

LITIGATING FOR PEACE: THE IMPACT OF PUBLIC INTEREST LITIGATION IN
DIVIDED SOCIETIES

by

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THESIS ABSTRACT

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Peacebuilding efforts are ongoing around the globe today. However, in societies that have transitioned out of conflict and have a strong judiciary, potential exists to use innovative techniques to assist in those efforts. Termed divided societies, these countries which have conflict simmering under the surface may benefit from public interest litigation as a tool for peacebuilding in the region. As peacebuilding and public interest litigation share many of the same goals, litigation may be able to assist the society to more sustainably transition from a culture of conflict to a culture of peace. This paper details current scholarship on public interest litigation, peacebuilding, and post-conflict reconstruction, provides research findings of best practices for litigating from Northern Ireland and South Africa, and discusses the efficacy and limitations of public interest litigation as a tool for peacebuilding.

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CHAPTER I

INTRODUCTION

A great deal of resources and research have been devoted to evaluating peacebuilding efforts in war-torn societies, post-conflict societies, or transitional societies; however, this paper focuses on the impact of preventative peacebuilding strategies in societies that are not necessarily coming out of conflict, but are considered divided on a potentially violent level. Specifically, this paper considers the impact of public interest litigation as a peacebuilding tool in divided societies. Rather than waiting until armed conflict has taken over a society and the judiciary and other governmental bodies have been debilitated, divided societies can provide an opportunity for local actors to engage in sustainable and authentic peacebuilding to help minimize the potential for the acceleration into conflict. If the judicial system is still intact, then public interest litigation may be a tool that can greatly improve the human rights and other circumstances that determine whether a country will become embroiled in conflict.

While litigation can be seen as an adversarial tool that actually causes further division, this paper shows the potential for new public meaning to be created through judicial orders that can lead to more harmony within the society. By granting protections to a marginalized group or enforcing elements of a peace agreement, for example, public interest litigation may help societies slowly evolve out of their conflict and into a functioning region with a strong rule of law. Where the conflict is identity based and deeply entrenched within the groups, outlawing the conduct that fuels the division can be one way to help the society outgrow the conflict.

This paper analyzes the potential and impact of public interest litigation in divided societies as a tool for peacebuilding. Chapter II reviews the relevant literature, focusing on current views and analysis of peacebuilding, public interest litigation, and evaluation efforts. Chapter III presents research and results from interviews with public interest litigators in Northern Ireland and South Africa shedding light on how and whether litigation is a valid tool for peacebuilding that actually minimizes the potential for conflict within these divided societies. Finally, Chapter IV considers the implications of the research discussed in Chapter III and attempts to show the potential benefits of public interest litigation as a tool for peacebuilding in a divided society.

Many countries in the post-conflict stage are still divided and struggling. Even if the conflict has been deemed by international bodies as “resolved”, the people on the ground are still reeling from conflict that is not temporal, but is generational, historical, and cultural in some cases. The peacebuilding process in such a society usually focuses on disarmament, government restructuring, etc. However, through public interest litigation and a strong judiciary, or through a strong case, society and the courts themselves could be re-legitimized while advancing interests of large marginalized groups in divided societies.

Public interest litigation could help minimize the potential for future violent conflict and could help establish a more solid rule of law. Public interest litigation not only assists the parties directly implicated in the cases, but also helps society as a whole accelerate towards rehumanizing one another and moving towards a less divided future. When choice is taken out of a matter then society as a whole could start to move forward without having the option to discriminate any longer. Public interest litigation is an

overlooked peacebuilding tool that could be used more effectively to accelerate social unity and change in divided societies.

For the purposes of this paper, the focus is on divided societies. This is for a number of reasons. First, there is a dearth of scholarship on peacebuilding efforts in divided societies. A significant amount of work has been done on post-conflict and transitional countries, of which divided societies may be a part, but that taxonomy is slightly too limiting for the intent of this paper. Second, labeling a country or region as post-conflict seems to minimize the daily inner and outer conflicts that exist in many of those societies. It does not seem to be an appropriate label to be given by an outsider. This author wishes to refrain from determining what level of conflict is occurring for the people within any given society. Similarly, transitional societies seem to take on a stigma that they are moving forward into something better than from where they came—which is of course, the hope. However, this can also be an insulting term and assumption for those who may feel the new government or political situation is being forced upon them from the outside. For example, an attempt to force non-religious democracy onto a religious country—just one that does not share the Western European predominant religion—could be a form of cultural imperialism.

Clearly, an important part of public interest litigation being used as a successful tool is to actually bring a successful case. Like any litigation, there are several factors to consider prior to taking a client and prior to deciding to go to trial. In a public interest litigation case, the decision can be even more important as the impact the case may have on the parties and the society as a whole is potentially great—win or lose. Therefore, tools for maximizing the efficacy of public interest litigation will be discussed below.

Overall, there is a need to focus on innovative peacebuilding strategies in societies that may be divided in a way that makes them vulnerable to armed conflict. Using local actors and strengthening civil society to bring public interest cases to minimize oppression and human rights abuses and to maximize equality may help prevent an impending conflict and encourage a respect for the law. Similarly, enforcing terms of peace agreements, constitutions, or other laws through public interest cases can legitimize and give social meaning to these documents, which may seem detached to the actual needs of the society until they are enforced in court.

CHAPTER II

LITERATURE REVIEW

The term “peacebuilding” was coined by General Boutros Boutros-Ghali in 1992 and refers to the two-prong approach to preventing future conflict through changed attitudes and infrastructures while also developing tools to deal with future conflict peacefully through education, resources, and other motivators.¹ Some debate exists in the scholarship as to which area of society should receive the most attention in peacebuilding efforts.² In his book *When War Ends*, David Francis cautions that socio-economic structures and development should receive as much attention in a post-conflict society as the military and security sector.³ However, Parver and Wolf highlight the importance of a stable justice system and an established rule of law for peacebuilding efforts to succeed.⁴ The UN Rule of Law Initiative agrees that a well respected rule of law is critical to any other reconstruction efforts in a post-conflict society.⁵ Hampson suggests a myriad of sectors which can help in the rebuilding efforts of a nation: the implementation of democratic institutions, a strong rule of law, physical reconstruction, social and economic development, and new models for interpersonal dispute resolution.⁶

¹ Corrine Parver, Esq. & Rebecca Wolf, *Civil Society's Involvement in Post-Conflict Peacebuilding*, 36 INT'L J. LEGAL INFO. 51, 55 (2008).

² Fen Osler Hampson, *Can Peacebuilding Work?*, 30 CORNELL INT'L L.J. 701 (1997).

³ DAVID J. FRANCIS, *WHEN WAR ENDS 2* (David J. Francis, 2012).

⁴ Parver & Wolf, *supra* note 1, at 56.

⁵ *Peacebuilding*, UNITED NATIONS RULE OF LAW INITIATIVE, http://www.unrol.org/article.aspx?article_id=27 (last visited March 5, 2013).

⁶ Hampson, *supra* note 2, at 702.

One scholar, Pouligny, provides an important critique of these peacebuilding efforts.⁷ Rather than having scholars debate which areas are of utmost importance for sustaining a peaceful transition out of conflict, Pouligny reminds the reader that the local residents should be the ones who provide the knowledge to decide where resources are needed.⁸ She explains the transformation experienced by societies that have gone through violence and armed conflict.⁹ Through their shared crisis, the locals have the information required to channel their new transformed society into one where the violence is minimized and peace is sought.¹⁰ Indeed, the locals have the highest stake in sustainable peace and should be treated as more than case studies or recipients of the wisdom from outsiders with one-size-fits-all peacebuilding kits.¹¹

This is an important critique on the approach taken by many towards post-conflict societies. Moreover, rather than focusing on which organization is most successful in peacebuilding, Pouligny reminds us that the focus should be on changing the identities that lead to the conflict, reconstructing group boundaries in a culturally appropriate way, addressing how to write history without perpetuating violence, and rebuilding trust both within the branches of government and between citizens.¹² All of these efforts are most successful when lead by local actors, or “insiders” as Pouligny refers to them.¹³

⁷ Beatrice P. Pouligny, *Civil Society and Post-Conflict Peacebuilding: Ambiguities of International Programs Aimed at Building ‘New’ Societies*, SECURITY DIALOGUE, Dec. 2005.

⁸ *Id.* at 9.

⁹ *Id.* at 2.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 11.

¹² *Id.* at 10.

¹³ *Id.* at 9.

On the other hand, civil society can play a vital role in peacebuilding efforts, as well.¹⁴ Parver and Wolf define civil society as “the voluntary actions of individuals who share common beliefs or values.”¹⁵ Parver and Wolf’s scholarship on civil society is distinguished from Pouligny’s in that civil society is advocated as a positive option, although the actors within the civil society are not limited to “insiders”.¹⁶ Members of civil society can be an international NGO, a local community group, or any such gathering of people pursuing a specific mission.¹⁷ Parver and Wolf list the many efforts that members of society undertake to promote peace in divided regions, such as holding government to account, working toward the public interest, socializing citizen’s behavior, establishing new peaceful norms, and building community.¹⁸ Accordingly, civil society’s engagement during the reconstruction phase has been shown to be a vital component to any success in building peace for the future in the region.¹⁹

Clearly, peacebuilding in post-conflict societies is an attempt to influence the overall structures and culture that lead to the conflict. In 1989, the term “culture of peace” was coined at a conference sponsored by the UN and has been influencing peacebuilding scholarship ever since.²⁰ The UN defines a culture of peace as “a set of values, attitudes, modes of behavior, and ways of life that reject violence and prevent conflict by tackling their root causes to solve problems through dialogue and negotiation

¹⁴ Parver & Wolf, *supra* note 1, at 53.

¹⁵ *Id.*

¹⁶ *See, Id.*; Pouligny, *supra* note 7, at 5.

¹⁷ *Id.* at 53.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Hampson, *supra* note 2, at 702.

among individuals, groups, and nations.”²¹ Some scholars refer to this call as a societal shift from a “culture of war” to a “culture of peace.”²² According to Parver and Wolf, a culture of peace requires a country to address the cultural violence which may have existed in social structures that ultimately fueled the conflict.²³ For example, where inequities exist due to government policy such as gender or ethnic disparity in wages, this can contribute to a general sense of being disconnected from the government or fellow citizens. Such socio-economic injustice is often referred to as structural violence.²⁴ Under this theory, a country built on structural violence is perpetuating a culture of war. By contrast, a culture of peace is one in which education, development, gender equality, and overall human rights are upheld and equitable across divisions.²⁵

Public Interest Litigation can be a powerful tool for making a change in the structures that fuel division, violence, and a culture of war.²⁶ Helen Hershkoff provides much insight into the principles and potential impacts of public interest litigation on a society in her piece *Public Interest Litigation: Selected Issues and Examples*.²⁷ Hershkoff explains that public interest litigation most often describes the actions taken by lawyers seeking to bring about societal change through the court system in order to

²¹ G.A. Res. 53/243, U.N. Doc. A/RES/53/243A (Sept. 13, 1999).

²² E.g., Parver & Wolf, *supra* note 1, at 72.

²³ *Id.*

²⁴ Johan Galtung, *Cultural Violence*, JOURNAL OF PEACE RESEARCH, Aug. 1990, at 291.

²⁵ Parver & Wolf, *supra* note 1, at 78.

²⁶ Helen Hershkoff, *Public Interest Litigation: Selected Examples*, available electronically at World Bank Legal Institutions, <http://www.worldbank.org/publicsector/legal/index.htm>. (Prepared for World Bank Empowerment Retreat 2002).

²⁷ *Id.*

reform rules, enforce laws, and articulate social norms.²⁸ Depending on the jurisdiction, public interest litigation can be initiated by local actors, civil society, or even international NGOs.²⁹ Among other aims, public interest litigation seeks to bring government to account, to create new public meaning, to boost trust in the legal system, and to bring a voice to the powerless in the society.³⁰ Further, public interest litigation can be used alongside an overall peacebuilding campaign in a way that forces the government to respond through a judgment or a dismissal, but at least some sort of an acknowledgment of the issue is made.

Some of the most prominent scholars in the field of public interest litigation are famous for their extensive research in what they refer to as “cause lawyering”.³¹ Professors Austin Sarat and Stuart Scheingold have provided the field with several volumes of essays discussing the highs and lows of public interest litigation.³² They point out one key distinction between public interest litigation and other forms of litigation in that public interest lawyers are taking up the cases with little hope of succeeding, but with a dedication and passion that keeps them joined to the client and the

²⁸ *Id.* at 1.

²⁹ See Christopher Roederer, *The Transformation of South African Private Law After Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy*, 37 COLUM. HUM. RTS. L. REV. 447, 486 (2006).

³⁰ Hershkoff, *supra* note 26, at 2.

³¹ AUSTIN SARAT & STUART A. SCHEINGOLD, CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY 3 (Keith Hawkins et al. eds., 1998).

³² *E.g.*, SARAT & SCHEINGOLD, CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY (Keith Hawkins, 1998), AUSTIN SARAT & STUART A. SCHEINGOLD, CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart A. Scheingold, eds., 4th ed. 2001); AUSTIN SARAT & STUART A. SCHEINGOLD, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM AND CAUSE LAWYERING (2004); AUSTIN SARAT & STUART A. SCHEINGOLD, CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold, eds., 2006).

overall cause—hence the term cause lawyering.³³ Further, Scheingold urges that politics be dealt with through the lens of legal rights and obligations.³⁴ While lawyers may not be the obvious choice for helping bring about a social movement, the professors explain that lawyers can contribute to a cause through their knowledge of legal vocabulary and awareness of rights.³⁵

One of the most common examples of lawyers contributing to a societal change campaign is through the pinnacle public interest case *Brown v. Board of Education*.³⁶ Hershkoff uses *Brown* to illustrate the many common components of a public interest case. First, she explains the plaintiff was representing a wider group, African-American schoolchildren; the Respondent was a government agency, the Board of Education of Topeka, Kansas.³⁷ Additionally, the issue of racial desegregation in schools was extremely divisive. There was considerable violence and socially acceptable discrimination occurring. In other words, the society was deeply divided. Finally, the relief being sought was founded on a principle within the Constitution of the country—the Fourteenth Amendment’s Equal Protection Clause was one of the major bases for finding in favor of the plaintiffs.

³³ SARAT & SCHEINGOLD, CAUSE LAWYERS AND SOCIAL MOVEMENTS 1 (Austin Sarat & Stuart A. Scheingold, eds., 2006).

³⁴ STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 131 (2nd ed. 2004).

³⁵ AUSTIN SARAT & STUART A. SCHEINGOLD, THE WORLD CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 10 (Austin Sarat & Stuart A. Scheingold eds., 2005).

³⁶ *Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 488-89, 74 S. Ct. 686, 688, 98 L. Ed. 873 (1954) *supplemented sub nom.* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955). For the purposes of this paper, this case is solely being used as an example of a public interest case. This is not to infer that *Brown* is applicable to litigation in other societies or that it occurred in an environment that was “divided” as the term is being used here. The U.S. at the time of *Brown* is not being compared to a post-conflict society in need of peacebuilding. The case is simply illustrating a successful litigation process that includes the many factors of a public interest case.

³⁷ Hershkoff, *supra* note 26, at 3.

When the U.S. Supreme Court ruled in favor of the plaintiffs and mandated desegregation in the public school system, a certain degree of structural violence was minimized. A culture of peace as described by the UN would most certainly involve cases like *Brown*. In a divided society like the segregated U.S. at the time of *Brown*, public interest litigation attempted to bridge the division. Indeed, as Sarat and Scheingold mention, *Brown* actually made the Constitution mean something.³⁸ Creating public meaning is one of the many pursuits of a public interest case as described above, and when it comes to a divided society, the constitutional design is even more important.³⁹ Sujit Choudhary and other scholars debate the difficult task of creating equitable constitutions in divided societies, and determine that one pressing issue is integration versus accommodation.⁴⁰ As seen through the South African experience, Roederer explains that no matter how solid the design of the constitution, it may not have any impact on society without lawyers forcing the laws to be implemented through public interest litigation.⁴¹

Some of the most important principles that guide public interest lawyers in their quest to build a culture of peace are summarized best by Hershkoff.⁴² First she explains the basic principle that public interest litigation challenges the rightness of the majority.⁴³ In most societies, the laws are made by a privileged group that might not be aware of or

³⁸ SARAT & SCHEINGOLD, *supra* note 33, at 5.

³⁹ SUJIT CHOUDHRY, CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 4 (Sujit Choudhry ed., 2008).

⁴⁰ *Id.*

⁴¹ Christopher Roederer, *The Transformation of South African Private Law After Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy*, 37 COLUM. HUM. RTS. L. REV. 447, 485-86 (2006).

⁴² Hershkoff, *supra* note 26.

⁴³ *Id.* at 7.

concerned with the negative impact its policies might have on the rest of society.⁴⁴ Even when laws and policies are enacted through a democratic process, it does not make them inherently right or equal especially in how they are actually applied to society. By questioning laws that are made by a majority, public interest litigation raises the voices and concerns of the minority.⁴⁵

Secondly, Hershkoff posits that public interest litigation attempts to make an outright acknowledgment that the “law on the books” is much different from the lived experiences of those under the “law on the ground.”⁴⁶ Put simply, public interest advocates realize and bring to light the difference between having humane laws and having equal application of those laws. She stresses that those using public interest litigation as a way to reform the law and minimize conflict must bear in mind the need to continue the legwork to reform the application and enforcement of the law as well.⁴⁷ This principle serves as a reminder that public interest litigation is just one part of the peacebuilding puzzle; although a public interest suit might have prevailed in the courts, extensive follow-up is required to ensure there is actual enforcement and implementation to change the experiences of those impacted by the law on the ground if peacebuilding is the goal.

Finally, Hershkoff’s most pressing point is that public interest litigation attempts to empower individuals to exercise their rights by reconstructing public meaning.⁴⁸ In a democratic society based on a strong rule of law, the citizens are intended to use that

⁴⁴ *Id.* at 8.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 8.

⁴⁷ *Id.* at 10.

⁴⁸ *Id.* at 9.

system to improve society and their quality of life.⁴⁹ However, she cautions that more often than not, this right and exercise of power is largely inaccessible to those who need it the most.⁵⁰ Through public interest litigation, access to the courts and to impacting positive societal change is put in the hands of those vulnerable members of society.⁵¹ By empowering citizens to participate in powerful legal change, public interest litigation seeks to redefine the meaning of the justice system and the power of the people in civil society.⁵²

The impact of these theories and efforts is not as meaningful without a system for evaluation. Scholarship on evaluating peacebuilding strategies is growing along with the awareness of the importance of the issue of evaluation.⁵³ The United States Institute for Peace recently released a guide to evaluating peacebuilding.⁵⁴ It relied on the definition of evaluation provided in the OECD evaluation report from 2008: “evaluation assesses the merit and worth of an activity... This learning process helps ascertain the quality of policies and programs, enhance performance, identify good practices, and define appropriate standards.”⁵⁵ Basically, evaluation serves a dual purpose of learning and accountability.⁵⁶ However, USIP cautions that conducting evaluations is only one part of

⁴⁹*Id.* at 11.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 14.

⁵³ *E.g.*, Organisation for Economic Co-ordination and Development (OECD), *Evaluating Peacebuilding Activities in Settings of Conflict and Fragility: Improving Learning for Results*, (DAC Guidelines and Reference Series, OECD Publishing, 2012); ANDREW BLUM, IMPROVING PEACEBUILDING EVALUATION (Special Report for the United States Institute for Peace (USIP), 2011).

⁵⁴ USIP, *supra* note 53.

⁵⁵ *Id.* at 2.

⁵⁶ *Id.*

the evaluation process, which should include a broad range of ongoing monitoring and assessment activities.⁵⁷

Although the literature covers a range of peacebuilding efforts, proclaims the merit of public interest litigation, and emphasizes the importance of measurable activities, there is no explicit discussion of using public interest litigation as a tool for peacebuilding in divided societies. This paper will discuss below how and why public interest litigation may be a useful tool to assist a divided society towards a more positive union and a stronger rule of law. Further, given the relatively tangible outcome of a public interest case, it is a resource that is able to be evaluated and measured in order to improve future efforts and boost accountability. Therefore, public interest litigation meets many of the needs of a divided society and the needs of the practitioners who wish to evaluate their peacebuilding efforts.

⁵⁷ *Id.*

CHAPTER III

PERSPECTIVES FROM PRACTITIONERS

Over the course of a six-week internship with the PILS Project in Belfast, Northern Ireland, a number of regional NGOs and public interest advocates were interviewed and shared their perspectives on public interest litigation strategies.⁵⁸ Additionally, a major research report on public interest litigation from South Africa (Markus and Budlender) was used to supplement the Northern Ireland perspectives. The two major themes that emerged were: 1) best practices for maximizing the impact of public interest case in a divided society, and 2) best practices for conducting a public interest campaign that more easily allows for evaluation and measurement of the impact the case had on society. Northern Ireland and South Africa were chosen for these perspectives due to their status as divided societies. Additionally, both have legal documents that established a statutory scheme intended to minimize the division and potential for violent conflict.

Briefly, Northern Ireland, through the Good Friday/Belfast Agreement—a long awaited peace agreement signed in 1998—created various legislative bodies to work towards equality and human rights in the region. Similarly, South Africa, through a rebuilt constitution and progressive bill of rights in 1996, developed a public interest-friendly environment in which to bring many divisive issues to court. By focusing on how public interest cases have used those documents to build peace in the regions and

⁵⁸ The Public Interest Litigation Support (PILS) Project is an NGO in Belfast that was established in 2009 to encourage public interest litigation through financial and legal support with a mission to advance human rights and access to justice in Northern Ireland. I completed a six-week internship with the PILS Project during July and August, 2011. As part of my duties, I interviewed local public interest practitioners to gain their perspectives on building and measuring a successful public interest case and campaign.

minimize conflict, this paper hopes to highlight steps that may help in other regions experiencing division and conflict.

Maximizing the impact of the public interest case

This paper has given an overview of the principles of public interest litigation and peacebuilding. Now it will focus on the best strategies that have emerged from practitioners in divided societies to maximize the potential impact a public interest case could have on the society. The following strategies have been gathered from multiple reports and interviews concerning effective public interest action. In particular, this report depends heavily on a valuable research project conducted in South Africa by Gilbert Marcus and Steven Budlender.⁵⁹ Although the factors for a successful public interest litigation strategy in this report are supplemented with regional and international material, this section would not be as substantial without the guidance of the South African Report.

Most importantly, the Marcus and Budlender report provides an important reminder for any organization hoping to use litigation for social change to bear in mind. Specifically, a foundational principle of this report is that the use of public interest litigation is just one piece of an overall campaign for social change and peacebuilding.⁶⁰ In order for the change to be sustained and effective, it must be created through a combination of efforts: 1) educating the public on their rights through information campaigns; 2) providing advice and help to those trying to exercise their rights; 3) encouraging and supporting community organizing and direct action campaigns to assert

⁵⁹ GILBERT MARCUS & STEVEN BUDLENDER, A STRATEGIC EVALUATION OF PUBLIC INTEREST LITIGATION IN SOUTH AFRICA (The Atlantic Philanthropies) (2008).

⁶⁰ *Id.* at 94.

the rights being violated, and finally; 4) using litigation to help these voices be heard inside a courtroom.⁶¹

This is to say that each of these tools on its own is not going to have as strong a positive impact on the people in need of the support as it would in combination with the other tools. Please keep this in mind while reading the following suggestions for a high-impact public interest litigation strategy. Litigation is only one piece of the overall campaign to make positive social change in a divided society moving towards peace.

Common factors for a successful public interest case are described below with case illustrations, where available, highlighting how the tools were used in various regional and international cases. Specifically, these strategies and tools are used inside and outside the courtroom to support the case and increase its impact on the ground before, during, and after a public interest case has been brought. To best illustrate a public interest litigation campaign incorporating the factors discovered throughout this research, the public interest litigation process has been broken up into three sections: before the case, during the case, and after the judgment or settlement has occurred. These groupings are more to help with the structure of this section than to make any fixed judgment on which factors should happen at which point in the case. Therefore, these suggestions should be adapted based on the needs of the society in which the peacebuilding efforts are occurring.

Before the Case

Before bringing a public interest case there are a number of considerations that need to be addressed. There needs to be a decision about whether to bring a case at all; if

⁶¹ *Id.*

so, the lawyers must decided which case to bring, when to bring it, and which client would be most successful.⁶² These decisions should be supplemented by extensive research on the issue being challenged, how it is impacting the peace or division within the society, and collaboration amongst the NGOs in the area who specialize in the topic.⁶³

These decisions are heavily affected by the legal structure of the society. For example, in Northern Ireland, through the Good Friday Agreement, many new statutory bodies were created to facilitate the region into a more peaceful future.⁶⁴ Specifically, the Equality Commission (ECNI), the Northern Ireland Commission for Children and Youth (NICCY), and the Human Rights Commission (HRC) were established with governmental backing which gave them more authority in their public interest actions.⁶⁵ However, although the peace agreement devolved much power back to Northern Ireland from the rest of the UK, the region was still under the jurisdiction of the Human Rights Act (UK).⁶⁶ Among the impacts this Act has on Northern Ireland is that it limits the right to bring a case to someone who has victim status as defined by the Act.⁶⁷ Therefore, an NGO or other members of civil society are not able to bring cases on behalf of a concerned portion of the population. Only the victims themselves have standing to bring a case.

⁶² *Id.* (Supplemental Report).

⁶³ *Id.* at 137.

⁶⁴ Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998, 37 I.L.M. 751 [hereinafter Good Friday Agreement].

⁶⁵ Northern Ireland Act 1998, Part VII, available at: www.legislation.gov.uk/ukpga/1998/47/part/VII

⁶⁶ Human Rights Act (UK), 1998, c.42, available at <http://www.legislation.gov.uk/ukpga/1998/42/contents>

⁶⁷ *Id.*

On the other hand, South Africa, under its Constitution and Bill of Rights, created a broad range of rights that could be litigated by anyone in the jurisdiction.⁶⁸ In an effort to repair the society, South Africa included many socio-economic rights in their Bill of Rights. By bringing public interest litigation actions to enforce these rights—the right to housing, for example—the litigation forced judges to give public meaning to these written rights.⁶⁹ For a divided society, dealing with economic injustice can help build more trust and respect for the government and strengthen the rule of law. Without enforcing the rights, society will most likely not change on its own from the conflict from which it emerged. The 1996 Constitution and Bill of Rights provided many opportunities for equality and human rights to be upheld and demanded by those who had historically been oppressed.

The decision of whether or not to bring a case at all requires the practitioner to consider multiple factors⁷⁰. If the goal of a public interest case is to be a part of the peacebuilding campaign in the society, then it is important to consider the likelihood that the case that is brought is one that can advance peacebuilding goals. The goal in a divided society is to use the courts to address issues that are fueling conflict in a way that removes the option for perpetuating the conflict lawfully. As such, it is important to remember that if a case does not succeed, the negative impact can make it much more

⁶⁸ Roederer, *supra* note 41, at 486-87.

⁶⁹ However, there are pragmatic limitations to implementing such judgments. In *Grootboom*, a notorious case from South Africa finding a right to housing, the court held in the residents' favor but the infrastructure of society and economic conditions have not resulted in implementation of this judgment. *The Government of the Republic of South Africa and Others v. Grootboom and Others*, 2001(1) SA 46 (CC).

⁷⁰ E.g., Barbara Bukovska, *Perpetrating Good: The Unintended Consequences of International Human Rights Advocacy*, 3 PILI PAPERS, 2008.

difficult for the people on the ground if they need to bring another case on a similar topic.⁷¹

By setting a bad precedent or building up a campaign that fails because the case was not the right one, more damage can be done to human rights and peacebuilding within the community. Unfortunately a very likely result of a loss is that the judgment may reinforce the oppressive policies being challenged.⁷² Remember, litigation is just one part of the overall peacebuilding campaign, but it is one that can appear to have a very clear answer at the end of it: the court says “yes” or “no.” Although court decisions are not so linear in their judgment, the decision can seem to be either a justification of one side or a denouncing of the other. This clearly can have a powerful negative impact on the psyche of the clients and fuel the conflict within the society.

Ultimately, when deciding whether to bring a public interest case, lawyers should keep in mind the prospects of success, the impact the case would have on society if it did succeed and, alternately, the impact on society if it fails. Losing a public interest case can cause multiple problems for human rights issues in the region, as described above. An example of the decision making analysis from South Africa is described below.

As Marcus and Budlender explain, in efforts to bring about more rights for lesbian and gay people in South Africa, a carefully planned strategy of cases was undertaken by the National Coalition for Gay and Lesbian Equality (NCGLE).⁷³ They began with a

⁷¹ Marcus and Budlender, *supra* note 59, at 33.

⁷² *E.g.*, Robert García, Executive Director, Center for Law in the Public Interest, Race, Poverty, and Justice: Reflections on Public Interest Law and Litigation in the United States, Remarks at the Conference on Public Interest Law in Ireland – The Reality and the Potential (October 6, 2005).

⁷³ National Coalition for Gay and Lesbian Equality v. Minister of Justice, (1) SA 6 (CC) 1999.

case challenging the criminalization of sodomy in South Africa.⁷⁴ While this case was pending, a foreign gay couple met with the coalition hoping to bring a case challenging the South African law that prevented gay couples from getting married.⁷⁵ Although this is a right that the NCGLE was hoping to achieve for the community at some point in their strategy, there were concerns about the timing, the clients, and whether to bring the case at all.⁷⁶

The clients met a certain element of NCGLE's strategic litigation strategy, in that they were gay and wanted to get married.⁷⁷ However they were not South African and not representative of the citizens of the country; the Constitutional Court would likely have been more sympathetic to plaintiffs who were South African citizens.⁷⁸

Timing was also an issue for this type of challenge to be brought.⁷⁹ As the NCGLE explained to the couple, it had a carefully planned strategy to incrementally achieve more rights for gay and lesbians in South Africa by taking one case at a time at increasing levels of controversy.⁸⁰ Decriminalizing sodomy was the starting point as it should be relatively simple to achieve, but going straight from that issue to gay marriage was not part of the plan. It was not the right time.⁸¹

Finally, the NCGLE explained the danger of losing the marriage case at this time as it would have many negative effects on the whole range of other gay and lesbian

⁷⁴ Marcus and Budlender, *supra* note 59, at 28-42.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

issues.⁸² Because the NCGLE took a legitimate approach and explained its strategy, the couple saw the value in the plan and decided not to bring their case at all.⁸³

Once the right public interest case is chosen, there is another set of considerations on how best to proceed. Specifically, lawyers need to choose the right client and the right timing through both collaborating with other NGOs in the area and researching the legal and social issues will help make the best case moving forward.⁸⁴ Every case is about the client; public interest litigation is only utilized when there is a group of people on the ground in need of support in accessing and demanding their rights. That being said, the lawyer needs to be able to access the clients' needs and story in order to build an effective legal argument that keeps the clients' best interest at the heart of the case.⁸⁵ Therefore, whichever client brings the case should be fully able to commit to the case in terms of time, information, leadership, communication, exposure, and credibility.⁸⁶

The best clients are a well-organized group of dedicated and involved individuals seeking to use their situation to bring about wide-spread change in the area.⁸⁷ The litigation should form out of the active leadership of the clients and not be solely guided by the legal representatives.⁸⁸ As Budlander and Markus said “[Public interest litigation]...should ideally be run by clients not by lawyers.”⁸⁹ If that is the case, then it reinforces how important it is to be able to work well with whichever client is determined

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Interview with Children Law Centre (CLC), Legal Team, in Belfast, N. Ir. (July 2011).

⁸⁵ Bukovska, *supra* note 70.

⁸⁶ Interview with Policy Director, Participation and Practice of Rights (PPR), in Belfast, N. Ir. (July 2011).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Marcus and Budlander, *supra* note 59, at 125.

to move the case forward. However, the expectations of a public interest case in terms of communication skills and time commitment on the part of the client should be made clear at the outset.⁹⁰

In reality, it is not always possible to select the ‘best’ client, as this is a luxury of planned strategic litigation. However, using some of the same indicators mentioned above can help in considering whether the client who is available would be a good person with whom to proceed. The client always has to come first, so when a client shows up in need of legal support it is important to actively pursue the recognition of their rights through the court. In so doing, hopefully, there is time to factor in some of the characteristics mentioned above to make the litigation as successful and authentic to the client as possible.

The timing of the case is another important consideration prior to initiating legal action.⁹¹ When to bring a public interest case is a difficult and important factor in the overall success of the case.⁹² It is also a decision that must be made by the people involved on a case by case basis. The interviews for this section cannot provide the answer to when to bring a particular case, but it can attempt to give some cues to look for when making the timing decision.

First, the case should be brought when the legal, political, and social climate is ready for it.⁹³ This will be best known by keeping up to date on case law, on the political ideologies of the judges and elected officials, and on how society is evolving with respect

⁹⁰ *Id.* at 119.

⁹¹ *Id.* at 133.

⁹² ANN SKELTON, STRATEGIC IMPACT LITIGATION ON CHILDREN’S RIGHTS IN EASTERN AND SOUTHERN AFRICA SEMINAR 5 (2011).

⁹³ Marcus and Budlender, *supra* note 59, at 133-37.

to the issue at the heart of the challenge. For example, a good time to bring a case on unemployment issues may be when there has recently been an election with promises made to repair the unemployment system. This usually sparks debate in the public and people may be ready to see what that reform will look like—by bringing the case, there is an opportunity to set the agenda and highlight what reform would mean for the clients. Alternately, in the U.S., post 9/11 was a terrible time to bring any search and seizure cases. The people, the courts, and the government were more interested in guaranteeing security than upholding a right to privacy and to be let alone. Pay attention to the narratives going on in society and try to gauge when may be a good time to bring a particular issue.

Second, the case should be brought at a time in the client's situation where they have all the necessary evidence to prove the allegations in the case.⁹⁴ This is a factor that can evolve throughout the case as the legal issues may change or new allegations may arise. But, the initial bringing of the case should not occur until there is a sufficient amount of evidence ready to prove the allegations made in the petition. The powerful that are being challenged are going to try to undermine the credibility of the clients' case, so be prepared to prove every allegation on paper and through video, audio, and photographs, if possible.⁹⁵ Similarly, if the goal is to build peace in the region, there should not be any holes in the case which may reinforce negative stereotypes formed out of the conflict.

There are an impressive amount of NGOs and organizations working for the public interest on an international level. Each of those groups most likely has a wealth of

⁹⁴ *Id.*

⁹⁵ Interview with PPR, *supra* note 86.

information concerning the communities in which public interest cases are brought or intended to impact. Most public interest organizations do not have the luxury of too many resources. But most of them do have amazing staff committed to the mission and values of the organization. Therefore, it makes sense to create a practice of sharing information and collaborating among organizations with overlapping areas of interest in order to maximize the impact of a given public interest litigation campaign. By sharing resources and the burden of a public interest litigation campaign, the organizations can provide the court and the media with a more robust picture of the issues.⁹⁶ An NGO focused on housing rights and one working with children with disabilities can share their expertise in a case involving inadequate housing for a wheelchair bound child. Moreover, by not coordinating research, action, and litigation, the organizations can actually do more harm than good for the cause they are hoping to assist.⁹⁷

For example, in *D.H. and Others v. The Czech Republic*, the judgment of the European Court of Human Rights found in favor of Romani children who were being disproportionately segregated into special-needs schools.⁹⁸ However, in order to ensure impact of the judgment, the numerous NGOs who had assisted in the case further collaborated together to create a new organization focused on monitoring the implementation of the judgment.⁹⁹ By sharing resources, the burden is also shared of ensuring impact of the work being done in public interest cases.¹⁰⁰

⁹⁶ Michael Farrell, Senior Solicitor, FLAC, *The Role of NGOs in Public Interest Litigation* (Nov. 13, 2010).

⁹⁷ *Id.*

⁹⁸ *D.H. and Others v. The Czech Republic*, (No. 57325/00), ECHR, 2007.

⁹⁹ Lydia Gall & Robert Kushen, *What Happened to the Promise of D.H.?*, ROMA RIGHTS 1, July 26, 2010, available at <http://www.errc.org/cikk.php?cikk=3613&page=5>.

¹⁰⁰ *Id.*

The South African report cautions NGOs on the dangers of not collaborating with one another.¹⁰¹ When simultaneous cases are being brought in the same jurisdiction on a similar public interest issue, the lack of information sharing could set the cases up to fail if the arguments are based on each cases' limited amount of information.¹⁰² If the organizations coordinated beforehand, shared information of the cases and then chose the one ideal case to litigate, then the chances of advancing the human rights issue in that case is far greater than each group filing separate cases, arguments, and evidence.¹⁰³

This type of collaboration could be done through an organized process. There could be regular meetings among similar organizations and stakeholders to discuss and share ideas on potential litigation or other on-going advocacy campaigns, as the PILS Project facilitates in Northern Ireland.¹⁰⁴ Alternately, there could be a listserv established or other type of internet portal on which organizations could update their casework, discuss any pending cases and share other useful resources on the specific topic of interest.¹⁰⁵ Indeed, many of the organizations interviewed for this project currently utilize some method of information sharing.¹⁰⁶ This is a good sign of collaboration, but should be pushed further in a litigation situation to the point of coordinating any cases and clients to maximize the best possible case on an issue.

¹⁰¹ Marcus & Budlender, *supra* note 59.

¹⁰² The PILS Project attempts to address this issue through its case screening application process.

¹⁰³ Farrell, *supra* note 96. Farrell explains that the main reasons why Senator Norris' case was successful was due to the collaboration amongst special interest groups as well as to extensive follow-up after the case.

¹⁰⁴ The PILS Project hosts stakeholder forums and many conferences that draw together the various NGOs to facilitate resource and information sharing.

¹⁰⁵ Interview with the legal team, The Law Centre (NI), Belfast, N.Ir., July 2011.

¹⁰⁶ *Id.*

Finally, one of the most useful tools for coming to the right decision on the abovementioned factors is having a strong understanding of the issue at the heart of the case.¹⁰⁷ Therefore, detailed research is crucial to a successful public interest litigation campaign.¹⁰⁸ This includes conducting legal research, factual research, and primary research in the time leading up to a case.¹⁰⁹

Legal research is the foundation of a strong case. If there is no legal basis for even the most sympathetic case, then it is most likely not going to prevail in court. Similarly, public interest cases most often require a creative approach to research and argument given the limited domestic legal progress in the issue being litigated; be sure to include international and foreign legal standards in your research.¹¹⁰ Again, it may be helpful to check with similarly focused organizations to share any legal research they may have on the topic, as discussed above.

The factual research raises more complex needs in order to be conducted accurately. Most public interest cases will be run by attorneys and legal experts who know how to conduct legal research and analysis. However, most public interest cases can raise substantive issues which require a different type of expertise. Examples of such issues include health conditions requiring medical analysis, benefit issues requiring careful calculations, housing issues requiring an engineer's review, etc.¹¹¹ This factual research can be time consuming and complicated, but is vital to making a valid legal

¹⁰⁷ Marcus & Budlender, *supra* note 59, at 137.

¹⁰⁸ *Id.*

¹⁰⁹ This section expands on the types of research recommended in the Marcus and Budlender report, *supra* note 59.

¹¹⁰ Hershkoff, *supra* note 26, at 29.

¹¹¹ For example, the CLC and NICCY have an expertise on children and youth issues making them better at litigating children issues and conducting legal, factual, and primary research.

argument. This is an area in which collaborating with other NGOs can really help; also, it boosts the case's legitimacy in the court if the lawyer is able to speak confidently to both the legal and substantive issues of the case.¹¹²

Primary research is also needed in order for the case to be successful at all stages.¹¹³ This type of research is done on the ground with the population at the core of the case. Conducting interviews, building relationship, and gathering evidence of the allegations being made are all important steps towards presenting a complete case to the court.¹¹⁴ Similarly, spending time interviewing any governmental figures who are responsible for the policy at issue will help the advocate better understand the respondent's position and any budgetary or policy constraints.¹¹⁵ With a more well-rounded understanding of the people involved with the issues, the advocate can create a strategy that meets the needs of the specific case while going forward with the public interest litigation campaign.

During the Case

Once the public interest case has been filed, the focus can shift to some degree to how to build and maintain momentum around the issue. This is done through an overall advocacy campaign, including using the media to characterize and publicize the issues in the case properly, engaging with the community to keep their interests and needs at the core of the litigation, and soliciting legal interventions or amici curiae to help bolster the

¹¹² PATRICK GEARY, CHILDREN'S RIGHTS: A GUIDE TO STRATEGIC LITIGATION 38 (Child Rights Information Network) (2008).

¹¹³ Marcus & Budlender, *supra* note 59, at 137.

¹¹⁴ Interview with PPR, *supra* note 86.

¹¹⁵ *Id.*

legal strengths in the case.¹¹⁶ These factors can be done at any time in the case, and indeed throughout, but will be discussed here as part of the strategy to use while the case is pending.

Most public interest cases are designed to challenge the status quo, and therefore, usually are challenging a powerful majority.¹¹⁷ That being so, it is oftentimes a hard sell to make a case appeal to both the public and the courts to the extent of gaining support and ultimately a change in policy. Even if a case has particularly difficult facts or less than sympathetic clients, the public interest organization should do its best to frame the case and the clients in a way that rises above politics and prejudice. This is easier said than done; a popular case to look to as an example is *Roe v. Wade*.¹¹⁸ There, the attorneys characterized the issue as a person's right to privacy, rather than focusing all the attention on a woman's right to an abortion. This characterization gave the issue greater salience. More people could agree on the need to protect a right to privacy than a right to an abortion. Try to show the court and the community how crucial the right to bring a redress is to maintaining a law abiding, democratic, and peaceful society; make the clients on the ground "real" for both the public and the judges.¹¹⁹ By showing that real people are being affected every single day by the issue, it can help humanize the case and connect with those in the wider public; and try to focus on the fact that inequality is occurring and the case is simply trying to restore equality to the society.¹²⁰

¹¹⁶ Interview with PPR (PPR conducts many interviews of the community members involved throughout a campaign); CAJ intervenes on cases which raise human rights issues particular to the region of Northern Ireland; Marcus & Budlender, *supra* note 59.

¹¹⁷ Hershkoff, *supra* note 26, at 21.

¹¹⁸ 410 U.S. 113 (1973).

¹¹⁹ Marcus and Budlender, *supra* note 59, at 137.

¹²⁰ *Id.*

In a divided society it will often be difficult to garner support for your case, but practitioners from these two divided regions emphasize the importance of framing the issue as one that will ultimately lead to less conflict in the future. By upholding the rights and guarantees in the peace agreement through litigation, the courts are actually making a more secure peace for the future. The judgments that rely on a peace agreement or bill of rights give those documents public meaning which lets society know that the written words will actually be taken seriously by the government.

Accordingly, the media can be a powerful tool for a public interest campaign.¹²¹ The multiple media outlets available can provide an immense amount of instant publicity for the case and issues being raised.¹²² This can serve to spark public debate around an issue; hopefully, the debate would lead to support and social progress on an issue. The publicity can also show people who are facing a similar type of discrimination that they are not alone and that there is a way to raise their voice in the courts.¹²³ However, like the other components to a strategic case, in order for the right type of progress to be encouraged, there needs to be a significant amount of planning and management around the way the media is utilized. As mentioned above, the characterization of the case should be nailed down prior to any statements made to the media. By being proactive with the media, the public interest litigators can better control the narrative around the case by being the ones to explain the situation and the overall cause being campaigned through the litigation. Throughout any media contact, the issues and the cause in general, should be reinforced through interviews, reports, and pictures in a way that respects the

¹²¹ *E.g.*, Interview with PPR, *supra* note 86; interview with CLC, *supra* note 84.

¹²² *Id.*; Marcus & Budlender, *supra* note 59, at 105.

¹²³ Interview with PPR, *supra* note 86.

clients at the heart of the case and minimizes any negative stereotypes that may fuel division.¹²⁴

During the pending case, it is an opportune time to join with other organizations in a larger advocacy campaign around the cause and community bringing the case.¹²⁵ The organization using its resources to litigate can depend on the network of other organizations to do substantial advocacy work while the case is pending.¹²⁶ All the organizations are benefitting from the pending litigation and the community at the core is, ideally, benefitting from the advocacy and awareness being brought by both actions. By collaborating with other NGOs, using the media to paint a clearer picture of the challenge, and characterizing all of the issues in an accessible framework, the ultimate impact of the case will be that much more powerful.

As mentioned above, this advocacy should be on-going and part of the overall strategic plan for making peaceful societal change. It is mentioned in this section as a reminder to keep conducting outreach and campaigning while the case is pending. The case does not end or begin in the courtroom; rather it is one piece of a bigger picture of bringing rights to all and making systemic change in society. Litigation is but one form of advocacy and is best done in cooperation with the other types of action mentioned earlier in this section and peacebuilding efforts which match the needs of the specific society.

The most fundamental piece of advice on the work to be done while the case is pending is to remember to stay engaged with the members of the community at the heart

¹²⁴ *Id.*

¹²⁵ Marcus & Budlender, *supra* note 59, 119-27.

¹²⁶ The PILS Project in Belfast further assists with this process by providing financial and legal support to the litigation team.

of the challenge.¹²⁷ The clients are the ones who should be designing and evolving the course of action being taken by any organization intending to support or advocate for them in court.¹²⁸ Ultimately, the judgment formed by the clients themselves will be what shapes any progress in the area being challenged.¹²⁹ Remember that an important principle underlying public interest litigation is that it gives voice to the most vulnerable and disadvantaged in our society.¹³⁰ A public interest campaign is not intended to replace the voice of those clients; rather it should be providing them with a microphone. If at any point, the case is being formed without the clients' input, then it has followed the same oppressive cycle as society—it has left the clients out of the decisions affecting their daily lives. A successful strategic campaign will empower the community on the ground which is the only way to sustain the type of change being sought.¹³¹

This type of work requires the public interest litigation organization to engage on an equal level with the members of the community by demystifying the legal language and listening to their concerns and ideas for strategy.¹³² Rather than merely advocating on their behalf, the lawyers should be collaborating with the clients to best represent their concerns in court. The clients' needs are the core of the case and may not be the needs that a legal advocate would think of addressing. For example, when an NGO in Northern Ireland met with a resident's group to address their inadequate housing situation, the list

¹²⁷ Interview with PPR, *supra* note 86; Marcus & Budlender, *supra* note 59, at 109-12; Interview with CLC, *supra* note 84.

¹²⁸ Interview with PPR, *supra* note 86.

¹²⁹ Marcus & Budlender, *supra* note 59, at 152.

¹³⁰ See, The PILS Project, *available at* www.pilsni.org.

¹³¹ Interview with PPR, *supra* note 86.

¹³² Benedict Kingsbury, *Representation in Human Rights Litigation*, 2 HUMAN RIGHTS DIALOGUE 2, 3 (2000).

of concerns raised by the residents included too much pigeon waste, sewage problems, and damp.¹³³ These were not the list of issues which would have been drafted by the NGO, which may have focused more on structural process issues.¹³⁴ But, dealing with those issues listed by the clients led to a transformation of sorts in the way the systemic process of addressing the residents' needs was handled by the housing authority.¹³⁵ Thereby, the action tackled the underlying issues by meeting tangible needs of the people in the community.¹³⁶

By cooperating with the clients, rather than managing them, there is a credibility and authenticity given to the case.¹³⁷ Building that relationship and sustaining it throughout the case is as important as any judgment rendered by a court.

After the Case

Throughout the research conducted for this report, the importance of enforcement of the judgments was the number one tool highlighted to create a maximum impact of any public interest case. Following up on the case to ensure it is actually executed in a way that has the intended positive impact on the public is crucial. Unfortunately, the judgment of a court in favor of the issue being litigated does not necessarily translate into adherence with that order or a change in the lived experience of those needing the order implemented. For example, there are currently 9,000 judgments outstanding at the

¹³³ Interview with PPR, *supra* note 86.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ James Goldston & Mirna Adjami, *The Opportunities and Challenges of Using Public Interest Litigation to Secure Access to Justice for Roma Minorities in Central and Eastern Europe* 38 (Draft for ABA World Justice Forum, Vienna, July, 2008) available at http://www.google.com/goldston_adjami_roma_rights_litigation_in_cee_5_15_08.doc.

European Court of Human Rights (ECtHR).¹³⁸ That means for the rare case that actually makes it to the ECtHR, 9,000 of them have not had the judgments actually enforced. If that is happening in a court system that actually has its own body of members to monitor the enforcement of its judgments, then it is easy to imagine the number of judgments outstanding in domestic courts.¹³⁹ This is not to discourage the organization; rather it is to reinforce the importance of follow up in any case. The day after a judgment is awarded may be when the hardest work begins.¹⁴⁰

All the tools used to build up the case and to measure its impact can be relied on to engage in effective follow up. Specifically, the alliance among NGOs is crucial to be able to depend on one another for resources and to apply more pressure on the government. Indeed, in one case in the Czech Republic, a new NGO was created after a judgment in a public interest case with the purpose and mission of following up on the order and monitoring governmental compliance with its mandate.¹⁴¹

There are many ways for follow up to be conducted and will be further discussed below, but most importantly it needs to be given the same, if not more, attention and energy as the litigation itself. Because public interest litigation seeks to use the courts to create structural change on behalf of the most vulnerable in society, a judgment handed down from above is oftentimes not enough to achieve that goal. The judgments need to be followed up on, monitored, and ultimately enforced until the government agency feels

¹³⁸ Thomas Hammarberg, *Judgments issued by the European Court of Human Rights Cannot be Ignored*, THE COUNCIL OF EUROPE COMMISSIONER'S HUMAN RIGHTS COMMENT BLOG (July 19, 2011, 9:21 AM), http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=154.

¹³⁹ *Id.*

¹⁴⁰ Marcus & Budlender, *supra* note 59, at 154.

¹⁴¹ Robert Kushen, *Implementing Judgments: Making Court Victories Stick*, 1 Roma Rights (2010) http://www.errc.org/en-research-and-advocacy-roma-details.php?page=0&article_id=3613.

like they have no other choice. And they should not have any other choice, nor should there have to be so many resources used to force a government to uphold the rights of its citizens, but this is the work public interest litigation does and it is difficult and challenging and, unfortunately, necessary.

One important step in following up on a judgment is to publicize the outcome in the case and the impact it should have on the communities at the core of the case.¹⁴² This publicity should be highly controlled so it accurately explains the case and what the responsibilities of the government are as found in the judgment. Even if the case is not ultimately “won,” there may be language found in the case which supports the overall issue being litigated or, at least, pieces of the issue which can be highlighted through well-done publicity. Alternately, if the judgment is such that actually further oppresses the people at the heart of it, making that well-known may create a public outcry and lead to policy being changed for political reasons. Either way, publicity is important to continue the momentum of the case and to hold those in power accountable.¹⁴³

For example, when the Children’s Law Centre (NI) received a positive response to a judicial review involving the health trust and its neglect of the caregivers of children with autism, it publicized the response by the court along with guidance to caregivers.¹⁴⁴ This publicity encouraged the families and caregivers to send in a copy of the judgment if they were not getting the assessments conducted as demanded in the court order.¹⁴⁵ This action prompted the immediate assessment of all 73 families in need.¹⁴⁶

¹⁴² Interview with CLC, *supra* note 84.

¹⁴³ Interview with CLC, *supra* note 84.

¹⁴⁴ Interview with CLC, *supra* note 84.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

Another tool which can be used to help publicize agreement is used by the Equality Commission (NI).¹⁴⁷ The Commission does not agree to any form of gag order in its settlement agreements.¹⁴⁸ This allows the Commission to publicize the outcome of the agreements and spread the word to other sectors engaged in similar infringement of rights to be aware of how they can be held accountable for their conduct.¹⁴⁹ It also gives the media access to details of what are normally private agreements.¹⁵⁰ This can help other people involved in negotiations to depend on the publicized outcomes and be more empowered in their requests in any settlement agreement.

Remember, during the litigation the media should be regularly used to highlight the importance of the case and the widespread systemic issue at the core of the case.¹⁵¹ By having a well-planned media campaign alongside the litigation, it should make publicizing the outcome and impact of the case more feasible. There may be some relationships formed with journalists and reporters who will be able to understand the particularities of the case and the community by the time it is concluded.¹⁵² This may lead to the media taking its own initiative and conducting follow up and interviews of officials implicated to raise accountability and follow up on the judgment.¹⁵³

A fantastic legal team is only as good as the actual change caused through the litigation in the lives of the community. This means that focusing on follow up and

¹⁴⁷ Interview with the Equality Commission NI (ECNI), Belfast, N. Ir., July, 2011

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Interview with PPR, *supra* note 86.

¹⁵² *Id.*

¹⁵³ *Id.*

publicity of the case in order to ensure implementation of the order is a necessary piece to the overall litigation strategy.¹⁵⁴

If litigation has occurred, a very real problem with implementing a judgment is making sure people actually understand what the judgment means in terms of rights and responsibilities. After a public interest case is concluded, there needs to be an active education and training campaign conducted to ensure the case and its implications are understood and acted upon.¹⁵⁵ For example, the Law Centre (NI) educates NGOs through newsletters that summarize recent cases and the judgments found in each of them in terms of the impact the judgments will have on the people they serve and any one in a similar situation.¹⁵⁶ These publications are sent to about 500 people, who in turn, are encouraged to forward them along to anyone interested.¹⁵⁷ These publications are one way of disseminating the information of a specific case in terms of its broader impact to the NGOs and stakeholders in the area. Educating NGOs is an important way of spreading the impact of a single case across multiple jurisdictions.

Similarly, educating the rights holders is an important step in maximizing impact.¹⁵⁸ In the case of *JR30*, mentioned above, the Children's Law Centre (NI) and its allied NGOs conducted free training seminars for families to learn what their rights are in regards to the Health Trust as specified in the judgment of the case.¹⁵⁹ The rights being taught through these trainings were further spread across parent forums and by word of

¹⁵⁴ Goldston & Adjami, *supra* note 137, at 38.

¹⁵⁵ Interview with CLC, *supra* note 84.

¹⁵⁶ Interview with the Law Centre (NI), *supra* note 105.

¹⁵⁷ Interview with the Law Centre (NI), *supra* note 105.

¹⁵⁸ Interview with CLC, *supra* note 84.

¹⁵⁹ *Id.*

mouth from families attending.¹⁶⁰ This is to help ensure the rights guaranteed by the judicial review will be demanded by the families if ever infringed upon in the future.¹⁶¹ This type of education is crucial for the judgment to be accessible to those in need of it most. Remember, in order for any change in the community to be sustained, the people on the ground need to be empowered and aware of their rights and the forum in which they can be heard. By educating the public on their rights and the victories which have occurred through social change movements, power is being redefined and re-established within the people themselves.¹⁶²

Finally, educating and training those who draft and implement policies is necessary in order to ever get to a place where these types of cases are no longer needed.¹⁶³ Ideally, the training would translate into an actual human rights based approach to policy. One attempt at this type of education and training in the public sector is when an organization in Northern Ireland is found to be out of compliance with section 75 of the Northern Ireland Act, which demands public bodies to actively pursue equality and non-discrimination in their policies.¹⁶⁴ The Equality Commission provides free training and assistance to public organizations found in violation of the Act to assist with drafting a policy to come in line with the parameters of found within.¹⁶⁵ Also, it provides free training to the public employees to educate them on the purpose behind section 75 and how to implement the newly drafted policy in a non-discriminatory

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Hershkoff, *supra* note 26.

¹⁶³ Interview with ECNI, *supra* note 147.

¹⁶⁴ Northern Ireland Act (1998), *available at* <http://www.equalityni.org/archive/pdf/S75GuideforPublicAuthoritiesApril2010.pdf>

¹⁶⁵ Interview with ECNI, *supra* note 147.

way.¹⁶⁶ Although this is the intent of the training, it does not mean the intended result is always achieved. It is important to keep in mind that human rights, such as ‘equality,’ should not just be a box to tick off in the drafting of policy. There needs to be a proactive and holistic approach to ensure public organizations are complying with human rights standards *before* any violation occurs and necessitates litigation.

Finally, measuring the impact of a public interest case can provide an organization with much needed feedback on the success of their campaign.¹⁶⁷ Measurement should be part of the overall litigation strategy and is built and sustained through client relationship, collaboration with NGOs, and extensive research prior to the case being filed. Successful follow up can clearly provide better measurement results. That being said, measurement should be on-going throughout the post-judgment period to show how various follow up tools have affected the impact.

Because measurement strategies are such an important part of peacebuilding, a thorough breakdown of tools used in Northern Ireland will be discussed below. Measurement strategies are an often overlooked part of the campaign for systemic change and peacebuilding. By measuring the impact of the litigation, an organization can discover gaps in its approach and adjust its future strategies accordingly. Measurement is an important part of the overall impact and embodies the principle of progress found in public interest work. By discovering, admitting, and learning from mistakes, a public interest organization can be better equipped to support the next group of individuals in need of recognition through litigation.

¹⁶⁶ *Id.*

¹⁶⁷ Marcus & Budlender, *supra* note 59, at 154.

Measuring the impact of a public interest litigation case

The five most common and effective techniques for measuring the impact of public interest litigation will be provided here. This is not an exhaustive list, but simply what emerged from the interviews and literature on this topic. Some of the tools overlap and most of them build on each other. There is no specific hierarchy intended through the order in which they are described below, although there are some tools which might work best after others have been established.

Measurement Plan

First and perhaps most importantly, is the value of creating a measurement plan from the beginning of a public interest case.¹⁶⁸ Incorporating a way to gauge impact as part of the overall case strategy is a crucial way to maximize effective measurement of the work your organization does. This also offers an important opportunity to gain legitimacy as an organization through a tangible connection of inputs and outcomes evidenced by the results of the measurement process.¹⁶⁹

Most organizations engaged in human rights advocacy have a mission statement attached to their work that guides them and influences their approach to issues. This is an important step in defining the work the organization will be involved in, and hopefully will help keep the organization on track towards accomplishing its mission.

When an organization is dealing with public interest cases, a similar approach should be taken to outline the programmatic goals for its litigation department. One of

¹⁶⁸ Goldston & Adjami, *supra* note 137, at 15.

¹⁶⁹ USIP, *supra* note 53.

those goals should be a way to measure the impact the cases have on society.¹⁷⁰ Specifically, a crucial part of the planning and preparing for any public interest case should be a strategy for measuring the impact the case has upon completion.¹⁷¹ This not only provides structure for post-judgment follow-up, it also gives the organization valuable information about its effectiveness.¹⁷² By being able to create a measurement strategy for each case, the organization can boost its legitimacy by showing clear connections to the use of resources and change on the ground.¹⁷³ This is a benefit for any organization dealing with limited resources and trying to show its impact to funders and other interested groups.¹⁷⁴

Unfortunately, many mission statements and programmatic goals are drafted in a way that actually inhibit the organization's ability to measure or evaluate its success in meeting those goals. By making vague or blanket statements of extremely noble goals, the organization is left focusing on its resources spent on the work, rather than being able to focus on tangible change in the society based on the use of those resources. As Barber explains: "[R]ather than focusing on inputs and processes, [an] organization [should] focus on a combination of outputs, outcomes and impacts...."¹⁷⁵

This means that when an organization is preparing to bring a case, it should have clearly defined litigation goals and a measurement strategy in place. These should provide a framework for evaluating whether or not the goals were met and what impact

¹⁷⁰ Catherine Corey Barber, *Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organizations*, 55 HERTIE SCHOOL OF GOVERNANCE, WORKING PAPERS 11-17 (2010).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *E.g., Id.*

¹⁷⁵ *Id.*

those goals had on the community at the heart of the case. The focus of the measurement strategy should be on external impact rather than solely looking at what is done internally by the organization. Although this type of analysis might be hard to keep in mind at the outset of a case, it is a crucial part of measuring the efficient use of resources and the value of the cases that are brought by any organization.

When the NICCY legal team is preparing for a strategic litigation, one of their main considerations is how they will be able to measure the impact the outcome of their case will have on the children and young people at the center of the case.¹⁷⁶ By keeping this question in mind during the planning and preparing stages, the NICCY legal team is creating a measurement strategy alongside their litigation strategy.¹⁷⁷ In so doing, they are better prepared for an assessment of their efforts after the case is concluded.¹⁷⁸

Further, because NICCY is a body created out of the peace agreement, it is even more important that their legal team strives for accountability through measurement strategies. This further bolsters the credibility of the organization and the peace agreement, itself.

This strategy does not ignore the difficulty in spending extra time on creating some sort of measurement scheme alongside a complex, carefully-timed litigation scheme. Rather, the purpose is to legitimize and bring to light the impact of all the hard work put into a public interest case. As most organizations are constantly seeking ways to improve upon their work, this would also give some useful insight into the efficacy of its litigation strategy. The time and effort put into litigation on its own is immense; and taking extra time to create clear goals on which to measure success of a public interest

¹⁷⁶ Interview with NICCY legal team, Belfast, N. Ir., July, 2011.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

case can sound daunting, but hopefully the value of the process will encourage the public interest litigator to attempt to establish a more clear picture of impact assessment as they plan their overall strategy.

Building Relationships

Second, establishing a solid relationship with the client and the community represented through the public interest case can help facilitate an efficient measurement process.¹⁷⁹ By building that relationship, the post-outcome impact can be better followed-up on through contact with those affected and who are more willing to come to you with any complaints or concerns about the impact the case has had.¹⁸⁰

Building a relationship with the client and the community affected by the litigation is another essential piece of the measurement puzzle. As discussed, the measurement strategy should occur alongside the preparation for the litigation. In so doing, the organization can incorporate a plan for engaging with the community to gather the needs and better understand the status quo from the beginning of the case.¹⁸¹ By building that relationship with the community in need of the litigation, the organization can have a direct line to measuring the impact of the case after it is concluded. This relationship provides an avenue for follow-up and feedback by those intended to be positively impacted by the litigation. In order to gauge the impact the case has on the population at the core of the issue there must be open communication with those feeling the impact (or lack thereof).

¹⁷⁹ Interview with PPR, *supra* note 86.

¹⁸⁰ Gall & Kushen, *supra* note 99.

¹⁸¹ Interview with PPR, *supra* note 86 (discussed the importance of building a solid relationship with any community in which human rights challenges are being raised.).

For example, the Children’s Law Centre Northern Ireland (CLC) was able to benefit from the trusting relationship created by the NGO referring a case to them.¹⁸² When the family in need of legal assistance was sent to the CLC they were able to build on that healthy relationship and continue it throughout the case.¹⁸³ By engaging with the family, keeping the legal process transparent, and conducting research on the specific needs of the family and community dealing with the mental illness, the CLC maintained a mutually beneficial relationship with the clients.¹⁸⁴ In so doing, they were able to keep informed of the impact the case had on the families at the core of it, and to provide a valuable service to the children and families in need.¹⁸⁵ CLC’s ability to measure the impact of the work it undertakes is maximized because of the relationship it has created with the families in need.¹⁸⁶ The transparency of the process is not only empowering for the rights-holders, it also provides an effective means for measurement for the NGO. Because the community is so well educated and aware of its rights and responsibilities, it can provide valuable feedback concerning any changes in quality of life and respect for rights.¹⁸⁷

This measurement tool has many mutual benefits for the organization and the community. It also does not require many resources. Empowering, educating and legitimizing the community through relationship and acknowledgement is one of the

¹⁸² Interview with CLC, *supra* note 84.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

principles underlying public interest work and is truly in the public's best interest.¹⁸⁸

This is more than a tool for measuring the impact of a case; it is an essential part of making any impact from public interest litigation sustainable.

Benchmarks and Indicators

Third, developing clear benchmarks and indicators of success throughout the process as the needs and issues in the case evolve or expand can help give more structure to the measurement process.¹⁸⁹ This ties in to the need for a measurement plan. The plan provides the framework—*what* to measure—and the benchmarks and indicators help provide a clear process—*how* to measure.¹⁹⁰

By creating a measurement plan and building a relationship with the community in need of the public interest action, an organization should be in a suitable position to create a list of benchmarks and indicators of impact which are directly related to the specific case being litigated. It is important to keep in mind the diverse nature of public interest cases and to create indicators based on the individual needs in each new case. Although there will likely be some overlap in certain areas, taking time to create a list with the community being affected is a powerful tool to help measure the impact and to help empower the community.¹⁹¹

This approach has been well used by PPR—the Participation and Practice of Rights Project—an NGO in Northern Ireland that helps neglected communities realize their human rights.¹⁹² The group meets with the community members and helps them

¹⁸⁸ Hershkoff, *supra* note 26, at 14.

¹⁸⁹ Barber, *supra* note 170.

¹⁹⁰ Interview with PPR, *supra* note 86.

¹⁹¹ Interview with PPR, *supra* note 86.

¹⁹² *Id.*

create a list of concerns about their quality of life and where rights are not being upheld.¹⁹³ The group then makes a list of what an improved quality of life might look like—what having their rights upheld would look like.¹⁹⁴ These results are combined to create benchmarks and indicators of change in their lives.¹⁹⁵

For example, when determining benchmarks to show what a children’s right to play should look like, the community indicated that having more adequate lighting in the playgrounds would help meet that right.¹⁹⁶ By counting how many light-bulbs were currently functioning (32%) and creating a target number of what restoration would look like (90%), the community had made its own measurement standard.¹⁹⁷ As simple as some of the benchmarks may be, each one being met is a tangible sign of progress and success for the organization and the people on the ground. Such measurable progress lets the residents know their voices are being heard and that they have the opportunity to impact decisions that affect their daily lives.¹⁹⁸ It lets the organization know how to best utilize its resources when the result of its programs can be measured in such a visible way.

This is not only a great technique to help facilitate the measurement process, it is also an empowering tool for sustaining change and redefining public meaning—which is one of the important theories behind public interest litigation.¹⁹⁹ By setting the

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ WHEN KIDS DECIDE: REALIZING THE RIGHT TO PLAY ON THE LOWER SHANKILL (2009), *available at* <http://www.pprproject.org/sites/default/files/documents/right%20to%20play%20indicators%20book.pdf>.

¹⁹⁸ Interview with PPR, *supra* note 86.

¹⁹⁹ Hershkoff, *supra* note 26, at 10.

benchmarks and indicators for each specific case it makes it even more powerful when those personalized benchmarks are met. It means that those people who were so often ignored in policy decisions which directly impact them—something as simple as fixing the lighting in a playground, finally found a forum and created a checklist and are holding the government to account.

This is just one way that benchmarks and indicators can be created to measure the impact of the work being done by the organization. Although this was not an example of a public interest litigation, it is an easily translatable process to incorporate into a public interest case. It is not always going to be possible to set such clear indicators at the beginning of a litigation process. Many times the benchmarks and indicators will change throughout the case and will not be clear until the judgment is issued. However, from the beginning there should be an understanding of what a good outcome looks like and that can serve as a springboard on which to build more clear benchmarks and indicators as the case progresses.²⁰⁰

Another very clear way of measuring the impact a public interest case has on a certain issue is by incorporating specific timeframes into a judgment or settlement agreement and then checking in to see whether that timeline has been met.²⁰¹ It is similar to setting indicators and benchmarks within the community; however, it is more geared towards policy and legal change through compliance with a judgment or agreement. Therefore, like others, this measurement tool should not be utilized in isolation as it can only be indicative of the impact on a certain level. This tool is also more difficult to implement as it depends on third party cooperation—either a judge incorporating a

²⁰⁰ Barber, *supra* note 170.

²⁰¹ Marcus & Budlender, *supra* note 59.

timetable into a judgment, or the other party agreeing to incorporate one into a settlement. Nonetheless, it is an important strategy to strive for in any public interest case.

This tool is used in different ways by NGOs in the region.²⁰² One example of using this tool to measure the impact and encourage compliance with the goals of a public interest case is that of incorporating a timeline as a strong suggestion for the court in a case where the NGO is an Intervener.²⁰³ One example is found in a recent intervention submitted to the European Court of Human Rights on a series of Article 2 compliance cases by the Committee on the Administration of Justice (CAJ), a Belfast NGO.²⁰⁴ The intervention provides explicit suggestions to the Court for how to better ensure an effective impact any judgment would have on the people at the heart of the case.²⁰⁵ It suggests imposing a timeframe for those required to comply with the order, and to have a detailed schedule charging monetary fines for any delay in meeting that timeframe.²⁰⁶ Although the organization cannot enforce this, it provides a helpful suggestion to the Court and, if it is incorporated into the ultimate judgment, it will give a clear tool for measuring the impact of that intervention: either the timeframe was adhered to or it was not.²⁰⁷

When this approach is successful it creates a very clear way of measuring the impact of the work done by the organization on the public interest issue in question. It is

²⁰² Interview with the Committee for the Administration of Justice (CAJ), ; Interview with ECNI, *supra* note 147.

²⁰³ *Id.*

²⁰⁴ Submissions of the Committee on the Administration of Justice (Intervener), *McCaughey, Grew, and Quinn*, (2011 UKSC 20).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

clearly difficult to control whether or not a court is going to include the suggestions of an intervention or any argument for timelines. However, even the process of creating the suggestions gives the public interest organization a better understanding of what to measure in the follow-up stage of the case.

Similarly, these types of details can be incorporated in to settlement agreements to help measure the status of implementation after the case is resolved.²⁰⁸ The Equality Commission Northern Ireland (ECNI) incorporates timelines and indicators into their settlement agreements.²⁰⁹ By getting the other party in the case to agree to allow specific terms into the agreement—timelines, policy changes, compensation, etc.—the measurement process is much more straightforward.

However, coming to agreement on the specifics is probably easier said than done. The ECNI has the benefit of being a statutory body and therefore may have more pull in its agreement making with other parties.²¹⁰ However, any organization should try its best to incorporate detailed actions, which can be measured later, into the language of its settlement agreements. By participating in the joint creation of a checklist of sorts for the parties, it will provide structure to the measurement process and accountability for both parties.

These techniques serve to give guidance to both the organization involved in bringing the case and the organization on the other side that is being challenged.²¹¹ The clear guidelines in the agreement or order will allow the organization to have a clear set

²⁰⁸ Interview with ECNI, *supra* note 147.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* (Discussed benefits of incorporating timelines and specifics into agreements).

of criteria to measure the impact the case had on the issue. Similarly, the other party will have a detailed list of what it needs to do to comply with the order and come in line with human rights standards.²¹² This is a helpful way to measure the impact the case had on society and share those results with others. It also might have a positive effect on helping the other party comply with the order.

Primary Research

Fourth, utilizing primary research, such as in-person interviews, surveys, and correspondence on specific areas of impact can help uncover how the public interest case has affected the policy makers, those implementing the policy, and those affected by the policy.²¹³ This is a time consuming process which might not be feasible for most organizations, but is something to strive for even on a minimal level. There are multiple ways in which these tools can be implemented and this paper does not attempt to tackle them all; rather it hopes to provide a minimal explanation of the theory behind the measurement processes and ways they have been used in the past.

One valuable piece is the importance of looking at how the litigation actually affected more than just the law or policy in that instance. Remember, a major piece of public interest litigation work is the widespread impact it is intended to have on an entire group of individuals or community.²¹⁴ If the outcome can only be measured by how the law changed or how a specific situation was remedied, then the organization cannot

²¹² *Id.*

²¹³ Equality and Human Rights Commission (EHRC) Research Report Series, 2009.

²¹⁴ Roger, Smith, *Experience in England and Wales: Test Case Strategies, Public Interest Litigation, the Human Rights Act, and Legal NGOs* (2003) available at <http://www.pila.ie/key-issues/experience-in-england-and-wales-test-case-strategies-public-interest-litigation-the-human-rights-act-and-legal-ngos/>.

measure its success.²¹⁵ It must be able to decipher how much has actually changed in the lives of the people living under the new policy, the attitudes of those implementing the new policy, and the considerations of those drafting the new policy.²¹⁶

The Equality and Human Rights Commission (EHRC), an NGO in the UK, conducted research on the impact that multiple public interest cases have had on the various areas of the government implicated in the judgments.²¹⁷ By conducting surveys, in-person interviews, and a review of new policies, they were able to measure the impact the cases have had on influencing compliance with human rights standards in the area.²¹⁸ The process and findings are highlighted below through the case of *Osman*.²¹⁹

This case came down in 1998 challenging, *inter alia*, the duty of police officers to provide the assurances found in Article 2 of the Human Rights Act guaranteeing a right to life.²²⁰ *Osman* involved a murder of a father of a boy whose family had raised multiple concerns about the safety of their family after a schoolteacher became mentally deranged and obsessed with the boy.²²¹ Although multiple reports were made about the mental instability and safety concerns about the schoolteacher, the police never arrested or

²¹⁵ Barber, *supra* note 170.

²¹⁶ Marcus & Budlender, *supra* note 59, at 110.

²¹⁷ EHRC, *supra* note 213.

²¹⁸ *Id.*

²¹⁹ *Osman v. United Kingdom*, 1998, EHRR 101, available at <http://www.worldlii.org/eu/cases/ECHR/1998/101.html>.

²²⁰ *Human Rights Act*, 1998 c. 42, schedule 1, Article 2, UK. (Right to life: Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.).

²²¹ EHRC, *supra* note 213.

detained the teacher.²²² He ended up going to the family's home and killing the father and injuring the boy.²²³ He was ultimately arrested and convicted and is serving a sentence in a mental facility.²²⁴

The public interest issue was to clarify whether the police have a duty to intervene before a crime is committed in order to ensure a person's right to life is upheld.²²⁵ The European Court of Human Rights was able to use this case to provide clear guidelines for when "authorities had failed in their obligations to protect life."²²⁶ The intent of the judgment is that policing policy across the UK would conform to the new criteria.

Ten years after *Osman*, the EHRC conducted interviews and surveys of police officers, and those charged with training them, on how the standards created in *Osman* have impacted the policing practice and education around the right to life protections.²²⁷ Through this process they were able to find out how policy is made and amended for the police force.²²⁸ They discovered that the phrase '*Osman* warnings' has become a regular part of police vernacular and are given to people whom police have reason to believe are at risk.²²⁹ Many people who were interviewed described the connection between the

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

changes in policy as being a direct result of *Osman*.²³⁰ However, there was some caution given to the degree of understanding of how and when to give those warnings.²³¹

Overall, ten years later, the findings showed that the majority of the 43 police forces had changed their policies around the right to life issues to conform to the outcome of the *Osman* case.²³²

As described in the outcomes of the *Osman* research, the NGO receives valuable feedback on the amount of impact a certain case has on policy and practice. The findings reinforce the need for a holistic strategy for maximum impact of a case to be felt and sustained. Measuring through primary research also provides the NGO with useful results which help highlight: 1) existing gaps in the impact of the original case, 2) where a new case could possibly fill the gaps, and 3) where other forms of public interest advocacy work could support the original objectives of the case.²³³

This type of research might take a lot of resources and time, but it will also provide valuable feedback on the hard work being done by the organization. There may be ways to conduct similar research on a smaller scale, such as through feedback in the community where the relationships have been built throughout the litigation. Again, like the other measurement tools, the organization needs to determine what method of research would be most sustainable and in line with its overall objectives.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

Barriers to Measurement

The tools discussed above: creating a measurement strategy, building relationships with the community, creating tangible benchmarks and indicators, and conducting primary research when possible, provide some ideas on ways to measure the effectiveness of a given public interest case. However, there are some barriers to measurement that can be useful to keep in mind when approaching the overall measurement strategy. If organizations are aware of the barriers from the outset, then they can incorporate a more effective evaluation process into their overall strategy.

Clearly it is much easier to evaluate and measure the impact of a case if the goals and indicators of success are outlined at the start of the case. This is not to make light of the hard work done to prepare for a public interest case, but to remind those involved in public interest litigation to keep in mind some way of evaluating the impact the case will have in order to bring about even more societal change. As discussed above, the lack of a clear goal is a common barrier to measurement.

Another barrier is the difficulty in measuring the impact the case had on society versus the impact the entire advocacy campaign had on society.²³⁴ The impact of the litigation is often difficult to separate from other measures taken alongside the litigation. This is not bad news, as this just reinforces the importance of a concerted social effort to bring about rights reform. The advocacy groups, the media, the litigation, and political lobbying can all be used together to apply pressure on the government and decision-makers to act in the best interest of the public—be it through reforming laws, enforcing

²³⁴ Marcus & Budlender, *supra* note 59, at 133-34.

laws, or enacting new laws.²³⁵ However, it may make measurement difficult if attempting to isolate the impact the litigation itself had separately from the other factors.²³⁶

Measuring the impact that public interest cases are having on society is an important tool for NGOs to maximize their resources, build up their legitimacy, and learn from past cases to make a stronger campaign for the next case. Overall, it will help meet the principles behind public interest litigation work and be a more effective peacebuilding tool. It is helpful to remember that when measuring the impact of a case, keep it simple by following the techniques mentioned above, starting with a measurement plan from the outset.

Ultimately, it is the decision of the organization to incorporate a measurement mechanism that best lines up with the objectives and philosophy of the organization. These tools borrowed from other NGOs and research will shed some light on this important step towards creating a less divided society based on human rights and justice. Measuring the impact your public interest litigation is having is an essential piece to making that type of society a reality.

Summary of Findings

To summarize, the interviews and research found that there are multiple stages in a public interest litigation campaign which will need to be carefully managed. Before bringing any public interest case it is important to spend time analyzing whether to bring *this* case with *this* client at *this* time.²³⁷ During the case, the public interest litigation

²³⁵ Smith, *supra* note 214, at 4.

²³⁶ As discussed in the EHRC report, *supra* note 213.

²³⁷ Marcus & Budlender, *supra* note 59, at 119-127.

campaign is in full swing. The lawyers need to stay actively engaged with the clients and be guided by them as the case progresses. Finally, the media should be kept abreast of all issues, changes, and challenges in the case which should be characterized in a way that can cross political and social ideologies and gain public support.

Once the case is over in the courts, it is just beginning on the ground. There needs to be significant follow up and monitoring of enforcement of the judgment in order for any change to ever be felt. This can be done through publicizing, educating, and training the public, legal communities, and government bodies to understand the implications and responsibilities found in the judgment. Ultimately, the impact of the public interest case should be measured to evaluate the strength of the tools used in the particular case. This should help any future cases be strengthened and be more useful for returning rights to the rights holders.

The research showed that public interest litigation is best done as one piece of an overall systemic change campaign. It should be used alongside other peacebuilding tools such as legislative reform, legal education, lobbying the government, media outreach, and community direct action.²³⁸ There is much work to be done before the case, during, and, perhaps most importantly, after a judgment is received. All this work should be done as directed by the clients and community at the heart of the case.

Public interest litigation should not become another process which overlooks the individuals in decisions which affect their lives or one which builds more division within the society. Collaborating with the community and stakeholders helps the lawyers present the court with a picture of the collective vision of the people in their jurisdiction.

²³⁸Interview with PPR, *supra* note 86; Marcus & Budlender, *supra* note 59, at 130-32.

Multiple well-planned litigation campaigns will hopefully lead the court to collectively provide the people with a realization of that vision through upholding their rights and respecting the public voice.

CHAPTER IV

DISCUSSION

The literature review and interview findings build on one another to show that public interest litigation may be a successful tool for peacebuilding in divided societies. This Part will discuss the potential of public interest litigation, its limitations, and areas for further research to strengthen scholarship on this important topic. As the practitioners share, there are many tips to improve the impact of a public interest litigation campaign; also, there are many ways to measure the impact allowing for increased learning and accountability. Given the many potential impacts of public interest litigation, it seems to be a valid option for minimizing potential conflict in a divided society. Moreover, if the measurement strategies are used effectively, it would make an easily evaluated method for monitoring peacebuilding efforts. However, the many scholars who have contributed to peacebuilding literature have not explicitly mentioned public interest litigation as a viable option. Clearly, public interest litigation is not the answer to the peacebuilding failures around the world, but it may have a significant amount of stability and normalization to offer a country which may be headed toward conflict.

From the practitioners' perspectives above, public interest litigation appears to have many merits that could advance peacebuilding activities. First, public interest litigation relies on local actors throughout the campaign. Litigation is a unique tool in this regard, as the client must guide the case and the attorney has an ethical duty to proceed in the best interest of the client. Therefore, in a public interest case the local knowledge and resources of the clients—those directly impacted by the conflict or inequality—would be highly utilized as they would be the ones guiding the entire case.

This is a much different peacebuilding approach than bringing in a pre-made strategy for what worked in one divided region. Rather, through a public interest case the practitioner and the client are depending on one another to navigate the process in a way that matches the needs of that specific situation and conflict.

According to many scholars, strengthening the rule of law in a divided society was is one of the most important ways to minimize the acceleration into conflict. Therefore, it makes sense to exercise the law in order to increase its strength and determine its legitimacy. In a divided society, neutrality is a value in short-supply. However, for example, when the Good Friday Agreement was signed, parity of esteem for the multi-cultural society was drafted into the new statutory scheme. Therefore, the basis of the legislation which followed was on neutral and non-discriminatory grounds intended to establish more peace in the society. If the court then relies on those laws to guide its judgments, the peace agreement can gain legitimacy, the members of society who were promised parity of esteem from the language of the agreement can feel supported, and society on all sides of the divide can hopefully start to follow the law's example.

The transparency involved in litigation is another reason why public interest litigation is a hopeful option for peacebuilding.²³⁹ As described in the Part II, public interest litigation provides a forum for public justice where the media can widely distribute the outcome of a case and begin to create new public meaning through that publicity. Just as *Brown* made the U.S. Constitution mean something, cases upholding rights or guarantees in documents in divided societies—such as the Good Friday

²³⁹ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1086-87 (1984).

Agreement in Northern Ireland—can make those documents actually impact the people on the ground. By creating an open justice process, public interest litigation can help spread news far and wide of what the expectations are on the new social contract within the society.

Many of the practitioners referenced above were not bringing public interest cases on the specific issues said to be the divide in the region—British-identified Loyalists versus Irish-Identified Nationalists, for example—however, they were working to bridge inequality on all levels. By addressing children’s rights, women’s rights, LGBT rights, and disabled persons’ rights the region is creating legal templates for any form of inequality and division to be dealt with civilly. Public interest litigators provide an example of how to deal with injustice in a non-violent way. Using the court system as a viable source to live into your identity without harming anyone else’s is a powerful side-effect of public interest litigation. By modeling a socially acceptable form of dispute resolution, public interest litigation can further build peace in the region.

Finally, a purely practical matter is that many public interest cases are subsidized financially or done through a pro bono program. This means the process is surprisingly affordable compared to other forms of peacebuilding. In Northern Ireland, many public interest groups are either funded through generous donors, the government, or have a legal team of pro bono attorneys. This makes public interest litigation a potentially more valuable contribution to society. Lawyers are gaining much needed experience bringing public interest cases through pro bono opportunities, while the clients are receiving the legal assistance they need to gain access to the courts and feel heard. Keeping costs low

makes for a much less discriminatory form of peacebuilding practice as the financial barriers will not be as prominent as in other forms of litigation.

This analysis is not purely idealistic. There are many barriers to progress in any society which cannot simply be dealt with in a streamlined fashion or through the perfect case. Although the practitioners provided some examples of hurdles to maximizing the impact of a case, there are other issues raised by public interest litigation as a peacebuilding tool. One concern is that the justice system and the laws on the books are actually perpetuating the division within the society. For example, prior to the new constitution and bill of rights in South Africa, many of the laws were divided along racial lines. Therefore, the laws would not be much good to anyone attempting to bridge that racial divide through public interest litigation. However, when there is a strong judiciary and equality legislation, there is a powerful opportunity to accelerate those documents into action on the ground through a good case—as is the potential in South Africa today.

Similarly, the case could fail and further reinforce division and inequality in the region. There are no guarantees to success when new laws are being tested in the courts. When a case is brought on new legislation or on a novel argument, the dismissal or loss can set a bad precedent which would make it all the more difficult to change that area of law in the future. This was discussed briefly in the Practitioner's section and is restated here as a caution to spend as much time as possible devising the right case, right time, and right argument. Avoiding negative precedent setting is crucial to using public interest litigation as a building block for peace and equality through laws.

Further, even if a suit prevails in the courts, if society is not ready to change, then it may be more stigmatizing to the group represented by the public interest case. In a

divided society, many people's identities are defined by the conflict. When that identity is being chipped away at by laws forcing equality or tolerance, the response may not always be to acquiesce. There will most likely be an outcry in some portion of the society, depending on the issue brought. On the other hand, there may simply be a lack of infrastructure to implement the new laws. Either way, the public interest case must be followed up on in order to ensure the impact it has is the one intended by the challenge.

The limitations of public interest litigation are many and must be addressed. The research done for this paper was focused on very specific societies where public interest litigation is practicable and culturally acceptable. Clearly, this option for peacebuilding may not be appropriate for every divided or post-conflict society. It can only work where the rule of law is a strong cultural value and is not further dividing society through cultural imperialism or oppressive laws. If the tool used for peacebuilding is not authentic to the people in conflict, then it will not be sustainable. Currently, this tool may only be successful in societies such as Northern Ireland, South Africa, and India. And even in those regions limitations persist.²⁴⁰

Beyond the cultural limitations to this approach to peacebuilding is the very obvious presupposition that public interest litigation presents: that the society is stable enough to support a case—that there is a judiciary, laws, courthouse, process, trained members of civil society to bring the case, etc. A certain degree of peace must already exist in order for this tool to work. However, peacebuilding is an ongoing approach to changing the culture within the society that requires much more than a stable judiciary. The people must feel like they can actually access that legal system and that it can work

²⁴⁰ As discussed above, without the financial backing to enforce judgments pertaining to socio-economic rights then many cases are being left unenforced.

for them in order for it to change the culture of conflict. Empowering civil society to litigate alongside rebuilding the justice system may be the difference posed by this paper. Ideally, public interest litigation would serve to replace the guns and the violence. The hope is that the parties can take the fight off the streets and into the courtrooms. But, the parties must first know that the courtrooms are a powerful option for them to bring a fight. This power is reinforced by exercising the laws through litigation. A new culture of using civil society to access the courts in order to minimize inequities and injustice must be developed if the courts are going to be a sustainable peacebuilding tool. Although public interest litigation requires a certain level of stability within the country, it does not presuppose a culture of peace.

A final limitation was that too few cases exist on which case studies can be done. Further research is greatly needed on the efficacy of public interest litigation as a part of peacebuilding in a divided or post-conflict society. However, finding a successful case and tracking the impact its outcome has had on the peace or conflict in the society proved difficult. There are many countries currently in flux which would be ripe for this type of research. Alongside economic development, a study of efforts to rebuild a country by educating and empowering civil society to bring public interest cases would be ideal. Rwanda, Bosnia, Liberia—these countries receive much aid and attention from peacebuilding organizations, but have not focused those resources on changing the culture through litigating for peace. In the future, this would be an important area to research to measure the impact it has on peace in the region.

CHAPTER V

CONCLUSION

Peacebuilding in divided societies is a much needed area of research and practice. Divided societies differ from post-conflict societies in that their governmental infrastructure may be better equipped to handle legal challenges. Therefore, public interest litigation may be a powerful tool to reduce social division and strengthen the rule of law. By utilizing local actors, resources, and knowledge, public interest litigation taps into the needs of the community and maximizes the impact through that relationship. Further, public interest practitioners have provided many measurement strategies to help in evaluation efforts of public interest cases and the impact it has on a divided society. In so doing, public interest litigation becomes a highly effective tool for learning from and boosting accountability through measurement and evaluation of past cases. Peacebuilding efforts are in great need of evaluation in order to maintain legitimacy and maximize impact on the country in need of support. Public interest litigation provides an affordable, measurable option for peacebuilding in divided societies.

As globalization and civil society increase, so does the need for innovative and effective peacebuilding techniques. Public interest litigation attempts to give new public meaning to a society in need of healing and unity. Through a cooperative case, a strong outreach and media campaign, and a follow up strategy, public interest litigation can transform the law on the books to meet the needs of those on the ground. By empowering individuals within a divided society through a nonviolent resolution process, public interest litigation can strengthen the members of that society to fully participate in its progress. Scholarship and members of civil society may be overlooking a valuable

peacebuilding tool when they do not utilize public interest litigation as a part of their overall efforts.

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