STRATEGIES FOR EFFECTIVE PUBLIC INTEREST LITIGATION

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I have the unusual experience of being involved in public interest litigation both under the repressive apartheid legal order and under the new progressive constitutional dispensation which took effect in South Africa in 1994. I shall say something about both.

Legal systems vary markedly in their capacity and willingness to come to the assistance of poor or politically marginalised communities. Ironically, even repressive regimes frequently like to portray themselves as upholding human rights, the rule of law and the independence of the Judiciary, even if the reality is very different. Apartheid South Africa was a case in point. Successive apartheid governments seldom lost the opportunity to proclaim the independence and excellence of the Judiciary and to profess respect for the rule of law. Few took these claims seriously. But for so long as the State made such claims, extravagant as they were, they presented opportunities to public interest lawyers to hold the State to their professed respect for legality and the rule of law.

Those who invoked the legal process, whether pro-actively or defensively, were alive to the limits of the law. They did so with

their eyes open, knowing that the system was stacked against them. But they did so sometimes with dramatic effect, particularly in the sphere of the much hated past laws, forced removals and labour rights.

But winning cases was not the only reason for recourse to the courts. The courts offered a unique forum for the voices of the politically weak, the poor and the marginalised sections of society to be heard in ways which would otherwise simply not have been possible. A court is a forum in which debate is structured. Irrespective of how poor or politically weak a particular litigant may be, a judge is obliged to give both sides a fair hearing and moreover, to do so in a manner that does not permit one side to silence the other. So the very process of a legal hearing is a form of empowerment. Furthermore, save in exceptional circumstances, courts are required to operate in the open. Members of the public, and more importantly, the media, have access to court proceedings. Hence, litigation presents the possibility of wide dissemination of views and arguments which might otherwise enjoy only limited circulation.

This feature of litigation therefore presented opportunities to ventilate issues, frequently with significant moral overtones, in a public forum and simultaneously to draw attention to the plight of those affected and to mobilise support, both domestically and internationally.

The legal landscape changed dramatically with the advent of democracy in 1994 and the adoption of a progressive Constitution embodying a Bill of Rights, including socio-economic rights. The last 20 years has been a period of burgeoning public interest litigation. But despite major victories, problems of poverty and inequality remain endemic. The need for strategic public interest litigation initiatives thus remains acute. I, together with my co-authors have conducted a study on behalf of Atlantic Philanthropies on the strategic lessons learned in the past 20 years. I summarise our conclusions.

We believe that litigation should not be a strategy of first resort nor that it should ever be employed in isolation of other strategies. For public interest litigation to achieve maximum success in advancing social change, it must take place in combination with three other strategies: public information campaigns to achieve rights awareness; providing advice and assistance to persons in claiming their rights; and social mobilisation and advocacy. When, however, a decision is taken to litigate it must be properly conceptualised, effectively managed and followed up. In order to ensure that public interest litigation has the best prospects of success and achieves maximum social impact we have identified seven critical factors. These are: (1) Proper organisation of clients; (2) Overall long-term strategy; (3) Co-ordination and information sharing; (4) Timing; (5) Research; (6) Characterisation; and (7) Follow-up.

Proper organisations of clients

In general, use of an institutional client which is well organised and informed is usually the client of choice. Such a client brings to bear knowledge of the problems and strategies to achieve success. It will also be able to identify the best individuals to litigate in tandem with the organisation and it will have the capacity to follow up any success achieved.

Overall long-term strategy

Where public interest litigation achieves maximum social impact, this is usually not by virtue of a single case. Rather, it tends to require a series of cases, brought on different but related issues over a substantial period. The earlier cases thus act as vital building blocks for the more complex and difficult later cases. The greatest impact is achieved by developing a coherent long-term strategy.

Co-ordination and information sharing

If there is insufficient co-ordination and sharing of information among public interest organisations, there is a real danger that resources will not be used effectively and, even more damaging, viable cases will be undermined by other conflicting cases being brought by other organisations simultaneously or beforehand. It is crucial, therefore, that there be proper information sharing and co-ordination among different organisations.

Timing

The damaging effects of running litigation too soon can be disastrous, particularly as an unsuccessful piece of public interest litigation could in practice, effectively foreclose the issue from being re-litigated. It is also usually helpful to be able to demonstrate that litigation has not been the first port of call. Where litigation is against government on controversial issues, courts will tend to be far more receptive and sympathetic where it can be demonstrated that the organisation has repeatedly sought to engage with government to achieve a solution but that this has not resulted. The chances of succeeding in the litigation are substantially increased if government has had an opportunity to resolve the issue, but has failed to do so without justification.

Research

A critical and often neglected facet of successful public interest litigation is the need for detailed research in advance of the litigation. Research includes both legal research and factual research. Use of the comparative method (in jurisdictions receptive to comparisons) is particularly important because courts are comforted by providing solutions that are in line with those adopted in other countries. The need for access to proper factual research is equally acute. In cases on socio-economic rights, many of the factual issues will be highly specialised requiring appropriately qualified experts.

Characterisation

Any case – especially when in the public eye – might be viewed and perceived in multiple ways by courts and the public. It is thus extremely important for those involved in public interest litigation to demonstrate to both courts and the public that the issues at stake are critical, that the assertion of fundamental rights is being used to redress unfairness and inequality rather than perpetuate it and that there are real people being affected on a daily basis.

Follow-up

Finally, a critical factor of ensuring long-term success is follow-up after the litigation. This involves ensuring that a victory in the litigation is put into effect by the relevant government department, thus translating the legal success into practical benefits for a large number of people on the ground, including those who are were not directly involved in the litigation at all. Follow-up is often linked to the kind of order sought and obtained in the litigation. Creative remedies can be particularly important.

In identifying these seven factors, I do not wish to advocate a "one size fits all" approach. I merely present these factors as being the most effective in post-apartheid South Africa. There may well be other important factors and the ones already mentioned might be appropriately modified in different jurisdictions.