PUBLIC INTEREST LAW: THE SOUTH AFRICAN EXPERIENCE

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South African public interest law really took off towards the end of the 1970s, when several public interest law organizations were formed. Their methods varied, but there were a number of elements which they had in common: they aimed to work on or through the law as a means of promoting social justice; they wished to tackle justice issues in a strategic manner; they believed that the courts were a potentially useful "site of struggle" against apartheid; and they employed full-time salaried lawyers devoted to this work; They were initially funded mainly by US foundations.

Between the late 1970s and 1994, public interest lawyers took on a wide range of issues with some success. In 1994, we finally achieved a democratic Constitution, with a Bill of Rights. That did not bring an end to public interest law. On the contrary, it provided public interest lawyers with the tools which they needed to do their work. That work continues.

In the time available to me, I want to tell briefly the story of two sets of cases – one under apartheid and one after 1994 – which illustrate the work which public interest lawyers have done in South Africa. Then I will reflect on some of the lessons which we have learnt from this work.

The first story is about the pass laws. The pass laws were at the heart of apartheid. They prohibited black Africans from living in the towns without a permit, unless they qualified for a statutory exemption. They controlled movement, residence, and employment. They destroyed family life.

A series of cases was planned and taken through the courts. Plaintiffs were carefully selected to ensure that the cases with the most favourable facts came before the courts. Three times the highest court, the Appellate Division, was engaged. Each time, the

Appellate Division ruled in favour of greater freedom for the people affected. It did this by very conventional means which will be familiar to lawyers in common law systems. It did so by holding that an act of parliament did not authorize a particular regulation, by holding that a regulation could not deprive someone of a statutory right, and by interpreting a statute in favour of the liberty of the individual.

By this time, the pass laws had become increasing difficult to enforce in a modern economy. People were ignoring them, in increasing numbers. In 1986, the pass laws were repealed. I will say something later about the significance of the litigation in contributing to this outcome.

There were many other cases. The courts declared unlawful the removal of a tribe from its land; ordered the release of some 'security' detainees – though not many; struck down the election of a repressive client regime of the government on the basis that women had not been permitted to vote; avoided statutory ouster provisions by holding that they applied only to lawful actions; ordered the reinstatement in their jobs of striking mineworkers; and so on. Cases such as these were taken to court by the new public interest lawyers, or by private lawyers who were paid from overseas funds.

It is difficult for a participant in this movement to give an impartial judgment on how successful they were overall. However, I think most informed observers would share the judgment of Richard Abel, an eminent sociologist of law, who in 1995 after an exhaustive analysis of "law in the struggle against apartheid," asked the question, "Did law make a difference?", and concluded "(t)he bottom line is an unambiguous yes."[1] I think it is fair to say that the public interest law movement made a significant contribution to the movement for democracy in South Africa.[2] This happened in a legal system in which the courts were not permitted to pronounce on the validity of any statute passed by the Parliament.

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[1] Richard L Abel **Politics by Other Means: Law in the Struggle Against Apartheid 1980-1994** (1988) p 533

[2] I do not intend to enter here into the issue of whether they legitimized a fundamentally illegitimate legal system. My views on this are expressed in my chapter "On Practising Law" in Hugh Corder (ed) **Essays on Law and Social Practice in South Africa** (1988).

Now let me jump almost 20 years, to 2000. By then, a legal revolution had taken place in South Africa. We had a new Constitution, which contained a generous and justiciable bill of rights, including social and economic rights.

My second story is about HIV/AIDS. It is one of the greatest crises facing South Africa. We have very high rates of infection and death. The single greatest cause of transmission of the virus is from mother to child, at birth. An inexpensive anti-retroviral drug, which is easily administered at the time of birth, can dramatically reduce the rate of transmission. But the government refused to provide it on a comprehensive or extensive basis. Some senior people in government have a deep skepticism about the proposition that HIV causes AIDS, which can be treated by anti-retroviral drugs – this despite overwhelming scientific evidence and the registration of the drug by the official medicine regulatory body. But the government dug in its heels.

A non-governmental organization, the Treatment Action Campaign, and a group of paediatricians challenged the government's refusal to provide an inexpensive life-saving medicine. The Constitutional Court found that the government had failed to comply with its constitutional duty to take reasonable measures, within its available resources, to provide access to health care services. The Court ordered the government to undertake a comprehensive roll-out of the drug.

There were concerns about the extent to which the government would implement the order. The Treatment Action Campaign is an umbrella organisation which represents churches, trade unions, and many other bodies, and also people living with AIDS. It monitored the implementation of the order, it campaigned in the media, and it took the struggle into the streets and into parliament. There has been substantial compliance. The TAC's campaign was so successful that the government has felt compelled to undertake to provide anti-retroviral drugs not only to pregnant women, but also to others who need them.

This case does not stand on its own. Public interest litigation under our new Constitution has resulted in a declaration that the state housing programme does not meet the requirements of the Constitution, because it does not make provision for the urgent needs of people who are truly homeless or living in intolerable circumstances; in orders on the government to make provision for prisoners exercise the right to vote; in a declaration that excluding non-citizen permanent residents from state social welfare benefits is unlawful; in a declaration that a state-owned rail corporation is under a duty to take reasonable measures to protect its passengers from attack on the trains; in the striking down of the exclusion of African women from inheriting from the intestate estates of their husbands or fathers; and in the striking down of laws which discriminated against gays and lesbians.

From this account, I want to deal with two issues. First, how could the earlier gains have been made in apartheid South Africa? Second, what have we learnt more generally about how to achieve effective public interest lawyering?

Public interest law under apartheid

Apartheid was unique in the way in which the country's citizens were rigidly classified into racial groups, and rights and duties distributed differently to racial groups. But South Africa is not the only country in which a minority has exercised political power over the majority. It is also not the only country which has suppressed opposition through a repressive state apparatus. However, an unusual feature of the South African system was that all of this was done through the law. The government could discriminate against its citizens - but first it passed a law saying that it could do so. People could be forcibly removed from their homes — through a law. Opponents could be detained without a trial - but there had to be a law to authorize this. If they were tortured, it was unlawful, and so there had to be an elaborate system of lies and censorship to deny that torture happened at all – not because it was brutal, but because it was unlawful. And so discrimination and repression were mediated through the law.

This had consequences. The historian E P Thompson, reviewing the relationship between state absolutism and the courts of eighteenth century England, drew the following conclusion:

> "The essential precondition for the effectiveness of law, in its function as ideology, is that is shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion by actually *being* just."[3]

The South Africa courts *were* in fact sometimes just. The country had a tradition of courts which were formally independent, at least at the level of the higher courts. The effect of this formal independence was limited by the fact that the judges were all white (and almost all male). They brought with them to the bench the perceptions, prejudices and assumptions of their peers. But they believed that they were independent, and they generally acted out their belief. The result was that it was often possible to attempt to hold the system to its promises of consistency and lawfulness.

South African legal activists complained about the "positivism" of South African judges. By this they meant that judges had no regard to the values which were supposed to underlie the legal system, or to the consequences of the manner in which they interpreted statutes. The judges pretended that they were undertaking a purely mechanical task of reading and interpreting words. But this had some positive results. In many of the successful cases, laws were mechanically interpreted in a way which was in conflict with the true intention of the law-maker, because the law-maker had not clearly enough expressed its intention. Most of the public interest cases were in fact heard and decided by conservative old school judges, who were "just doing their job".

There were limits to all of this. There would have been no possibility of success if the legal attack had threatened the very foundations of the system. That is most clearly shown by the acquiescence of the courts in the government's abuses during states of

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[3] E P Thompson **Whigs and Hunters** (1975) p 265.

emergency. Those cases demonstrated what has been seen in other countries - that when courts perceive that "society" is under attack, they tend to close ranks with those in power.

In the 1980's another critical factor was the changing political climate. It was a period of renewed mass resistance to apartheid. Economic sanctions against South Africa were starting to bite. Government was keen to present a reformist face to the world, and so it generally did not reverse by legislation the gains which had been achieved in the courts.

The conclusions I draw about why this work was possible during the late apartheid period are the following:

- The State exercised its power through the legal system.

- The judges believed that they were independent, and most acted out that belief.

- The conservatism of most of the judges, adopting a "positivist" or technicist method of interpreting the law, created opportunities to have the laws interpreted in ways which did not favour the government.

- The cases were brought at the right time, when a favourable political climate enabled activists to use local and international pressure on the government to protect favorable decisions of the courts.

Structuring public interest litigation

The lessons of public interest lawyering under apartheid have not been contradicted by the experience of public interest litigation in a democracy. They remain the same, and their validity is underlined by the fact that they have manifested themselves in a very different political and legal environment.

There had been public interest lawyers in South Africa before the new wave. What was different once the new wave arrived was the number of people involved, and the fact that some of them worked full-time in this area. Having full-time lawyers made it possible to plan the work strategically. One of the key pass law cases was described in the funding proposal which the Legal Resources Centre sent out in 1978, before it had even opened its doors. The case was planned long before it went to court. Suitable clients were carefully selected,[4] and the case was finally decided in 1983. This careful strategic planning was made possible by having people dedicated full-time to the work.

The Legal Resources Centre established a board of trustees with the multiple functions of giving advice and guidance to the staff, giving the organized profession sufficient confidence that it would provide waivers of its rules, and providing protection against hostile government action. The trustees included leaders of the established legal profession and ultimately included some retired and sitting judges.[5]

Another lesson was the value of high-volume 'routine' casework alongside the precedent-setting cases. The high-volume work was useful for three reasons: to identify common problems which needed a legal solution; to identify suitable litigants for the 'test' cases; and to enforce decisions of the Courts on the ground. Of course, the volume work and the test cases can be done by separate organizations, if they plan their strategy together. The Legal Resources Centre worked closely with the Black Sash, a non-governmental organisation which ran advice offices and had an enormous caseload. The Centre itself handled literally hundreds of cases in the aftermath of the first test case on the pass laws, and took six further cases to the Supreme Court to ensure that the judgment was carried out in practice.

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[4] The first two carefully selected cases came to nothing from a 'public interest' point of view, when the administration conceded them administratively before they reached court. Mr Rikhoto was the third client who was selected as presenting a particularly favourable set of facts.

[5] Professor George Cooper described the Trust as a "heat-shield." George Cooper "Public Interest Law - South African Style" *Columbia Human Rights Law Review* Vol. 12 p 105 (1980).

Case selection was critical for the test cases. The lawyers learnt a new adage: the law emerges from the facts. Case-law develops incrementally, and at each stage the most sympathetic case has to be found and the facts carefully placed before the court.

A key issue was the link with popular movements. A case could be designed by lawyers, but it could not work unless there were clients with the courage to stand up for their rights. Links with popular movements were best demonstrated in the area of labour law, where the emergent trade unions made skilful use of lawyers to build an entirely new labour jurisprudence and to protect themselves as they grew into a powerful social force. To me, this was a fundamental point. There were limits to what the lawyers on their own could achieve.

This lesson was underlined by the experience in the new constitutional era. We have learnt that judgments which require the government to take positive action are sometimes only as effective as the ability of social movements to insist on effective implementation.

We learnt, too, that legal activism does not take place only in the courts. A sympathetic member of parliament can be a valuable ally. The press has a critical role to play in influencing public opinion and in exposing the truth.

An area where the public interest lawyers could have done better was through cooperation with lawyers in private practice, who were sympathetic and willing to donate some of their time. This was demonstrated in 1979, when the government started many hundreds of prosecutions of black people who were living illegally in the areas of Johannesburg set aside by law for whites. There was seldom a legally valid defence. But the private profession came to the rescue. A large number of lawyers agreed to represent the accused people for free. The prosecution now found that they had to prove every element of the offense - the race of the person prosecuted, the racial demarcation of the area concerned, the residence of the accused in the area. And after conviction, there was further argument about sentencing. Simply making the

prosecution do its job in every case brought the campaign of prosecutions crashing to the ground because of the time involved.[6]

This was a shining example of cooperation between the public interest lawyers and the private profession.[7] Regrettably, the examples were too few. The new public interest lawyers were so busy with their 'own' work that they failed to mobilize other resources which could have multiplied the impact of what they were doing.

The lessons I have learned from all of this are the following:[8]

- There is a need to create institutions which are dedicated to this work, and which can undertake it in a systematic and strategic manner. There is a need to plan the work strategically, select the right lawyer, select appropriate cases, select the proper forum, and select the right defendant. The institution needs to work with other institutions to maximize the impact of a single case and to celebrate partial victories.

This is demonstrated by the story of public interest litigation in South Africa. In an important book based on careful study of four other societies (USA, India, UK and Canada), Charles Epp has come to a similar conclusion: successful rights revolutions depend as much on what he calls 'support structures for legal mobilisation' as they do on variables such as favourable constitutional conditions, a sympathetic judiciary, and public rights consciousness.[9] Typically, the support structures are public interest litigation centres and rights advocacy organisations.

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[6] The campaign of prosecutions finally collapsed when in the *Govender* case, a rights-minded judge held that even after the accused had been convicted of living in the area illegally, the availability of alternative accommodation had to be considered before an order for eviction could be made.

[7] A few years earlier, private lawyers in Cape Town had co-operated in a similar manner to support resistance to the destruction of the Crossroads 'squatter' camp.

[8] I need here to acknowledge a justly celebrated article by Gary Bellow, which deeply influenced my own thinking at the time when I was entering this field: 'Turning Solutions into Problems: The Legal Aid Experience' *NLADA Briefcase* vol 34 no 4 (August 1977). Many of the South African lessons are foreshadowed in this article.

[9] Charles R Epp **The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective** (1998)

- There is a need to build public interest law institutions which are sturdy and sustainable - financially, politically, structurally.

- 'Routine' casework can be very important in identifying important issues to litigate, finding the right client, and ensuring that favourable court decisions are implemented in practice. The casework can be done by either the litigating organization or by an associated organization, with the two co-operating closely in sharing information and strategies.

- The effect of the legal work is greatly strengthened by links with community organizations. The lawyers can provide valuable organizational support to those movements.

- Effective legal activism needs to be linked with lobbying and work through the media, parliament and other institutions which can inform and change public and government behavior.

- The impact of the work of the public interest lawyers can be greatly multiplied if they cooperate with sympathetic lawyers in private practice.

The legal framework in South Africa is now extremely favourable for public interest litigation. Procedural innovations have further opened the door. The poor, the vulnerable and the marginalised have benefited very substantially from this litigation.

And yet – it must immediately be acknowledged that despite this highly favourable legal environment, the benefit has often been less than we had hoped. Significant progress has been made, but despite the generous provisions of the bill of rights, many people live under conditions which mock the promises we made to one another as we established a new nation. The school system remains highly unequal, despite the right to education and the right to equality.

There are many reasons for this. I will mention four briefly. One is the sheer magnitude of the challenges facing the new society, and the new state machinery. Another is the failure of the state, particularly in some parts of the country, to set up and maintain effective state administrative procedures. Another is the failure of civil society to mobilize and assert and enforce the new rights – a key element of any rights-based approach. And another, somewhat paradoxically, is the shortage of public interest lawyers willing and able to undertake the necessary litigation. A major factor in this has been the withdrawal of funding for public interest law. Many donors felt that their purpose had been achieved, and moved on to other things.

Steps are now being taken to address this by mobilising the resources of the private profession through a new institution, along the lines of the Public Interest Law Clearing House in Australia and New York Lawyers for the Public Interest. This model involves creating an institution which will encourage and enable private practitioners to offer some of their time for this work on a “pro bono” (no charge) basis; identify issues and cases for litigation through working with civil society organisations; screen the cases to identify those which are suitable for litigation; and match the cases with the lawyers.

Conclusion

The work of South African public interest lawyers did not end in 1994. Now they have a new challenge — to hold the new government to the promises of our new democracy, to make democracy real, and to make democracy a means of sharing the resources of our country among all its people. They have powerful new tools: a constitution with a strong and extensive bill of rights; a new Constitutional Court with a firm commitment to human rights; new legal rules which give standing to those who seek to promote the public interest; and new administrative, political and legal remedies for our problems. The public interest law movement has to play a creative role in building our new democracy. At least for South Africans, the lessons from the struggle against apartheid remain as valid as ever in this new context.