

TRANSCRIPT

"VALUE AND IMPACT OF STRATEGIC LITIGATION: FOOL'S PARADISE OR INDISPENSABLE WEAPON?"

A Conversation With Noeline Blackwell, Brian Kearney-Grieve, and Gilbert Marcus
Moderator: James Goldston

INTRODUCTION:

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JAMES GOLDSTON:

I'm Jim Goldston, the director of the Open Society Justice Initiative. Just to note that we are being recorded for the benefit of future posterity, so all-- everyone's aware of that. We are here to have a-- what I hope is a rich and-- and-- and very interesting discussion about-- the value, impacts, costs, risks of strategic litigation, a subject of no small moment-- at Open Society of course where a number of us engage in-- litigation.

A number of us-- fund litigation-- and some of us are looking to study-- in comparative contexts-- what have been the impacts of litigation in relation to other tools for change on different themes in different places over time. So this is-- a conversation today which is-- (NOISE) taking place at a moment of intense activity and thought inside Open Society and we've got three wonderful-- people here to-- to help us understand some of the issues involved.

To my immediate right is-- Brian Kearney-Grieve, the program executive for reconciliation and human rights at Atlantic Philanthropies. Brian has been instrumental in-- funding, thinking about, shaping-- strategic litigation activity in different countries where Atlantic (NOISE) is working. And actually-- co-- collaborated with us on a convening yesterday as the International Human Rights

Law Funders Group-- about this very-- topic.

Further to the right is-- Gilbert Marcus, senior counsel practicing at the bar of Johannesburg, a specialist in human rights and constitutional law and he's argued numerous cases in the constitutional court-- of South Africa on issues including the challenge to the death penalty, the striking down of laws criminalizing gay sex, and compelling the government to provide anti-retroviral drugs to pregnant women living with HIV.

And then to my far right is Noeline Blackwell-- the director general of the Free Legal Advice Centers in Ireland-- focused on access to justice. Herself-- a strategic litigator and managing an organization that-- very much engages-- in that in-- in Ireland-- and in-- at the European level-- as well. So-- thrilled to have them here.

We thought that-- each of them would-- would offer a few minutes-- of-- of-- their own thoughts to begin and then we can open it up. 'Cause I hope folks will-- perhaps challenge some of the orthodoxies that-- that we come to this with-- in the course of-- of this discussion. We asked Brian if you could just to perhaps-- since Atlantic has done so much work in this area, to give us a sense of-- of-- of why and what he feels it has achieved and what he may have learned along the way.

BRIAN KEARNEY-GRIEVE:

Well, th-- thanks very much for having us here today-- James-- much appreciated. We don't have a huge amount of time so I'm gonna keep my comments quite short. I'm not a lawyer, so here are the experts. I'm-- I'm pleased-- really pleased that-- that they-- they here with us because that's where all the knowledge is. I'm a grant maker, but really just to give some quick background on why Atlantic is in this space.

It started back in the '90s and it actually-- I think we should attribute why we got into this area to Harvey Dale. Some of you may know him, he's with Duke University here in the U.S. (NOISE) But he really got-- he-- he-- he saw the issues in South Africa and he was looking at how do we-- what do we do in using the law to address some of these issues. And that's really where our program has emerged from over time. And I have other colleagues in South Africa and Northern Ireland that have worked in this area as well.

But really where it comes from is that-- that-- that belief that those who are most in need of the protection of the law are often least av-- able to avail of it. So how do you address that issue? And that's-- I think has been the driving-- force behind the program, linked to that whole issue of how do we improve access to justice and services for disadvantaged and vulnerable communities in those countries in which we work. And that's the key objective of our human rights program if we try and boil it down, it's how do you improve-- (BANGING) access to justice and services, but how do you also do it-- in a systemic way?

How do you create that systemic reform in-- an-- a sustainable way, which is quite a challenge for us as a (UNINTEL) foundation that really only has a couple of months

to go in our core program, grant making, so we-- we're really nearly the end of all of this-- in terms of our role. But what we've been trying to do over the last number of years is build capacity of other organizations to actually use the law in various ways. And we've been doing that here in-- in the U.S., in South Africa, Northern Ireland, and the Republic of Ireland, and in multiple areas.

So, you, one of the-- the advocates in the-- in the (UNINTEL) cases in South Africa is probably one of the first cases that we were-- really got involved with in South Africa. We looked at areas such as education, Guantanamo, racial profiling, death penalty, immigration, disability, same-sex marriage-- increasingly going into aging areas and-- and-- and-- and children's rights. So it's-- it's a broad spectrum.

So really looking at this today from-- more from this is a strategy and a tactic to advance human rights (COUGH) and to protect different approach in d-- in each country, different legal systems, all common law though. That's the one common element to it. But-- we'll hear some of the differences from-- from Noeline and Gilbert. Some of the things I just wanted to raise and I-- I'm not-- I don't wanna steal thunder from-- from Noeline and-- and Gilbert, but-- some of the-- the key elements I think which we've learned what we've learned, and I think we've really learned this from the people in the field. And so we've-- we've spent a lotta time listening as to what we can do as a foundation that would be helpful and-- and-- and support above the field.

Because we're not an operational foundation so a slight difference to what-- what-- what you're doing here. But a number of different areas that we've tried to focus on and tried to develop, law reform being one of them, legal education-- within universities so the next generation of applicants, how do we get them engaged in this area. So how do we create a (UNINTEL) over time. How do we encourage where there isn't a culture of pro bono, a real challenge for us in the Republic of Ireland.

Looking at the issues of community legal education, what we've found-- found is that many of the organizations and-- and-- and the issues that we're dealing with, those that are representing people don't know how the law could be used in their advocacy to advance and protect rights, so how do you educate people around that. Then obviously the public interest litigation elements and-- and then also how do we fund it and do you create a strategic litigation fund, what does that mean, what does that fund mean, et cetera.

So some of the-- very briefly, some of the lessons that-- that I would suggest have merged for us are the importance of s-- staying the course. This all takes time. You know that better than we do as funders, but it's something that as funders we need to appreciate and know that this is a strategic or tactic, it does take time. Things take time to wind through the courts, you gotta find the clients, you gotta find the right cases, et cetera. So you've gotta be prepared for setbacks and know that from the outset and accept that as part of the approach.

Setbacks m-- are not always setbacks as well. It could just be (COUGH) a different way that you can bring the issues forward, so a loss isn't always a loss. It might an

incremental step towards the eventual win. As funders we don't necessarily understand the unintended consequences of our well-intentioned grant making. So it's critically important that we listen and understand and question with the-- with our partners how we fund

So an example that I'd give in that is if you're th-- if we were thinking of supporting a strategic litigation fund, does that cover the fees of lawyers to take cases and what's the unintended consequence? Potentially it's that it encourages the courts or the state to seek costs being awarded against those that can't afford it. So you're encouraging a behavior that n-- isn't necessarily there if you structure your funding in that way. That's just one-- small example of not understanding as a grant maker and the importance of us listening out there in the field.

Another lesson that I think we've learned is the challenges of translating language between the operations field of using the law litigation, strategic litigation, back into the decision-making process within a foundation, which isn't expert, doesn't have expertise in litigation, don't have legal expertise, et cetera. How do you work with your grantees to understand what they do and then translate that back into our own internal language. (COUGH)

And Noeline-- can attest to the-- the-- the long arguments and discussion and frustration that we've both felt and try to do that. But we've got there, thankfully. But it is something that we need to be aware of. The other thing is how do you fund something like this in a way which is sustainable in the longer term. It's a challenge into foundations around this whole issue of dependency. You can't fund something forever, so how do you do it in a way that it sustainable into the longer term? Might it be attracting other sources of funding, but it might be how do you do-- how do you attract voluntary or pro bono into certain elements. Or how do you remove some of the systemic barriers that could potentially fund.

And linking to that then is early on we learnt the lesson of never include cost towards as an income stream that you can depend on and require your grantees to take that as an income or-- a reliable revenue stream. It should rather be looked at a windfall that could be used to g-- generate a reserve. And-- often I think funders look at costs as being an inc-- cost towards as being an income stream. (NOISE) I would seriously-- argue against that.

Two other final quick points. The importance of peer-to-peer exchanges. I think when we see how we've tried to develop-- public entities, public interest law in Ireland and the culture and pro bono and those sorts of things, one of the most useful things that we've done I think as a funder is bring people together from different jurisdictions that are actually doing the work.

And giving them the opportunity to talk to each other and for us as funders to actually listen. And listen to s-- hear what works. And it's an iterative process and we need to do-- be-- be-- be doing more of it and hopefully we will get to do the opportunity to do-- have the opportunity to do that. So to me it's not just about litigation. I understand that you're an operational-- unit here, but it's not (COUGH)

just about litigation, it's about really developing a broader culture of using the law in the public interest. But there are different sub-elements of that and we need to understand what those are. So-- I'll leave it there.

JAMES GOLDSTON:

Fantastic, Brian. Thank you. Can I just a-- ask you, is there-- if not that's of course understandable. I'm just wondering if there was an area in the course of your engagement intensively in this area, was there some assumption you made about where you thought litigation would be a help-- recognizing litigation as one piece of a broader-- mosaic of-- of strategies, is there one area where you assumed litigation would-- and then you learned in the course of this, "Well, actually maybe litigation is not as helpful as I thought it might be." Or were you-- or-- or-- or did everything tell you, "Nope, litigation is useful where I thought it was and maybe in areas where I didn't."

BRIAN KEARNEY-GRIEVE:

Well-- the strategy that have, say, in the rights program in Ireland is we have-- we focus on specific communities. So migrants, LGBT community, people with disabilities. But then we have a separate strand which is around core human rights infrastructure. And we knew that litigation would be useful in migration, all right. And we're seeing it being useful in that, but it's-- it's really protracted-- and it's been very helpful in some instances, just the threat of litigation has been very helpful.

In disability it's-- we've had some real setbacks in that area with significant cost awards being awarded against people and that have been seeking a constitutional entitlement. And that's had a huge chilling effect. The th-- the-- I think what we've learned from it though is-- is the importance of linking litigation to movement. (UNINTEL)-- I think that's r-- I always get nervous when I see litigation that isn't linked and it's taken by individual lawyer and it's an individual case.

And you're just wondering where-- but here are the experts on that side. I wanna talk more about that. The place that it hasn't worked as well and it's been very difficult is around-- LGBT rights-- and it's really got to do black-letter law and a-- a-- a-- really-- traditional approach as to how you interpret the constitution. Is it a living document or not. And-- we-- we-- we really did hope and we put quite a bit of money into litigation in the area, right up to a supreme court challenge, and we just haven't really got anywhere.

But we've-- we've-- well, but we've balanced that (COUGH) with another strategy. So we've had-- a litigation strategy and an advocacy. So it has actually brought the issue to the fore and it's forced a referendum. So hopefully in the spring next year Ireland'll be the first country that passes civil marriage through the popular vote. We're really hoping so.

JAMES GOLDSTON:

Great. Thank you very much. And of course we can come back to those issues as well and I imagine we may thought on them very soon. Gilbert, you have-- coauthored this-- extraordinary study-- for Atlantic of-- looking at-- the rich history of public interest litigation in South Africa and this-- I believe this is just a working draft, right? We're still awaiting the final. But-- (UNINTEL) maybe this conversation can contribute to that. I believe you-- you've distilled this massive tome into some very-- succinct lessons. Please.

GILBERT MARCUS:

Thank you, Jim. And-- and thank you for inviting me. A few years ago I was approached by Atlantic Philanthropies to do, and I quote, "A strategic evaluation of public interest litigation in South Africa." The first edition of this work was coauthored with a colleague of mine, Steven Budlender, and this latest edition-- we brought on-- a second author-- a third author, Nick Ferraira.

But I-- I'm a practicing litigator, not a sociologist, I'm not a legal philosopher, so the question was how do we go about producing a strategic evaluation of public interest litigation in South Africa? So we sat down and we thought, "Well, the best way to do this is to speak to the people who are best qualified to answer that question." And so what we did was we spoke to the major litigators, the major barristers, advocates, who were doing work in this field.

We spoke to judges, we spoke to two former chief justices and a number of other judges of the constitutional court, and we spoke to virtually every other public interest litigation organization in South Africa. And we did so in every (COUGH) place on the guarantee on anonymity because we wanted candid response. We didn't want people to trumpet their victories and to explain away their losses. We wanted to understand why cases succeeded and why cases didn't succeed.

And the result is-- is this work and-- and-- and we think it's generated a great deal of interest around the world. I and my coauthors have presented this report in a number of countries-- and it seems to have struck a resonance wherever we have presented it. What we've managed to distill or arrange of factors which we believe-- best contribute to successful outcomes. We don't purport to give a mathematical formula, we obviously could never do that. And we obviously are perfectly alive to the uncertainties of litigation.

We-- we concluded that litigation should not be a strategy of first resort, nor should it ever be employed in isolation of other strategies. For public interest litigation to achieve maximum success in advancing social change we consider that it should take place in combination-- with at least three other strategies. And they are public information campaigns to achieve rights awareness, providing advice and assistance to persons claiming their rights, and social mobilization and advocacy.

When, however, a decision is taken-- to litigate, we suggest it must be properly conceptualized, effectively managed, and followed up. And in order to ensure that public interest litigation has the best prospects of success and achieves maximum social impact, we identified seven critical factors. They are proper organization of clients-- and I'll say something about each of these in a moment. Secondly, overall long-term strategy; third, the coordination and information sharing; fourth, timing; fifth, research; sixth, characterization; and seventh, follow up.

It's what I refer to the Seven Habits of Highly Effective Public Interest Litigators. (LAUGHTER) Something with the proper organization of clients, in general the use of an institutional client, which is well-organized and informed, is usually the client of choice. That kind of client brings to bear knowledge of the problems and strategies-- conducive to ultimate success. It will also be able to identify the best individuals to litigate in tandem with the organization and it will generally have the capacity to follow up any success achieved.

With regard to overall long-term strategy, we suggest that where public interest litigation achieves maximum social impact, it is usually not by virtue of a single case. Rather it tends to require a series of cases brought on different but related issues over a substantial period. The earlier cases thus act as vital building blocks for the more complex and later cases, and the greatest impact is achieved by d-- by developing a coherent long-term strategy. And I stress, where this is possible. It's not-- not always possible.

Regarding coordination of information sharing, if there is insufficient coordination and sharing of information among public interest organizations, there is a real danger that resources will not be used effectively, and even more damaging, viable cases can be undermined by other conflicting cases being brought by other organizations simultaneously or beforehand. It's critical therefore that there be proper information sharing and coordination among different organizations.

With regard to timing, the damaging effects of running litigation to soon can be disastrous, particularly as an unsuccessful piece of public interest litigation could in practice effectively foreclose the issue from being re-litigated. And it's also usually helpful we find to be able to demonstrate that litigation has not been the first port of call. Where litigation is against government on controversial issues, courts will tend to be far more receptive and sympathetic where it can be demonstrated that the organization has repeatedly sought to engage with government to achieve a solution, but that this has not resulted in anything concrete.

The chances of succeeding in litigation we think are substantially increased if government has had an opportunity to resolve the issue but has failed to do so without justification. Then there is the question of research, and this perhaps might be self-evident, but we think it's-- it's a critical but often neglected facet of successful public interest-- litigation. And that is the need for detailed research-- in advance of the litigation, both on questions of law and on factual matters.

In our country the use of the comparative method is in fact permitted by the

constitution and our constitutional court is a great proponent of the-- comparative method. And we think it's particularly important because-- again, as a generalization, courts are comforted by providing solutions that are in line with those adopted in other countries. The need for factual research is equally acute and in cases concerning socioeconomic rights, many of the factual issues will be highly specialized requiring-- appropriate and qualified experts.

With regard to characterization, any case, especially one in the public eye, might be viewed and perceived in multiple ways by courts in the public. We think it's therefore important for those involved in publ-- public interest litigation to demonstrate to both the courts and the public that the issues at stake are critical, that the assertions of fundamental rights are being used to address fairness and inequality rather than to perpetuate it, and that there are real people that are affected by the issue on a daily basis.

And finally is the question of follow up. We think this is a critical factor in ensuring long-term success after a litigation. It involves ensuring that a victory in the litigation is put into effect by the relevant government department, thus translating the legal success into practical benefits for a large number of people on the ground, including those who were not directly involved in the litigation at all.

Follow up is often linked to the kind of remedy that one seeks and in this sphere I think there is scope for-- for creative remedies in seeking to persuade the courts to provide a remedy which has (UNINTEL) mechanisms to ensure appropriate follow up-- and implementation of a court order. So those are the-- the factors that we've identified. We (COUGH) don't advocate-- a one size fits all. These are the factors that have emerged in our particular jurisdiction. I'm sure that they will have a resonance in many other jurisdictions, but we have certain advantages flowing from our constitution which others don't have.

We've got very, very generous rules of standing, we've got decisions which have effectively insulated-- unsuccessful litigants who have pursued their constitutional rights from an adverse order of costs, and all of these really play a part-- in identifying the factors that we think are ultimately conducive to success. Thank you.

JAMES GOLDSTON:

Thank you, Gilbert, very much. Can I just-- follow up on one matter. A lot of what you said is very-- provocative I think and very helpful and I-- in relation to-- research I think it was you said that when litigating in the area of social and economic rights-- special expertise may be required-- given the nature of what you're trying to prove. I wonder if there's anything else about those issues, those rights, which-- colors your view of the utility of strategic litigation in those spheres relative to others? Should one be thinking about strategic litigation in a different way or approaching it or considering it when dealing with social and economic rights from others, or no?

GILBERT MARCUS:

Well, (CLEARS THROAT) under our constitution the various socioeconomic rights follow-- I'm talking in general now, a formula. And the formula-- first of all the issues around whether or not we should include socioeconomic rights in our constitution was a highly contested issues in the negotiations leading up to the adoption of the constitution.

There were some who argued very powerfully that there is no place in a constitution for socioeconomic rights because it places courts in really-- an impossible situation, (COUGH) argued how does a court-- give an order-- requiring a hospital to perform a heart transplant or things like that. Yet our history was such that most people argued-- and it was the view that ult-- ultimately prevailed, that our history was one of-- of utter depredation in these various spheres and that given the historical response-- to what had taken place in the past, it was absolutely appropriate that these rights be included.

But the drafters adopted a particular formula, and the formula generally speaking is that the state is under an obligation progressively to recognize the rights in question within available resources. So there is always the potential for a heavily-contested debate around the availability of resources. And it is open to the state to argue that whatever is being called for is simply not affordable.

So for example in the-- in the case concerning access to anti-retrovirals by-- pregnant women who were living HIV, we put up an expert affidavit by a health economist. It turned out that the state didn't contest it, so we were able to take off the agenda the question of affordability. But it's a serious issue.

JAMES GOLDSTON:

Great. Thank you very, very much. Noeline, the situation in Ireland.

NOELINE BLACKWELL:

So-- what I'm going to say-- is going to reflect a certain amount of what-- Gilbert has just said because as a result of some of these peer-to-peer discussions that Atlantic organized we were able to draw very heavily on the work that Gilbert and Steven Budlender had already done in identifying how to structure public interest law well when we were expanding our work in the area in Ireland.

So my organization is called Free Legal Advice Centers and we do actually, through a large network of volunteers, give day-to-day, normal legal advice to people in evening (NOISE) clinics run by volunteers and-- and give them basic advice and refer them onto lawyers where necessary or not. And that's part of what we do, but we don't do it so much as a service as par-- but we do it to facilitate the right of a greater number of people to access to justice. And then we work with-- a group of advisers as well

who advice on citizens information in Ireland-- and who advise on money advise and budgeting for poor people.

And we supply second-tier expert legal advice to these people when they don't have it themselves, and we also try to link-- non-governmental organizations who are working for social justice in Ireland with available pro-bono legal resources. So we try to structure our own campaign work in a broader-- reach out to-- a much bigger group of people in the country. Okay, it's a very small country by U.S. standards with a very tiny population, but we're a very tiny, little organization within that (LAUGHTER) and we would get very little done if were just depending on our own resources.

And specifically, we wouldn't have access to the wealth of information that comes through a broad linkage in to quite a wide group of people. That is also what gives us our credibility with government when we're lobbying and campaigning and we can say we are talking not just from the-- one small office in a less fashionable side of Dublin, but we're actually talking from the experience of having 26,000 or 27,000 people contact us directly in the course of the year, plus all these other organizations we work with.

So that's the context in which we work. And within that then we work specifically on a number of-- core areas of law that affect poorer people and that the private bar in Ireland simply isn't able to facilitate-- because-- it wouldn't pay. So we do ask people to do pro bono work, we ask them to do it in a structured way, but at the same time we work in areas of social welfare, consumer debt and credit, access to the legal system-- and-- and we work in a case that I'll be mentioning in the course of our strategic litigation-- in-- when I'm talking about (UNINTEL) strategic litigation.

So-- which is different from all of those areas. So that's the context. And that is why when I was asked to talk about strategic litigation for yesterday's conference my first reaction was that I could not talk about it alone because to us-- we say we work on advise, we work on analysis, and we work on advocacy. And our litigation-- work is part of our advocacy. Sometimes it's part of our analysis and research as well, and sometimes it's part of our advice.

So it's one strand, but it's the most useful tool for us. And so I'm talking from the experience of working with that organization, also working with a lot of other NGOs who are working on social justice right in Ireland and I also link into two European networks. One is the Public Interest Law Network and the other is the International Federation of Human Rights, all of whom have litigation as a way of operating.

So just-- so-- so the first thing is it is not standalone. And-- for instance-- we have two-- people who say in Ireland that they're working on standalone test cases-- and I would say they are not. (LAUGHTER) One of them is an academic who understood the issue of digital rights within the European Union extremely well-- before he structured a case-- a very careful case to protect-- privacy rights in Europe-- in the European Union-- before he took the case and to his-- has an excellent communication strategy as well.

So already he has some of the basic elements of any standard campaign. And the other is a person-- a s-- a tiny, little organization working on the rights of people who are visually impaired who's bringing-- a case on voting and we-- we facilitated his linkage to pro bono assistance. But he maintains he only has a case but he knew what he was doing. Our lawyers did the research and the entire blind and visually impaired community has rode in behind him.

But-- to go back to something that Jim asked-- Brian at the outset as well about where strategic limitation can go wrong, one of our longstanding cases-- and one we can never explain how it fits with the rest of our strategy, is a case where we seek to-- to advance-- the rights of transgendered people in Ireland because you cannot get a birth certificate-- Ireland is the only European country left-- the only country within the European Union and indeed within the Council of Europe where a transgendered person cannot get-- a birth certificate.

This is a case that Ireland started very frankly because-- we were the only people who would take a case on for a transgendered woman a very long number of years ago, before any of the current members of FLAC, my organization, were there. So it has gone through several iterations, it has gone through times when FLAC had no money at all-- and hopefully it will finish before our money runs out, Brian. (LAUGHTER) Because we're nearly there.

(BRIAN KEARNEY-GRIEVE: UNINTEL)

NOELINE BLACKWELL:

We're nearly there. Because we now have draft legislation. But over the course of the case-- and-- and this also goes for the other LGBT case that-- Brian mentioned and mar-- a claim for recognition of-- a marriage of a same-sex couple in Ireland. I believe that both of those cases did no harm to the LGBT-- community and in fact certainly in the transgender case it-- the only safe place that this woman could have a discussion where she would not be called a freak and photographed before-- something happened-- I'm talking ten years ago or more, was really in the courts.

And there is no way on earth that our courts would eventually have come to the conclusion that Ireland's law was not compatible with the European Convention on Human Rights if the judges had not been able to work through in a very careful way-- through her advocacy and through her lawyer's advocacy, the rights of transgendered people, a topic which our judges would really run away from if they could at all.

But there was enough access to the court in order to realize it. That taught our judges, it taught our legal community about the rights of transgendered people, and ultimately it contributed to the public debate. Similarly with the-- with the equal marriage case, they are the perfect plaintiffs. They even go around everywhere together to show how they are committed they are to each other. Married in Canada-- and simply want their marriage recognized for tax purposes in Ireland. And--

BRIAN KEARNEY-GRIEVE:

Theologians both as well.

NOELINE BLACKWELL:

Theologians. Two women theologians. Yeah, that's right. (LAUGHTER) So (UNINTEL)-- they-- they could not be more perfect as plaintiffs if you're looking for perfect plaintiffs. And-- and-- and really-- excellent and very balanced in everything. So they-- the case was decided-- on the basis that our constitution-- and it is true at the time, certainly in 1037, the Irish politicians who put our constitution could never have contemplated-- two women marrying each other and being recognized as a married couple in Ireland, will go no further.

You know enough about Ireland and-- and our system even today. But-- but-- still people have a sympathy-- through-- through the case. But they did not do that case alone. That case was carefully conceived and they ran it-- again, would probably have run it too early by your standards, Gilbert, but none the less they ran it and a civil partnership-- arrangement has come in in the courts of case and the case is not over yet. And extraordinarily while we are still being held to account by the U.N. Human Rights Committee this week in relation to our failure to properly implement recommendations in relation to abortion rights, we will have a referendum on whether there will be equal marriage next year.

So it's rarely run alone. The-- the collaboration point that Gilbert also made is so important to us. I explained the various networks we operate in, but I just want to mention briefly an example of where we-- took on finance houses in relation to a consumer credit matter-- so time ago. Finance for cars for poor people is at very high rates in Ireland and-- our job is to try and make sure that-- that whenever consumer protection exists it's properly implemented.

We saw that there was-- potentially a gap, but the way we saw it was through our network of money advisers who told us about these cases. We tried lobbying, we spoke to the regulator, we spoke to politicians, we spoke to the finance companies, we asked them to recognize that they weren't implementing consumer protection properly. As the recession hit they were particularly loath to listen to us because they were-- they were going to be left with acres and acres of cars that nobody wanted anymore and-- and they would-- they would have had to minimize rather than maximize their opportunity to recover debt.

So eventually we had to bring a case to court-- against one of the finance houses. The court said, "Yeah, no, that's-- we-- we correctly interpreted the law, the finance houses had to change their position." They only had-- they only adjusted it a little bit. So w-- it was then only through the fact that we were able to get the word out again, more public education to the advisors, information on our website, et cetera, that somebody else came back to us and said, "Look, that case doesn't seem to be-- doesn't seem to be to my benefit," and we said, "It should be," and had to go back in

again.

So implementation-- was a slow job in-- in that particular case. It took a small series of cases to get the finance houses to implement it correctly. I think they will always do the minimum-- to-- to-- to change-- where it affects profits or where it actually is required of government, and therefore you need your intelligence gathering and you and your further publicity and your public education afterwards.

We-- we believe therefore that in some ways unless there is-- a specialist organization that keeps their on the-- on the ball, the implementation is very difficult. Because private law does a case, closes the file, puts the file away, and shreds it after six years or four years or ten years or whatever it-- the length of time is. You need somebody who has the campaign and the issues in mind in order to keep the case going. Having said that we certainly would not be able to work without really sincere linkages to pro bono lawyers-- and we are seeking to build more structure.

Every lawyer in Ireland says they do pro bono. Normally they mean they don't get paid for all their cases (LAUGHTER) and even when they take cases on, it's on the basis that-- somebody is-- knows somebody, and that is-- that's quite easy in Ireland. But nonetheless in the poor, urban areas of our cities they know no lawyers at all. And so what we're trying to do is that make sure that any tiny, little community organization that's trying to advance a social justice cause knows there's a focal point where we can link them with the legal expertise that they need.

That's very important. And our experience in Ireland and the experience across Europe is that where-- where people have access to pro bono expertise or to legal expertise, they do want to know information. First of all they want to know how the law applies to them. That's the first stage. Those who are then interested can then identify gaps in the law or ways in which the law is not working justly for them. That can lead to inquiries about law reform, collaboration between lawyers, and other social justice organizations.

And out of that litigation may emerge as one strategy for the organizations. To my mind, this is one of the real win-win situations, because you have a much broader group of people who are not specialist lawyers but have a good understanding of the law as it affects themselves, and who are more careful of the law for their clients. Finally, just before I pass over to you, I want to talk about-- struggle's we've had over the years trying to work out what is strategic litigation.

And one of the ways of litigating that we find quite valuable for our target groups, who are normally poor, looking for discretionary remedies, particularly in areas of migrant rights and social welfare rights, is-- administrative tribunals. Because the layers of bureaucracy that stand between a person and the court are huge, particularly in Europe. I know this is absolutely-- the-- you know, it's so-- anti-republican here you-- get-- get government out-- out of people's lives and the rest of it.

But there are layers and layers of bureaucracy, and I think that's even true here. It's true near everywhere. And if you can use those administrative tribunals carefully,

then I think you can education decision makers themselves as-- as they are going along. If they get careful representations made by lawyers or, you know, good advocates-- based on-- on good law, then decision making can actually improve. But also the decisions-- can-- so-- so they-- so the awards of these tribunals can then be used to build a cheaper, faster, safer mechanism for poor people to-- to-- to get justice.

One of the problems with these tribunals is they're very often in private. So what we've started doing is trying to put together databases of information which we can share with other people working in the areas where-- and which they can build on in order to identify what are this-- what are the decisions coming out. Because even though these decisions are not-- don't create precedents, nonetheless, people who are making these decisions are not free to make irrational decisions, and there must be some logic-- internal logic within the department.

And if we can show what logic is, we can kind of create precedent. Finally I-- I'll just talk about-- second finally (LAUGHTER), I will mention (LAUGH) how useful-- we-- we don't use them very much, because our courts tend to-- believe that the lawyers involved in the case should-- be able to do all of the advocacy in the case, but the-- the value of amicus briefs is really quite high, as a cheap and-- as a both-- time-- short-time way of making an intervention in a case, and-- and we hope to use those, you know, discreetly as we go along.

And our courts are getting kind of used to-- to asking about them. But finally the last thing we have available to us are the soft law mechanisms, which are often every bit as valuable as a judgment if not more valuable. So we can either take individual complaints to a couple of the international mechanisms like the U.N. And-- human rights committee, or we can take a collective complaint to the European social charter-- social committee-- based on the European social charter, or shadow reporting.

And we, for instance-- if (UNINTEL) are leading on Ireland's shadow report now-- on the economic social and cultural rights convention, because we will construct our submissions to those as carefully as we would a (COUGH) legal submission to a court. And we will use a finding or a recommendation from that committee in the same we would use a judgment in order to implement human rights.

We have serious risks in our system, we don't have easy standing rules. You have to be an individual to bring a case. Costs can be awarded against a losing plaintiff-- and the delays are very extensive. But w-- having said all of that, strategic litigation's a really useful tool for us.

JAMES GOLDSTON:

Excellent.

NOELINE BLACKWELL:

Sorry.

(OVERTALK)

JAMES GOLDSTON:

I think we've learned--

NOELINE BLACKWELL:

--finish--

JAMES GOLDSTON:

--I think we've learned we do not wanna go up against Noeli-- Noeline Blackwell if she's the advocate (LAUGHTER). That--

NOELINE BLACKWELL:

I didn't (UNINTEL) him--

JAMES GOLDSTON:

--was great.

NOELINE BLACKWELL:

--the whole time. I knew he was (LAUGHTER) (UNINTEL).

JAMES GOLDSTON:

Thank you very much. So-- so let's-- let's open this up, colleagues in Washington, in New York, we've heard-- some very rich stuff here. Of course, I think we wanna keep in mind we've heard-- we've heard from-- from-- experiences which are-- though, of course they need more, relatively well-resourced in terms of their NGO infrastructure, civil society sector, compared to some of the other places that-- that-- that we and others operate in or fund in.

These are systems where precedent generally-- is supposed to operate and generally does, I suppose. And that's a little bit different from some of the places in which-- in

which we operate. The judicial systems, whatever the complaints about individual judges, are generally capable, knowledgeable, on the whole trustworthy. That's sometimes different.

We didn't hear-- maybe we touch on Gilbert talking about his pre-1994 experience under apartheid, and the challenge of litigating in-- non-democratic-- system. What-- what-- so I-- just-- just to point out some of the-- the challenges in terms of what we've heard-- in terms of the operating environment we're in. But hands, colleagues, folks in Washington, anybody wanna get in to start? Emily?

EMILY:

I-- I do have one question, and-- and-- and pose it to the panel. But I think one of our findings-- around litigation has been that when litigation-- and I think you made this point, isn't sort of embedding in a bigger strategy, it can be challenging. I think we take that one step further to say that when-- when litigators are not informed by the movements that they're working in, sometimes that litigation can run afoul of aspirations of that movement.

And I wonder if any of you can speak to-- whether that's an experience you've seen-- and to what extent-- that is something that we need to be thinking about as we-- as we support litigation to really make sure that-- lawyers and litigators are embedded or-- or c-- deeply connected to the movements-- around which the issues they are taking cases-- come from.

JAMES GOLDSTON:

Great. Thank you, Emily. It's a question that was touched upon yesterday as well, and it's a question about the relationship between lawyers and movements and lawyers and clients that we are very sensitive to, and a number of conversations here at Open Society. Does anybody wanna address that issue? Gilbert, you took it on a--

GILBERT MARCUS:

Sure--

JAMES GOLDSTON:

--little bit yesterday.

GILBERT MARCUS:

--I-- I think-- I think it's a-- it's a very live issue to which you refer, and I think it's one

that requires-- a measure of delicacy, for want of a better description. I-- I think it's incumbent upon lawyers to be open minded-- and to take onboard-- perhaps strategies which do not comfortably fit within a fairly conventional and conservative mold of traditional litigation.

Certainly in-- in one of the cases in which I was involved, the-- case concerning the provision of anti-retrovirals to pregnant women who are living with HIV. I certainly sat down with the-- the treatment action campaign, who was driving the case. And we put up a fair amount of evidence just from ordinary people-- which technically speaking may well have been regarded as irrelevant, but which I think brought a color and a flavor to the litigation which was ultimately terribly important.

Just a recounting of the experiences of ordinary people, nurses in hospitals-- mothers who had been denied access to ARVs and the like. And so I do think that that's important. I-- I say that it calls for a measure of sensitivity because ultimately I think it's important for lawyers to be able to advise the clients on what's ultimately likely to succeed.

And so it-- it's conceivable that cases will arise in which there is a disjunct (SIC) between the social movement behind the litigation and the way in which it is presented in court. And I think these are things which simply have to be carefully negotiated-- and discussed through, and compromises may well have to be reached.

JAMES GOLDSTON:

C-- can I just follow up on that, just to ask-- Gilbert or-- or Noeline. I mean, Noeline, you've talked about the-- the-- the vital importance of-- rooting the litigation in broader campaigns and linking it with other strategy, et cetera, and-- and Gilbert's report makes the same points. But-- so what-- what does that mean? Does that mean before you even take the case you agree (COUGH) here are the main advocacy points were going to be making, and you're gonna do this, and they're gonna do this, and we're gonna do this? And we're only gonna make these kinds of arguments, but we're not gonna make those kinds of arguments? I mean, how-- how do you do that?

NOELINE BLACKWELL:

Well-- well for us, it's-- it's more that question of does this require litigation? Are there-- what-- what are the ways that we can accomplish the objective? And-- and sometimes litigation is one of the ways we can accomplish the objective. But w-- we-- we might not be doing it alone.

So in fact I'm quoted in the Irish study (LAUGH) that Brian has, because I love the fact about my job that-- I can say to politicians, "I'd like to persuade you that this is the case, but if I can't persuade you I may have to sue you." And-- (LAUGHTER) it kind of-- it's-- it's just one of the possibilities that's there for us, and I-- I think that's the thing. You see, I think, Emily, that's a point, and we-- the best cases are run from

where it's a very thoughtful-- process where-- you know, where you do bring people in, where you have the smart advocates along the way.

But I also think everything can fall flat, certainly for us, if you get the wrong judge on the day, somebody-- is s-- s-- starts d-- in the same way if a government changes, you know, you can have a whole strategy of advocacy that changes as well. And the other thing that I have great faith in is bringing public interest lawyers together, even just for general purposes, so that they kind of understand each other (DOOR CLOSING) without a specific case in mind. Because some of the great advances in public interest law in Ireland have not been part of any campaign, they have just been really good public interest lawyer who saw an injustice and who chased it-- down the whole way.

JAMES GOLDSTON:

Thank you. Thank you. Brian, you wanna (UNINTEL)--

BRIAN KEARNEY-GRIEVE:

Em-- Emily, good to see you. I think from a founders (?) Perspective I think what we've gotta bear in mind are-- is that there are no silver bullets. And often we look at-- potentially as funders, we look to strategic litigation as a silver bullet, and that this is a quick fix and you'll be able to get this resolved.

I think we need t-- to bear in mind the principal of do no harm. And if we take the f-- if we take the perspective of what is the outcome you're trying to achieve-- and then understanding the different elements that-- that are required to achieve that outcome, the question we've gotta ask ourselves is are we prepared to fund or can we get others to join us in funding the various elements. So when we look at the case on-- on-- on-- on civil marriage in Ireland, you know, do-- w-- we-- we supported elements of the campaign around that, but we didn't fund the actual litigation.

But we knew that the two needed to be connected. So to me, it's-- there's a responsibility (UNINTEL) to fund the (UNINTEL) as well as, you know, we can play a useful role in this, in-- in-- in-- you know, if-- when we are looking to fund-- are we seeing all the different parts at the table. And if they're not, well then we should be questioning why they're not.

JAMES GOLDSTON:

Arie (PH) , you've thought about these questions a little bit over the years (LAUGHTER).

ARIE (PH):

What I-- what I ask in the discussion-- so far-- is-- differentiation-- with respect to the kinds of issues that are being addressed-- in litigation. There are (THROAT CLEARING)-- some issues which one can address where-- if you achieve the-- the high court-- legal victory-- essentially the-- the result becomes-- self-enforcing.

Then there are other kinds of cases where-- that's only the beginning-- where you have-- low-level bureaucrats-- who have to-- to implement various matters, and the-- the decision may be-- nice to have symbolically, but it doesn't actually change-- any practices because the low-level bureaucrats have a million strategies for evading the-- the results-- of the case.

I'm-- I'm-- familiar with cases and have been involved in-- in-- cases where-- we thought that-- it was worth bringing the case-- because we would achieve something by losing-- and we would-- expose certain practices-- by losing, and we would be able to generate-- the-- the pressure to address those-- issues-- in some other forum, and litigation was the-- the best vehicle-- for attracting attention-- to-- to certain kinds of guys.

On the other hand-- there've been cases-- which-- ostensibly-- we won-- and-- the-- the actual consequences-- turned out to be worse-- than-- what had taken place-- previously. In litigation in the United States the police have a kind of genius-- for-- turning around-- certain kinds of-- victories-- that-- that one can win. And so-- my-- my own-- concern ab-- in-- in this area is, you know, the-- the general criteria you get for-- what makes-- a good case, you know, sound-- okay, but I don't think you can really leave it at that.

I think you have to elaborate this with respect to-- to the particular kinds of cases. If you win a free speech case, you win. That is the-- the initiative rests with those people who want to engage in speech. Others then have to interfere with-- you've won-- at that particular point. One of the early cases-- that I was involved in-- created the right of dual citizenship in the United States.

Once we won, we won. That is-- there wasn't any way-- to evade the result. If you win the equal marriage case-- in Ireland, you have won at the point-- that you've won the case. Implementation is not the-- the crucial issue. If you deal with, let's say-- as we have in the United States but also elsewhere, school segregation-- you've got a million-- ways in which-- the bureaucrats-- can evade-- the decision on schools-- desegregation. And unless you have a comprehensive effort-- to-- to implement the decision-- you're not going to get any practical results-- from-- from that kind of case. So it-- that differentiation seems to me a-- a very important part of this.

JAMES GOLDSTON:

Would you-- any-- anybody wanna reflect on that, on the-- the distinction that Arie is presenting as-- as decisive or important in considering the value of strategic

litigation?

GILBERT MARCUS:

I don't disagree with you at all. One of the seven factors is follow up, and depending on the type of case, the need for follow-up, particularly in the face of intransigence, is absolutely essential if you're going to turn the initial legal victory into anything meaningful at all. (UNINTEL) let me get back to the-- the case concerning ARVs.

The political atmosphere in which the case was litigated was-- was difficult. The-- the president at the time had flirted with the denialist cause and certainly the-- the legal victory in and of itself was not sufficient. We actually-- had to implement contempt applications-- which ultimately weren't litigated, but we actually instituted proceedings, in order to compel at least one of the provinces, which was-- recalcitrant-- to get them to actually give effect to the court order. And so I-- I absolutely agree with it. It's-- it's-- there are going to be cases in which, as you put it, the outcome is in a sense self-implementing. There are others in which, absent follow-up, the victory will be hollow. I agree.

NOELINE BLACKWELL:

And if I could just add to that-- one of the things we were speaking about a little bit earlier was-- who was that American lawyer who said, for instance, a procedural victory can be so much more effective than-- a substantive law victory, because it stays and is immediately implemented. So for instance, in a case I was involved in, in a migration case-- actually before I went to Flack (PH)-- the addition of-- a cont-- a particular standard of proof in cases had to be improved to where somebody was at risk of deportation, by including an assessment of their human rights.

That was very important, because it didn't require any law to change it. And once it came in, it-- the-- the administration was stuck with it. On the other hand, there is kind of-- a sense in our immigration service-- for-- for an organization that emigrates so many of its people, we're very reluctant to let people in unless we invite them specifically.

And there was a reluctance to let people in, and a thing called-- a residence condition was being used to (COUGH) keep people out by denying them basic social welfare benefits. And that was a case where we found it really useful to go at the administration level through a series of-- of cases done at a very low level of the administration, just building up case after case, where we-- where they had to concede that somebody met a residence condition because the law had been misunderstood by the bureaucrats.

And once we had enough of those cases, we were able to make-- a wider claim and-- and send the word out wider that they-- the legislation and the case law, and the way it was being interpreted was far too simplistic by bureaucrats, and was denying

people social welfare benefits. So there's a huge-- there's a huge capacity in clever-- bureaucrats to stop-- to stop-- victories.

But on the other hand, you-- you just have-- I think you have to keep fighting that. And I think it's particularly true for vulnerable people, people who are poor, people who are not able to access legal services so easily. They're the easiest to keep away from their rights.

JAMES GOLDSTON:

Okay, if I could just push this point briefly, Arie, so the-- the-- the distinction between self-executing judgments and those which require the actions of someone else to effectuate, is that-- are you suggesting-- a decisive criteria to determine whether to pursue litigation at all, or in evaluating the impact, obviously as-- as was just suggested, there'll be many other things required to do beside the litigation.

ARIE:

It-- it's-- a crucial factor in terms of how you go about pursuing-- litigation. That is-- just having the lawyers-- deal with it-- can be fine in the-- the self-executing-- matters, but where-- once you've won-- you know you're only at the beginning of the process. You really have to embed-- the-- the litigation-- in-- some-- much broader strategy-- and connect it to-- to other efforts in order to-- to bring about-- change.

Sometimes you-- you-- you make-- mistakes. I was involved-- in the litigation-- which resulted in-- in Roe V. Wade-- and-- I didn't see coming-- the sort of backlash movement-- to-- complicate at every step-- the-- the process. Somebody else came to me and said, "This is going to take place." I was skeptical-- and that person-- pushed the establishment-- and I-- I went along-- of a program to-- to actually get compliance. So sometimes, you know, you-- you-- you-- you make mistakes about-- whether something is going to-- to enforce itself. I was mistaken in that case.

JAMES GOLDSTON:

Great. Thank you.

GILBERT MARCUS:

I think the world is a better place for Roe V. V-- we-- v. Wade. I think the world is a better place for Roe V. Wade, despite the backlash.

JAMES GOLDSTON:

Right, right. Right. Okay--

ARIE:

I-- I agree with that. I think it had (LAUGHTER)-- had tremendous-- impact. But there were political-- elements-- to the way the backlash-- developed, and-- if we had been more perceptive-- we might have done better.

JAMES GOLDSTON:

Erica?

ERICA:

Thanks to everyone on the panels, it was really-- thoughtful and-- and interesting. I'm wondering if-- either Gilbert-- Gilbert or Noeline have had experience litigating against-- corporate actors. 'Cause I think-- generally when we talk about this realm of work, we're going up against the state. But when you start looking into corporate accountability for-- for various abuses, there's a host of additional problems.

It's harder to find pro-bono assistance because of conflict of interest, there's deeper pockets in terms of defense strategies, and communication strategies that the corporates pull out. And-- and also a point that, Noeline, you raised about, you know, listening to the community groups and sort of-- their knowing-- how the issues affect them, I think there's also-- a complication of sometimes with corporate involvement and abuses, it's not always clear to people h-- how these-- actors are involved.

GILBERT MARCUS:

Yeah.

ERICA:

And so there's, like, an additional layer of education even. So I'm just wondering if you've had any experience with that, and any insod-- insights, and-- you know, maybe does that change sort of a weighing of some of these factors, Gilbert, that you have laid out?

GILBERT MARCUS:

Y-- I have had some experience-- in-- in litigate-- litigating against corporates. And you're absolutely right, they're well-resourced, extraordinarily well-resourced-- frequently very determined. And one has to deal (COUGH) with that. And one of the-- the one of the cases that comes to my mind was a case-- in fact, strange case, but ultimately a critically important case which got to the constitutional courts, about costs.

And-- the litigant was Monsanto, the (UNINTEL) pharmaceutical company. And what had happened was that a-- a public interest environmental organization had-- made an application under our access to information statute-- from Monsanto about genetically modified crops. And-- it had been refused, and they went to court and they litigated around it, and although they were partially successful in getting the information that they had requested, the high courts made an order of costs against this NGO, and it would've wiped them out. It's as simple as that.

And we took it all the way to the constitutional court, ultimately to establish a principle which is vital to public interest litigation in South Africa, and that is that organizations which in good faith go to courts to ventilate their constitutional rights will, in general, be insulated against an adverse order of costs-- even if they lose.

There have been a number of others cases-- s-- litigation produces strange alliances. There was a challenge by the major pharmaceutical companies to legislation in South Africa, which really was designed to reduce the costs of drugs. And they fought it initially tooth and nail, until the treatment action campaign came on board in support of the government legislation designed to reduce the-- the costs-- of drugs and in their case, particular anti-- anti-retroviral drugs. They are formi-- formidable opponents. But one has to take them on in appropriate cases, just like one takes on any other opponent.

NOELINE BLACKWELL:

I think that's right. Not so-- not so much at home. We haven't done enough of it. We're starting to do it, and particularly as a result of the severe recession in Ireland. Some of the focus has been around finance houses and banks, where we are working. And there is the added complication that the state is extremely nervous about, in any way-- damaging banks, which are considered fragile at the moment.

So you-- you get absolutely no assistance at all from them or the establishment. Where I've seen a bit more of it is in work I do-- w-- with the International Federation for Human Rights, a little bit, where they are looking at some issues-- I was trying to find h-- so some-- some mining issues. And-- and-- and what-- what I've seen there and what I've also seen through other organizations operating around Europe-- and I guess you would know this more than I do (UNINTEL), is that where sometimes pro-bono assistance is hard to get at home because of conflict of interest.

You can shop it out. So for instance, we're doing some-- we organized some pro-bono activity for somebody in another country who is investigating a corporate accountability issue, where they can't get proper pro-bono assistance in their own country for exactly those reasons, and we're able to draw-- cross-country expertise because some of the principles are staying the same. And you're 100% right about the-- the-- the-- the more-- the-- where-- where a group is less understanding of their own issues in some ways, then they very often don't at all understand how corporate responsibility comes into it.

It is a bigger issue than we've had much to do with so far. And-- and it's very dangerous, because they do what the state do not do. They go to their lawyers first, whereas the state very often-- only goes to their lawyers very late in the day. But they're-- they're in with their PR, but also with their-- with their legals. And they also try and repress-- it's easier to repress things like, say, freedom of speech, without threat of a defamation action, all of these kind of things as well. So the-- it's harder to deal with.

GILBERT MARCUS:

Now, I-- I-- if I could just add one point. It is much harder to deal with precisely because certainly in our system, the state is under a range of special duties--

NOELINE BLACKWELL:

Yes.

GILBERT MARCUS:

--in litigation. They are required to do things which private parties are not required to do. They have a duty of candor, they've got a-- a range of ethical obligations in the very way they conduct litigation. Private parties don't have those same duties, and it's-- it makes it much, much more difficult--

NOELINE BLACKWELL:

I'm not sure our state has a duty of candor. I (LAUGHTER) (UNINTEL PHRASE).

GILBERT MARCUS:

Great. The court is adjourned (LAUGHTER).

JAMES GOLDSTON:

I know there's more questions, more-- just but I think we've gotta wrap up the formal part of this conversation now-- and folks can perhaps pursue individually thereafter. I wanna thank very much Noeline, Gilbert, and Brian for a superb (UNINTEL) conversation (APPLAUSE).

* * *END OF TRANSCRIPT* * *