

# Using the Courts to Change the World? Successes and weaknesses of “strategic litigation”

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**This year, India’s Supreme Court freed millions of gay Indians from the fear of being imprisoned. Meanwhile, in Hong Kong, the Supreme Court there upheld the right of freedom of expression even as the territory is increasingly silenced by China.**

And that was just in September.

These cases involved so-called public interest, or strategic litigation cases—cases brought by lawyers seeking a ruling that goes beyond the particulars of a case to benefit the rights of a larger group of people. Such rulings form the bulwark of human rights jurisprudence and practice. Together, they serve as an important counter-weight to the increasingly noisy attacks on human rights institutions and principles.

Now, a new report by the Open Society Justice Initiative, [Strategic Litigation Impacts: Insights from Global Experience](#), offers an unprecedented overview of the diverse ways strategic human rights litigation is practiced around the world. It draws from hundreds of interviews with litigators, judges, victims, and activists in a dozen countries, looking at access to education, the prohibition against torture, and the rights of indigenous peoples to their historic lands. The study offers eight key lessons, addressing both the risks of undertaking strategic litigation, so that they can be minimized in the future, and its innovations and successes, in the hope that they can be adapted elsewhere.

As *Insights from Global Experience* illustrates, strategic litigation is often the tool that ultimately dislodges entrenched social ills where all else has failed. In South Africa, for example, lawyers took the government to court over its failure to provide decent school conditions for the country’s poorest students, winning a judgment that led to the replacement of unsafe mud structures with 138 new schools in the Eastern Cape. In India, strategic litigation led to changes that brought 90 percent of truant children in the state of Karnataka back into the classroom in just two years. In the United Kingdom, it compelled the government to award Kenyans tortured by the British colonial administration about \$25 million in compensatory damages, and to issue the survivors an apology.

In spite of these victories, the report’s case studies from Argentina, Paraguay, Kenya, and elsewhere illustrate that strategic litigation can be a painfully slow process, and be alienating, expensive, unaccountable, and risky. It can wreak havoc on the people and communities filing suit. Bringing a case compels them to place their fates in the hands of strangers whose legal language and thinking they often do not understand. They can lose the case, ending up worse than when they started. Or they can win, but suffer backlash. Kenyan torture survivors who sued for compensation because they were rendered unable to work were publicly ostracized as dissemblers and money-grubbers.

Most significantly, the study reveals that litigation should be viewed not as a single legal

intervention, but as something that must be mutually reinforcing with social movements. The judge presiding in the case to allow pregnant mothers in South Africa ready access to HIV/AIDS drugs may have been influenced by the sea of pregnant mothers in matching t-shirts, chanting for their rights outside the courthouse. At the same time, those pregnant women could not have secured the drugs without recourse to the courts. With such symbiosis, sometimes the threat of litigation alone can bring the desired results.

Ultimately, the study encourages retiring the binary notion of “winning” or “losing” a case. Instead, around the world, effective practitioners see opportunities to add value, or “win,” at various stages of the often lengthy process. When carefully crafted, strategic litigation can ensure that even a negative judgment can provide complainants with a sense of pride and accomplishment that can inspire others to challenge injustice in their own way.

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## **Executive Summary**

If the arsenal for defending human rights globally is made up of diverse swords and shields, one of the most effective—and controversial—is surely strategic human rights litigation. For its supporters, strategic human rights litigation (hereinafter “strategic litigation”) can be an under-appreciated tool of profound empowerment and social change that donors, governments, and civil society advocates should exploit more often and more skillfully. For its critics, strategic litigation can be seen as an expensive, time-consuming, risky, unaccountable, and often elitist enterprise that too often fails to advance rights protection in practice and privileges the lawyer’s goals over the client’s. For many others, the competing claims about the relative value of strategic litigation shed little light while sowing confusion and misunderstanding. And for the vast majority of the world’s population, strategic litigation is either unheard of or an unattainable dream.

Currently, the global use of strategic litigation is on a steep upward trajectory. The rapidly growing volume of cases filed and adjudicated and the number of courts available to hear them confirm unequivocally that, “the public interest law movement as become a worldwide phenomenon.” [1] However, precisely during the period when this research has been undertaken, serious questions are being raised about the limits of human rights as a framework for change more generally. [2] As “illiberalism” has become a badge of honor for many, it may seem perverse that the Open Society Foundations would dedicate precious human and financial resources to assessing the long, uncertain, often frustrating project of strategic litigation to advance open society values. After all, the ideals upon which litigation is premised—including respect for the rule of law, impartial fact-finding, and the principle of legal accountability—are increasingly disparaged as unnecessary hindrances to the popular will. Yet law still plays a vital role in defending, fostering, and strengthening open societies. In a world of increasing political intolerance, courts are among the few spaces where power may be challenged, dissent voiced, and independent scrutiny applied. Thus, it may be especially timely, during a moment of fundamental challenge for the human rights movement as a whole, to reflect on the development of strategic litigation as a revolutionary tool and its continuing relevance to the human rights mission.

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Today, around the world, a vast and varied array of tactics is being used to catalyze social change, including street demonstrations, economic and diplomatic sanctions, and public debates, to name

just a few. But political winds change, governments rise and fall, and popular opinion can be opaque, contradictory, and fickle. Court judgments are distinctive because they are legally binding: states are obligated by the force of law to respond. There is no similar obligation to respond to a petition or demonstration. Often considered society's best chance of securing lasting change, litigation engenders high expectations. However, it can also produce unanticipated outcomes and disappointments.

We seek here to interrogate the validity of those expectations—to identify good and cautionary experiences and innovations in the practice of strategic litigation from around the world. Among the principal questions we pose are:

- What contributions to social, political, and legal change has strategic human rights litigation made on particular issues in particular places?
- What were the conditions, circumstances, and manner in which litigation has been pursued (in conjunction with other tools) which enhanced or diminished its contributions?
- To what extent are any insights from those particular experiences of use to advocates for change working on other issues and in other places?
- Can these experiences help us decipher ways to prevent and mitigate human rights problems caused by complex phenomena like political repression and discrimination?

This inquiry draws insights from the findings of more than three years of original, comparative socio-legal research under the banner of the Strategic Litigation Impacts Project, which the Open Society Justice Initiative conceptualized, operationalized, managed, and, together with various partners, funded. [3] The project aspired from its inception to be a contribution to the field by the field.

The inquiry deliberately sought out diversity, to make the most of the comparative research model. This diversity included common law, civil law, and customary law traditions; domestic and regional jurisdictions; individual and peoples' rights; attempts at distributive, procedural, restorative, and retributive justice; litigation on behalf of minority and majority populations; urban and rural populations; areas of law that are well litigated and those that are not; well-established rights and rights whose justiciability is still being accepted; litigation that met its objectives and that which did not. Geographically, the studies examined post-dictatorship democracies in Argentina, Brazil, Greece, Paraguay, and Turkey; post-colonial democracies in Kenya, India, Malaysia, and South Africa; and post-communist democracies in the Czech Republic and Hungary.

Each of the four studies had a specific thematic focus, and each examined three country examples in depth. Adriána Zimová and her team explored the impacts of strategic litigation on Roma school desegregation in the Czech Republic, Greece, and Hungary. Ann Skelton and her team examined attempts to realize equal access to quality education in Brazil, India, and South Africa. Helen Duffy and colleagues focused on the impacts of strategic litigation on torture in custody in Argentina, Kenya, and Turkey. Jérémie Gilbert and his team studied the use of strategic litigation to defend the land rights of indigenous peoples in Kenya, Malaysia, and Paraguay. These are together referred to as the Strategic Litigation Impacts Reports.

The reports' findings consider litigation supported by a variety of funding sources, sometimes including Open Society Foundations entities. [4] They are supplemented with insights from academic literature, legal mobilization theory, illustrations from jurisdictions apart from the 11 countries the inquiry explored in depth, consultations and interviews with practitioners, and original analysis.

Many studies in the field of law and society have examined the impacts of strategic litigation through the lens of the litigator. The point of departure for this inquiry, however, is that litigation is but one of many options for social action and therefore cannot be fully understood in isolation. From

the outset, this inquiry sought to consider the perspectives of many social-change agents, including litigators, complainants, funders, members of social movements, government officials, journalists, and others. (Because of the exigencies of the interview process, there was more data available from some stakeholders, such as litigators, than others, such as judges or journalists.)

This capstone study offers neither a didactic guide for litigators nor a scholarly review. Rather, it is an empirical inquiry based on hundreds of semi-structured interviews conducted by independent experts in an attempt to provide a broad range of perspectives from diverse stakeholders. This research seeks to take due account of the wealth of academic studies on this topic, and builds upon an impressive body of case studies. These include the path-breaking Ford Foundation study *Many Roads to Justice: the Law Related Work of Ford Foundation Grantees Around the World*, published in 2000, [5] Helen Duffy's *Strategic Human Rights Litigation: Understanding and Maximising Impact* (2018), [6] and Aryeh Neier's *Only Judgment: The Limits of Strategic Litigation in Social Change* (1982). [7] The study also builds on the thoughtful scholarship of Catherine Albiston, Scott L. Cummings, Charles R. Epp, Marc Galanter, Michael McCann, Gerald N. Rosenberg, Austin Sarat, Stuart A. Scheingold, Kathryn Sikkink, and others (see Appendix C). But first and foremost, it is grounded in the lived experience, perceptions, and aspirations of those seeking change for themselves, their communities, and their clients.

This inquiry seeks to surface complex findings and safeguard against wishful thinking about the value of strategic litigation. Indeed, the research revealed impacts and perceived impacts of wide variety and contextual specificity that have sparked deep debates and soul-searching among the authors, Justice Initiative staff, and our many counterparts in the field. That complexity largely defied attempts to identify broad truths about the practice of strategic human rights litigation as a whole. However, the research did yield insights we have attempted to distill in this paper.

The disaggregated analysis of impact strongly suggests that strategic human rights litigation in the areas studied is not, as some claim, a “hollow hope,” [8] but rather has direct and indirect positive influence in many areas of law, policy, and lived experience. To be sure, the impact of litigation is dependent on many factors. In an attempt to identify which were most influential, these reports sought to cover extensive ground. They addressed first-generation rights, such as the right to protection from torture and from discrimination; second-generation or socio-economic rights, such as the right to education; and third-generation rights, such as the rights of peoples, including indigenous peoples, and the right of ethnic minorities such as the Roma to be free from discrimination in education. The research concludes that the multiplicity of variables attending each individual case defies identification of clear patterns; cases are highly contextual. However, there is some evidence that the nature of the right at issue and of the remedy requested can influence litigation outcomes.

The nature of the issue under judicial scrutiny may mean that some court decisions are more likely to be implemented than others. Richard Abel's landmark examination of the use of law in the struggle against South African apartheid concluded that, “law is far more effective in defending negative freedom than conferring positive liberty; it can restrain the state but rarely compel it.” [9] Thus, successful legal challenges to government action—whether related to official censorship, gay marriage, or capital punishment—may have immediate effect. Other decisions—for example, finding that discrimination exists in hundreds of schools in dozens of localities—may require numerous administrative decisions by a host of decentralized actors to effectuate. Insofar as all of the rights violations under study in this project were perpetrated by multiple actors spread over large geographic areas, it is not surprising that court decisions have not generally yielded swift results.

Unlike areas of law where jurisprudence is relatively inchoate, anti-torture prohibitions are among the oldest and strongest: non-derogable under any circumstance, supported by abundant case law

and numerous implementing and monitoring mechanisms. The use of torture is both a crime and a human rights violation, and therefore subject to both criminal and civil claims. Notwithstanding a revival of political support for torture in some circles in the aftermath of the 9/11 terrorist attacks, there remains a deep and broad social consensus against the practice in many places. Although the rights to education, and to non-discriminatory access to education, have acquired progressively greater legal recognition, there exists less agreement in law as to what constitutes quality education, let alone as to which aspects of quality are legally enforceable.

Rights to access, control, or own land have the most precarious legal status. This is especially so for members of indigenous communities, notwithstanding the historical bonds which tie many such communities to places of residence and/or ancestry. While some land disputes have been litigated for decades, the international legal regime regulating indigenous peoples' land rights is still relatively new and norms largely undomesticated. [10] As a result, litigation in this field offers the prospect of breaking new jurisprudential ground, just as it did decades ago for what are now considered well-enshrined legal standards, such as those for the prohibition of torture and other ill-treatment.

Litigation is not a panacea: it can be frustrating, time-consuming, and ineffective—or even generate a backlash.

The notion that political context can influence the impact of litigation has a long pedigree. [11] In his landmark study, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*, Charles R. Epp emphasized the importance of knowledgeable, well-positioned allies in government and weakly-organized opposition forces. [12] Michael J. Klarman has similarly noted that political backlash is “especially likely when a court decision not only contravenes public opinion but has supporters who are less intensely committed than are its opponents.” [13]

It is axiomatic that strategic litigation wields its greatest direct impacts when the rule of law is already largely respected. It may be equally true that such enabling environments offer alternatives to strategic litigation, from elections to independent media to public protest. By contrast, in societies with limited democratic space and fewer options to express dissent or subject official policy to independent scrutiny, litigation may play a singular role. In short, while strategic litigation may be more *effective* in democratic societies, it may be more *significant* in illiberal societies where it is often one of the few forms of advocacy permitted.

Strategic litigation can generate successes, including material improvements, positive changes in government policy and jurisprudence, and shifts in public attitudes and behaviors concerning human rights. But litigation is not a panacea: it can be frustrating, time-consuming, and ineffective—or even generate a backlash. It is an instrument that becomes more effective when combined with other tools of change and when deployed with skill. Above all, it is a complex subject that defies simplistic bromides and is ripe for further research, thought, and exploration. *Strategic Litigation Impacts: Insights from Global Experience* is designed to assist those involved in or considering using strategic litigation to remedy human rights abuses, as well as those committed to making litigation into a more effective tool of social change.

## Findings

**1. Strategic human rights litigation matters.** Whether viewed from the perspective of its targets or its purported beneficiaries, the reports make clear that strategic litigation has forced the hand of recalcitrant and abusive states. The most positive trend across the studies—that as a result of strategic human rights litigation and related advocacy, some victims of human rights violations received material benefits and felt empowered as rights holders—inspires hope.



**2. Need to shift from a binary to a multidimensional impact model.** One of the principal insights of this inquiry is that the binary “win or lose” understanding of a case’s outcomes is in many ways inadequate. It is unduly limiting, constraining thinking about what advances can be achieved, both inside and outside the courtroom, as a direct and indirect result of litigation. Strategic human rights litigation is instead multi-dimensional, multi-disciplinary, multi-stakeholder, iterative, and composed of several stages.

A simple binary approach fails to take sufficiently into account the challenges of implementation, and the many layers of impact that extend beyond material measures. Many human rights challenges require funding, legislative or administrative changes, as well as political will. The precise meaning of a ruling is almost always open to interpretation. In evaluating the impacts of litigation, it is important to keep in mind that no change is easy, and that executive and legislative bodies often have challenges, as do courts, in securing meaningful implementation of their decisions. [14] This understanding opens up space for creative strategic thinking, partnerships, and activism that could substantially enrich efforts to advance human rights and legal empowerment.

**3. This multidimensional model—capturing the myriad outcomes from direct to indirect, positive to detrimental, predictable to unforeseen—comprises three broad categories of impact: material, instrumental, and non-material.** Specifically:

- **Material changes** for individual petitioners and affected communities, such as compensation for harm, transfer of land, an order that perpetrators be prosecuted, or the disclosure of information as the result of discovery;
- **Instrumental changes**, wherein judicial decisions prompt direct and indirect changes in policy, law, jurisprudence, and institutions, including the judiciary itself; and
- **Non-material changes**, such as indirect shifts in attitudes, behaviors, discourse, and community empowerment. These include impacts on the complainants’ sense of empowerment and agency, or in the behavior and attitudes of government officials, or in the direction or contours of public discourse, including through the demonstrative power of the rule of law in action.

**4. Strategic human rights litigation is a process, not a single legal intervention.** More than a final judgment, strategic litigation is in fact a series of phased actions, from case development, to hearings and ruling, to post-judgment implementation (or its absence). Each phase presents its own sets of options and decisions; each requires its own strategies and can generate a range of outcomes. Factors such as political context and the extent of community mobilization can change dramatically over the (typically) long life of a case, so the original strategy may require adjustment by the time judgment is rendered—and afterward. This insight suggests that there are advocacy opportunities for complainants, advocates, and litigators alike at various stages of the process, in ways perhaps not always fully appreciated.

**5. Strategic litigators, potential plaintiffs, and social activists should act in ways that are mutually legitimizing and reinforcing.** When it comes to strategic human rights litigation, a broad, holistic, multi-stakeholder strategy is ultimately more determinative of positive impact than the legal strategy alone. Although coordinating human rights litigation with other actions to secure positive change can present challenges, it generally enhances litigation’s impact.

**6. A strategy of filing mass or iterative cases is often more effective than seeking a single landmark judgment.** Given the scale of rights-related challenges litigation often takes on, it is not surprising that more than one judgment may be required to bring about change. Some of the greatest rights advances have come through repeated litigation that sensitized judges and built popular awareness gradually. While this may seem obvious, it is often not part of strategic planning,

whether for lack of funds, poor communication, inexperience, or a combination of these and other factors.

**7. Strategic value can be derived from a case after the fact.** Although our research sought to identify cases that were consciously aimed at achieving rights-related changes above and beyond relief for the named plaintiff(s), researchers found that many significant judgments actually commenced with more limited objectives. In other words, strategic value can be drawn from a case retroactively. The insight that strategic human rights cases are not always intentionally strategic does not diminish the importance of planning and forethought in undertaking litigation as part of an effective human rights strategy. It does, however, underscore that some change, including through litigation, is the product of opportunistic and/or organic work whose value may become apparent only with the passage of time.

**8. While litigators are required, strategic litigation is most effective when carried out principally for, and together with, non-litigators.** At various points in the process, the litigator may play multiple roles and may appropriately defer to and/or collaborate with others, whether community organizers, researchers, fundraisers, members of the media, or spokespersons. A common theme of field interviews was that litigators were most effective when they were embedded within the community on whose behalf they were working, and embraced some non-legal strategies. While the technical expertise provided by litigators can be of significant value, some felt lawyers missed opportunities for impact, or even made matters worse for their clients, by failing to engage sufficiently, or by disengaging prematurely. To be sure, there is a broad array of appropriate roles for litigators to play. Nonetheless, the research consistently suggested that there is demonstrable value in humility about the essential but limited contribution of law to the struggle for social change.

In conclusion, it is hoped that the Strategic Litigation Impacts Studies may lead to a more effective use of strategic litigation as a complementary strategy to achieve social change. But we are well aware that strategic litigation is no magic potion and that the field would benefit from more—and more rigorous—thinking. This reflection, then, is offered as one step toward developing a better shared understanding of the promise and pitfalls of this vital, albeit imperfect, civil society tool.

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## Footnotes

[1] Public Law Project, *Guide to Strategic Litigation*, 2014, p. 5, at <http://www.publiclawproject.org.uk/data/resources/153/Guide-to-Strategic-Litigation.pdf>

[2] See, e.g, Zeid Ra'ad Al Hussein, "'Human Rights no longer treated as a priority, but as a pariah,'" Zeid tells 25<sup>th</sup> anniversary gathering in Vienna," press release and speech, May 22, 2018, at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23117&LangID=E>. Martín Abregu, "What Strengthening Human Rights Has to Do with Challenging Inequality," May 22, 2017, at <https://www.fordfoundation.org/ideas/equals-change-blog/posts/what-strengtheninghuman-rights-has-to-do-with-challenging-inequality/>. ("Human rights standards, as a moral barrier to authoritarianism, may be extremely effective in the battleground of ideas. But those same standards are not that effective when there is a need to disentangle a complex system of socioeconomic norms and practices.") Chris Stone, "On Wiktor Osiatynski and the Limits of Human Rights," at <https://www.opensocietyfoundations.org/voices/wiktor-osiaty-ski-and-limits-human-rights> (noting, with reference to Wiktor Osiatynski, "the diminishing utility of human rights claims in an age when both liberal and illiberal democracies had replaced dictatorships as the most prominent violators of human rights").

[3] The Justice Initiative gratefully acknowledges the collaboration and generous co-funding of the Roma Education Fund and OSF partner entities the Asia Pacific Regional Program, the Education Support Program, the Latin America Program, Open Society Foundation—South Africa, Roma Initiatives, and others.

[4] With the exception of the *D.H. and Others v. the Czech Republic* case, it does not examine the Justice Initiative's own litigation practice. A separate internal learning and self-reflection process has accompanied the research.

[5] Mary McClymont and Stephen Golub, eds., *Many Roads to Justice: The Law-Related Work of Ford Foundations Grantees Around the World*, the Ford Foundation, 2000.

[6] Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact*, Hart Publishing, 2018.

[7] Aryeh Neier, *Only Judgment: The Limits of Strategic Litigation in Social Change*, International Debate Education Association, 1982.

[8] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?*, University of Chicago Press, 2008.

[9] Richard L. Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994*, Routledge, Taylor & Francis Group, 1995, p. 538. See id. (A public interest law group "might persuade [South African] courts to extend §10 rights to migrant workers and their families, but it could not assure them jobs, housing, schools, transportation or safety.")

[10] International Labor Organization Convention 169 (concerning indigenous and tribal peoples) was adopted in 1989 and the United National Declaration on the Rights of Indigenous Peoples only in 2007. The case law is evolving rapidly. As the study notes, "only in the last five years, important rulings on indigenous peoples' land rights have been adopted by the High Court of Belize, the Supreme Court of India, the Constitutional Court of Ecuador, the Constitutional Court of Colombia and the Constitutional Court of Indonesia." Open Society Justice Initiative, *Strategic Litigation Impacts: Indigenous Peoples' Land Rights*, Open Society Foundations, 2017, p. 24.



[11] See, e.g., Scott Cummins and Deborah Rhode, "Public Interest Litigation," *Fordham Urban Law Journal*, 2009, p. 609 ("in order to evaluate the social change potential of litigation in a given circumstance, it is necessary to examine the conditions—political, economic, cultural and organizational—within which a lawsuit operates"). Our empirical findings are not dissimilar from Rosenberg's argument that U.S. court decisions are likely to bring about significant social change only when: (i) there is ample judicial precedent for bold action; (ii) the legislative and executive branches are supportive; and (iii) a mix of citizen support and low opposition. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, p. 36; see also Michael W. McCann, "Reform Litigation on Trial," in 17 *Law and Social Inquiry* 715, 717, 1992.

[12] Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, University of Chicago Press, 1998.

[13] Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash and the Struggle for Same-Sex Marriage* Oxford University Press, 2013, p. 172.

[14] See Scott Cummings, "Empirical Studies of Law and Social Change," 2013 *Wisconsin Law Review* 171, 199, 2013 (underscoring importance of "judg[ing] output measures" while taking into "consideration ... how they fare relative to viable alternatives").