PUBLIC INTEREST LITIGATION IN SOUTH AFRICA: SPECIAL ISSUE INTRODUCTION

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The Constitution of the Republic of South Africa, 1996 has been aptly termed a transformative one, a framework for the large-scale transformation of the South African society through law.[1] Reflecting in 2011 on nearly two decades of legal reform in South Africa, much preceded by public interest litigation, we can conclude that many changes have indeed occurred to much (but not all) of the doctrine of the law. And yet, the desired societal transformation has not occurred. Levels of inequality are increasing and the effect, positive or negative, of governance remains debated. This *SAJHR* Special Issue aims to recover the impetus of a transformative constitutional project through attention, not to changes in the doctrine of the law, but rather to the organisational modes of human rights advocacy and litigation, focusing on one of these modes – public interest litigation.[2]

The articles, case note and current developments in this Special Issue address a diverse range of topics, though all fall within a broad definition of public interest litigation in South Africa: refugee rights, environmental rights and inner city as well as informal settlement housing rights, in addition to the rights to basic services, decent prison conditions and, finally, the transnational arena of investor-state arbitrations.

Recent socio-legal literature has investigated the conditions under which the rights contained in constitutions have had impact in societies.[3] Broadly speaking, this literature has argued that the existence of a support structure for legal mobilisation is a necessary precondition for constitutional rights to have impact. Such a support structure consists of (a) organised group support; (b) financing; and (c) access to institutions of justice, including the legal profession.

A question subsumed in this inquiry into the impact of rights has been the extent to which litigation – whether strategic, impact or reform litigation – has led to structural changes. While some from the legal realist and critical legal studies schools have been sceptical,[4] others have been more optimistic. In particular, legal mobilisation scholars have explored the indirect effects of

1 K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146.

2 This Special Issue has developed from a panel on public interest law in South Africa at the 2010 Annual Meeting of the Law and Society Association held in Chicago, Illinois, US where Jackie Dugard and Jeff Handmaker presented papers and Jonathan Klaaren was the panel discussant. The financial assistance of the National Research Foundation is gratefully acknowledged.

3 C Epp 'Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms' 90 *American Political Science Review* (1996) 765–9.

4 G Rosenberg *Hollow Hope: Can Courts Bring About Social Change?* (1991) (legal realism); M Kelman *A Guide to Critical Legal Studies* (1987).

legal mobilisation, even in cases where victories in court have either not been won or have not themselves been specifically implemented.[5] The most recent scholarship investigates the growing significance of transnational networks in such legal mobilisation and critically explores the potential for legal mobilization to hold states accountable.[6]

There is of course an extensive literature on lawyering and advocacy under the conditions of apartheid.[7] However, relatively little of that literature has focused specifically on the strategic choices and the forms of mobilisation undertaken. Instead, the focus has been on questions of jurisprudence such as the morality of lawyering for social justice under apartheid[8] and on conceptualising the outcomes of various trials and campaigns as being a form of 'politics by other means'.[9] This latter aspect has begun to be supplemented by a number of practitioner-authored trial and lawyer accounts.[10]

The depth of this literature on apartheid lawyering has not been matched by accounts of post-apartheid lawyering, and much less by work explaining its successes and failures. Nonetheless, recent South African work has turned to the role of strategic lawyering in specific campaigns.[11] Further, there are important investigations into specific litigation campaigns raising critical questions.[12] Finally, some practitioner-authors have begun to work explicitly with a legal mobilisation framework[13] and to explore legal mobilisation as part of broader processes of social justice mobilisation.[14]

5 M McCann *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (1994).

6 C Holzmeyer 'Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in *Doe v Unocal*' (2009) 43 *Law and Society Review* 271 and J Handmaker, Advocating for Accountability: Civic-State Interactions to Protect Refugees in South Africa (2004).

7 See, for example, R Abel *Politics by Other Means? Law in the Struggle Against Apartheid, 1980–1994* (1995); S Ellmann *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992); D Dyzenhaus *Judging the judges, judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998).

8 V Bronstein 'Review Article: *Politics by Other Means: Law in the Struggle against Apartheid, 1980–1994*' (1998) 20 *J of Social Welfare and Family Law* 217–20; G Budlender 'On Practising Law' 319–33 in H Corder (ed) *Essays on Law and Social Practice in South Africa* (1988); R Wacks 'Judges and injustice' (1984) 101 *SALJ* 266; J Dugard 'Should Judges Resign? A Reply to Professor Wacks' (1984) 101 *SALJ* 286.

9 See, for example, Abel (above note 7 above).

10 P Harris *In a Different Time* (2009); J Joffe *The State vs. Nelson Mandela: The Trial that Changed South Africa* (2007).

11 G Marcus & S Budlender 'An Evaluation of Strategic Public Interest Litigation in South Africa' *Atlantic Philanthropies Report* (2008).

12 C Albertyn & S Meer 'Citizens or Mothers? The Marginalization of Women's Reproductive Rights in the Struggle for Access to Health Care for HIV-positive Pregnant Women in South Africa' in M Mukhopadhyay & S Meer (eds) *Gender, Rights and Development: A Global Sourcebook* 27–56; P de Vos 'Same-Sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga' (2007) 124 *SALJ* 795.

13 J Dugard 'Rights, Regulation and Resistance: The Phiri Water Campaign' (2008) 24 *SAJHR* 593; J Dugard 'Choice from No Choice – Rights for the Left?: State, Law and the Struggle Against Prepayment Water Meters in South Africa' in A Nilsen & S Motta (eds) *Social Movements and/in the Postcolonial: Dispossession and Resistance in the Global South* (2010).

14 J Handmaker & R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010).

It is our opinion that legal mobilisation scholarship holds great promise for critical reflection, both by practitioners and in scholarly work, in the South African context. Legal mobilisation scholarship examines indirect as well as direct effects of litigation and advocacy – thus paying attention to the impacts of litigation on extra-judicial actors as well as its empowering effects and varying effects in different contexts. In this view, legal mobilisation often entails (a) organisational growth and capacity building; (b) increased participation in transnational advocacy networks; (c) broadening activists' and litigators' tactical repertoires, including possibilities for synergy; and (d) cultivation of symbolic and communicative resources for mobilisation and movement-building.[15]

The above point regarding the promise of legal mobilisation scholarship should not detract from the additional value that may be offered by other forms of impact analysis. There is much to be said for the wider impact of even pure legal reform or simple precedent cases outside of explicit legal mobilisation. Indeed, the relationship between mobilisation and litigation is dynamic and multidirectional as well as interactive.

The impact of litigation is directly addressed by the account of Roni Amit in 'Winning Isn't Everything: Courts, Context, and the Barriers to Effecting Change through Public Interest Litigation'. Amit explicitly employs Gerald Rosenberg's political analysis – not to necessarily agree with his famously pessimistic conclusion in *Hollow Hope* (1991) regarding the efficacy of public interest litigation – but to elucidate the particular configuration of obstacles faced by public interest advocates in the South African context. Noting Rosenberg's factors constraining the efficacy of legal decisions, Amit thus examines, in order to overcome those factors, whether there is sufficient legal precedent / constitutional language, as well as a high degree of support from the other branches of government, and widespread public support. Crisply put, those factors are not present in her narrative of litigation on behalf of the rights of asylum seekers and immigration detainees.

Indeed, Amit's caution is perhaps underlined in the argument made by Tumai Murombo and Heinrich Valentine in their piece, 'SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa'. Murombo and Valentine argue that the protection of environmental rights poses a greater challenge than most socio-economic rights due to the tension between economic development and environmental protection. In their view, the environment can most effectively be protected through public interest environmental litigation, among other strategies, when it is supported by democratic participation in environmental decision-making. However, the point of their piece is to identify an emerging South African threat – strategic litigation against public participation (SLAPP) suits. Seeing the threat as serious, they argue that South Africa may have to consider taking the route of targeted anti-SLAPP suit legislation, as has been done in California. In

15 Holzmeyer (see note 6 above).

the absence of such targeted legislation, however, courts should use existing procedural and substantive legal tools to protect litigants faced with SLAPP suits.

In 'Proceduralisation's Triumph and Engagement's Promise in Socio-economic Rights Litigation', Brian Ray examines three 2009 Constitutional Court decisions, which can be considered the culmination of a strong trend towards the proceduralisation of socio-economic rights. While this trend does restrict the direct transformative potential of these rights, Ray notes the positive aspect of this trend, reflected in the Court's emphasis on participatory democracy and the ability of procedural remedies to democratise the rights-enforcement process. He argues that, properly developed, what he refers to as the *engagement remedy* can give poor people and their advocates an important and powerful enforcement tool. At the same time, engagement can help strengthen and promote consistent attention to the constitutional values these rights protect. For Ray, the courts are only the starting point. For engagement to truly succeed, government must develop comprehensive engagement policies and institutionalise those policies at all levels. Finally, civil society must expand its role beyond pressing for engagement in individual cases into advocating for such institutionalisation.

Jackie Dugard and Malcolm Langford in 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' take as their starting point a report that some view as representing the state of the art in South African public interest litigation. In 2008, one of the largest funders of human rights organisations in South Africa, the Atlantic Philanthropies, published a report that identified several factors for optimal public interest litigation. Engaging with that report directly, Dugard and Langford aim to contribute to the discussion about the uptake and value of public interest litigation by problematising the premises and recommendations of the report. They test the analysis of the report in part through the lens of two recent cases concerning the disconnection of municipal services – *Mazibuko* (water) and *Joseph* (electricity). As the article details, there is a rich and suggestive contradiction between a case where poor people with a right to water linked to a powerful social movement failed in the highest Court (though won in two previous Courts) but still retained and expanded their de facto water rights since the case politicised the issue effectively, and another case where better off though not rich people litigating on a right to electricity won in the highest Court (though lost twice in the lower Courts), where no right to electricity was extant and where the actual litigants still do not have electricity because the judgment is impossible to execute (with electric wires stolen and replacement costs prohibitive).

Presenting a view distinct from that in the report, Dugard and Langford see the public interest litigation process as generally too unpredictable and diffuse for it to be adequately assessed through a formulaic or scientific approach. Yet, they would argue that such litigation has more potential for social change than covered in the report. Dugard and Langford advance a more expansive, contextualised and responsive framework for conceptualising the role of public

impact litigation and assessing its impact. This framework takes into account structural conditions of power, agency in the form of social mobilisation, and the role of public interest litigation in constituting 'politics by other means'.

In a sense, Stuart Wilson's 'Litigating Housing Rights in Johannesburg's Inner City 2004–2008' supplements the analysis of Dugard and Langford for the public interest law practitioner in South Africa. Using a study of housing litigation in Johannesburg's inner city, Wilson argues that the success or failure of rights and the strategies which give effect to them is always contingent on a broad range of factors, many of which are beyond the control of public interest law practitioners. The best that can be done is to practise law with an acute awareness of the nature and likely impact of those factors. This will guard against both an over-reductive approach which posits that litigation can never 'ultimately' make a difference, and the over confidence of the intellectually able, but socially dislocated, elite practitioner who equates social change with 'good jurisprudence'.

Also concerned ultimately with social change, Jeff Handmaker in 'Public Interest Litigation for Refugees in South Africa and the Potential for Structural Change' brings to the empirical material of refugee and migrant rights advocacy in South Africa an analytical framework that arguably differs in principle from that of the legal mobilisation school and perhaps finds itself more in tune with an integrative European analysis of the sociology of law. For Handmaker, the unit of analysis in his study of public interest litigation is broader than that of a public interest law campaign: instead, the unit is that of various confrontational civic-state interactions that yield public interest law. Further, the series of civic-state interactions should be principally understood through a country's culture of constitutionalism. This makes the particular understanding of and contestation over South Africa's constitutional culture especially significant. Finally, these interactions are (or at least are ideally) participatory in nature; they are conditioned through public involvement on the civic side and by discretion on state side. Handmaker thus treats as significant the doctrine of meaningful engagement (born largely within the discourse and jurisprudence of socio-economic rights) and the different input and traction of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and executive policy space in the fostering of public participation. Handmaker's final step is to investigate how civic actors – by means of employment and articulation of constitutional and administrative law – are engaged in translating global rules and norms into locally-relevant contexts. Such actors can be more or less skilled and perceptive in recognising the shifting social, cultural and political boundaries, particularly around the concept of government support and independence. Going for the big prize, it is ultimately structural change that Handmaker is most interested in while examining public interest litigation.

Elements of the theoretical models that are debated above are present, often explicitly and always implicitly, in the specific accounts of public interest litigation in contemporary South African and transnational arenas. In 'Demolishing Development at Gabon Informal Settlement: Public Interest Litigation Beyond *Modderklip*?', Kate Tissington examines current devel-

opments at the Gabon informal settlement, where in May 2010 over 300 families had their shacks illegally demolished by the Ekurhuleni Metropolitan Municipality and its metro police. Gabon is the site of the precedent-setting *Modderklip* Constitutional Court case, and the note examines the role of the public interest amici curiae in this case – both in the litigation proceedings as well as in conducting research in Gabon and monitoring the Court order – as well as more recent litigation efforts to provide relief for those rendered homeless by the recent illegal eviction at Gabon. This note advocates for a broader role for legal non-governmental organisations (NGOs) and public interest advocates – whether those who intervene in cases as amici curiae or those who are directly litigating public interest cases – in ensuring that court orders are complied with after judgments are handed down, as well as assisting the court in its supervisory capacity when it hands down structural orders in socio-economic rights cases.

In 'Prison Conditions in South Africa and the Role of Public Interest Litigation Since 1994', long-time prison advocate Rudolph Jansen and Tendayi Achiume outline the major rights violations experienced by South Africa's prison population as a result of the conditions of their incarceration. They further discuss some of the litigation that has happened in this area since 1994 and the strategic role they feel public interest litigation has played in improving prison conditions. In their view, public interest lawyers must have a sound understanding of the social and administrative reality within which they work. Jansen and Achiume also identify aspects of prison conditions that public interest litigation is especially suited to addressing.

Similarly, in 'Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest', David Cote and Jacob van Garderen draw upon the extensive, tacit knowledge of its co-authors in terms of their organisational experience at Lawyers for Human Rights (LHR), an organisation which has been in the midst of the South African human rights NGO organisational field since the late 1970s. Cote and van Garderen attend to history and also distinguish between, on the one side, strategic advocacy and, on the other side, organisational learning, where LHR was able to – but also forced – to adapt and to pursue different roles. Their account is particularly innovative as it is set with the South African legal mobilisation literature. Among other issues, including legal ethics and the dynamics of donor influence in South Africa, they discuss diversity and note the relative lack of black lawyers in public interest law NGOs in South Africa.

In 'Two's Company, Three's a Crowd: Public Interest Intervention in Investor-State Arbitration (*Piero Foresti v South Africa*)', Jason Brickhill and Max du Plessis present an account of an amicus-style intervention within the sphere of international arbitration. As they note, while amici are now relatively well-established domestically in South Africa, investor-state arbitrations, conducted before international arbitral tribunals in terms of international treaties, are relatively uncharted territory for public interest interventions, especially in the developing world. In 2009, two South African human rights organisations,

the Legal Resources Centre (LRC) and the Centre for Applied Legal Studies (CALS), formed an amicus-style coalition with two international organisations and petitioned to intervene as non-disputing parties in an international investor-state arbitration involving a claim against South Africa. The claim was instituted against South Africa by a group of investors in the International Centre for the Settlement of Investment Disputes (ICSID) and alleged that domestic legislation expropriated their existing mineral rights and replaced them with less valuable rights and further subjected them to the Broad-Based Black Economic Empowerment objectives of the Mining Charter, reducing the value of their rights significantly.

A Way Forward

We have aimed in the compiling of this Special Issue to pose two initial questions that are largely descriptive and which may be answered in a variety of ways, some perhaps conflicting. The first is: what are the human rights advocacy and litigation structures as well as the organisational forms and tactics that have shown the greatest potential in contemporary South Africa? The second is to pose the negative of the first question: what are the obstacles that these structures, organisational forms and tactics encounter and are sometimes overcome in realising human rights? We hope that posing these questions has moved the discussion of public interest litigation beyond the descriptive into a broader analysis of underlying social structures. Our authors have asked how public interest litigators and actors use symbolic resources, organisational resources – including both national and transnational contacts – and access to institutions of justice, including the legal profession, to realise their goals. We do not doubt that these, and a host of additional questions, will result in a further series of debates, questions, and answers, in both theory and practice.