has brought this application may well include impecunious and unsophisticated tribes-people who all live in isolated areas far from the seat of the court and whose freedom of action and movement may be or may be thought by them to be severely circumscribed by the application of martial law to the areas in which they reside. In my view this suffices to clothe the applicant with the necessary locus standi to bring an action of this nature

This is a robust and expansive formulation of the standing requirement. The judge considered the importance of the right asserted in deciding whether or not the applicant had standing. Further, he considered the circumstances of the people whose interests the applicant sought to represent. This is a proper formulation of the standing requirement in actions involving groups. Courts should view the standing requirement not as a mere procedural requirement, but should also consider the merits of each case before deciding the issue of standing. The seriousness of the right asserted and the circumstances of the members of the groups or the people the group seeks to represent should be of paramount importance in the determination of the standing requirement.

(d) *Res Judicata*

According to Order 13, Rule 89(3), a judgment given in representative proceedings is binding on all persons represented but shall not be enforced against any person not a party to the proceedings except with the leave of court. According to Rule 89 (5), the person against whom the judgment or order has been made may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.

The above provisions deal with the issue of *res judicata*. Under Rule 89 (3), a member of the group represented will be bound by the findings of the court. It means that no member or

30 1981(2) SA 821.

31 1979 RLR 200.

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members of the group can withdraw after judgment and claim that he or they are not bound by the findings of the court. If they attempt to bring another action later on, they will be met with a special plea that the "whole of the legal rights and obligations of the parties are concluded by the earlier judgment and that the plaintiff is stopped by the findings of fact involved in the earlier judgment," as laid down in *Flood v Taylor*.³²

The plea of *res judicata* assumes a lot of importance in actions involving large groups. The possibility of a member or members of the groups withdrawing after judgment in dissatisfaction is higher with larger groups than smaller groups. The issue needs to be seriously addressed for purposes of group litigation.

The need for reform

From this analysis, it becomes obvious that the law as it currently stands has very little room for groups that seek to protect or vindicate their rights through the legal system. Such a position is unacceptable in a society in which the political economy of the country excludes the majority of the people from enjoying access to the courts through excessive costs and formalities. If as individuals, people do not enjoy access to the courts, they should be permitted access as a group. If they have rights they enjoy individually, there is no rhyme nor reason why they should not be allowed to aggregate their actions. The need for reform is therefore self-evident.

The dangers of collective representation should not be overlooked. The individual may find himself unrepresented or misrepresented.³³ Another danger that has been mentioned in connection with group litigation is the possibility of abuse by groups that may employ it to force the other party to settle out of court rather than incur the adverse publicity that group actions often attract.³⁴

Any proposed reform should address itself to problem areas mentioned earlier. These include:

- (a) the need to liberalise standing requirements so as to permit groups to represent their own interests as a collective or those of their members.
- (b) the modification or replacement of the indemnity rule in group actions;
- (c) an extension of remedies that are available to groups. The equivalent of Rule 89 in England has been restrictively interpreted to permit groups to seek interdicts and declaratory orders but not damages. Damages should be made available to groups. Groups should be permitted to separate the issue of liability from the issue of damages. Once the groups has established liability, individual claims for damages could then be considered.
- (d) the clarification of the issue of *res judicata*.

Additionally, a screening procedure similar to the one found in Rule 23 of the United States Federal Rules of Civil Procedure, should be considered.³⁵ Rule 23 stipulates that before an action is maintained, it should be subject to judicial approval or certification. This is designed to ensure that unfounded actions are not allowed to proceed and that the procedure is not used as a form of legalised blackmail.³⁶

Under Rule 23, a number of conditions need to be satisfied before a class or group action can be certified. These are:

³² 1978 RLR 230.

³³ Cappelletti and Garth, *op. cit* 112.

³⁴ See Van Beuren, (1983) *Legal Action Group*, 9.

³⁵ See Van Beuren and Chayes for a discussion of Rule 23.

³⁶ Van Beuren, *op. cit* at 9.

- (a) the class or group must be so large that joinder is impracticable;
- (b) there must be questions of law and fact common to the group or class;
- (c) the representative parties must fairly and adequately represent the class.

In addition to the above, the class or group action is allowed where:

- (i) separate actions would impair or impede other group members' interests; or
- (ii) separate actions would lead to judgments establishing varying standards of conduct; or
- (iii) an interdict or declaratory relief would be suitable for the entire group.

If reform on the lines suggested above is introduced, the role of the courts would need to be modified and extended. In addition to being dispute or conflict settlement fora courts would have to play a managerial role. They would have to be managers of the group action, especially when it comes to the issue of determining damages suffered by the different members of the group and the subsequent disbursements. One can envisage a situation where some members of the group may choose to accept out of court settlements offered by the defendant while others may choose to have their rights and entitlements decided by the court. If such a situation arose, the courts would have to depart from their traditional role as conflict resolution fora and become managers and paymasters. Courts would therefore have to play a more active and affirmative role than they are presently playing.

The reforms suggested above are piecemeal ones which have been introduced and adopted in advanced capitalist countries. They seek to ameliorate the injustices inherent in traditional legal rights, remedies and procedures. Since they have their genesis in developed capitalist countries, would it be wise and realistic to prescribe them for developing countries such as Zimbabwe? Are they not culturally and historically specific to those countries where they have their origins? Would it not be a case of prescribing old wine for new wine skins?

Developing countries face socio-economic problems which call for radical rather than piecemeal reforms. Social relations in these countries are characterised by inequality in the distribution of wealth, exploitation, abject poverty, illiteracy, ignorance, poor and inadequate health services, state repression and administrative inefficiency. Victims of the above conditions have no meaningful rights and remedies under the traditional legal system. What is needed therefore, are legal reforms which have, as their target, the various disadvantaged sections of society, and which seek to promote socio-economic and political transformation. An example of such legal reforms are the reforms that have been evolved and developed by the Supreme Court of India. These reforms have been described as social action litigation.³⁷ What follows is a brief discussion of these reforms.

Social action litigation is a product of three interrelated developments; viz:

- (i) judicial activism in the Indian Supreme Court,
- (ii) the social justice approach to the interpretation of fundamental rights enshrined in the constitution, and
- (iii) participatory justice,³⁸

³⁷ For a discussion on social action litigation, see Justice Bhagwati, "Fundamental Rights In Their Economic, Social and Cultural Context", in *Developing Human Rights Jurisprudence, The Domestic Application of International Human Rights Norms, Commonwealth Secretariat, 1988* and also Baxi, "1982 (No 29) *International Commission of Jurists Review*, 37.

³⁸ Bhagwati, *op. cit.*, 58.

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Since these reforms are "judge led and even judge-induced",³⁹ it is convenient to start by discussing judicial activism. However, it is not possible to put the three developments into neat compartments. The categorisation adopted here is for purposes of convenience and as such, it will not be slavishly stuck to.

Judges of the Indian Supreme Court have sought to depart from the traditional function of judges which is to interpret and apply the law as it exists.⁴⁰ Finding themselves in the midst of inequality, abject poverty, illiteracy and ignorance and repression, they have refused to interpret and apply the existing law knowing that such application and interpretation would result in injustice to the masses of people. To this end, they have initiated a movement for juridical democracy through innovative uses of judicial power.⁴¹

Basically, the innovative uses of judicial power is encapsulated in the social justice approach to the interpretation of fundamental rights enshrined in the constitution. While not underrating the importance of civil and political rights championed by the West, the Indian Supreme Court has realised that these rights are meaningless to the majority of people in the developing world who suffer from exploitation, repression and administrative inefficiency. The court has realised that social and economic rights which focus on socio-economic transformation are more relevant to the disadvantaged than civil and political rights.⁴²

In the light of the above realisation, some judges of the Supreme Court such as Justices Krishna Iyer and Bhagwati began converting much of constitutional litigation into social action litigation through a variety of techniques of juristic activism.⁴³ In their interpretation of fundamental rights, they have shifted their focus from the bureaucratic abuse of rights approach to the social justice approach. This shift of focus has resulted in an expansion in the frontiers of fundamental rights.⁴⁴ According to the social justice approach, fundamental rights have been interpreted as imposing affirmative obligations on the state instead of merely imposing negative restraints on the powers of the state.⁴⁵ Thus where the state is held to have violated fundamental rights, it is required to perform an affirmative act to remedy the violation.

One of the techniques which has been adopted in the interpretation of fundamental rights has been to place reliance on international human rights instruments such as the International Convention on Civil and Political Rights. The result has been the incorporation of international human rights norms into domestic law through a process of judicial interpretation.

It is necessary at this stage to give a few examples of the court's decisions. The court has held that insistence on monetary bail in a case of a poor accused would be inconsistent with reasonable, fair and just procedure so far as the poor accused is concerned. This is in violation of Section 21 of the Indian Constitution which provides that no person shall be deprived of his life or personal liberty except by procedure established by law. The court has also held that in a criminal case where the accused's life or personal liberty is in danger, it is a violation of Article 21 of the Indian Constitution to proceed to try him without giving him proper and adequate legal representation if the accused is too poor or ignorant to afford legal representation. The court thus requires the state to provide free legal assistance to poor accused.⁴⁶

39 Baxi; op. cit, 38.

40 Bhagwati, op. cit, 61

41 Baxi, op. cit, 37.

42 Bhagwati, op cit, 62.

43 Baxi, op. cit, 39.

44 Bhagwati, op. cit, 63.

45 Bhagwati, op. cit, 64.

46 Bhagwati, op. cit, 65.

What is of particular relevance for our purposes is the innovative and creative extension of the doctrine of *locus standi* so as to ensure that the underprivileged have access to justice. The court realised that access to justice is a fundamental right to the underprivileged sections of society. The doctrine of *locus standi* provides that an action can only be commenced by the person who has suffered injury. In *habeas corpus* petitions, the court usually acts on a letter written by or on behalf of the detainee.⁴⁷ Because of the detainee's inability to petition the court and the importance attached to the right to freedom, exceptions have been made to the general rule to allow other people to petition the court on the detainee's behalf.

Under Justice Bhagwati's direction, the Indian Supreme Court extended the technique employed in *habeas corpus* petitions to disadvantaged sections of society.⁴⁸ The doctrine of *locus standi* has been extended to allow any public spirited person who is aware of any injury that has been suffered by a person or group of persons who are unable by reason of poverty, ignorance or any other socio-economic handicap, to bring an action seeking judicial redress for the injury caused to such person or class of people. This can be done by addressing a letter to the court.⁴⁹

The Supreme court has thus evolved a new jurisdiction; the "epistolary jurisdiction". This new jurisdiction has been rightly called a "momentous social invention".⁵⁰ Through the epistolary jurisdiction, the court has opened its doors to underprivileged women and juveniles, workers, prisoners awaiting trial and many other disadvantaged sections of society.

What are the lessons that can be learnt from developments in India? The most important lesson is that the potential, and indeed the capacity, for reform lies in the legal actors, institutions, laws and legal strategies. The Indian Supreme court has demonstrated that judges who are courageous, resourceful, and above all, who are not tradition-bound, can perform a lot within the existing legal and institutional constraints. What we need in Zimbabwe are judges and lawyers who are courageous, resourceful and iconoclastic. We need legal actors whose vision of law is not static but dynamic, actors who will fashion the law in an innovative and resourceful manner and make it responsive to the demands and cries of the masses of people.

In discussing law reform, the nature and character of law need to be properly appreciated. Law in general individualises, atomises and disarticulates social class struggle into individual grievances and disputes.⁵¹ Reform should address itself to the above aspects of law. Group litigation is one method of democratising law and therefore a method of legal struggle for democratic rights. By aggregating their actions or demands, the dispossessed and disadvantaged seek to use the law to reverse the individualisation and disarticulation of social class struggles into individual grievances that is built into legal formalities and techniques. Group litigation serves to mobilise, organise and conscientise those who are beyond the pale of the law and the legal system.

Conclusion

The door-keepers who jealously stand guard before the law are too powerful for the poor, lone man from the country. He has waited patiently by the door in the hope that he will be granted admittance to the law. His waiting has been in vain. It is time for the man from the country to realise that he will not be granted admittance in spite of his long wait. The only way to gain admittance is through struggle. Since the door-keepers are too powerful for him, he should seek the assistance of other men who, like him, seek admittance to the law but are denied by the

47 Baxi, *op. cit.*, 40.

48 Baxi, *op. cit.*, 40.

49 Bhagwati, "Human Rights As Evolved by the Jurisprudence of the Supreme Court of India" 1987 (Vol. 13) *Commonwealth Law Bulletin*, 236 at 244.

50 Baxi, *op. cit.*, 40.

51 Shivji I. G., *op. cit.*, 120.

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powerful guards. For men like him, strength lies in numbers.

BIBLIOGRAPHY

1. Bhagwati P. N., Fundamental Rights In Their Economic, Social And Cultural Context, in *Developing Human Rights Jurisprudence, The Domestic Application of International Human Rights Norms*, Commonwealth Secretariat, 1988, 57.
2. Bhagwati P. N., Human Rights As Evolved By Jurisprudence of The Supreme Court of India, 1987 (Vol 13) *Commonwealth Law Bulletin*, 236.
3. Bhagwati P. N., Human Rights And Democratisation Of Remedies, 1983 (Volume X) *Indian Bar Review*, 584.
4. Baxi U, Social Action Litigation In The Indian Supreme Court, 1982 [No 29] *International Commission of Jurists Review*. 37.
5. Chayes A, Public Law Litigation And The Burger Court, (1982) *Harvard Law Review*,1
6. Cappelletti M and Garth B, Finding An Appropriate Compromise, (1983) 2 *Civil Justice Quarterly* 111.
7. Herbststein J, and Van Winsen L, *The Civil Practice Of The Superior Courts In South Africa*, 3rd Edition, Juta and Company, 1979,163 - 166.
8. Jolowicz, Protection of Diffuse Fragmented And Collective Interests In Civil Litigation, 1983 42 (2) *Cambridge Law Journal* 222.
9. Shivji I. G, Within And Beyond Legal Radicalism in Shivji I. G. (Editor), *Limits of Legal Radicalism*: Faculty of Law University of Dar es Salaam 117.
10. Uff K, Class, Representative And Shareholders' Derivative Actions In English Law, 1986 *Civil Justice Quarterly* 109.
11. Van Beuren, The Case of A Statutory Class Action,(1983), *Legal Action Group* (AUGUST) 7.
12. Yeazell, "From Group Litigation to Class Action "(1980) 27 *UCLA Law Review* 514 and 1067.



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