INTERNATIONAL HUMAN RIGHTS FUNDERS GROUP

NEW YORK CONFERENCE
JULY 15-16, 2014

Is Strategic Litigation a Good Investment? Lessons from the Field

July 16, 2014
10:30-12:00

***Session Organizers*:**

- Brian Kearney-Grieve, Programme Executive, The Atlantic Philanthropies
- Erika Dailey, Senior Officer for Research, Open Society Justice Initiative

Panelist and Facilitator:

- James Goldston, Executive Director, Open Society Justice Initiative

***Panelists*:**

- Noeline Blackwell, Director General, Free Legal Advice Centres
- Gilbert Marcus, Advocate and co-author of Strategic Evaluation of Public Interest Litigation in South Africa

Sponsors:

- The Atlantic Philanthropies
- Open Society Foundations (Justice Initiative)

James Goldston, Executive Director of the Open Society Justice Initiative opened the panel by discussing OSF's efforts in strategic litigation**.** Ongoing research conducted by the IHRFG has found that more than 70 organizations are giving grants around strategic litigation. OSF's goal is to learn about what organizations are doing and funding around this issue. Strategic litigation has many names and contexts, but is generally understood to have a focus on individuals who are disadvantaged and unrepresented. *Litigation* refers to a particular kind of law-based advocacy that is generally carried out by testing laws in courts and tribunals. It is distinct from the advocacy NGOs usually do. *Strategic* connotes pursuit of litigation that is grounded in a particular, well-developed strategy. *Strategic litigation* by this definition involves making critical choices. It has the specific intention to achieve a result for people beyond those directly involved in the case. OSF works on this as both a funder and as a strategic litigator itself. OSF uses it to secure remedies and promote the rule of law in the courts across a variety of topics, from torture to Internet freedom. Lessons from strategic litigation show us the impacts and the costs. Scholars and practitioners have identified four categories of benefits:

1. Important results through success in the court room (i.e. establishment of jurisprudence; monetary compensation; mobilization of community);

2. Benefits can come when litigation loses in court (i.e. renewed energy to pursue struggle in other forms by communities; a powerful dissenting opinion may provide a path to fight another day);
3. Positive results, regardless of outcome, through the discovery of new information or development of legal capacity of participants in the process;
4. Value in considering and rejecting pursuing strategic litigation.

The drawbacks to strategic litigation include the high expenses and time. Some critiques suggest that winning a judgment may not be worth it. It may provoke a backlash that makes additional advances even more difficult. Focusing on strategic litigation alone can divert resources from other effective strategies for social change. Litigation often underestimates the conservative bias of lawyers and judges; lawyers often override the wants of the constituents because they assume they have greater knowledge. It is also important to consider which issues strategic litigation is a good tool to use (e.g. housing rights, land rights).

Noeline Blackwell, the Director General for Free Legal Advice Centres discussed her work in strategic litigation in Ireland. She emphasized that strategic litigation is only useful when it is part of a wider campaign strategy. Even though strategic litigation seems like the core of the work that is being done, it should not be alone, but be part of a wider strategy. In some instances, private law firms are not willing to take on cases that will take many years to solve.

She also stressed that follow-up is key. Winning a case does not mean the job is done. Her team won a case against a finance company that was misinterpreting law and after the win they did not comply with the judgment so her team had to go to court again. Following up on implementation of the court's decision is crucial.

She highlighted that legal rights organizations rarely want to bring cases to court – it is usually the last option. Strategy around timing should be discussed between the NGO and legal rights organization. Non-legal NGOs often start by educating themselves around legal issues for their communities, then identify law reform opportunities and then later approach strategic litigation groups and pursue strategic litigation activities. This method of initial learnings is much better. It is important to set the agenda first, understand the law, identified opportunities and only when appropriate, pursue legal means. Even if the case is lost, the process is worth it.

Using international mechanisms – like European Social Committee or UN mechanisms –is a great way to avoid the courts and use soft law. Lawyers can submit shadow reports and recommendations that can be used for lobbying purposes within the home country.

Gilbert Marcus, Advocate and co-author of Strategic Evaluation of Public Interest Litigation in South Africa, spoke about his career in public interest law in South Africa. He has experience both under oppressive apartheid law and in law under a new constitution. The court is a unique forum for voices of the politically weak and marginalized sections to be heard in ways that are not otherwise possible. Debate is structured in a court, irrespective of political weakness. A judge is obliged to give a fair hearing. Courts are required to operate in the open; media have access to court proceedings. The very process of a legal hearing is a form of empowerment and litigation presented the possibility of wide dissemination of arguments. Under apartheid there were opportunities to draw attention to plight of those affected and mobilize support domestically and international through strategic litigation.

Gilbert believes that strategic litigation should not be employed in isolation of other strategies. To achieve maximum success in advancing social change it should take place with other strategies including public information campaigns, providing assistance to people to know their rights, as well as social mobilization and advocacy. Gilbert highlighted seven critical factors to ensure that public interest litigation has the best prospects of success and achieves maximum social impact:

1) Proper organization of clients. A client who is an institution is very useful. It can identify the best individuals to litigate and provide info for class-action/collective cases.
2) Overall long term strategy. Maximum impact is usually as a result of a series of cases, each building on the other.
3) Coordination: without coordination with other organizations there is a danger that resources will not be used well and there could be duplicative work being done in other SL forums. Poor collaboration can make winning cases more difficult.
4) Timing: initiating strategic litigation too soon can be disastrous. Litigation should not be the first port of call. Courts tend to be far more receptive where it can be demonstrated that the organization has repeatedly tried to achieve solutions through government action first.
5) Legal and factual research is key. Comparative research is important in terms of what is being done in other countries. Gathering data on trends can help build stronger cases.
6) Characterization: any case in the public eye might be viewed and received in multiple ways by the court and the public. Organizations need to be able to characterize to the court and the public that the issue is crucial and that real people are being affected on a daily bases.
7) Follow-up: It is critical to have follow-up after litigation to make sure litigation is put into effect and implemented.

Some Questions and Answers:

In the US, there seems to be a competition to get to the high court. This can result in a competition for resources and lack of coordination around the issue. How does this play out in different parts of the world?

Gilbert compared the situation in the US to the relatively small, centralized simple legal system in South Africa where this was less of a challenge. Rather the challenge has been over coordination and competition between NGOs. Eventually groups began sharing information and are now beginning to select cases strategically. The LGBT NGOs did fantastic strategic litigation in South Africa, persuading groups to follow a step-by-step strategy as to the timing and sequence of cases.

Noeline described the high levels of collaboration between lawyers and NGOs and hopes this can be a basis for solidarity between people working in the public interest sector, although risks remain of opportunistic private lawyers. There are challenges explaining the strategic potential of cases in lower courts to funders, and remaining flexible in strategies as situations change, such as judges being switched.

How strategic can work be when there is not a precedent format in the law? What about amicus briefs? What happens when you're doing strategic litigation on issues that have

already been decided in our favor but the problem was there was no uptake/implementation on the original decision?

Noeline explained that international venues, such as the European courts, are much more friendly to amicus briefs, which help the courts understand work over time and allows an easy form of litigation, as well as adding to the store of active legal knowledge.

Gilbert described how to address problems of implementation, and avoiding hollow victories, through creative remedies. There have been examples where the state is supposed to report back to the court, so organizations go to court to ensure compliance.

Jim played down the distinction between common and civil law jurisdictions, pointing to the many international legal bodies that have various binding value in civil and common law. A judge will want to consider other judges' reasoning and decisions in other jurisdictions, including internationally. Groups are using comparative findings in jurisprudence in strategic litigation initiatives to persuade judges in their own jurisdictions, and this should be encouraged and utilized.

How do we look at the relationship of clients, communities and social movements and the tensions that exist there? Public interest lawyers often confine strategies to the law and they often constrict social movements from doing what they think is best. How do we get around this tension?

Gilbert explained the importance of recognizing the limits of the law. When deciding to litigate, attracting the sympathy of the court and having sympathetic applicants must be considered. When social movements are encouraging violence, it can damage the case and the long-term strategy. Bringing personal stories of constituents that are technically irrelevant to the case in general, can still help in winning hearts and minds of the court.

Noeline described the common experience of working with NGOs with no legal capacity where such cases can be pursued in order to build up confidence, understanding and trust in what the law can do for them.

What about use of public interest law by right-wing groups?

Glibert suggested that the use of courts has attracted the attention of right wing groups in South Africa, so more progressive organizations need to remain alert to what they are doing and can intervene in those cases as an amicus.

Noeline noted that this right-wing backlash is not only a legal issue; it is a problem for advocacy in general, particularly as courts tend to have a right-wing bias.

Do you have any advice on how donors can collaborate more effectively?

Noeline responded that there was a need for organizations to come together and agree to work on common goals and better measure how the law is achieving success in human rights, which would allow for more effective collaboration.

Biographies of Panelists:

Noeline Blackwell, Director-General, Free Legal Advice Centers
Since 2005, Noeline Blackwell has been Director-General of Free Legal Advice Centres (FLAC), an Irish human rights NGO focused on access to justice. Noeline oversees all of FLAC's work, which includes promoting the general right of access to law, to lawyers and to fair redress systems, as well as running her own strategic litigation case load. FLAC developed the Public Interest Law Alliance (PILA) in 2009, which has successfully broadened the scope for Irish lawyers and social justice NGOs to use law and litigation in the public interest. She is a board member of the Immigrant Council of Ireland and Front Line Defenders, and Vice-President of FIDH (International Federation for Human Rights). She is an adjunct professor at the School of Law and Government of Dublin City University and was awarded an honorary Doctor of Laws by University College-Dublin. FLAC supports the European PILnet (the Global Network for Public Interest Law) and Noeline was a speaker at the opening session of the PILnet conference in Madrid in 2012.

James Goldston, Executive Director, Open Society Justice Initiative
James Goldston is Executive Director of the Open Society Justice Initiative, which advances the rule of law and legal protection of rights worldwide through advocacy, litigation, research, and the promotion of legal capacity. A leading practitioner of international human rights and criminal law, Goldston has litigated several groundbreaking cases before the European Court of Human Rights and United Nations treaty bodies, including on issues of torture, counterterrorism, and racial discrimination. He served as coordinator of prosecutions and senior trial attorney in the Office of the Prosecutor at the International Criminal Court. Prior to Open Society, Goldston was the legal director of the Budapest-based European Roma Rights Centre; Director General for Human Rights of the Mission to Bosnia-Herzegovina of the Organization for Security and Cooperation in Europe; and Prosecutor in the Office of the United States Attorney for the Southern District of New York, where he focused on organized crime. Goldston graduated from Columbia College and Harvard Law School and has taught at Columbia Law School and Central European University.

Gilbert Marcus, Legal Specialist, Human Rights and Constitutional Law (South Africa)
Gilbert Marcus is a senior counsel practicing at the Johannesburg Bar. He is a specialist in Human Rights and Constitutional Law and has appeared in numerous cases in the Constitutional Court. These cases include the successful challenge to the death penalty, the striking down of laws criminalizing gay sex, and compelling the government to provide antiretroviral drugs to pregnant women living with HIV. He was also counsel in several major political trials prior to the transition to democracy. He has done missions for Amnesty International. Gilbert is an honorary Professor of Law at the University of the Witwatersrand and has published widely. He serves on the editorial boards of The South African Journal on Human Rights and the South African Law Journal. He is the co-author (with Steven Budlender) of *A Strategic Evaluation of Public Interest Litigation in South Africa* published by Atlantic Philanthropies. Gilbert holds a Master's degree in Law from University of Cambridge and a Bachelor of Laws degree from University of Witwatersrand.