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Public Interest Law & Litigation: Re-drawing the rules of engagement

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It is a great pleasure and an honour to be in a country which has, in unexpected ways, shaped my work as a human rights and public interest lawyer and indeed, my appreciation of the values which inform that work. I grew up in apartheid South Africa and practiced there as a lawyer for 8 years before the conviction of 25 of my clients (for the murder of one policeman), the sentencing to death of 14 of the 25 and the assassination of my treasured friend and their barrister, Anton Lubowski, took me to my other country, Australia. When the 14 were sentenced to death in 1989, and leave to appeal was initially refused – with execution looming as the inevitable, inconceivable last phase of the trial - the Anti-Apartheid Movement in London invited me on a speaking tour to meet with trade unions and human rights groups, lawyers and members of the UK and European Parliaments, to persuade them to put pressure on the South African government not to proceed with the hanging of my clients. I met an incredible array of people from the British Parliament and the Foreign Office and from the Office of the Republic of Ireland, representing the EEC. Almost 10 years later in 1997, in a book about the trial, *Upington*, I wrote:

> There was something immensely refreshing about the Irish approach to the case. Unlike representatives from the (British) Conservative Party government and the … Foreign Office, who hedged their bets, never bringing themselves to outright condemnation of injustice, the Irish were open and forthright in their criticism of the South African state and its arms of government. There was no diplomatic caution in their expression of anger and they were keen to make their position heard, with passion and no ambivalence. It was then that I knew I would love Ireland and her people forever.[1]

It is astonishing that this is my first visit to the country that so touched my soul through its people. And to be here has been a very moving and important validation of a first impression. It is that passion and keenness to make your position heard when injustice parades its wares that again drew my delight and relief when recently our Prime Minister visited your land and was received by your parliament with appropriate indifference and disdain. That was once a response which the democratic world reserved for the leaders of a racist, brutal regime – the land of my birth. What is enormously disturbing to me is that as the cycle of history has turned towards democracy in South Africa, so it has turned uncharacteristically away from it in Australia. The use of law has been a primary mechanism in achieving both ends.

It is the use of law in different contexts and at different times in a nation's history, as a sole operator and in conjunction with select collaborators, that is perhaps most instructive when considering the role of the practice of public interest law in various jurisdictions and evaluating its benefits and limitations in shaping public policy and keeping the health of a nation in check.

I have lived in two countries where I have worked with the consequences of human rights violations by the state, its agents and its apologists. In South Africa, I worked as a lawyer with victims of apartheid who were subject to acts of deep inhumanity and

[1] Andrea Durbach, *Upington*, Allen and Unwin, Sydney, 1999 at 189

terror, acts which were motivated by racism and a desire to punish and silence those who dared to oppose an illegal and repressive power. In Australia, my work, especially while principal solicitor and Director of the Public Interest Advocacy Centre (PIAC) for 13 years, focused on the needs of those who faced social and economic exclusion in a country that was becomingly increasingly prosperous and dangerously complacent as it tentatively strode from economic isolation into the global economy. In more recent times, PIAC's work tended to focus on litigation which sought to hold a government accountable for conduct which was at odds with its trumpeted perception of itself as a nation dedicated to egalitarianism, tolerance and fairness: when, for example, the Australian government and its executioners denied those whom they mark as 'other', protection of the law - Indigenous Australians, refugees from non-English-speaking backgrounds or those with questionable religious affiliations. And now that our government has positioned us as war-seeking ally with the regrettable coalition of the willing, we are endeavouring to claw back hard-won rights and freedoms which face insidious extinction in the face of a perceived 'threat of terror'.

I came to the study of law by force. And I came to its practice with scepticism and resistance. I grew up in a country which had great respect for the law, for its tradition, for its pomp and ceremony and for its ability to regulate and refine power. South Africa's legal system, despite its manifestations, was derived primarily from a mix of two legal systems, creatures of the civilised world. Its Roman-Dutch underpinnings and British influences, its common law, was shaped by liberal principles and values that were ostensibly equitable, reasonable and just. And the rules, procedures and structures through which the law was applied and interpreted, were abundant and central to a society which liked to boast about the independence of its judiciary and an adherence to the rule of law.

While these elaborate legal furnishings sought to display independence and aspirations towards justice, the South African state used the trappings of law to construct, legitimise and enforce an oppressive, unjust regime against the majority of its inhabitants. It was the cruelty of apartheid, the relentless destruction of people's lives in the name of the law, which forced or compelled me to the practice of law because of a deep hope I held that the proper use of law was to exploit its capacity to exact justice.

I worried that opportunities to challenge unjust laws would be minimal and thwarted and that working within the apartheid system as a lawyer would be tantamount to my justification of it. But I worked with inquiring and imaginative lawyers and activists, whose belief in the law to agitate the status quo and facilitate change was constant and clear, whose teachings and fierce passion and convictions, persuaded me to become a conscientious participant in the South African legal system, using the law as a sword to carve cracks in the fortress of apartheid.

I quickly discovered my lack of interest in matters commercial and revelled in litigation which involved the behaviour of people and their engagement with life. Ultimately, it was the political context for behaviour, the combination of forces which compelled people to act in certain ways, which drew me towards a fascination with the use of law in negotiating power and balancing rights.

The courts became a site of struggle, where the harm perpetrated under apartheid

laws was made visible, where rights were articulated, fought for and hard-won. In bringing these cases we worked with community in its rawest form and despite lives of adversity, we were inspired, indeed incited, by the bravery and tenacity of our clients, and, importantly, by their belief in the law, in its potential to deliver justice and slowly transform a closed society, bound by rules, to an open democracy with a robust relationship to law.

Faced with a consistent palette of cases of trampled lives, and manifestations of the use of law to exclude, to silence, to harm, judges began to take bold steps persuaded by innovative contract, tort, criminal and administrative law arguments quashing unreasonable regulations, ordering the release of detainees, unbanning newspapers and organizations, and reinstating thousands of workers discarded as expendable by mining giants. It seemed that at last members of the judiciary were beginning to see beyond the law and appreciate the impact of a savage state on ordinary lives.

The accumulation of the lessons of public interest litigation during apartheid, and in particular during the last, crumbling years of a desperate, isolated and flailing state, and the values which that work sought to demonstrate and entrench, were important strands that would make up the fabric of the new South Africa. The struggle against the laws of apartheid by communities and their advocates is widely reflected in the pages of the new South African Constitution with its Bill of Rights protected by a Constitutional Court representative of all the peoples of the land. South African public interest lawyers now have the challenging task of giving substance to new rights and laws, of holding the new, democratic government to its ambitious commitments while recognizing that the developing state faces the reality of matching thinly spread resources with expectations from a majority of citizens who have only recently exercised their right to participate in their own society.

The practice of public interest law in apartheid South Africa was very much about challenging the legislative armoury which fortified untenable state power, exercised to keep the majority of citizens with the status of unwanted visitors in their own country, simply by virtue of the colour of their skin. The particular social and political features of South Africa, make it injudicious to generalise the role of law in re-shaping history to other countries. But it does offer a strong commentary about the role that lawyers may, and indeed must, play in advancing a crucial task of the courts as protector of rights. Law was by no means the only factor in the struggle against apartheid – social, economic, legal and international pressures finally combined with a mass movement to topple a teetering edifice. Litigation did however expose the behaviour of a repressive regime, "demonstrating its vulnerability and eroding its will to dominate"[2] The legal battles empowered communities across the nation and through this form of resistance, communities built alliances, received some protection from state retaliation and re-charged their hopes and commitment to undermine apartheid rule. Importantly, the use of law laid the groundwork for the 1994 constitution and cultivated a belief in the capacity of litigation to assert and declare rights and begin a reinvigorated jurisprudence for a democratic South Africa.

Perhaps what struck me as a new lawyer in Australian in the early nineties, was the invisibility of the needs of vulnerable communities. Despite the suppression of lives

[2] Richard L. Abel, Politics by other Means: Law in the Struggle against Apartheid. 1980-1994, Routledge, New York, 1995 at 549

via a complex web of laws and regulations, the denial of rights, of life, of dignity and livelihood could not easily escape a curious observer of apartheid. That rights were non-existent or were being eroded, hit you right between the eyes. What was difficult to imagine, was a legitimate means of redressing the crass injustice and inequality endemic to that society.

To an exile from a world devoid of rights, Australia seemed to a have a plentiful supply. It had a Human Rights and Equal Opportunity Commission, which established the national **human rights** institution and endorsed many provisions of the International Covenant on Civil and Political Rights which were implemented domestically via the Sex, Race and Disability Discrimination Acts[3]. The institutional arrangements for resolving complaints under the various discrimination statutes, were designed to ensure inexpensive and expeditious access to complaint-resolution mechanisms and determination of disputes, with informal evidentiary requirements and proceedings. The Commission also had a strong educational function, with power to issue major reports and convene public inquiries on matters of national human rights significance. **Consumer rights** were protected via a range of informal and statutory mechanisms and progressive legislation, initiated by a government which valued the contribution of consumer advocacy to informing public policy, was widely enacted. Litigation tested consumer protection laws halting attempts at a monopoly of media ownership; corporations were held liable to compensate thousands of consumers for harm caused by defective products, via class action or representative proceedings; tobacco companies faced regulation as litigants successfully demonstrated the addictive and fatal effects of smoking; banks were forced to reduce interest and charges on services for tens of thousands of low-income consumers; and consumers of health services established the right to informed consent and participation in decision-making, rights to equity and inclusion.

After decades of struggle, **Indigenous Australians** secured a critical degree of political and cultural recognition, when the highest court in the land in 1992, rejected the long-held view that Australia was settled in accordance with the principle of *terra nullius*. In the *Mabo*[4] case, the High Court recognized native title – that Indigenous Australians had a pre-existing system of law which would survive sovereign acquisition except where specifically modified or extinguished by legislative or executive action. The decision was important not only for dismissing a enduring legal fiction and establishing a right to land – a right quickly given legislative validation by the Australian government under the Native Title Act of 1993 – but also for the High Court's declaration that:

> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and indiscriminatory document of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.[5]

Justice Brennan, then of the High Court, also gave a strong indication of the value of international human rights law and its appropriate influence on domestic law in certain situations:

> The opening up of international remedies to individuals pursuant to Australia's

[3] Racial Discrimination Act 1975, Sex Discrimination Act 1984, Disability Discrimination Act 1992
[4] *Mabo and Others v. Queensland* (No. 2) [1992] HCA 23
[5] Per Brennan, J in *Mabo* ibid at para 42

> accession to the Optional Protocol to the *International Covenant on Civil and Political Rights* brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[6]

For a public interest lawyer concerned with **environmental protection** in Australia, the early 1990s offered important opportunities to use the law to conserve forests and fauna, rivers and heritage sites. These were also times when government was committed to facilitate sustainability and access to clean water and air. Specialist environmental and planning courts had been established signalling a significant and discrete focus for legislative and judicial attention and their task was considered to administer social justice in the enforcement of the legislation, "a task which travel(ed) beyond simply administering justice between the parties".[7] The courts were characterised by open standing provisions allowing for maximum public participation in environmental decision-making and further measures to augment participation, including right to information provisions; community consultation and notification requirements; community representation regarding natural resource management plans; and reviews of government legislation, were introduced.

When I began my work at the Public Interest Advocacy Centre in 1991, PIAC was just over 10 years old and public interest litigation was beginning to make a visible imprint on the legal and political landscape. There was institutional support for public interest initiatives from within state and federal governments who in the main believed that the attainment of social purpose and not simply economic wealth was a strong indicator of the health of a nation. Government funded Legal Aid Commissions and Community Legal Centres provided the expertise and necessary resources for public interest litigation and this period also saw the private legal profession recognize the value of providing focused pro bono assistance in public interest matters, committing resources via mechanisms such as the Public Interest Law Clearing House.[8] Perhaps the visibility of legal needs and rights protection of which I spoke earlier was not immediately apparent because it was a time when political, social and economic democracy in Australia was having a good run and the leadership understood the importance of nurturing human capital to the integrity of a cohesive and well-functioning society. It was a time when we took rights for granted, when our expectations of government were high and often what they offered in response to demands to enhance the system, was cynically viewed as insufficient. Certainly, at some point in a nation's growth cycle, a prosperous, predominantly consensual society, with access in the main to education, work and health care, can afford to be generous. But it can also become adept, at least for a while, at sustaining an illusion of an absence of disparity and discontent. It risks rote invocation of the rhetoric of democratic aspirations, covering over the cracks with pretensions to egalitarianism and tolerance.

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[6] ibid

[7] Per Street CJ in Hannan Pty Ltd v The Electricity Commission of NSW (No. 3) (1985) 66 LGRA 306 at 313 quoted in Jeff Smith, *The Changing Nature of Environmental Law: recent developments in public participation* at http://www.edo.org.au/edonsw/site/pdf/publicpartic.pdf at 3

[8] For details about the Public Interest Law Clearing House see http://piac.asn.au/legal/pilchhelp.html; www.pilch.org.au and www.qpilch.org.au

And even when that tolerance and egalitarianism is insidiously under threat, as Australia, in the last 10 years, has become materially acquisitive, politically conservative and socially individualistic, the residual aura of a 'fair-go' society has hovered over the nation sufficiently long enough for retrogressive forces, contemptuous of democratic principles and values, to take hold with little contemplation by a self-focused citizenry of the long-term consequences.

Three years ago, Justice Arthur Chaskalson, National Director of the Legal Resources Centres in South Africa and inaugural President of the new South African Constitutional Court, addressed a PIAC dinner. He said:

> … (C)ourts are the institutions to which people in democratic societies turn for the protection of their rights and no one has greater responsibility for promoting and protecting human rights than judges and lawyers. If that protection is lacking, if institutions fail, the consequences can be catastrophic.
> … Although South Africa was ruled by a minority regime the same course could (also) be followed … by majority governments, where the opposition is weak and the courts and the legal profession are either not powerful enough nor vigilant enough to resist incursions upon freedom[9]
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> … (F)irst incursions into the protection of human rights are often the most dangerous, for they begin a process of erosion which is difficult to stop once it has begun … (T)he erosion of the power and independence of courts, and the lack of vigilance by lawyers, judges, and organs of civil society, permit those who should be held accountable for their conduct, to go free [10]

In the last ten years of an economic boom, Australia has turned its back on human rights and reduced its status from a world champion of universal freedoms to that of ill-considered critic of the United Nations human rights machinery and self-serving proponent of the 'national interest.' A stance which is trumpeted as strident by insular citizens keen to punch above their weight and which is deeply infectious when the tide of economic gain inevitably turns and coincides with a global refugee crisis, with those whom we maim, kill and disrupt in their homelands, fleeing to safety in our own, only to be rebuffed or interned in detention camps which former Chief Justice of India and special representative of the UN High Commissioner for Human Rights, Rajendra Bhagwati, described as "inhuman and degrading".[11] And when the Federal Court declared that the lawyers representing the asylum-seekers in the infamous *Tampa* habeas corpus proceedings had

> acted according to the highest ideals of the law … (giving) voices to those who are perforce voiceless and, on their behalf, (holding) the executive accountable for the lawfulness of its actions and so (serving) the rule of law and … the whole community, [12]

the Federal Attorney General at the time characterised the work of the lawyers as "promoting unlawful activity."[13]

The same Attorney General, a few years earlier, saw fit to slash the funding of the Federal Human Rights and Equal Opportunity Commission and so curtail its powers,

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[9] Justice Arthur Chaskalson, *South African Law under Apartheid*, address to Annual Dinner of Public Interest Advocacy Centre, June 2000 (unpublished) at 6

[10] ibid at 8

[11] Justice P N Bhagwati, *Human Rights and Immigration Detention in Australia*, Report to the United Nations High Commissioner for Human Rights, Geneva, United Nations, 2002

[12] Per French J, *Ruddock v Vadarlis* [2001] FCA 1329 at 63

[13] David Marr and Marian Wilkinson, *Dark Victory*, Allen & Unwin, Sydney 2003 at 155

limit its functions and reduce the reach of its mandate.

As the new Howard government courted big business as its chief political driver, the priorities of ordinary consumers struggling against the impact of inflation and a reduction in social service expenditure, were demoted. One of the new government's first actions which sent a strong message to consumers was the complete defunding of the nation's effective and well-regarded consumers advocacy body, the Consumers Federation of Australia.[14]

The gains of the High Court in the *Mabo* and subsequent *Wik*[15] decisions, saw the promise of the native title legislation being eroded with amendments to the Native Title Act[16] which effectively wound back the notion of co-existence, licensing governments to racially discriminate against the interests of Indigenous peoples and again elevating the property rights of non-Indigenous Australians. Political leaders rationalised this erosion of Indigenous rights as being in the interests of economic development and "certainty" and determined that the right of native title holders to have any real say in decisions affecting their country, was not in the national interest.[17]

As environmental public interest lawyers successfully challenged government grants of wood-chips licences which permitted the export of woodchips derived from old growth forests and wilderness areas of high conservation value, government funding of a network of Environmental Defenders Offices was restricted to policy and training work and specifically excluded the funding of litigation directed at the Federal government. And while the government was failing to sustain our environment domestically, we moved to top the list of the developed world's highest per capita greenhouse polluters and resisted signing the Kyoto Protocol, holding that ratification would impose "an unrealistic and unfair speed limit"[18] on Australia's growing economy. What is perhaps more disturbing about our refusal to comply with emission reduction regulation domestically, is that facilitation of our fossil fuel industry, ranks us high on the human-sponsored climate change register, with responsibility for the displacement of communities in our region as rises in sea level place entire atoll countries at risk, potentially creating a mass movement of environmental refugees.

As Justice Chaskalson warned, the erosion of **substantive** rights is often the most dangerous, for it begins a process of erosion which is difficult to resist and turn back once it has begun. There is however a great deal at stake for public interest lawyers and the community if public confidence in the judiciary is eroded – more so when the perpetrators of that erosion are government leaders who seek to blur the separation of powers as the executive tramples on judicial turf, attack rights and their advocates by denigrading institutions charged with their enforcement and undermine the legitimacy of lawyers as agents of justice. This is the backdrop against which lawyers must find their voice in contemporary Australia when seeking

[14] Chris Field, *Consumer Advocacy in Victoria*, Research Paper No 7, Consumer Affairs Victoria, Melbourne, at 5

[15] *The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* [1996] HCA 40 (23 December 1996)

[16] Native Title Act Amendment Act 1998

[17] Daryl Williams QC (former Attorney-General for Australia), *Native Title - The Impact on Mining Exploration*, speech to Cairns Chamber of Commerce Breakfast, Hilton Hotel, Cairns, 12 September 2001

[18] Prime Minister John Howard, *Removing the speed limits on growth*, address to the Australian Chamber of Manufacturers, Melbourne, 6 October 1997

to use the law as both sword and shield in the public interest.
It is often hard as lawyers representing clients in need of redress and protection from the state, to explain to them why the courts have not found in their favour. Hard enough when a court has reached that decision in accordance with the law, and demonstrated substantive and procedural fairness. It is a much tougher task to explain judicial processes and outcomes and instil confidence in a legal system when government leaders show a cavalier disdain, at best and contempt, at worst, for the very institutions – structural and procedural – which offer some protection to those within the reach of the state.
This has been a short tale of two countries by a lawyer convinced that the struggle to move them both towards equitable and inclusive societies can be advanced through the effective use of law. But it is a cautionary tale which hopes to demonstrate that for public interest litigation to succeed, lawyers are required to be vigilant, even in tranquil times, for as Joni Mitchell writes, and as Australia can attest (with apologies to Ms Mitchell):

> You don't know what you've got till it's gone
> (and then) they've paved paradise and put up a parking lot.[19]

This vigilance demands that **(i)** we dig beneath the trappings of our relatively flat societies and invite serious engagement with community, to reach where governments cannot and will not, and to bring to the attention of society hard questions and issues that cry out for resolution. For it is when one talks to refugees fleeing persecution and poverty held in hostile and cruel detention camps, to residents at risk from toxic landfills and emissions, and to farmers and fisherman whose sources of livlihood – land and sea – face contamination by avaricious corporate development to indigenous communities still without access to water and health services, to those who suffer disabilities and dismissive attitudes and vilification because of their origins, sexual preferences, religious affiliations or age, to workers who fall victim to the dictates of the casualisation of labour, to disaffected youth and those addicted to drugs and alcohol and gambling, to women who fear reprisals if they talk of cruel employers or partners, to children who sleep rough, to men and women with mental illness and disabilities who face constant exclusion, and to people turned away from or harmed by a health system ostensibly established to care – that we receive instruction in how systems and institutions combine to damage fragile lives and halt individual advancement.

(ii) As public interest lawyers, it is our duty, through the cases that we bring, to convincingly demonstrate to our judges the impact of dispassionate conduct and intrusive laws on ordinary lives.

And conversely, it is also our task **(iii)** to educate civil society about the potential for law to exact justice both via litigation and beyond the courts, by claiming and executing civil and political rights to government accountability and transparency, and to participation in government decision-making.

(iv) And linked to this task is a realisation, which comes from working as a lawyer in both South Africa and Australia, that for change to come, for rights to take hold, one must learn to ride the waves, to pull back from the courts as sites of change when political forces fear the power of courts and undermine their role; and when judges cling cautiously to narrow interpretations or rejections of rights on technical grounds.

[19] Joni Mitchell, *Big Yellow Taxi*, 1966-69 Siquomb Publishing Co. BMI

It is during this 'court down-time' when the preparatory and complementary work with civil society - in nurturing ideas, the careful gathering of testimony, the building cross-sectoral alliances, the crafting of policies and campaigns and the conceptualisation of cases - can be critical to the success of the next wave of judicial endeavour.

In a class action brought by the Tobacco Control Coalition in Australia which sought to hold cigarette manufacturer Philip Morris liable for the harm caused by tobacco to existing and potential, as yet unharmed, smokers, Justice Wilcox of the Federal Court, in dismissing the description of the class as lacking specificity for the calculation of damages, said that while the claim was clearly "motivated by a concern for the public interest", and in particular, "for the amelioration of a major public health problem",

> it is not enough for litigants and advisers … to have their hearts in the right place; their heads must be there also.[20]

The practice of public interest law requires curiosity and compassionate insight into the lives of marginalised individuals and communities. "Compassion," wrote Susan Sontag in her book, *Regarding the Pain of Others*, "is an unstable emotion. It needs to be translated into action, or it withers."[21] When compassion is underpinned and informed by intellectual inquiry and rigour, sustained commitment, professionalism and bold creativity, legal intervention can offer the best result. It is a steady translation of compassion into action, a commitment to the enduring value of institutions and a determined belief in humanity's capacity to change – in the face of crude attempts to denigrate rights and human dignity - which ultimately create the space for rights to break through and for integrity to triumph.

[20] *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] FCA 1004 at para 124
[21] Susan Sontag, *Regarding the Pain of Others*, Farrar, Straus & Giroux, New York, 2003