

# Strategic Litigation Impacts



**INSIGHTS FROM GLOBAL EXPERIENCE**

OPEN SOCIETY JUSTICE INITIATIVE



# Strategic Litigation Impacts

## Insights from Global Experience



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**Open Society Justice Initiative**

**OPEN SOCIETY**  
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# Foreword

As a woman of color growing up in apartheid South Africa, justice and human dignity always spoke to me in the language of the law. This may be paradoxical, as the law itself, demanding the unequal treatment of people such as myself based on race, was inherently unjust. Indeed, the first time I entered a judge's chambers was when I walked into my own office at the South African High Court in 1995.

Over the years, I have witnessed firsthand the multifaceted value of strategic human rights litigation from different perspectives—as an activist and lawyer for victims of torture and women's rights, as a national and then an international judge, and as UN High Commissioner for Human Rights. In the 1970s, litigation I pioneered secured the right of political prisoners on Robben Island, including Nelson Mandela, to access to counsel. A quarter century later, I was proud to serve on the panel of the International Criminal Tribunal for Rwanda that found for the first time that rape and sexual assault could constitute acts of genocide.

These cases produced real and meaningful change for victims of severe rights violations. At the same time, I cannot but recognize the failure of the courts to mete out justice for all.

This Open Society Justice Initiative reflection on global experience using strategic human rights litigation brings us an important step closer to an authentic understanding of the role of the courts in the fulfillment of human rights. It does so in part by taking the law in context, as one of several possible catalysts of social change, including activism and politics. But its true innovation may be that it understands “impact” as a series of resonating results defined by all stakeholders, not just litigators, and across a broad spectrum of issue areas and geographies. Together with partners, the Justice Initiative invited hundreds of people around the world to share their views through international convenings and interviews, and captured them in four thematic reports: on Roma rights,

equal access to quality education, indigenous peoples' land rights, and torture in custody. Instead of measuring impacts through a binary balance of judicial "wins" and "losses," these Justice Initiative studies consider impacts in different dimensions, and through the lens of those in the best position to judge: victims of rights violations, their attorneys, the judges who heard the cases, the journalists who covered them, the officials who translated rulings into law and policy, and the communities of parents, teachers, indigenous peoples, and torture survivors who were affected—positively and, sometimes, negatively.

The Justice Initiative's research is consequential and timely for a number of reasons. Let me highlight three.

First, in a time of growing criticism aimed at many traditional strategies of the international human rights movement, this essay invites rights advocates to engage in self-examination as a means of shifting from defensive denial to renewal, rebuilding, and strengthening of their toolbox.

Second, this body of research affirms in rich and vivid detail something we have long known but often failed to appreciate: litigation does not occur in a vacuum. To the contrary, it is rooted in often contentious social and political struggles that shape and define how legal action is understood and what it can achieve. Litigants are more likely to generate positive results when they view litigation as one strand of a more comprehensive, and often more complicated, array of pathways to change.

Finally, the paper proposes a new taxonomy of impacts that opens the door to more creative approaches to strategic human rights litigation and even more helpful and sensitively calibrated donor support. Material remedies, such as forcing the government of South Africa to deliver textbooks and furniture to mud schools, represent essential, measurable success. But so too do the less tangible but equally critical empowerment and rights awareness of the youth movement that brought and monitored compliance with the judicial decisions. Even if torture persists to varying degrees in Argentina and Kenya, legal challenges have helped shift popular opinion away from blaming the victim to demanding accountability for the perpetrator, creating a social environment that is generally hostile to the use of brutality by the state.

We are at a moment of great peril for the future of human rights. The practical experience surfaced in this Justice Initiative study is a critical resource for rights defenders across the globe seeking to combat demagoguery, unbridled nationalism, and populism on a scale not seen since the Second World War. Drawing on hard-won lessons from four continents, this research can help lawyers and other actors alike improve good practice in litigation as an essential tool of rights advocacy. I invite you to join me in working to translate the insights from this paper into action.

Navanethem Pillay

*Former UN High Commissioner for Human Rights*

# 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 has become a worldwide phenomenon.”<sup>2</sup> 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.<sup>3</sup> 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,

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to reflect on the development of strategic litigation as a revolutionary tool and its continuing relevance to the human rights mission.

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.<sup>4</sup> 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.<sup>5</sup> 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,<sup>6</sup> Helen Duffy's *Strategic Human Rights Litigation: Understanding and Maximising*

*Impact* (2018),<sup>7</sup> and Aryeh Neier's *Only Judgment: The Limits of Strategic Litigation in Social Change* (1982).<sup>8</sup> 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,”<sup>9</sup> 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.”<sup>10</sup> 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.<sup>11</sup> 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.

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

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The notion that political context can influence the impact of litigation has a long pedigree.<sup>12</sup> 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.<sup>13</sup> 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.”<sup>14</sup>

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.<sup>15</sup> 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.

# About the Strategic Litigation Impacts Inquiry

## Strategic Human Rights Litigation and the Open Society Foundations

In 2014, the Open Society Justice Initiative—a human rights law center housed within the Open Society Foundations—undertook a broad consultation with staff, partners, and legal experts around the world to try to gain insight into the questions, “What are the actual impacts of strategic human rights litigation as one of many social-change tools, and how were those impacts achieved?” We then sought answers from the perspective not just of those who litigate but from many sectors of society, and compiled those answers in four thematic studies.

This capstone essay is a reflection on a four-volume series examining the answers, in respect of the impacts of strategic human rights litigation (or, hereinafter, “strategic litigation”) in four fields of human rights around the world. It cannot do justice to the richness of the scores of cases elaborated in the four thematic reports (see Appendix B), all of which are consequential in their own right, but which are mostly known in their own field or country. The reader is encouraged to consider those reports in conjunction with this paper. *Insights from Global Experience* also draws on cases and scholarship not referenced in the four thematic studies.

The first of the four reports, *Strategic Litigation Impacts: Roma School Desegregation* (2016), was written by Adriána Zimová. It looks at efforts to end discrimination against Roma schoolchildren in the Czech Republic, Greece, and Hungary.

It is available online at <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-roma-school-desegregation>.

The second, *Strategic Litigation Impacts: Equal Access to Quality Education* (2017), by Ann Skelton, examines the struggle for education justice in Brazil, India, and South Africa. It is available at <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-equal-access-quality-education>.

The third, *Strategic Litigation Impacts: Indigenous Peoples' Land Rights* (2017), by Jérémie Gilbert, explores the experiences of advocates and indigenous communities in Kenya, Malaysia, and Paraguay. It is available online at <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-indigenous-peoples-land-rights>.

The fourth, *Strategic Litigation Impacts: Torture in Custody* (2017), by Helen Duffy, investigates strategic litigation efforts to prevent and seek accountability for torture and other ill-treatment in places of detention in Argentina, Kenya, and Turkey. It is available online at <https://www.opensocietyfoundations.org/reports/strategic-litigation-impacts-torture-custody>.

The inquiry into strategic litigation impacts flows equally, if less directly, from several other streams of the Open Society Justice Initiative's work. Since 2003, the Justice Initiative has litigated and provided third-party interventions in scores of human rights legal proceedings around the world.<sup>16</sup> Its team of in-house litigators has worked with activists and lawyers in numerous jurisdictions to advance the prohibitions against torture and all forms of discrimination, as well as the rights to freedom of information, expression, protest, assembly, and association, and to develop legal norms relating to counter-terrorism and national security. Justice Initiative staff have also taught a week-long course in strategic human rights litigation at Central European University. A past curriculum is available on the university's website [https://summeruniversity.ceu.edu/sites/default/files/course\\_files/CEU%202017%20Proposed%20Curriculum-RS-1.18.17.pdf](https://summeruniversity.ceu.edu/sites/default/files/course_files/CEU%202017%20Proposed%20Curriculum-RS-1.18.17.pdf). James A. Goldston, executive director of the Justice Initiative and co-author of this study, also co-teaches a course on Strategic Human Rights Litigation at the New York University School of Law.

The Justice Initiative has also contributed to thinking about the implementation of human rights judgments and judicial decisions. *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (2010) uses empirical data as well as interviews to offer insights into how to translate the verdicts of the world's four human rights systems into meaningful change on the ground. *From Rights to Remedies: Structures and Strategies for Implementing International Human Rights Decisions* (2013) examines what it takes at national level—within the executive branch, legislatures, and domestic courts—to thwart or promote implementation.

The Justice Initiative's work in the field of legal empowerment also inspires much of our interest in the impacts of strategic human rights litigation. The Justice Initiative



and its partners across the Open Society Foundations (OSF) have long championed community-based legal services as a fundamental means of insuring access to justice and strengthening rights awareness around the world.

The use of strategic litigation to advance human rights is also of keen interest to OSF as a philanthropy. Since 2006, OSF has invested around USD \$35 million in strategic human rights litigation as one manifestation of its support.

## Methodology

Given OSF's long-standing support for and practice of strategic litigation, it was critical to the value and credibility of the inquiry that the research process include every possible effort to mitigate institutional bias. This project was therefore structured to ensure ample participation by experts and activists who were not previously affiliated with OSF. To ensure the research was intellectually rigorous and to safeguard its methodological integrity, each study was conducted by teams of independent researchers. Each team comprised a lead author and one or two field researchers in each of the three target countries. None of them was on the staff of or previously funded by the Open Society Foundations. To the extent possible, each team comprised expertise from a variety of fields, including law, political science, sociology, and geography. Each researcher conducted between 12 and 50 interviews over the course of three to six months of fieldwork and legal analysis. All field researchers conducted their research using the dominant language of their focus country, except in two cases where other languages were used (Guaraní and Romanes).

The research methodology and findings were scrutinized by five external advisory panels, comprising a total of 22 academics, litigators, and activists. Advisory panel members commented on all relevant drafts and discussed progress at meetings that were convened 2–3 times a year between May 2014 and December 2016. Advisors were selected for their high levels of expertise, independence from OSF, and subject-matter knowledge that complemented the expertise of the other advisors serving on their panel. Most advisors received a small honorarium for their time and expertise, although several served without compensation.

Preliminary research findings were challenged and enriched at two- or three-day group discussions involving some 40 litigators, judges, practitioners, activists, plaintiffs, community leaders, and others. Summaries of these peer consultations are publicly available on the Justice Initiative website: on desegregation for Roma pupils in European schools (Budapest, July 2014);<sup>17</sup> on the framing of the inquiry (Palo Alto, USA, December 2014); on equal access to quality education (New Delhi, September 2015);<sup>18</sup> on equal access to quality education in Brazil specifically (São Paulo,

October 2015);<sup>19</sup> on torture in custody (Istanbul, December 2015);<sup>20</sup> and on indigenous peoples' land rights (Nairobi, June 2016).<sup>21</sup>

Research for the inquiry followed a bespoke exploratory, comparative, qualitative methodology based on semi-structured interviews and targeted sampling, devised by members of the Justice Initiative staff and the project's advisory panels. We recognize that much strategic litigation may have a tangential relationship, at best, to the promotion of human rights and justice,<sup>22</sup> and that it is challenging and often impossible

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to establish causative or even correlative relationships between a judicial decision and subsequent changes. In response to that challenge, the inquiry used overwhelmingly qualitative methods to determine impact. The inquiry also drew heavily on legal research and primary source analysis.

The studies followed the collective action research model, a methodological approach that aims to solve a problem ("How can we litigate human rights cases more effectively?") through collaborative inquiry, often as part of a "community of practice," and to improve the way problems are solved.<sup>23</sup> It is our conviction that good research is as much about the process of shared inquiry as about its outputs and that the practice of strategic human rights litigation benefits from shared learning among stakeholders.

The semi-structured interviews were framed around a normative questionnaire (see Appendix A). It was not possible to interview the same number of people in each stakeholder group (complainants, litigators, judges, teachers, etc.), so no direct comparisons across the studies should be attempted.

Over months of consultations in 2013–2015, Justice Initiative staff and, later, the inquiry's advisory panels concluded that, given the highly contextual nature of strategic litigation, it would be more illuminating to examine rights *struggles*, rather than individual cases or groups of cases.

The information and counsel that went into the selection of the rights themes, jurisdictions, and cases at the heart of the research have been, in many ways, as valuable as the field research and writing. Staff and consultants conducted preliminary desk research on a broad spectrum of rights areas for which a body of strategically generated case law already existed. Of primary interest were public health, the rights of people with disabilities, the death penalty, and housing rights, in addition to the four ultimately selected: Roma and education desegregation, equal access to quality education, indigenous peoples' land rights, and torture in custody. Selection of the four topics that were ultimately pursued was based on the following criteria:

1. **Demand:** Consultation with experts revealed demonstrable interest from litigators and rights advocates in using and learning from the inquiry;
2. **Self-consciously strategic:** The efforts were understood, at least by some within their national context, as being significant attempts to bring about change through litigation—whether or not they were successful;
3. **Diversity:** The situations examined were selected, as a totality, to illustrate the greatest possible geographical, thematic, and jurisprudential diversity of global experience.
4. **Feasibility:** The studies offered the potential for our researchers to gain access to lawyers, clients, judges, affected communities, and other relevant parties without undue risk to them or the respondents and in accordance with the Open Society Justice Initiative’s principles for ethical research.

## What Do We Mean by “Strategic Human Rights Litigation”?

We use the term “litigation” here to address court-centric advocacy before judicial officers applying law to facts. This definition does not include submissions to legislative committees, executive bodies, or other institutions that do not have a judicial or quasi-judicial character. The phrase “strategic human rights litigation” can refer to different activities and is often used interchangeably with other terms, such as “impact litigation,” “cause lawyering,” “public interest litigation,” “public policy litigation,” and “human rights litigation.” For the purposes of this essay, the working definition of “strategic human rights litigation” is legal action in a court that is consciously aimed at achieving rights-related changes in law, policy, practice, and/or public awareness above and beyond relief for the named plaintiff(s).

Litigation that is “strategic” is rooted in a conscious process of working through advocacy objectives and the means to accomplish them, of which litigation is often but one. Ideally, such a process involves lawyers and many other actors, considers the political and social context within which the advocacy takes place, takes a long view, and deploys the full range of tools available. Such an approach can create value regardless of the judicial outcome, in part because it may include the option to delay litigation, to accept a friendly settlement, or not to litigate at all, and to use court-centered action in concert with other social-change agents, such as direct advocacy with governments, street rallies, and voting.

Indeed, inaction can be good legal strategy. Choosing not to litigate can, for example, conserve resources, focus energies on more productive paths to change,

protect complainants when retaliation for filing seems imminent, or stall for time until a more favorable jurisdiction opens up or a more knowledgeable or progressive judge becomes available to hear the case. Some observers believe that legal action is often “most successful when it works as an unfulfilled threat.”<sup>24</sup> Lawyers confirm that, when backed up by the actuality of litigation when needed, the judicious threat to sue is often far more effective in securing government compliance than regularly going to court. Education justice litigator and report author Ann Skelton describes the phenomenon of strategic inaction:

A... case we [at the Centre for Child Law] chose not to bring was an effort to prohibit corporal punishment in the home. A bill to this effect had failed in Parliament. We knew that, if we failed in court, we would fail not just for South Africa, but for Africa as a whole. Because everyone is watching what everyone else is doing. So we did not bring the case, because four judges left the Constitutional Court at once. Three of them we thought would have been with us, and we did not really know the new judges. But our feeling was that the new judges might be more conservative on family issues. (Although in the end, our fears have not been fully realized.) So we refrained from bringing this case in order not to create a negative precedent.... We are still working to address corporal punishment in the home, but we don't believe litigation is the way to go. First we have an opportunity to work with Parliament. Maybe in a few years we will have to go to court.<sup>25</sup>

## **What Do We Mean by “Impact”?**

In the context of this study, “impact” is intended to be broadly synonymous with the terms “effect,” “result,” and “outcome.” It is not understood to be a single, time-bound occurrence (such as the “impact” of a car hitting a tree), but to accommodate all open-ended, iterative, subjective interpretations and positive, negative, and neutral meanings. Throughout this report, we use both “impact” and “impacts” (plural) in recognition of the complexity and often continuing resonance of many case outcomes.

It is instructive to differentiate strategy from impact. Some cases start with the conscious aim (strategy) of far-reaching impacts, but never fulfill their ambition. Others result in broad impacts, despite beginning with limited or no strategic goals. Some cases become strategic over the course of litigation, as aims change, opportunities emerge, and a more conscious effort to utilize other tools evolves. Indeed, the research concludes that across highly diverse areas of human rights law, a number of previously inchoate or discrete litigation actions were launched without great ambitions, but came to be seen as vehicles for broader social change once they reached higher levels of the national,

regional, or international court system and were joined with other advocacy tools. Often, a judgment viewed as effective can inspire further litigation, triggering a cycle. And as mentioned, some litigation strategies never result in actual litigation at all.

While not all human rights litigation is necessarily strategic, it is equally true that strategic human rights litigation is not always effective in the way that was intended. A strategy is often essential to secure impact, but strategy alone is not sufficient. Many exogenous variables beyond the legal merits of a case influence the impacts of court decisions. A range of factors—including the personal values and capacity of the individual judge assigned to a case, advocates’ sophistication in combining litigation with other tools, the political climate, popular support, and sheer serendipity—can shape a case’s outcomes as much as any strategy.

**How Do We Measure Impact?**

As the field research amply illustrates, “impact” is subjective and may only be in the eye of the beholder. But for the sake of further inquiry, three broad categories may accommodate its complexities: material, instrumental, and non-material impact.

Different stakeholders often affixed very different values to identical juridical outcomes: what was a great success to some was a bitter disappointment to others, and individuals’ assessments of a case sometimes changed over time. The authors, too, are susceptible to their own biases. The studies, however well-intended and deliberately self-critical, must be understood in that cold light.

We have benefited from the thoughtful taxonomies developed by scholars who have also grappled with this conundrum. Over the course of many conversations with advisors and partners, we applied a working three-part typology at the start of the research, looking at changes in policy, practice, and mobilization. We discovered that one category can bleed into another, and reasonable people can disagree about where one or another impact should fit. After much deliberation, our taxonomy evolved into three different categories of impact: material, instrumental, and non-material, which are explained and illustrated below. Further research, and others’ own experience, may suggest still other categories. We welcome the debate and efforts to continually improve the model.

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Sherrilyn Ifill, president and director-counsel of the NAACP Legal Defense and Educational Fund, has suggested that strategic litigation’s very invisibility in certain

contexts is evidence of its influence: “The reason why people criticize public law litigation in [the U.S.] is because the effects of it have become ubiquitous... It’s almost become like air... The success of your work can become so deeply embedded that it’s no longer understood as being connected to the work of communities that sacrificed and lawyers that litigated and so forth... It’s important to remind people of that. There is no metric for the free stuff that we’ve given.”<sup>26</sup>

With these caveats in mind, the following discussion seeks to distill the key findings from the Justice Initiative’s studies of strategic litigation impacts as well as from our review of related literature and our cumulative experience with the field. It is our hope that this offering will generate ideas and motivation for practitioners working on the topics and the countries addressed in the Strategic Litigation Impacts Reports, but also more generally.

## **The Challenges of Identifying Impacts, Correlation, or Causation**

In some instances, it is possible to draw a direct correlation between a strategic case and specific results. This is of course clearest when specific legal remedies, such as monetary compensation, are ordered and implemented. But generally, it is far more difficult to assert with confidence a correlation, let alone a causal relationship, between strategic litigation and impact. Laws change, prejudices soften or harden, and governments become more or less responsive to human rights concerns for numerous reasons. Indeed, “society changes in so many ways that it is hard to pick out the causal contribution of particular legal acts in many situations.”<sup>27</sup> Thus, the impacts of strategic litigation tend to be unpredictable, unclear, paradoxical, occasionally perverse, and difficult to measure. In arriving at a strategy to achieve a human rights goal, activists generally view the prospect of litigation as but one among a number of potential courses of action. Their challenge is to fit together a group of tools to maximize the positive outcomes under particular circumstances. The complexity of the resulting action cannot be easily untied to determine the unique impact of each element. But as the Strategic Litigation Impacts Reports show, important insights can come from attempting to understand the role of litigation as a tool for change in the field of human rights.

The choice of timeframe for assessment is critical, but may not be obvious.<sup>28</sup> An ever-present challenge in assessing impacts is that they change over time. The impacts of the legal challenge to racial segregation in United States schools have appeared different at successive points over the past six decades. In the late 1950s, the campaign of “massive resistance” marshaled by many Southern states to stymie court-ordered desegregation might have given rise to skepticism that the 1954 Supreme Court ruling in *Brown v. Board of Education of Topeka* would ever be heeded. However, a different

assessment of impact might have been warranted in the mid-1960s when the federal government passed the Civil Rights Act of 1964 and Voting Rights Act of 1965 built on the logic of *Brown*, or in the early 1980s when the number of American children attending segregated schools reached a statistical low point.<sup>29</sup> Then again, by the first decade of the 21<sup>st</sup> century, when many schools experienced re-segregation,<sup>30</sup> *Brown* looked less significant to some.

A related point is the importance of distinguishing post hoc evaluations from the perspectives of actors making choices in real time. As a leading scholar has explained, “In evaluating outcomes of campaigns to mobilize law for change, it is relevant, though not always decisive, to know the conditions propelling the campaigns forward. This means understanding the motives and goals of the lawyers and activists who chose law and how the campaigns were triggered and evolved.... [A]t the moment lawyers and activists elect to pursue law [as a strategy for change], they operate under conditions of deep uncertainty.”<sup>31</sup>

Clearly, assessing the impact of strategic litigation is a complex undertaking in which multiple factors, including timeframe, causality, and individual perspective, can shape perceptions of strategic litigation’s impact or lack thereof. This complexity is magnified when strategic litigation is examined in context, and considered as one possible tool of social change among many—as the next section seeks to do.





### III. Strategic Human Rights Litigation as a Catalyst of Change

In undertaking this assessment, it is important to recall not just how strategic human rights litigation is experienced around the world, but also how rapidly it has become one of global civil society's more significant tools. After some experimentation in the 18<sup>th</sup> century, strategic human rights litigation emerged in earnest only in the second half of the 20<sup>th</sup> century as one of the most powerful innovations in international efforts to prevent and seek accountability for human rights abuses.<sup>32</sup>

What ultimately became known as strategic human rights litigation was forged largely in the crucible of the British anti-slavery movement. In 1772, Lord Mansfield, Chief Justice of the Court of the King's Bench, ruled in the landmark *Somerset v. Stewart* case that slavery was unlawful in England. The implications of the judgment were profound: "[a]s a result [of the *Somerset* decision] over 15,000 slaves in England were liberated."<sup>33</sup> The *Somerset* decision did not just happen. To the contrary, it was the product of determined and calculated efforts by anti-slavery activists to secure an appropriate case that would put the question of slavery's lawfulness squarely before the most respected jurist in England.<sup>34</sup>

Other countries have long experience with litigation aimed at affecting social policy. In the 1870s in Brazil, Luiz Gama, a former slave who had received some informal legal education and had been fired from his job as a government clerk because of his political agitation for the abolition of slavery, helped free over 500 slaves by persistently filing case after case in Brazilian courts.<sup>35</sup>

In the United States, the 1896 judgment of the Supreme Court in *Plessy v. Ferguson*<sup>36</sup> still stands as an example of a carefully planned legal challenge to racial discrimination that failed spectacularly.<sup>37</sup> In upholding segregation in railroad cars in

the state of Louisiana, *Plessy* entrenched Jim Crow laws in public life for several decades, and ultimately spurred the long campaign to overturn it.

Finally, in 1954 the U.S. Supreme Court, in outlawing racial segregation in public schools,<sup>38</sup> gave birth to what became a paradigm for generations of activists seeking to bring about social change through the courts. Interpretations of *Brown v. the Board of Education of Topeka* and its legacy are far from uniform, and they have varied over time. But even those deeply critical of the limited progress litigation has had in desegregating U.S. schools acknowledge *Brown*'s power in galvanizing a national conversation about race relations and the place of race in American public life.<sup>39</sup> Indeed, *Brown*'s influence as a model for how to pursue transformation through litigation has extended beyond the United States.<sup>40</sup>

Despite these and other examples, strategic human rights litigation as we know it today did not come to be widely practiced until the last quarter century. This should not be surprising, given the rather special conditions necessary for litigation in support of human rights to be possible, let alone effective.<sup>41</sup> It has taken historic shifts in global and regional politics—including the birth of the post-World War II normative and institutional structure of human rights, followed by progressive, if still incomplete, democratic advances in broad swaths of Africa, Asia, Europe, and Latin America—to make strategic litigation a viable tool in most places.

As recently as 1949, when the European Court of Human Rights was proposed as a means of preventing the disasters of World War II from being repeated, the United Kingdom Foreign Office warned: “to allow governments to become the object of such potentially vague charges by individuals is to invite Communists, crooks and cranks of every description to bring actions.”<sup>42</sup> Thankfully, that advice was rejected, the U.K. joined the European Court of Human Rights when it was created ten years later, and the past half century is a history of extraordinary advances in the protection of human rights through litigation in Europe and beyond, particularly in countries where constitutional protections of human rights are strong.

## Strategic Litigation's Distinctive Role as a Social-Change Tool

Notwithstanding the proliferation of rights-based litigation in recent years, the reality is that most rights abuses are not addressed in any way. Victims suffer. Perpetrators go unpunished. The judiciary is not engaged. It may therefore be helpful as a point of departure to situate strategic litigation within the wider set of options available to address human rights abuses.

Framed and legitimized by international human rights and humanitarian law and inspired and sustained by the international human rights movement, strategic human rights litigation was conceived as a way to produce legally binding enforcement of states' obligations. Indeed, the very concept of human "rights" implies the entitlement to a legal remedy for violations: courts are a logical means to such ends.

Yet strategic litigation does not exist in a vacuum.

The actions of courts are "just one of many different types of resources and constraints that shape the terms of power struggles among contending groups."<sup>43</sup> Protests, advocacy, research, media campaigns, legislative and administrative lobbying, strategic alliances, even the arts, have all proven to be useful tools of social change.

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Strategic human rights litigation was conceived as a way to produce legally binding enforcement of states' obligations.

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As a lever for social change, litigation operates in a complicated relationship with these other tools.

On the one hand, activists often observe that litigation, because of its risk, cost, and limitations, should generally be deployed after other attempts to find a remedy have failed. Much scholarship "emphasizes that litigation and other official legal actions are most often and effectively utilized as a secondary or supplementary political strategy in social movement struggles."<sup>44</sup> On the other hand, litigation is generally most effective when combined with other problem solving approaches—most importantly media campaigns, advocacy, and attempts to modify legislative or administrative actions. In a robust strategy, litigation and other tools reinforce each other either as serial activities or as part of a complex network supporting positive change.

Context matters enormously. In democracies, it may make more sense, and may well carry greater legitimacy, to seek change through the ballot box rather than the courts. In autocracies, court action may be a waste of time, and even fomenting revolution may seem to some a better course of action.<sup>45</sup> In conflict and immediate post-conflict situations, the judicial system may be in tatters. In high-poverty environments, litigation simply may not be an option. And everywhere, the tried and true tactics of organizing, community building, documenting, and publicizing abuses, and naming and shaming those responsible, may prove effective without the often expensive, time-consuming, inherently risky ordeal of launching a legal case.

Even where a movement does aim to confront legal problems, going to court may not be necessary; rather, legal guidance or research short of court action—whether provided by lawyers, paralegals, or others—may be sufficient. In the relatively small number of instances where litigation is deployed, it is usually complementary to other tactics. For those who seek to build social and political movements, litigation, if undertaken at all, is not an end in itself; it is a means to something else. In sum, for a variety

of reasons, strategic litigation in defense of rights is a narrow subset of the far larger pool of potential responses to rights violations.<sup>46</sup>

Litigation is among the least well understood, and simultaneously most challenging, methods available to promote and protect rights. Some lawyers in particular are too susceptible to what Stuart A. Scheingold, in his classic work on the subject, called “the politics of rights”—“[t]he assumption ... that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and, finally, that realization is tantamount to meaningful change. The myth of rights is, in other words, premised on a direct linking of litigation, rights, and remedies with social change.”<sup>47</sup> Even in countries where judicial power is at its most expansive, courts cannot, and should not be asked to, govern. They can check the executive and legislative branches, but not replace them. All too often, the limited contribution, the real costs, and the potentially negative consequences of litigation are given insufficient consideration.

This is unfortunate, because litigation is a distinctive form of advocacy. The process of articulating claims and securing rulings, framed in the language of legal entitlement and legal obligation, invokes, reaffirms, and at times alters society’s most considered and explicit promises to itself. In this respect, litigation can make a special contribution. Court proceedings are formal affairs imbued with the full authority of the state. Judges provide decisions that derive their legitimacy in part and in principle from evidence and transparent reasoning, not simply ideology or political preference. What judges say about the law often carries more weight than the pronouncements of a powerful NGO, an administrative clerk, or even a senior government official.

While legislation speaks in the general language of policy, it is through litigation that the implications of legal provisions are critically examined as they apply to the practicalities of real life. To be sure, human rights have many dimensions that extend beyond the law: as discourse, as aspiration, as morality, and as politics.<sup>48</sup> But litigation is premised on the notion that those human rights that are codified in law should be applied in practice and enforced by courts.<sup>49</sup> In this sense, strategic litigation is where the human rights rubber hits the road. As Sherrilyn Ifill has noted, “When democratic norms and ethics are brushed aside, law remains. Law demands facts, not spin.... Because whatever you can say about [rights violations] ... on cable news or at a campaign rally, in a court you have to prove it.”<sup>50</sup>

As a result, more so than some other tools, litigation can be an effective bulwark against backsliding, particularly in legal systems (usually, but not always, common law systems) that accord particular weight to judicial precedent. It is harder for a government to overturn a judicial ruling than to impede a public demonstration in favor of better schools, or ignore petitions seeking restitution of ancestral lands, for example.

Litigation seeks to seize upon, and give meaning to, those provisions, norms, and instruments of human rights that are binding upon states.

At the same time, for understandable reasons, the full dimensions of litigation's practice and implications are not always fully appreciated by non-lawyers (or by many lawyers as well). To be sure, there are exceptions, including social and rights activists without formal legal training who have educated themselves about law and litigation, to the point of informally instructing lawyers and others about legal strategy. Still, the procedural and substantive complexities of some areas of law, combined with the clubby, elitist culture of the bar in many countries, have left many activists insufficiently aware of litigation's potential and constraints.

Litigating exemplifies the rule of law in action; the process of litigating can therefore be seen as a contribution to public discourse in and of itself. In many societies, the very demonstration of law's capacity to resolve disputes and vindicate rights through the courts carries political significance. In support of this demonstrative function, a number of social change actors in South Africa consciously use litigation in order to "demythologize law"—to bridge the gap between the grand aspirations of the Constitution and people's lived experiences. Said one:

When the Constitution came into effect, people were more optimistic about what courts and other parts of officialdom could do to change their lives for the better. But now, 20 years later, with a whole new generation of people who have not had access to housing or water or education, why should they believe in the political or the judicial system? We have a rich Constitution and a rich jurisprudence, but they have not been felt by many people. So people find other ways to express themselves. We can't let this continue. We need to show that law can be used to bring people improvement in their lives.<sup>51</sup>

Whether through a *suo moto* ruling by an activist judge or a class-action suit, strategic litigation can create a space for direct confrontation with the state, and can have a degree of visibility that could scarcely be achieved through alternative means. Win or lose, respondents who were otherwise marginalized as impoverished (Roma), illiterate (children), or living on the fringes of society (pastoralists and hunter-gatherers), frequently expressed surprise that litigation provided an opportunity to have their voices heard. Community members in different contexts represented across the studies noted how litigation helped them see that the law could serve not only to protect the powerful, but could at times advance the interests of the marginalized.

As Michael McCann has suggested, "simply constructing compelling rights claims and justifying standing as rights claimants is hardly enough.... Discursive reconstructions of rights must be supported by material organizational power that poses an instrumental *counterweight* to status quo institutionalized hierarchies. This means, of course, that rights claimants must mobilize material resources and support networks—money,

advocacy organizations, allies in other groups and the state, and experts, including lawyers. This mobilization of political and legal resources, whether by defiant individuals or groups, is how rights are made real.”<sup>52</sup>

Notwithstanding its distinctive value, strategic human rights litigation is generally most effective when it plays a complementary role in the search for meaningful recognition and implementation of rights. As heard throughout the interviews, discussions, and research that informed the reports, it is misguided to conceive of, or to pursue, rights-based litigation as an isolated activity, separate from social and political struggle. Rather, scores of respondents suggested it is both possible and necessary to assess the value of strategic rights litigation in light of the reality that “judicial victories are embedded in political struggles; they are neither self-realizing nor self-effectuating; [court] decisions are the beginning of the fight, not the end.”<sup>53</sup> Equally important, however, the research revealed that strategic litigation not only builds upon but helps build social change movements.

# Criticism

The burgeoning use of strategic litigation around the world does not reflect its universal popularity. Indeed, its practitioners were among its most consistent and full-throated critics. While there were clear proponents and detractors, many respondents felt at best ambivalent, noting that the process could yield positive and negative impacts at the

same time. Among other things, they noted, strategic litigation can unduly delay justice, be alienating, expensive, unaccountable, and risky.

One of the most common laments was that litigating takes too long. Some complainants filing on behalf of themselves and others who had survived state torture expressed sadness and frustration that survivors were passing away before a judgment could be rendered.

Those seeking land title complained that while the case dragged on, their ancestral lands and natural resources were being irreparably polluted. Lawyers working pro bono spoke regretfully of having to eventually abandon cases to move on to paying clients. Judges who had become deeply familiar with the facts of a case over time and were therefore well positioned to render an informed judgment died and were replaced, with the onus on the complainant and his/her lawyer to start from scratch, further delaying the proceedings. If justice delayed is justice denied, then victims of human rights violations might arguably do better to seek other means of relief and redress than through strategic litigation.

Another common criticism of strategic litigation is that it is expensive—often prohibitively so. Legal fees, court fees, the costs of securing and/or protecting witnesses, travel and communication costs, and other expenses essential to many legal challenges are typically beyond the means of individual clients. Additionally, strategic human rights cases funded by private individuals, organizations, or law firms raise questions about the tool's legitimacy. For example, some have asserted that wealthy individuals, including OSF's funder, George Soros, and pro bono law firms exert disproportionate influence over lawyers' and indeed entire regional courts' priorities.<sup>54</sup>

Others interviewed for the studies lamented that lawyers and judges were incompetent, financially or politically corrupt, or both. Indeed, many of those interviewed for the studies—particularly interviewees in Kenya and Turkey—argued that corruption in the courts effectively precluded strategic litigation as a viable course of action. (That perception did not stop some strategic litigators from bringing cases, however.)

Some victims and activists expressed concern over their inability to locate or access lawyers to take their cases. Similarly, many lawyers were frustrated that they did not have ready, regular contact with their clients.

Many complainants spoke of litigation as something alien. They could not understand its terminology; its notions of justice were not intuitive; it forced them to be dependent on strangers, such as lawyers and judges, who did not know them and had no personal investment in their fate, yet had ultimate control over it.

These criticisms resonate with academic concerns about litigation's undue tilt toward legalism. Judith N. Shklar, Sam Moyn, and others have cautioned against lawyers' use of the law as something unconnected to political context and other important non-legal dynamics affecting human rights.<sup>55</sup> As Scheingold observed years ago, "Lawyers are ... reinforced in their natural inclinations to think of litigation apart from other political tactics rather than as part of a coordinated strategy."<sup>56</sup> This tendency has been noted by many others, including the Socio-Economic Rights Institute of South Africa (SERI), which found widespread concern that legal practitioners are "heavily inclined towards litigation" and "frequently cultivate an unduly optimistic, even naively romantic view of the law's transformative potential."<sup>57</sup> The Strategic Litigation Impacts Reports and this paper argue against an unduly rosy view of strategic litigation.

At a more theoretical level, too, legal scholars including Catherine Albiston and Michael McCann note that, particularly in common law systems, litigation is too adversarial to serve productive ends in a complicated world of *realpolitik*.<sup>58</sup> More generally, even as rights litigation purports to challenge and overturn unjust power relations, it can also reinforce and legitimize the status quo by appealing to, and operating within, the existing legal system, which can suppress or overturn rights claims bubbling up from below.<sup>59</sup>

Likewise, the central role played by litigators, with their own interests and concerns, often comes under criticism. More than four decades ago, Derrick Bell highlighted the ways in which American civil rights litigators' own aims diverged from those of their clients.<sup>60</sup> In her reflection on the U.S. Alien Tort Act, Beth Van Schaack cautions that, "Members of the plaintiffs' bar, who are perhaps motivated more by the potential high stakes promised by these cases than by ideological or reform goals, are increasingly initiating [impact litigation] suits."<sup>61</sup> Albiston warns: "[L]itigation strategies, regardless of outcome, have the potential to deradicalize and subtly reshape social movements in undesirable ways, all while supporting the status quo. Because these constitutive influences are largely beyond the control and even conscious recognition of movement participants, activists do not always take them into account in the decision to litigate. They should."<sup>62</sup> A particularly damning critique from Gerald N. Rosenberg suggests that, even where litigation has produced celebrated jurisprudential outcomes, it has contributed little or nothing to change on the ground.<sup>63</sup> Given limited time and

resources, dedicating efforts to litigation may detract from other, potentially more effective tools of advocacy and mobilization.

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Strategic human rights litigation can be risky to the client, the jurisprudence, the broader social movement, and to the very human rights values and causes that animate the cases.

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Experience also suggests that undertaking strategic human rights litigation can be risky to the client, the jurisprudence, the broader social movement, and to the very human rights values and causes that animate the cases. Retrogressive judgments, particularly at apex courts, can set negative legal precedents that cannot easily be reversed and may send a message to society that human rights violations are lawful and may continue with impunity.

Good luck and skillful management can mitigate these concerns. But one flaw is inherent in strategic human rights litigation: the litigator is unaccountable to all but the client. When a strategic case is successful, the litigator helped bring about a rights windfall. However when it fails, it can negatively affect not only the client, but many others in whose name the case was brought.

## A Growing Phenomenon

Even as criticism persists, strategic litigation in defense of human rights is expanding into previously untested jurisdictions and new rights fields. Over the past quarter century, the number of cases filed before regional human rights courts and United Nations



treaty bodies has increased steadily.<sup>64</sup> Several courts now struggle with backlog, with the European Court of Human Rights receiving over 53,000 applications in 2016 alone. Cases filed before the newest regional court, the African Court of Human and Peoples' Rights, rose tenfold in a single year (2015). While no reliable data exist about the percentage of cases in national courts that relate to fundamental human rights, that is where almost all human rights cases originate, and many end.<sup>65</sup> This should come as no surprise, given that all regional human rights courts and the UN treaty bodies require that applicants first exhaust all available, effective, and practicable national remedies.

Not only are more cases being brought, but litigation is expanding into new fields, from anti-corruption to international criminal justice, from the right to land to a sustainable environment, from access to citizenship to the rights of persons with intellectual disabilities. It is being pursued, not only in domestic fora, but transnationally through participation in other national court systems, on the assumption that, as national judges increasingly look to comparative as well as international jurisprudence for guidance, strategic litigation in one place may affect norm development elsewhere.<sup>66</sup>

This widening practice is evidenced in the expanding number of organizations born in the past quarter century that devote part or all of their activity to strategic litigation in defense of human rights. Perhaps predictably, some of these organizations have emerged in countries with a common law tradition and/or a history of rights litigation, such as The Gambia,<sup>67</sup> Tanzania,<sup>68</sup> Uganda,<sup>69</sup> South Africa,<sup>70</sup> Israel,<sup>71</sup> Malaysia,<sup>72</sup> Nepal,<sup>73</sup> and Zimbabwe.<sup>74</sup> But in recent years, strategic litigation has gone global, flowering even in countries where the common law principle of *stare decisis* does not hold sway, and which are not traditionally known for the use of court-based advocacy to protect rights.<sup>75</sup>

Continental Europe was hardly obvious ground for the growth of litigation aimed at achieving political aims. For a long time, it was "customary" in many European states for "legislatures [to] monopolise the law-making power and ... courts [to] function as mere administrative agencies, applying and enforcing rules and regulations to the letter of the law."<sup>76</sup> But the emergence of the European Union, and its Court of Justice, changed this dynamic. As a result, today "the questions of judicial review, rights, and the use of litigation in the pursuit of political ends have come to occupy a more central place in Europe.... Thanks to the power of the European Court [of Justice] to stand in judgment of national laws and serve as a vehicle for citizens of the EU to pursue grievances and claim rights ... the political playing field in Europe has truly changed."<sup>77</sup> This change is reflected at the national level, where new organizations dedicated to strategic litigation have come to life in, among other places, Germany,<sup>78</sup> Hungary,<sup>79</sup> Italy,<sup>80</sup> Russia,<sup>81</sup> and Ukraine.<sup>82</sup>

Strategic litigation is practiced vigorously in Commonwealth countries and across sub-Saharan Africa, including in Côte d'Ivoire, Kenya, and Senegal.<sup>83</sup> Despite its civil law tradition, Latin America has a flourishing practice of strategic rights litigation, with

recent examples in Argentina,<sup>84</sup> Brazil,<sup>85</sup> Colombia,<sup>86</sup> Guatemala,<sup>87</sup> Mexico,<sup>88</sup> and Peru.<sup>89</sup> Asia has seen the birth of organizations dedicated to strategic litigation in China,<sup>90</sup> Kyrgyzstan,<sup>91</sup> Kazakhstan,<sup>92</sup> Mongolia,<sup>93</sup> and Thailand.<sup>94</sup>

In the Middle East, the Egyptian Initiative for Personal Rights, founded in 2002, has won major cases in the African Commission of Human and Peoples' Rights and in Egypt's own courts on behalf of victims of unlawful detention and torture, even while under extraordinary political and legal pressure from the state.<sup>95</sup> In Lebanon, "causes once considered lost"—including women's right to nationality, the right of independent unions to exist, and justice for the disappeared—"are being successfully championed in [the] judiciary after years of being shunted aside."<sup>96</sup> As one leading lawyer says, "It's what we call strategic litigation, to get a change in policy."<sup>97</sup> In recent years, litigants have persuaded courts to recognize a union of supermarket employees, allow a forensic expert to examine an alleged mass grave, and transfer Lebanese nationality to the children of a Lebanese woman married to a husband with Egyptian nationality.<sup>98</sup>

Notwithstanding the risks and limitations of strategic litigation, advocates for social change—in the Global North and South, working to advance civil and political, economic, social and cultural rights—are choosing to pursue strategic litigation in growing numbers. Why?

There are surely many structural reasons impelling the growth of strategic litigation. These include the role of "public interest law" in furthering "law and development," "rule of law" and other paradigms that came to prominence in international policymaking and foreign aid in the aftermath of the Cold War.<sup>99</sup> Other factors include the proliferation of regional,<sup>100</sup> sub-regional,<sup>101</sup> and international judicial fora<sup>102</sup> that offer new opportunities for rights-based litigation, and the role of U.S. foundations (including OSF) in fostering strategic litigation in support of the rule of law around the world.<sup>103</sup> Donor funding often fills a gap created by the absence of government-supported legal aid for most legal action aimed at generating policy impact.<sup>104</sup>

Yet external factors explain only so much. Absent genuine and sustained demand on the part of intended beneficiaries, outside efforts to encourage litigation are not likely to succeed. Indeed, the post-World War II field of international development is riddled with failed attempts to export various Northern or Western models of legal institution-building.<sup>105</sup> A distinctive feature of the rise in strategic litigation over the past quarter century is the extent to which it has been driven by the needs and interests of local clients, communities, activists, and lawyers. If in prior years the use of strategic litigation in defense of rights could plausibly be characterized as an Anglo-American "export,"<sup>106</sup> today that seems overly simplistic and inaccurate. Even where such litigation may have been given initial impetus by external funding or example, local actors have invariably stamped this tool with their own distinctive practice, as the Strategic Litigation Impacts Studies illustrate.

## IV. Insights from Global Experience

It is extremely challenging to attempt to draw normative “lessons” from a body of information as rich, complex, and often internally contradictory as that surfaced in the Strategic Litigation Impacts Studies. Yet it is possible at least to identify central findings; below is a summary of the eight main insights gained from both the Justice Initiative’s experience with strategic litigation, and its research across four thematic studies into the use of this tool.

### 1. Strategic Human Rights Litigation Matters

Given the aforementioned critiques, the frequent non-implementation (or partial implementation) of judgments, and the complexity of both engaging in strategic litigation and assessing its impacts, one could be forgiven for doubting the effectiveness of strategic human rights litigation. Some respondents from the ostensible beneficiary communities, such as European Roma and indigenous people, were blunt in dismissing or even ridiculing litigation efforts. But whether viewed from the perspective of its targets or its purported beneficiaries, the studies make clear that strategic litigation at least matters. And it matters in sometimes unanticipated ways.

The very extent to which strategic litigation’s principal targets, including government leaders and other powerful institutions and individuals, go to undermine, shut down, or ignore judicial decisions suggests that, in their view, such litigation is highly consequential. In other words, one way to evaluate the effectiveness of strategic litigation is through the degree of opposition to it.

Regional and international human rights courts, as well as national courts addressing rights issues, have come under withering attack from political figures precisely because strategic litigation has the capacity to embarrass governments, constrain their decision making,<sup>107</sup> force payment of damages, and at times compel them to change

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For at least some governments, strategic litigation may be unwelcome precisely because it cannot be ignored.

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policy or practice. Examples abound of states pushing back against the use of strategic litigation, including the shutdown of the Southern African Development Community Tribunal in 2011 following a decision challenging Zimbabwe's expropriation of land,<sup>108</sup> the heightened criticism of the European Court of Human Rights from Britain and Russia,<sup>109</sup> and the concerted pushback against the Inter-American Commission of Human Rights in 2016.<sup>110</sup> U.S. President Donald Trump's attacks on the federal judiciary for blocking proposed immigration

bans on rights grounds are a particularly extreme confirmation of this phenomenon.<sup>111</sup> These actions suggest that, for at least some governments, strategic litigation may be unwelcome precisely because it cannot be ignored.

At the same time, the research confirms that strategic litigation can be deeply important to the victims of human rights violations. Notwithstanding the reality that much litigation disappoints, individual complainants often value a positive judgment's declaratory vindication of their rights, independent of whether the judgment is fully implemented. At a fundamental level, court judgments can affirm factual narratives that have long been denied or concealed. They can provoke individuals to action. They can alter an individual's or a community's conceptions of their own rights and power, as well as their understandings of what constitutes "discrimination," "ill-treatment," and the "right" of indigenous peoples to their ancestral lands, for example. Indeed, the most positive trend across the studies was that strategic human rights litigation and related advocacy helped many victims receive material benefits and feel empowered as rights bearers.

## 2. 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 both limited and limiting. Strategic human rights litigation is instead multi-dimensional, multi-disciplinary, multi-stakeholder, iterative, and longitudinally segmented.

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.

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.<sup>112</sup> To view strategic litigation simply in terms of wins and losses in the courtroom is to overlook the many effects of litigation that are felt beyond the courtroom. A plaintiff may lose a case, but still derive benefits from being a litigant, or being able to challenge those in power (even if unsuccessfully), or having the opportunity to speak her truth, or gaining an increased understanding of her rights and a greater sense of agency.

This understanding of the ripple effects of strategic litigation opens up space for creative strategic thinking, partnerships, and activism that could substantially enrich efforts to advance human rights and legal empowerment.

### 3. The New Model: Material, Instrumental, and Non-material Impacts

Strategic human rights litigation has myriad impacts: direct and indirect, positive and detrimental, predictable and unforeseen. Hundreds of interviews with diverse stakeholders around the world made clear that strategic litigation's relationship with society is extremely complex, and often quite personal. Two complainants on the same case sometimes had diametrically opposite assessments of how the case affected them. We therefore set about to devise a taxonomy crafted broadly and inclusively to accommodate a comprehensive and nuanced appreciation of all possible types of impacts. The Methodology section of this paper elaborates a tri-partite taxonomy of impacts: material, instrumental, and non-material.

- **Material impacts** include direct changes as a result of the litigation, such as monetary restitution, compensation for harm, transfer of land, an order that perpetrators be prosecuted, or disclosure of information.
- **Instrumental impacts** include changes in policy, law, jurisprudence, and institutions, including the judiciary itself. Instrumental impacts may be understood as results that are indirect but quantifiable. Much as with the passage of a specific law on a specific date that may come years after a judgment is handed down, the judgment has an impact on the instrument of change.
- **Non-material impacts** may be understood as impacts that are indirect and impossible to quantify. These could include changes in the complainants' sense of empowerment and agency; the behavior and attitudes of policymakers, teachers, or police officers toward complainants and the group or movement

they represent; the degree of community cohesion; or the direction and contours of public discourse, including through the demonstrative power of the rule of law in action.

## Material Impacts

Activists turn to strategic litigation because, on occasion, it can produce concrete benefits for clients and affected communities—impacts that can substantially improve their enjoyment of rights. Unlike other types of impact, material benefits are relatively easy

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to request as legal remedies and are almost always positive in nature. Direct material improvements to litigants' personal conditions also tend to be the easiest to evaluate. Yet they are infrequently secured.

Strategic litigation has been an effective tool in achieving the fulfilment of many human rights and prohibitions of rights abuses around the world. Examples abound in the four thematic studies, including shuttering a segregated, Roma-only school in Aspropyrgos,

Greece;<sup>113</sup> generating a 60.7 percent increase in enrollment in child care institutions and pre-schools in Brazil;<sup>114</sup> achieving large reductions in the numbers of out-of-school children in India;<sup>115</sup> erecting monuments to victims of torture in Kenya; and securing new schools, textbooks, desks, and chairs in South Africa.<sup>116</sup> Courts have also put millions of dollars in monetary compensation and damages into the hands of those who survived torture and of the families of those who did not. In a landmark 2013 settlement, for example, the British government paid £19.9 million (about USD \$26 million today) to 5,228 Kenyans who were tortured or suffered other harm during the Mau Mau Uprising against British colonial rule some 50 years earlier.<sup>117</sup>

Even modest financial compensation can have substantial significance for many victims, as a form of recognition and declaratory relief. For example, for Kenyan torture survivors who were “stigmatized, ostracized, and [for whom] even small awards made a big difference,” compensation was transformative in both a symbolic and a very practical sense.<sup>118</sup>

## **School Infrastructure in South African Schools**

*Section 27 v. Minister of Education and*

*Basic Education for All v. Minister of Basic Education (2012)*

*Madzodzo and Others v. Minister of Basic Education and Others (2014)*

South Africa's segregationist apartheid government (1948–1994) used education policy to perpetuate racial inequality. At the time of transition to democracy, white children were taught in classrooms with a student/teacher ratio of about 1:18; the ratio for blacks was about 1:39; almost all teachers for whites were qualified; the same was true for only 15% of teachers for blacks; and state expenditure for basic education was similarly disproportionate. Black students, particularly in the Eastern Cape, often studied in mud huts without electricity, running water, sanitation, textbooks, transportation, and other necessities for learning. Learning outcomes for black children were predictably, disproportionately poor.

In 2008, civil society developed an exceptionally successful strategic litigation model to address these material problems, as well as other important matters of education policy and fundamental rights.

The well-organized grassroots Equal Education movement was founded with chapters across South Africa. A group of unaffiliated but like-minded public-interest litigators began collaborating with the movement to advance education justice, in some cases filing individually, in some cases together, but virtually always in strategic coordination. Together, the coalition has used progressive post-apartheid constitutional guarantees to help South African children realize their right to equal access to quality education.

Since about 2010, the Legal Resource Centre (LRC), the Centre for Child Law at the University of Pretoria, Section 27, and the Socio-Economic Rights Institute have filed cases and amici curiae briefs on behalf of South African primary and secondary school students and their parents and teachers. The Equal Education movement spawned its own legal center, the Equal Education Law Centre, which also litigates on behalf of equality in education.

In short order, they launched a barrage of successful legal attacks to ensure tangible material outcomes, including the provision of safe school buildings, teaching and non-teaching staff, desks and chairs, textbooks, and transportation. In addition, they won access to education for pregnant students, a binding definition of the meaning of “the right to a basic education” in terms of the specific norms and standards that all pupils can expect, and affirmation that education is an immediately realizable fundamental right.

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## ***Disclosure of Information***

Disclosure of information occupies a special place among other tangible outcomes of judicial decisions in strategic human rights cases. Sometimes, information disclosure is ordered as a specific form of relief. In other cases, it is an inevitable byproduct, surfacing as part of the discovery process or at trial.

The disclosure of evidence of human rights abuse can be among the most potent material results of strategic litigation. The information may be in the form of reports, sworn testimony, forensic evidence, statistical data, transcripts, photographs, audio recordings, maps, death certificates, or other tangible documentation. Our research largely accords with scholar César Rodríguez Garavito's theory that strategic litigation has the power to "unlock" information that can then be used to create space and opportunities for other forms of social change.<sup>119</sup> By its very nature, strategic litigation increases the amount and quality of information available about the violations at issue, creating new opportunities to seek redress, monitor state compliance, and generate public understanding of the magnitude of a problem.

More, and more interesting, information can feed media coverage and create greater pressure on governments to respond to a movement's demands. Information surfaced through one court case can be used as the basis for others, fueling a virtuous cycle of justice.

New information can help expose the truth or correct a previously false understanding of reality. In Kenya, following years of state-sponsored torture in the 1980s, journalist Kwamchetsi Makokha observes the contribution of anti-torture litigation to public awareness: "Out of court, the media, which had previously been intimidated and threatened when reporting on allegations of torture under previous regimes, began to play a more open role in the course of the Nyayo House cases. This forced discussion of torture as a weapon of the state into the public domain. The perception cultivated by the state was that torture was against the "bad guys," as a result of which the public showed little moral outrage. The Nyayo House cases revealed that the victims could not readily be classified in this way, thereby 're-educating the public.'"<sup>120</sup>

Efforts to force the desegregation of Roma-only schools in Europe have generated previously unavailable information about ethnic school placement patterns. As the Strategic Litigation Impacts Report on Roma school desegregation points out, "One of the key changes in Hungarian policy stemming from the ECHR's *Horváth and Kiss* judgment is the collection of ethnically disaggregated data" about the composition of students in schools for children with mental disabilities. This information showed that Roma children were 27 times more likely than non-Roma children to be sent to such schools. A Hungarian Ministry of Human Resources official confirmed that the resulting databases of school assignments were indeed established in response to this



court order.<sup>121</sup> As a result, the Hungarian government, the Committee of Ministers of the Council of Europe, and independent monitors now have a more rigorous factual basis for measuring government compliance with the ECHR ruling.

In addition to generating information, litigation can also prompt information collection, a crucial tool for monitoring compliance with human rights obligations. In 2010–2012, a pattern of losses in court prompted the Human Rights Commission of Malaysia (SUHAKAM) to conduct the first-ever national inquiry into indigenous peoples' land rights, increasing government understanding of the issue.<sup>122</sup> Such efforts, according to Strategic Litigation Impacts Report on indigenous land rights, indicate better communication between indigenous peoples and political institutions.<sup>123</sup>

While the strategy of filing claims against the government of Argentina for torture committed during the darkest days of its military dictatorship (1974–1983) proved “largely ineffective,” according to the Strategic Litigation Impacts Report on torture in custody.<sup>124</sup> However, the report notes that litigation prompted the disclosure of government-held information, including judicial approval of the vast numbers of corpses deposited at the morgue, as well as the signatures of those presenting the bodies. Subsequent high-profile interventions from Amnesty International and the Inter-American Commission for Human Rights compelled the government to initiate a truth-seeking process inside Argentina—something that would likely have been impossible in the absence of litigation.<sup>125</sup>

Information surfaced through litigation can then make it possible for other victims to seek justice. For example, documentation of grave crimes that came to light during dictatorship-era litigation in Argentina, when judicial redress was rare, later served as evidence in more successful anti-torture cases that were brought during the country's democratic period.

Indeed, the very fact that someone else has already gone to court provides a substantial and positive domino effect across jurisdictions and victim affinity groups. In Kenya, for example, members of the indigenous Ogiek community, who in 2017 won a major ruling of the African Court of Human and Peoples' Rights, reported that they would never have thought to litigate had they not become aware of the experience of a completely different indigenous community, the Endorois.<sup>126</sup> Similarly, one indigenous community in Paraguay reported learning how to make the most of court orders by drawing upon the experience of prior litigants. Specifically, while indemnity payments were made to the Sawhoyamaxa and the Yakye Axa, “they did not seem to have generated any long-lasting and visible beneficial material impact for the communities. In reaction, the Xákmok Kásek made a collective decision” to use these funds on their

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One indigenous community in Paraguay reported learning how to make the most of court orders by drawing upon the experience of prior litigants.

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own terms, purchasing ten cows to start a community herd and one truck to meet the medical and transportation needs of community members.<sup>127</sup>

Finally, strategic human rights litigation's informative function has proven to have a cumulative material effect. In Argentina, some of the first cases brought to redress abuses under the dictatorship encountered judicial reluctance to overturn a general legislative amnesty. Yet those cases, while not immediately successful, did lead to the disclosure of facts about specific abuses, which over time changed public opinion and ultimately made possible hundreds of prosecutions of those responsible for dictatorship-era abuses.

## ***Caveats***

Notwithstanding these gains, it is important to temper this positive assessment with an understanding of the complexity of every social change effort and the possibility of the negative and unintended consequences of tangible forms of judicial relief. Great care and sustained effort are critical to ensuring that the fruits of litigation are realized. In an interview for this report, South African education economist Nicholas Spaull cautioned that, in certain circumstances, even material outcomes that seem positive may not always be so: "Providing additional remedial teachers to the poorest schools might be justified if it improves learning outcomes, but not if it doesn't. Litigation that forced government to provide remedial teachers that did not improve learning outcomes would be unsuccessful in my opinion. Whereas litigation that ensured functional toilets/buildings/electricity would be successful irrespective of what happened to the learning outcomes."<sup>128</sup>

Indeed, as the studies of indigenous peoples' land rights and custodial torture in particular suggest, material outcomes from litigation can also, perversely be profoundly damaging to the complainant and to the credibility of the legal effort. The research on torture in custody made clear that restitution paid to survivors of torture in countries as diverse as Kenya and Turkey sparked popular resentment toward the recipients, who were often derided as selfish or undeserving.

Similarly, many material gains awarded by courts to complainants are never realized due to states' non-compliance with the terms of judicial orders.<sup>129</sup> One may fairly question the value of material impacts that are ordered but never delivered. In such cases, effective redress may require changes in government institutions and state practice, which are examined in the next section.

## **Instrumental Impacts: Changes in Policy, Jurisprudence, Legislation, and Institutions**

Material results are often a major goal of strategic litigation, certainly for the client. But it is a judgment's measurable but indirect changes to government policy, laws, or institutions that can have the greatest impact on the largest number of people. Truly far-reaching change often requires enabling policies, jurisprudence, institutions (including the judiciary itself), and legislation to translate the benefits of a judicial decision to the lives of those not directly involved in the legal case. In short, changes achieved in these areas often offer the most visible evidence that the ambitious objectives of strategic litigation are (or are not) being fulfilled.

According to global experience captured in the Strategic Litigation Impacts Studies, these instrumental impacts are among the most difficult to achieve. This is in part because they are typically beyond the authority of the court to demand. Instead, they are the purview of entirely different branches of government. The executive controls many policy decisions, for example, and the legislature controls legislation. This division helps explain why strategic human rights litigation is often so ineffective: the courts have no control over the branches of government responsible for implementing court orders. Moreover, global experience suggests that complainants and litigators often overlook instrumental remedies when crafting their legal strategies.

### ***Policy Impacts***

Changes in policy resulting from litigation efforts were among the most common positive impacts evidenced in the Strategic Litigation Impacts Reports.

Litigation played a crucial role in securing recognition of the immediately realizable right to early childhood education in Brazil.<sup>130</sup> In India, it narrowed the definition of students who had “dropped out” of school, thus increasing student placement, and litigation compelled the publication of binding norms and standards for school infrastructure in South Africa. Litigation against torture led governments to waive statutes of limitations in many jurisdictions, including in Argentina<sup>131</sup> and Kenya,<sup>132</sup> making it possible for more victims and their families to seek legal remedies. Litigation has yielded judicial recognition of indigenous customary land rights even where statutory law does not. But, strikingly, indigenous land rights litigation has generated few policy changes in Kenya, Malaysia, or Paraguay, even as it has given rise to new state institutions with a mandate to implement judicial rulings (Kenya) or to address indigenous issues more generally (Malaysia and Paraguay).<sup>133</sup>

One of the clearest policy changes forged through strategic litigation is the adoption of state policy mandating the collection of ethnically disaggregated data in European schools. For years, official refusal to collect—or even condone independent collection of—ethnic data impeded efforts to document and reverse discriminatory practices. This has begun to change, as Greek and Hungarian courts and the European Court of Human Rights have successfully compelled states to dismantle specific parts of the machinery of discrimination. For example, almost immediately after the ECHR ruling in *D.H. and Others v. the Czech Republic* was handed down in 2007, the Czech government began collecting disaggregated data about the ethnic background of all pupils. This provided a quantifiable measure of the disproportionate placement of ethnic Roma students in schools where the curriculum caters to students with mild intellectual disabilities. That data, thereafter collected periodically over time, made it possible to measure whether the government was continuing to segregate Roma in such inferior environments. As the Czech academic and politician Ivan Galal told researchers, “Such surveys would never have had a chance without the [*D.H.*] judgment.”<sup>134</sup>

## CASE STUDY

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### Hungary Adopts Policy on Ethnic Data Collection

*Horváth and Kiss v. Hungary* (2013)

In Hungary, as in many other Eastern European countries, Roma children were assigned to classrooms where they received a separate and inferior education, typically following curricula intended for students with mental disabilities. This phenomenon was well documented. By the early 2000s, Roma students were estimated to be 27 times more likely to be placed into “special” schools than non-Roma.<sup>135</sup>

In a unanimous 2013 ruling, the European Court of Human Rights found Hungary liable for discrimination against Roma regarding their right to education. As a remedy, the government adopted a policy that would allow it to demonstrate that it was reducing that disproportion and bringing its practices into compliance with the ruling. In July 2014, the Hungarian Parliament amended its main education legislation to mandate that expert panels, which diagnose pupils with disability, collect and record ethnically disaggregated data in a centralized database. A Ministry of Human Resources official confirmed that this database was established in response to the *Horváth and Kiss* judgment.<sup>136</sup>

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To be sure, the shaping of government policy is often political and opaque, making it particularly difficult to isolate individual causes as the catalyst for change. Yet it is likely that strategic litigation on behalf of Roma children has contributed to other significant policy outcomes as well. The *D.H.* and *Horváth and Kiss* judgments, together with national litigation in Hungary, helped prompt legislative changes aimed at ensuring the integrity and impartiality of educational diagnostic and testing processes. In September 2016, prompted in part by the *D.H.* ruling and follow-on civil society advocacy, the government approved new amendments to the Czech Education Act designed to provide more support for children with “disabilities or with social disadvantage,” including through limiting the number of children with special educational needs to five per class, and abolishing separate schools and classes for children with mild mental disabilities. The Czech government eventually adopted a policy requiring schools to accept any reasonable proxy to function as identity papers for Roma and to prohibit denial of school access for lack of documents. The authoritative factual findings and legal conclusions rendered by the ECHR in the *D.H.* case were undoubtedly important elements in giving the European Commission, in 2014, the factual basis, legal support, and political cover to launch unprecedented infringement proceedings against the Czech government for alleged failure to comply with the EU Racial Equality Directive.<sup>137</sup> Although ethnic discrimination remains a pervasive phenomenon in Czech schools, “the trend lines suggest, albeit cautiously, gradual improvement in the disproportionate placement of Roma into programs for children with mild mental disability.”<sup>138</sup>

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It is likely that strategic litigation on behalf of Roma children has contributed to other significant policy outcomes as well.

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Litigation against torture in custody has contributed to an equally broad range of legal impacts, including changes in jurisprudence<sup>139</sup> and the adoption of new laws or amendments in Argentina,<sup>140</sup> Kenya,<sup>141</sup> Turkey.<sup>142</sup> It has also led to the nullification of existing laws in Argentina;<sup>143</sup> the criminalization of torture in Kenya;<sup>144</sup> changes in standards of proof, evidence, and/or procedure in Kenya<sup>145</sup> and Turkey;<sup>146</sup> and changes in the statutes of limitation for torture and other ill-treatment in Argentina, Kenya, and Turkey.<sup>147</sup>

Turkey provides a dramatic example of a complete policy shift that likely came about as an indirect result of legal challenges. For decades, the Turkish government denied that its police used torture, although torture was, according to the European Commission on Human Rights (in its 1985 admissibility decision in *France, Norway, Denmark, Sweden, Netherlands v. Turkey*<sup>148</sup>) an unwritten but officially sanctioned administrative state practice. After numerous judgments finding Turkey in breach of its obligations to refrain from torture and to prevent and punish it, “blanket denials gave

way to a stated policy of opposition to torture.... This was epitomized by the new Prime Minister Recep Tayyip Erdoğan's 2003 speech stating that his government would show 'zero tolerance' to torture practices."<sup>149</sup> Following this change in policy, the practice of torture became less routine in Turkey.<sup>150</sup> Unfortunately, while the government's official policy of opposing torture has remained the same, the practice of torture has in fact increased since the political clampdown in Turkey in June 2016. "Cases of torture and ill-treatment in police custody were widely reported through 2017, especially by individuals detained under the anti-terror law, marking a reverse in long-standing progress, despite the government's stated zero tolerance for torture policy."<sup>151</sup>

Argentina also experienced policy shifts on torture as a result of strategic litigation. In July 2004, Argentinian human-rights lawyers filed a complaint before the Inter-American Commission for Human Rights alleging impunity for inhumane conditions of detention and overcrowding in the state of Mendoza.<sup>152</sup> Five months later, the commission took the extraordinary measure of visiting the prisons and subsequently asking the Inter-American Court to add its binding force to provisional measures to protect the inmates' lives and investigate, which it did.<sup>153</sup> According to the Strategic Litigation Impacts Report on torture in custody, one piece of research<sup>154</sup> suggests that broad changes resulted, "including a reduction in the number of violent deaths,<sup>155</sup> creation of new prisons that reduced overcrowding, improvements in health and hygiene conditions, fewer hours of confinement of detainees, educational and work programs for detainees, prison staff training, defense attorneys being allowed to attend disciplinary proceedings, and the production of official information on conditions of detention."<sup>156</sup>

This inquiry found evidence of policy impacts in the field of indigenous land rights as well. In at least one ruling, in 2010, the Inter-American Court of Human Rights ordered the authorities to establish a documentation and registration program for indigenous communities.<sup>157</sup> While obtaining ownership documents continues to require "significant effort and sacrifice to travel" to obtain them, "many people in the community [in Paraguay] now have identity documents" provided by the Department of Identity of the National Police and the rulings have "pushed forward the issue to be addressed by the authorities."<sup>158</sup>

Similarly, the Kenyan government has been notably active in recent years in crafting policy responses to the rights of indigenous peoples to their historic lands. As a direct result of the African Commission for Human and Peoples' Rights condemnation of indigenous community evictions in the 2010 *Endorois* decision, the Endorois initiated implementation hearings to facilitate communication with the state. While difficult to demonstrate causality, it is likely that this and other major judgments against the state may have prompted subsequent policy innovations, such as provision of community development funds, adoption of the Community Land Rights Law (2016), and less frequent denial of birth certificates to Endorois children.

Malaysia provides a clearer example of the causal relationship between judgments from strategic human rights litigation and changes in public policy. The head of the indigenous rights NGO Sarawak Dayak Iban Association observed, “Ever since I have been involved in land rights cases in Sarawak, there have been a lot of changes in the laws and policies, mainly initiated by the government, especially after cases have been decided in courts. One landmark case which was decided in 2000, the case of *Nor Anak Nyawai*—immediately after the case was decided the government amended the Sarawak Land Code.”<sup>159</sup>

Judicial rulings can also cause a ripple effect across policy spheres, reaching influential stakeholders beyond those directly involved in the litigation. For example, legal rulings, among other developments, convinced the

World Bank to amend its lending policies by adding more explicit “special consideration” of the rights of indigenous peoples. The bank’s operations manual now stipulates that the bank has an affirmative responsibility to create an “action plan for legal recognition” of indigenous communities’ ownership of their land before or concurrent with implementation of a development project (Article 17).<sup>160</sup> Edward Dwumfour, a senior environmental specialist working in the World Bank’s country office in Addis Ababa, observed that, “in the design of the safeguard policies, the bank takes cognizance of the pronouncements made by courts and other human rights mechanisms.”<sup>161</sup>

Another example of litigation’s power to generate transformative policy—one that has been noticed by activists from the around the world—was the successful campaign in South Africa for government provision of anti-retroviral treatment to prevent mother-to-child-transmission (MTCT) of the HIV virus. Driven by the Treatment Action Campaign (TAC), this effort has been called “a shining example as to how litigation—when run properly and as part of a series of broader strategies—can achieve social change.”<sup>162</sup>

By 1998, it was estimated that up to 70,000 children were born annually in South Africa with HIV. Infant mortality was on the rise. By 2000, almost a quarter of all pregnant women attending public health facilities in South Africa had HIV. Advocacy groups undertook sustained lobbying of Health Ministry officials to develop and implement a program to prevent MTCT, including face-to-face meetings, public demonstrations, civil disobedience, petitions, the drafting of policy memoranda, and a campaign targeting pharmaceutical companies to reduce essential medicine prices.

In 2001, after years of government hesitancy and then outright denials, TAC launched legal action to demand broader access to the drug Nevirapine. As Steven Budlender and his co-authors have underscored, TAC used litigation as one tool in a larger strategy of social mobilization: “For the TAC, litigation both emerges from and

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Judicial rulings can also cause a ripple effect across policy spheres, reaching influential stakeholders beyond those directly involved in the litigation.

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feeds back into a social context. Resort to litigation is not exclusive of other strategies. Litigation can also help catalyse mobilisation and assist public education on contested issues, as well as bring about direct relief to individuals or classes of applicants.”<sup>163</sup>

In 2002, the Constitutional Court unanimously held that the government had failed to satisfy its obligations to provide people with access to health care in a manner that was reasonable and took account of pressing social needs. The court ordered the government to remove the restrictions on, and to facilitate the use of, Nevirapine at public hospitals and clinics when medically appropriate.

The effect of the court’s judgment was swift and sweeping. As Edwin Cameron, now a Constitutional Court judge and then head of the AIDS Law Project, has observed:

As a matter of political history, the court’s decision was the pivot that eventually forced government to take decisive action in the epidemic. Although it responded grudgingly at first, government eventually gave effect to the ruling. Large-scale provision of ARVs began 30 months later, in December 2004. Today. [...] no one, rich or poor, employed or unemployed, is denied treatment for AIDS because they cannot afford it. The South African government programme to provide antiretroviral medications is the largest publicly provided AIDS treatment programme in the world. This is the most significant practical outcome of the court’s decision. Although too many people are still dying of AIDS, the decision saved many lives....[T]he Nevirapine case materially changed the lives of hundreds of thousands and ultimately millions of people: it enabled them to not die. In this way, the court’s decision had dramatic practical force.<sup>164</sup>

TAC’s influence continues. As of 2016, “3.1 million of the more than 6 million people living with HIV in South Africa are on medication. And that number [of those on medication] is expected to increase.”<sup>165</sup>

These examples illustrate that litigation can both directly and indirectly lead to important changes in government policy.

### ***Jurisprudential and Legislative Impacts***

Perhaps the clearest manifestation of strategic litigation’s instrumental impact can be found in changes in jurisprudence and legislation. Asking a court to expand a legal interpretation or recognize a new right, in common-law and many civil-law systems, can fundamentally alter the legal landscape, for better or for worse.<sup>166</sup> By articulating supportive rationales, offering evidentiary foundations, or responding to objections, positive jurisprudence can make it more difficult for governments to ignore rights with impunity.



## Judgment Changes Criminal Procedure Code—and Prison Conditions—in Argentina

*Verbitsky, Horacio s/ hábeas corpus v. 856. XXXVIII, Federal Supreme Court of Argentina (2004)*

In November 2001, a group of NGOs, coordinated by the Centro de los Estudios Legales y Sociales (CELS), lodged a collective habeas corpus petition arguing that overcrowding and other poor prison conditions in Buenos Aires amounted to a widespread violation of prisoners' rights. The Criminal Court of Cassation rejected the claim. But CELS's subsequent appeal to the Federal Supreme Court of Justice brought significant media attention to the issue of prison conditions. It also drew the involvement of various international organizations, which intervened as *amici curiae*, lending weight to the case. On May 3, 2005, the Federal Supreme Court handed down a wide-reaching and groundbreaking judgment. It found that prison conditions fell short of constitutional and international human rights standards, linking them with the obligations of the state in respect of torture.

The *Verbitsky* case also catalyzed debate on the role of the judiciary and procedural issues that triggered a long process of implementation of the expansive decision. Among other instrumental changes prompted by the litigation, Buenos Aires authorities reformed the criminal procedure code, changing the rule that certain crimes were not subject to the possibility of release. In the end, incarceration rates declined from 211 per 100,000 in 2005 to 185 in 2008. The number of detainees in police stations fell from 6,000 in 2005 to 800 in 2012, and the detention of children in police stations was promptly banned. Equally important were institutional strengthening measures that stemmed from the decision, such as the creation of the Sub-secretariat for Human Rights to track the implementation of the ruling, and the organization of judicial officials' visits to prisons. More information on detention conditions also became available, providing significant tools for future reform efforts.<sup>167</sup>

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The 2001 decision of the High Court (Kuching) in *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* enshrined the concept of native title in Malaysian law, marking a turning point away from the historic mistreatment of indigenous peoples. A year later, in *Sagong Bin Tasi & Ors v. Kerajaan Negeri Selangor & Ors*, the High Court (*Shah Alam*) recognized that indigenous customary land rights have the same legal status as full ownership or land title. This reportedly enabled other indigenous Malaysian communities to enjoy the right to land as well.<sup>168</sup>

In 2010, the Brazilian pre-school movement *Movimento Creche para Todos* won judicial recognition of early childhood education as an immediately realizable right.<sup>169</sup> Strategic litigation also clarified, in 2013, that the right to education in South Africa is immediately, rather than progressively, realizable. That provision not only gave immediate relief to the current generation of children, but ensured that the younger cohort of learners would not fall irretrievably behind in their education while the case dragged on in the courts.<sup>170</sup>

Sometimes judicial rulings change the law in and of themselves. In other cases, judgments prompt legislatures to act. This inquiry suggests that the latter is particularly evident in the field of torture litigation. In *Aguiar de Lapacó v. Argentina*, for example, the

Inter-American Commission on Human Rights held in 1999 that states have a positive obligation to reconstruct the past, including the fate of thousands of people killed and disappeared.<sup>171</sup>

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Litigation pressured the governments of Argentina and Kenya into fulfilling their international legal obligations to prohibit the use of torture and other ill-treatment.

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The reduction of incommunicado detention in Turkey, together with the adoption of other legislative and administrative safeguards against torture, were among the most important developments in that country's efforts to combat torture and ill-treatment. According to the Parliamentary Assembly of the Council of Europe, legislative improvements in criminal procedure laws

relating to the right of access to legal counsel in Turkey "were a direct impact of ECHR cases, notably the *Salduz v. Turkey* application."<sup>172</sup> *Salduz* (2008) also provided the basis for other European states to amend criminal procedure laws, thereby strengthening their anti-torture practices.<sup>173</sup> The Strategic Litigation Impacts Report on torture notes that litigation pressured the governments of Argentina and Kenya into fulfilling their international legal obligations to prohibit the use of torture and other ill-treatment.

Following litigation, Argentina ratified the Optional Protocol to the Convention Against Torture (CAT),<sup>174</sup> and Kenya drafted an anti-torture bill intended to domesticate CAT provisions.<sup>175</sup> Litigation also stimulated adoption in 2014 of Kenya's Victim Protection Act, affording specific redress to torture survivors.<sup>176</sup>

European courts have successfully prompted legislative reform as a way to reduce prison overcrowding. In quick succession, the ECHR used its pilot judgment procedure in the cases of *Torreggiani and Others v. Italy* (2013), *Neshkov and Others v. Bulgaria* (January 2015), and *Varga and Others v. Hungary* (March 2015) to address torture and other abuses resulting from conditions of detention. In its 2013 decision in *Torreggiani*, the ECHR found the government of Italy in violation of the Article 3 prohibition on torture on the basis of prison overcrowding. At the time of the complaint, a state of

emergency had been in place in the prison system for years, and Piacenza prison held more than twice the designated number of inmates. The court found that inmates in Piacenza and Busto Arsizio prisons had only three square meters of personal space, among other inhuman conditions. As a direct result of the *Torreggiani* ruling, the Italian state amended its early release laws, shortened some sentences, and relied more heavily on alternative sentencing methods such as house arrest and electronic bracelets. It also allowed inmates to file grievances about the conditions in which they were being held with a judicial rather than an administrative authority and introduced compensation for persons whose Article 3 rights had been violated. The ECHR has subsequently found Italy's new internal remedies to be sufficient and has turned down applicants who have not exhausted them.

In a different field, litigation's power to galvanize change was similarly evidenced in the 2006 decision of the Inter-American Court of Human Rights in *Claude Reyes v. Chile*.<sup>177</sup> In *Reyes*, the court held that the government's failure to disclose information about a deforestation project in response to an NGO's request violated the right of access to state-held information. While significant as a jurisprudential matter in recognizing an independent right of access to information as part of Article 13 of the American Convention of Human Rights, the judgment has over the past decade sparked political and legislative developments at the regional and national levels throughout the hemisphere.

Before 2006, only three countries in Latin America had right-to-information (RTI) laws in force: Belize, Mexico, and Peru. The *Claude Reyes* judgment led to the adoption of a strong right-to-information law in Chile (2008), followed quickly by the adoption of laws in five other countries: Uruguay (2008), El Salvador (2011), Brazil (2011), Colombia (2014), and Paraguay (2014). In Argentina, an RTI bill has passed the lower chamber of Congress and is being considered by the upper chamber.

In turn, the approval of these national laws has triggered favorable national-level jurisprudence, as well as the 2010 adoption by the Inter-American Commission of Human Rights of a Model Inter-American Law on Access to Information.<sup>178</sup> Litigation following in the wake of *Reyes* has reached the Inter-American Court, allowing it to further broaden the scope of this right and establish higher RTI standards for states.<sup>179</sup>

However, litigation explicitly seeking legislative change has a mixed record. For example, the research on indigenous peoples' land rights revealed that across all three focus countries, changes in jurisprudence "had minimal bearing on the legislative framework: there was no impact on the statutes in Paraguay, a negligible and indirect impact in Kenya, and a negative and restrictive impact in Malaysia. There has been no direct executive or legislative action to give effect to the legal pronouncements on indigenous rights in the three countries."<sup>180</sup>

## Institutional Impacts

All of the Strategic Litigation Impacts Studies found evidence that court orders have led, both directly and indirectly, to a proliferation of formal and informal institutional structures. These fledgling institutions, which can be governmental or non-governmental, are typically designed to facilitate implementation of a judgment through monitoring, decision-making, administering, or advocating. Though some of these mechanisms have genuinely contributed to enhanced rights protection, in practice others have become roadblocks, lacking the mandate, the will, or the resources to exercise proper authority. Frequently conceived of without sufficient, if any, inputs from the complainants and affected communities, regularly under-funded, and sometimes weak and/or corrupt, these institutions can prove more of an empty gesture than a helping hand.

Yet such setbacks have not dimmed the aspirations of many social movements. Civil society has taken advantage of the strategic litigation process, and judgments in particular, to monitor government action or inaction, create political platforms, enhance victim solidarity, launch community services, and self-advocate. Relatedly, international donors have created funding mechanisms and consultative bodies following judicial rulings, in order to support affected communities in negotiating implementation with governments.

## CASE STUDY

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### African Commission Spawns Governmental and Grassroots Structures

#### *Endorois Welfare Council v. Kenya* (2010)

In its 2010 *Endorois* ruling, the African Commission on Human and Peoples' Rights recommended that the Kenyan government grant registration to the Endorois Welfare Council, the organizing entity that had brought the case on behalf of the indigenous community. A year later, the Kenyan government created the Environment and Land Court as a branch of the High Court dedicated to adjudicating the growing number of indigenous land claims cases.<sup>181</sup>

Following the positive ruling in the *Endorois* case, this Kenyan community swung into action, creating an implementation committee to follow and encourage implementation of the judgment, a benefit-sharing committee to determine distribution of compensation, and a Lake Bogoria management committee to manage the distribution of funds. In addition, community members also adopted a draft community decision-making code and are developing bio-cultural protocols to guide community affairs, land management, and revenue-sharing—all issues addressed in the African Commission's ruling.

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Another example of institutional impact is the governmental Selangor Orang Asli Land Task Force, the Malaysian authorities' attempt to protect and gazette all Orang Asli areas within the Selangor state land preserves. Created under pressure following the 2002 ruling in *Sagong bin Tasi and Ors v. Kerajaan Negeri Selangor and Ors*, the task force was established on the basis of consultations with the Orang Asli community, some of whom served on it. The task force was assigned the critical job of protecting and publicly recording all Orang Asli areas in the state as Orang Asli reserves. Unfortunately, in establishing the task force, the negotiating authorities chose to ignore and bypass an existing, traditional decision-making and governing structure, the Lembaga Adat, or Council for Tradition, opting instead to deal directly with the state-sanctioned Village Development and Security Committee (JKKK).<sup>182</sup> The imposition of the state's own governance structure on the indigenous communities affected by the judgment effectively disempowered the community and undermined its cohesion. Thus, an institution given life as a result of strategic litigation failed to fulfill its promise, and in fact undermined an existing indigenous institution.

In Paraguay, after having lost several indigenous land cases before the Inter-American Court of Human Rights, the government established a special institution charged with monitoring and reporting on progress in implementing the judgments of international courts. The Inter-institutional Commission Responsible for the Execution of Necessary Actions for Compliance with International Rulings and Recommendations (the Spanish acronym is CICSI) has produced few concrete steps toward implementation. But its creation may yet reflect a change in the government's attitude toward complying with international rulings.<sup>183</sup>

In Argentina, as a direct result of litigation addressing prison conditions, torture, and ill-treatment, the executive established a number of institutions, including the Provincial Mechanism against Torture, the Ombudsman for People Deprived of Liberty, and a specialized bureau within the Attorney General's Office to investigate individual cases. In parallel, a "control system" for monitoring prisons was established by the judiciary. Interviewees report that these monitoring institutions, whose origins are closely linked to litigation processes, have had an impact in practice: "It is more difficult for systematic torture to persist, as now torture is more visible and there are more institutions to help denounce and prevent these practices."<sup>184</sup>

Interestingly, there is also an innovative example of a non-governmental organization being spawned not to advance implementation of a single particular judgment, but to advance the implementation of all judgments handed down by a single human rights court. In 2016, the non-governmental European Implementation Network was established in Strasbourg, France—the seat of the European Court of Human Rights—as a constant presence to advocate for robust compliance with all ECHR judgments. The civil society organization is intended to monitor and strengthen not only implementation of ECHR judgments, but the transparent functioning of the court itself.

Finally, litigation can sometimes strengthen judicial institutions simply by encouraging more active government participation in their processes. As the Strategic Litigation Impacts Report on indigenous land rights notes: “The [*Endorois*] case also precipitated Kenya’s involvement in the African Commission. The commission informed the government that it would decide the case *ex parte* if Kenya did not participate. In response, a high-level delegation that included the minister of justice and attorney general attended the commission’s session deliberating the case, and Kenya has participated in subsequent sessions in relation to other cases.”<sup>185</sup> Legal scholar and Open Society Justice Initiative Senior Advocacy Officer Christian De Vos noted, “these newly created institutions—even if sham, or underfunded, or created in good faith but politically weak—create additional avenues for advocacy. The judgments create new means to the end.”<sup>186</sup>

As De Vos suggests, not all government changes carried out in response to strategic litigation are effective—or even made in good faith. Yet even this skeptical view implicitly acknowledges that strategic litigation can have instrumental impacts that change government policies, court jurisprudence, legislation, and institutions. Although difficult to assess, such instrumental impacts can at least be measured. The next section considers the more complex situation of impacts that cannot be easily quantified.

## **Non-Material Impacts: Changes in Attitudes and Behavior**

As we have seen, the most readily detected impacts of litigation are material, such as the number of hectares of land granted as title to the Yakye Axa indigenous community in Paraguay, or the number of textbooks delivered to South African schools. Jurisprudential and policy impacts are also at least objectively verifiable: the petition before the court was won or lost; a zero-tolerance policy against the use of torture was adopted or it wasn’t.

It is more difficult to assess how litigation influences what cannot be measured: attitudes and behaviors, whether of governments, rights advocates, litigators, judges, complainants, affected communities, or the general public; public discourse; state practice; institutional change. Many respondents observed that non-material impacts might be the most consequential for their perception of justice. Yet such changes are rarely the primary goal of litigation and are never the legal remedy.

Bringing legal action against a state on behalf of human rights is a means of asserting power—whether affirming the power of victims, mobilizing the power of communities, disrupting and diminishing the power of rights violators, affecting public discourse, or modeling the rule of law. At its most successful, strategic litigation can dislodge entrenched abuse and accelerate, slow, or redirect social change through a

virtuous cycle of legal and discursive reframing, government engagement, and popular empowerment. In this sense, the studies' conclusions are broadly consonant with what Michael McCann describes as law's power to "shape our very imagination about social possibilities."<sup>187</sup>

In his seminal 2016 analysis *Impact: How Law Affects Behavior*, Lawrence M. Friedman asserts that the first important factor determining impact is communication. Broadly, a rule or law has no effect if it never reaches its intended audience. This point was borne out particularly clearly in the course of researching the Strategic Litigation Impacts Report on indigenous peoples' land rights. The 2012 African Commission on Human and Peoples' Rights decision on behalf of Kenya's Endorois community is seen by many scholars as a groundbreaking decision epitomizing the positive impact of strategic litigation on the rights of vulnerable people. But when the field researchers sought comment on it from Kenyans three years on, they struggled to find many who had even heard of it.

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Many respondents observed that non-material impacts might be the most consequential for their perception of justice. Yet such changes are rarely the primary goal of litigation and are never the legal remedy.

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### ***Affirming—and Sometimes Undermining—the Power of Victims***

One of the most telling, if complex, findings about strategic litigation's non-material impacts involves changes in complainants' understanding of their rights and their power. (This resonates with Diane Orentlicher's recent findings in an international criminal justice framework, in *Some Kind of Justice: The ICTY's Impact on Bosnia and Serbia*.)<sup>188</sup> Individual complainants often placed high value on a positive judgment's vindication of their rights, independent of whether the judgment was implemented. At a fundamental level, court judgments can powerfully affirm factual narratives that have long been denied or concealed. They can inspire individuals to action. And they can alter individual and community (as well as public) understandings about what constitutes "discrimination," "ill-treatment," and "rights" in lived experience.

For many claimants in indigenous land rights cases, for example, strategic human rights litigation has offered a platform to challenge state failings, and markedly improved rights awareness and a sense of agency. After years of unsuccessful efforts to negotiate with the governments and private companies that had expelled them from their historic lands in the 1970s, Kenya's indigenous Endorois community filed the *MRG & CEMIRIDE (on behalf of Endorois community) v. Kenya* complaint in 2003 before the African Commission on Human and Peoples' Rights. In 2010, the commission

created judicial precedent by ordering full restitution and compensation. But as of this writing, the Endorois are no better off materially than they were when they were evicted two generations ago.

However, according to some of those interviewed for this inquiry, the community has gained a degree of self-organization, increased internal communication, and improved morale that would scarcely have been possible but for the litigation's function as a focal point of advocacy. Korir Singo'ei, who served as co-counsel in the case, observed: "This ruling is good for every Kenyan. The law that treats some communities as children, unable to own their own land, is a colonial relic that needs to be changed."<sup>189</sup> Even where it yielded no material or policy benefits, litigation became a central element of claimants' narratives about their identity and struggle.

In some cases, a positive judgment carries meaningful declaratory relief for petitioners. A member of the Czech Roma community captured this sentiment in the aftermath of the *D.H.* judgment: "Someone finally believed us. An ordinary person was able to make it to [the European Court of Human Rights] and tell the truth."<sup>190</sup> For some, this shift in understanding in turn engendered greater faith in the judiciary. As one Roma petitioner explained, "I would use [the courts again]... because they must accept our children the way they accept the other children."<sup>191</sup>

For some human rights victims who prevail in court, the positive impacts on their sense of entitlement and empowerment can be virtually existential, even if they receive no material benefit. Respondents frequently used words like "hope," "vindication," "healing," "determination," "motivation," and "empowerment" to describe litigation's impact on their lives and self-understanding. Chicha Mariani, a torture survivor from Argentina, spoke of the psychological impact of litigation seeking redress: "I think [the cases] awakened, in desperate people in their bitter homes, a basis for hope."<sup>192</sup>

The leader of an anti-racism organization in France underscored the scale of impact on an affected community's perceptions in characterizing members' reactions to the Court of Cassation's 2016 condemnation of ethnic and racial profiling by police:

For us it is not a technical matter. To win this case in court is an emotional thing. We won against the French state. After so many years of injustice, we won against the French government. It's not just juridical for us. It's that, but it's more than that. We now believe we can win.... It's not a matter of paying money or sending someone to prison. People who are stopped and searched don't want money. They want dignity. They want it to be acknowledged that the stop was unlawful. They want official recognition—by the guys who stand in a building with the French flag flying overhead—that what was done to them was wrong. With this ruling, the court recognized we are human beings, that 'you are one of us.' It's a matter of basic equality.<sup>193</sup>



To be sure, as the Strategic Litigation Impacts Report on indigenous land rights observes, “attributing empowerment to litigation specifically is difficult when communities might also experience empowerment through public protests, re-occupation of land, and other community actions. Hence the impact on the community’s sense of empowerment has to be placed within this overall dynamic.”<sup>194</sup> However, interviewees did single out litigation specifically as a source of confidence and belief. As Hopolang Selebalo of the South African social justice organization Ndifuna Ukwazi, put it, “We first started asking questions, but we were getting no answers from government. It was only when we started speaking as lawyers—writing public statements in the language of the law and actually exploring legal action—that they began to take us seriously.”<sup>195</sup> For indigenous groups in Paraguay, winning a case seemed to change their view of themselves: “[r]eview of historic and contemporary images and videos from protests and social mobilization clearly demonstrates that the IACHR ruling [in favor of the Sawhoyamaya, Xákmok Kásek and Yakye Axa communities] is frequently mentioned and displayed on banners or used in verbal discourse.”<sup>196</sup>

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“We first started asking questions, but we were getting no answers from government. It was only when we started speaking as lawyers—writing public statements in the language of the law and actually exploring legal action—that they began to take us seriously.”

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Strategic litigation that proceeds to judgment can validate the concerns and narratives of victims that may otherwise be ignored or not heard. As a co-leader of the South African NGO Ndifuna Ukwazi observed, “Court action is the jewel in the crown.... Going to court and getting a judgment is very affirming. Before you get to court, you’ve made those arguments in the public domain. To then have a court say, ‘you are right,’ is powerful.”<sup>197</sup> Beyond the national realm, scholars have noted how the use of transnational legal mechanisms, such as universal jurisdiction in the *Pinochet* cases in the United Kingdom,<sup>198</sup> “created a sense of empowerment, providing legitimacy and agency to the victims and survivors of gross violations as they transformed into the driving forces behind new domestic prosecutions.”<sup>199</sup>

Even the formidable challenge of contesting land grabs in Israel’s occupied Palestinian Territories has yielded court-won affirmation of the aspirations of Palestinian inhabitants. In 2017, the small Israeli human rights group Yesh Din won a landmark victory when the Israeli Supreme Court held that the Israeli settlement of Amona (formerly Al-Mazaria) was unlawful and ordered its demolition.<sup>200</sup> “In legal terms, the Amona case was simple. Someone had invaded private land and built structures on the property,” said Michael Sfard, Yesh Din’s legal adviser. “But ultimately we were dealing with the Israeli government with all its power, not just the trespassers... Even if the

Amona settlers had stayed on the hill, we would have won because we succeeded in empowering the Palestinian landowners.”<sup>201</sup>

The process of litigating can have a particularly powerful impact on women’s rights. A male member of the Kenyan indigenous community that had engaged for years in litigation saw long-term benefits for women flowing from the process: “After the victory, we have seen greater attention given to Endorois women by Endorois men generally... Consequently, Endorois women are now firmly entrenched into the community decision-making structures” and there are now programs targeting women’s development.<sup>202</sup> Daniela Ikawa, who supported the ruling’s implementation as an advocate at the NGO ESCR-Net, observed, “The *Endorois* case was won on the basis of international human rights law. Its implementation must therefore follow the norms of international human rights law that include the rights of women.”<sup>203</sup> In sum, it might not have been the case itself which provided a direct focus on women’s land rights, but indirectly the legal ruling provided an enabling environment to push for more gender equality.<sup>204</sup>

### ***Mobilizing—and Sometimes Undermining—the Power of Communities***

In certain contexts, litigation can empower not just individuals, but entire communities.<sup>205</sup> As Scheingold observes, “Court decrees often articulate as a right that which has been traditionally withheld ... or granted only as a favor .... These judgments can therefore alter expectations and/or self-conceptions and may be useful as well in creating a new sense of collective identity.”<sup>206</sup>

Community empowerment can take various forms. Michael McCann has observed that strategic litigation can foster expanded and more deeply rooted rights consciousness by helping social actors define and name what are often perceived as complicated social injustices.<sup>207</sup> Sometimes a judgment can generate information, advancing transparency and accountability, and forcing official acknowledgment and public recognition of previously hidden or denied abuses.

In the U.S., it has been suggested that the “program of litigation leading up to the famous 1954 *Brown v. Board of Education of Topeka* decision ... sparked southern blacks’ hopes by demonstrating that the southern white power structure was vulnerable at some points and by providing scarce practical resources for defiant action.”<sup>208</sup> Litigation in the U.S. helped the gay rights movement to “denaturalize the current notions of sexuality, marriage, love and commitment”; “publicly proclaim [its] presence and signal that [it] was active”; “reappropriate[d] the idea of same sex marriage and return[ed] its ‘ownership’ to lesbian and gay individuals”; and transform gay marriage “from the ridiculous to the possible.”<sup>209</sup>

In South Africa, a number of observers have noted the empowering impact of strategic litigation for groups and communities working to give meaning to the right

to basic education in the Constitution. Nurina Ally, executive director of the Equal Education Law Centre, says, “The role of activist lawyers is to protect and defend the space in which social movements operate.”<sup>210</sup> Through legal action, “learners, teachers and parents can yield significant bargaining power in the moral and political battle that takes place outside of the court, in the media and on the streets. In this way, the legal and concomitant extra curiae process opens up space for dialogue between the State (as a responding litigant) and rights claimants.... Viewed in this way, the courts could be conceived of as an equalizing mechanism through which ... litigation itself can act as a loudhailer or boombox for the demands of rights claimants.... [L]itigation serves to turn up the volume button for citizens who could otherwise be feeling disillusioned and muted.... [V]iewing the legal process as a form of dialogue can have the effect of strengthening citizens’ substantive participation in democratic life.”<sup>211</sup>

Dustin Kramer of the Social Justice Coalition, which began to mobilize community engagement for improved policing in Khayelitsha, a Cape Town township, explained that law “gives you a framework or way to articulate things, a way to conduct the political struggle for the right to security, or decent water, or other things that are in the Constitution.... Law gives communities the power to make demands.”<sup>212</sup>

In Nigeria, the director of the Social and Economic Rights Action Centre (SERAC) has explained: “We use litigation as a rallying point—another means of building a social movement.”<sup>213</sup> For SERAC, “the outcome of a legal case is secondary to its mobilising role.”<sup>214</sup> As Nigerian human rights attorney and Open Society Justice Initiative Senior Legal Officer Chidi Anselm Odinkalu put it, “for us, going to court alone was a victory. Not to give us a judgment, but to give us a means of protest.”<sup>215</sup>

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“The outcome of a legal case is secondary to its mobilising role.”

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According to the Endorois Welfare Council’s Charles Kamuren, one community in Nakuru, Kenya, “now believes they exist and they have a future. The case gave them psychological healing.” He added that following the judgment members of the community felt more confident in pursuing different economic activities.<sup>216</sup> As Wilson Kipkazi, another leading member of the Endorois Welfare Council, described, “Community members have learned the importance of being proactive not only in community struggles but also in their personal struggles. The victory has motivated many young Endorois to go to school after observing how their professionals came together and organized around the case.”<sup>217</sup> Shadrack Omondi of the NGO Reconcile agreed: “When the community wins a land case, it has a motivational impact.”<sup>218</sup>

Half a world away, Serafin Lopez of Paraguay’s Xákmok Kásek community echoed the sentiment about the constructive role of the litigation process in contributing to community building: “After the ruling we had many meetings and debated for a long

time what to do. It made us think and talk about our struggle more. The resolution from the court was important and it made us stronger. It spoke of a truth.”<sup>219</sup> Similarly, in the Kampung Orang Asli Bukit Dugang village of Malaysia, Ilam Senin echoed the affirmative value of a court ruling: “We now have confidence that we have... the right to fight for our rights.”<sup>220</sup>

Christina Coc, a seasoned rights activist from Belize, however, sounds a cautionary note. “Litigation is important. It creates this world where indigenous peoples can participate at a level with government authorities where they should be, but often are not, permitted. But there is a danger inherent in litigation. Its language and process—which are often foreign to many of the people on whose behalf it is waged—can take on a life of its own. And in doing so, litigation can remove the participation of the community. We have to work to insure that the community remains involved even while these are often lengthy processes, so that it remains their tool, and serves their aims.”<sup>221</sup>

***Reprisal and Backlash***

Positive though the effects of declaratory judgments can be, several of the studies found that those benefits can be lost or reversed when governments defy the courts. Negative rulings and judgments that are not implemented fully or promptly can exacerbate feelings of disempowerment and injustice among complainants and their constituents. In the studies on torture, Roma education desegregation, and indigenous peoples’ land rights, respondents used similar language to describe the impacts of unimplemented

judgments on their lives: “pain,” “suffering,” “living in jail,” and “dead.” They reported feeling deeply alienated, isolated and/or rejected.

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Suing the government is a quintessentially provocative act. Depending on the political climate, bringing a case can incite serious reprisal against complainants, their families, supporters, and lawyers. Indeed, the risk of such a backlash is arguably the strongest cautionary tale to emerge from the Strategic Litigation Impacts Studies.

In recent years, many governments and their security forces have singled out for repression or retaliation those who represent rights defenders and victims of human rights abuses. China is perhaps most notorious. In 2015, authorities “rounded up nearly 250 lawyers and their associates in one of the most concerted attacks on the profession in decades.”<sup>222</sup>

But China is hardly alone. While the list of lawyers and judges who have made their name through landmark strategic litigation is long and growing, some have also been threatened, blacklisted, and tortured. In recent years, lawyers have been among those most prominently targeted in a concerted effort by the government of Azerbaijan to stifle peaceful dissent and political protest.<sup>223</sup> In Brazil, lawyers who defend environmentalists, indigenous people, or protestors that exercise their freedom of assembly have received death threats, been detained, and suffered intimidation.<sup>224</sup> Lawyers who seek judicial redress for rights violations have endured arrest, intimidation, and abuse from Egypt to Guatemala, Iran to Russia.<sup>225</sup>

Complainants can also face such a backlash. As indigenous rights expert Jérémie Gilbert has noted, “It is not that litigation starts new conflict, as eviction and land dispossession have usually been quite violent events, but rather that litigation can change the power dynamics at stake. Litigation, and notably winning a case, can have a detrimental impact on the relationship between the indigenous communities and their neighbors, or/and in the relationship with private actors having an interest on the indigenous territory.”<sup>226</sup> Teofilo, an elder member of the Sawhoyamaya community of Paraguay, reported being unable to fish or ride his horse through the forest after his community won the *Sawhoyamaya v. Paraguay* ruling, because of threats from nearby ranchers. He recounted how a ranch administrator was caught on film pointing a gun at one of the community members, even “in full view of police, at least 40 community members, the community’s lawyers, and a journalist.”<sup>227</sup>

Apart from physical dangers, litigation has had a profound, negative impact on some complainants’ sense of their own well-being. Scores of one-on-one interviews conducted for this inquiry revealed consistently high levels of frustration, exhaustion, disillusionment, disappointment, and sometimes despair with both the process and the outcomes of the litigation. This also appeared to be true for both client and attorney, and even when the litigation had been “successful” according to their own definitions.

Christine Kandie, programme officer of the indigenous community activist group the Endorois Welfare Council, explained that, in her view, the litigation had detrimental effects on women: “We [women] have suffered a lot agitating for our land rights, including through litigation. We were the ones that were left at home to care for the children, livestock, and the home as the men went to strategize on the cases. This generally impacted us negatively economically and socially.”<sup>228</sup>

## Use of Courts to Harass Complainants

*Joseph Letuya and 21 Others v. Attorney General and 12 Others* (2014)

Indigenous herders and hunter-gatherers have lived in the Rift Valley of modern-day Kenya for millennia. In recent decades, the British colonial administration, the Kenyan government, and commercial industries have evicted indigenous people and laid claim to their ancestral lands and natural resources, largely without permission, consultation, or compensation. Local authorities and gangs have subjected protesters and community leaders to beatings and other forms of intimidation, burned down their homes, and blacklisted them from local employment.

A distinct form of harassment has been reserved for those who have fought back through the courts: harassment by law. Those activists have been arrested “on many occasions. Many Endorois and Ogiek land rights activists... found themselves regularly in court to answer petty charges only aimed at harassing them... In the *Joseph Letuya* case, one of the principal litigators, Patrick Kiresoy, had over 26 cases [against him in] different courts as a form of harassment by the state to discourage him from pursuing the... case.” Kiresoy himself has said, “No one can be able to compensate me for the loss suffered.”<sup>229</sup>

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The Strategic Litigation Impacts Studies also revealed a pattern of reputational backlash against complainants and those they represent. Even in situations that could be expected to engender profound sympathy for the petitioners, such as those who have survived torture, court cases have had perverse effects. The government of Argentina diminished popular recognition of the suffering of torture victims by labeling them “enemies of the state.” The Turkish government fueled the political canard that torture victims were being “used by the ‘West’ against Turkey... [and] were injuring themselves or that deaths in custody were in fact suicides.”<sup>230</sup> Some Kenyan survivors of torture under the dictator Daniel arap Moi (e.g. the Nyayo House cases) and under British colonial rule (e.g. survivors of the Mau Mau Uprising) who were awarded monetary compensation reported being re-traumatized by being accused of having brought the case for “mercenary” reasons.<sup>231</sup> A similar pattern of attacks on the character of torture victims emerged in Argentina and Turkey. The torture report notes that “[t]he tendency of the media to focus more on awards being paid by ‘tax-payers’ money’ than on torture, the occasional adverse reaction of other victims and subsequent tensions, and the discomfort on the part of NGOs supporting victims, all manifest a great deal of ambivalence and mixed messaging in respect of victims’ rights.”<sup>232</sup>

Backlash against judicial rulings can also damage the credibility of entire movements and human rights principles. For example, after the *D.H.* judgment was announced, “many who ‘felt directly or indirectly affected by it’—special educators, counselling centers, non-Roma parents—did not accept it.” As a result, the decision spawned a powerful counter-movement.<sup>233</sup> The Association of Special Pedagogues’ campaign secured over 76,000 signatures to a petition against key *D.H.* provisions in only six weeks. The backlash effectively delayed the closure of offending schools. Even after the European Commission initiated infringement proceedings against the Czech government for non-compliance, and despite concerted civic and international pressure, the Czech authorities continue to resist full implementation. Today, despite modest improvements, discrimination against Roma remains the norm.<sup>234</sup>

Involvement in the legal process sometimes provoked rifts within formerly united indigenous communities and irreversible changes to traditional decision-making processes. Furthermore, some ostensibly strategic litigation has been marred by acts of theft, corruption, and embezzlement. The litigating attorney in a Maasai case in Kenya absconded with the equivalent of about USD \$6,800 in fees without providing the community any legal services.<sup>235</sup> (The already impoverished community, which had been evicted from its historic lands, had sold prized cattle to engage the lawyer.) A Malaysian lawyer who had appointed himself one of the three trustees for the *Adong Kuwau* settlement’s trust fund committed criminal breach of trust and was subsequently disbarred.<sup>236</sup> Ruben Quesnel, at the time the president of Paraguay’s indigenous issues authority, embezzled at least USD \$700,000 from the Yakya Axa and the Sawhoyamaya Community Development Fund. Paraguayan Senator Miguel López Perito asserted that a “lack of education and training” regarding indigenous rights and a “lack of will” by the government created a broader danger of *coima* [bribes] and “a type of complicity that destabilizes the actions of the state.”<sup>237</sup>

### ***Changing, but Not Necessarily Correcting, the Behavior of Perpetrators***

Under certain circumstances, litigation can foster the agency and affirm the dignity of individuals and affected communities. But it is also seen by some as a way to diminish the power of rights violators, through monitoring, punishment, and deterrence. As the co-leader of a community development organization in South Africa explained, litigation is a process of invoking rights, but more as well: “[R]ights is not the full picture. Litigation is also about interrogating and disrupting power. It is not just that we have a right to land or equality in the allocation of physical space. It is also about how government officials are colluding with business interests to violate these rights. Litigation can target that.”<sup>238</sup>

Advocates working to combat human trafficking argue that litigation can impose concrete costs on those who breach human rights. “In recent years,” one anti-slavery group observes, “strategic litigation has been used to hold both states and private actors accountable for” trafficking and modern-day slavery. “A number of landmark cases heard by civil courts, as well as by regional and international human rights bodies, have resulted in significant verdicts. In one case, a United States company found to have used forced labor was pushed into bankruptcy. Most importantly, strategic litigation greatly increases the risks to those involved in human trafficking. It is a direct challenge to the impunity they currently enjoy and establishes a potent deterrent to would-be traffickers.”<sup>239</sup>

In India, scholars have explained how the Supreme Court “introduced” public interest litigation “in the late 1970s to reverse its surrender to the executive during the [Indira Gandhi-imposed State of] Emergency and to influence legislation in the name of redistributive justice.... P[ublic] I[nterest] L[itigation] expanded the sphere of judicialized activism, making it possible for ... civil society groups to question legislation and state actions, make policy interventions and do political work.”<sup>240</sup> Two prominent examples of the use of litigation to contest powerful institutions are litigation by relatives of some of the thousands killed by the 1984 Union Carbide industrial gas leak in Bhopal, and by displaced residents to challenge construction of, and seek compensation for, the Sardar Sarovar dam in the state of Gujarat.<sup>241</sup>

In Argentina, strategic litigation related to torture was seen as having a constraining effect on officials and perpetrators. According to the torture report, “Massive political support for the trials, and organized civil society coalescing around criminal accountability as policy priorities” put pressure on perpetrators in Argentina and set up protective barriers against future abuse.<sup>242</sup> Activist and attorney Victor Abramovich told researchers that members of Argentina’s notorious *Gendarmería* (a police force) knew about Inter-American cases such as *Bueno Alves v. Argentina*<sup>243</sup> and *Bulacio v. Argentina*<sup>244</sup> and had a sense, however erroneous, that “if they committed violence, they could be tried not by the Argentinian judiciary, but by international bodies.”<sup>245</sup>

Indeed, Argentina’s experience with strategic litigation suggests that cases can be brought to make a political statement. Cases have been brought not only to redress individual violations, but as a public indictment of a political regime, whether the British colonialists in Kenya or President Augusto Pinochet’s dictatorship in Chile. Not surprisingly, such cases tend to be heavily reliant on political variables for favorable judgments and robust implementation.

At the same time, in certain instances strategic litigation has compelled perpetrators to change their abusive behavior, but not necessarily for the better. Sometimes, they simply mask or transform it into less detectable, but equally bad, forms of abuse. This was seen most egregiously with the practice of torture. In Argentina,<sup>246</sup> Kenya,<sup>247</sup> and



Turkey,<sup>248</sup> the torture report revealed that policemen and prison guards held responsible for gross mistreatment of people in their custody did initially diminish or cease the specific practices for which they were punished. However, they then simply changed torture techniques. Where they used to use beatings of the face and body that resulted in visible, documentable bruises and lacerations, they switched to invisible or “white” torture, such as hitting detainees with water bottles or on the soles of their feet, or using psychological torture, leaving no evident marks of ill-treatment for which they could be punished. Alternatively, they would “outsource” torture to third parties, such as detainees’ cellmates, making it easier for the guard to evade accountability for his crime.<sup>249</sup> In those cases, litigation had the unintended consequence of stopping one form of abusive behavior, while exacerbating another.

Judicial sanctions can spawn other forms of sleight of hand, such as partial or non-compliance masquerading as full compliance. For example, in 2007 the Chance for Children Foundation (CFCF) secured a court order requiring the Hungarian government to close the segregated Roma-only School No. 13. Formally, School No. 13 was indeed closed down. However, the school later re-opened under a new name and operated in the same manner as before, with Roma children forced into separate and inferior classroom settings. When the deception was discovered, CFCF was forced to re-litigate a victory already won.

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### ***Changing Public Attitudes and Behavior***

A distinctive benefit of strategic litigation is its potential to influence public discourse and introduce new ideas. Of all of the impacts considered in this context, measuring changes in attitudes and behavior is perhaps the most challenging. Many dynamics drive such intangible or “non-material” changes. But research conducted for the Strategic Litigation Impacts Reports found a clear correlation between litigation and changes in attitudes and behaviors. For governments, litigation prompted public recognition that human rights violations were taking place and that the state bore responsibility for them. For victims, litigation brought a recognition that what happened to them was unlawful and that perpetrators could and should be held accountable.

By making findings of fact or rendering conclusions of law, litigation can eliminate taboos, forcing certain abuses from the shadows into the light. The 1995 decision of the South African Constitutional Court to abolish the death penalty not only ended

capital punishment in a society where it was long practiced. Through its reasoning, the decision “created space for civil society advocates to talk with the police and other law enforcement authorities about concepts like ‘human dignity,’ ‘torture’ and ‘cruel and unusual treatment or punishment.’”<sup>250</sup>

Similarly, through its groundbreaking 2008 ruling, the Constitutional Court of Colombia affirmed the fundamental nature of the right to health and ordered sweeping changes in the provision of health care, including achieving universal coverage. In so doing, “the Court accomplished what [advocacy groups] had tried to achieve politically for many years; ... to get the issue of equity for the poor in the health system on public, political and technical agendas.”<sup>251</sup> The judgment “conveyed the idea of health as a right, not a commodity as it had been previously considered,” which gave it “exceptional symbolic power. [It] raised the consciousness of society on the fulfillment and effective realization of rights, especially among excluded and marginalized populations, and empower[ed] them to make claims and expand their advocacy to other fronts.”<sup>252</sup>

Such changes in “consciousness” or in feeling “empowered” are impossible to quantify. But that does not make these changes insignificant. In fact, some of the activists and lawyers interviewed pointed to non-material impacts as among the most important results of strategic litigation. As this section has explored, strategic litigation can increase people’s sense of agency and awareness of their rights, however hard that may be to measure. Strategic litigation can also increase people’s willingness to go to court, repeatedly if necessary. The next section considers strategic litigation not as a single act, but as an ongoing process.

## CASE STUDY

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### From Denial to Recognition of Systemic Discrimination

#### *D.H. and Others v. the Czech Republic* (2007)

For centuries, the Roma people have been “the most persecuted minority in Europe.”<sup>253</sup> Across many countries, they have been subjected to forced sterilization, hate crimes, forced evictions and deportations, segregated schooling, employment and housing discrimination, and, under the Nazis, genocide.<sup>254</sup> “Anti-gypsy” sentiment was indeed so widely practiced that it was often attributed to the inherent nature of Roma themselves. In a demonstration of the power of strategic litigation, a 2007 ECHR judgment ultimately broke that cycle of discrimination in the sphere of education.

When *D.H. and Others v. the Czech Republic* was brought before the European Court of Human Rights, alleging systemic racial segregation in the Czech education system, Roma children there were 27 times more likely to be placed in “special schools” for the mentally disabled than non-Roma children, thereby receiving a separate and inferior education. Perhaps the most groundbreaking element of the court’s decision against the Czech Republic was that it explicitly embraced the principle of indirect discrimination. The court held that a *prima facie* allegation of discrimination shifts the burden to the defendant state to prove that any difference in treatment is not discriminatory. According to the Strategic Litigation Impacts Report on Roma school desegregation:

“*D.H.* is one of those judgments that determined what is no longer permissible,” according to academic and politician Jiří Zlatuška. By refusing to give judicial imprimatur to the decades-long status quo and declaring it illegal instead, *D.H.* sparked change in government civil servants’ attitudes and behavior in the education sector and beyond. Czech scholar and politician Ivan Gabal noted that the precondition for change can be found in the judgment’s recognition of the problem: “It named [the problem], to some degree measured it, and recognized it. If you do not recognize it, you have no reason to deal with it.” Change followed. “The fact is that all activities of the state in this area are inspired by the [ECHR] judgment about discrimination of Roma pupils in former special schools,” noted an article in *Teachers News*, a newspaper for Czech educators that has reported in detail on government policies in the wake of *D.H.*, in 2012. Many interlocutors agreed that *D.H.* either jumpstarted, boosted, or sped up change. A Czech Ministry of Justice official likened *D.H.* to “a pebble that paves the road for certain changes.”

To many interlocutors, *D.H.* shifted the debate about Roma education segregation. The judgment established the “limits or lines that cannot be crossed,” in Mr. Zlatuška’s view, and thereby helped set the bounds for those in power who craft and influence legislation. That reverberated and translated into legislative changes. In the view of some, it also led to the acknowledgment of the problem by the authorities. Roma activist Edita Stejskalová observed that after *D.H.*, the Ministry of Education “started to use the word ‘discrimination’ and they were not as afraid of it anymore; they acknowledged it.” Recently, the Czech Ombudsperson similarly remarked that with *D.H.*, “[t]he silence which persisted until 2007, when the authorities regularly denied any discrimination, has ended...”

At the European level, thanks to the Roma education judgments, “there is no more discussion on the lawfulness of Roma segregation,” stated Wolfram Bechtel, a lawyer at the secretariat of the European Commission against Racism and Intolerance (ECRI). “Everybody knows it is unlawful.”<sup>255</sup>

## 4. Strategic Litigation Is a Process, Not a Single Legal Intervention

One of the clearest insights from the Strategic Litigation Impacts Reports is that strategic litigation is best understood as a process, rather than as a single legal intervention. Various impacts can be achieved at different stages of the litigation process. Factors such as political context, the strength of community mobilization, and the number and composition of stakeholders in the equation can change dramatically over the long life of a case—including the years before and after the case comes before a judge. As a result, the original strategy may require multiple adjustments over time.

While acknowledging that the process may look different in different jurisdictions, for illustrative purposes this study suggests three principal phases of strategic litigation: (i) case development; (ii) hearings, trial, and deliberation up to ruling; and (iii) post-judgment. In each of these phases, skill and craft are essential to building a persuasive case. But many external factors beyond the exclusive control of litigators and litigants—including which judge is assigned the case, the timing of relevant political events, the availability and admissibility of persuasive evidence—also matter greatly in the inherently unpredictable road of litigation. Indeed, “[a]t the moment lawyers and activists elect to pursue law [as a strategy for change], they operate under conditions of deep uncertainty.” Nonetheless, thinking through the challenges and opportunities in an iterative manner, at each stage of litigation, can be strategically valuable and even multiply the positive impacts generated.

### Case Development

There are many steps that must be taken at the outset of any litigation that aspires to be strategic. These steps, in no particular order, include: strategic planning and legal framing; securing funding; documentation; the selection of a case, client, and (where a choice exists) jurisdiction; considering and analysing options for implementation should the litigation succeed; risk analysis and development of contingency plans; identifying and locating witnesses; framing a remedy request appropriate to the claim and feasible to implement; building alliances and nurturing solidarity with relevant actors in government, civil society, and the media; filing pre-trial briefs and legal documents; and preparing for a trial or hearing.

Early engagement between clients and lawyers, and with other actors, is often critical to ensuring that a case rests on solid factual premises and that it fits within a broader social movement for change. Security and logistical concerns may make it

more difficult for some clients, such as those in detention, to contribute meaningfully to strategy development.<sup>256</sup> Nonetheless, time spent up front ensuring alignment—or at least mutual understanding—of goals among clients, affected communities, and lawyers can help sustain the often long and difficult litigation process.

According to some study respondents, litigating to advance human rights seems to have some of its most positive impacts for complainants and affected communities at this early phase, before a case gets to court. For example, cases brought on behalf of indigenous communities engendered substantial community involvement and increased rights awareness and agency well before reaching a court. Traditional decision-making processes typically required that community leaders, almost invariably men, seek consensus among the community before engaging legal counsel in their name and thus help build a sense of common cause. But genuine consensus is often impossible to achieve with groups composed of many thousands of people, such as the Endorois community of Kenya or the Roma living in areas that span numerous European countries. So the notion that entire “communities” or even “movements” have adopted a certain position may be, at best, an approximation.

By contrast, the meaningful involvement of individual plaintiffs is often (relatively) easier to secure. Their commitment and staying-power are essential to the success of the case. Such endurance should not be taken for granted. The field is littered with cases by plaintiffs who chose not to proceed, were coerced or threatened into withdrawing, could no longer pay lawyers’ fees, or died.

As we have seen, the Strategic Litigation Impacts Reports clearly suggest the importance of litigation’s power to uncover information, as both an empowering tool for clients and an instrument for more effective litigation and follow-on advocacy. The report on equal access to quality education concludes that “data gathering is itself an outcome of litigation. This is sometimes built in as a conscious part of the strategy from the beginning, or is sometimes a byproduct of the litigation. Once gathered, the information can be very useful for monitoring and evaluation, or for identifying areas needing further action.”<sup>257</sup>

Most courts require physical documentation and sworn testimony to assess claims to historic lands. Since colonial powers typically appropriated historic lands illegally, leaving no receipts, and traditional cultures often use dispute-resolution systems that do not require such documentation, the litigating communities typically struggle to demonstrate prior ownership or even physical settlement. Nonetheless, indigenous hunter-gatherers, agriculturalists, and forest peoples in Kenya, Malaysia, and Paraguay told researchers that the act of compiling evidence for the discovery phase of their cases—often by undertaking “mappings” of ancestral lands to stand in lieu of deeds and title—was valuable to their communities in and of itself. Being asked by paralegals and attorneys to record memories of the land they once lived on allowed indigenous peoples

to articulate, and in turn courts to understand and affirm, the profound meaning that historic lands have for members of indigenous communities.

The Strategic Litigation Impacts Studies suggest that involvement in evidence collection and case preparation enables otherwise marginalized members of communities to be seen, and see themselves, as providing value. In Kenya, for example, litigators have called (usually male) elders as witnesses to share their memories of where the community lived when they were children as evidence of prior inhabitation. Women have been asked to document the location of ancestral religious and burial sites on disputed lands, because it falls to them to maintain them.<sup>258</sup> According to numerous respondents, pre-litigation organizing, fact-finding, and communication efforts can be empowering, motivating, and gratifying. The resulting narratives, drawings, maps, photographs, and other evidence reportedly also enhanced many persons' appreciation for their culture, language and history.

## Hearings, Trial, and Deliberation up to Ruling

The second phase of strategic litigation typically comprises court action or hearings leading up to the point when a ruling is handed down.

Public hearings and trial proceedings, while perceived by some complainants as highly stressful and inconvenient, offer rare and potentially valuable opportunities to mobilize public support for victims and witnesses, raise awareness of abuse, and persuade judges to rule in favor of the plaintiff(s) through visual and emotional cues. During court proceedings, complainants can lead with their strengths, demanding their rights both through, and without the proxy voice of, legal counsel, directly within the experiential scope of the presiding judge(s). The often underappreciated work of community mobilization behind and in support of litigation can take on a higher profile during this phase. Experience from the studies suggests that the courtroom phase offers numerous opportunities for well-orchestrated, and sometimes emotional, presentations.

In some cases, public pressure and the threat of litigation alone can secure the desired reforms. Thus, when first- and second-phase strategies are successful, strategic litigation has done its job before ever reaching a judgment.

The landmark *Treatment Action Campaign* ruling in 2002 by the South African Constitutional Court was pursued as part of a broader strategy that consciously mobilized domestic and international opinion and pressure.<sup>259</sup> As a result, the “court itself felt it was under scrutiny,” reflected Fatima Hassan, former attorney for the AIDS Law Project and currently the executive director of the Open Society Foundation for South Africa. The visual “spectacle of court hearings packed with people wearing HIV t-shirts was not unimportant to judges who, after all, are human beings too.... If the case had

been brought by one lawyer on behalf of one client, it could well have produced a different result.”<sup>260</sup> While it is impossible to prove that the court “spectacle” swayed the judges’ ruling, the courtroom space became a stage for exercising rights and manifesting public engagement.

Ten years later, South African civil society deployed a similar strategy, this time in the area of education justice.

## CASE STUDY

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### Courthouse as Theater in South Africa

#### *Norms and Standards Case (2012)*

For two years, hundreds of members of the South African NGO Equal Education (EE), had fasted, picketed, petitioned, held community meetings, written letters, and slept outside of Parliament, without achieving their goal of forcing the Minister of Basic Education to issue norms and standards for school infrastructure. Students, parents, and teachers upped the pressure by taking to the streets while wearing masks displaying the face of Minister of Basic Education Angie Motshekga. As a last resort, in March 2012 the non-governmental Legal Resources Centre launched litigation on behalf of Equal Education to compel Minister Motshekga to publish norms and standards for school infrastructure. EE believed that establishing binding standards would provide the government with a clear legal standard and a mechanism to meet constitutional obligations, provide schools and communities with an indication of what they are entitled to, and establish a mechanism for top-down accountability.

On October 17, 2012, the chairperson of Equal Education, Yoliswa Dwane, addressed about 1,000 marchers in Cape Town: “We are wearing masks of Minister Motshekga because she is the one that has failed to fix the school infrastructure crisis in South Africa. It is now more than 17 years since the start of democracy, and most of South Africa’s learners are still faced with inadequate school infrastructure. We are going to court next month to force Minister Motshekga to set minimum norms and standards for school infrastructure. We will camp outside the Bhisho [capital of the Eastern Cape Province] High Court for the duration of the court case.”<sup>261</sup> Within weeks, on November 19, 2012, Minister Motshekga agreed to a friendly settlement and issued legally binding norms and standards.<sup>262</sup> Ad hominem theatrics continued to complement the legal battles that were to follow. For example, on March 15, 2018, Equal Education once again anchored its demands for action outside Bhisho courthouse with an enormous blow-up likeness of Minister Motshekga.<sup>263</sup>

An attorney with the Equal Education Law Centre underscored the communicative value for judges, as well as for the general public, of embedding litigation within a visible effort at community mobilization: “It’s important that the community be organized to support the litigation, because otherwise we might not have fruitful results. Mass support is very important so that it is clear to the judge when it comes time to litigate. You would think that you can’t influence the judiciary. But it helps to show that a case is being brought in the public interest—that this issue matters to people.”<sup>264</sup> Nigerian human rights litigator and Open Society Justice Initiative Senior Legal Officer Chidi Anselm Odinkalu observed that, while it is impossible to calibrate the impact of such tactics in producing results, “Emotions play a huge if not decisive role in strategic litigation... Tell a story that captures the imagination of the judge, and you will always win.”<sup>265</sup>

The innovative use of evidence may also influence judicial deliberations. Some significant rulings examined in the Strategic Litigation Impacts Reports pivoted on precisely such novelty. For example, the ECHR’s 2007 verdict in *D.H.* broke legal ground in numerous ways, including by relying heavily on the use of extensive statistical data as evidence of widespread discriminatory practice.<sup>266</sup> Similarly, when CEMIRIDE and Minority Rights Group International successfully argued before the African Commission on Human and Peoples’ Rights that the government of Kenya should return the historic lands of the indigenous Endorois community of Kenya, the attorneys entered into evidence an advocacy video that transported the emotive words and images of a community in limbo.<sup>267</sup>

But the converse can also be true: the hearing phase can be particularly disempowering for those who are more at its mercy than at its command. According to the report on indigenous land rights, in Malaysia, Orang Asli witnesses “tend to perform poorly on the witness stand, regardless of expert preparation. Their customary conflict resolution systems (*bicaraq*) involve seeking the truth of the dispute rather than the adversarial method adopted by the court.” Across the four thematic studies, victims of and witnesses to human rights violations reported struggling to communicate effectively when they did not speak the language used in court, or did not speak it well.<sup>268</sup>

## Post-judgment

The final phase of strategic litigation—analogous to what Michael McCann refers to as the “legacy” phase of movement activity—is characterized by efforts to secure implementation of all or parts of the judgment, including community mobilization (for or against the ruling), media coverage, psychological adjustment, and either appeals or additional, related filings.<sup>269</sup>



By definition, the post-judgment period is the most expansive of the three phases, as it has no clear end. Implementation of judgments can go on for years. The parties dispute whether or not the respondent rights violator has fully complied with the order, and the struggle for the broader cause morphs sooner or later into the next cycle of repression or activism. To that extent, the post-judgment phase may ultimately be most determinative of the resonance and legacy of the ruling. Indeed, it is sometimes referred to as the “verdict on the verdict.”

## CASE STUDY

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### **Post-Judgment Advocacy and Community Engagement in Kenya** *Minority Rights Group International*

In 2010, the Endorois Welfare Council (EWC), a non-governmental organization representing some 60,000 members of this indigenous community in Kenya, won a landmark decision before the African Commission on Human and Peoples’ Rights. Around the world, human rights activists hailed the decision as the first to recognize the right to development and as a groundbreaking victory for the rights of indigenous peoples across Africa.<sup>270</sup> Since then, however, the *Endorois* case has become a textbook example of non-implementation of a judicial decision: the Endorois remain separated from their ancestral lands, and almost none of the rights in question have been realized.

Some of the litigators who brought the case, however, have remained deeply engaged in the post-judgment phase, in large part because they took a holistic approach to strategic litigation from the start. Since the decision, Minority Rights Group International has continued to work with the Endorois community to take advantage of whatever progress the decision makes possible. For example, MRG works with the EWC on a three-pronged strategy to support the long-term implementation of the ACHPR decision, including forming an implementation taskforce, developing an independent Lake Bogoria Management Plan process, and engaging in long-term legal empowerment. Though the management plan in itself does not grant the community legal title over the land, it supports the community’s claim for legal recognition and demonstrates how it can be integrated into Kenya’s Community Land Act.

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Many of those interviewed for this inquiry observed that the need for community engagement was greatest during the post-judgment phase. Often, they reported, collective efforts among lawyers, activists, and members of an affected community were critical to translating a ruling into action. For example, in the 1990s politically connected

ranchers unlawfully drove the indigenous Sawhoyamaya community from the Chaco region of Paraguay, taking over lucrative grazing lands and committing widespread human rights violations against the community. The 2006 *Sawhoyamaya Indigenous Community v. Paraguay* decision of the IACHR ordered restitution of the Sawhoyamaya land within three years. When eight years passed without the government's compliance, the community took matters into its own hands and unilaterally re-occupied its ancestral land in June 2013. It was only after high-profile collective action by several non-governmental human rights organizations that the Paraguayan Parliament finally approved and the president signed the expropriation bill in June 2014. As the indigenous land rights report notes, "the rulings served as a key political tool to take actions that the communities would not necessarily have taken otherwise."<sup>271</sup> Similarly, six years after the *Xákmok Kásek* ruling of the IACHR, the Paraguayan authorities finally moved to purchase the disputed land from private owners after the *Xákmok Kásek* re-occupied their lands.<sup>272</sup>

Members of affected communities sometimes identified the post-judgment phase as the least satisfying, even when the court had ruled in their favor. Among the reasons respondents cited were the absence of clear remedies, the slow pace of implementation, and government defiance.

Indigenous respondents in Kenya and Paraguay, interviewed about their experience litigating for return of their historic lands, reported that delayed implementation created a sense of disillusionment in their communities.<sup>273</sup> One young member of the Yakyé Axa community in Paraguay, Belfio Gomez Benitez, reported that living on the side of the road waiting for promised government action is tantamount to "living in jail."<sup>274</sup> "Many of the elders of the Endorois community in Kenya shared that despite the landmark positive ruling from the African Commission on Human and Peoples' Rights, they feared they would die before they enjoy the fruits of their hard work. And some young community members felt that the elders had wasted their time on the lawsuit."<sup>275</sup>

Similarly, Roma rights activist Marcela Miková reported that despite some groundbreaking judgments in their favor ordering the desegregation of Roma-only classrooms, "I feel disappointed... as nothing has changed for Roma children in mainstream schools."<sup>276</sup> Among the few torture survivors to receive monetary compensation, some reported feeling a "sense of guilt," adding to their already overwhelming psychological burden.<sup>277</sup>

Despite these setbacks and disappointments in the post-judgment phase, the Strategic Litigation Impacts Reports surfaced numerous examples of innovative efforts to use the post-judgment phase to make strategic litigation more effective. For many engaging in strategic litigation, this was the period for ongoing political, legal, and community efforts beyond the judicial ruling.

In Paraguay, for example, the independent rights organization *Tierraviva a los Pueblos Indígenas del Chaco* elected to take on an additional role: developing legisla-

tion to enable the meaningful implementation of judgments it had won on behalf of its clients. Tierraviva had successfully litigated three successive landmark cases before the Inter-American Court of Human Rights for indigenous communities whose lands had been unlawfully expropriated. In *Sawhoyamaxa Indigenous Community v. Paraguay* (2006) and *Xákmok Kásek Indigenous Community v. Paraguay* (2010), the IACHR ordered the government

of Paraguay to provide the communities with USD \$1 million in community development funds, among other remedies. Tierraviva's post-judgment strategies included high-level international advocacy, such as high-visibility international visits to the lands that had not been returned, and working with the communities to develop a law providing the government with guidance on administering and delivering the community development funds.

Although it is best understood as an iterative, ongoing process, strategic litigation can be broken into three distinct phases, each with its own set of possible actions. While those actions may differ from case to case, a consistent finding is that all three phases require close coordination between litigators and their clients, and the broader social movement of which they are a part.

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## 5. Litigation and Social Movements Should Be Mutually Reinforcing

Strategic human rights litigation hinges on a central paradox: despite the overwhelming scale of human rights abuse around the world, activist lawyers and activist victims often struggle to connect with one another. The lawyer may struggle to find a "model" client, sympathetic to the judge and the public, telegenic with the media, persistent, healthy and strong enough to stay the course over gruelling years of litigation with no guarantee of success. Similarly, victims of human rights abuse often have neither the money, the information about where to find the appropriate attorney, or indeed the basic awareness of their right to due process to seek counsel at all, let alone a specialized strategic human rights lawyer. As a result, cases are often initiated in an improvised manner. Global experience culled from the studies suggests that whether the effort is begun by the lawyer, the victim, or the social movement is less important than that they are all mutually legitimizing and mutually reinforcing, and that they share a strategy.

The studies revealed a complex synergy between litigators and social movements in which, under certain circumstances, social movements can give rise to litigation, and

litigation can catalyze social movements. These cycles may not be linear or sustained, but they often influence the respective strategies of litigation and movement-building and their impacts.

Although coordinating human rights litigation with other actions to secure positive change can present challenges, it generally enhances litigation's impact. Indeed, much scholarship "emphasizes that litigation and other official legal actions are most often and effectively utilized as a secondary or supplementary political strategy in social movement struggles."<sup>278</sup>

One sentiment frequently expressed by activists and legal scholars was that litigation is the tool of last resort and was therefore not strategic for the victims, even if it served a strategic purpose for the lawyers. First, interviewees said, it makes little sense to employ a complicated, expensive, and risky strategy if simpler ones, such as out-of-court advocacy or street demonstrations, would be effective. Second, strategic litigation about human rights is generally more likely to have maximum resonance when it is rooted in, and driven by, a social movement. Sequencing litigation after movements and constituencies become well-organized increases the likelihood that plaintiffs will see the case through to conclusion and advocate robustly for implementation of judgments.

The "last resort" sentiment seemed especially strongly-held in the case study of South Africa, where strong constitutional guarantees, a vibrant civil society, and government leaders keen to shed the country's repressive legacy worked in concert with a generally progressive bench. One leading South African litigator observed, "Behind virtually every major rights case, there is recognition that the law is the last resort, after you try everything else.... Virtually every case that has gone to the [Constitutional] Court since 2000 was preceded by a 5 to 7 year political process of seeking remedies for denial of rights to, say, water, housing, HIV treatment, or electricity. Only when that process failed did we go to the courts."<sup>279</sup>

Adjoining litigation to community struggle has political benefits as well. As former General Secretary of Equal Education Brad Brockman explained, "During the Norms and Standards [campaign]... at some point the minister of education said, 'These are a bunch of white adults.' We had to be able to answer that and say, 'We are a mass movement of youth, the majority of whose leadership and membership attended the very schools we are trying to fix.' This was important to us politically and strengthened our demands."<sup>280</sup>

Likewise, scholars have suggested that, "simply constructing compelling rights claims and justifying standing as rights claimants is hardly enough.... Discursive reconstructions of rights must be supported by material organizational power that poses an instrumental *counterweight* to status quo institutionalized hierarchies. This means, of course, that rights claimants must mobilize material resources and support networks—money, advocacy organizations, allies in other groups and the state, and

experts, including lawyers. This mobilization of political and legal resources, whether by defiant individuals or groups, is how rights are made real.”<sup>281</sup>

## CASE STUDY

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### Argentina’s Mothers of the Plaza De Mayo and the Right to Truth Movement

*Aguiar de Lapacó v. Argentina* (1999)

*Julio Simón et al. v. Public Prosecutor* (2005)

Between 1974 and 1983, a military dictatorship gripped Argentina. Between 10,000 and 30,000 civilians were disappeared, tortured, raped, forced to make false confessions, and/or stripped of their children. Only a handful of mothers of the disappeared were desperate enough to stand on the square outside the state house with handmade posters to keep vigil and demand the return of their loved ones. The Mothers—and, later, Grandmothers—of the Plaza de Mayo in Buenos Aires became icons of the country’s human rights struggle to bring the truth of the military dictatorship to light.

Carmen Aguiar de Lapacó, a co-founder of the Mothers of the Plaza de Mayo, went on to co-found the Center for Legal and Social Studies (*Centro de Estudios Legales y Sociales*, CELS), arguably Argentina’s leading human rights organization. In 1998, Aguiar de Lapacó and CELS filed a complaint with the Inter-American Commission for Human Rights challenging Argentina’s amnesty laws on behalf of her daughter, Alejandra, who had been disappeared. The following year, the government of Argentina finally accepted its obligation to continue judicial investigations regarding the fate of the disappeared. The government of Argentina recognized its citizens’ right to the truth and began shifting its policy to facilitate redress.

In 2005, the Supreme Court of Argentina in the *Julio Simón et al. v. Public Prosecutor* case declared unconstitutional the amnesty laws that had guaranteed impunity for atrocities, unleashing, “a massive wave of 1,609 criminal cases against hundreds of persons accused of torture and other crimes under the dictatorship.”<sup>282</sup> To date, judgment has been rendered in hundreds of cases, resulting in hundreds of convictions.

Over the course of the litigation, the litigators and social movements worked together in mutually reinforcing ways. A similar pattern obtained across the study on torture: numerous survivors and relatives of victims involved in litigation subsequently become political actors and human rights advocates not only in Argentina, but in Kenya and Turkey as well.

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A counter example, which proves the importance of litigating in concert with a strong and organized social movement, can be found in the relationship between strategic litigation and the Roma rights movement in Europe. “One resounding message from the research,” according to the Roma school desegregation report, was that litigation on behalf of Roma may be unsuccessful in part because “Roma are underrepresented (especially in the Czech Republic and Greece) in the debate over the litigation and its implementation.”<sup>283</sup> Some respondents attributed the slow and minimal improvements in the inclusive education of Roma schoolchildren to that perceived disconnect. Roma activist Edita Stejskalová, who followed the execution of the *D.H.* judgment from the start, said, “I am observing an unbelievable dwindling of Roma in the working monitoring groups, in various more formal meetings on [*D.H.* execution]. This mirrors not only the discussions at the national level, but also within the [NGO] sector.”<sup>284</sup>

Czech Roma community organizer Magdaléna Karvayová observed that as the people most directly affected by discrimination, Roma ought to be the ones leading the struggle to change the education system.<sup>285</sup> In Greece, as well, “Roma mobilization as such is missing.” A Roma lawyer there reported knowing of only two other Roma attorneys in the entire country.<sup>286</sup> Whatever the explanation, Roma rarely lead the fight for implementation of these successful ECHR judgments. Indeed, some Roma parents continue to support segregated schools as places less likely to provoke hostility toward their children.

Although outside the scope of the four thematic studies, a landmark 2008 ruling by Colombia’s Constitutional Court,<sup>287</sup> illustrates how impacts in shaping jurisprudential and public discourse about the right to health, have “not fully translated into the actual enjoyment of health related rights by the worst-off socially and economically.”<sup>288</sup> While this shortcoming has many roots, one may be that “the judgment has not been linked with a strong social movement advocating for the full and effective implementation of the decision.”<sup>289</sup> Moreover, it is notable that the court’s decision emerged, not as the product of a civil society-led legal action, but rather through a self-initiated decision by the court to select, among thousands of health-related complaints that had been flooding the judicial system for years, “22 cases to illustrate systemic problems in the health system. Using those cases ... [the court] called for structural remedies and reforms.”<sup>290</sup> The absence of civil society as a driving force behind the cases to promote follow up on the powerful judgment the court issued, may help explain why its impact on health care reform has remained limited to date.

According to the indigenous land rights report, “The way communities were organized, and the degree to which they were united (or not), played a crucial role in whether positive judgments were ultimately implemented.”<sup>291</sup>

In turn, the land report suggests that, “the participatory impact of litigation can” affect the community profoundly: “Engaging with litigation has a significant impact on the internal decision-making for the communities... [It] forces communities to either

renew traditional processes to take decisions or to establish new forums.”<sup>292</sup> The process of litigation also has a substantial impact on leadership, according to the report. In some cases, it has caused friction and splintered communities as members vie for the tangible benefits of the case. But it has also given new voice to some, such as elders and women in Kenya, whose interests were less well represented in social-change efforts outside the legal sphere.

Brazil’s movement for broadened access to quality education deployed litigation after it had pursued other tools of change, including community mobilization, and then as a complement to those tools, rather than as a substitute for them. The series of Roma education cases filed in the first decade of the 21<sup>st</sup> century in Europe both benefited from and strengthened the international Roma rights movement. These cases would not have been possible absent years of prior awareness-raising, community engagement, and public discussion, at elite and grass-roots levels, which crystallized scrutiny of specific rights violations and heightened recognition of the potential for law to respond. At the same time, by rearticulating long-standing claims of injustice in the language of judicial obligation, successive rulings by the European Court of Human Rights (and some national courts) helped spur international funding and high-level political attention to combat discrimination against Roma. Among other things, the rulings gave fresh impetus and a hopeful agenda to the Decade of Roma Inclusion platform, in which 12 European governments collaborated to counter the same unlawful practices that had animated the original legal challenges.<sup>293</sup>

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These cases would not have been possible absent years of prior awareness-raising, community engagement, and public discussion.

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Zachie Achmat, a leading rights activist and founder of the Treatment Action Campaign in South Africa, underscores the “dialectical interplay between law and social mobilization”: “social mobilization is the only guarantee that constitutional rights to health, housing, education, social security and equality can be made real....”<sup>294</sup> Along the same lines, Mbekezele Benjamin of Equal Education Law Centre, observes:

There is an obligation on us to go beyond the courts—to explain to communities what the law means, and what the likely outcome of the court process will be. Remember that in the end, all you get from a court is a piece of paper, and there needs to be movement on the ground to make that matter.... In South Africa, we have that heritage of anti-apartheid struggle lawyers to learn from.... That is important. But often it is the people themselves who take up the struggle. Even if a court interdict would not have much impact, the power of the people can demand action from government. You create those consequences on the ground by mobilizing people.<sup>295</sup>

Though desirable, embedding litigation into a broader social movement is not always either possible or necessary. For example, cases may be taken up successfully on behalf of minors, who lack strategic capacity, voice, or legal majority, or of those in custodial detention, who are at particular risk of reprisal. Further, some litigators interviewed for these studies countered that in fact it was not always advantageous to wait for movements to mature in every case, and that litigators could sometimes expedite the reform process by going first. Either way, there appeared to be high levels of awareness that sequencing litigation with other tools of change was an important variable to consider in the strategy-development process.

## 6. Strategic Litigation Is Often Repeat Litigation

Given the massive scale of the rights abuses challenged by litigation, it is not surprising that more than one judgment may be required to bring it about. Often, one ruling opens a pathway to further judicial action through incremental change that, over time and further decisions, generates cumulative results. According to study findings, this has proved true in both common law and civil law systems. While a single landmark judgment is the most enduring way to advance or set back human rights jurisprudence in a single jurisdiction, global experience suggests that a strategy of filing mass or iterative cases can be more effective in bringing change.

### CASE STUDY ---

#### Chipping Away at Racial Discrimination in Europe

*D.H. and Others v. the Czech Republic* (2007)

*Sampanis and Others v. Greece* (2008)

*Oršuš and Others v. Croatia* (2010)

*Lavida and Others v. Greece* (2013)

*Horváth and Kiss v. Hungary* (2013)

*Sampani and Others v. Greece* (2013)

The European Court of Human Rights first declared a European government guilty of systemic racial discrimination in 2007. The victims were among Europe's most vulnerable residents: Roma children. The *D.H. and Others v. the Czech Republic* judgment opened the door for anti-discrimination activists to bring legal challenges on behalf of Roma



schoolchildren before domestic courts in other countries with substantial Roma populations, including Croatia, Greece, and Hungary. Each ensuing judgment further clarified how courts and governments should understand discrimination and specifically how the segregation of Roma schoolchildren should be dismantled.

Three judgments against the Greek authorities denounced discrimination in access to education: *Sampanis and Others v. Greece*, *Sampani and Others v. Greece*, and *Lavida and Others v. Greece*. *Oršuš and Others v. Croatia* rejected the government's justifications for education segregation based on language. *Honvát and Kiss v. Hungary* took *D.H.* a step further by clarifying that states have a positive obligation to avoid perpetuating past discriminatory practices. These victories were, on their own terms, piecemeal and of reasonably limited jurisdictional reach. But as part of a broader social movement to advance Roma rights, each successive judgment strategically removed another brick in the wall of state-sponsored discrimination preventing Roma children from receiving equal access to quality education.

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Rapid-fire claims filed strategically between 2010 and 2013 also materially improved the lives of millions of South African schoolchildren in “mud schools” that, according to the report on equal access to quality education, were the “left overs of a deliberate strategy during the apartheid years not to invest in schools for black children.”<sup>296</sup> Resulting judgments secured funding;<sup>297</sup> qualified, paid teachers;<sup>298</sup> desks and chairs;<sup>299</sup> textbooks;<sup>300</sup> school transportation;<sup>301</sup> and the promulgation of binding norms and standards for school infrastructure.<sup>302</sup> While each one of these decisions or results may have had relatively limited effect, taken together, the stream of litigation began to improve the quality of education afforded the poorest children in South Africa. Court orders were complied with due to continual monitoring and pressure by civil society groups.<sup>303</sup> As the NGO Equal Education explains, “For the first time ever it is now the law that every school must have water, electricity, internet, working toilets, safe classrooms with a maximum of 40 learners, security, and thereafter libraries, laboratories and sports facilities.”<sup>304</sup>

Finally, while progress against torture in custody may have been made at various stages in Turkey, for example, it is only when we consider the whole series of ECHR torture cases and the evolution of responses—each of which advanced the framework further—that these small steps represent significant strides forward.

While it may be easier to understand strategic litigation by examining individual, precedent-setting cases such as *Brown v. Board of Education of Topeka*, it is actually fairly rare for a single case to bring large-scale change. Rather, it is often through the accretion of lower-profile cases that change can occur. Sometimes, the strategic nature of those cases is apparent only in hindsight.

## 7. Strategic Value Can Be Derived from a Case after the Fact

Researchers studying strategic litigation for this inquiry often struggled to determine whether cases that turned out to be influential in the human rights movement had in fact begun with those ambitions. (The exception were the anti-discrimination cases brought on behalf of Roma in Europe, which were clearly strategic.) They discovered that many had not.

Much land rights litigation on behalf of indigenous peoples started because all other options were exhausted, and they had no choice but to go to court. “Previously inchoate or discrete litigation efforts were typically made more ‘strategic’ over time by being deployed together with other advocacy tools, generating progressive jurisprudence that could benefit others. It was not until the cases reached a higher court (either nationally or internationally) that they were viewed as possible vehicles for social change beyond the interests of individual claimants.”<sup>305</sup> Some litigators and activists interviewed for this inquiry emphasized their primary obligation to a client rather than to a cause. Kurdish litigator Tahir Elçi echoed the response of many: “I do not know what you mean with ‘strategic.’ In our case, people who were tortured came to us, and we took their cases.”<sup>306</sup>

### CASE STUDY

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#### Right to Education in India

*Mohini Jain v. the State of Karnataka* (1992)

*Unnikrishnan v. the State of Andhra Pradesh* (1993)

Two cases brought solely in the interests of the individual complainants were claimed post hoc as having opened the jurisprudential floodgates for education justice in India. In fact, the goals and outcomes of the cases could hardly have been more different. The complainants were seeking seats in institutions of higher education for themselves only; the Supreme Court, however, used the motions to establish the justiciability of the fundamental right to education and to define it. The judgments ultimately provided hundreds of millions of Indians with basic education.

According to UNDP data, in 1992 only about half of India’s population was literate, and only about a third of women were. The government was under no obligation to provide basic education to its population of around one billion people and devoted less than two percent of the country’s GDP to it. In *Mohini Jain*, a candidate for admission to a medical college

challenged the constitutionality of a private medical college's charging significantly higher fees for some seats than for others. The Supreme Court held that there was a fundamental right to education and that the fees in question violated that right. (The right to life, the court stated, included the right to live a life with dignity and education was necessary for such a life.) The court, however, did not go into the details of what, exactly, the right entailed. A year later, in *Unnikrishnan*, a group of private medical and engineering colleges asked the court to review its judgment in *Mohini Jain*. The Supreme Court clarified that the fundamental right to free and compulsory education extended up to the time that a child reached 14 years of age. Today, in the wake of these decisions, India's literacy rate is around 70%, and 65% for women.

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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. Nor should it always be understood as a choice: sometimes litigating is a point of last recourse for the simple reason that it costs more than other avenues to deploy. People deeply involved in the fight for rights are often too focused on the daily struggle to be aware of any broader implications. Some change, including through litigation, is the product of opportunistic and/or organic work whose value and significance may become apparent only with the passage of time. Even a loss in court may come to be seen as strategically important in hindsight.

If the relief ordered by a judgment is not forthcoming, discouragement may lead to complaints and affected communities taking enforcement into their own hands. Members of the Iban community in Malaysia and the Sawhoyamaya in Paraguay have forcibly re-occupied their lands following long periods of waiting fruitlessly for post-ruling government action.

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Members of the Iban community in Malaysia and the Sawhoyamaya in Paraguay have forcibly re-occupied their lands following long periods of waiting fruitlessly for post-ruling government action.

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Undue delays in the adjudication and implementation of judgments can create an atmosphere of implicit coercion for individuals and communities who must make decisions in the interim, sometimes choosing paths that are not in their long-term best interests, such as accepting unfavorable land dispute settlements to gain provisional access to shelter.

## Losing as a Litigation Strategy

Legal scholars Catherine Albiston, Ben Depoorter, and Douglas NeJaime, among others, have remarked on the potential strategic value of litigation loss.<sup>307</sup> As Depoorter argues in his classic essay, “The Upside of Losing,” “losing the case can provide substantial benefits. Unfavorable litigation outcomes can be uniquely salient and powerful in highlighting the misfortunes of individuals under prevailing law, while presenting a broader narrative about the current failure of the legal status quo. The resulting public backlash may slow down legislative trends and even prompt legislative initiatives that reverse the unfavorable judicial decisions or induce broader reform.”<sup>308</sup> Indeed, some evidence suggests that litigation need not necessarily prevail in the traditional sense to galvanize community action. Cases that fail in court can expose the need for a law to be changed, and motivate people to do something to accomplish that.

Although beyond the scope of the four thematic studies, the Thomas More Law Center (TMLC) is known for embarking on court challenges in the United States that it has little chance of winning. The TMLC created a niche for itself among Christian Right legal organizations by litigating for the adoption of school curricula that offered alternatives to evolution, and for restricted sex education.<sup>309</sup> These areas have relatively settled bodies of law, and therefore slim chances of legal success.<sup>310</sup>

Although their litigation has not achieved substantial changes in jurisprudence, it has established the organization’s identity within its constituency and through high-profile mainstream media coverage as one that prioritizes religious rights above all else.<sup>311</sup> In mid-2004, TMLC founder Tom Monaghan, who initially funded the organization with \$500,000,<sup>312</sup> stopped financially supporting the center.<sup>313</sup> Yet as of late 2015, TMLC had diversified its donor base to 50,000 individuals and almost quintupled its donations, to USD \$2.3 million per year.<sup>314</sup> So the center’s failure-prone legal strategy may, paradoxically, have helped its organizational cause.

It is noteworthy that this tactic, however, seems to be alien to the global experience with strategic human rights litigation. None of the cases encountered in this global inquiry revealed any evidence of being deliberately crafted or selected so as to lose in court. This was even true in instances when a litigator would have welcomed a loss. (For example, a common-law litigator could use a negative judgment from a lower court to then seek potentially greater jurisdictional impact at a higher-court level.<sup>315</sup>) It is likely that none had the luxury of being able to deploy such expensive and scarce resources as high-risk advocacy.

However, claiming a judicial defeat as a partial victory does appear to be a common tactic seized on by activists around the world. When practiced effectively, reframing a loss in a strategic human rights case can have myriad benefits, including creating a rallying point for public support, as a case for access to education in Brazil illustrates.

## **Suing for Information about Access to Education in Brazil**

*Movimento Creche para Todos*, writ of mandamus (2008)

Around 2008, a Brazilian civil society coalition under the banner of *Movimento Creche para Todos* (Childcare for All Movement) started escalating demands on the municipality of São Paulo to expand early childhood education for the city's burgeoning population of some 11 million. The government's resistance to collecting and publicizing this information was due in part to its fear of disclosing the shortage of spaces in São Paulo's early childhood education system. *Movimento* attempted to gain access to this information as a critical first step toward its larger goal of accessing quality early childhood education for all.

*Movimento* filed a writ of mandamus to secure implementation of municipal legislation. But the court declared the claim inadmissible. Even so, one week later, Brazil's Secretariat for Education published the information requested, revealing, as expected, serious shortages of pre-school spots. Ironically, the government had disclosed the information not in response to *Movimento's* legal claim, which had failed, but to the broad media coverage of *Movimento's* suit against the government. As Esther Rizzi, a law professor and expert on strategic litigation in Brazil, commented, "The dispute for access to information had a fundamental impact on the public debate on the topic, because it uncovered the actual magnitude of the problem of access to education."<sup>316</sup>

In the end, what had started as a modest and legally unsuccessful demand for information triggered much more ambitious strategic litigation. In December 2013, the Court of Appeals of the State of São Paulo ordered the municipality to create, between 2014 and 2016, at least 150,000 new vacancies in childcare institutions (covering from birth to age three) and pre-schools (ages four and five), 50% of which had to be created within the 18 months following the ruling. These dramatic, tangible benefits for tens of thousands of Brazil's most vulnerable could not have been won without the prior disclosure of information about the problem they faced, forcibly brought to light through the threat of litigation.<sup>317</sup>

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## **8. The Litigator Should Be Part of a Multidisciplinary Team**

A final theme that emerged from the studies is the importance of taking a multi-disciplinary approach to strategic litigation. Economists, statisticians, budget experts, curriculum specialists, and disability specialists have all played critical roles in securing positive judgments and ensuring they translate into meaningful education reform.

Similarly, successful pleadings on indigenous peoples' land rights cases have relied heavily on the expertise of ethnographers, geographers, and historians as much as on strict legal argumentation. Independent journalists were also named as invaluable allies in the litigation process, informing judges and the public about human rights violations and generating and/or communicating demand for compliance with judicial rulings.

## CASE STUDY

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### Multistakeholder Success for Torture Survivors in Kenya

*Mutua & Ors v. The Foreign and Commonwealth Office* (2012)

In 1952–1961, the British Colonial Administration in Kenya brutally suppressed opposition to its rule. Some 50 years later, in 2009, a British pro bono law firm helped five elderly survivors of the Mau Mau Uprising bring civil charges in the U.K., seeking damages for torture and other grave ill-treatment, including castration. In a landmark 2013 settlement, the British government paid £19.9 million (about USD \$26 million today) to 5,228 Kenyans. The government also issued an apology before Parliament for abuses committed during that period and established a monument to the victims in the Kenyan capital. This historic case would likely never have come before a court had it not been for a loosely strategic concatenation of efforts by diverse stakeholders.

The break came by coincidence. In 2005, two authoritative historical accounts were published by independent scholars, each providing overwhelming evidence of the systematic use of torture during the Mau Mau Uprising in the 1950s: *Imperial Reckoning: the Untold Story of Britain's Gulag in Kenya*, by Caroline Elkins of Harvard University, and *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire*, by David Anderson of Oxford University. The documentation emboldened a Kenyan human rights organization, the Kenya Human Rights Commission (KCHR), to seek out survivors of the period to explore the possibility of seeking legal remedies. The KCHR brokered a pro bono relationship between the complainants and U.K. law firm Leigh Day. The firm helped spark national and international attention, unleashing a wave of amicus curiae briefs from numerous human rights organizations on behalf of the Kenyan survivors. The intense public pressure undoubtedly played a role in forcing a settlement that the British government vehemently opposed.

It is unlikely that the litigators and complainants would ever have met, let alone secured this landmark decision and historic coup, had it not been for the combined efforts of complainants, litigators, historians, activists, local politicians, and international social leaders.

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In South Africa, where strategic litigation has been practiced and refined, first under apartheid, and for more than two decades under democratic government, thinking about the relationship of litigation to other tools of change has evolved over the years. As Ann Skelton, author of the Strategic Litigation Impacts Report on equal access to quality education and a leading children's rights litigator, explains: "For a long time, we thought we were just doing cases. The litigation was previously not well integrated with our other activities. The attorneys thought their job was to bring cases. Now we realize we are trying to bring change—toward which litigation is a useful strategy but not the only one.... And one of the biggest advantages of having to re-conceptualize how we think about 'strategic litigation' is that our attorneys no longer see these other things—going to Parliament, networking with community groups—as 'extras.' When you see all of our jobs as achieving the goal, that changes the way we think and improves how we do our litigation."<sup>318</sup>

In part out of a desire to ensure that any litigation would be grounded within a larger social movement, South Africa's Equal Education campaign sued the Minister of Basic Education only after community activism, public protests, and direct advocacy, by themselves, had failed to produce a normative framework for redressing egregious educational shortcomings.

Many lawyers interviewed in the course of these studies felt that their responsibility ended when the judge ruled. Contractually, that may be true in many jurisdictions. Moreover, financial and other burdens often constrain lawyers' choices of the cases they accept or initiate. Nonetheless, lawyers can often add value by playing complementary or even supportive roles in the pre-trial and post-judgment phases. The studies show that implementation of judgments is often one of the most significant challenges of litigation and requires considerable post-judgment effort by lawyers as well as others.

A number of members of the bar seemed surprisingly unaware of the commensurate contributions of other actors to the generation of litigation impacts or even the attending risks for their clients, the strength of the movement in whose name a case is brought, and the success and credibility of the litigation itself. At more than one international convening held in connection with this inquiry, litigators wondered aloud why non-lawyer activists had been invited.

To be sure, the human rights lawyer's challenge is complex. In the words of Colin Gonsalves, the founder and director of India's leading strategic litigation organization, the Human Rights Legal Network, strategic human rights lawyers can be "instigators," initiating dialogue with human rights victims and making them aware that they can seek legal remedies. "What is the role of a lawyer? The role of the lawyer is to be a great instigator of peoples' movements. In a situation where the blood is just below the boiling point... the role of the lawyer... is to bring that blood to a boil."<sup>319</sup> Gonsalves filed

suit with India's Constitutional Court on behalf of hundreds of millions of Indians in need of food, ultimately prompting recognition of the right to food as a human right in 2001. The ruling prompted the adoption of the 2013 National Food Security Act, obliging the state to guarantee subsidized food to 50% of the urban population and 75% of the rural population. It is difficult to imagine that result without an activist lawyer having joined the effort.

But others warn that lawyers can inadvertently jeopardize broader social change strategies by transgressing their boundaries as advocates on behalf of others. Dmitri Holtzman, founder and former executive director of South Africa's Equal Education Law Centre, agrees that "[t]here is a role for lawyers to instigate... But I am cautious about the idea of the lawyer being the instigator in all circumstances.... The point from which they're instigating is not always from the state of what is best for the community. It's what is best for the lawyer, what is best for the jurisprudence... They are not always attached to any particular clients or to movements... It could be very dangerous not only for the amount of work that has been brought up... [O]ne really bad judgment could set us back many, many years down the line." Concerned that, "[l]awyers can come in with the best intentions, but be completely off-track with what the needs are," Holtzman warned against "a dictatorial relationship" developing with the client and the lawyer being seen as the "savior."<sup>320</sup>

Notwithstanding its importance, dialogue with communities may not come instinctively to many lawyers. As Geoff Budlender has noted: "What has been learned in public interest lawyering in South Africa includes how important it is to cede the space to community organizations to allow them to take control of choices in the course of a political/legal struggle. As a lawyer, it is much easier and quicker to make the decision yourself, but then you may get it wrong. We have learned through experience that local knowledge and thinking are critical, and the lawyer can never have that, in the way that the client can. But that's a hard lesson to learn. And all our professional training teaches the opposite."<sup>321</sup>

To be sure, there is a broad array of appropriate roles for lawyers to play. The research consistently suggested that there is demonstrable value in lawyers' listening to, learning from, and collaborating with clients and their broader constituencies, as well as in drawing upon non-legal expertise. This suggests a need for humility about the essential but limited contribution of law to the struggle for social change.

In the end, the survey of scores of disparate impact cases around the world suggests that while litigators are required, strategic litigation is most effective when carried out principally for, and together with, those with other forms of expertise.



## V. Conclusion

The Strategic Litigation Impacts Project was born of a desire to gain a global, experience-based understanding of the impacts of strategic human rights litigation as an instrument of social change. To that end, it interviewed hundreds of respondents in more than the 11 focus countries (Argentina, Brazil, the Czech Republic, Greece, Hungary, India, Kenya, Malaysia, Paraguay, South Africa, and Turkey) in four subject-matter areas: on Roma school desegregation, equal access to quality education, indigenous peoples' land rights, and torture in custody. This fifth and final volume in the series has sought to summarize and distill lessons from the four thematic studies.

The lessons drawn from those previous studies speak to the complexity of the topic. It is clear that strategic litigation matters, and is capable of generating impacts. However, it is equally clear that understanding those impacts requires a multi-dimensional model that looks beyond material impacts to account for changes in jurisprudence and institutional practice, and even changes in attitude and discourse. The pursuit of change through strategic litigation can be accelerated or retarded by a host of factors, including the interactions among litigators, plaintiffs, and activists, and the iterative use of courts to build momentum toward social change over time. Finally, the impacts of strategic litigation—and even the question of whether specific litigation should be considered strategic—are often understood only in retrospect.

These lessons should give pause to both champions and detractors of strategic litigation. The Strategic Litigation Impacts Reports illustrate that strategic litigation can have profound, powerful, and lasting effects: segregated, Roma-only schools have been closed in Greece; “mud schools” have been replaced with proper learning facilities in South Africa; the suffering of torture survivors has been memorialized in Kenya; and indigenous people driven from their traditional lands have received legal title in

Paraguay. Yet schools remain segregated and under-resourced, torture is practiced widely and with impunity, and indigenous people continue to have their land stolen from them.

Given this complicated picture, there is a clear need for more, and more nuanced, thinking about strategic litigation and its impacts. The Justice Initiative is grateful to the scores of activists, organizers, plaintiffs, and litigators around the world who shared their ideas to help paint this unprecedented picture of global experience with strategic human rights litigation. This series of reports is in many ways a tribute to them, their perseverance, ingenuity, and generosity. But above all, this project may be seen as a call for more study of and attention to strategic litigation and its impacts. It is intended to serve not as a final word on the topic, but rather as one small step in the march toward a deeper understanding of this complex tool for human rights and social change.

## VI. Appendices

### Appendix A: Interview Questionnaire

#### Sample Questionnaire

**This questionnaire was used for the semi-structured interviews conducted for the study on indigenous peoples' land rights.**

**Important instructions to Researchers:** The Study on Strategic Litigation on Indigenous Peoples Land Rights proposes using the following normative lines of inquiry in its primary research. **All Researchers associated with this study should use these questions to elicit views from all of the stakeholders they interview for the “360-degree” harvesting of perspectives on the impacts of strategic litigation.** Views should address the three types of impact identified in the study (see methodology): Views should **address the three types of impact identified in the study** (see methodology):

1. **material outcomes** (such as the number of indigenous people securing their rights to land),
2. **legal and policy** (such as amendments to national laws, issuance of administrative directives or changes in budgets) and
3. **behaviours and attitudes** (reported changes in rights awareness, mobilization of coalitions, etc.).

Questions should be formulated so as to elicit views on the situation *before the case* was mounted and *after the judgment* or settlement, to reflect correlation or causation. The list of questions is not exhaustive, and should not preclude interviews with any stakeholders not explicitly mentioned here.

**Interview protocol:** The researcher should begin every interview or email exchange with a request for a brief oral or written narrative of the history of the struggle for indigenous peoples' land rights in their respective context. If oral, the response should be captured on video or voice recorder and submitted to the lead author and the Open Society Justice Initiative. (Such equipment could be provided by the Open Society Institute, if necessary.) Responses to these questions should be recorded in written form, in English, and submitted to the Lead Researcher and to Erika Dailey, as part of the researchers' contractual obligations.

# Questionnaire Used in Semi-Structured Interviews

(used for the study on indigenous peoples' land rights, but adapted from a normative questionnaire)

## **I. Impacts on 'clients' (members of the petitioning community, community leaders)**

- a) Legal redress for the client(s) (whether in form of monetary compensation, authoritative judicial finding, overturning a wrongful lower court decision, etc.)
- b) What has happened to the individual communities, and individual members, on whose behalf the cases were brought? To their broad socio-economic and/or racial or ethnic cohorts? How do they think their rights have changed as a result of the case, or their perception of the use of strategic litigation, if at all? How did they perceive their life possibilities to have changed, if at all? Their views on the rule of law, if at all?
- c) What did clients expect from the litigation at the time? How do clients today perceive the litigation? What impact has it had subjectively on them? How do they view the rule of law and/or judicial remedies and their impacts?

## **2. Impacts on the affected communities**

- a) Awareness of rights violations and the role of the courts in providing redress
- b) Awareness of the judgments
- c) Awareness of rights to non-discrimination against indigenous peoples and their right to land
- d) Actions taken to enforce those rights apart from strategic litigation
- e) To what extent have the decisions prompted and/or benefitted from mobilization/organization among communities?
- f) Interaction with the clients—to what extent and through what means have the clients been involved in the litigation process?
- g) How has access to indigenous lands changed as a result of the judgments/settlements, if at all? Has it had any knock-on effect for indigenous communities who also suffer these violations but may not have (yet) brought a case?
- h) If there were some remedies awarded by the court, have these been 'shared', accessible to the whole community or just to the clients?
- i) To what extent your customary laws or equivalent indigenous land tenure systems have been important?

3. **Impacts on non-indigenous communities living in closed vicinity of the concerned indigenous communities**
  - a) Attitudes of majority about issue of discrimination against indigenous groups and their claims to land: (1) before the judgment; (2) after the judgment
  - b) Awareness of non-indigenous populations of the judgments and impact (or perceived impact) of the judgment on them
  - c) Interaction with the clients: (1) before the judgment; (2) after the judgment
4. **Impacts on strategic litigators (lawyers, legal team, supporting NGOs)**
  - a) On those who brought the case(s)
  - b) On the broader cohort of strategic litigators or the Bar?
  - c) What did they learn, if anything, from the experience as litigators? As social-change agents?
  - d) How did they apply the learning in their work as they went, if at all?
  - e) How important (or not) was international and comparative law in the arguments put forward to the court?
  - f) What would they have changed in their approach in retrospect?
  - g) In what way, if any, have they or would they adapt their practice for similar cases in the future?
5. **Impacts on policymakers**
  - a) Interview national officials (legislators, ministers) and regional officials if relevant (at the Inter-American Commission, the African Commission on Peoples' and Humans' Rights, as relevant) to explore their perceptions of the cases and how they have or have not impacted their understanding, decisions and actions with regard to indigenous land rights.
  - b) How did the national governments and, as relevant, municipalities, interpret the cases and their impacts, such as in speeches, public reporting, media interviews, etc.?
  - c) What changes in policy, if any, emerged from the court proceedings, judgments and implementation or lack thereof?
  - d) Rules issued by relevant government bodies?

**6. Impacts on the judiciary and the law**

- a) Interview national judges and judges at the regional courts/commission (as relevant) = what is their perception of the impacts of these cases to date?
- b) Education of the judiciary about issues at stake and/or about their own role/responsibility to act—Domestic jurisprudence—to what extent have domestic courts been impacted
- c) Number of references to any of the relevant judgments
- d) Number of cases decided at domestic level on issue of land rights
- e) What changes in legislation/regulations governing access to land rights since the litigation at issue was launched?

**7. Impacts on media coverage**

- a) To what extent were these cases covered in local and national media at all? When mentioned, what were the principle messages conveyed?
- b) Interview media—what are media perceptions of the cases and of the broader issue of indigenous peoples' rights and/or land rights and/or indigenous land rights in the cases addressed?

**8. Impacts on officials**

- a) Interview relevant official who are dealing directly with land claims: for examples land registry, conservation agencies, wildlife parks rangers, forestry department, etc: to what extent are they aware of the judgment? Do they know how they have to support implementation?
- b) Have the judgments changed their relationship with indigenous communities?

**9. Impacts on non-state actors, such as corporations disputing the land claims**

- a) Awareness of the disputes and the legal challenges
- b) Awareness of the judgments, if relevant
- c) Changes in company policies or practices as a result of the challenge, if any

**10. Impacts on organized civil society**

- a) Community rights groups (whether related to indigenous rights or land rights or not)

- b) Policy research and advocacy organizations
- c) Mainstream human rights NGOs
- d) Conservation or wildlife organisations if relevant
- e) The Bar or equivalent
- f) Impact on donors (i.e. organizations which might have funded litigation —if relevant)

**II. Impacts on non-state actors, such as corporations and investors disputing the land claims**

- a) What was the situation before the case was filed and/or the judgment handed down?
- b) What, if anything, has changed since then?
- c) Awareness of the disputes and the legal challenges
- d) Awareness of the judgments, if relevant
- e) Changes in company policies or practices as a result of the challenge, if any



## Appendix B: Legal Citations

Following are legal citations for all case law referenced in this paper.

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## Appendix C:

### Select Academic Resources

This list cannot capture more than a fraction of the immensely rich and informative contributions to the scholarly field. It identifies merely some of those that have proven most relevant and useful in the context of this study.

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# Appendix D: Research Hypotheses about Strategic Litigation

The Open Society Justice Initiative in collaboration with the Stanford University Law School Policy Lab Practicum

## **Research Hypotheses about the Impacts of Strategic Litigation**

The following hypotheses should be read as questions. They do not intend to advance one viewpoint or another, but to suggest lines of inquiry to be interrogated. They appear in no particular order of importance.

*“Strategic litigation is more likely to be demonstrably impactful when –*

### **I. Political context:**

- a) The judgment and its implementation are as impervious as possible to political and social pressure.
- b) There are at least some sympathetic allies in government, such as relevant ministers, ombudsmen and/or parliamentary committees.
- c) Actual or potential opponents of the judgment are poorly organized and/or have an incoherent challenge, and/or are not unduly or directly threatened by it.

- d) The supporting and/or representative social and/or advocacy and/or client communities—such as Roma, or an NGO—provide a relatively high degree of solidarity and self-organization.

**2. The Nature of the Issue:**

- a) Judgments addressing certain issues are self-executing—i.e., they do not require further action by legislative, executive, administrative or other bodies to take effect (example: court ruling striking down prior censorship result in publication; court ruling outlawing the death penalty ends capital punishment).
- b) Certain kinds of issues may be more or less expensive and/or time-consuming and/or politically resistant to address, for example, social or economic rights, torture and physical abuse.

**3. Strategic Attributes of a Case:**

- a) All other reasonable avenues for the defense and/or advancement of the right(s) at issue have been exhausted, including judicial arbitration and the threat of litigation.
- b) The legal culture of the jurisdiction is deemed by the litigator, client and relevant advocates to lend itself to strategic litigation, for example, where corruption and the presumption of corruption should not be a mitigating factor.
- c) Litigators conduct an informed, comprehensive risk analysis before committing to proceed with any judicial action. This includes consideration of risks to the client and litigator, and to the judgment and remedies sought. The resulting risk-mitigation strategy should be developed together with a detailed back-up plan for safeguarding both in case the desired outcomes are not achieved.
- d) Litigators and clients share an understanding before any court action is taken about their respective criteria for settling and for, discontinuing post-judgment implementation and advocacy efforts. This should be informed by a shared understanding of the funding available to support efforts in the medium and long term and, as needed, prospects for securing additional/alternative funding.
- e) Litigators and clients have a shared understanding about their mutual prerogatives and roles as rights advocates in the context of the planned court

action; that both parties be assured that their interests do not conflict, or conflict with those of the implicated constituency; and that mutually satisfactory resolution mechanisms exist to resolve any unforeseen such conflict.

- f) In the case of treaty body and common law cases in particular, litigators, clients, and ideally a majority of the implicated constituency share an understanding of whether securing remedies for the individual client(s), the advancement of relevant jurisprudence, or raising political and/or social awareness is of paramount importance to each in crafting a possible legal strategy.
- g) Litigators propose remedies to the presiding judge(s) or quasi-judicial body/bodies that are possible for the judge to order and, of ordered, feasible for other essential actors to implement.
- h) Social services and, as needed, security/protection safeguards are guaranteed and provided in good faith for as long as the petitioner requires.
- i) The case is taken on in a particular jurisdiction as part of a national, regional or global legal or advocacy strategy.
- j) The filing refers explicitly to regional and/or international obligations, norms and/or precedent.
- k) It is made clear to the judge(s) and other actors necessary to implement the judgment that the case is being brought not in isolation but as part of a strategy that could generate additional such cases and is backed by substantial political support and/or social demand.
- l) Follow-up strategic litigation succeeds the judgment(s) whose impacts are being measured, such as following a regional judgment with a domestic challenge, or one domestic victory with another domestic victory.
- m) There is funding available to support the case and possible appeals and/or follow-on filings in the long term.



# Endnotes

1. The Stanford Law School Policy Lab Practicum students were Eeshan Chadurvedi, Michael Frenkel, Ju-Ching Huan, Gaëlle Tribié and Swain Uber.
2. Public Law Project, *Guide to Strategic Litigation*, 2014, p. 5, at <http://www.publiclawproject.org.uk/data/resources/153/Guide-to-Strategic-Litigation.pdf>.
3. 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-strengthening-human-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-osiatynski-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").
4. 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.
5. 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.
6. 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.

7. Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact*, Hart Publishing, 2018.
8. Aryeh Neier, *Only Judgment: The Limits of Strategic Litigation in Social Change*, International Debate Education Association, 1982.
9. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?*, University of Chicago Press, 2008.
10. 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.”)
11. 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.
12. 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.
13. Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, University of Chicago Press, 1998.
14. Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash and the Struggle for Same-Sex Marriage* Oxford University Press, 2013, p. 172.
15. 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”).
16. A compilation of the Justice Initiative’s cases is available at <https://www.opensocietyfoundations.org/reports/global-human-rights-litigation-report>.
17. Available upon request.
18. See <https://www.opensocietyfoundations.org/publications/impacts-strategic-litigation-equal-access-quality-education>.
19. See <https://www.opensocietyfoundations.org/publications/impacts-strategic-litigation-equal-access-quality-education-brazil>.

20. See <https://www.opensocietyfoundations.org/publications/impacts-strategic-litigation-custodial-torture>.
21. See <https://www.opensocietyfoundations.org/publications/impacts-strategic-litigation-indigenous-peoples-land-rights>.
22. Corporations in the United States have carried out extensive, and often successful, strategic litigation campaigns to create, preserve, protect, and expand their rights to do business, and promote their interests and causes, free from government regulation. See, e.g., Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights*, W.W. Norton, 2018.
23. See, for example, the Centre for Collective Action Research, University of Gothenburg, Sweden. <https://cecar.gu.se/>.
24. Michael McCann, "Law and Social Movements," in Austin Sarat, *The Blackwell Companion to Law and Society*, Blackwell, 2004, p. 514.
25. Interview with Ann Skelton, Centre for Child Law, University of Pretoria, South Africa, by James A. Goldston, Cape Town, South Africa, March 12, 2015.
26. Panel discussion, "Strategic Litigation Impacts: Global Narratives about Social Change," Open Society Justice Initiative, New York City, October 26, 2015, <https://www.opensocietyfoundations.org/events/strategic-litigation-impacts-global-narratives-about-social-change#t=36m17s,39m21s>.
27. Lawrence M. Friedman, *Impact: How Law Affects Behavior*, Harvard University Press, 2016, p. 57.
28. "When do researchers decide when to start and stop measuring social change? There is no obvious answer in many cases and the choice of endpoints, which may be artificial, can affect one's ultimate assessment." S. Cummings, "Empirical Studies of Law and Social Change," 2013 *Wisconsin Law Review* 171, 193, 2013.
29. Gary Orfield and Jongyeon Ee, "Segregating California's Future: Inequality and Its Alternative 60 Years after *Brown v. Board of Education*," UCLA, The Civil Rights Project, May 2014.
30. See <http://www.pbs.org/wgbh/frontline/article/the-return-of-school-segregation-in-eight-charts/>.
31. Scott L. Cummings, "Empirical Studies of Law and Social Change," 2013 *Wisconsin Law Review* 171, 187, 190, 2013.
32. Aryeh Neier, *The International Human Rights Movement: A History*, Princeton University Press, 2002.
33. Program to "celebrate the Bicentenary of the Prohibition of Slavery in Great Britain," July 14, 1972, quoted in Steven M. Wise, *Though the Heavens May Fall: The Landmark Trial that Led to the End of Human Slavery*, Da Capo Press, 2005, p. xiii.
34. See *id.* at xvi. ("The Somerset case ... catalyzed ... an unusually prolonged and public struggle ... that echoed not just through cavernous Westminster Hall, but in the pages of monographs, newspapers and magazines, in extraordinary letters to the editor, and in pubs and drawing rooms throughout England and the Americas. Everyone began talking about black slavery and the African slave trade, and they didn't stop until both had been abolished.")

35. Oscar Vilhena Vieira, "Public Interest Law: A Brazilian Perspective," *UCLA Journal of International Law and Foreign Affairs*, 2008. Gama's death on August 25, 1882 brought thousands of former slaves to the streets, and generated several laudatory editorials and obituaries in major newspapers. Slavery in Brazil was abolished six years later. *Id.*

36. 163 U.S. 537 (1896). *Plessy* constitutionalized racial segregation in the United States for 60 years through the doctrinal sleight of hand known as "separate but equal."

37. In 1890, the state of Louisiana passed a law that required separate accommodations for blacks and whites on railroads, including separate railway cars. A group of prominent black, creole, and white residents of New Orleans, the Comité des Citoyens (Committee of Citizens), sought out a plaintiff who would be most likely to appeal to white male judges. Homer Plessy fit the bill. Born a free man, Plessy looked "white" even though, under the archaic racial laws then in force, he was required to sit in "colored" railway cars because of his one-eighth African ancestry. On June 7, 1892, as part of a carefully orchestrated plan, Plessy bought a first-class ticket and boarded a "whites only" car of the East Louisiana Railroad in New Orleans. After Plessy took a seat, he was asked to move to the blacks-only car. When he refused, Plessy was arrested, taken off the train, and later sentenced to pay a fine. The Supreme Court found that, so long as Louisiana provided accommodations that were equal in condition, they could be separate. What began as an effort to strike down segregation ended up legitimizing it for generations to come: it took nearly six decades to persuade the Supreme Court to change course. See generally Keith Weldon Medley, *We As Freeman: Plessy v. Ferguson: The Fight Against Segregation*, Pelican Books, 2003.

38. *Brown v. Board of Education of Topeka*, 347 U.S. 483, 1954.

39. See James A. Goldston, "The Unfulfilled Promise of Educational Opportunity in the United States and Europe: From *Brown v. Board* to *D.H.* and Beyond," in Jacqueline Bhabha, Andrzej Mirga, and Margareta Matache, eds., *Realizing Roma Rights*, University of Pennsylvania Press, 2017, p. 164.

40. See Richard J. Goldstone & Brian Ray, "The International Legacy of *Brown v. Board of Education*," 35 *McGeorge Law Review*, 2004, p. 105. (*Brown* demonstrated "the ability of courts to promote human rights and [of] lawyers to effect social change.")

41. See Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*, University of Chicago, 1998. "The U.S. rights revolution is usually attributed to one or more of the following: constitutional guarantees of individual rights and judicial independence, leadership from activist judges (particularly Supreme Court justices) who have been willing to use those constitutional provisions to transform society, and the rise of rights consciousness in popular culture. Conventional explanations tend to place particular emphasis on judicial leadership as the catalyst for the rights revolution," p. 2.

42. Foreign Office, Draft Ministerial Brief, July 1949, FO 371/78936 [UNE 3567/17311/96/1949], quoted in Dominic Grieve QC MP, "Is the European Convention Working," *European Human Rights Law Review* 584, 586, 2015. In 1950, the U.K. Attorney General "regarded the possibility of UK citizens lodging complaints against their government in Strasbourg as 'wholly opposed to the theory of responsible government.'" Letter of 4 October 1950, from the Right Honourable Sir Hartley Shawcross QC MP, LCO 2/5570, quoted in Anthony Lester, *Five Ideas to Fight For*, Oneworld Publications, 2016, p. 19.



43. Michael McCann, "Reform Litigation on Trial," in 17 *Law and Social Inquiry* 715, 740, 1992.
44. Michael McCann, "Law and Social Movements," in Austin Sarat, *The Blackwell Companion to Law and Society*, 2004, pp. 508–9. "[L]itigation and other seemingly conventional legal tactics can be fused with ... disruptive forms of political expression" such as "protests, marches, strikes and the like...." *Id.* at 509. See Scott L. Cummings and Louise G. Trubek, "Globalizing Public Interest Law," 13 *UCLA Journal of International Law and Foreign Affairs* 1, 2009, p. 47. (Domestic litigation "is increasingly viewed as part of a broader repertoire of advocacy techniques that lawyers bring to bear in complementary and politically sophisticated ways to address complex global problems.")
45. But there are exceptions, to be sure. The use of law to challenge abuses under South African apartheid is one. There, litigation was pursued, even in the absence of democracy, in part because "the opposition had few avenues other than litigation through which to challenge the regime," and "South Africa [under apartheid] repeatedly proclaimed its respect for the rule of law, to both foreign and domestic audiences." R. Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980–1994*, Routledge, 1995, p. 2.
46. It is not within the scope of this study to assess current financial resourcing for strategic human rights litigation. Definitive data are scarce, however some scholars have argued that financial support for rights litigation constitutes a minority portion of the relatively small sums dedicated to "human rights" more generally by government development agencies and the leading private foundations which provide philanthropic support for social change. See James Ron, Archana Pandya & David Crow, "Universal Values, Foreign Money: Funding Local Human Rights Organizations in the Global South," 23 *Review of International Political Economy*, p. 20, 2016.
47. Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, University of Michigan Press, 2d ed. 2004, p. 5.
48. Cf. Hurst Hannum, "Reinvigorating Human Rights for the Twenty-First Century," 16 *Human Rights Law Review*, 409, 411, 2016. (The difference between "human rights as ... law" and "other obligations of a moral or political nature needs to be maintained.")
49. See Rachel A. Cichowski, "The European Court of Human Rights, Amicus Curiae and Violence against Women," 50 *Law & Society Review* 890, p. 893. ("Formal legal norms provide more certain codes of behavior that in the presence of independent judicial authority can then be enforced and protected"; *ibid.* at 897 (The participation of civil society organizations in litigation "provides the critical comparative research and argumentation that transforms vague human rights into a safeguard against contemporary atrocities and violence").
50. Sherrilyn Ifill, "How Democrats Must Fight the Confirmation of Jeff Sessions," *New Republic*, December 8, 2016, at <https://newrepublic.com/article/139220/democrats-must-fight-confirmation-jeff-sessions>.
51. Interview with Mandisa Shandu, co-director and head of law, Ndifuna Ukwazi, by James A. Goldston, Cape Town, South Africa, July 25, 2016.
52. Michael McCann, "The Unbearable Lightness of Rights," 48 *Law & Society Review* 245, 257, 2014, (citing Charles R. Epp, *Making Rights Real*).
53. R. Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980–1994*, Routledge, 1995, p. 64.

54. Gaëtan Cliquennois and Brice Champetier, “The Economic, Judicial and Political Influence Exerted by Private Foundations on Cases Taken by NGOs to the European Court of Human Rights: Inklings of a Cold War?,” *European Law Journal*, Vol. 22, No. 1, January 2016, pp. 92–126.

55. See, e.g., Judith N. Shklar, *Legalism: Law, Morals, and Political Trials*, Harvard University Press, 1986. Sam Moyn, *Not Enough: Human Rights in an Unequal World*, Harvard University Press, 2018.

56. Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, University of Michigan Press, 2d ed. 2004, p. 6. This tendency has been noted by many others including, recently, the Socio-Economic Rights Institute of South Africa (SERI). See SERI, *Public Interest Legal Services in South Africa: Project Report*, 2015, p. 11 (finding widespread concern that “legal practitioners are ‘heavily inclined towards litigation’ as the preferred means to achieve legal reform and ‘frequently cultivate an unduly optimistic, even naively romantic view of the law’s transformative potential’”) (citations omitted).

57. See SERI, *Public Interest Legal Services in South Africa: Project Report*, 2015, p. 11, citations omitted.

58. See, e.g., SERI, pp. 91–92. (Noting “the adversarial and antagonistic nature of litigation and how this impacts on organisations’ relationships with government officials and politicians” and quoting one respondent saying that “everyone is very conscious of the negative dynamics of being quick to litigate and to engage in too adversarial a process.”) And yet, “[l]itigation against the state does not always damage relationships... [I]n the current socio-political context [in South Africa], progressive officials whose hands are tied as a result of political will use litigation as a justification for pushing more progressive developments and sometimes encourage public interest legal organisations to litigate.” SERI, p. 92. But see Public Affairs Research Institute and the Raith Foundation, *Confrontational, Complementary, Co-operative or Co-opted? Social Justice Organisations working with the State*, 2016, p. 39. (“Litigation is often widely perceived as only building adversarial relations with the state, and it does indeed carry that risk, but our findings proved that it was a complex yet useful tool. Litigation offered the opportunity to unblock certain pathways to parts of the state that prevented action on important social justice issues, compelling action on strategically placed government spheres or departments. There were also examples where a court ruling forced a government department to build working relations with an SJO in pursuit of a social justice outcome. Legal action was particularly useful when it received support, whether implicit or explicitly, from other government actors who lacked decision-making power, but supported the SJO. Rather than only conceived as uniformly compromising relations with the state, strategic litigation can also strengthen relations with parts of the state in the pursuit of a social justice agenda.”)

59. See, e.g., Catherine Albiston, “The Dark Side of Litigation as a Social Movement Strategy,” 96 *Iowa Law Review Bulletin* 61, 75, 2011. (Noting “a longstanding critique of litigation as essentially winning the battle, but losing the war. In this view, litigation strategies may win some short-term advantages for the parties, but by working within the system such strategies help legitimate the larger structure of domination through legal ideology and law. The law, in this view, helps stave off revolution and justify the status quo of unequal social relations by providing nominal individual remedies for unequal treatment.”) See also Michael McCann, “The Unbearable Lightness of Rights,” 48 *Law & Society Review* 245, 250, 2014. (“[R]ights constructions ensure order less because they dupe or brainwash ordinary people than because they are harnessed to constellations of group power, institutional arrangements, and state force supporting traditional constructions of rights that are difficult or costly for most people, and especially subaltern or disadvantaged groups, to challenge

and change. And such practical understandings of ordinary persons about the difficulties or costs of challenging the status quo order then often ossify into resignation and routine.”)

60. Derrick A. Bell, Jr., “Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,” 85 *Yale L. J.* 470, 1976.

61. Beth Van Schaack, “With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change,” *Vanderbilt Law Review*, Vol. 57, No. 2305, 2004; Santa Clara Univ., Legal Studies Research Paper No. 07-34, available at SSRN: <https://ssrn.com/abstract=1007792>.

62. Catherine Albiston, “The Dark Side of Litigation as a Social Movement Strategy,” 96 *Iowa Law Review Bulletin* 61, 62, 2011. Cf. See S. Cummings, “Empirical Studies of Law and Social Change,” 2013 *Wisconsin Law Review* 171, 183, 2013. (“[I]t is not always obvious that lawyers pose more risk to movement self-determination—whatever that may mean—than other types of leaders.... [R]esearch has shown that cause lawyers are often highly attuned to power discrepancies between themselves and clients, and make efforts to minimize them; they are also attuned to the possibility of divergence between client interests and the broader interests of communities, and attempt to structure the lawyer-client relationship in such a way that promotes accountability.”) See also Michael W. McCann, “How Does Law Matter for Social Movements?,” in Bryant G. Garth and Austin Sarat, eds., *How Does Law Matter?*, Northwestern University Press, 1998. (“Few studies of social movements in the broad resource-mobilization tradition have confirmed legal scholars’ fears about oligarchic lawyers and the ‘lure of litigation’ they pose.”)

63. Gerald Rosenberg has made this argument particularly powerfully in relation to the purported impact of litigation challenging racial discrimination in many spheres of American public life: “[C]ourts had virtually no effect on ending discrimination in the key fields of education, voting, transportation, accommodation and public places, and housing. Courageous and praiseworthy decisions were rendered, and nothing changed....” Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, University of Chicago Press, 1991, pp. 70–71. See also Gerald N. Rosenberg, “Courting Disaster: Looking for Change in All the Wrong Places,” 54 *Drake Law Review* 795, 813, 2006. (Arguing that, in the absence of a social movement to support their litigation, “[s]ame-sex marriage proponents ... confused a judicial pronouncement of rights with the attainment of those rights.”) See also Robert Gordon, “Some Critical Theories of Law and Their Critics,” in David Kairys, ed., *The Politics of Law: A Progressive Critique*, Basic Books, 3d ed. 1998, pp. 642–44. (“Courtroom victories are often not translated into changes in practice, yet alone in the structures of power.”)

64. This has not gone unnoticed in the academy. See, e.g., Christopher McCrudden, “Transnational Culture Wars,” 13 *International Journal of Constitutional Law* 434, 2015. (“NGOs have well understood the power that courts have in generating interpretations of existing legal norms that support their policy positions and have sought to expand their activities into regional and domestic litigation in order to secure such favorable interpretations”; noting “growing evidence” that the more traditional roles of NGOs in lobbying inter-governmental institutions on rights issues “is now being supplemented by an additional role: the initiation and conduct of, or participation in, litigation at the domestic level and beyond.”) See also Michael McCann, “Law and Social Movements,” in Austin Sarat, *The Blackwell Companion to Law and Society*, Blackwell, 2004, p. 515. (“The explosion of human rights, environmental, peace, and indigenous people’s NGOs and cause lawyers, along with the growth of regional ... and international ... adjudicatory institutions, has facilitated the use of legal leveraging as a key tactic of social movement politics around the globe.”)

65. One study recently concluded that, as a result of a new 1991 Constitution liberalizing access to judicial review for alleged breach of constitutional rights, and a 1993 reform of health care provision, “Colombian courts have resolved more than 1.1 million claims relating to the violations of the right to health care since the entry into force of the 1991 Constitution.” Alicia Ely Yamin, *Case Study: Colombian Constitutional Court Case T-760/08*, 2016, (report for Open Society Foundations), p. 2.

66. Christopher McCrudden, “Transnational Culture Wars,” 13 *International Journal of Constitutional Law* 434, 2015. (Describing increasing frequency of litigation on issues of religion in European courts by US-based NGOs, including those opposed to American judicial reliance on foreign precedents: “We’re forced to do it, because if we don’t, we’re going to lose according to rules of a game we never created,” quoting from Clifford Bob, *The Global Right Wing and the Clash of World Politics*, p. 83, 2012.)

67. The Institute for Human Rights and Development in Africa (IHRDA), founded in The Gambia in 1998, has litigated dozens of cases in more than fifteen countries on the African continent concerning refugee and minority rights, children’s rights, the right to fair trial, freedom of expression, and freedom from discrimination.

68. The Pan African Lawyers Union (PALU), based in Arusha, Tanzania, was created in 2002 to defend the shared interests of Africa’s five regional lawyers’ associations and over 54 national lawyers’ associations. “About the Pan African Lawyers Union,” PALU website, <http://lawyersofafrica.org/about-the-pan-african-lawyers-union/>. PALU engages in public interest litigation, including before the African Court of Human and People’s Rights and the East African Court of Justice. In one of its more notable cases, PALU successfully challenged before the African Court of Human and Peoples’ Rights Tanzania’s effort to bar a religious figure from running for elective office. According to the Oxford Human Rights Hub, “This case contains many firsts—it is the first case to be considered on its merits, the first finding in favour of the applicant and the first matter to consider the issue of compensation and reparations.” Available at: <http://ohrh.law.ox.ac.uk/a-watershed-case-for-african-human-rights-mtikila-and-others-v-tanzania/>. See *Tanganyika Law Society (TLS) and Legal and Human Rights Centre (LHRC) and Rev. Christopher R. Mtikila v. The United Republic of Tanzania* (2013), Application 009/2011. “In 2013, the Court found the state in violation of the individual’s right to participate freely in the government and ordered reparations.” Reverend Mtikila died in a suspicious car accident on October 5, 2015.

69. Founded in 2007, the Center for Health, Human Rights, and Development (CEHURD), based in Kampala, Uganda, pursues what it terms an “equitable, people-centered health system” in Uganda and the East African region. In addition to using research, advocacy, and community empowerment, CEHURD hosts its own Strategic Litigation Program, which provides free legal services to individuals whose health rights have been violated. It “aims at addressing systematic challenges in the health system by challenging laws, policies and practices that hinder the realization of the right to health.....” See “Strategic Litigation Programme,” CEHURD website, available at <http://www.cehurd.org/programmes/strategic-litigation/>.

70. South Africa has a hybrid legal heritage, comprising Roman Dutch law for many of its civil law principles, but also a common law tradition regarding procedural matters. South Africa has a wealth of organizations dedicated to strategic litigation, including several created only in the past 15 years. To take one example, Equal Education, born in 2008, has built a broad-based social movement directed toward advancing quality and equality in schools. In 2011, Equal Education saw the

need to create its own law center, which has undertaken successful litigation to mandate the Ministry of Education's promulgation of minimum norms and standards for the construction of school infrastructure nationwide. See generally Yana van Leeve, "Mobilising the Right to a Basic Education in South Africa: What Has the Law Achieved So Far? (Draft)," 2014, p. 2, available at <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/van-Leeve.pdf>. Together with the Equal Education Law Centre, Equal Education and other groups have taken cases to court to vindicate the rights of students to organize at school, to challenge the arbitrary imposition of disciplinary measures, to secure libraries for all schools (93% of all schools in South Africa do not have a library), and to secure non-discriminatory admission to quality schools for all students regardless of ability to pay.

71. Founded in Tel Aviv in 2005, Gisha, meaning "access" or "approach," deploys strategic litigation to protect freedom of movement, freedom of information, property/residency rights, and access to education for Palestinians, especially Gaza residents, across borders. By focusing on Israel's restrictions on Palestinians' mobility, Gisha helps occupied Palestinian Territory residents secure access to education, jobs, family members, and medical care. Other organizations in Palestine have been using litigation to challenge rights abuses for many years. Shawan Jabareen, executive director of Al Haq, based in Ramallah, notes: "The Israelis criticize us for using what they call 'lawfare.' I feel proud to use the law to achieve change. This is a long struggle which we are fighting using legal means. We have nothing to be ashamed of." Interview with Shawan Jabareen, executive director, Al Haq, by James A. Goldston, Ramallah, occupied Palestinian Territories, June 4, 2015.

72. Lawyers for Liberty, founded in Malaysia in 2011 as a "human rights lawyers' organization," has engaged in legal intervention and representation for rights defenders, opposition politicians, and dissidents. The organization believes that "public interest litigation ... remains... one of the most effective ways to get some answers, redress and accountability for human rights violations especially in cases of death in custody and police shooting[s] where there is almost absolute impunity." "What we do" section of Lawyers for Liberty website, available at <http://www.lawyersforliberty.org/what-we-do/>. Lawyers for Liberty participated in the corruption probe that led in mid-2016 to the filing of a U.S. Justice Department money-laundering complaint against Prime Minister Najib Razak. Richard C. Paddock, "Justice Department Rejects Account of How Malaysia's Leader Acquired Millions," *The New York Times*, July 22, 2016, at <http://www.nytimes.com/2016/07/23/world/asia/malaysia-1mdb-najib-razak.html>.

73. Since 1995, the Forum for Women, Law, and Development (FWLD) in Nepal has pursued litigation to further women's rights to work and freedom of movement, equal pay, and protection from gender-based violence, including by criminalizing marital rape. See <http://www.fwld.org/our-works/major-achievements.html>.

74. Founded in Harare in 1996, Zimbabwe Lawyers for Human Rights (ZLHR) pursues domestic and international litigation to promote free and fair elections, freedom of information, unimpeded administration of justice, equal treatment, and the protection of human rights defenders.

75. In ECOWAS countries, see for example Olabisi D. Akinkugbe; "Legal Aspects of Economic Integration in Africa," by Richard Frimpong Oppong, *Journal of International Economic Law*, Volume 18, Issue 4, December 21, 2015, pp. 935-938.

76. Lars Tragardh and Michael X. Deli Carpini, "The Juridification of Politics in the United States and Europe: Historical Roots, Contemporary Debates and Future Prospects," in Lars Tragardh, ed., *After National Democracy: Rights, Law and Power in America and the New Europe*, Bloomsbury, 2004, p. 53.

77. Ibid., p. 51.

78. The European Centre for Constitutional and Human Rights (Berlin), founded in 2007, “initiates, develops, and supports high-impact, strategic human rights litigation to hold state and non-state actors accountable for the violations of the rights of the most vulnerable.” See [https://www.ecchr.eu/en/our\\_work.html](https://www.ecchr.eu/en/our_work.html). In February 2011, former U.S. President George W. Bush cancelled a public appearance in Geneva after ECCHR threatened to launch criminal proceedings against him on behalf of victims of the post-9/11 CIA torture program, see [https://www.ecchr.eu/en/our\\_work/international-crimes-and-accountability/u-s-accountability/bush.html](https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/bush.html). Similar complaints filed in French and German courts against former senior Bush Administration officials failed to spur criminal prosecution, but signaled the continuing threat of legal action for alleged perpetrators of crimes. See [https://www.ecchr.eu/en/our\\_work/international-crimes-and-accountability/u-s-accountability/rumsfeld.html](https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/rumsfeld.html).

79. The Mental Disability Advocacy Centre (MDAC), founded in Budapest in 2002, has pursued pathbreaking litigation on behalf of people with intellectual disabilities before the European Court of Human Rights and in the domestic courts of several former Communist countries. Among its achievements, MDAC has helped persuade Czech courts to order that government provide individualized social services to persons with intellectual disabilities. On July 19, 2016, Ceske Budejovice Regional Court rejected the claim. See <http://www.mdac.info/en/news/czech-court-tells-young-man-hes-entitled-disability-support> and <http://www.mdac.info/en/news/czech-supreme-court-enforces-legal-right-children-disabilities-live-community>, and <http://www.mdac.info/en/news/czech-supreme-court-enforces-legal-right-children-disabilities-live-community>. MDAC secured a judicial finding that the Bulgarian government should provide education for up to 3,000 children with intellectual disabilities living in so-called “homes for mentally disabled children.” See *Mental Disability Advocacy Center v. Bulgaria*, October 13, 2008, European Committee on Social Rights, available at <http://mdac.info/en/news/bulgaria-right-education>. MDAC also supported through a third-party submission litigation leading to a ruling by the European Court of Human Rights that held the Romanian government accountable for the neglect and ill-treatment leading to death of a youth with severe mental disabilities in a public mental hospital. See *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Application no. 08/47848, Eur. Ct. H. Rts. July 2014, 14. Also in Hungary, the Chance for Children Foundation, founded in 2004, has won several major anti-discrimination cases on behalf of Roma children. See: <http://www.cfcf.hu/en/gy%C3%B6ngy%C3%B6spata-case> and <http://www.cfcf.hu/en/miskolc-desegregation-case>.

80. In Italy, attorneys in private practice pursue a number of *cause innovative* or *cause piloto* cases likely to have a national impact: “A lot of cases we take but we know they involve a small battle. But the *cause innovative* are aimed at winning the war.” Interview with Salvatore Fachile, attorney, by James A. Goldston, Rome, Italy, February 11, 2015. Examples of such cases include *Hirsi Jamaa and Others v. Italy* (2012), where the European Court of Human Rights found Italy in breach of Article 4 of Protocol No. 4 of the European Convention for its policy of pushing back migrants rescued at sea to third countries; and *Torreggiani, and Others v. Italy* (2013), a pilot judgment which has transformed the over-crowding of and improved conditions in Italian prisons.

81. In Russia, the Chechen Justice Initiative, founded in 2001, has brought and won dozens of cases before the European Court of Human Rights against the government of Russia for mass rights violations in Chechnya. See <http://hudoc.echr.coe.int/eng?i=001-77926>. These cases have forced the government to pay large sums to victims, and have documented egregious abuses in meticulous detail.

82. In Ukraine, the Anticorruption Action Center (ANTAC), founded in 2012, has been a central player in the anticorruption struggle both before and since the 2014 Maidan protests ended the rule of President Viktor Yanukovich. ANTAC has pursued litigation to secure investigations of public procurement corruption and has worked to uncover stolen assets and develop and assist asset recovery initiatives targeting stolen money in Europe and the US. See <https://antac.org.ua/en/publications/recovery-of-stolen-assets-in-ukraine-losing-time-and-money?>

83. The Association of the Victims of the Crimes of Hissene Habre's Regime, formed in Chad in 1999, has pursued a landmark series of legal actions against the country's former dictator, winning major decisions in Belgium, and before the UN Committee against Torture and the International Court of Justice, and ultimately securing Habre's conviction in an African Union-backed chamber in Senegalese courts in 2016. See <http://www.newsweek.com/hissene-habre-senegal-court-chad-life-sentence-591557> and <https://trialinternational.org/latest-post/hissene-habre/>.

84. In Argentina, the Asociacion Civil por la Igualdad y la Justicia (Civil Association for Equality and Justice), founded in 2002, started in 2002 to plan legal action to address the shortage in the number of openings for early education in Buenos Aires. Litigation succeeded in securing a settlement agreement that committed the city government to duties that were "wider and more detailed than those in any possible judicial injunction." It also gave rise to a new digital information system to improve transparency of enrollment registration and forced different state agencies, including ministries of social development and education, to work together. Fernando Basch, "Children's Right to Early Education in the City of Buenos Aires," International Budget Partnership Impact Case Study, August 2011. See [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2333716](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333716).

85. In Brazil, since 2002, Terra de Direitos (Land of Rights) has provided legal advice in support of environmental and human rights litigation on behalf of social movements and civil society organizations. See <http://terradedireitos.org.br/en/quemsomos-2/>. For information on emblematic cases, see <http://terradedireitos.org.br/casos-emblematicos>. The leading Brazilian human rights organization Conectas has also pursued important litigation. See <http://www.conectas.org>.

86. In Colombia, since 2003, Dejusticia has pursued public interest litigation, in conjunction with other activities, to combat discrimination and foster transitional justice and the rule of law. Its cases have challenged the constitutionality of legislation concerning the country's military tribunals, and secured court-ordered reforms to Colombia's educational system. See <http://www.dejusticia.org/#/actividad/litigios/2/1>.

87. In Guatemala in 2013, CALDH (Centro para la Accion Legal en Derechos Humanos—Center for Human Rights Legal Action), founded in 1994, secured the first-ever conviction on charges of genocide of a former head of state in a national court in *Efraín Ríos Montt & José Mauricio Rodríguez Sánchez vs. Guatemala*. See <http://www.newyorker.com/news/daily-comment/the-maya-genocide-trial>, and <https://www.ijmonitor.org/category/efrain-rios-montt-and-mauricio-rodriguez-sanchez/>.

88. In Mexico, Sin Fronteras, founded in 1995 to promote the rights of migrants and refugees, recently affirmed the value of "litigation in defense of human rights" in advancing rights protection for its constituent communities. See [sinfronteras.org.mx](http://sinfronteras.org.mx).

89. As Peru's leading women's rights litigation organization since 1999, DEMUS has launched cases addressing domestic violence, reproductive rights, and sexual harassment of women. See <http://www.demus.org.pe/sobre-demus/quienes-somos/>.



90. In 2014, China's environmental protection law was amended to broaden eligibility for civil society groups to enforce its provisions through litigation. Since then, NGOs and local environmental protection bureaus, like the All-China Environmental Federation, have taken on powerful companies for illegal pollution and dumping. The All-China Environmental Federation secured a court-imposed fine totaling 160 million yuan (approximately \$25.7 million) against six companies for illegal pollution and dumping. Additionally, with collaboration from the Alibaba Foundation, Friends of Nature, China's first environmental NGO, set up an environmental foundation that provides up to 80,000 yuan per public interest case. Following the deregulation of strict litigation rules, China's environmental rights movement places greater emphasis on strategic litigation to affect change. See Robert L. Falk and Jasmine Wee, "China's New Environmental Protection Law," *Morrison Foerster*, September 30 2014, available at [http://www.mofo.com/~media/Files/ClientAlert/2014/09/140930ChinasNewEnvironmentalProtectionLaw.pdf?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](http://www.mofo.com/~media/Files/ClientAlert/2014/09/140930ChinasNewEnvironmentalProtectionLaw.pdf?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original). See also Zhang Yu, "New law allows NGOs to pursue legal action against environmental offenders," *Global Times*, January 19, 2015, available at <http://www.globaltimes.cn/content/902744.shtml>. In the last several years, public interest law organizations in China have secured a judicially-supervised settlement permitting persons with HIV to board domestic airplane flights. They have successfully challenged the politically-motivated institutionalization of persons with purported intellectual disabilities, and have defended the rights of persons with Hepatitis B to education and employment. Others have represented children in cases involving juvenile delinquency, sexual abuse, work or other injuries, welfare and custody issues. See website of Beijing Children's Legal Aid & Research Center (established 1999), available at <https://sites.google.com/a/chinapilaw.org/bclarc/about-us>. None of the organizations that brought these cases existed 20 years ago.

91. In Kyrgyzstan, Golos Svobody, founded in 2005, has won landmark cases before the UN Human Rights Committee and the UN Committee against Torture on behalf of victims of torture. It has also secured rulings in domestic courts making clear that the decisions of these UN bodies must be obeyed by law enforcement actors. See <https://www.opensocietyfoundations.org/sites/default/files/gerasimov-cat-decision-20120726>.

92. In Kazakhstan, the Kazakhstan International Bureau for Human Rights and the Rule of Law, formed in mid-1993, has secured similar gains.

93. In Mongolia, since 2000, the Public Interest Law Clinic of the Center for Human Rights and Development (CHRD) has litigated cases against mining companies accused of decreasing pasture area, harming valuable water resources, causing dust pollution, and destabilizing the Gobi desert's ecosystem. See Center for Human Rights and Development, "Human Rights in the Mining Industry of Mongolia," *Asia-Pacific Human Rights Information Center*, September 2014, available at <http://www.hurights.or.jp/archives/focus/section3/2014/09/human-rights-in-the-mining-industry-of-mongolia.html>.

94. In Thailand, since 2001, ENLAWTHAI (Environmental Litigation and Advocacy for the Wants) has funded and pursued litigation in support of communities affected by pollution, natural resource problems, and health issues resulting from environmental degradation. In early 2013, in a case brought by ENLAWTHAI, the Supreme Administrative Court ordered Thailand's Pollution Control Department (PCD) to pay compensation to a community of villagers to restore the environmental integrity of a creek that had been contaminated by lead. See <https://www.pressreader.com/thailand/bangkok-post/20140416/282041915116997>.



95. See <http://caselaw.ihrrda.org/doc/334.06/> <http://caselaw.ihrrda.org/doc/323.06/>.
96. Meris Lutz, "Judiciary Proves Last Hope for Lost Causes," *The Daily Star*, February 28, 2013, p. 4.
97. Ibid.
98. Ibid.
99. Scott L. Cummings and Louise G. Trubek, "Globalizing Public Interest Law," 13 *UCLA J. Int'l L. & For. Aff.*, 2008.
100. Africa, Americas, Europe.
101. Such as the ECOWAS Court in West Africa and the East Africa Court of Justice.
102. Such as the United Nations Treaty Bodies and the International Criminal Court.
103. Indeed, by one count, five private foundations (Atlantic Philanthropies, Ford Foundation, MacArthur Foundation, Oak Foundation, and Open Society Foundations) spent over USD \$138 million supporting "strategic litigation" over the decade from 2006 to 2015. Foundation Center Maps, available at <http://foundationcenter.org/gain-knowledge/foundation-maps>.
104. For example, almost 100% of strategic litigation in South Africa depends on donor funding, most of it from external donors. Legal aid does not cover most strategic litigation, though there is a small impact litigation fund. Interview with Jacob van Garderen, executive director, and David Cote, director litigation unit, Lawyers for Human Rights, by James A. Goldston, Johannesburg, South Africa, March 11, 2015.
105. The notoriously unsuccessful U.S. government effort to seed a particular model of "law and development" in Latin America in the 1960s is just one example. See, for illustration, Brian-Vincent Ikejiaku, "International Law, the International Development Legal Regime and Developing Countries," *The Law and Development Review* 7(1), 131-163, 2014.
106. Scott L. Cummings and Louise G. Trubek, "Globalizing Public Interest Law," 13 *UCLA Journal of International Legal & Foreign Affairs*, 2008.
107. See, for example, Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights*, Princeton University Press, 2014.
108. See: <http://www.corteidh.or.cr/tablas/r30717.pdf>.
109. See: <https://www.theguardian.com/law/2013/dec/22/britain-european-court-human-rights>; for Russia, see: <http://en.odfoundation.eu/a/7280,russia-s-ignoring-of-european-court-of-human-rights-decisions>; for Switzerland, see: Tilmann Altwicker, "Criticizing the European Court of Human Rights in Switzerland in *Shifting the Convention System: Counter-Dynamics at the National Level*, Patricia Popelier, Koen Lemmens, Paul Lemmens, Sarah Lambrecht, Catherine Van de Heyning, eds., Intersentia, 2015, available at SSRN: <https://ssrn.com/abstract=2640478>.
110. Laura Planas, "The Challenges of the Inter-American Commission on Human Rights," Council on Hemispheric Affairs, July 15, 2016, <http://www.coha.org/the-challenges-of-the-inter-american-commission-on-human-rights/>.
111. See: <http://www.cnn.com/2017/02/09/politics/travel-ban-9th-circuit-ruling-immigration/index.html>.

112. See S. Cummings, “Empirical Studies of Law and Social Change,” 2013 *Wisconsin Law Review* 171, 199, 2013, (underscoring the importance of “judg[ing] output measures” while taking into “consideration ... how they fare relative to viable alternatives”).
113. *Sampanis and Others v. Greece*, Application no. 32526/05, ECHR June 5, 2008.
114. Open Society Justice Initiative, *Strategic Litigation Impacts: Equal Access to Quality Education*, Open Society Foundations, 2017, p. 65.
115. *Ibid.*, p. 24.
116. *Ibid.*, p. 55.
117. Open Society Justice Initiative, *Strategic Litigation Impacts: Torture in Custody*, Open Society Foundations, 2017, p. 56.
118. *Ibid.*, p. 55.
119. César Rodríguez Garavito, “Beyond the Courtroom: The Impact of Judicial Activism on Socio-economic Rights in Latin America,” 89 *Texas Law Review* 1669, 2010–2011.
120. Interview with Kwamchetsi Makokha, journalist, by Anita Nyanjong’, Nairobi, Kenya, December 17, 2015.
121. Open Society Justice Initiative, *Strategic Litigation Impacts: Roma School Desegregation*, Open Society Foundations, 2016, p. 44.
122. Open Society Justice Initiative, *Strategic Litigation Impacts: Indigenous Peoples’ Land Rights*, Open Society Foundations, 2017, p. 56.
122. Open Society Justice Initiative, *Strategic Litigation Impacts: Indigenous People’s Land Rights*, Open Society Foundations, 2017, p. 56.
123. *Ibid.*
124. Open Society Justice Initiative, *Strategic Litigation Impacts: Torture in Custody*, Open Society Foundations, 2017, p. 32
125. *Ibid.*
126. *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, African Commission on Human and Peoples’ Rights, Application No. 006/2012 (26 May, 2017).
127. Open Society Justice Initiative, *Strategic Litigation Impacts: Indigenous Peoples’ Land Rights*, Open Society Foundations, 2017, p. 43.
128. Interview with Nicholas Spaull, South African economist and educational expert, by Cameron McConnachie, November 25, 2015, cited in Open Society Justice Initiative, *Strategic Litigation Impacts: Equal Access to Quality Education*, Open Society Foundations, 2017, p. 23.
129. For more on the global crisis of implementation, see Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*, Open Society Foundations, 2010 and Open Society Justice Initiative, *From Rights to Remedies: Structures and Strategies for Implementing International Human Rights Judgments*, Open Society Foundations, 2013.
130. Open Society Justice Initiative, *Strategic Litigation Impacts: Equal Access to Quality Education*, Open Society Foundations, 2017, p. 24.
131. *Julio Simón et al. v. Public Prosecutor*, No 17.768, S. 1767. XXXVIII, Corte Suprema de Justicia de la Nación (Supreme Court), Argentina, 2005.

132. *Wachira Weheire v. Attorney General*, 2010 AHRLR 185 (KeHC 2010).
133. Open Society Justice Initiative, *Strategic Litigation Impacts: Indigenous Peoples' Land Rights*, Open Society Foundations, 2017, p. 56.
134. Open Society Justice Initiative, *Strategic Litigation Impacts: Roma School Desegregation*, Open Society Foundations, 2016, p. 37.
135. *Ibid.*, p. 29.
136. *Ibid.*, p. 44.
137. See: [https://www.amnestyusa.org/files/musttryharder\\_embargoed\\_report.pdf](https://www.amnestyusa.org/files/musttryharder_embargoed_report.pdf), page 50.
138. Open Society Justice Initiative, *Strategic Litigation Impacts: Roma School Desegregation*, Open Society Foundations, 2016, p. 46.
139. Open Society Justice Initiative, *Strategic Litigation Impacts: Torture in Custody*, Open Society Foundations, 2017, pp. 26, 73, and 88–99.
140. *Ibid.*, p. 88.
141. *Ibid.*, p. 59. See p. 88 for brief discussion of the adoption of the Victims Protection Act in Kenya.
142. *Ibid.*, pp. 65, 72, 88, 89.
143. *Julio Simon et al. v. Public Prosecutor* found Argentinian amnesty laws unconstitutional *ab initio* and prompted a constitutional amendment to implement the holding; Open Society Justice Initiative, *Strategic Litigation Impacts: Torture in Custody*, Open Society Foundations, 2017, pp. 34 and 89.
144. Open Society Justice Initiative, *Strategic Litigation Impacts: Torture in Custody*, Open Society Foundations, 2017, p. 89.
145. *Ibid.*, p. 59.
146. *Ibid.*, pp. 65, 72.
147. *Ibid.*, pp. 90, 91.
148. *France, Norway, Denmark, Sweden, Netherlands v. Turkey*, the European Commission of Human Rights, *Admissibility Decision*, Application nos: 9940-9944/82, EcomHR December 6, 1983.
149. Open Society Justice Initiative, *Strategic Litigation Impacts: Torture in Custody*, Open Society Foundations, 2017, p. 85.
150. *Ibid.*, p. 41.
151. Human Rights Watch, *Human Rights Watch World Report 2018*, available at <https://www.hrw.org/world-report/2018/country-chapters/turkey>.
152. *Penitentiaries of Mendoza*, Precautionary Measures, No. 923-0, IACHR, August 3, 2004 available at: <http://www.derechos.org/nizkor/arg/doc/carcjul4.html>.
153. The IACHR asked the state to take measures to protect the inmates' lives and physical integrity and to investigate the deaths. In May 2005, a public hearing was held in Asuncion, Paraguay, before the Inter-American Court to evaluate policies implemented to comply with the precautionary measures; see Inter American Court of Human Rights, "Medidas Provisionales, Caso de las

Penitenciarias de Mendoza,” June 18, 2005, available at <http://www.ppn.gov.ar/sites/default/files/CIDH.%20Penitenciar%C3%ADas%20de%20Mendoza.%2018-06-05%20fallo.pdf>.

154. Pablo Salinas, “La aplicación de la tortura en Argentina. Realidad social y regulación jurídica,” editores del Puerto, Buenos Aires, 2010.

155. A separate source indicates a drop from 36 inmates’ deaths registered in 2004, to 19 deaths in 2009, *Diario Los Andes*, July 27, 2009.

156. Open Society Justice Initiative, *Strategic Litigation Impacts: Torture in Custody*, Open Society Foundations, 2017, p. 47.

157. *Xákmok Kásek v. Paraguay*, IACHR (ser. C) No. 214, August 24, 2010.

158. Open Society Justice Initiative, *Strategic Litigation Impacts: Indigenous Peoples’ Land Rights*, Open Society Foundations, 2017, p. 44.

159. Interview with Nicholas Mujah, indigenous rights activist and head of the Sarawak Dayak Iban Association, by Yogeswaran Subramaniam, Sarawak, Indonesia, September 11, 2016.

160. Point 1 of the April 2013 revised version of the World Bank’s “Operational Manual OP 4.10 – Indigenous Peoples” stipulates: “This policy contributes to the Bank’s mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples. For all projects that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in a process of free, prior, and informed consultation. The Bank provides project financing only where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples. Such Bank-financed projects include measures to (a) avoid potentially adverse effects on the Indigenous Peoples’ communities; or (b) when avoidance is not feasible, minimize, mitigate, or compensate for such effects. Bank-financed projects are also designed to ensure that the Indigenous Peoples receive social and economic benefits that are culturally appropriate and gender and intergenerationally inclusive. See <https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b0822f89d5.pdf>.

161. Open Society Justice Initiative, *Strategic Litigation Impacts: Indigenous Peoples’ Land Rights*, Open Society Foundations, 2017, p. 57. The World Bank describes its “safeguard policies” as “a cornerstone of its support to sustainable poverty reduction.” According to the bank, “The objective of these policies is to prevent and mitigate undue harm to people and their environment in the development process. These policies will be replaced during 2018 with the Environmental and Social Framework (ESF). The two sets of policies will operate in parallel for about seven years to govern projects approved before and after the date the ESF starts to be applied... [Safeguard policies] serve to identify, avoid, and minimize harms to people and the environment. These policies require borrowing governments to address certain environmental and social risks in order to receive Bank support for investment projects.” See <http://www.worldbank.org/en/programs/environmental-and-social-policies-for-projects/brief/environmental-and-social-safeguards-policies>.

162. Steven Budlender, Gilbert Marcus and Nick Ferreira, “Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons,” *The Atlantic Philanthropies*, 2014, p. 57, available at <https://www.atlanticphilanthropies.org/wp-content/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf>.

163. Ibid., p. 52.
164. Edwin Cameron, *Justice: A Personal Account*, Tafelberg, 2014, p. 197.
165. Nosipho Mngoma, “World hopes to end AIDS by 2030,” *Weekend Argus*, July 16, 2016, p. 10.
166. Many civil law jurisdictions have accepted the precedential power of judgments of regional and/or sub-regional courts in Africa, the Americas, and Europe. The Constitution explicitly references a specific regional or sub-regional treaty, making it the law of the land directly applicable before national courts without the need for domestication of implementing legislation, as its *bloc constitutionnel*. In addition, some higher courts in a number of civil law jurisdictions have the power to issue judgments that are binding for future cases. See, for example, Vincy Fon and Francesco Parisi, “Judicial precedents in civil law systems: A dynamic analysis,” *Review of Law and Economics*, Volume 26, Issue 4, December 2006, pp. 519–535.
167. Open Society Justice Initiative, *Strategic Litigation Impacts: Torture in Custody*, Open Society Foundations, 2017, pp. 45–46.
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## Open Society Justice Initiative

The Open Society Justice Initiative, part of the Open Society Foundations, uses strategic litigation and other kinds of legal advocacy to defend and promote the rule of law, and to advance human rights. We employ litigation, advocacy, research, and technical assistance across a range of issues. We pursue accountability for international crimes, support criminal justice reforms, strengthen human rights institutions, combat discrimination and statelessness, challenge abuses related to national security and counterterrorism, defend civic space, foster freedom of information and expression, confront corruption, and promote economic justice. In this work, we collaborate with a community of dedicated and skillful human rights advocates across the globe, and form part of a dynamic and progressive justice movement that reflects the diversity of the world. More information on the Justice Initiative and its activities can be found at [\*\*www.JusticeInitiative.org\*\*](http://www.JusticeInitiative.org).

## Open Society Foundations

The Open Society Foundations work to build vibrant and tolerant democracies whose governments are accountable to their citizens. Working with local communities in more than 70 countries, the Open Society Foundations support justice and human rights, freedom of expression, and access to public health and education.

[\*\*www.opensocietyfoundations.org\*\*](http://www.opensocietyfoundations.org)



Defending human rights requires an array of tools. One of the most powerful is strategic litigation: using the courts to effect large-scale social change. Strategic, or public interest, litigation has tipped the balance in ending segregation in state schools, securing reproductive rights for women, and ensuring freedom of the press, among other contested but fundamental rights.

Yet strategic human rights litigation can also be costly, slow, and risky. Drawing on years of field-based research, *Insights from Global Experience* takes an unprecedented, empirical look at the impacts of strategic human rights litigation. It is based on interviews conducted in 11 diverse countries with hundreds of people—from torture survivors and teachers to judges and policymakers—who have direct experience with this civil society tool. The report also offers the field of law and society a new three-part typology of impacts, framing a hopeful path to make the courts work for human rights causes.

*Insights from Global Experience* is the final in a five-volume series studying strategic litigation impacts. The previous four thematic reports focused on the effects of strategic human rights litigation on desegregation of Roma in European schools, equal access to quality education, indigenous peoples' land rights, and torture in custody. Looking across those four issues and examining first-hand accounts from Argentina, Brazil, the Czech Republic, Greece, Hungary, India, Kenya, Malaysia, Paraguay, South Africa, and Turkey, *Insights from Global Experience* distills eight essential lessons, while also urging further study of the potential and pitfalls of strategic litigation. Arguing against a simplistic view of cases being won or lost, the study instead reveals that strategic litigation's impacts are in fact far more complex—positive and negative, anticipated and unforeseen, direct and indirect—and far more plentiful than previously understood. In so doing, it presents critical findings for anyone—or any movement—considering using the courts as a vehicle for social change.

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