presidential Portfolio Review SUMMARY and Outcomes

Justice Initiative – Antidiscrimination

August 2015

A Portfolio Review of the Equality and Inclusion cluster’s antidiscrimination work was held on Thursday, August 6, 2015.[[1]](#footnote-1)

The objective of the review was to assess our efforts to challenge ethnic discrimination in Europe, focusing on work that had not already been reviewed in the past 18 months.[[2]](#footnote-2) In particular, the review aimed to capture the various inflection points in the history of our antidiscrimination work when we changed strategy or tactics in response to specific obstacles.

The review wrestled with the two, closely intertwined issues of the project’s goal, and the means by which we achieve it. CS appreciated the “high-level”’ view presented at the beginning of the review narrative, which clearly stated the goal of the portfolio—to bring to bear international antidiscrimination norms at the national level, by using the courts. Yet he noted that the activities undertaken over a course of years appear to reflect a different goal: transforming the practice of different national legal communities to use the law to combat discrimination. CS described this as reflecting an attempt to “shape the legal community so they see the possibilities [we] saw” —potentially leaving the project with a different ambition than what we began with and raising the question of what is the overarching ambition today.

The ”detour”’ into transforming the views and practices of affected communities and lawyers with respect to legal remedies for discrimination was necessary in the program’s view to get antidiscrimination cases into the courts at all. When training or persuading lawyers through national-level roundtables in different countries to bring more antidiscrimination cases did not change the level or scope of antidiscrimination litigation, we worked more intensively with fewer lawyers, paid by us, through a ”ground-up” approach to litigation in Germany and France.

Similarly, our work with communities was essential to engaging courts in search of legal remedies, thanks to the need to find plaintiffs. The review compared our litigation on discrimination with that on citizenship, in which we have had no difficulty identifying plaintiffs. This may be due to citizenship being essentially bureaucratic, a status that can be given only by the state, such that individuals accept the courts as their only resource. In contrast, discrimination is often viewed as an inter-personal or social problem, and the courts, far from being viewed as givers of remedies, are viewed with a skepticism that we did not anticipate. In the first place, this means that litigation may not be the right tool in these contexts. In the second place, where we do go ahead with litigation, we should form an individual assessment of the courts in a given country. While we, as outsiders steeped in the myth of rights, viewed courts as allies, we have seen, as in our German education case, that skepticism was in fact justified. The review affirmed that Justice Initiative should form individual assessments of the courts.

While we ultimately launched cases in both France and Germany, in order to transform legal practice and find plaintiffs, we became deeply engaged in building or encouraging active constituencies to complement our litigation. In France, this was in no way planned: as we embarked on close work with, and outreach to, those affected by profiling (only possible thanks to our staff presence in France) we did not conceptualize it as building a movement. In Germany, while community outreach was key to building our litigation, our conscious realization that a supportive movement, or at least community, was necessary to change the way the schools in Berlin treated children of migrant background, came simultaneously with the filing of our lead case, which ended in dismissal at the first instance. Our work in Germany, while scaled back from when we were preparing litigation, continues in this mode. The review reflects the lesson learned that, while it is important to combine litigation with other tools (and to understand when litigation is not the right tool at all), a long time and significant investment of human resources is needed to show results and assess impact.

TL, as discussant, focused on this shift to building local constituencies: even if this is successful, how does it add up to the broader impact we seek beyond the national context? She also noted that the review raised the question of the sustainability of the investment that goes into building a supportive social and political environment to complement antidiscrimination litigation. Is it compatible with how JI is structured, as a small, international organization with technical skills? Is it sustainable to go to places where JI has to build the work up from the ground vs. investing in finding interesting work that JI could support? One answer is that, in Europe, we are still working towards the application of European laws to create judicial remedies. Work at the local level is a lengthy way to getting to our goal, but we felt that, if we don’t dig down to the local and build a supportive context, we may not be effective at all. Specifically, the CJEU is a mechanism to which national courts have to make referrals; the CJEU then decides on questions of European law and sends the case back to the national level where the local court has to grapple with the clarification issued by the CJEU at the local level.

The portfolio contains a few, dramatic examples of where a purely “technical” intervention (with no element of community outreach or political or social mobilization) led to an important victory. Thus, the antidiscrimination project has before it two distinct models of intervention (depth versus volume): the time- and resource- intensive engagement with communities and lawyers in a specific country to build a common understanding and social action around a given antidiscrimination issue, alongside or instead of litigation; and the opportunistic model of harvesting quick wins where we can join a case that already exists. CS queried the work on antidiscrimination in Peru, expressing disappointment that the beneficiary of experiences in Germany and France would be Peru, where we would be starting anew. In the program’s view, engagement in Peru and on equality data mapping in Latin America is a means of transferring some of the lessons and tactics we have learned in our work in Europe to like-minded partners who would benefit from technical assistance in their own antidiscrimination work.

One outcome of the discussion was an endorsement of maintaining the two potential tactics. There was appreciation of efforts to combine the legal and social/political: to go deep into communities, to engage for long periods of time, even if this engagement does not produce a stream of court cases. It was recognized that thematically-defined engagement, grounded in listening to what communities say, may take us down a road that is not purely legal. We should grapple with what constitutes a real remedy for discrimination, i.e. better public policy, in these thematic spheres, whether or not this leads us into litigation.

At the same time, the program should maintain its freedom, and capacity, to make specific legal/technical interventions where we see opportunities in places where we do not have engagement, such as Bulgaria. We have a vision of Justice Initiative skills that can be readily brought to bear across geographies, rather than rooted in them. Opportunities for technical intervention could be identified by the likelihood of moving forward key jurisprudence, as defined by our strategic priorities or advancing the antidiscrimination practice of local actors

We need to develop criteria for choosing the more appropriate approach based on context, while recognizing the tight constraints imposed by Justice Initiative’s small size, connecting our own capacity and skills with the local context. In evaluating both approaches, however, we have a new appreciation for the importance of strong local partners.

In addition to the question of goals/approaches, the review dealt at length with the question of whether it was necessary for us to learn through experience the lessons we did on the difficulties of litigation, or whether we could have learned from the experience of other antidiscrimination organizations, or hired individuals with the necessary knowledge. What was the role of the “community of strategic litigators worldwide” to which we had access? The answer to this question, in part, was that we misjudged the maturity of the field in which we were engaging once we adopted a national-level approach. We had a small number of specialist counterparts at the international level, but to bring cases up from the national level, we confronted a low level, in terms of volume and depth of expertise, of antidiscrimination litigation. In the European countries where we worked—Russia, France, Germany, Italy—there was virtually no community of lawyers working on antidiscrimination on the basis of race or ethnicity at the national level, much less collaboration across countries and even less between common-law antidiscrimination lawyers and those working in continental or civil law systems. A linked observation was that, while our programming has focused has on peer learning opportunities and collaboration with local partners, we haven’t in practice cooperated much with other OSF entities programs. In certain cases where we have done so, it felt extracurricular to our approach and aims. This is something that we plan to remedy in the future.

It was also observed that, while we speak of a shift in strategy to a “ground up” approach and deeper engagement at the national level, these were not always full shifts and we remained committed to original “top down” approaches, which distracted us from a full appreciation of the time and place of our work. We were thinking about where a case was heading, rather than confronting the realities of the local context.

The question was raised as to whether we have now built the staff that we think are necessary. In practice, we have hired a series of consultants over the years in various contexts, Germany and France in particular, and what’s needed has thus emerged. In addition to the lawyers with whom we have agreements, we have hired people with a social anthropology or social work background. Community relations and organizing are skills we absolutely need to have, but it may not make sense to have them in-house given how context-specific they are. On the Justice Initiative staff, we now have a mixed staff of lawyers and non-lawyers, with expertise on both specific fora and specific issues.

Other points raised in the review were the importance of understanding the local context and how change actually happens. LH mentioned the interplay of internal pressure (e.g Justice Initiative wanting to bring a case), countered with local actors’ opinion that the proposed strategy would not work. The lesson is to always consider the broader political context, and to learn through listening. In France, we held a lot of discussions with various actors on complementary strategy. Learning from this required being open, not stuck in our thinking. The staff needs the skill to be able to listen and be strategic.

CS raised the question of whether Justice Initiative’s assumption that it could act as a catalyst, inspiring action by others, was realistic. The program’s view was that, at least in France and Germany, while the investment of time was far greater than we had originally anticipated, we have been successful.

1. **Participants:** Chris Stone (CS), Laura Bingham (presenter) (LB), Julia Harrington Reddy (presenter) (JHR), Rupert Skilbeck (Moderator) (RS), Tirza Leibowitz (Human Rights Initiative, discussant) (TL), Liliana Gamboa (Program Officer, OSJI) (LG), Marc Krupanski (Program Officer, OSJI) (MK), Zsolt Bobis (Program Coordinator, OSJI) (ZB), Rob Varenik (Director of Programs, OSJI) (RV), Heena Khalid, (program coordinator, OSJI) (HK), Steve Kostas (Legal Officer, OSJI) (SK), Ostalinda Maya (Program Officer, OSJI/RIO) (OM), Lanna Hollo (Program Officer, OSJI) (LH), Costanza Hermanin (Senior Policy Advisory, OSEPI) (CH). [↑](#footnote-ref-1)
2. Prior related PRs were: Germany school segregation litigation and advocacy, Justice Initiative Board review, April 2014; Citizenship litigation, Justice Initiative Board review, October 2014; Equality Data Initiative, staff review, October 2014; Ethnic profiling in Europe, joint with OSIFE, Presidential review, April 2015; My City Real World, joint with Youth Exchange, Presidential review, March 2015; DH implementation, staff review, April 2015; Italy, OSIFE staff review, July 2015. [↑](#footnote-ref-2)