Chapter 1 Introduction

1.1 Introducing 'Strategic' Human Rights Litigation

This book explores an issue of growing significance in the contemporary practice of human rights law, namely the role, impact and limitations of 'strategic human rights litigation' (SHRL). While there is no fixed definition of SHRL, the term is generally used to mean litigation undertaken in pursuit of goals – or which concerns interests – that are broader than only those of the immediate parties. SHRL advances human rights in a way that reaches beyond the impact on particular victims or applicants at the centre of the particular case. SHRL, sometimes referred to as 'public interest' or simply 'impact' litigation, is a tool invoked increasingly by victims and survivors, human rights activists, lawyers and NGOs around the world.

A question that underpins this study is what is it exactly that makes some litigation strategic?[1] Is it the goals pursued, and if so, *whose* goals – or strategies – count for this purpose? Is it a feature of the *way* the litigation is conducted, or how it is *used*, 'strategically'? Does it depend on the intention, or even identity, of the actors driving or engaged in it? Or is the question of what difference that litigation actually makes in practice – its impact or influence – central to its classification as 'strategic'?

While all of these considerations may be relevant and important to the SHRL enterprise, the key question explored in this book is the impact or influence of human rights litigation; whatever the goals, strategies or resources involved, did human rights litigation make a difference, and if so what sort of difference, how and why? The focus of this book is on the need to explore and expose the usefulness and limitations of resort to the courts to bring about human rights change. By reference to multiple types of 'human rights' litigation as it unfolds in the world today, on a range of issues in diverse situations and systems, it enquires into the true nature of the impact or influence of human rights litigation.

The whole idea of strategic human rights litigation, and the role that the courts *can*, or even *should*, have in bringing about human rights change, has long been somewhat controversial. To an extent, this reflects profound differences of view on the role of the judiciary in democratic society. At one end of the spectrum, the courts can be regarded with an almost religious reverence: solutions are sought, as if from on high, before the ultimate arbiters of truth and right, whose job it is to apply the law without fear and favour and to 'resolve' the problem. Lawyers and litigators may be particularly prone to this view, placing emphasis on the importance of lawyers' pleadings and interpretations of the law and judicial determinations of them, perhaps partly (if unconsciously) to justify our own exclusive role as initiates in the exotic rituals of the court whose carefully crafted legal arguments lead our clients towards the light. The faith of many is ultimately placed on judgment day when the (legally) righteous are rewarded and justice done.

At the other end of the spectrum, there are those who almost demonise the role of the courts, seeing them as anti-democratic, wresting power from elected representatives and their

[1] Chapter 3.1 queries the basis for stark distinctions between 'strategic' and other types of legal service provisions or victim focused litigation, primarily defining strategic litigation for the purpose of this book by reference to its impact.

procedures, or as inherently elitist and disconnected from the social struggles within which real change happens. For them, the courts either *should* not (as they are undemocratic), or more commonly *cannot* (as they manifestly lack political power), deliver the meaningful social and political change on which respect for human rights depends. Proponents of both these views have often cited 'landmark' cases such as *Brown v Board of Education*[2] in the US Supreme Court: *Brown* established that segregation in education was unconstitutional in the US, yet – sixty years on – complete desegregation remains elusive. Brown therefore, like other 'landmark' cases (including some explored in this study) can be cited alternatively as a shining historic victory that changed everything, or as a chimera that achieved nothing. The truth, no doubt, lies somewhere in between.

This book explores, by reference to multiple recent or on-going cases and situations, where, within these extremes of heaven and hell, the role and impact of SHRL lies. Fundamentally, it seeks to recast the way we think about 'success' in this field,[3] by exploring the many different ways in which litigation can and does make a contribution to change.

It will be suggested, that done strategically and used properly, both inside and outside the court, SHRL can have multiple types of impact over extended periods of time. Most obviously, it may provide or contribute to protection, redress and reparation for victims and survivors, including through recognition, compensation, guarantees of non-repetition, rehabilitation or symbolic restorative measures. However, strategic human rights litigation can also catalyse and contribute to much broader changes, of a legal, political, institutional, social or cultural nature. It may be a vehicle for achieving accountability – whether at the level of the state or its institutions, corporations or the individual. It may help unearth information, contributing to historical clarification and broader processes of reconciliation. It may influence attitudes, discourse and behaviour. It may energise and empower social movements and civil society. It may pursue and strengthen a broad democratic, rule of law agenda.

On the other hand, it may not. Human rights litigation is not a neutral enterprise that at worst does little good, while not doing any harm. Rather, as one interviewee described it, it is 'a hazardous journey, not to be undertaken lightly.' Litigation may have serious repercussions for victims, families and communities, and for human rights causes, if backlash compounds problems rather than presenting solutions. It can lead to the erosion of legal standards due to poor jurisprudence or regressive legislative responses. It may contribute to a veneer of legitimacy that shrouds the reality of justice denied. It may generate 'false expectations and vain promises,' and compound original wrongs. In many more cases, there may be reason to question how much really changed beyond the confines of the courtroom, while lengthy and resource-intensive proceedings were depleting resources that could perhaps more effectively have been channelled elsewhere.

For these and other reasons explored in this report, the positive nature and impact of litigation can certainly not be taken for granted. As one recent report aptly noted '*litigation is*

[2] *Brown v. Board of Education of Topeka*, US Supreme Court, 347 U.S. 483 (1954).

[3] Jules Lobel 'Success Without Victory; Lost Legal Battles and the Long Road to Justice in America,' NYU Press 2004, famously referred to the 'success without victory,' through the power of the losing case in the U.S. See Chapter 3.

not an ideology; it is a tool.'[4] The extent of its impact or influence will invariably depend on how, where, when and perhaps by whom the tool is used.[5]

At the same time, the role of courts that authoritatively determine human rights claims, interpreting and applying the law, is arguably a particular *type* of human rights tool, with its own particular authority and weight (as well as shortcomings), and care must be taken to 'use' litigation fora in ways that do not undermine the distinctive value of the judicial function. Likewise, care is due to ensure that reaching the 'strategic' potential of litigation does not mean undermining the interests of the victims in whose names, and pursuant to whose right to access justice and reparation, cases are brought. These and other myriad challenges and tensions must be borne in mind in the difficult determinations that must be made as to whether SHRL is an appropriate tool at all in a particular context, and if so how it should be approached.

The central goal of this book is to explore how we might understand the nature and potential of this litigation tool. It will be suggested that understanding impact requires that we jettison the narrow view of the litigation process and its 'outcomes', in favour of an approach that explores the full range of diverse sites or levels of impact - direct or indirect, immediate or incremental, planned or unanticipated, plain or barely discernible. It requires that we consider how 'impact' arises in myriad ways and at multiple stages. It may be positive and negative and sometimes both - at different stages, or if seen from different vantage points. Only by weighing up all the many types of impact that litigation often turns out to have in practice, can we assess its true significance.

It is hoped that the reflections in this book, on understanding impact, and its influence on developing strategy, will prove useful to the growing body of actors engaged in and affected by the rapidly expanding field of human rights litigation, nationally and internationally. This includes victims and survivors, NGOs employing SHRL as a tool across continents and systems, many legal firms, private practitioners, law clinics keen to use law to protect, as well as the activists, academics across disciplines, policy-makers, judicial officers and other legal professionals whose work is inherently intertwined with the impact of litigation. It also includes funders, whose support is imperative, some of whom have long supported strategic human rights litigation but shown increasing scepticism towards it, or at least increasingly seek accountability for use of funds in an opaque area where understanding impact can be complex and investment long term and costly.[6] This book hopes to make a contribution to much needed, and evolving, conversations between all of these actors on the role that litigation can and should play in improving the human rights landscape.

1.2 Overview of Chapters

Chapter 2 locates the growing field of SHRL within an evolving international landscape that presents both opportunities and challenges. It signals trends in the expansion of human rights litigation before national and international fora, the proliferation of such fora,

[4] 'Public Interest Legal Services in South Africa Project Report,' Socio Economic Rights Institute of South Africa.' (2015).
[5] See Chapter 9, Developing Strategy and Meeting Challenges.
[6] The resources challenge is one of many flagged in Chapters 2 and 9. Not all SHRL is costly, but strategic long-term engagement for maximal impact generally is.

remedies, substantive human rights law and engaged actors. This richer, more fertile context is undoubtedly offset by serious challenges. Political pressure on judiciaries in many parts of the world, serious deficits in judicial capacity or independence, attacks on human rights defenders including lawyers globally, and geographical gaps in available international human rights fora are among the real challenges that often affect the ability to engage in human rights litigation at all. Myriad impediments stand in the way of victims, survivors and civil society and in practice access to justice very often remains elusive. Despite the challenges, obstacles and dangers, it is a burgeoning field, as survivors, human rights lawyers and activists around the world increasingly seek recourse to litigation to address human rights problems.

Chapter 3 is the heart of the study, suggesting a framework for understanding and identifying the impact of the growing field of SHRL. It suggests lenses through which we might capture the multi-dimensional and complex nature of litigation's impact, over prolonged periods of time, and in synergy with other action for change – such as advocacy, education, protest and legislative reform for example. It suggests the need to focus not only at what courts say and do, or what people say and do in court, but how the work of the range of actors relevant to the litigation process may influence the discourse, attitudes, legal, political and social contexts in which violations unfold. Looking beyond the plain *outcomes* of litigation, which rarely *provide* a solution for some of the broad-reaching social or political problems that underpin rights violations, it enquires into how it may *contribute* directly and indirectly to change. While acknowledging that many types of impact are simply not susceptible to 'measurement' as such, it identifies and illustrates eight broad categories of impact.

Chapters 4-8 present five detailed case studies, based on litigation, which I have been engaged in as a lawyer or considered as a consultant. The studies enable a closer critical look at context, and the unique interplay of factors or conditions that have affected the impact of the litigation in diverse situations. Each of the case studies juxtapose the sometimes carefully constructed goals and strategies that guided the litigants, with the broad range of relevant factors that interacted with the litigation process, before, during and after it, and suggest indicators of the positive and negative impact of human rights litigation.

Chapter 9 presents an approach to planning and strategy at the various phases of litigation, formulated on the basis of the experience gained in large part from the case studies. It emphasises the attention that must always be paid to the unique situational, legal, cultural, institutional and other contexts in which the cases arise.[7] Diversity is all the greater on the national level, and cautions strongly against a 'one size fits all' formula for strategic litigation. At the same time, while legal strategies must emerge from the individual, local and regional environment, they can and should be informed by an awareness of strategic litigation experience in other contexts. The emphasis in Chapter 9 is therefore on strategies, tactics and approaches that may enhance impact and meet some (by no means all) of the challenges that arise in the SHRL enterprise.[8]

[7] There are vast variations between the supranational human rights systems, and diversity is greater on the national level. See Opportunities and Challenges in Chapter 2 below.

[8] See Chapter 2 on identifying challenges and Chapter 9 on how we might meet some of them through SHRL; it is recognized that many of the obstacles and challenges highlighted in this book as impeding litigation or its

By exposing for consideration a range of experience in the litigation of serious human rights violations, and some honest reflections on tensions and limitations that arise in practice, the book ultimately questions how lessons from the past might inform the development of strategic approaches in the future. How can we better understand SHRL, and employ it most effectively, to meet the very real challenges facing human rights work around the world today?

effect - political, economic, institutional, legal or practical – require broader solutions, such as judicial, political or institutional reform. Chapter 9 focuses on how SHRL in the future might try to meet those challenges that may be influenced by the way we do our litigation work. Issues include: strategic planning, identification of goals and risks, selection of cases, fora and partners, timing, the dynamics of relationships, participation and leadership, remedies sought, early investment in post-judgment implementation, among many others.