Introduction

“We Did not Create Sur Journal Because We Had Certainties, But Because We Were Full of Doubts”

Profile of Pedro Paulo Popovic

Reflections On the International Human Rights Movement in the 21st Century: Only the Answers Change

What an Era of Global Protests Says about the Effectiveness of Human Rights as a Language to Achieve Social Change

After Human Rights Standard Setting, What’s Next?

Global Trends and the Future of Human Rights Advocacy

The Future of Human Rights

Challenges to the Global Human Rights Regime: Are Human Rights Still an Effective Language for Social Change?

Human Rights as an Effective Way to Produce Social Change

UN Special Procedures System is “Designed to Be Ineffective”

“Besides Human Rights, I Don’t See a Solution for Serving the Victims”

“The Rule of Law Has Consolidated All the Injustices That Existed Before It”

Are we Depoliticising Economic Power?: Wilful Business Irresponsibility and Bureaucratic Response by Human Rights Defenders

Are Human Rights an Effective Tool for Social Change?: A Perspective on Human Rights and Business


Issues and Challenges Facing Networks and Organisations Working in Migration and Human Rights in Mesoamerica

The Protection of LGBTI Rights: An Uncertain Outlook
Emerging powers: Can it be that sexuality and human rights is a ‘lateral issue’?

SONIA CORRÊA

Transitional Justice and Social Change

CLARA SANDOVAL

PERSPECTIVES

NICOLE FRITZ

Human Rights Litigation in Southern Africa: Not Easily Able to Discount Prevailing Public Opinion

MANDIRA SHARMA

Making Laws Work: Advocacy Forum’s Experiences in Prevention of Torture in Nepal

MARIA LÚCIA DA SILVEIRA

The Struggle for the Recognition of Human Rights in Mozambique: Advances and Setbacks

HARIS AZHAR

The Human Rights Struggle in Indonesia: International Advances, Domestic Deadlocks

HAN DONGFANG

A vision of China’s Democratic Future

ANA VALÉRIA ARAÚJO

Challenges to the Sustainability of the Human Rights Agenda in Brazil

MAGGIE BEIRNE

Are we Throwing Out the Baby with the Bathwater?: The North-South Dynamic from the Perspective of Human Rights Work in Northern Ireland

INTERVIEW WITH MARÍA-I. FAGUAGA IGLESIAS

“The Particularities in Cuba Are Not Always Identified Nor Understood By Human Rights Activists From Other Countries”

VOICE

FATEH AZZAM

Why Should We Have to “Represent” Anyone?

MARIO MELO

Voices from the Jungle on the Witness Stand of the Inter-American Court of Human Rights

ADRIAN GURZA LAVALLE

NGOs, Human Rights and Representation

JUANA KWEITEL

Experimentation and Innovation in the Accountability of Human Rights Organizations in Latin America

PEDRO ABRAMOVAY AND HELOISA GRIGGS

Democratic Minorities in 21st Century Democracies

JAMES RON, DAVID CROW AND SHANNON GOLDEN

Human Rights Familiarity and Socio-Economic Status: A Four-Country Study

CHRIS GROVE

To Build a Global Movement to Make Human Rights and Social Justice a Reality For All

INTERVIEW WITH MARY LAWLOR AND ANDREW ANDERSON

“Role of International Organizations Should Be to Support Local Defenders”
<table>
<thead>
<tr>
<th>Tools</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Global Human Rights Movement in the 21st Century: Reflections from the Perspective of a National Human Rights NGO from the South</td>
<td>375</td>
</tr>
<tr>
<td>Systems, Brains and Quiet Places: Thoughts on the Future of Human Rights Campaigning</td>
<td>385</td>
</tr>
<tr>
<td>A ‘Movement Support’ Organization: The Experience of the Association For Women’s Rights in Development (AWID)</td>
<td>399</td>
</tr>
<tr>
<td>Supporting Locally-Rooted Organizations: The Work of the Fund For Global Human Rights in Mexico</td>
<td>411</td>
</tr>
<tr>
<td>Human Rights Activism In Times of Cognitive Saturation: Talking About Tools</td>
<td>419</td>
</tr>
<tr>
<td>Raising Digital Consciousness: An Analysis of the Opportunities and Risks Facing Human Rights Activists in a Digital Age</td>
<td>427</td>
</tr>
<tr>
<td>New Information and Communication Technologies’ Influence on Activism in Cambodia</td>
<td>437</td>
</tr>
<tr>
<td>Strategic Litigation Experiences in the Inter-American Human Rights System</td>
<td>449</td>
</tr>
<tr>
<td>“Get Off Your Pedestal!”</td>
<td>461</td>
</tr>
<tr>
<td>“NGO’s are not the Same as Civil Society But Some NGOs Can Play the Role of Facilitators”</td>
<td>469</td>
</tr>
<tr>
<td>Convergence Towards the Global Middle: “Who Sets the Global Human Rights Agenda and How”</td>
<td>475</td>
</tr>
<tr>
<td>Solid Organisations in a Liquid World</td>
<td>483</td>
</tr>
<tr>
<td>Why We Welcome Human Rights Partnerships</td>
<td>491</td>
</tr>
<tr>
<td>The Future of Human Rights: From Gatekeeping to Symbiosis</td>
<td>499</td>
</tr>
<tr>
<td>Towards a Multipolar Civil Society</td>
<td>511</td>
</tr>
<tr>
<td>“Avoiding Using Power Would Be Devastating for Human Rights”</td>
<td>519</td>
</tr>
<tr>
<td>“We Are Very Much A Multi-Polar World Now, But Not One Comprised Solely Of Nation States”</td>
<td>525</td>
</tr>
<tr>
<td>“Human Rights Organisations Should Have a Closer Pulse to the Ground” Or How We Missed the Bus</td>
<td>531</td>
</tr>
<tr>
<td>“North-South solidarity is key”</td>
<td>539</td>
</tr>
</tbody>
</table>
INTRODUCTION

HUMAN RIGHTS IN MOTION:
A MAP TO A MOVEMENT’S FUTURE

Lucia Nader (Executive Director, Conectas)
Juana Kweitel (Program Director, Conectas)
Marcos Fuchs (Associate Director, Conectas)

Sur Journal was created ten years ago as a vehicle to deepen and strengthen bonds between academics and activists from the Global South concerned with human rights, in order to magnify their voices and their participation before international organizations and academia. Our main motivation was the fact that, particularly in the Southern hemisphere, academics were working alone and there was very little exchange between researchers from different countries. The journal’s aim has been to provide individuals and organizations working to defend human rights with research, analyses and case studies that combine academic rigor and practical interest. In many ways, these lofty ambitions have been met with success: in the past decade, we have published articles from dozens of countries on issues as diverse as health and access to treatment, transitional justice, regional mechanisms and information and human rights, to name a few. Published in three languages and available online and in print for free, our project also remains unique in terms of geographical reach, critical perspective and its Southern ‘accent’. In honour of the founding editor of this journal, Pedro Paulo Poppovic, the 20th issue opens with a biography (by João Paulo Charleaux) of this sociologist who has been one of the main contributors to this publication’s success.

This past decade has also been, in many ways, a successful one for the human rights movement as a whole. The Universal Declaration of Human Rights has recently turned 60, new international treaties have been adopted and the old but good global and regional monitoring systems are in full operation, despite criticisms regarding their effectiveness and attempts by States to curb their authority. From a strategic perspective, we continue to use, with more or less success, advocacy, litigation and naming-and-shaming as our main tools for change. In addition, we continue to nurture partnerships between what we categorize as local, national and international organizations within our movement.

Nevertheless, the political and geographic coordinates under which the global human
rights movement has operated have undergone profound changes. Over the past decade, we have witnessed hundreds of thousands of people take to the streets to protest against social and political injustices. We have also seen emerging powers from the South play an increasingly influential role in the definition of the global human rights agenda. Additionally, the past ten years have seen the rapid growth of social networks as a tool of mobilization and as a privileged forum for sharing political information between users. In other words, the journal is publishing its 20th issue against a backdrop that is very different from that of ten years ago. The protests that recently filled the streets of many countries around the globe, for example, were not organized by traditional social movements nor by unions or human rights NGOs, and people’s grievances, more often than not, were expressed in terms of social justice and not as rights. Does this mean that human rights are no longer seen as an effective language for producing social change? Or that human rights organizations have lost some of their ability to represent wronged citizens? Emerging powers themselves, despite their newly-acquired international influence, have hardly been able – or willing – to assume stances departing greatly from those of “traditional” powers. How and where can human rights organizations advocate for change? Are Southern-based NGOs in a privileged position to do this? Are NGOs from emerging powers also gaining influence in international forums?

It was precisely to reflect upon these and other pressing issues that, for this 20th issue, SUR’s editors decided to enlist the help of over 50 leading human rights activists and academics from 18 countries, from Ecuador to Nepal, from China to the US. We asked them to ponder on what we saw as some of the most urgent and relevant questions facing the global human rights movement today: 1. Who do we represent? 2. How do we combine urgent issues with long-term impacts? 3. Are human rights still an effective language for producing social change? 4. How have new information and communication technologies influenced activism? 5. What are the challenges of working internationally from the South?

The result, which you now hold in your hands, is a roadmap for the global human rights movement in the 21st century – it offers a vantage point from which it is possible to observe where the movement stands today and where it is heading. The first stop is a reflection on these issues by the founding directors of Conectas Human Rights, Oscar Vilhena Vieira and Malak El-Chichini Poppovic. The roadmap then goes on to include interviews and articles, both providing in-depth analyses of human rights issues, as well as notes from the field, more personalized accounts of experiences working with human rights, which we have organized into six categories, although most of them could arguably be allocated to more than one category:

Language. In this section, we have included articles that ponder the question of whether human rights – as a utopia, as norms and as institutions – are still effective for producing social change. Here, the contributions range from analyses on human rights as a language for change (Stephen Hopgood and Paulo Sérgio Pinheiro), empirical research on the use of the language of human rights for articulating grievances in recent mass protests (Sara Burke), to reflections on the standard-setting role and effectiveness of international human rights institutions (Raquel Rolnik, Vinodh Jaichand and Emílio
Álvarez Icaza). It also includes studies on the movement’s global trends (David Petrasek), challenges to the movement’s emphasis on protecting the rule of law (Kumi Naidoo), and strategic proposals to better ensure a compromise between utopianism and realism in relation to human rights (Samuel Moyn).

Themes. Here we have included contributions that address specific human rights topics from an original and critical standpoint. Four themes were analysed: economic power and corporate accountability for human rights violations (Phil Bloomer, Janet Love and Gonzalo Berrón); sexual politics and LGBTI rights (Sonia Corrêa, Gloria Careaga Pérez and Arvind Narrain); migration (Diego Lorente Pérez de Eulate); and, finally, transitional justice (Clara Sandoval).

Perspectives. This section encompasses country-specific accounts, mostly field notes from human rights activists on the ground. Those contributions come from places as diverse as Angola (Maria Lúcia da Silveira), Brazil (Ana Valéria Araújo), Cuba (María-Ileana Faguaga Iglesias), Indonesia (Haris Azhar), Mozambique (Salvador Nkamat) and Nepal (Mandira Sharma). But they all share a critical perspective on human rights, including for instance a sceptical perspective on the relation between litigation and public opinion in Southern Africa (Nicole Fritz), a provocative view of the democratic future of China and its relation to labour rights (Han Dongfang), and a thoughtful analysis of the North-South duality from Northern Ireland (Maggie Beirne).

Voices. Here the articles go to the core of the question of whom the global human rights movement represents. Adrian Gurza Lavalle and Juana Kweitel take note of the pluralisation of representation and innovative forms of accountability adopted by human rights NGOs. Others study the pressure for more representation or a louder voice in international human rights mechanisms (such as in the Inter-American system, as reported by Mario Melo) and in representative institutions such as national legislatures (as analysed by Pedro Abramovay and Heloisa Griggs). Finally, Chris Grove, as well as James Ron, David Crow and Shannon Golden emphasize, in their contributions, the need for a link between human rights NGOs and grassroots groups, including economically disadvantaged populations. As a counter-argument, Fateh Azzam questions the need of human rights activists to represent anyone, taking issue with the critique of NGOs as being overly dependent on donors. Finally, Mary Lawlor and Andrew Anderson provide an account of a Northern organization’s efforts to attend to the needs of local human rights defenders as they, and only they, define them.

Tools. In this section, the editors included contributions that focus on the instruments used by the global human rights movement to do its work. This includes a debate on the role of technology in promoting change (Mallika Dutt and Nadia Rasul, as well as Sopheap Chak and Miguel Pulido Jiménez) and perspectives on the challenges of human rights campaigning, analysed provocatively by Martin Kirk and Fernand Alphen in their respective contributions. Other articles point to the need of organizations to be more grounded in local contexts, as noted by Ana Paula Hernández in relation to Mexico, by Louis Bickford in what he sees as a convergence towards the global middle, and finally by Rochelle Jones, Sarah Rosenhek and Anna Turley in their movement-support model. In addition, it is noted by Mary Kaldor that NGOs are not the same as civil society,
properly understood. Furthermore, litigation and international work are cast in a
critical light by Sandra Carvalho and Eduardo Baker in relation to the dilemma
between long and short term strategies in the Inter-American system. Finally,
Gastón Chillier and Pétalla Brandão Timo analyse South-South cooperation from
the viewpoint of a national human rights NGO in Argentina.

Multipolarity. Here, the articles challenge our ways of thinking about power
in the multipolar world we currently live in, with contributions from the heads of
some of the world’s largest international human rights organizations based in the
North (Kenneth Roth and Salil Shetty) and in the South (Lucia Nader, César
Rodríguez-Garavito, Dhananjayan Sriskandarajah and Mandeep Tiwana). This
section also debates what multipolarity means in relation to States (Emilie M.
Hafner-Burton), international organizations and civil society (Louise Arbour) and
businesses (Mark Malloch-Brown).

Conectas hopes this issue will foster debate on the future of the global human
rights movement in the 21st century, enabling it to reinvent itself as necessary to
offer better protection of human rights on the ground.

Finally, we would like to emphasize that this issue of Sur Journal was made
possible by the support of the Ford Foundation, Open Society Foundations,
the Oak Foundation, the Sigrid Rausing Trust, the International Development
Research Centre (IDRC) and the Swedish International Development Cooperation
Agency (SIDA). Additionally, Conectas Human Rights is especially grateful for
the collaboration of the authors and the hard work of the Journal’s editorial
team. We are also extremely thankful for the work of Maria Brant and Manoela
Miklos for conceiving this Issue and for conducting most of the interviews, and
for Thiago Amparo for joining the editorial team and making this Issue possible.
We are also tremendously thankful for Luz González’s tireless work with editing
the contributions received, and for Ana Cernov for coordinating the overall
editorial process.
Human Rights in Motion

Perspectives

NICOLE FRITZ
Human Rights Litigation in Southern Africa: Not Easily Able to Discount Prevailing Public Opinion

MANDIRA SHARMA
Making Laws Work: Advocacy Forum’s Experiences in Prevention of Torture in Nepal

MARIA LÚCIA DA SILVEIRA
Human Rights and Social Change in Angola

SALVADOR NKAMATE
The Struggle for the Recognition of Human Rights in Mozambique: Advances and Setbacks

HARIS AZHAR
The Human Rights Struggle in Indonesia: International Advances, Domestic Deadlocks

HAN DONGFANG
A Vision of China’s Democratic Future

ANA VALÉRIA ARAUJO
Challenges to the Sustainability of the Human Rights Agenda in Brazil

MAGGIE BEIRNE
Are We Throwing Out the Baby with the Bathwater?: The North-South Dynamic from the Perspective of Human Rights Work in Northern Ireland

INTERVIEW WITH MARÍA-I. FAGUAGA IGLESIAS
“The Particularities in Cuba Are Not Always Identified nor Understood by Human Rights Activists from Other Countries”
Nicole Fritz
Nicole Fritz is the executive director of the Southern Africa Litigation Centre (SALC) based in Johannesburg, South Africa. SALC promotes and advances human rights and the rule of law in Southern Africa, primarily through strategic litigation support and capacity building.
Email: nicolef@salc.org.za

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

Original in English.
Received in April 2014.

KEYWORDS
Public opinion – Litigation – SADC Tribunal – Botswana – Death Penalty

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

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

1 Death penalty and public opinion

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

*Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions.*
without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected. (SOUTH AFRICA, S v. Makwanyane and Another, 1995, para. 88).

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

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

2 Regional courts and States’ acceptance

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

Some of the very earliest cases filed before the Tribunal concerned the contested land expropriation process in Zimbabwe. In 2007, the Tribunal ruled against Zimbabwe in the case of Campbell (Pvt) Ltd and Others v. The Republic of Zimbabwe and Others (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL, 2008), holding that the Zimbabwean law ousting the domestic courts’ jurisdiction to rule on the lawfulness of land seizures violated the rule of law in...
that it denied claimants the right of access to the courts and the right to a fair hearing. The Tribunal also held that the impugned law, in targeting white farmers alone, regardless of other factors, amounted to indirect racial discrimination and was accordingly unlawful. The Tribunal emphasised that its ruling would have been different had the land expropriations been conducted in a reasonable and objective rather than arbitrary manner (NATHAN, 2011, p. 126).

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

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

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

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

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

*While negative publicity may influence a State to comply with an adverse judgment, a human rights court or commission can exert pressure on a State only at the risk of*
jeopardizing the State’s voluntary support for the system itself. Regional systems thus are caught in a tension between maintaining political unity and protecting individual rights.

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

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

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

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

3 Customary law and judicial self-restraint

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

The High Court of Botswana found the consequence of the customary rule was that women had limited inheritance rights in comparison to their male siblings.
and that this meant that daughters could be evicted from their family home. The Court held that:

[The law [at issue] is biased against women [...] This gross and unjustifiable discrimination cannot be justified on the basis of culture [...] It cannot be an acceptable justification to say it is cultural to discriminate against women [...] Such an approach would [...] amount to the most glaring betrayal of the express provisions of the Constitution and the values it represents [...] [the law at issue] has no place in a democratic society that subscribes to the supremacy of the Constitution – a Constitution that entrenches the right to equality.

(BOTSWANA, Mmusi & Others v. Ramantele & Another, 2012, para. 200-202)

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

this court also rejects outright any suggestion [...] that this court must take into account the mood of society in determining whether there is violation of constitutional rights as this undermines the very purpose for which the courts were established.


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

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

wrong signal to those who are not cognizant of the primary role of a judge, namely to resolve disputes before him/her and interpret the law to be applied in the dispute before him/her. It is not for the judge to traverse issues that do not directly arise from the case being dealt with however important they may be.

(BOTSWANA, Ramantele v. Mmusi & Others, 2013, para. 74).

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

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

4 Conclusion

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

REFERENCES

Bibliography and Other Sources


Jurisprudence


SUR 1, v. 1, n. 1, Jun. 2004

EMILIO GARCÍA MÉNDEZ
Origin, Concept and Future of Human Rights: Reflections for a New Agenda

FLAVIA PIOVESAN
Social and Economic and Cultural Rights and Civil and Political Rights

OSCAR VILHENA VIEIRA AND A. SCOTT DUPREE
Reflections on Civil Society and Human Rights

JEREMY SARKIN
The Coming of Age of Claims for Reparations for Human Rights Abuses Committed in the South

VINOHI JAICHAND
Public Interest Litigation Strategies for Advancing Human Rights in Domestic Systems of Law

PAUL CHEVIGNY
Repression in the United States after the September 11 Attack

SERGIO VIEIRA DE MELLO
Only Member States Can Make the UN Work

Five Questions for the Human Rights Field

SUR 2, v. 2, n. 2, Jun. 2005

SALIL SHETTY
Millennium Declaration and Development Goals: Opportunities for Human Rights

FATEH AZZAM
Reflections on Human Rights Approaches to Implementing the Millennium Development Goals

RICHARD PIERRE CLAUDE
The Right to Education and Human Rights Education

JOSÉ REINALDO DE LIMA LOPES
The Right to Recognition for Gays and Lesbians

E.S. NWAUCHE AND J.C. NWOBIAKE
Implementing the Right to Development

STEFVEN FREELAND
Human Rights, the Environment and Conflict: Addressing Crimes against the Environment

FIONA MACAULAY
Civil Society-State Partnerships for the Promotion of Citizen Security in Brazil

EDWIN REKOSH
Who Defines the Public Interest?

VÍCTOR E. ABRAMOVICH
Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies


CAROLINE DOMMEN
Trade and Human Rights: Towards Coherence

CARLOS M. CORREA
TRIPS Agreement and Access to Drugs in Developing Countries

BERNARDO SORJ
Security, Human Security and Latin America

ALBERTO BOVINO
Evidential Issues before the Inter-American Court of Human Rights

NICO HORN
Eddie Mabo and Namibia: Land Reform and Pre-Colonial Land Rights

NERUM S. OKOGBULE
Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects

MÁRIS A. GUEMBE
Human Rights and Justiciability: A Survey Conducted in Rio de Janeiro

LOUISE ARBOUR
Plan of Action Submitted by the United Nations High Commissioner for Human Rights

SUR 4, v. 3, n. 4, Jun. 2006

FERNANDE RAINÉ
The measurement challenge in human rights

MARIO MELO
Recent advances in the justiciability of indigenous rights in the Inter-American System of Human Rights

ISABELA FIGUEROA
Indigenous peoples versus oil companies: Constitutional control within resistance

ROBERT ARCHER
The strengths of different traditions: What can be gained and what might be lost by combining rights and development?

J. PAUL MARTIN
Development and rights revisited: Lessons from Africa

MICHELLE RATTON SANCHEZ
Brief observations on the mechanisms for NGO participation in the WTO

JUSTICE C. NWOBIAKE
Pharmaceutical corporations and access to drugs in developing countries: The way forward

CLÓVIS ROBERTO ZIMMERMANN
Social programs from a human rights perspective: The case of the Lula administration’s family grant in Brazil

CHRISTOF HEYNS, DAVID PADILLA AND LEO ZWAAN
A schematic comparison of regional human rights systems: An update

BOOK REVIEW

SUR 5, v. 3, n. 5, Dec. 2006

CARLOS VILLAN DURAN
Lights and shadows of the new United Nations Human Rights Council

PAULINA VEGA GONZÁLEZ
The role of victims in International Criminal Court proceedings: their rights and the first rulings of the Court

OSWALDO RUIZ CHIRIBOGA
The right to cultural identity of indigenous peoples and national minorities: a look from the Inter-American System

LYDIAH KEMUNTO BOSIRE
Overpromised, underdelivered: transitional justice in Sub-Saharan Africa

DEVIKA PRASAD
Strengthening democratic policing and accountability in the Commonwealth Pacific

IGNACIO CANO
Public security policies in Brazil: attempts to modernize and democratize versus the war on crime

TOM FARER
Toward an effective international legal order: from co-existence to concert?

BOOK REVIEW

SUR 6, v. 4, n. 6, Jun. 2007

UPEENDRA BAXI
The Rule of Law in India

OSCAR VILHENA VIEIRA
Inequality and the subversion of the Rule of Law

RODRIGO UPRIMNY YEPES
Judicialization of politics in Colombia: cases, merits and risks

LAURA C. PAUTASSI
Is there equality in inequality? Scope and limits of affirmative actions

GERT JONKER AND RIKA SWANZEN
Intermediary services for child witnesses testifying in South African criminal courts
SERGIO BRANCO
Brazilian copyright law and how it restricts the efficiency of the human right to education
THOMAS W. POGGE
Eradicating systemic poverty: brief for a Global Resources Dividend

SUR 7, v. 4, n. 7, Dec. 2007
LUCIA NADER
The role of NGOs in the UN Human Rights Council
CECÍLIA MACDOWELL SANTOS
Transnational legal activism and the State: reflections on cases against Brazil in the Inter-American Commission on Human Rights

TRANSITIONAL JUSTICE
TARA URS
Imagining locally-motivated accountability for mass atrocities: voices from Cambodia
CECILY ROSE AND FRANCIS M. SSEKANDI
The pursuit of transitional justice and African traditional values: a clash of civilizations – The case of Uganda
RAMONA VIJEYARASA
Facing Australia’s history: truth and reconciliation for the stolen generations
ELIZABETH SALMÓN G.
The long road in the fight against poverty and its promising encounter with human rights
INTERVIEW WITH JUAN MÉNDEZ
By Glenda Mezarroba

SUR 8, v. 5, n. 8, Jun. 2008
MARTÍN ABREGÚ
Human rights for all: from the struggle against authoritarianism to the construction of an all-inclusive democracy - A view from the Southern Cone and Andean region
AMITA DHANDA
Constructing a new human rights lexicon: Convention on the Rights of Persons with Disabilities
LAURA DAVIS MATTAR
Legal recognition of sexual rights – a comparative analysis with reproductive rights
JAMES L. CAVALLARO AND STEPHANIE ERIN BREWER
The virtue of following: the role of Inter-American litigation in campaigns for social justice

RIGHT TO HEALTH AND ACCESS TO MEDICAMENTS
PAUL HUNT AND RAJAT KHOSLA
The human right to medicines
THOMAS POGGE
Medicines for the world: boosting innovation without obstructing free access
JORGE CONTESTE AND DOMINGO LOVERA PARMO
Access to medical treatment for people living with HIV/AIDS: success without victory in Chile
GABRIELA COSTA CHAVES, MARCELA FOGAÇA VIEIRA AND RENATA REIS
Access to medicines and intellectual property in Brazil: reflections and strategies of civil society

SUR 9, v. 5, n. 9, Dec. 2008
BARBORA BUKOVSKÁ
Perpetrating good: unintended consequences of international human rights advocacy
JEREMY SARKIN
Prisons in Africa: an evaluation from a human rights perspective
REBECCA SAUNDERS
Lost in translation: expressions of human suffering, the language of human rights, and the South African Truth and Reconciliation Commission

SIXTY YEARS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS
PAULO SÉRGIO PINHEIRO
Sixty years after the Universal Declaration: navigating the contradictions
FERNANDA DOZ COSTA
Poverty and human rights from rhetoric to legal obligations: a critical account of conceptual frameworks
EITAN FELNER
A new frontier in economic and social rights advocacy? Turning quantitative data into a tool for human rights accountability
KATHERINE SHORT
From Commission to Council: has the United Nations succeeded in creating a credible human rights body?
ANTHONY ROMERO
Interview with Anthony Romero, Executive Director of the American Civil Liberties Union (ACLU)

SUR 10, v. 6, n. 10, Jun. 2009
ANUJ BHUWANIA
DANIELA DE VITO, AISHA GILL AND DAMIEN SH-ORT
Rape characterised as genocide
CHRISTIAN COURTIS
Notes on the implementation by Latin American courts of the ILO Convention 169 on indigenous peoples
BENYAM D. MEZMUR
Intercountry adoption as a measure of last resort in Africa: Advancing the rights of a child rather than a right to a child

HUMAN RIGHTS OF PEOPLE ON THE MOVE: MIGRANTS AND REFUGEES
KATHARINE DERDERIAN AND LIESBETH SCHOCKAERT
Responding to “mixed” migration flows: A humanitarian perspective
JUAN CARLOS MURILLO
The legitimate security interests of the State and international refugee protection
MANUELA TRINDADE VIANA
International cooperation and internal displacement in Colombia: Facing the challenges of the largest humanitarian crisis in South America
JOSEPH AMON AND KATHERINE TODRYS
Access to antiretroviral treatment for migrant populations in the Global South
PABLO CERIANI CERNAĐAS
European migration control in the African territory: The omission of the extraterritorial character of human rights obligations

SUR 11, v. 6, n. 11, Dec. 2009
VÍCTOR ABRAMOVICH
From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System
VIVIANA BOHÓRQUEZ MONSALVE AND JAVIER AGUIRRE ROMÁN
Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law
DEBORA DINIZ, LÍVIA BARBOSA DEBORA DINIZ, LÍVIA BARBOSA AND WEDERSON RUFINO DOS SANTOS
Disability, Human Rights and Justice
JULIETA LEMAÎTRE RIPOLL
Love in the Time of Cholera: LGBT Rights in Colombia

ECONOMIC, SOCIAL AND CULTURAL RIGHTS
MALCOLM LANGFORD
Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review
IMPLEMENTATION AT THE NATIONAL LEVEL OF THE DECISIONS OF THE REGIONAL AND INTERNATIONAL HUMAN RIGHTS SYSTEMS

MARIA ISSAEVA, IRINA SERGEEVA AND MARIA SUCHKOVA

Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges

CÂSSIA MARIA ROSATO AND LUDMILA CERQUEIRA CORREIA

The Damião Ximenes Lopes Case: Changes and Challenges Following the First Ruling Against Brazil in the Inter-American Court of Human Rights

DAMIÂN A. GONZÁLEZ-SALZBERG

The Implementation of Decisions from the Inter-American Court of Human Rights in Argentina: An Analysis of the Jurisprudential Swings of the Supreme Court

MARCIA NINA BERNARDES

Inter-American Human Rights System as a Transnational Public Sphere: Legal and Political Aspects of the Implementation of International Decisions

SPECIAL ISSUE: CONECTAS HUMAN RIGHTS - 10 YEARS

The Making of an International Organization from/in the South


PATRICIO GALELLA AND CARLOS ESPÓSITO

Extraordinary Renditions in the Fight Against Terrorism. Forced Disappearances?

BRIDGET CONLEY-ZILKIC

A Challenge to Those Working in the Field of Genocide Prevention and Response

MARTA RODRÍGUEZ DE ASSIS MACHADO, JOSÉ RODRIGO RODRIGUEZ, FLAVIO MARQUES PROL, GABRIELA JUSTINO DA SILVA, MARINA ZANATA GANZAROLLI AND RENATA DO VALE ELIAS

Law Enforcement at Issue: Constitutionality of Maria da Penha Law in Brazilian Courts

SIMON M. WELDEHAIMANOT

The ACHPR in the Case of Southern Cameroon

ANDRÉ LUIZ SICILIANO

The Role of the Universalization of Human Rights and Migration in the Formation of a New Global Governance

CITIZEN SECURITY AND HUMAN RIGHTS

GINO COSTA

Citizen Security and Transnational Organized Crime in the Americas: Current Situation and Challenges in the Inter-American Arena

MANUEL TUFRO

Civic Participation, Democratic Security and Conflict Between Political Cultures. First Notes on an Experiment in the City of Buenos Aires

CELS

The Current Agenda of Security and Human Rights in Argentina. An Analysis by the Center for Legal and Social Studies (CELS)

PEDRO ABRAMOVAY

Drug policy and The March of Folly

Views on the Special Police Units for Neighborhood Pacification (UPPs) in Rio de Janeiro, Brazil

Rafael Dias — Global Justice Researcher
José Marcelo Zacchi — Research Associate, Institute for Studies on Labor and Society — IETS

SUR 17, v. 9, n. 17, Dec. 2012

DEVELOPMENT AND HUMAN RIGHTS

CÉSAR RODRIGUEZ GARAVITO, JUANA KWEITEL AND LAURA TRAJBER WAISBICH

Development and Human Rights: Some Ideas on How to Restart the Debate

IRENE BIGLINO, CHRISTOPHE GOLAY AND IVONA TRUSCAN

The Contribution of the UN Special Procedures to the Human Rights and Development Dialogue

LUIS CARLOS BUOB CONCHA

The Right to Water: Understanding its Economic, Social and Cultural Components as Development Factors for Indigenous Communities

ANDREA SCHETTINI

Toward a New Paradigm of Human Rights Protection for Indigenous Peoples: A Critical Analysis of the Parameters Established by the Inter-American Court of Human Rights

SERGES ALAIN DJOYOU KAMGA AND SIYAMBUNGA HELEBA

Can Economic Growth Translate into Access to Rights? Challenges Faced by Institutions in South Africa in Ensuring that Growth Leads to Better Living Standards

INTERVIEW WITH SHELDON LEADER

Transnational Corporations and Human Rights

ALINE ALBUQUERQUE AND DABNEY EVANS

Right to Health in Brazil: A Study of the Treaty-Reporting System

LINDA DARKWA AND PHILIP ATTUQUAYEFIO

Killing to Protect? Land Guards, State Subordination and Human Rights in Ghana

CRISTINA RÁDI

The Ineffective Response of International Organisations Concerning the Militarization of Women’s Lives

CARLA DANTAS

Right of Petition by Individuals within the Global Human Rights Protection System

SUR 18, v. 10, n. 18, Jun. 2013

INFORMATION AND HUMAN RIGHTS

SÉRGIO AMADEU DA SILVEIRA

Aaron Swartz and the Battles for Freedom of Knowledge

ALBERTO J. CERDA SILVA

Internet Freedom is not Enough: Towards an Internet Based on Human Rights

FERNANDA RIBEIRO ROSA

Digital Inclusion as Public Policy: Disputes in the Human Rights Field

LAURA PAUTASSI

Monitoring Access to Information from the Perspective of Human Rights Indicators

JO-MARIE BURT AND CASEY CAGLEY

Access to Information, Access to Justice: The Challenges to Accountability in Peru

MARISA VIEGAS E SILVA

The United Nations Human Rights Council: Six Years On

JÉRÉMIE GILBERT

Land Rights as Human Rights: The Case for a Specific Right to Land

PÉTALLA BRANDÃO TIMO

International Organisations Development and Human Rights: The Impact of Mega-Projects on Human Rights in Brazil

DANIEL W. LIANG WANG AND OCTAVIO LUIZ MOTTA FERRAZ

Reaching Out to the Needy? Access to Justice and Public Attorneys’ Role in Rights to Health Litigation in the City of São Paulo

OBONYE JUNAS

Human Rights, Extradiation and the Death Penalty: Reflections on The Stand-Off Between Botswana and South Africa

ANTONIO MOREIRA MAUÉS

Supra-Legality of International Human Rights Treaties and Constitutional Interpretation

Previous numbers are available at <www.surjournal.org>.
FOREIGN POLICY AND HUMAN RIGHTS

DAVID PETRASEK

ADRIANA ERTHAL ABDENUR AND DANÍLO MARCONDES DE SOUZA NETO
Brazil’s Development Cooperation with Africa: What Role for Democracy and Human Rights

CARLOS CERDA DUEÑAS
Incorporating International Human Rights Standards in the Wake of the 2011 Reform of the Mexican Constitution: Progress and Limitations

ELISA MARA COIMBRA
Inter-American System of Human Rights: Challenges to Compliance with the Court’s Decisions in Brazil

CONOR FOLEY
The Evolving Legitimacy of Humanitarian Interventions

DEISY VENTURA
Public Health and Brazilian Foreign Policy

CAMILA LISSA ASANO
Foreign Policy and Human Rights in Emerging Countries: Insights Based on the Work of an Organization from the Global South

INTERVIEW WITH MAJA DARUWALA (CHRI) AND SUSAN WILDING (CIVICUS)
Emerging Democracies’ Foreign Policy: What Place for Human Rights? A Look at India and South Africa

DAVID KINLEY
Finding Freedom in China: Human Rights in the Political Economy

LAURA BETANCUR RESTREPO
The Promotion and Protection of Human Rights through Legal Clinics and their Relationships with Social Movements: Achievements and Challenges in the Case of Conscientious Objection to Compulsory Military Service in Colombia

ALEXANDRA LOPES DA COSTA
Modern-Day Inquisition: A Report on Criminal Persecution, Exposure of Intimacy and Violation of Rights in Brazil

ANA CRISTINA GONZÁLEZ VÉLEZ AND VIVIANA BOHÓRQUEZ MONSALVE
Case Study on Colombia: Judicial Standards on Abortion to Advance the Agenda of the Cairo Programme of Action