

# Approaching the Court

## Introduction

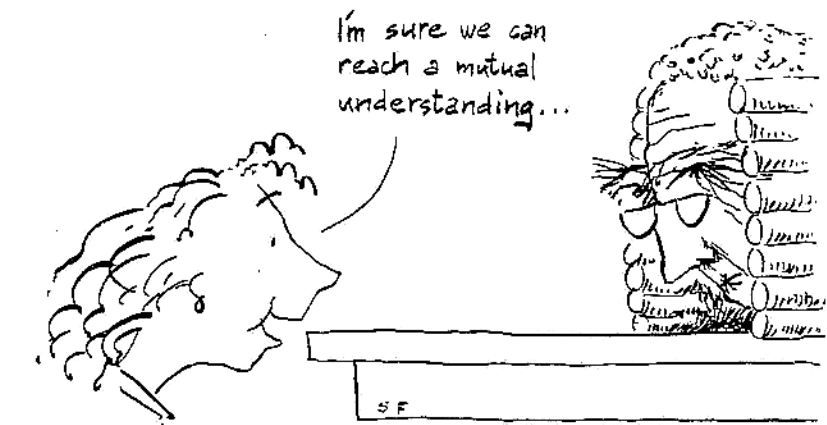
The nature of the activities which nonviolent activists undertake means that we sometimes find ourselves in court. We have written elsewhere about the experiences of a range of activists in cases arising from the Nurrungar '93 protest.<sup>1</sup> Based on our observations of those cases and other activists' experiences, we would like to consider possible tactics which nonviolent activists may use in approaching the court, and the theoretical bases of different approaches. In this article we will focus on decisions about how to approach the court and not with the original decisions about whether to take arrestable action, how to deal with the police and whether or not to attend court. Ideally all of these matters would be considered as integral parts of one action.

We will be looking at these issues in the context of ideas about the state. Broadly speaking, when we say "the state" we mean the collection of formal institutions (the government, the legal system, the police and the army) which have the power, using violence if necessary, to make rules and enforce decisions in society in the name of the community as a whole.

It should be said at the outset that we don't always get a full range of choices. There are any number of personal reasons including poverty, previous experiences of police or the courts, and work/relationship/family situations which mean that activists may choose to minimise legal hassles. These must be respected as legitimate reasons to avoid any more engagement with the legal system than necessary. There is no reason to see engaging the legal system as necessarily better than not doing so; any more than engaging in arrestable action is better than living out your activism in ways that you don't expect to result in your arrest.

## The State's Starting Point

The understanding of the state that is commonly accepted is a liberal theory which assumes that the state is completely neutral and that society is basically a collection of autonomous individuals. Courts make unbiased decisions based



on applying fair laws to individual situations. Judges are not affected by sexism, racism or the fact that most of them come from wealthy backgrounds. Everyone - whether they are a Nunga, a lesbian, Alan Bond, or a 16 year old from a poor suburb will be treated exactly the same in the police station, in prison or in court. Or so liberal theory tells us! Thus people appearing before the court are constructed as "individuals before the law", shorn of the history of privilege or oppression of their community and the rest of the background that brought them to the point of breaking the law. These things are not to be taken into account in court - it's as if they didn't exist at all.

Liberal theory also assumes that human beings are rational, and having a particular view of what rationality means, that they will therefore make decisions about their actions and their lives that will maximise their material wellbeing. This is something that many activists would find hard to accept as describing how we choose what to do! Emotions are also viewed as irrelevant and scarcely acknowledged.

If we really do accept the liberal definitions and theory above, the logical outcome should probably be that we plead guilty and accept the justness of punishment. After all, laws are made and judgment imposed for the good of society - aren't they?

This may be one way of looking at the actions of some famous nonviolence activists of the past. Both Socrates and Gandhi argued that while a particular law

or decision of the court might be wrong or unjust, the institutions of the law themselves needed to be respected. Thus when Socrates was in prison, unjustly sentenced to death, he refused an escape organised by his friends because he believed it would bring disrespect upon the law. Gandhi often invited the court to impose the highest possible sentence upon him if the judge could not agree that the law itself was unjust, thereby affirming the institutions of the law but arguing he had been compelled by conscience to disobey a particular unjust law.

It also seemed to us that many activists appearing in court after Nurrungar (especially those who lived in Adelaide and could easily get to court) tacitly accepted the courts' view of them as individuals before the law and so did not approach their cases as a unified group (an irony given that they were arrested as part of a mass action). This severely limited the options which could be pursued through the legal system.

We have a sneaking suspicion that many nonviolent activists don't accept the liberal theory of law and society and therefore do not expect justice from the law or the state. However this does not mean that there is no use engaging with that system. In a strange way the liberal basis of the law opens some opportunities for political activists. For instance, liberal theory assumes individuals will make 'rational' decisions based on accumulating money, like making a quick guilty plea to minimise the fine when they are obviously 'guilty.' Activists may choose differently for political/moral reasons.

Similarly sanctions like fines and costs are based on liberal notions of individuals who have property to give up and who will try to preserve that property. But many activists do not have such property and are prepared to do community service (or go to gaol), thus undermining the impact of court sanctions and not contributing to the state's coffers.

### Social Democratic Approaches

The fact that we do not expect justice from the court does not necessarily mean that no justice is possible. Sometimes courts make decisions which are important in themselves and mark a victory or a landmark stage in wider social justice campaigns. The court ruling in *Roe v Wade* consolidated the gains of the struggle for abortion law reform in the US, and it was a legal case begun by Eddie Mabo and others which finally led to official recognition of the prior indigenous ownership of Australia in white law and signalled a new phase in the continuing struggle of Aboriginal peoples here.

The law has also proven to be a valuable tool in protecting people's rights, even the rights of people it subordinates. For instance, work conditions and decent wage levels won through union struggle become part of awards and those awards then provide all workers with some protection from exploitation by ruthless employers.

These gains are not straightforward, and working for similar successes does not mean accepting the state as a neutral arbiter. The approach of trying to use the legal system as a tool for social change comes from the social democratic tradition which gave rise to labour and the left wing reform political parties around the world. The underlying belief here is that the state can be reformed bit by bit and running court cases and winning them to achieve social change is one way that it can be done.

While this belief is widespread among activists, it does not mean that we should rush into court, legal arguments in hand. Our conclusion from the Nurrungar cases was that legal arguments in the Magistrate's Court, particularly those presented by non-lawyers, were largely a waste of time. Individual attempts at "bush lawyering" consumed activist time and other resources out of all proportion

to the reception they received from Magistrates. Even well prepared legal arguments were rejected with little explanation, and at least one activist who had prepared a legal defence was told by the Magistrate that their legal argument would not be listened to. A Magistrate told one arrestee who offered a moral rather than a legal argument that his moral argument was convincing, but legal argument was required if he was to be found not guilty. The same Magistrate later refused to listen to legal argument put by a non-lawyer.

If activists are serious about wanting to win cases and set precedents which advance our cause, then we need to organise the resources and commitment to take our cases to higher courts and to get the legal representation necessary to argue cases there. We also need to consider whether the political/legal context is one that supports the possibility of getting a favourable decision. The US court decision which ordered that schools should be racially integrated (*Brown v Board of Education*) was strategically chosen as a case worth pursuing and backed up by an extensive community campaign. This sort of strategy will require planning and a collective approach to the court, but even if such an approach were to be organised, there are traps and questions which non-violence activists need to be aware of.

The first trap is getting carried away with the sense of importance which pervades the courts, with the cleverness of your arguments or with your lawyer's enthusiasm for the case. If you begin to think that you can win there is a temptation to twist your original political message to fit it into the required legal framework. This is a particular problem if activists give control of their cases to lawyers representing them.

Other issues may arise, for example, letting someone else speak for you in language which you would not choose (even assuming that you understand it!) may not be what you want. Running such a case necessarily involves giving some power to your counsel in the first instance and ultimately to the court, and working within a hierarchical environment - something which may not sit well with the idea of an empowering non-violent action.

### Anarchist and Socialist Approaches

Social democratic approaches require us to believe in the legitimacy of the court as an interpreter and enforcer of the law. However, institutionalised racism, the protection of private property bought by exploiting workers and misogynist rape laws have left some of us questioning whether the legal system is capable of being used to produce real justice at all.

Both anarchists and socialists have identified the state as a source or instrument of oppression whose power is ultimately based in coercion/violence. While socialists view the state as having a necessary role in the transformation of class society, anarchists argue that it is central to the problem and must be abolished.

Behind the polite face of the court system with its antique customs lies the threat of gaol and other violent institutions. If the whole system is based on violence, then there is a large question about whether nonviolent change can be brought about by using it, and whether nonviolent activists want to try using it as a tool. Starting from these analyses, several different approaches emerge.

### Total Non-Co-operation

If the state is seen as being basically unjust, one possible response is total non-cooperation with its institutions - including the courts. This can be based on either a political/moral refusal to work with injustice, or a pragmatic choice to try and make the state pay. This latter approach arises from the contradictions of liberal law with its notions of "rights" and on the nature of court imposed sanctions discussed earlier. It is based on the idea that the cost of prosecuting activists can be made greater than any fines which may ultimately be collected from them. An unfortunate side effect of some forms of non co-operation is that they can be time consuming and expensive not just for the state but also for the activists(s) involved. Seeking eight adjournments might not make sense if you need to travel interstate and appear in court to obtain each one!

Refusal can include refusing to attend court at all. You can then either wait to be arrested and taken to gaol or present yourselves to a police station after a warrant has been issued for your arrest and volunteer to be locked up on that

particular day. You need to consider the fact that this approach will almost certainly result in you having to forfeit your bail as well as pay any fines issued against you (or serve the equivalent amount of time in prison).

A different form of refusal used by Greenham women involves going to court but refusing to co-operate as far as possible, for example by refusing to speak or refusing to enter a plea. This means that you refuse to say whether you plead guilty or not guilty. The court will basically treat you as having pleaded not guilty. One woman played a saxophone rather than speak in court. Others turned their backs on the proceedings and remained silent. Approaches such as these can be extended to include the non-payment of fines and non co-operation in prison, including refusal to comply with orders, dress or eat.

"Making the state pay" means stretching the system as far as possible. It can include the forms of non co-operation mentioned already, but others are also available. You can seek as many adjournments as possible. You can refuse to agree on any of the "facts," forcing the prosecution to prove every element of the case against you. This greatly increases the amount of time taken for your case and adds to the costs of the prosecution. It may well also add to the court costs you have to pay, but it may make a political point: the courts' version of what facts are relevant (I jumped the fence into the prohibited area) is very different from what we might see as relevant facts: the existence of a US war base supporting the waging of war or the role of Australian produced ammunition in maintaining the blockade on Bougainville.

From a nonviolence perspective, one of the key questions that may arise in considering these alternatives involves whether and how to reconcile the injunction to "refuse everything humiliating" and the general principle of respecting one's opponent.

#### **Fishing Expeditions...**

The court can in some situations be used as a way of getting information that is otherwise unavailable from your opponent by cross examining officials or calling for documents. This approach has

been used with success by the London Greenpeace activists involved in the current McLibel case. They have apparently succeeded in getting lots of previously secret information from MacDonalds, some of which is now posted on the Internet for anyone interested to read!

Court can also be a way to get alternative information and voices into court and onto the public record. It may be possible to call for documents or witnesses dealing with the subject of the original action, or to read them into the court record yourself. For example, in explaining why they felt they had to trespass at Nurrungar, some activists called a Kokatha elder as a witness. Others spoke in court about the functions of the base and its role in US war fighting.

#### **Learning**

Court can be an opportunity to learn: activists can work individually or (more powerfully) together to find out about how the courts operate and what the applicable law is and to gather information about the issues that led them to undertake arrestable action. Appearing in court can be a way of learning by experience. However without appropriate preparation and support it can be a harsh lesson.

#### **Making a Statement**

Inside the court itself there is often an opportunity for individuals to make their own statements about why they chose to be arrested. Many activists do this by pleading guilty and making a speech when asked for comments before sentence is passed. In this case the choice to plead guilty is tactical rather than philosophical. Arrestees may take the same approach but plead not guilty and make their statements from the witness stand. Pleading guilty explicitly recognises that a crime has been committed according to the law, while by pleading not guilty activists stress that they believe they have committed no moral wrong. In both cases it is a matter of saying, "*we do not accept that the law is just, and we have a duty to disobey unjust laws*".

In the Nurrungar cases, at least one arrestee tried to go beyond talking about why he had chosen to be arrested by highlighting not only the necessity of the trespass, but the shortcomings of the defence of necessity (and therefore of the law it-

self); the main political point being about the links between the law, the state and militarism.

The effect of these statements, usually made before near empty courtrooms, is difficult to judge and in the Nurrungar cases, the attitudes of the Magistrates and court staff varied from interest and sympathy to boredom and frustration. Although some arrestees appeared to believe it was possible to affect the political consciousness of the magistracy in this way, it is hard to know to what extent they achieved their aim.

Political statements can also be made, or repeated, outside the court with a view to educating other people through public speaking or trying to obtain media coverage. Activists choosing this approach need to put effort into organising an event likely to attract media attention. After Nurrungar the Peace Action Collective organised a symbolic "cutting of the lease" on the bases outside the Court on the first big court date, which arrestees cut in order to enter the court. Other groups have used street theatre, well known figures speaking outside the court, or simply a media release advising where, when and why their cases are going ahead.

#### **Technical defence**

Mounting a legal defence and trying to get off on a technicality (e.g. arguing that the trespass signs were not erected under a legal authority) does not serve to promote a political cause or make a political gain. Indeed this type of defence may undermine or detract from the purpose of the original action, because it may minimise the intention of the activist (assuming there was a deliberate decision to make an arrestable action and the court appearance was not the result of surprise). However if the starting point is that the court and the state are about power not justice, then a technical defence may be a reasonable response in terms of undermining state power by using it against itself, and protecting activists from state violence. This approach is not so much a political action in its own right as a consequence of a political action. Legal representation may increase your chances of succeeding on a technical defence.

#### **How to Choose?!**

Choosing between these alternative ap-

proaches involves some serious consideration of various issues, including how you think the state works and what you think can be achieved in court. Resources are a key factor too. These include time, energy and money, but as always our major resource is ourselves.

We should not, however, take ourselves for granted. An appreciation of the personal background of activists planning court actions is important. It can give us clues about what information we may need to seek out, what skills we need to learn, and what support we may need to organise. From our Nurrungar observations, activists not from middle class, Anglo-Saxon backgrounds were less likely to have the information necessary to follow court procedure and some had previous experience of the police and the legal system that led them to treat it with justified cynicism. Middle class people seemed more likely to accept the legitimacy of the legal system or to consider it a useful place to expend effort. Certainly middle class arrestees were more likely to have the kinds of skills and/or the confidence to run defences based in legal argument.

Those who had a strong political analysis, activist experience and some organisational support were more likely to feel they could take on the court no matter what their class background. Feminist analysis and experience also seemed to prepare women better for the deeply gendered nature of court, where almost all those present other than court reporters are likely to be men operating in ways that are patriarchal as well as middle class. Several of the groups running cases after Nurrungar did training including legal briefing sessions and even mock trials allowing a practice run. In the absence of analysis, support and training, arrestees were more likely to find the experience humiliating and to see that as reflecting on them personally rather than illustrating the injustices of the system.

All of these things need to be discussed and weighed up beforehand so that informed decisions can be made and so groups don't break up under the pressure of a court case.

Even if you believe that you have the necessary resources and you and your legal advisers agree that you have a lot to

gain from pursuing an appeal to the high court, you may decide against it. Perhaps you have worked out how much it would cost you to forfeit your bail and pay court costs for a trial and have decided to plead guilty instead and donate the difference to Pay the Rent. Perhaps you've decided that the time and energy that you could spend on media coverage for a court case would produce a better outcome if you worked at a Women's Shelter instead. Perhaps your group has decided that actions focused on the court will simply detract from the main points of the campaign you are working on. You may decide that the political climate doesn't favour your case, or that you don't have the energy at this point to build up the broad base of support you would really need to succeed. On the other hand, there are some activists who will put time, energy and money into a court case that they would not commit to any other activist activity.

#### **To Have a Lawyer or Not to Have a Lawyer?**

There are many ways to obtain legal information, and consulting a lawyer is only one of them. Other activists, books, leaflets, law teachers, and telephone advice services may all be useful. Cost is one consideration in working out whether you want to seek legal advice from a lawyer, but there are others. While some lawyers (especially those who are activists themselves) will have a good understanding of what you may be trying to achieve, others may be completely unable to understand what you are doing unless your first priority is getting a finding of not guilty at all costs. They may understand their duty to represent you as requiring them to do everything they can to obtain a not guilty finding, which may not be compatible with what you want. There are real issues of control to consider here. There are many options including not seeking legal advice from a lawyer, seeking advice but representing yourself, and being represented by the lawyer who advises you. If you do see a lawyer, remember that they are there to carry out YOUR instructions, not the other way around!

After Nurrungar at least one activist found that his lawyer said things on his behalf that he would never have said himself, including that he hadn't really intended the trespass and was sorry to have broken

the law. Given his choice to engage in civil disobedience, this simply wasn't true. He felt that he had been made to look foolish and that his politics had been compromised. Be sure to get the information you seek from lawyers, but be aware that you may need to educate them about your intentions, needs and ideas. Whether it is worth putting in that effort will depend on whether your lawyer is open to the information as well as your assessment of whether she or he will be able to make use of that information later.

Ultimately the deeper issue here may be about building relationships with lawyers who undertake court action as activists engaged in the action in their own right rather than as outsiders "employed" by activists. The hierarchy and rules of the legal system mean that this presents real challenges and dilemmas both for non lawyer activists and for activist lawyers.

#### **Conclusion**

Our conclusion is that there is no one correct strategy, but that activists need to give more thought to approaching the court and the legal system. We have fewer obvious choices in court than we do in organising the part of the action that got us there. It follows that the part of our action that takes place in court requires at least as much thought as we would give to the other aspects, and the same collective approach. We need to see court as an integral part of action which should be planned alongside arrestable action. We have tried to consider a variety of possible approaches and the political understandings on which they are based. Our intention is not to provide the answer, but to promote reflection and debate between activists which can strengthen actions of the future. Both action and reflection are essential if we are to recognise the limitations of the state's liberal/individualist starting point and better pursue the collective project of social change.

*Greg Ogle and Mary Heath*

#### **Footnote:**

1. Heath, Mary and Ogle, Greg "Law and Peace" (1994) 19 (4) *Alternative Law Journal* 171; Heath, Mary and Ogle, Greg "Defending the Nurrungar 1993 Protest: The Campaign in the Courts" (1994) 21 *Anti Bases Campaign Bulletin* 10.

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