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AFRICAN LAWYERS HARNESS HUMAN RIGHTS TO FACE DOWN GLOBAL POVERTY

*Lucie E. White**

In 1963, Martin Luther King stood before the Lincoln Memorial and spoke to an audience of black and white Americans who were starting to burst free from the shackles of Jim Crow segregation:

I have a dream that one day every valley shall be exalted, and every hill and mountain shall be made low, the rough places will be made plain, and the crooked places will be made straight This is our hope, and this is the faith that I go back to the South with. With this faith, we will be able to hew out of the mountain of despair a stone of hope.¹

This is an exciting time in Africa. Yes, of course it is true that the rise of fundamentalist political movements, armed conflict, epidemic diseases, and extreme poverty will challenge the continent for decades to come. I don't need to tell you that. Yet at the same time, we are witness to what many call an "African Renaissance." In many domains, including the arts, civil society, social provision, and democratic governance, African nations are beginning to take their place in a newly configured globe.² One of these domains of energy, innovation, and hope is a new human rights movement. This movement emerged out of three converging trends: new capacities and institutions for democratic governance, a new vibrancy of civil society and grassroots participation, and a new enthusiasm among young, determined, and iconoclastic human rights lawyers who have embraced pragmatic rather than formalistic approaches to law.

These young lawyers have taken on the most challenging area of human rights practice: that of vindicating people's core rights to food, health care, housing, education, and a decent livelihood—indeed, to life itself. These lawyers have embraced the impossible, reworking human rights to bring sustainable improvements to people's lives. They have been out there when others have given up, hewing "stones of hope" from what others had wrongly called a "mountain of despair."³

The International Covenant on Economic, Social, and Cultural Rights calls on all nations to progressively realize their peoples' fundamental human entitlement to the safety net that will enable them to live lives of material security, human dignity, and political inclusion.⁴ By ensuring these basic rights, the Covenant entitles all peoples to basic needs such as food, housing, and health care. Yet most social justice lawyers

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1. Martin Luther King, Jr., Speech at the Lincoln Memorial, Washington, D.C. (Aug. 28, 1963) (transcript available at <http://www.americanrhetoric.com/speeches/Ihaveadream.htm>).

2. For an excellent collection of stories discussing the many facets of the "African Renaissance" see the special issue of Vanity Fair devoted to the subject. Special Issue, *Africa*, VANITY FAIR, Aug. 2007.

3. See King, *supra* note 1. Cf. DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW 44-66 (2004) (discussing the development of the American civil rights movement in the face of extreme opposition).

4. G.A. Res. 2200A, art.2(1), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

have not seen this Covenant's potential. They have regarded it as inspiring, but ultimately more political rhetoric than justiciable law.

Why? There are several reasons. First, its core protections are worded in vague and contradictory ways.⁵ Second, even when people face extremes of deprivation, they can rarely go to court to get relief. Third, many scholars argue that because the Covenant addresses wealth redistribution, it *should* be enforced by legislative bodies, rather than courts.⁶ And finally, those cautious about the Imperial origins of human rights instruments and institutions in the global "north" fear that economic and social rights will impose Northern cultural values on the South.⁷ They also fear that human rights advocacy will divert grassroots groups from public education, community mobilization, and transnational networking, which they claim to be the best ways to defeat global poverty.⁸

Thus, lawyers who care about social equality—in Africa and elsewhere—have shied away from framing extreme inequality as a human rights violation. Only very recently has a new generation of African lawyers and activists turned economic and social rights advocacy into a field of innovation. Though schooled in conventional human rights theory, these lawyers have gone "against the grain" of this orthodoxy to bring human rights back to its roots and to transform human rights practice into a powerful way to fight for economic justice.

Several features characterize their work. First, these lawyers are pragmatic; they use all the tools they can find to challenge the problems at hand. Second, they are also honest, self-reflective, indeed critical, about what their work can accomplish. They ask: "Will this human rights campaign that I've designed really improve people's lives, right now, in palpable ways, or will it just give me the rush of a moment of fame?" Third, these lawyers resist the jurisprudential constraints that conventional human rights theory imposes. Human rights claims are traditionally aimed exclusively at the nation-state, which in Africa is often cash-strapped. These new lawyers look beyond the state. They target every accountable actor—all of the deep pockets—on local, regional, national, and international levels. If an entity like a district government council or the World Bank claims that it does not have an affirmative obligation to exempt poor kids from school fees, for instance, these lawyers use human rights values to create one, in peoples' hearts and minds if not also in the law books. Furthermore, they reject the public/private divide as an illegitimate throwback to a formal theory of law. Instead, they target all illegitimate power in the marketplace: large corporations,

5. See Makau Wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 604 n.38 (1996) (noting that, in reference to the fundamental rights protected by the Covenant, "there is still little understanding of the normative content of the rights to food, education, health care, clothing, and shelter").

6. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 275 (2d ed. 2000) (noting that the Covenant is "weak with respect to implementation" and that "[f]or many governments, it seems to follow that traditional legal remedies such as court actions are either inappropriate or at best impracticable").

7. See generally Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001) (discussing the potential imposition of European norms on non-European cultures through the implementation of human rights law).

8. See DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 8-9, 26-27 (2004) (discussing the capacity of the human rights movement to divert crucial resources from less formalized attempts at equality).

family arrangements, and customary practices. They scrutinize civil society organizations, as well as the state apparatus and multilateral entities for practices that obstruct the delivery, to people who need them, of basic safety-net rights. I am talking here of food that may be stockpiled in Midwestern silos or medicines protected by patents that make them far too expensive for African peoples to buy. They cooperate with these actors when they can, but they will speak power to pretension when a recalcitrant actor leaves them no other choice.

In short, these new economic and social rights lawyers go against the grain in these ways, because, in order to face up to what is real, they see no other choice. These lawyers often remind their law student interns that when babies are dying fast and your government is nearly bankrupt, nobody can teach you what to do as a human rights lawyer. You have to make up the game.

Consider the following examples.

First, there is Zackie Achmat, from South Africa. Achmat, who is HIV positive himself, founded South Africa's Treatment Action Campaign (TAC), a grassroots organization formed primarily to campaign for equal and affordable treatment options for South Africans with HIV/AIDS.⁹ In two recent interviews he outlined TAC's strategy.¹⁰ He explained that TAC's goal was to pressure corporations to lower the price of antiretroviral medication. Through this tactic, the Campaign would assist the state in dealing with a very restrained fiscal environment. The tactics were multi-pronged: organizing, using the media, mass mobilization, and a legal strategy. Litigation and law were critical, but these conventional tactics were only part of a larger toolkit for social justice. When litigation was used, it often came after other tactics. Achmat explained that TAC starts every campaign with serious analysis of the politics, economics, and science related to the matter.

In spite of all of TAC's tactical complexity, Achmat emphasized that the Campaign's motive is simple: to get medicine and save people's lives. The South African Constitution, though not self-enforcing, was of some help because it requires the state to take a proactive role to promote socio-economic transformation.¹¹ He was emphatic that TAC intends to hold the state to this obligation, for in TAC's view, the real issue at stake is the distribution of wealth. To achieve this goal, TAC uses a range of institutions, laws, and mobilizations. TAC's tactics are not confined within the boundaries of South Africa. Rather, TAC has linked with global mobilization, and shown that drug companies can be held accountable globally. Achmat estimates the impact of TAC's mobilization to be a breakthrough \$470 million dollars allocated for this issue by the government, the largest national social expenditure in recent years.

9. TAC also includes among its various objectives the prevention of new HIV infections and the sponsorship of legislation ensuring equal treatment of all people with HIV/AIDS. See Constitution of the Treatment Action Campaign, available at <http://www.tac.org.za/Documents/Constitution/Constitution13Dec04.PDF>.

10. Telephone Interviews with Zackie Achmat, Founder, Treatment Action Campaign (Dec. 14, 2006 & May 25, 2007) (tapes and transcripts on file with Moira Harding at Harvard Law School).

11. S. AFR. CONST. 1996 § 152(1)(c).

So far, the campaign and related litigation have led to an imperfect mother-to-child prevention program,¹² but the prospect of further litigation has driven the government to start a general treatment program for the whole population. Today, about 200,000 South Africans benefit from public treatment. Because of further mobilization and legal action the price of retroviral drugs has substantially decreased. Achmat pays only about \$40 a month today for his own drugs; the price was about \$1000 a month not so long ago. In addition, TAC has recently begun a campaign to require the state to provide AIDS treatment to prisons.¹³ The campaign has put the issue of prisoner treatment on the map and raised public support for it. As a result, the government has finally launched a prison treatment program and a small number of prisoners are already receiving drugs.

Next, consider Mwambi Mwasaru, from Kenya, a long-time lawyer and organizer among people with no decent shelter. His story, though very different from Achmat's, echoes similar themes.¹⁴ Several communities living in the Malindi district of Kenya, a remote area, were thrown out of their land by private salt farming companies. Crops and livelihoods were destroyed. The Coast Rights Forum, a network of community based groups, mobilized people to act. They made a claim to the Kenya National Commission on Human Rights. The Commission organized a public inquiry locally. During five days, the evicted people and company officials told their stories in front of a wide audience. The people's stories seemed alive, while those of the salt farming company were dead.

Like Achmat's, Mwasaru's strategy was multi-pronged. It involved educating people about their rights and linking them both vertically to attainable sources of power such as the Human Rights Commission and horizontally to other mining communities around the country with which they could share tactics and experiences. Mwasaru also used media involvement, litigation, demonstrations, and other forms of protest. People got a boost in their self-confidence. They started a Malindi Rights Forum to deal with a wide range of issues. Relying on a right of access to water, the forum has forced the opening of routes to water wells located inside the salt farms' land. People have actually started to go back to their land. People have also begun to advocate in more systemic ways.

Finally, consider Mahama Ayariga from Ghana. As a law student at the University of Ghana, Mahama and a friend organized a volunteer legal advice center in a very impoverished area of Accra. This clinic evolved into the Ghana Legal Resources Centre (LRC), which is now an anchor social and economic rights organization in West Africa.¹⁵ The LRC used the right to health as guaranteed in

12. See *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC) (S. Afr.) (requiring that the South African government ensure proper treatment of pregnant women and their newborn children as a means of preventing mother-to-child transmission of HIV).

13. For pertinent facts regarding the state of AIDS treatment in South African prisons, as well as an overview of TAC's prison treatment campaign, see Fact Sheet, Treatment Action Campaign, Westville Prison: Everyone Has the Right to Life and Dignity, available at <http://www.tac.org.za/GDOA%20Docs/Westville%20Prison%20Fact%20Sheet.pdf>.

14. The following material was presented by Mwambi Mwasaru at the "Stones of Hope": African Lawyers Reclaim Human Rights to Challenge Global Poverty, First Phase Conference, held at the Rockefeller Foundation Retreat Center in Bellagio, Italy, December 4-16, 2006.

15. See Legal Resources Centre Homepage, <http://www.lreghana.org> (last visited Dec. 15, 2007). The

Ghana's constitution to challenge the "cash and carry" health system. This system was introduced by the International Monetary Fund and World Bank during the 1980s as a money-saving reform.¹⁶ It required all Ghanaians to pay cash up front for essential health services, even if they lived in a non-cash economy.

To challenge this system, the LRC launched a right to health campaign that used every trick in the books. It organized doctors and nurses to stand beside disenfranchised peoples and speak out against the cash-up-front system, because it prevented them from practicing their vocation to heal the sick. It organized town meetings with government officials, public marches, legislative advocacy campaigns, and litigation. In one lawsuit, the plaintiff was locked up in a hospital after medical discharge because he was unable to pay an illegally assessed hospital bill. A petition drive and march by several thousand people led the government to settle the case and back away from its cash and carry policy. To Mahama, this case shows how sustained work on a single illegal policy, even if arguably excusable because of the government's budgetary limitations, can build community capacity while achieving concrete objectives.¹⁷

Though the work of these lawyers is varied, a new paradigm of human rights advocacy is starting to emerge. This work is characterized by several distinctive features. To recap, these lawyers:

1. *Pay Attention to Process As Well as Outcomes*

While outcomes are important, a deeply democratic process—working *with* people on the ground—turns victims into citizens. It builds political capacities, cross-class alliances, democratic institutions, and a sustainable political economy.

2. *Recognize Potential Unintended Effects*

Human rights practice is a powerful tool, but it is a double-edged sword. These advocates are acutely attuned to what has been called the "dark side" of human rights practice.¹⁸

3. *Remain Pragmatic About Tactics*

These advocates litigate only when there is a good reason to do so. Rather than seeking to litigate first, they draw from the entire toolbox of activist "lawyering" tactics, such as organizing, media work, public education, lobbying, transnational networking, and appealing to regional and global human rights bodies.

details of the Legal Resources Centre's strategies were discussed throughout the "Stones of Hope": African Lawyers Reclaim Human Rights to Challenge Global Poverty, First Phase Conference, held at the Rockefeller Foundation Retreat Center in Bellagio, Italy, December 4–16, 2006.

16. The International Monetary Fund and World Bank introduced Structural Adjustment Programs (SAPs) that required disadvantaged nations to incorporate user fees and other cost-saving provisions into their domestic health laws as a condition of their receipt of needed loans. See Brooke G. Schoepf, Claude Schoepf & Joyce V. Millen, *Theoretical Therapies, Remote Remedies: SAPs and the Political Ecology of Poverty and Health in Africa*, in *DYING FOR GROWTH: GLOBAL INEQUALITY AND THE HEALTH OF THE POOR* 91, 91-125 (Jim Yong Kim et al. eds., 2000). In Ghana, user fees were originally incorporated into domestic law in the early 1970s, but were not widely enforced until administrative directives were issued in the mid-1980s. *Id.* at 109-110.

17. This health rights case is the subject of an untitled draft manuscript by Jeremy Perelman and Katharine Young on file with the author at the Harvard Law School.

18. See KENNEDY, *supra* note 8, at 3-36 (outlining potential negative effects of the human rights movement).

4. *Target All Accountable Parties*

They work both with and against all sources of exclusionary or subordinating power, both public and private, on the local, national, and international stage.

5. *Remain Explicit About their Own Values*

These lawyers see economic and social rights work as a political commitment and an ethical practice. They endorse the core norms of human rights, for example the right of all persons to dignity, inclusion, voice, security, and well-being—not as a fundamentalist creed or a natural law— but rather as a human political *choice*. They also respect those from different political and faith traditions, who may espouse different ethnical and political priorities. And they use those chosen values as benchmarks for evaluating their own efforts.

Though the projects I've just described have saved many lives, none of these lawyers consider themselves saviors. Rather, they have *emboldened* people to claim their place, as citizens, and, from that place, to demand that economic growth be shaped to promote all peoples' well-being rather than to placate the greed of the rich.

In the stories we've heard, the dual goals of getting results *and* building democracy have been successfully advanced side by side. But such challenging work is not without risk, frustration, and sometimes failure. I want to cite to one such disappointment. I do this *not* to undermine the astounding effort, and important victory, that the story represents. Rather, I do it to show that the work carries big risks.

Consider the case of Irene Grootboom in South Africa. At the time of the case, Ms. Grootboom lived under plastic sheeting in a shack she had built with her own hands in an informal settlement on the flats around Cape Town. She had no source of clean water, human waste removal, or electrical power. Her home often flooded in the rain. Yet in spite of these horrendous conditions, things can always get worse. Without warning, the government bulldozed and burned her entire community, apartheid style, after deciding to use the land to build so-called permanent housing. When they smashed down her house, they destroyed everything that she owned. She was left without any shelter. When she and others in her community found a lawyer to help them, he responded to their plight by filing a lawsuit.

The South African Constitutional Court decision in Ms. Grootboom's case¹⁹ gave a great victory to human rights lawyers. It said that people like Irene Grootboom had standing to sue in a court of law to enforce their human right to housing against the South African state.²⁰ The decision required that the government provide minimal shelter to people, like her, who found themselves in desperate need.²¹

In spite of this stunning victory, however, which was hailed around the world by human rights scholars,²² the case left Ms. Grootboom without safe shelter, closed out of the new housing process, baffled by the legal process, and very angry. Consider these words, which she spoke to two student interviewers in March of 2005:

19. *Gov't of the Republic of S. Afr. v. Grootboom & Others* 2001 (1) SA 46 (CC) (S. Afr.).

20. *Id.* at 53-54.

21. *Id.*

22. *See, e.g.*, CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 235-37 (2001); Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 364-68 (2007).

I'm not involved in the new housing process because I . . . didn't want to be in meetings any more. I just hear . . . that it's about lawyers and I've got nothing to do with lawyers now I'm not going. I want to just run away and not speak to anyone anymore because it's just too much for me. . . . The government actually do nothing for us or for me. Nothing. . . . Where is the money for the Grootboom case? What did the government do with the money? Nothing. Nothing for Grootboom case

I've got a daughter and I can't stay, for all my life, with her in a single shack. Now, I need a proper shack Nothing²³

The lawyer who represented Ms. Grootboom is one of the most distinguished and sensitive social justice advocates in recent history. Yet the structure of litigation, especially when it is undertaken for a cause, makes it hard for lawyers to approach complex lawsuits in a spirit of intensive partnership with their clients, especially around highly technical judgment calls.²⁴ Therefore, the following comments are offered not to critique the lawyer in this case, but rather to make note of the position in which the client is placed by the structure of the litigation process. When we take the perspective of a sorely disappointed client such as Ms. Grootboom, it is possible to ask what is at risk of going wrong. Here are some ideas. First, it is easy for lawyers to leap to litigation without first considering either the community's often contested wishes or the other available tactics. Second, the technical demands of litigation make it very hard to include clients in the decision-making process. How so? For starters, it is hard to involve a client in the choice to litigate when the client has been recruited to make the lawsuit possible. Second, it is tempting to skip the arduous process of explaining to "unschooled" clients the litigation strategy, the significance—and limitations—of the claim, or the nature and scope of the remedy, especially when it is a complex structural injunction.²⁵ If Ms. Grootboom ended up with anything, she knew it was not the house that she had taken part in the lawsuit to secure. Only a deep commitment to process as well as outcome can warrant such efforts, and when a victory in court has the potential to trigger substantial redistribution, the arguments for privileging process are hard to sustain.

Another feature of litigation that contributed to Ms. Grootboom's anger was the way that it portrayed her—as an icon of suffering rather than a complex human being. As a woman of mixed race, she was suspicious of the reasons for which she was chosen as the "poster person" for the right to housing litigation. Was it because she would not trigger the lingering prejudice of judges as much as black Africans might? Was it because she could speak English more clearly than some of her black African neighbors? These are questions that might arise for plaintiffs in cause litigation even if they do not reflect their lawyers' actual calculations. We do not know how Irene

23. Interview by Natasha Kim & Aaron Sawchuck with Irene Grootboom, in Natasha Kim & Aaron Sawchuck, *Searching for a New Rest Under a Big Tree: A Case Study of the Grootboom Case and its Aftermath* (May 17, 2005) (unpublished paper, on file at Harvard Law School).

24. See Austin Sarat & Stuart A. Scheingold, *What Cause Lawyers Do For, and To, Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 1, 20-22 (Austin Sarat & Stuart A. Scheingold eds., 2006).

25. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (discussing the contours of public law litigation as contrasted with the traditional model of adjudication).

Grootboom might have felt at the close of her lawsuit if she had felt herself informed, if not included, in the litigation design and remedial process. Could such cases be a school for citizenship as well as a source of damages if plaintiffs are offered such opportunities? Could the remedy itself have been more thoughtfully designed? Perhaps Irene Grootboom's anger had little to do with the litigation experience, and was more a reflection of the endless frustrations of a life in poverty. Yet, even so, it is safe to say that when realizing social rights becomes a technocratic game rather than a democratic challenge, the results are unlikely to satisfy anyone's desires. Can more "democratic" approaches to human rights promotion work differently? People tend to share their vision and power when they are treated with respect, and they tend to take pride in solutions that they have a hand in creating.

Most of the lawyers featured in this Essay started their work while still in school. How can you best support their work? Because our own social policies play such a big role in Africa's well-being, we can challenge our own government to change them. But we can do something more. We can bring the creative approaches of African human rights activists into our work to end poverty here at home.

This new understanding can also challenge us to work as partners, rather than saviors, with our "clients." Driven by our new self-perception, we can learn to think like architects, strategists, and conveners, as well as within the traditional human rights lawyer's role. With that new openness to our own potential, we can design procedures and institutions for thickly democratic innovation, governance, and dispute-resolution. We can then invent networks that link those local innovations upward and outward, so we are not isolating ourselves inside grassroots empowerment projects that leave us buried in the sand.

But we must not dwell too much on such sweeping possibilities. Rather, even as we open our hearts and minds to hope, we must also choose a single point of entry, and, simply, begin the work.