

The background is a solid teal color with various geometric patterns. At the top, there is a repeating pattern of interlocking triangles and lines. On the left side, there are vertical rectangular panels with horizontal lines, resembling window blinds or architectural details. At the bottom, there are larger, more complex geometric shapes, including circles and arcs, some with internal patterns.

Public Interest Litigation

Summary of a meeting of organisations from Northern Ireland, the Republic of Ireland, South Africa and the United States

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May 2011, Johannesburg, South Africa

CONTENTS

Introduction and background	3
Challenges faced in undertaking public interest litigation	4
How litigation can advance social justice	7
What funders can do	12

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Introduction and background

The purpose of this summary is to make available to a broader audience key findings of a meeting of civil society organisations held in Johannesburg, South Africa, in May 2011. The meeting brought together organisations involved in public interest litigation in Northern Ireland, the Republic of Ireland, South Africa and the United States.

As part of its focus on promoting social justice, The Atlantic Philanthropies supports organisations to carry out and develop the use of public interest litigation. These organisations utilise a combination of legal advocacy, research, campaigning and civil suits that seek to change law, regulations and – more broadly – public attitudes, to address issues of discrimination and inequity, as well as structural barriers to the use of public interest litigation. They focus on issues such as challenges to the death penalty in the United States, discrimination against people who are HIV-positive in South Africa, challenges to social security benefits in Northern Ireland and discrimination in social benefits for migrants and asylum seekers in the Republic of Ireland.

In May 2011, The Atlantic Philanthropies brought together a number of the organisations it supports in this area to share challenges, successes and strategies.

What follows is a brief summary of the main points that emerged during the course of the meeting.



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Challenges faced in undertaking public interest litigation

Lack of access to legal services

People who need legal assistance experience real difficulties in finding lawyers who have relevant legal expertise and experience in the specific area of law. And in instances where state legal aid is available and individuals meet the means test, they often encounter restrictions in terms of the areas of law that are covered.

Private law practices can also be reluctant to take on public litigation cases, or offer more junior staff who are insufficiently experienced in the specific area.

Small law firms have limited capacity – both in terms of staff and financial resources – to undertake *pro bono* work. This is sometimes exacerbated by difficulties in attracting and retaining good and experienced staff, as private and government sectors often offer more attractive salaries.

Delay and duration

A backlog of cases means that applicants can wait many months for civil legal aid services to take on a case, followed by another many months for a court to hear the case. Litigation is extremely slow, particularly where new points of law are being tested. It can take a number of years to work through the court system, and applications to international mechanisms can only be made after all domestic court remedies have failed. This means that plaintiffs may have to engage for years, even decades. This is difficult not just for the person bringing the case, but also for legal firms because it requires long-term commitment.





Prohibitive costs

Individuals who file suits take a huge financial risk. They must carry not only their own legal costs but if they lose they may also be required to pay for the costs of the other side. Protective cost orders, which help address this risk, are still to be granted in some jurisdictions, or are new in others – that is to say they are not codified and are at the discretion of the judge.

Enforcement and accountability

Even if litigants win their case this does not mean that they will necessarily see a difference in their lives. After an order is made in court, the state can be slow to enforce a decision. Further, even when a precedent is set in one case, the state may not accept the principle and may force individual litigation by each person affected by an unfair process or act. Still, even where legal and political frameworks are good, enforcement and accountability remain challenges.

In instances where judges are elected and lawyers are appointed by these judges, additional accountability problems emerge.

In short, public interest lawyers have to also work outside the courtroom to secure reform by engaging in policy, advocacy and research.

Lack of political will

Another common challenge is government indifference at best, and outright hostility at worst, in litigation aimed at addressing issues of discrimination and human rights violations.

There is evidence of governments becoming more rigid in their attitudes towards public interest litigation. Where in the past a government may have typically been willing to settle, due to high-profile cases, attitudes are changing.

Government budget cuts are also hampering efforts to introduce changes in the legislative field, such as independent judicial appointment systems, and broad funding of legal aid.



A lack of public awareness and debate on cases is a further challenge. The increasing use of confidentiality clauses on settlements by state lawyers is exacerbating this situation.

In situations where cases on ‘minority’ issues are being fought in what can be described as hostile political environments and the issue is seen as political, increasingly politicians and other elected officials, such as judges, are using their populist positions to seek political gain. Where there is majority support for the populist position and the courts are overwhelmingly conservative, this mindset can mean that a broader and sorely needed debate about human rights and dignity does not take place.

Difficulties of social mobilisation

Some organisations experience difficulties in mobilising the social groups that they represent – for example, refugees, who often face discriminatory practices, and who do not form a homogenous group but are a diverse community comprising multiple identities facing a variety of legal challenges. The challenges of social mobilisation make it hard to organise and carry out cross-racial and cross-class movements.

Lack of funding for public interest litigation

In general, there is a lack of funding for training. Also, short (one- or two-year) donor funding cycles make it impossible to build staff capacity to engage strategically in public interest litigation.





How litigation can advance social justice

Recruit lawyers and law firms to take on litigation

As mentioned above, it is often a struggle to find lawyers and law firms that are both willing and also have the capacity to take on difficult public litigation cases. The following are suggestions on how to recruit the right lawyers and legal team for *pro bono* work as well as attract full-time staff for public interest litigation.

To create a culture of public interest litigation:

- Do match-making or carefully pair the expertise of lawyers to the needs of an organisation.
- Engage with universities to highlight areas of law that they do not teach and encourage professional bodies to integrate specialised areas into training courses.
- Invite high school students from communities where litigation is taking place to interact with lawyers working on these cases. This helps staff gain a deeper understanding of their client communities before “trouble hits.”

For organisations seeking full-time lawyers:

- Offer assistance to staff to further their studies as a way to both attract and retain them.
- Include time for staff socialising and ensure the organisation has family-friendly policies.
- Expose staff to a variety of work but give them opportunities to specialise.



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- Bring in new people with new energy and ideas. At times, veteran public interest lawyers can be defensive and reluctant to engage with the painful issues that these cases surface, perhaps because they have been fighting these types of cases for a long time. Also, there can be a macho culture among long-time public litigators who experience trauma from their cases, as evidenced by self-medication among some public interest lawyers.

For organisations seeking *pro bono* assistance from private law firms:

- Across all jurisdictions, the *pro bono* help that organisations need is not primarily for litigation but rather for a better understanding of the legal framework in which their target groups/clients operate.
- Identify law students who show an interest in public interest litigation and bring them into public litigation firms as interns. When they later go into private practice, they are likely to pursue *pro bono* work.
- Provide courses or theme-based clinics for *pro bono* lawyers.
- Create a mentor system to help lawyers learn about the complexities of engaging in this type of litigation.
- Carry out practitioner fora outside office hours and bring in external people.
- Look beyond major cities for lawyers working in towns where litigants live. They could be encouraged and supported to be more connected to *pro bono* work.
- Insist on commitment and that the same lawyers stay on a case. A danger in using *pro bono* lawyers is a high turnover of attorneys assigned to a case.
- Look for volunteers outside the legal profession. *Pro bono* is not limited to lawyers. Other people can volunteer on cases and bring great value, for example engineers or medical experts, by providing expert non-legal testimony.





- Find a legal ‘hook’ that will interest lawyers. Private sector lawyers may not respond to cases about social and economic rights, but they will take cases about the rule of law and bill of rights.

Come well prepared to all cases

To enhance chances of success, it is critical to thoroughly research and prepare for cases and to have a deep knowledge of the issue. The courts should be used as part of a wider drive to reform and as a last resort. Where the defendant realises that the litigators are serious and see during court arguments that the judge is convinced, it is more likely that an out-of-court settlement will be reached and that relief sought will be given.

Focus on thematic and structural issues rather than *ad hoc* litigation

Ad hoc litigation is typically not very useful. Social justice is better served if organisations focus on structural issues and form networks with other organisations and social movements.

Consider the pros and cons of test cases

Cases that are won can have adverse consequences, while cases that are lost can yield gains at a later stage.

Work more closely with the media

It is important not to be naive when it comes to marshalling the forces of the media. However, as public interest litigation cases are generally interesting to journalists and to the public, it might be worth, for example, to invite journalists along on a case. Aside from highlighting the case and broader issues of social justice at stake, media coverage of *pro bono* successes can act as motivation for other lawyers and law firms to become involved in *pro bono* work.





A useful technique to consider is that of ‘speed matching’ between advocates and journalists, where information can be exchanged and connections made in a structured and quick way.

In terms of getting the message out to middle-class people, whom litigators often fail to reach, litigators need to work with the media to find leverage points to get to this group.

Think about implementation and enforcement from the beginning

Legal victories are hollow without implementation. There is a need to focus not just on winning a particular case but to think about how to ensure implementation and enforcement of a favourable decision from the beginning. International standards and procedures can be useful. In addition, it is important to analyse legal barriers and the concerns of policymakers. Often implementation does not occur because litigators fail to understand the constraints on the implementers.

Link legal work with policy and education work

Litigation is never enough on its own and must be coupled with efforts to change policy, and educate policymakers and the public.

Public litigation lawyers can help frame changes by working with government officials. However, even where public interest lawyers collaborate with a government official on a policy, a new official can be appointed and the momentum evaporate. But public interest litigators do generate awareness about issues, which they can propel through government channels to mitigate this risk.





Make public interest litigation part of broader social movements

It is critical to link litigation to social movements, excellent analysis, credible organisations and campaigns, and to determine how a particular issue and individuals at the centre of a case can be placed into a broader context.

In this process, it is useful to gather in-depth information on clients, their families and communities, as well as the circumstances in which the clients grew up. The result is a picture not only of a particular client, but of whole communities. This can help establish whether clients are in fact victims of systemic failure. Litigators can present this picture to the judge, including – if it exists – evidence of police, prosecutorial and other procedural misconduct.





What funders can do

Invest in models, visions and holistic work

Core funding is most useful for organisations working in public interest litigation as it allows for long-term capacity-building and institutionalisation. Often, however, donors are attracted to issues and have a desire for tangible ‘products’, although this can be counter-productive to organisations and to the communities they serve.

Organise gatherings

It is very useful if donors can provide opportunities for organisations from different jurisdictions to share experiences and exchange strategies and ideas.

Engage in frank discussions about impact and assessment

It would also be helpful if funders could find common ground in terms of what they want with regard to impact and assessment.

Share strategic litigation lessons

Donors could also encourage and provide opportunities for their partners to share strategic litigation lessons and experiences, for example with young, aspiring lawyers.

Continue to focus on litigation

If properly informed, framed and used, public interest litigation is a powerful tool that can capture people’s mind and provide the building blocks for mindset changes.



