

Funding Strategic Litigation – Funder Reflections

TAI members have been scaling funding to strategic litigation and are actively looking to learn from funders well versed in strategic litigation support such as the former [Atlantic Philanthropies](#), [Just for Kids Law](#), and the [Digital Freedom Fund](#). This brief captures insights from that exchange.

WHAT IS STRATEGIC LITIGATION AND HOW IS IT CONNECTED WITH TRANSPARENCY, PARTICIPATION, AND ACCOUNTABILITY?

Strategic litigation - the process of using litigation to create lasting and impactful change - has been deployed to defend people's rights for decades. Philanthropies including TAI members have aided in this process over the years by funding groups responsible for or supporting litigation. For example, MacArthur Foundation grantee Socio-Economic Rights Accountability Project uses litigation to hold the government accountable and advance the rule of law in Nigeria. Similarly, Luminare, Open Society Foundations, and Ford Foundation support the Digital Freedom Fund, an intermediary fund that provides resourcing for cases advancing or protecting digital freedom and privacy.

FUNDER ENTRY POINTS

It's often incorrectly assumed that these grants are expensive and time consuming. Some certainly are, but small amounts of money and time can still lead to lasting change. Nonetheless, it is paramount to thoroughly vet the case to ensure it is a worthwhile endeavor and minimize the risk of setting a devastating negative precedent.

There are [myriad entry points](#) to support strategic litigation, such as:

- Direct support to organizations doing the work, such as the American Civil Liberties Union
- Funding a case that aligns with funder interest
- Supporting intermediary funds that support work in various ways so as not to reinvent the wheel
- Investing in the capacity of the organization making the complaint – typically CSOs and other community representatives
- The plaintiff level - typically an organizational plaintiff, like advocacy CSOs. Usually helping in community outreach, data collection
- Funding training and education or supporting legal fellowships for grantees
- Bolstering the movement or network level – supporting the connective tissue. To help people find the right groups and share information

Grantees involved in strategic litigation may use funds to pay lawyers, experts, support mobilization efforts, and for following up on the impact/enforcement of their litigation. It is essential to gain and maintain the trust and support of the community whose rights are affected.

Funders can link strategic litigation to broader legal empowerment work. Frontline organizers can be the entry point for development of ideas, clients, problems, that can then move further through the strategic litigation ecosystem. Legal empowerment groups can help the community determine if litigation is the best course of action (after other avenues have been exhausted) and can help ensure the community's voice is accurately represented by counsel in proceedings. CSOs and [community activists](#) can be essential in monitoring implementation, as enforcement failures are common (see below).

LITIGATION WITHIN A BROADER APPROACH

Litigation can also be effective in countries where the rule of law is absent, or if there's not a win in court. Although a robust enabling environment is certainly helpful (for example, in [South Africa](#) with a progressive constitution and committed judiciary), it is not required to have long lasting change. For example, some funders have seen progress and positive impacts in places where the environment is not robust or seen as legitimate, such as 1970s Argentina under the military dictatorship. These cases can draw widespread international media attention, and with it, international pressure, which may ultimately lead to change.

Litigation can be the [hook the media](#) needs to write a story and give visibility to the cause in question, perhaps even internationally and potentially setting the stage for positive responsive legislation.

WHAT DOES SUCCESS LOOK LIKE?

[Volumes of work](#) by the Open Society Justice Initiative have led to creation of a new taxonomy of defining success, categorized as: material (tangible) impacts, non-material impacts, and instrumental impacts, which can lead to systemic change. **Success in litigation is not binary.** A possible outgrowth of these cases is that typically marginalized people can feel empowered after their voice has been heard, whether the case wins or loses, thus building momentum for future change efforts.

Even a win in court is not the end of the process. Funders need to anticipate that success is not guaranteed as enforcement failures are common. Monitoring and implementation may necessitate as much investment and attention as actual litigation, as “a law that is not enforced is not a law.” Some cases may even need to be relitigated.

WHERE CAN I LEARN MORE?

Below is a list of top resources we found useful in our research and conversations

1. Atlantic Philanthropies - [Seven Factors Leading to Success in Strategic Litigation](#)
2. Atlantic Philanthropies – [Strategic Litigation Insights Report](#)
3. Open Society Justice Initiative – [Strategic Litigation Impact Report](#)
4. Just for Kids Law – [Evaluation on strategic litigation in UK regarding migrant student finance](#)
5. Just for Kids Law – [Animations from the evaluation](#) showing how to make the use of the law as a campaign tool to campaigners/lay people
6. [Catalysts for Collaboration](#) – On the benefits of collaborating in strategic litigation. Focused mainly on internet and data rights.
7. [Using the Law for Campaigning and Social Change: A 101 Guide](#) by the Sheila McKechnie Foundation gives an overview of the questions grantees should ask and steps to take when determining if and how to use litigation
8. [Digital Freedom Fund](#): Model Ethical Funding Policy and a framework for impact measurement of litigation
9. Trocaire - Research on [Strategic Litigation in Guatemala and Honduras 2019-2020](#) and its Annex: [Gender-Responsive Approach and Women's Participation](#)