



MANY

ROADS

TO

The Law
Related Work of
Ford Foundation
Grantees
Around the World

JUSTICE

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Mary McClymont
Stephen Golub
Editors

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Public Interest Litigation: An International Perspective

HELEN HERSHKOFF & AUBREY McCUTCHEON

This chapter provides an international perspective on public interest litigation by looking at the work of a sampling of Ford Foundation grantees that use public interest litigation in a number of ways to improve conditions for disadvantaged groups, such as the poor, women, and religious and ethnic minorities. Litigation can help to reform existing laws that hinder or prevent members of these groups from participating fully and fairly in society. It can enforce rights that existing laws guarantee, but are not followed in practice. Litigation can complement a broader political movement, or foster mobilization and encourage alliances that then produce political action. Furthermore, litigation can help change attitudes toward the law and create a culture in which government and private entities respect and enforce human rights values.

The Foundation first supported groups undertaking public interest litigation in the United States during the 1960s. In the following decades, the Foundation increased the range of its geographic commitment, and grantees now undertake litigation in many countries in Latin America, Asia, Africa, the Middle East, and Eastern Europe. These nongovernmental organizations address a broad range of social concerns—from job discrimination in China, to wrongful imprisonment in Peru, to violence against women in Poland. They use a variety of creative strategies and often work against great odds, nevertheless winning signifi-

cant courtroom victories that seek to enforce human rights, to change entrenched practices and laws, and to encourage political consensus for social improvement.

An earlier chapter of this volume focuses on public interest litigation in the United States. This chapter turns attention to the equally important work of the Foundation's grantees in other parts of the world. The first part of the chapter provides an overview of public interest litigation, examining its goals, approaches, and structural adaptations in a global context. The second part highlights the specific litigation efforts of Ford grantees in Nigeria, India, and parts of the Middle East, Latin America, and Eastern Europe.

Public Interest Litigation: Goals, Approaches, and Adaptations

Over the last twenty years, the Foundation has supported groups conducting public interest litigation in a wide variety of political and social areas around the world. Organizations sometimes refer to their work as "social action litigation" or "social cause lawyering." By whatever name, these groups are seeking to use the courts to help produce systemic policy change in society on behalf of individuals who are members of groups that are underrepresented or disadvantaged—women, the poor, and ethnic and religious minorities.

Grantees litigate for multiple and reinforcing reasons and they select cases and clients with reform interests in mind. Their work builds on a model of group representation, where a single lawsuit can vindicate the rights of many individuals. They also make strategic use of individual cases that enable public interest lawyers to identify broader patterns of inequity; by representing a single client, grantees can enforce legal entitlements, declare new rights, change bureaucratic attitudes, and promote alliances in support of shared goals.

In using litigation as a vehicle for social change, public interest law NGOs face a uniquely complex set of incentives and challenges. Indeed, because domestic conditions vary considerably from country to country, one cannot generalize about litigation as a global strategy. In countries where the laws are them-

selves unjust, litigation can document the legal system's failures and inequities. Where legal procedures hinder or oppose legal rights, lawsuits can confront and eliminate those barriers. In transitional societies shifting from authoritarian rule to democratic governance, litigation can help new constitutional principles to take root, as well as increase public awareness of human rights and embolden those with legal claims to come forward. In communities where judges lack broad knowledge of legal alternatives, lawsuits can serve an educational function, teaching the courts and the public about basic rights and legal possibilities. Where national laws are repressive or insufficient, litigation based on international law can provide normative guidelines for domestic courts. Lawsuits do not always succeed in court, but they help to focus public attention and to shape public opinion in favor of reform.

Law affects society in many complicated ways; social and economic practices likewise affect legal possibilities. In the global transition toward human rights and rule-of-law values, litigation can be instrumental in achieving shared goals. Despite broad variations across countries in terms of legal, cultural, political, social, and economic conditions, one can nevertheless point to several key variables that seem to shape litigation and are in turn altered as litigation goes forward. These variables include the system of government and scope of existing laws, the independence of the judiciary and the operation of the court system, and public attitudes toward law.

Obviously, the nature of a country's governance structure—whether a military dictatorship, totalitarian, democratic, or a system in transition—shapes the role that courts can play in social reform and the kinds of problems that grantees can meaningfully address through litigation. South Africa, for example, where the Foundation has supported legal reform efforts since the 1970s, had a viable judicial system during the period of apartheid, but its judges were constrained by laws that were themselves unjust. Civil rights lawyers nevertheless successfully challenged discriminatory “pass” laws (as described in the South Africa case study). The Legal Resources Centre handled hundreds of individual cases to compel implementation of Supreme Court rulings that limited the reach of those laws.

The independence and operation of the court system also

affect the anticipated consequences of public interest litigation, creating opportunities as well as obstacles to reform. A number of factors seem to be important: whether a judicial system is insulated from political domination; whether the judge has formal power to review the legality of legislative action or to enforce judgments against the government and private entities; and whether the judiciary possesses professional capital in terms of resources, prestige, education, and credibility. In some countries, judges are not legally trained; elsewhere they may be corrupt, ideologically hostile, or politically subservient. In certain legal systems rulings in individual cases may build a body of legal precedent that can help other victims of injustice. In addition, court rules and procedures vary widely from country to country, affecting nearly every stage of the litigation process—from who is allowed to bring a lawsuit, to the kinds of evidence that the court will hear, to the types of questions that judges are authorized to decide. India's Supreme Court, for example, has exercised strong judicial leadership in establishing “epistolary” jurisdiction, allowing any person to write to the court to seek judicial help in resolving social problems. This procedure has generated a tremendous demand for legal services on behalf of disadvantaged groups.

Public attitudes toward the law also create challenges for public interest litigators. After living through years in which the courts were corrupt, inefficient, or complicit in oppressive practices, citizens may not trust the legal system and may be reluctant to assert claims for relief. Moreover, disadvantaged people may not regard their problems—often involving social and economic conditions—as ones that law can redress. Even where they perceive their injury in legal terms, they may fear that going to court is not safe and that they will be targeted for retribution. Ford grantees have used many different approaches in encouraging new forms of social trust.

Perhaps the most salient feature of public interest litigation worldwide is its synergistic relation with a wide range of other activities—many of which are described in other chapters in this volume—that grantees undertake to promote broader social, political, and economic change. As in the United States, the groups profiled in this chapter regard their work as part of a larger reform effort that may include community organizing, public education,

research, media publicity, and other nonadversarial legal strategies. Public interest litigation thus depends on the work of a great many people, legal and lay, with a wide range of interests, expertise, and experience.

Public Interest Litigation: Selected Highlights of Grantee Work

From Nigeria to India, public interest lawyers have used litigation for various purposes: they have documented injustice and exposed the inequities of repressive regimes; they have repeatedly gone to court to help implement constitutional principles and laws, as well as to further legal reform through creative forms of lawyering; and they have struggled to integrate favorable international norms into their domestic legal systems and pursued vindication of rights in international tribunals. This section highlights several of these important efforts, focusing on cases involving law reform.

Exposing Repressive Regimes

NGOs often use litigation as a way to document and thus expose institutionalized injustices, even where the lawsuit as a formal matter is unlikely to succeed in court. By creating a record of official practices, grantees try to use well-targeted litigation to document official abuse or private violence; to crack the veneer of legality that some repressive government practices claim; and to lay the foundation for future action. In Chile, for example, the Vicariate of Solidarity repeatedly filed lawsuits during the years of military rule to seek the release of prisoners (called “habeas corpus” actions). They thus created a powerful record of abuses that over time acquired political importance. Although the Vicariate could count few courtroom victories, its massive documentation later played an important role in proving the extent of the government’s rights violations. After changes in the political regime, the Vicariate’s work in documenting prior repression contributed to the work of the National Commission on Truth and Reconciliation.

In Nigeria, groups have similarly used litigation to document and expose official injustices. In 1999, Nigeria held democratic elections that reinstated civilian rule after more than fifteen years. Since shortly after its independence in 1960, a series of military regimes had run the country without regard for constitutional requirements, sometimes with grave consequences for human rights. The government suspended a 1979 constitution, and never implemented a 1989 constitution. In addition, military authorities often used decrees to usurp judicial authority and to suspend human rights. (A 1994 study identified at least forty-one decrees that were in force that stripped the courts of power to decide disputes involving land use, newspaper publication, treason, civil disturbances, and trade matters.) Even when the courts issued rulings to stop repressive practices, the military regimes frequently did not obey them.

The Constitutional Rights Project (CRP) was established in 1990 with the aim of using research and litigation to promote basic rights and to strengthen the judiciary. The Foundation began supporting CRP the following year. Although Ford and CRP staff may not have expected the group's courtroom actions to produce significant legal victories under very difficult circumstances, they nevertheless believed that CRP's work could help build public awareness of rights abuses and sustain the momentum of those working for democracy. CRP and other law groups brought case after case charging the government with a wide range of abuses of power. In some cases, they were able to win release of prisoners illegally detained; in others, they were able to win limited victories for free speech. Much of their litigation, however, was hamstrung by interminable delays, judicial apathy, and corruption, and in many instances the courts threw out cases or otherwise denied relief. Even when the court ruled in favor of CRP's clients, the military authorities ignored the rulings.

CRP nevertheless succeeded in focusing a public spotlight on the injustices of the military regime. Newspapers that did not dare report a public demonstration would nevertheless cover a court case and give the reform effort much-needed publicity. For complicated reasons, litigation became a somewhat safe way to challenge government practices. Those undertaking direct human rights campaigns, by contrast, often faced jail, torture, and even

death for their efforts. Despite “losing” many cases in court, CRP’s litigation served as a vital tool for educating the public at home and for exposing official crimes to an international audience.

Implementing Laws

Public interest lawyers try to use court cases to win equal enforcement of existing laws and to enforce wide-ranging victories on behalf of large classes of people. Many courtroom victories, however, are accomplished piecemeal, with incremental successes matched by repeated failures over the course of many years. This building block approach depends on steady and persistent efforts to hold government and private interests accountable for complying with the law. Lawyers thus file many lawsuits to enforce laws that are on the books, but which, for various reasons, remain unenforced.

In Argentina, for example, groups mounted similar efforts to enforce rights that existed on the books on behalf of the physically disabled. In 1997, two NGOs—the Argentine Association of Civil Rights and Citizen Power—petitioned the courts to implement a law that requires buildings to be accessible to the disabled. One case was brought on behalf of an attorney with physical disabilities who could not enter the courthouse. Although the lawsuit produced results—the decision required all court buildings in Buenos Aires to have ramps and be accessible to wheelchair-bound individuals—the lawsuit did not require enforcement of the law elsewhere in the country.

Grantees also try to address the problems of unequal enforcement of the laws. Governments in some countries respect the legal rights of some groups, but deny those same rights to others. For example, Palestinian residents of the Occupied Territories face serious environmental health hazards from industries that have moved there to avoid Israel’s enforcement of environmental codes. In 1992, LAW—the Palestinian Society for the Protection of Human Rights and the Environment—filed a lawsuit on behalf of residents of Tulkarem in the Occupied Territories to close a chemical factory that manufactured insecticides. The factory had relocated to the Occupied Territories after the residents of an

Israeli town won a court order closing it down for environmental violations. The order specifically barred the factory from operating in agricultural or residential areas, but the factory nevertheless ran unimpeded for several years in Tulkarem. LAW filed its case in military court, the presiding court in the Occupied Territories. LAW argued that the factory was operating in violation of Israeli environmental laws, producing evidence showing that factory outputs were damaging water, croplands, and the health of residents.

The military court granted LAW a partial victory. It allowed the factory to continue operating in Tulkarem, but it ordered the company to stop production of the more toxic chemicals and required the factory to protect workers with masks. The case also provided the impetus for a cohesive community education effort—including workshops, lectures, films, and publications—that continued to raise public awareness of environmental issues in the area. Finally, publicity about the lawsuit helped pressure government agencies to provide more evenhanded enforcement of environmental regulations in the Occupied Territories.

Encouraging Legal Change

Grantees also use litigation to try to reform laws and to secure official recognition of human rights. Some of these efforts aim at expanding the fabric of legal protection to include groups and interests that society has historically ignored or mistreated.

In India, for example, *dalits* (those formerly known by the derogatory term “untouchables”) continue to suffer widespread discrimination despite laws that guarantee equal rights. India’s constitution guarantees all persons a right to life. In addition, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act aims at erasing the caste system and its discriminatory effects, providing for stringent penalties against those who practice “untouchability.” Enforcement of and compliance with this law, however, remains uneven and inconsistent.

The Centre for Social Justice (CSJ) has worked to broaden and interpret these existing laws to remedy specific injustices against the dalits. For example, the village of Borsad received a

water pipeline from the government, but residents tampered with the line and cut off water to dalits who lived in the village. CSJ, in partnership with the Navsarjan Trust, brought suit on behalf of the Borsad dalits, arguing that the state had a duty to ensure a supply of drinking water. CSJ's case was brought directly to the High Court of the State of Gujarat because it involved violation of a basic human right—the Indian Constitution's guarantee of a right to life—through the denial of drinking water. The lawsuit, one of a series of cases that CSJ has filed on behalf of dalits, also claimed violations of the Prevention of Atrocities Act. The Gujarat High Court ruled in favor of the dalits, and directed the state to repair the pipeline and to provide an interim water service while making the repairs. The litigation contributed to building a human rights foundation for future antidiscrimination efforts by public interest lawyers. The case also helped to promote development on behalf of groups being discriminated against, for it holds the state responsible for providing basic life resources and for ensuring fair delivery of necessary services.

Public interest law advocates in Israel have also filed dozens of lawsuits before the Supreme Court to strengthen and expand that country's legal protections for marginalized people. Through such litigation before the Supreme Court, the Association for Civil Rights in Israel (ACRI) has slowly helped develop human rights jurisprudence in Israel. Its landmark victories include cases involving gender equity, freedom of information, gay and lesbian rights, and freedom from discrimination.

In September 1999, ACRI and other groups won a historic victory on behalf of Palestinians when the Supreme Court outlawed use of physical force by Israeli security officers during interrogations. For years, human rights organizations had contended that Israeli security often abused Palestinians who were detained for questioning. Although public interest lawyers had brought dozens of cases, the court had avoided making a precedent-setting ruling. In May 1998, the Court agreed to address the legality of the interrogation methods, and it heard a series of petitions brought by ACRI and other public interest law groups. By now, each of the nine justices had heard many such cases in which ACRI had marshaled important facts during its years of litigation.

The Court's September ruling constituted a major legal step toward more equitable treatment of Palestinians and an affirmation of human rights principles more generally.

Using International Law

Public interest lawyers are also making innovative use of international human rights law where domestic venues or laws fall short. Grantees use two strategic approaches. They argue for the application of international laws in domestic courts and they take cases to international tribunals when domestic options have proved unsuccessful.

Grantees in Latin America, Eastern Europe, and Africa are working to implement international laws through domestic litigation. It will be years before the broad impact of such litigation is known. At present, its benefits may be best gauged not solely in terms of cases won and lost, but in its educational value, as judges learn about human rights standards and integrate international norms into domestic systems.

In Hungary, the Legal Defence Bureau for National and Ethnic Minorities (NEKI) repeatedly relies on international human rights law in domestic courts in order to cultivate an increased awareness of human rights norms. In as many cases as possible, NEKI cites international and European human rights law. It believes that this strategy, in conjunction with political changes in the country, will over time spawn a change in judicial attitudes and activity.

Similarly, several public interest law organizations in Nigeria are attempting to break new legal ground through lawsuits that seek to implement international law in domestic courts. The Shelter Rights Initiative and the Social and Economic Rights Action Center (SERAC) are two grantees focusing on poverty-related problems. They are asking domestic courts to develop enforceable remedies under the African Charter on Human and Peoples' Rights, and the United Nations International Covenant on Economic, Social and Cultural Rights. Problems of poverty are of special concern given decades of military rule, combined with mismanagement and corruption, that have left a deteriorating economic infrastructure and a nationwide housing crisis.

SERAC, founded in 1995, has filed cases in Nigerian courts on behalf of the former residents of Maroko, whose shantytown the government demolished in 1990, leaving three hundred thousand people without shelter. After protests from residents and advocates, the government promised to provide shelter at the housing colony of Ilasan. But housing at Ilasan was never completed. Eight years after the government demolished their homes, more than two hundred eighty-five thousand Maroko evictees remained without shelter, and as many as six hundred thousand people lived in Ilasan without water, electricity, roads, or a sewage system. SERAC's lawsuit charged the government with violating the Covenant on Economic, Social and Cultural Rights, which establishes rights to housing, education, food, health, and a safe environment. In one of the cases, although there was no final ruling as of this writing, SERAC had succeeded in persuading the court to hear a claim that the government, by evicting thousands of Maroko children from their homes and interrupting their studies, had violated their right to education under international human rights law.

Grantees also turn to international bodies to enforce international norms when domestic courts are unwilling to rule in favor of their claims. As lawyers repeatedly employ mechanisms for enforcing international law, domestic governments find it more difficult to avoid or ignore international decrees. Not least, actions based on international law help draw the attention of an international human rights community to ongoing abuses, and strengthen ties among regional NGOs working for human rights.

Groups working in Eastern and Central Europe, for example, have developed lawsuits that seek to enforce the European Convention on Human Rights. As more countries in postcommunist Europe have joined the Council of Europe, the Convention has become applicable in their domestic laws. As a first step, grantees try to vindicate the norms of the Convention in their national courts. When those efforts fail, lawyers and their clients take cases to the European Commission of Human Rights and the European Court of Human Rights in Strasbourg. An important example of this strategy is found in the regional work of the Budapest-based European Roma Rights Center, which successfully represented Anton Assenov, a Roma teenager who was beaten

by Bulgarian police. In 1998, the European Court issued a landmark ruling finding that the Bulgarian government violated Assenov's rights by subjecting him to torture and degrading treatment while he was in police custody, and also by failing to undertake an official investigation of the incident. The ruling extended the scope of international law by making the right to an investigation part of the right to be free of official mistreatment.

Similarly, in Latin America, the Center for Justice and International Law (CEJIL), a regional organization founded in 1991 by a consortium of ten prominent NGOs from the Americas, has successfully used the American Convention on Human Rights and its enforcing institutions—the Inter-American Commission on Human Rights and the Inter-American Court—to redress human rights violations that have gone unenforced in domestic courts. (The commission holds hearings, facilitates negotiated settlements, issues recommendations, and can forward selected cases to the Inter-American Court, whose rulings are accepted as binding by twenty-one of the thirty-four members of the Organization of American States.) Advocates here have had to deal with the legacy of military rule and civil wars, years in which governments carried out widespread violations of human rights with impunity. Moreover, even in the context of democratic regimes, a wide range of human rights violations exists. Some Latin American countries have since adopted broader constitutional protections for human rights, but their judicial systems remain lax or ineffective in prosecuting offenders and enforcing penalties.

By 1999, CEJIL was handling more than one hundred fifty cases involving forced “disappearances,” extrajudicial executions, violations of due process rights, limits on freedom of expression, and torture. Some cases have resulted in legal victories, but, not surprisingly, CEJIL often faces considerable difficulty in enforcing a favorable ruling from the Inter-American Commission or Court. Although domestic governments may officially acknowledge the Inter-American system's authority, very few have enforcement mechanisms built into their national laws. Without persistent monitoring and subsequent efforts by CEJIL and other NGOs to enforce decisions in domestic courts, most Inter-American Commission and Court decisions would probably go unheeded.

In particular, the Inter-American system has been critical to

CEJIL's efforts to improve conditions for indigenous peoples whose land and livelihoods face threats from encroaching miners, farmers, and loggers. For decades the Enxet-Lamenxay people of Paraguay, for example, suffered as their ancestral land, part of the last intact wilderness in South America, was parceled out to cattle ranchers. Despite a domestic court decree affirming their land rights, the Enxet were not even given access to the area except as laborers. CEJIL took their case to the Inter-American Commission, and in 1998 the Paraguayan government agreed to buy back more than twenty-one thousand acres from ranchers to help the Enxet move back to their lands, and to develop projects to improve their living conditions. The agreement, which calls for a return of lands to an indigenous people, sets a precedent for future cases on behalf of indigenous land rights.

Conclusion

Today's world is at an important crossroads as many societies advance from authoritarian regimes to democracies in which the values of human rights and the rule of law take root. The public interest litigation described in this chapter supports this broad movement, while seeking to assure that disadvantaged populations do not become worse off in the process of globalization and law-based reform. Public interest litigation serves as an important instrument for publicizing human rights abuses and for helping to provide protection to marginalized groups. Even if a lawsuit fails to change an unjust law, the act of going to court can influence or even change attitudes about the law and contribute to a climate for reform. Unorthodox arguments can serve to suggest innovative uses of the law; complaints can present a cumulative record that documents mistreatment. Grantees recognize that the relationship between litigation and social change is complex and incremental, and that litigation comprises only one of many important approaches for reform. As the other chapters in this volume show, building a system of justice demands sustained efforts on many fronts; the work requires a long-term perspective and a great deal of patience. In that struggle, public interest litigation is an incomplete strategy, but nevertheless an essential one.

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