Megumi Tsutsui
Independent Clinical Paper
January 2013

Lessons for improving impact of public interest litigation: A study of the Equal Education and Equal Education Law Centre Partnership

I. Introduction

[1] This paper explores the academic literature on the effectiveness of public interest litigation (PIL) to create meaningful and sustained impact. It further seeks to understand the potential for greater impact that can be harnessed through collaboration and interaction with social movements. In particular, this paper reflects on best practices for PIL to engage with social movements and how that tangibly plays out in the partnership between Equal Education (EE) and Equal Education Law Centre (EELC). Analysis of the partnership was largely based on interviews conducted with members of both organizations. Because of the newness of EELC and the partnership, this paper represents a starting point for understanding the potential for impact that the relationship has. Time will tell if the partnership is able to effect meaningful and lasting impact. But, thus far, the signs are positive. The partnership has already implemented many of the best practices in the literature and developed new innovations to overcome criticisms in the literature. Thus, there is still much to learn about how PIL firms can innovate in practice to achieve greater social change.

II. Limitations of Public Interest Litigation

[2] The effectiveness and the place of PIL as a tool for social change has been a hotly debated issue among scholars and social movement actors alike. At times, litigation has been thought of as *the* strategy to bring about a revolution in civil rights. At other times, litigation and the lawyers who develop legal strategies for social change have been demonized by the

communities they have purported to help for "coopting" the movement, creating backlash, and generally setting back the socio-political strategies employed by other groups.

[3] To understand the potential for litigation to be used to effect social change, it is important to understand first the validity of the criticisms laid against it, which largely center around the use of litigation in isolation from broader socio-political movements. Understanding the dangers of viewing PIL as a tool for social change in isolation, will inform the conversation about how PIL and legal strategies should be combined with other strategies and contextualized within broader socio-political strategies to effect change.

[A] Litigation by itself cannot produce significant social change

[4] One of the most common criticisms levied against PIL is that litigation by itself does not lead to reform of social institutions or practices.[1] The tangible change desired is reduced to legal concepts and arguments, which may have the effect of de-radicalizing the real change being sought.[2] Moreover, even when judicial relief is granted, it may fall short of what was originally requested and is likely not self-enforcing.[3]

[5] Perhaps one of the paradigmatic examples of litigation falling short of the change it sought is the case of *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). The members of the Grootboom community were evicted from their homes, which were built on privately owned property. They were promised by the municipality that they would have low-cost housing built for them, but the government failed to keep its promise. As a result, the lawyer for the community filed a court complaint requesting an

[1] Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URBAN L. J. 603, 604 (2009).
[2] Sandra R. Levitsky, *To lead with law: Reassessing the influence of legal advocacy organizations in social movements*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 145, 146-47 (Austin Sarat & Stuart Scheingold eds., 2006).
[3] *Id.* .

order directing the municipality to provide the community with "adequate and sufficient basic temporary shelter and/or housing" based on the constitutional right to housing and shelter. In the end, the Constitutional Court refused to give an order forcing the government to provide temporary housing. Instead, it provided a declaratory order stating the government's housing policy breached its constitutional mandate to prioritize housing for the most vulnerable in society.[4] Years after the decision, the plaintiffs continued living in the same squalid conditions as before.[5]

[6] While the *Grootboom* decision may have had a broad impact in validating the justiciability of the right to housing in the Constitution, the immediate impact on the Grootboom community was severely limited. A major issue underscored by relying on litigation for relief is the limitation of judicial remedies. In this case, the declaratory order proved insufficient to move government to improve the living situation of the Grootboom community.

[B] Lawyers and legal strategies may "co-opt" social movements

[7] A more damaging critique of PIL goes beyond pointing to its inefficacy to pointing out how it can actually be detrimental to the aims of a social movement. Some academics have indicated that the strength of a social reform agenda draws from political action, e.g., political organizing and mobilization. [6] This political action can then translate to legislative reform, which may be seen as more legitimate and better at producing long-term change versus change resulting through the courts.[7]

---

[4] An in-depth summary of the case is provided in *The Atlantic Philanthropies Report*, at 43-68.
[5] Mia Swart, *Left out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor*, 21 S. AFR. J. ON HUM. RTS. 215, 216 (2005).
[6] *See*, *e.g.*, Gerald N. Rosenberg, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2nd ed.) 430 (2008).
[7] Cummings and Rhode, at 612.

[8] The danger, coming from the legal field is "legal cooptation," that is, "a process by which the focus on legal reform narrows the causes, deradicalizes the agenda, legitimizes ongoing injustices, and diverts energies away from more effective and *transformative* alternatives."[8] Thus social movements that turn to and rely on litigation and reform through the courts may actually find themselves weakened by this process. This danger has been seen to materialize time and again, particularly as a result of the unilateral relationship that develops between lawyers and social reform organizations as described below. [9]

[9] Theoretically, public interest organizations and social cause organizations have much to gain from each other. Public interest organizations can contribute an understanding of the law and legal rights which may be useful for "public education, protest activity, lobbying, and consciousness raising."[10] Nonlegal organizations can contribute information to legal advocacy groups regarding the issues and concerns being raised within communities.[11] In reality, activists do rely on legal advocacy for a number of things: (1) as a source of legal expertise, (2) to litigate specific cases to help constituents, (3) to provide public education of important lawsuits, (4) to help mobilize members, particularly around litigation campaigns; (5) and to provide education on legal rights and foster a sense of pride and self-confidence among members.[12]

[10] However, what's notable in these relationships is that the legal advocacy organizations usually did not solicit help or advice from their nonlegal partners.[13] This lead to the perception that legal advocacy organizations worked entirely independent of the movement. Moreover, the resources of the legal advocacy organizations reinforced the perception that these organizations

---

[8] Orly Lobel, *The paradox of extralegal activism: critical legal consciousness and transformative politics*, 120 HARV. L. R. 937, 939 (2007). *See also*, Michael McCann, *Impact litigation on trial*, 17 L. & SOCIAL INQUIRY 715, 719 (1992).
[9] Levitsky, at 146.
[10] Levitsky, at 148.
[11] *Id.*
[12] Levitsky, at 152.
[13] *See id.*

dominated the movement in terms of size, sophistication, and visibility.[14] This lopsided dynamic leads to legal strategies not being in sync with political and legislative strategy, and questions the legitimacy of litigation firms in accurately representing the movement's diverse constituencies.[15]

III. The Potential for Combining Social Movement with Strategic Public Interest Litigation

[A] Recognizing the contribution of litigation

[11] Despite the critiques of PIL, there are many reasons why PIL should be encouraged. First, the limitations of PIL are not unique to the field and may apply equally to social movements and political strategies.[16] As mentioned above, in some situations, pursuing litigation may have the detrimental effects of diverting resources, demobilizing support, or creating a backlash. However, it is equally true that mobilizing to pursue policy advocacy and legislative change may be subject to the same "strategic reinterpretation, deliberate non-enforcement, and political reversals" as judicial orders.[17]

[12] Second, context, particularly the political and power structures in which a movement is located, plays a strong role in determining the shortcomings or advantages of PIL. For example, in a country such as South Africa, which provides for socio-economic rights in its constitution and where courts have made a clear effort to protect their justiciability, legal strategy can be highly important aspect of any social change effort.[18] What's more, in a country with a highly repressive, chaotic, or unresponsive political regime, the courts may be the best forum to engage in effective dispute resolution.[19]

---

[14] Levitsky, at 157.
[15] *Id.*
[16] *See* Cummings and Rhode, at 612-13.
[17] *Id.*, at 612-13.
[18] *See id.*, at 614.
[19] *See id.*, at 648.

[13] Finally, public interest lawyers can avoid the shortcomings mentioned above to support movement activity and achieve important social outcomes. Opportunities include: (a) destabilizing institutions, subjecting them to greater accountability,[20] (b) raising the public consciousness and stimulating movement activity, (c) providing bargaining leverage for political issues, and (d) strengthening client organizations to be better advocates for the communities they support.

[14] To expand on the above, Cummings and Rhode suggest that lawsuits may help to raise public consciousness and stimulate movement activity by exposing the weaknesses and failings of institutions.[21] This consciousness can then be channeled to change and improve those institutions. Moreover the discourse of legal rights and entitlements can empower social movements by helping to define existing relationships and point out why they are unjust.[22] Finally, pursuing large reform through litigation while anchoring it to social mobilization can create energy for the movement and help mobilize supporters.[23]

[15] In situations where political strategies are not realistic on their own because of the strength of the oppositions, litigation can provide powerful political leverage that can force parties to the table and advance a struggle faster than it would otherwise move.[24] The downside is that legal action carries the risk of becoming a draw-out legal battle with a potentially better resourced adversary. Defeat in a case may also deliver a blow to movement momentum. Thus, the litigation is usually most effective when it remains a threat not carried out. However, if

---

[20] *Id.*, at 610.
[21] *Id.*, at 610.
[22] Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANNU. REV. LAW SOC. SCI. 17, 25-26 (2006).
[23] Jackie Dugard and Malcolm Langford, *Art of Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism*, 27 S. AFRICA J. OF H. RTS. 39, 56 (2011).
[24] *See* Cummings and Rhode, at 612-13.

litigation is carried out, a court win can also validate the moral authority of the movement and endow it with greater social legitimacy and political strength for future negotiations.[25]

[16] Finally, public interest law firms can endow social movements with greater strength by training activists and NGOs to become better advocates for their communities. In the first place, lawyers can help empower communities and individuals by educating them on their rights and use of rights terminology to shame perpetrators of violations or to frame demands of entitlements.[26] Secondly, in the course of providing legal services, lawyers may empower clients to be "stronger, and in a position to monitor and enforce a favorable decision."[27] In fact, many cause lawyers dedicate a majority of their time to such activities, rather than preparing and arguing cases,[28] which suggests that many lawyers see the greatest payoff in these efforts rather than in litigation.

[B] Best practices for strategic public interest litigation firms

[17] Having laid out a few of the major criticisms and benefits of using litigation to help advance social reform agendas, I next address the practical implications of this discussion – laying out best practices for public interest lawyers to avoid the pitfalls of the past and maximize the benefits to be had in meaningful engagement with social movements.

[18] An important, if somewhat controversial, effort to develop a set of best practices for PIL in South Africa was conducted by Gilbert Marcus and Steven Budlender on behalf of The Atlantic Philanthropies.[29] Through extensive interviews of public interest attorneys across South Africa and case studies of important social rights cases, the authors developed a framework for

[25] McCann, at 30.
[26] *Id.*, at 26.
[27] Quoted in Cummings and Rhode, at 648-49.
[28] Levitsky, at 147.
[29] Gilbert Marcus and Steven Budlender, *A strategic evaluation of public interest litigation in South Africa*, Report produced for The Atlantic Philanthropies (2008). Hereafter referred to as "APR."

advancing social change that included four strategies: (1) empowering civil society by building awareness of rights; (2) providing advice and assistance for people to claim their rights, though not necessarily by engaging in litigation; (3) complementing and supporting social mobilization and advocacy efforts outside the courtroom; and (4) engaging in PIL. Within PIL, they identified seven factors important for maximizing impact: (1) proper organization of clients, (2) a long-term strategy, (3) coordination and information sharing, (4) timing, (5) research, (6) characterization, and (7) follow-up.

[19] Obviously these criteria do not provide a perfect recipe for social change. Outside factors beyond the control of PIL firms, such as social and political context, will always play a large role in determining outcomes of litigation and social change efforts.[30] However, these criteria do offer a good starting point for understanding how combining PIL with social movements may lead to greater social change than having them work on completed isolated levels. The rest of this paper will use these factors as a starting point in assessing the potential for social change for a specific collaboration between a social movement (Equal Education) and PIL firm (Equal Education Law Centre).

IV. Unique Partnership between EE and EELC[31]

[20] The partnership between Equal Education (EE) and Equal Education Law Centre (EELC) provides an interesting case study for pushing on the concepts and best practices established above. Many scholars have written about the success of the partnership between Treatment Action Campaign and the AIDS Law Project in bringing significant improvements in the reach

[30] *See* McCann, at 28 *and* Dugard and Langford, at 54.

[31] What follows is a background description and assessment of the partnership between Equal Education and Equal Education Law Centre. The content of this section has been gleaned from interviews conducted with members of both EE and EELC. None of the content is attributed to any individuals, as this paper pulls out the major themes brought up by multiple persons interviewed. A list of persons interviewed is provided at the end of this paper.

and quality of service delivery to those suffering from HIV/AIDS in South Africa.[32] That success has largely been attributed to the successful integration of PIL into a broader political campaign to advocate for the rights of those living with HIV/AIDS. After the consolidation of a number of political and court wins, the partnership was dissolved, but the model for partnership did not die out. EE and EELC, has in a sense adopted an updated version of this model and thus provides a contemporary example through which to understand the Atlantic Philanthropies Report (APR). However, because the partnership is still fairly new (EELC has only existed for a year), the verdict is still out on its long-term impact. Yet, in the short time that the partnership has been operating, it has achieved remarkable success in its effort to improve the quality of education in South Africa.

[A] Partnership Background

[21] Equal Education was formed to advance a campaign advocating for equal and quality education for learners in South Africa. The two founders of the organization, Yoliswa Dwane and Doron Isaacs, started the organization soon after graduating from law school. Thus, at the conception of Equal Education, the organization had a keen awareness of the importance of the opportunities presented by the law, particularly in South Africa where education has the status of a constitutionally-protected right. However, in its first few years, the organization did not engage in much litigation strategy but rather focused on building its membership and addressing local concerns that did not necessarily lend themselves to legal solutions.

[22] But in 2010 that started to change. Early that year, Equal Education organized a march to the seat of government in Pretoria, but their permit to march was denied. They engaged the AIDS

[32] *See e.g.*, Mark Heywood, *South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health*, 1 J. OF HUM. RTS. PRACTICE 14 (2009).

Law Project (now Section 27) to file an urgent application to have the court declare that EE could undertake the march. Although the court proceeding was unrelated to education, the case received much media attention and the march itself gained more attention as a result.

[23] As EE matured as an organization and membership began expanding, it started receiving an increasing number of complaints about schools from learners. And, whereas before complaints involved matters best addressed through negotiation and mediation, new issues were being raised that were not easily settled through negotiation, and which also raised elements of legal duties and violation of rights. Though, EE partnered with PIL firms, the steady increase of cases pushed them to think of a more institutionalized solution to address complaints. At the same time, EE embarked on its campaign to push the Minister of Education to develop minimum norms and standards for school infrastructure. This campaign always had a legal underpinning, and they realized that this was an issue they were willing to take to the court.

[24] There were several reasons why EE decided not to simply partner with PIL firms, and instead, spin off a sister law centre that shared its name. First, in EE's experience, questions about education were quite complex, and though they worked with plenty of lawyers highly experienced in PIL, education issues required more expertise than could simply be conveyed by briefing lawyers. Particularly in the context of building long-term campaigns, what EE required was more devoted attention and expertise to the matter, which was difficult to build with firms who dedicate themselves to multiple issues and cases at any given time. Second, having been trained as lawyers, EE's leaders were highly engaged on the legal strategy, which sometimes produced a difficult dynamic with its lawyers. This tension could be evidenced in the back and forth of putting together papers for submissions and in developing a cohesive media strategy for advocacy. Finally, it was the experience of EE that PIL firms often operated by finding the ideal

client for a case it was set on litigating, and EE felt that being the client on such cases had the effect of distracting them from their strategic aims. What EE wanted was a close relationship with a legal firm, whose strategy was synchronized with theirs, and who would build expertise and dedication to the single cause of bringing equal and quality education to all learners in South Africa. Thus, in 2012, the Equal Education Law Centre was born, headed by the former Head of EE's Policy, Communication and Research (PCR) division.

[B] Partnership in Action

[25] To give a better sense of the mechanics for how the EE and EELC partnership operates, two mini-case studies are presented below. The relationship is largely described from the perspective of EELC. Following the case studies is an assessment of the partnership in terms of the framework for best practices as presented by the Atlantic Philanthropies Report.

Case Study 1: School Closures in the Western Cape

[26] In June 2012, EE was approached by the principal of Peak View High for support to keep the school open in the face of mass school closures being instituted by the Western Cape Education Department. EE and EELC began looking into the matter by attending school meetings and by making phone calls to other schools to gather information. Based on information largely gathered by EE, EELC helped EE draft letters to the MEC requesting information on the school closures. When these requests were denied, EELC prepared a PAIA application[33] on behalf of EE, requesting release of the information. This request was also denied, but the media subsequently picked up this story and within days, the department released the information.

[33] A PAIA application refers to a request for information made under the Promotion of Access to Information Act 2 of 2000.

[27] A joint task team with two EELC attorneys, the head of the PRC, and PRC researcher was set up to review the documents (largely conducted by EELC) and conduct interviews with learners and principals (largely conducted by EE). Based on this research, the team developed a report on how to engage with the MEC to develop a plan to support learners whose schools were being closed, and to support rather than close down three underperforming schools, which included Peak View High. As a contingency plan, they developed a litigation strategy to keep the three schools open only if engagement with the MEC failed. Meanwhile, EE pursued other forms of advocacy such as picketing, marching, and writing an op-ed on the school closures matter. Though EELC was not involved in these activities, EE always requested their opinion and advice on these activities. In the end, EE with EELC's support was able to gain the commitments it wanted from the MEC, and litigation was not pursued.

Case Study 2: Minimum Norms and Standards for School Infrastructure

[28] EELC is not the attorney on record for the litigation against the Minister of Basic Education to prescribe minimum norms and standards for school infrastructure. Despite this, EELC is highly involved in the matter at all levels. The litigation ended in a settlement in late 2012, with the Minister of Basic Education agreeing to write the standards. However, in early January, when the Minister released the draft standards, it became clear that the Minister had not complied with the settlement, and that EE would have to confront the Minister to get meaningful standards that would actually provide guidance to provincial and local education administrators and create accountability in the system.

[29] EELC analyzed the draft standards and helped brief EE so that its leadership could comment to the media and reach out to civil society partners and NGOs to coordinate a response. EELC also wrote and circulated legal memos to EE and EELC's attorneys from Legal Resources Center which explained the deficiencies in the draft memos. A task force focused solely on this

matter was developed consisting of EE's leadership and entire PRC department and EELC's Director and an attorney.

[30] To coordinate the legal strategy for responding to the draft norms and standards, a meeting was called involving the entire task force, and the lawyers involved in the original litigation. During this meeting, the lawyers who originally litigated the matter began by laying out their recommendation for how to proceed, which contrasted significantly with how EE had envisioned proceeding. EE's Deputy General Secretary, Doron Isaacs, engaged very actively in the discussion and challenged many aspects of the legal strategy. As an observer, one could easily see the divergence in thinking between the two sides. Where the lawyers approached the issue by focusing on building the strongest legal case that could be won, EE's approach involved shaming and advocating for specific standards to be implemented. It was a paradigmatic clash of thinking between lawyers and political activists. Despite the strong differences in opinion at the start of the meeting, active engagement on both ends led to mutual recognition of the benefits and drawback of each approach, and the beginnings of a strategy were laid forward that considered both the legal and political ramifications. After this strategy session, EELC was invited by EE to come to its annual retreat and conduct a workshop to educate its entire staff on the new draft standards and its legal shortcomings. Further, EELC created materials to be disseminated among the broader EE membership.

[C] Assessment of the EELC

[31] 1. ***Public information***. The APR underscores that one of the biggest obstacles to achieve social change through the law is the lack of awareness of rights.[34] The partnership between EE and EELC demonstrates how this barrier can be effectively overcome. Though EE's leaders

[34] APR, at 94.

have legal backgrounds, the organization relies heavily on EELC to train its staff who, in turn, engage in education of its membership on their rights and on high profile litigation to which EE is a party. Particularly with the norms and standards case, EELC has engaged in numerous workshops to educate staff and members about the minister's obligations, the importance of having standards, and the status of the litigation. The purpose of the workshops is to empower members of EE to take ownership of the cause and collectively voice their demands to the Minister. The close and ongoing partnership between EELC and EE has allowed EE's membership to stay up-to-date on developments in the case, which has thus far helped EE to quickly mobilize support and apply pressure at strategic moments, for example, when it organized marches, fasts, and pickets to pressure the Minister to agree to promulgate minimum norms and standards.

[32] 2. ***Advice and assistance***. This is perhaps the area where there was the greatest difference in opinion among those interviewed. No one disputed the importance of providing advice and assistance to parents and learners who requested help in resolving issues with their schools. However, people disagreed on the extent of the advice and assistance that should be provided.

[33] Those interviewed who had been with EE early on tended to see this role as residing with EE. When individuals approached EE for help, EE would provide advice on how the learner or parent should deal with the principal or student governing body, but try to avoid getting involved to allow the person to take ownership of the solution. EE would only intervene if the parent or learner exhausted all their options, and they would ask EELC to help if the school representative(s) was flagrantly violating a learner's rights. The lesson learned by those who had in the past been all too ready to intervene on a learner's behalf was that such action did more harm than good. Those who had been helped were disempowered, continued to rely on EE for

help when the same issue came up, and took the support for granted by opting not to support EE's efforts when it came time to mobilize for a campaign.

[34] On the other hand, newer members of both EE and EELC tended to view this role differently. They looked favorably on a recently discontinued project to establish a law clinic in Khayelitsha, the township where EE is based. The law clinic was seen as providing an important resource and link between EELC and EE's community base. Representatives from EELC would come every Wednesday and provide free legal advice, and if a case was strong enough, EELC might even provide representation. The clinic was seen as an opportunity to provide a tangible benefit to individuals in the community, to provide important hands-on training for candidate attorneys, and to build an important connection between EELC and the issues being faced by people on the ground. It was a way for attorneys to build connections with the movement and the people they were most motivated to help. However, it was recognized that such clinics had a tendency to draw more privileged people rather than the most disempowered and vulnerable.

[35] To date, no resolution has been made on whether or not to revive the law clinic. And, no formal processes exist or a clear strategy on how EE and EELC will collaborate to provide advice and assistance to help individuals resolve their issues without litigation.

[36] 3. ***Social mobilization and advocacy***. This section is best broken up into two parts: social mobilization and policy advocacy. On the social mobilization front, EELC supports EE's efforts in two ways. First, as mentioned above, EELC acts a legal backstop, providing EE with legal assistance on technical matters to support its mobilization efforts, e.g., securing permits for gatherings. Second, EELC helps educate staff and create materials for social mobilization efforts around important litigation like the Norms and Standards campaign.

[37] In all the strategies mentioned discussed thus far, EELC acts in the service of EE to support its mostly non-litigious work. However, when it comes to policy advocacy, the two organizations have a more co-equal partnership. EELC works closely with EE's PCR department, meeting with them on a biweekly basis. The strong partnership appears to have resulted as the two organizations realized they were engaging in some redundant work, and much of the policy advocacy work coming out of the PCR would benefit from having the EELC help with drafts of submissions to parliament or letters to ministers, particularly if it involved a constitutional component. The partnership has also realized that important litigation may come out of the policy advocacy effort, as happened with the norms and standards case, which provided another reason for close collaboration between the two organizations.

[38] 4. ***Litigation***. Litigation as a strategy to achieve significant social change is perhaps the most controversial of the strategies described by the APR. The APR emphasizes that for litigation to achieve maximum social change, it must be done in concert with the other strategies listed.[35] However, what's interesting to note about the partnership between EELC and EE is a shared philosophy that litigation should always be a last resort tool that is used only after exhausting the other strategies above. This thinking is in keeping with concerns addressed earlier in this paper about the potential of litigation to coopt movements. It is also informed by a strategic calculation on improving odds of winning in court – should the matter eventually go to court, judges are likely to be more sympathetic towards a group that has exhausted all other options. Given this backdrop, I now move towards assessing EELC's litigation strategy against APR's factors thought to provide the best opportunity to maximize social impact.

[39] *(1) Proper organization of clients*. On this first factor, EELC does exactly what the APR recommends. The APR suggests that PIL is likely to achieve greater social change when the

[35] APR, at 114.

client is an organization with a direct interest in the matter, and where the client plays an active and engaged role.[36] One of EE's hallmarks as a client is their active engagement in legal strategy and reviewing legal submissions on their behalf. While this may lead to tensions at times, both EE and EELC agreed that such engagement led to better work product.

[40] There are, however, a few interesting wrinkles in this seemingly ideal relationship. The strong relationship between the two organizations has benefitted to a large degree from the legal training of current leaders/founders of EE and from the fact that the director of EELC came from EE. This poses a few potential challenges for the future of this relationship. Will EE continue to be an engaged and active client in litigation if its current leaders are one day replaced with leaders without a legal background? Will the shared philosophy about litigation between the two groups continue to persist if the leadership in EELC is one day replaced with someone not grown from the ranks of EE?

[41] Finally, it's not necessarily clear from EELC's perspective that EE will always be the proper client for litigation. Sometimes individual cases and stories provide the more sympathetic cases and can bring the legal issues into greater relief. It's incredibly difficult to predict or determine the broad outcome of cases based on who the client is, which is a critique echoed in the literature as well.[37] And, as acknowledged by both EE and EELC, it's important that EELC branch out and represent other clients in order to gain a more independent perspective and to gain a better grasp of the legal issues, which will improve its ability to litigate cases in the future.

[42] (2) *Overall long-term strategy*. This is perhaps the hardest factor to assess about EELC because it is such a young organization and only just beginning to pin down a long-term strategy. In its short existence, it has largely deferred to the needs of EE in terms of where it devotes its

[36] APR, at 119.
[37] Dugard and Langford, at 54.

resources. But, as EELC has gained more experience in the field and begun to develop its independent research priorities, it has identified two broad areas it hopes to pursue in the future: bolstering school districts and ensuring support for underperforming schools. EELC recognizes these are broad areas of focus, and in order to make an impact, it will have to hone in on key areas of change. EELC hopes to refine its strategy with more experience. One potential challenge this may pose is how EELC's growing independence may reshape its relationship with EE. Will EELC always ensure that its long-term strategy is aligned with EE's? If their strategies take them in different directions, how will the organizations adapt to fewer resources at EELC being devoted to EE priorities?

[43] (3) *Co-ordination and information sharing*. EE is obviously EELC's biggest partner, and the two engage in frequent co-ordination and information sharing, particularly on large campaigns such as norms and standards. Additionally, joint task forces created for both the school closures and norms and standards campaign provide a formalized structure for coordination and information sharing. Outside of EE, EELC reaches out strategically to other PIL firms working on similar issues. Because of the scale of the norms and standards campaign, EELC has coordinated with all the major PIL firms doing work in education.

[44] However, though the APR indicates that not engaging actively in coordination and information sharing can hinder litigation, the reality most PIL firms face in South Africa is the classic problem of having to compete for the same limited donor funds. Competition generally tends to caution against collaboration, which leads to a certain amount of inefficiencies in how litigation is pursued. Though greater coordination is ideal, practical realities make it difficult to accomplish this.

[45] (4) *Timing*. As mentioned above, EELC takes a cautious approach to timing, and only pursues litigation after other forms of advocacy and negotiation have been exhausted. It also works closely with EE to ensure political strategies align with important legal deadlines. For example, EE is planning on holding public workshops to gain input just ahead of the deadline for the norms and standards draft, after which EELC and EE will finalize their legal strategy.

[46] Dugard and Langford raise an important criticism of this approach to timing. Violation of people's rights now argues for action to be taken immediately and not after what is often prolonged negotiation that will almost surely lead to litigation regardless in the future.[38] For example, Dugard and Langford pose the question whether bringing litigation earlier on in TAC's campaign could have saved more lives by forcing the government to distribute ARV's earlier on.[39] The norms and standards campaign is different in that lives are not at stake, but it certainly reflects the dilemma posed by the above critique. Is it always best to exhaust political solutions when everday children's right to education is being violated by not having proper school infrastructure in which to learn?

[47] (5) *Research*. Strong, reliable research is a necessary component of EELC's work and goes without saying. What's interesting to note is how much EELC relies on EE, specifically the PCR division, to support this work with factual research. For example, in the school closures case, EELC relied heavily on facts gathered from interviews conducted by EE, in order to draft letters to the MEC of Education and build its legal strategy for potential litigation.

[48] (6) *Characterisation*. Although EELC acknowledges that characterization of litigation is highly important, it also recognizes that it doesn't have much say in this. When EE is the client, EE develops the media strategy and is very careful about how lawyers characterize their efforts.

---

[38] Dugard and Langford, at 49.
[39] *Id.*

EELC is often asked to provide input into the media campaign, but final decisions ultimately reside with EE.

[49] (7) *Follow-up*. This is a factor that's difficult to assess in light of EELC's youth as an organization. They recognize that follow-up after litigation or campaigns is important, but many of their efforts have not yet been closed and amenable to follow-up. However, the EELC acknowledges that any follow-up on current issues would be done in collaboration with EE.

[50] (8) *Flexibility*. Finally, on this last factor added based on Dugard and Langford's critique,[40] EELC agreed that being flexible in the types of cases taken was essential for its first couple years of operation. Though some cases may not be seen as having a broad impact, if the issues are sufficiently strong, they will not turn the cases away, and instead take the opportunity to bring quick relief for the clients while providing its young attorneys with important experience. Additionally, EELC has learned a great deal from the cases it has decided to take on, which has exposed the attorneys to gaps in the law and new opportunities to bring impactful litigation. However, EELC recognizes that as it matures as an organization and develops a longer term strategy, it will likely be less flexible in the types of cases it pursues.

V. Conclusion: Lessons for other public interest litigation firms

[51] There is much to recommend and to learn from the unique partnership model between EE and EELC. Only in its first year of operations, and it seems to score very highly on many of the strategies and factors laid out as best practices for a PIL firm to maximize impact. But, the unique partnership also goes beyond the best practices and offers additional learnings for collaborating with social movements. First, the strong partnership keeps EELC grounded in the

[40] Dugard and Langford, at 61 (suggesting that flexibility is required to enable organization to seize opportunities presented by "unorganized" and "local" claims approaches).

broader social movement to improve education and ensures that legal strategies are appropriately considered to maximize social change without fear that they will "coopt" the movement. This is accomplished through a conscious recognition on the part of EELC that litigation is not usually the best way to accomplish social objectives, and should be used mostly as a last resort strategy. It is also accomplished through frequent communications and interpersonal interactions between the organizations, e.g., EE inviting the EELC to its Youth Camps, annual staff retreat, and Task force teams. The task force teams, designed to create a joint-effort between EE and EELC to tackle specific campaigns, for example norms and standards, have gone a long way to improving communication and coordination of activities between EE and EELC. Finally, the relationship benefits from a two-way communication, where EELC provides workshops and trainings to educate staff and members about legal rights, options and pending litigation. And EE provides strong engagement on legal strategy resulting from this education and prior legal training of its leaders.

[52] Though not every partnership between a social movement and PIL firm will be able to match the specifics of this relationship, it provides a window into a new way of thinking for some firms. Rather than simply engage with clients and social movements on legal issues, PIL firms can seek to gain first-hand knowledge of the political activities and strategic thinking that goes along with building a social movement. They can create formal structures of collaboration such as a task force team. Finally, they may also seek to establish more formal and regular channels to educate and train activists to be able provide input on how legal strategies can and should interface with socio-political strategies.

[53] Building on this point, a second insight from the partnership is its effectiveness at building awareness of rights and important legal issues being debated among learners, parents,

and communities whose education system is failing them. The APR discusses education of the public as an important strategy that often proves a barrier to realizing change on the ground. EE and EELC appear to have developed a way to overcome this barrier. EE's membership base consists of learners and parents who would benefit the most from understanding their rights and what they are entitled to. They have a network structure designed to reach all their members across the country. Thus, EELC's workshops, trainings, and input on educational materials can be appropriately filtered by EE and widely disseminated to EE's network. This facilitates EE's efforts to empower its membership and mobilize support around legal demands. In part, the success of this public awareness building is due to the specific structure of EE's organization. However, the benefits of this awareness building can still be had on a smaller scale through a firm's ongoing education of staff at nonprofits involved in community organizing.

[54] A third insight comes from the close and co-equal cooperation between EE and EELC on policy advocacy. While this may not usually be viewed as being a major activity for PIL firms, it has been the experience of EE and EELC that strategies for policy advocacy, and the quality of that advocacy, e.g., submissions to parliament and letters to ministers, are greatly improved by combining the fact-finding and research efforts of EE with the legal analysis of EELC. This could be an area where other PIL firms may wish to seek out collaborations to support the efforts of nonprofits active in this field.

[55] The above is only a starting point for ways that PIL firms may improve their partnership with social movement groups and NGOs to maximize social impact in the field. However, the partnership between EE and EELC is still young, and there remain open questions that will affect the success of such a partnership to create impact. For example, there remains a question about the quality of legal services that should be provided through EELC to the communities served by

EE. On the one hand, it's an important means for young lawyers to stay grounded in the movement and learn about the complex issues facing community members. It's also a vital service that is missing in the community. On the other hand, providing services can have a disempowering effect and create a reliance on the attorneys to solve their problems. Another open question is how independent will EELC become and how far will it allow its long-term strategy to stray from EE's? Finally, the close nature of the relationship raises more mundane but potentially contentious questions of how to allocate resources, how to charge for costs when EE is a client and not just a partner? And to what degree should funding be done collaboratively versus independently, given their greatest asset is their unique partnership?

[56] In sum, though this partnership's story is only just beginning, there is much that PIL firms can learn from it to maximize social impact in the field. Hopefully, this paper serves as a starting point to extract those lessons and encourage PIL firms to engage in improved collaboration with nonprofits and social movements.

VI. Appendix

List of persons interviewed for this paper:

- Brad Brockman, General Secretary at Equal Education
- Doron Isaacs, Deputy General Secretary at Equal Education
- Kate Wilkinson, Media Officer at Equal Education
- Catherine Boulle, Researcher at Equal Education
- Dmitri Holtzman, EELC Executive Director
- Lisa Draga, EELC Attorney