STRATEGIC LITIGATION: A GUIDE TO LEGAL ACTION

SYSTEMIC JUSTICE

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A NOTE FROM SYSTEMIC JUSTICE

Strategic litigation can be a powerful tool in fighting for racial, social, and economic justice. It can help bring about change in regulation, law, policy, or practice. Yet marginalised communities are often unable to leverage the full potential of litigation for their causes and campaigns.

Communities should be able to make informed choices about how they want to incorporate strategic litigation in their campaigns for change. At Systemic Justice, we aim to help build the knowledge and power of organisations, movements, and collectives by developing resources on strategic litigation, delivering workshops and training, and hosting drop-in calls to address communities' questions.

We're not here to take over or set the agenda. The resources we provide are for people who are considering whether legal action is for them, and who wish to learn more about strategic litigation, on their own terms.

SYSTEMIC JUSTICE,
THE MOVEMENTS' LAW FIRM

INTRODUCTION

Defined as the “process of bringing or defending a lawsuit in a court of law”, litigation can be a powerful tool in the fight for racial, social, and economic justice. Litigation involves various stages, some more well-known than others, and has many different applications to bring about systemic change.

Understanding what strategic litigation is, what it can do, and how, when, and where it can be used are some of the key considerations to have in mind when thinking about the role it can play in pushing for racial, social, and economic justice.

This guide will walk you through these essential components of strategic litigation and what it can do for your campaign for change, both inside and outside of the courts. By breaking down the essential components of the litigation process, the guide provides a fuller picture of the myriad of ways in which legal action can be taken. Beyond the courtroom, there are many different ways to engage with strategic litigation. An introductory understanding of litigation and its applications can be useful to bring legal analysis into advocacy and campaigning work, engage with legal developments, bolster activism efforts, and strengthen participation in public debate. Through concrete, real-world examples, this guide aims to illustrate some of the ways in which strategic litigation can serve your cause.

USING THE GUIDE

The guide won't outline strategic litigation through an academic lens, or with complex legal analysis. Instead, you'll find a resource rich in practical applications from real cases, illustrating the many legal strategies serving campaigns for change around the world. We've prioritised clarity and accessibility with this easy-to-use tool that brings you different uses of strategic litigation to support the fight for racial, social, and economic justice.

This guide is structured around six key questions, each responding to a specific aspect of strategic litigation. These questions are:

- WHAT IS STRATEGIC LITIGATION?
- WHAT CAN STRATEGIC LITIGATION DO?
- HOW CAN STRATEGIC LITIGATION BE USED?
- WHEN SHOULD YOU USE STRATEGIC LITIGATION?
- WHERE CAN YOU TAKE STRATEGIC LITIGATION?
- WHO CAN TAKE STRATEGIC LITIGATION?

Each section contains general explainers supported by summaries of real-life legal cases, both big and small. Each example illustrates the relevant aspects of the litigation process that make the case strategic in pushing for change.

In this digital guide, you can jump straight to the question you are most interested in. For a comprehensive picture of strategic litigation, we recommend working your way through the guide, section by section.

The guide is by no means a substitute for legal advice, but we hope it can help to further demystify litigation processes. If you can't find the answer to a particular question you have about strategic litigation, you can let us know by emailing us your questions at knowledgeandpower@systemicjustice.ngo

The questions you submit will be taken into account to revise future editions of this guide and to build new tools and resources on strategic litigation.

Key terms are defined within this guide. If you'd like to understand more of the language and meanings used throughout litigation, you might find it useful to refer to "Words for justice: A glossary for essential legal terms" which can be found on our website.

We hope this guide helps you to get to grips with the role strategic litigation can play in your own campaign for change.

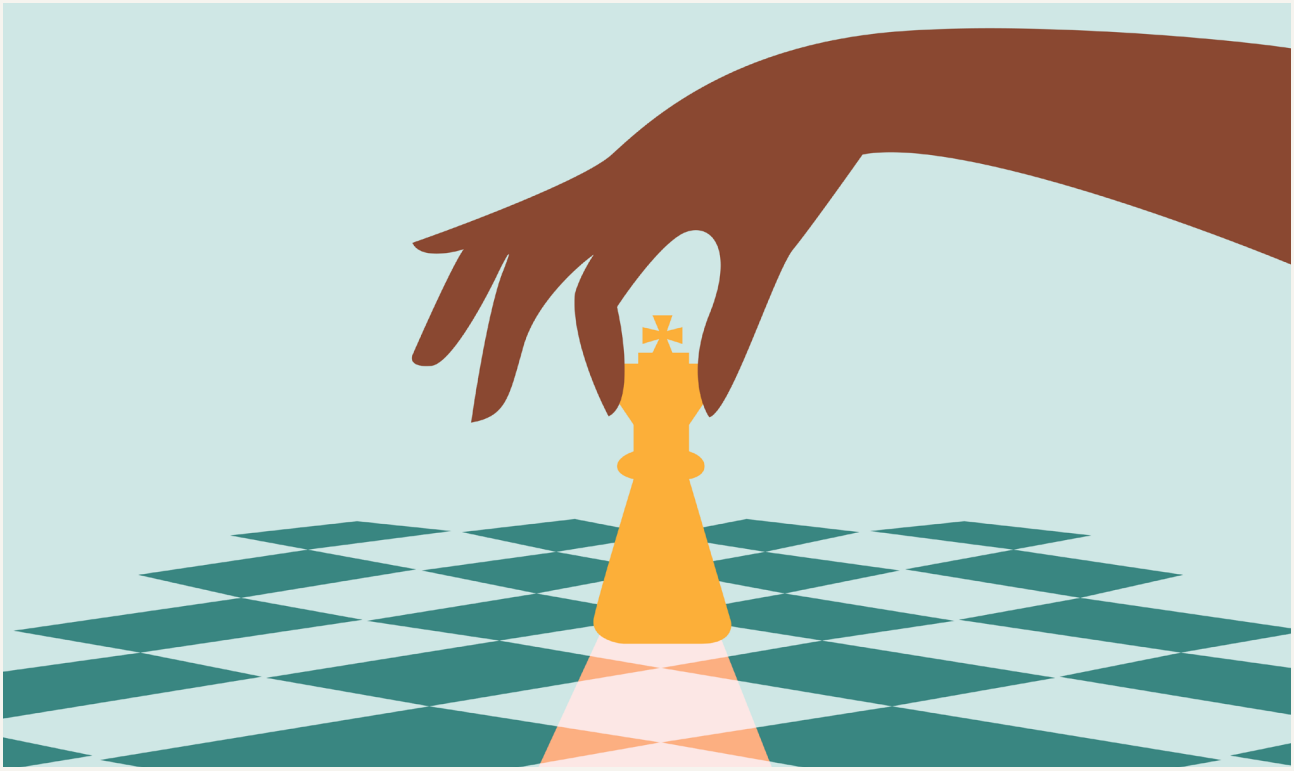
This resource has been produced by Systemic Justice, the movements' law firm.
Find out more about Systemic Justice here.

Providing an introduction to strategic litigation, this guide explores some of the essential questions related to the litigation process through examples. The examples used have been selected to illustrate a particular tactic or approach in strategic litigation. This means that not all of the case examples necessarily align with Systemic Justice's values and methodology of taking community-driven strategic litigation. But one of the reasons for our work remains clear: because community-driven litigation on racial, social, and economic justice is vastly underrepresented in the litigation landscape.

This guide has been designed based on needs identified in a consultation process with organisations, communities, and movements working on racial, social, and economic justice in the Council of Europe region. We will continue to develop resources as part of our work to build the knowledge and power of communities fighting for justice.

CHAPTER ONE:

WHAT IS STRATEGIC LITIGATION?



WHAT IS STRATEGIC LITIGATION?

The term “strategic litigation” can be broken down into its two component parts: litigation and strategy.

WHAT IS LITIGATION?

Litigation is a process of resolving a dispute or redressing a harm by taking a legal complaint to an official body that has the power to make decisions about that complaint.

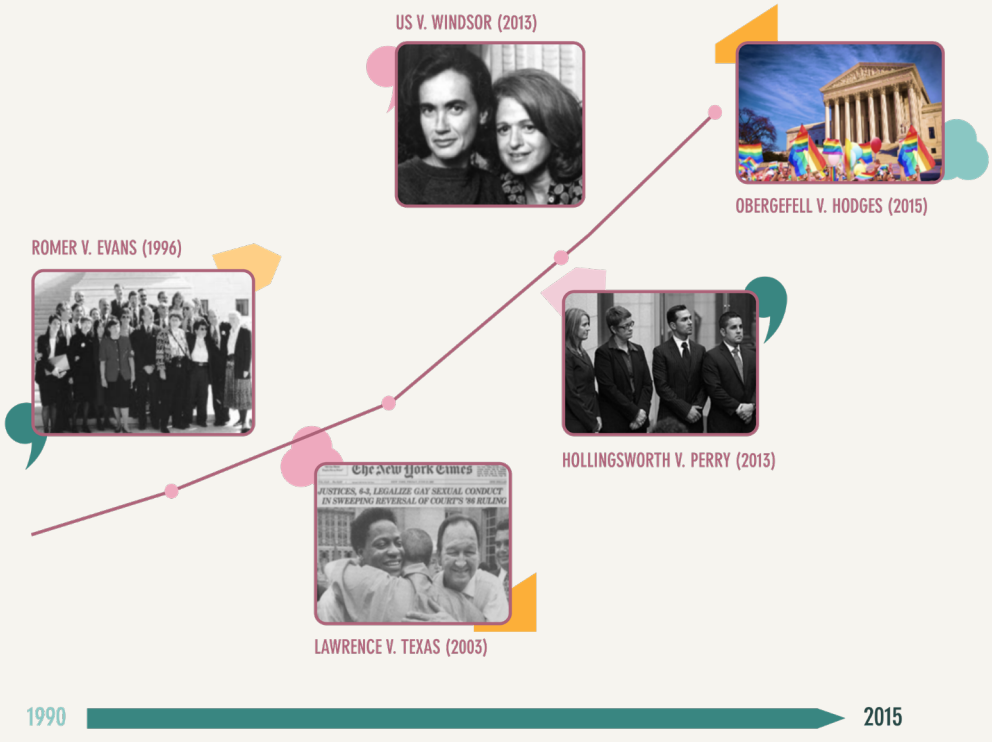
A “legal complaint” is a process of setting out specific facts, as well as a set of arguments, before an official body demonstrating that the law has been broken by another person or entity.

Filing a legal complaint against a person, arguing that they have broken the law, is otherwise referred to as suing someone.

When deciding on the legal complaint, the official body can formally declare the law has been broken and can apply certain measures against those responsible for breaking the law. Some of these measures can include:

- **publishing a decision that sets out the body’s reasons for reaching its findings (this is sometimes referred to as a “judgment”), which may then be used later by other bodies when deciding on similar cases;**
- **requiring that an individual or entity who has broken the law pay a sum of money, this could be in the form of a fine or it might be in the form of compensation directly to those who have suffered a loss or injury from the legal breach;**
- **ordering that an individual or entity who has broken the law take a certain action, or refrain from taking a certain action, such as by changing their policy or stopping a discriminatory practice;**
- **requesting that something should be done by others not necessarily involved in the case. For example, this could be authorities or the government carrying out an investigation or changing the law.**

The official body that deals with legal complaints is usually a court. In most countries, courts are the primary institution with the authority to decide on such complaints and administer justice.



WHAT MAKES LITIGATION STRATEGIC?

Using litigation strategically is the process of identifying and pursuing a selected set of legal complaints as part of a long-term plan to achieve one or more goals. These complaints might be selected in the hope that the court will be in favour of the arguments presented, or they might be chosen because they can help achieve some other goals for a cause. These goals might be achieved without even needing to obtain a positive court decision.

The goals pursued through litigation can form part of a broader strategy or movement to bring about societal and systemic change. They can be supported by other actions, such as campaigning, protest, and advocacy.

CASE STUDY:

MARRIAGE EQUALITY: THE LONG LEGAL FIGHT FOR RECOGNITION

In the US, same-sex marriage was officially recognised as a fundamental right by the US Supreme Court in 2015. However, this was merely one case in a long, strategic journey to marriage equality in the US. Litigation on same-sex marriage dates back to the 1970s, but many of these early efforts were unsuccessful and merely solidified in law that a legal union could only be formed between a man and a woman.

In the early 1990s, protest groups began staging "marry-ins" in city halls. Many of the protesters disagreed with the institution of marriage, but they believed it should still be extended to everyone. There was a recognition that going straight to court seeking recognition of same-sex marriages was too big an ask for conservative judges to deliver on at that time. A strategy was developed to pursue legal claims that would incrementally pave the way to a case that would seek full recognition of same-sex marriage.

These cases started with claims challenging laws that permitted discrimination against people with homosexual, lesbian, or bisexual orientation (Romer v. Evans), and those people involved in homosexual, lesbian and bisexual conduct, practices or relationships (Lawrence v. Texas).

Later, cases were taken that sought recognition of same-sex marriages that had been legally recognised outside of the US (US v. Windsor). Cases also concerned challenges to constitutional amendments that sought to limit marriage to heterosexual couples (Hollingsworth v. Perry). Finally, in 2015, a number of cases came before the US Supreme Court that sought formal recognition that same-sex marriage is a constitutionally protected right (Obergefell v. Hodges). These cases built up to this landmark decision that finally found same-sex marriage protected under the US Constitution.

WHAT IS STRATEGIC LITIGATION?

Strategic litigation is the process of taking legal complaints to court with the objective of bringing about societal change. It usually comprises three elements:

1. The case is aimed at bringing about change.

Often, cases are part of a wider campaign for change. This might be to change the law or policies around a certain issue, or to change how those laws are interpreted and applied in practice. It could be to change how decisions are reached in the courts, or the actions or behaviours of others. It could be to bring about structural, systemic, or institutional change.

2. The impact of the case goes beyond the parties bringing the case.

The case is not just fought in the courts to get results for those who have made the legal claim. The outcome sought from the litigation does not only benefit the individuals directly involved in the case. Instead, it will also have an impact on a broader group of people, to better serve justice.

3. The case is part of a wider strategy or movement.

This is a crucial element: litigation that is strategic is more than a court case alone – it is deployed alongside other efforts outside the courtroom. These efforts often consist of advocacy, lobbying, and campaigning. This also includes using litigation to raise awareness on an issue or generate a public debate. In this context, we can refer to litigation as one of the tools in the toolbox of campaigning for change.

CHAPTER TWO:

WHAT CAN STRATEGIC LITIGATION DO?

WHAT CAN STRATEGIC LITIGATION DO?

Strategic litigation can help bring about change in several different ways. This change might come directly from how a legal complaint is resolved by a court. The decision of the court may be sufficient to bring about the change needed, but change might also be made indirectly. This is often through external visibility of the case which results in public pressure.

Here are some of the forms of impact strategic litigation contributes to:

- **raising the profile and visibility of a topic**
- **establishing (new) individual rights**
- **catalysing or galvanising campaigns**
- **scrapping unjust laws**
- **validating truths for people and communities**
- **exposing limitations of existing laws or practices**
- **ensuring that individuals and entities are meeting their obligations under the law**
- **broadening access to justice**
- **shaping and moving what the law says on a particular topic**
- **shaping environments and conditions that support the work of pushing for change**

RAISING THE PROFILE AND VISIBILITY OF A TOPIC

Bringing a case to court provides an opportunity to raise public awareness around an issue. Litigation may even be taken with the primary purpose of raising visibility and publicity around a particular injustice. Court cases can attract significant visibility and will provide a "hook" or "event" for the media to report on the broader issues being considered in the case, as well as the actors and communities involved.

Communities taking litigation have an opportunity to shape the narrative that is built around the case. Putting forward this narrative can help shift public discourse on an issue, or force those who hold power to take action.

CASE STUDY:

ENDING RACIAL PROFILING AT DUTCH BORDERS: USING THE COURTS AND PUBLIC CAMPAIGNS TO HOLD INSTITUTIONS TO ACCOUNT

In April 2018, Mpanzu Bamenga was returning from a conference to his local airport, Eindhoven Airport. While in the airport, he was pulled out of line for a check by the Royal Netherlands Marechaussee, the Dutch military border police. Only Black people had been pulled out of line for such a check, and he asked an officer why this was. The officer said that they had been informed of a "Nigerian money smuggler" travelling to the Netherlands and had received a risk profile for a "well-dressed, fast-walking man of non-Dutch appearance" to carry out security checks. He added that they were tasked, by law, with "preventing potential criminals and terrorists from entering the Netherlands" and that they had to use a number of indicators, including personal characteristics based on race or ethnicity (such as skin colour), to select travellers for security checks.

Mpanzu collaborated with another person who was subjected to ethnic and racial profiling at a Dutch airport, and a coalition of civil society organisations, among which the Dutch Section of the International Commission of Jurists (NJCM), Amnesty International Nederland, Controle Alt Delete, and RADAR. They were represented by Dutch strategic litigation foundation PILP and pro bono firm Houthoff. The coalition collaborated to bring a legal case against the actions of the Royal Netherlands Marechaussee. Their case argued that the Dutch State violated the principle of non-discrimination by racially profiling in the context of the Royal Netherlands Marechaussee's border checks at Dutch airports. They asked the court to stop the use of ethnicity or race in these selection processes and in the risk profiles used for such checks.

In June 2021, the District Court of The Hague held hearings on the case. Mpanzu came to the proceedings carrying a sign saying "Royal Netherlands Marechaussee: Stop ethnic profiling." Three months after these hearings, the court ruled that the border police could maintain their existing policy of using ethnicity to select people for stop-and-search practices at the border because, as they put it, a person's physical characteristics, such as the colour of their skin, can be an objective indicator of one's nationality. They were adamant security checks of this type should continue to be used for immigration purposes.

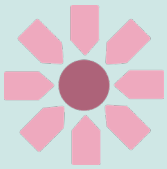
The coalition was not defeated by this outcome. This initial ruling in support of the existing policy of the Royal Netherlands Marechaussee, although unfavourable to Mpanzu's case, proved on paper that the Ministry of Defence endorsed racial and ethnic profiling. By publicising this unjust decision from the court, the coalition was able to demonstrate the pervasiveness of this issue beyond the two individuals taking the case, raising even more public awareness on racism and racial profiling in the Netherlands and sparking public outrage. News outlets began reporting on the "loss." Stories ran in different languages across the globe. For example, Al Jazeera went with the English language headline "A court just confirmed: To be Dutch is to be white" and the General Rapporteur on combatting racism and intolerance of the Council of Europe wrote a letter to the Dutch Ministry of Justice asking to repeal this decision.

In November 2021, amidst the negative press around the court decision, the Royal Netherlands Marechaussee said that they would stop using ethnic and racial profiling when selecting individuals for checks at the border. Nonetheless, their position did not appear to have truly changed. In May 2022, the initial decision of the Dutch courts was appealed and, in February 2023, the Dutch Court of Appeal ruled that the selection policy was discriminatory and effectively banned ethnic and racial profiling at the border.

CATALYSING OR GALVANISING CAMPAIGNS

Litigation is a concrete, focal activity that communities can build campaigns and organising efforts around. It offers a process through which communities can get behind a set of demands or "asks" of the courts.

It is also a concrete activity with a set of milestones that can be leveraged in campaigning or advocacy: milestones such as filing the case, the holding of court hearings (which will often be in public), the publication of a final decision, and the appealing of negative decisions. These steps in the process present potential opportunities for lobbying, direct action, protest, demonstrations, or engaging with the media on the issue.



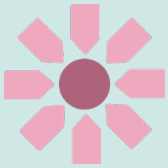
CASE STUDY:

MANY VOICES: PROTESTING INSIDE AND OUTSIDE COURT

Court hearings and decision days are often used as opportunities to protest and raise awareness on the issue. For example, the numerous hearings in the case against the UK's proposed policy of deporting people seeking asylum in the UK to Rwanda have been used as opportunities to protest against racism in the UK's asylum and immigration system by groups such as Stand Up To Racism.

In the US, in 2021, three women interrupted oral hearings of the US Supreme Court. They did this in protest over the overturning of the important abortion case Roe v. Wade. They shouted, "The right to choose will not be taken away" and "Vote for our right to choose". When they were sentenced for this protest, the sentencing judge stated that, although they did not condone the action, they could understand it.

The process of building a case and taking a legal complaint to court can also be a collective effort. Non-lawyers are able to engage and collaborate in a case by becoming parties to the case, participating as witnesses or experts, or engaging as observers or supporters in the court. Broader engagement and participation in a case demonstrates a groundswell of support and solidarity around an issue.



CASE STUDY:

FIGHTING FOR THE LIVELIHOODS OF SEX WORKERS IN SCOTTISH COURTS

In March 2022, Edinburgh city council became the first council in Scotland to outlaw strip clubs. At the time, four strip clubs existed in the city centre. The council applied the ban after two poorly advertised public consultations, neither of which revealed majority support for such a measure. When considering the ban, the council had relied on "evidence" that consisted of unsubstantiated, degrading, and emotive statements on sexual entertainment venues and sex workers.

Within a month of the decision to ban strip clubs, the sex workers union United Sex Workers launched a campaign to fund a legal challenge to the council's decision. At the same time, a case was taken by three sex entertainment venues in Edinburgh. The union wanted to join this case as a party so they could put forward their position.

Lawyers representing the union shared that the council tried very hard to prevent them from taking part in the case, including by attempting to increase the risk that the union would have to pay significant costs if they lost the case. Despite this, they were finally admitted as a party.

During the hearings, three sex workers who worked at Edinburgh strip clubs provided testimony directly to the court. They told of how the ban would not only see them losing their jobs during a recession but would also put their homes and relationships at risk because they would have to leave the city to find work. Mina, one of the women who provided their testimony to the court, shared on the day of the hearing that "we were pleased [...] to have our voices heard. We feel our voices were just being ignored by the council. It was upsetting to see how much money the council must be spending on lawyers to take away our jobs, but we are hopeful after the hearing."

On 10 February 2023, the court quashed the council's ban on strip clubs in Edinburgh. It ruled that the council had been misdirected by taking into account irrelevant factors when considering the policy and that the decision was a violation of sex workers' rights to respect for their private and family life. Following the decision, the United Sex Workers said: "Not only is this a huge win for strippers in Edinburgh, who are no longer facing the prospect of forced mass-unemployment in the middle of a recession, but for the working rights of strippers across Britain."

VALIDATING TRUTHS FOR PEOPLE AND COMMUNITIES

Before courts can reach a decision, they must first make "findings of fact", in other words: decide on what the truth is on which they will base their decision. The litigation process includes several measures, rules, and practices that facilitate getting to know the truth in a legal dispute.

Courts have powers of investigation and fact-finding. They can also review the effectiveness and fairness of investigations undertaken by other public bodies. They can order that private or internal documents be disclosed and made available to the court or others involved in the case so justice can be served.

Those who provide information to the court must swear to the accuracy of what is presented; they must tell "the whole truth, and nothing but the truth". Lying to a court is often met with severe penalties. Courts also have powers to order individuals to give evidence before them.

Court hearings themselves are often open, increasing the transparency of both the process and the facts being laid out before the courts. Moreover, the decisions they reach are published and are widely available. These decisions will include the court's official findings of fact – or truth – for the case.

All these factors mean that the courts can be a powerful tool for getting official recognition that harm has occurred, that a particular issue exists, or that a particular thing happened. It can expose truths that had previously been denied. It's this proof or validation that some people pursuing litigation before the courts seek, for themselves and their communities.

CASE STUDY:

ELLA'S LAW: A CLEAN AIR LEGACY

Ella Roberta Adoo Kissi-Debrah was born in 2004 in South East London. She was a happy, sporty, and creative child, who had a dream of becoming an air ambulance doctor. Just before she turned seven, she began developing asthma. What followed were years of ill-health, including severe episodes of coughing and hospital admissions.

On 15 February 2013, just three weeks after her ninth birthday, Ella died from a fatal asthma attack. At no point was air pollution mentioned as a possible factor in relation to her illness and death. Her original death certificate said she died from "acute respiratory failure". Ella's mother, Rosamund, started doing some research and discovered that the heavily congested South Circular Road, near where they lived, had illegal levels of nitrogen dioxide caused by traffic. A consultant respiratory physician who looked over Ella's medical records had come to a similar conclusion and believed it was a contributing factor in her death.

Rosamund then decided to take a case that would open a fresh inquest into Ella's death. An inquest is a court-led inquiry into a person's death, and they are usually conducted by coroners who are specialist judges. In December 2020, following a new inquest that looked at the role air pollution played in Ella's death, the coroner found that "Ella died of asthma contributed to by exposure to excessive air pollution". It found that Ella's asthma was both induced and exacerbated by unlawfully high levels of nitrogen dioxide and particulate matter from traffic emissions. It was also recognised that Ella's mother, Rosamund, had not been informed of the health risks of air pollution and its potential to exacerbate asthma.

This was the first time in legal history that air pollution was ruled to be a cause of death, and for air pollution to be listed as such a cause on a death certificate. Rosamund continues to campaign for Ella's law, which was proposed to the UK Parliament in May 2022, that would establish the right to clean air in the UK.

ENSURING THAT INDIVIDUALS AND ENTITIES ARE MEETING THEIR OBLIGATIONS UNDER THE LAW

Litigation is a primary means of holding those in positions of power to their duties and obligations under the law. Sometimes there is nothing wrong with the law itself. Instead, it is simply not being complied with or enforced in a proper way.

Courts can require those who are breaking the law to take or refrain from certain actions to properly comply with their legal obligations. In other words, litigation can be a primary means for the law to apply. Litigation can effectively ensure the law is implemented and complied with, to make sure that those who hold power do not get away with ignoring what is expected of them under it.

CASE STUDY:

SPACES FOR THE COMMUNITY: PUSHING BACK AGAINST PROPERTY DEVELOPERS

In 2017, in a town called Shrewsbury, in the UK, a local authority sold part of a public park to a private company to build 15 high value private houses on the land. Nearly 100 years prior to this, the public park had been given to the local community as a recreational area. When part of it was sold, the community had not been consulted and the authority did not advertise the sale. This was against local government laws and regulations.

A group of local residents brought the issue to court between 2017 and 2023, during which time the case made its way to the highest level of court in the UK (the Supreme Court). The Supreme Court decided that the property had been wrongly sold to the private developer, and it scrapped the planning permission for the private housing development. The local authority has since expressed its intention to return the land to public ownership.

SHAPING AND MOVING WHAT THE LAW SAYS ON A PARTICULAR TOPIC

Laws are meant to be accessible and drafted with clarity and precision. They should allow individuals to regulate their conduct according to what is set out within them. They should permit individuals to understand with sufficient certainty what the legal implications would be if they did not follow what the law says.

At the same time, laws cannot cover and prescribe every possible scenario that may arise. This means there is usually flexibility and room for interpretation when the laws are applied to specific scenarios. Within this inherent flexibility of the law, it is possible for cases to be brought that push for interpretations of what the law says in such a way that rights are properly respected, and justice is properly served, in future applications of that law.

CASE STUDY:

CLARIFYING THE LAW: REPAIRING BUREAUCRATIC POTHOLES IN ACCESS TO HOUSING

In Ireland, people in need of social housing support had to apply to the local authority where they were considered to have “normal residence”. In 2016, a family belonging to the Traveller community applied to their local authority to be placed on the social housing list. Their application was refused, with the authority arguing that they were not “normally resident” in the county because they were “illegally residing in a caravan on private property”. In other words, the authority was reading into the term “normal residence” the additional criteria of “legal” or “lawful” residence.

The Workplace Relations Commission, a state agency responsible for workplace and employment rights and relations, found that “the issue of legality is not mentioned in the [law] and in [their] view, the introduction of this additional criterion disproportionately affects members of the Traveller community and is therefore discriminatory”. The Commission ordered that compensation be paid to the family, and they directed that the policy be reviewed and the criterion of legality be removed when interpreting “normal residence”.

ESTABLISHING (NEW) INDIVIDUAL RIGHTS

Laws establish legal rights, which are specific interests or entitlements protected by the law. This means they give individuals a legally enforceable claim when those rights have been broken by others. These rights can touch upon different aspects of society or an individual's life, such as in employment, commerce, or in relation to property. Human rights are a form of legal right that are specifically aimed at protecting the basic freedoms that belong to every person, such as the right to life, the right to non-discrimination, and the right to education.

When making decisions on an individual's rights, the courts have an opportunity to clarify the scope and nature of such rights. This can strengthen the rights of individuals under existing laws. One example could be, for instance, that the "right to marry" not be confined to cis-heterosexual couples.

In some circumstances, it may be possible for the courts to establish "new" rights. In other words, recognising that certain rights exist where there may have been uncertainty or an assumption that no such right existed before.

The courts can do this by reading rights into existing laws. For example, in India, the government's duty under its Constitution to "[raise] the level of nutrition and the standard of living of its people and the improvement of public health" has been interpreted by the courts as including "the right to food". In Ireland, the courts have recognised that the "right to work" is protected as a personal right under the Irish Constitution despite it not being explicitly mentioned in it.

CASE STUDY:

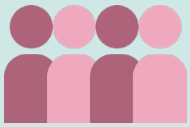
RECOGNISING THE RIGHT TO HEALTHY ENVIRONMENTS

The Inter-American Court of Human Rights has the authority to enforce the rights protected under the American Convention on Human Rights against certain countries that are party to that Convention. The American Convention makes no reference to climate or environment. However, it does require governments to adopt measures towards "the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards" of the region.

In a series of decisions, the Inter-American Court has recognised that this encompasses the "right to a healthy environment". It has clarified that such a right protects components of the environment, such as forests, seas, rivers, and other natural features, as interests in themselves. In short, the Court read such a right into the American Convention even though it is not specifically mentioned there.

SCRAPPING UNJUST LAWS

It is possible for some courts to overturn or invalidate existing laws or regulations if they are found to be in breach of some other higher or superior law. This means that the incompatible law will effectively cease to exist. This might happen, for example, if a law is found to be contrary to international law, human rights law, or a country's constitution.



CASE STUDY:

INVALIDATING ISLAMOPHOBIC LAW IN ITALY

In 2015, a law was passed in Italy that came to be known as the "anti-mosque law". This law set out a complex set of requirements and procedures for constructing places of worship and temples that were not part of the Catholic Church. The law was passed in one of the most populated regions in Italy, and it effectively made it impossible for mosques to be built there.

A case was brought before the Italian courts, and it went to the highest court in the country, the Constitutional Court. The Court found the "anti-mosque law" to be unconstitutional. In other words, the court found it to be in breach of the principles set out in the Italian Constitution. The principles that were found to have been breached by the law included freedom of religion and the principle of equality in freedom of religion and worship. The law was automatically invalidated, meaning it could no longer be applied by the Italian courts or authorities. It had no effect after the decision had been published.

Where courts do not have such powers, it may be possible for them to call for laws to be scrapped or amended. However, this means the lawmakers must take action to bring about that change in law, as the courts do not have the power to do so.

EXPOSING LIMITATIONS OF EXISTING LAWS OR PRACTICES

Court cases can expose gaps, oversights, or limitations that currently exist in law or policy. Litigation can compel those in authority to take action to remedy these areas where the law is failing.

Under human rights law, for example, governments are required to take action to ensure the rights of all people are respected and protected. This can include by taking legislative action, and by adopting appropriate laws and policies to protect human rights. Where such action has not been taken, the courts can be called upon to expose these omissions and require the government to take action to correct them.

CASE STUDY:

DISABILITY JUSTICE DURING A HEALTH CRISIS: HOLDING THE GERMAN GOVERNMENT ACCOUNTABLE

During the COVID-19 pandemic, huge demands were made on healthcare services across the globe. This led to an increased risk that healthcare providers would have to "triage" patients, a process by which evaluations would be made on who should be prioritised for medical treatment in situations where resources were scarce.

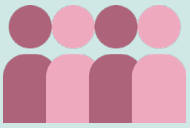
Nine people with disabilities took a complaint to the German courts, arguing that the absence of formal guidance or law on triage decisions left people with disabilities at risk of discrimination. The Federal Constitutional Court agreed and ordered the German legislature to regulate triage by concrete laws in order to protect people with disabilities. In its decision, the Court reasoned that existing equality laws were insufficient to protect the rights of persons with disabilities in the specific context of intensive care triage so more had to be done by the legislature.

BROADENING ACCESS TO JUSTICE

Litigation offers opportunities for individuals to exercise their rights, challenge discrimination, and hold decision makers to account for their unlawful actions. It can offer routes to justice where such opportunities might not otherwise exist. However, these routes to justice will only truly serve justice if they are accessible to all.

The courts have a role to play in broadening access to justice and ensuring legal wrongs are remedied. The courts have the power to do this when shaping their own procedures and processes for administering justice. Courts could be called upon to remove or address barriers that prevent or hinder justice being done to communities or individuals that take cases before them.

One example might be by reconsidering the amount or type of evidence that is required from an individual or community before they can make claims that are otherwise difficult to prove. This is often the case with discrimination, as the evidence is either non-existent, difficult to collect, or falls within the exclusive monopoly of those who hold power.



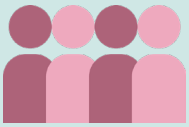
CASE STUDY:

JUSTICE IN A BELGIAN DISCRIMINATION CASE: CALLING FOR AUDIO EVIDENCE TO COUNT

In 2022, a Belgian court allowed an individual to submit an audio recording to court in an employment discrimination case. This was a recording of a conversation with her employer, who was offering her a part-time contract (instead of a full-time contract) because she was going to be a mother. The employer was unaware that the recording was being taken.

In its decision admitting the evidence, the Belgian court said "the question of evidence is a major difficulty for victims of discrimination because the authors do not generally act openly. The fact that recordings can be recognised as a form of evidence by the courts will strengthen the effectiveness of the rights of victims of discrimination".

Access to justice can also be supported by educating the courts through the litigation process. For example, by exposing the racial, social, and economic injustices in their own processes and decision-making. This can force them to confront the unjust dynamics hard-wired into their systems and convince them to take action to bring about the change needed to start addressing these systemic issues.



CASE STUDY:

CONFRONTING ANTI-BLACK RACISM IN THE CANADIAN CRIMINAL JUSTICE SYSTEM

In 2014, a criminal trial of a 22-year-old Black man in Toronto, Canada, for possession of a firearm led to a sustained effort by lawyers and activists to highlight to the criminal courts the link between anti-Black racism and criminal sentencing. The criminal courts were presented with two reports at the time of the man's sentencing, one on anti-Black racism in Canadian society and the other on the specific history of the man being sentenced. These sought to provide wider context around discrimination and racial trauma that could explain the offence and called on the courts to rely on these to impose a shorter sentence.

After considering the reports, the sentencing court passed a shorter sentence and stated that it would be "invaluable" to have such a report available every time a Black person is sentenced. This decision was brought to a higher court, which ultimately disagreed with the length of sentence imposed by the sentencing judge. It did, however, accept that the courts should consider the effect of anti-Black racism on an offender during sentencing where it has "some connection" with a specific offender. It also clarified that there is no need to show a "direct causal link" between the offence and the negative effects of systemic anti-Black racism for such considerations to be taken into account.

The outcome of this case is a far cry from abolishing a racist criminal justice system, but it has pushed the courts towards adopting a more just approach and to reflect on the systemic racism that underpins the cases that come before them. The higher court itself opened its decision with the words: "It is beyond doubt that anti-Black racism, including both overt and systemic anti-Black racism, has been, and continues to be, a reality in Canadian society, and in particular in the Greater Toronto Area. That reality is reflected in many social institutions, most notably the criminal justice system. It is equally clear that anti-Black racism can have a profound and insidious impact on those who must endure it on a daily basis [...]. Anti-Black racism must be acknowledged, confronted, mitigated and, ultimately, erased."

SHAPING THE CONDITIONS THAT SUPPORT COMMUNITIES' CAMPAIGNS AND ACTIVISM

Litigation might also support community campaigns and resistance in more indirect ways. Cases might try to improve the environment and conditions necessary for them to do their advocacy and campaign work.

For example, litigation could be used to challenge repression of certain forms of activism, restrictions on the spreading of information on people's rights, or discriminatory funding cuts that make it more difficult for a movement's work to be done.

It could be a strategic decision to start with cases that are aimed more at building power of the community, so it can be in a stronger or more resilient position to engage in the longer term, or develop more complex strategies in the future.

CASE STUDY:

DEMANDING RECOGNITION: THE PUSH FROM UKRAINE'S ENVIRONMENTAL ACTIVISTS

In July 2000, four individuals who had an interest in protecting their local environment came together to form a group. They then sought to register the group as an association called the "Civic Committee for the Preservation of Wild (Indigenous) Natural Areas in Bereznyaky." The authorities refused to register their association because the group's articles of association had not been drafted in accordance with domestic law. For instance, the articles did not limit the association's activities to the Bereznyaky area.

The four individuals took their case to the courts in Ukraine, and then to the European Court of Human Rights. In the meantime, they dissolved the association and its activities. The European Court found no justification for Ukraine's limitations on registering associations. It went on to say that the law regulating the registration of civil society organisations was too vague and gave the authorities too much discretion. In conclusion, the European Court found there to be a violation of the individuals' right to freedom of association.

Following the decision, Ukrainian authorities stated that the individuals were permitted to re-apply for registration and have the previous decisions concerning their association reviewed. Five years after the decision, the law on civil associations in Ukraine was amended, helping to eliminate territorial limitations on activities.

SUMMARY OF WHAT STRATEGIC LITIGATION CAN DO

Strategic litigation can do so much more than simply push a court to make a decision on a legal complaint. It has the potential to push for change through the raising of public awareness, supporting campaign efforts and movement building, changing or shaping law and legal processes, and holding the powerful to account.

We now know what litigation can do. But how can it be used to bring about outcomes that serve justice?

CHAPTER THREE:

HOW CAN STRATEGIC LITIGATION BE USED?

HOW CAN STRATEGIC LITIGATION BE USED?

Strategic use of litigation involves plotting out how different legal complaints can positively reinforce and work together with other strategies to achieve change. One legal complaint or case will rarely be the single solution for bringing about the change needed, but it can form part of a broader and longer-term process for reaching ultimate change.

A litigation strategy involves working back from the problem, starting with the fundamental thing that needs to change. In most cases, this change will be too great to bring about through one single action. This is when the importance of litigation strategy comes into play, breaking down the desired change into smaller, more achievable goals that can be pursued through legal actions. These legal actions might build or complement one another and help advance society towards the ultimate change that is needed.

CASE STUDY:

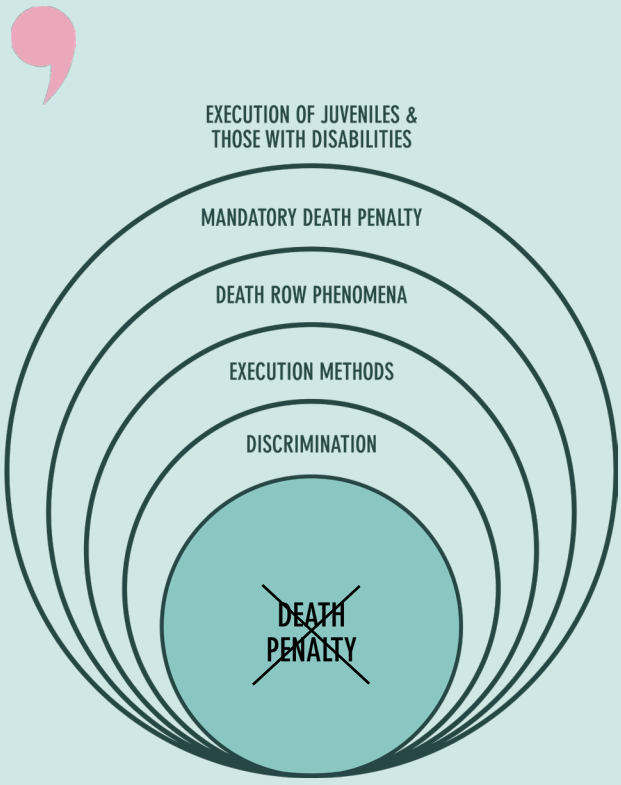
THE RIGHT TO LIVE: USING LITIGATION TO FUEL THE DEATH PENALTY ABOLITION MOVEMENT

The use of litigation by the death penalty abolition movement in the US has been described as "strategic gradualism". Instead of first taking a case seeking a declaration that the death penalty was unconstitutional, something that the courts would have been legally unable to do in the early years of litigation on the issue, cases were instead taken over a longer period.

By challenging smaller injustices over a period of time, these cases gave the courts an opportunity to analyse different aspects of the death penalty policy gradually. They were not confronted with the "daunting" task of taking a broad position on whether it was constitutional or not.

Cases started challenging the execution of juveniles and disabled people. Other cases focused on the mandatory death penalty, or inconsistencies in the law such as the fact that those who pled not guilty to aggravated murder would receive the death penalty, while those who pled guilty would not. Cases challenged the "death row phenomenon", the harm inflicted on prisoners who were awaiting imminent execution and held on death row for a prolonged period. Litigation was also taken against the different methods of execution, prioritising legal challenges to methods that were considered particularly inhumane and cruel.

In Washington, in the early 2010s, research was conducted on the State's death penalty cases. This research demonstrated that a Black person was four times as likely to be sentenced to death than a prisoner of any other race. This research was used to take a case up to Washington's Supreme Court which, in 2018, held that the State's death penalty law was unconstitutional and was applied in an arbitrary and racially discriminatory manner. This decision still did not take a broad position on whether the death penalty would be unconstitutional in all circumstances. Washington State finally passed a law abolishing the death penalty in 2023.



ENGAGING WITH DIFFERENT TYPES OF LEGAL CASES: CRIMINAL, CIVIL, PUBLIC LAW

In most legal systems, there are three key types of law. These laws are meant to perform different but complementary functions in society. They are:

1. Criminal law

These are laws that are intended to maintain a stable and safe society. The theory is that by breaching this law an individual is causing injury or harm to the society as a whole. Breaches of such laws will be met with a punishment or penalty, usually imposed by the courts, which can range from fines to disqualifications to prison sentences. It covers offences such as murder or assault, but also includes "non-violent" crimes such as corruption, fraud, or money laundering.

2. Civil law

These are laws that are concerned with regulating disputes between private individuals or entities. They will usually seek to compensate an individual for the harm, loss, or injury caused to them by another party. For example, if an individual is harmed because another person broke a legally binding agreement between them, or they have had property damaged by a (non-criminal) wrong caused by another person – as with an event such as a car accident. Civil court cases are taken by an individual or private entity against another individual or private entity. This can be contrasted with criminal legal proceedings, which are brought by the state against an individual.

3. Public law

These are laws that apply to public bodies, including the government and state institutions. These laws are usually aimed at ensuring that public bodies act lawfully, rationally, fairly, and in compliance with human rights. The courts have an important role in holding public bodies to the standards set out in public law.

Strategic cases can begin with the application of any one of these laws, and a litigation strategy might seek to leverage different types of law at different moments and in different ways in order to bring about change.

CRIMINAL LAW

It may be that cases engage with criminal law, for example by pushing for criminal accountability in relation to certain actors who are refusing to abide by the law or bring about the needed change. Criminal investigations or inquiries can be opportunities for truth-telling and justice. Criminal prosecutions might be sought where justice has been denied because of impunity, such as where police officers are not punished or held criminally responsible for violence against Black people. In most countries, criminal proceedings cannot be pursued by individuals. They are taken by public prosecutors on behalf of the state. In these circumstances, communities or collectives might still put pressure on the state to bring such proceedings.

It may be that cases start off as criminal trials but end up turning into litigation that tries to shape the criminal justice system itself. For example, those defending against a criminal charge might appeal the application of the criminal law in their case because it is unfair, unjust, and in need of reform.

It may also be that activists intentionally break the law and invite arrest in order to bring attention to an issue or expose injustices in the criminal justice system. This is often referred to as protest trials.

CASE STUDY:

TOPPLING THE LEGACY OF SLAVE TRADE: PROTESTERS ACQUITTED BY JURY

In 2020, two weeks after the murder of George Floyd, a number of protestors toppled over the statue of slave trader Edward Colston in Bristol, UK, throwing the statue into the River Avon. After this incident, nearly seventy other tributes to slave traders and colonialists were removed across the UK.

Four individuals were arrested for criminal damage because of their role in bringing down the statue, and they came to be known as the “Colston Four”. During their criminal trial, they argued that they had a lawful excuse for their actions. They argued that they had to act in order to prevent the more serious crime of public indecency, as the continued presence of the statue was offensive, abusive, and distressing. They argued that Bristol council’s failure to remove the statue, despite thirty years of petitions and demands from Bristol’s African-Caribbean community, amounted to the crime of misconduct in public office. They also argued that their conviction would amount to a violation of their rights to freedom of expression and freedom of assembly.

During the hearings before the court, the public gallery was filled with locals who cheered when videos of the incident were shown. The four individuals were acquitted by a jury after they had heard who Colston was, what he did, how the council persistently failed to act, and how the continued existence of the statue was a greater offence than its toppling.

CIVIL LAW

Strategic cases might also make use of civil law. This will involve pursuing private legal disputes before the courts that have the potential to affect wider change. These disputes can take many forms, from employment to property to consumer protection to family matters.

For example, the government or public bodies might be challenged on the basis that they have violated or acted in a way that risks violating constitutionally protected rights. Alternatively, they may be taken to court for their failure to abide by the law that regulates public administration and law-making. For instance, public law can be used to challenge policies or laws that amount to an unlawful exercise of legislative power.

CASE STUDY:

ARGUING AGAINST DISCRIMINATORY EMPLOYMENT LAWS: RECOGNISING PHILOSOPHICAL BELIEFS

In 2008, Tim Nicholson was made redundant from a large residential property business in the UK. He asserted that he was made redundant because he held the belief that humankind was heading towards catastrophic climate change. This belief meant he was no longer willing to travel by aeroplane, he reduced his consumption of meat, composted his food waste, and encouraged others to reduce their carbon emissions.

He feared for the future of the human race given the failure to reduce carbon emissions on a global scale. It was found that his beliefs were at odds with senior staff at the company, and he was made redundant.

He took a case to court arguing that his views on climate change should be covered by the laws protecting against religious and philosophical belief discrimination in employment. The Employment Appeal Tribunal in the UK found that his belief was capable of being a "philosophical belief", therefore recognising that employees could not be discriminated against at work because of their genuinely held beliefs on the climate crisis.

PUBLIC LAW

Many litigation strategies will include the use of public law, an important means of holding those with political power to account for their actions or omissions.

CASE STUDY:

JUSTICE FOR PEOPLE HARMED BY DOMESTIC VIOLENCE

In 2012, the UK introduced new rules on legal aid. Legal aid is government financial support for the payment of legal advice or legal representation in certain circumstances. These new rules set out strict limits on domestic violence evidence that had to be presented before legal aid would be granted in family disputes, including cases for protection orders against violent partners. Under the new rules, an individual would have to show they had suffered domestic abuse within the previous two years to receive legal aid.

A case was taken by Rights of Women, a charity that campaigned on women's rights, particularly in relation to gender-based violence. The case argued that these new rules unlawfully blocked women from legal aid, and forced those who had been physically and sexually abused by their partners to face them in court without legal representation.

Rights of Women undertook research that demonstrated that 53% of those affected by domestic violence had chosen not to pursue cases in the family courts because they could not get legal aid. The court found that the new evidential rule was arbitrary, and it frustrated the purpose of legal aid since it excluded a large number of individuals affected by domestic violence. This rule was, therefore, invalid. Shortly after the case, the government announced new rules increasing the time limit from two years to five years. As of January 2018, time limits on domestic abuse evidence for legal aid have been scrapped by the Ministry of Justice.

STEPS IN LITIGATION

There are a number of steps and stages to taking cases to court. Each of these phases can have different outcomes and make different contributions to campaigns for change.

The basic steps in litigation can be summarised as follows:

1. Threatening to sue

2. Filing a case to court and hearings

3. Settling a case

4. Winning a case

5. Losing a case and appealing

6. Litigating again

The following steps aren't intended to be a detailed explanation of all the phases involved in taking a case to court. Instead, this basic overview demonstrates how different steps in the process can present different opportunities for pushing for or bringing about change.

Initiating litigation should not be done lightly or alone. Before commencing litigation, it's recommended to get the support of a lawyer who can guide you through the specific steps in your particular case.

THREATENING TO SUE

Litigation will usually start with the person who intends to bring a case communicating this intention to the person they want to sue. This is to put them on notice, but also gives them an opportunity to resolve the matter before the courts are involved.

Simply the act of communicating this intention can be enough to bring about some kind of action or change. It may be that the other person was unaware of the illegality of what they were doing. It may also alert them to the fact that others are aware of their rights, are prepared to act on them, and are building a case against them. This can put pressure on them to do something about it to avoid going to court.

CASE STUDY:

THREATENING TO SUE A SUPERMARKET: MAKING CHANGE TO CO2 EMISSIONS AFTER LEGAL THREAT

In July 2022, Milieudefensie, a Non-Governmental Organisation (NGO) published a study on the climate plans of 29 major companies in the Netherlands. One of those companies was the supermarket chain Albert Heijn. This study demonstrated that, on average, most companies would achieve no more than 19% reductions in CO2 by 2030. This was despite the fact that companies had to reduce CO2 emissions by at least 45% to limit 1.5°C global warming.

When publishing these findings, the NGO indicated that they were starting a "preliminary legal investigation" and that their goal was "not litigation, but to stop dangerous climate change. However, if necessary, [they were] both willing and able to start new lawsuits". Just over three months after this publication, Albert Heijn announced changes to their ambitions for reducing CO2 emissions in their value chain from 15% to 45% by 2030.

FILING A CASE TO COURT AND HEARINGS

Filing a case involves the official submission of a legal complaint to court, which is then communicated to the individual or entity being sued.

This complaint formally sets out a set of facts and arguments demonstrating that the law has been broken. This complaint can then be further explored in hearings, which are public proceedings where the facts and arguments are explored in greater depth. This process itself can put pressure on those being sued to take action to resolve the matter before the court can reach a decision.

This could be because, having read or heard the complaint and evidence against them, the other party realises that their chances of winning the case are low. It may even be that they were unaware of the legal position before the case was brought.

CASE STUDY:

ENVIRONMENTAL GROUP SHOWS PLANNING AUTHORITIES ARE BREAKING THE LAW

In 2021, the Irish planning body granted permission for the building of an 18km ring road around Galway city. This decision was challenged by a group called Friends of the Irish Environment, who argued that the decision was made without taking into account Ireland's Climate Action Plan. This plan was publicised by the government four days earlier, and was promoted as reducing car traffic in favour of public transport, cycling, and walking as a way of reducing carbon emissions.

The Irish planning body later indicated that it would not fight the legal challenge because it "was not aware [...] that a new Climate Action Plan 2021 had been adopted" and the plan had not been communicated to them. They agreed that their original permission was unlawful and was no longer valid.

SETTLING A CASE

During the litigation process, the person against whom the case has been taken may decide it is not worth defending themselves through the courts. After all, it is a costly and time-consuming process. The courts also prefer amicable settlements to disputes that come before them, and will often request that attempts to settle be made.

It may just be that compromise through settlement outside of the courtroom can bring about the necessary change (or suitable change, for now) for those taking the case.

At the time, Southall Black Sisters said: "[F]rom the outset, it became apparent to the presiding judge [...] and to all those present in the courtroom including the packed public gallery, that Ealing Council was skating on really thin ice in attempting to justify its decision to cut funding to [Southall Black Sisters] and to commission instead one generic borough-wide service on domestic violence on the grounds of 'equality' and 'cohesion'". The judge handling the case said: "[A]s I have endeavoured to explain, specialist services for a racial minority from a specialist source is anti-discriminatory and furthers the objectives of equality and cohesion".

CASE STUDY:

THE FIGHT OF THE SOUTHALL BLACK SISTERS TO PROTECT CHARITY: TAKING LOCAL COUNCIL TO COURT

Since 1979, Southall Black Sisters have provided specialist services to Asian and Afro-Caribbean women, particularly in relation to issues around domestic violence. In 2007, they had been receiving funding from the London Borough of Ealing when they were informed that the Borough was changing its funding criteria.

The Borough said that they expected funded services to be provided to "all individuals irrespective of gender, sexual orientation, race, faith, age, disability, resident within the Borough of Ealing experiencing domestic violence".

Southall Black Sisters brought the issue to court, highlighting that such an approach would have a disproportionate negative impact on BPOC women, as they relied on specialist services like those delivered by Southall Black Sisters whose funding would be cut under this criteria. The Borough withdrew from the case on the second day of hearings, and agreed to change its approach to funding domestic violence charities.

WINNING A CASE

For many, winning a case involves obtaining a decision from the court that is in their favour. That means the court has agreed with their arguments and made orders accordingly. It may be that this favourable decision itself brings about the change that was being pushed for through the courts. For example, by invalidating a particular law so it is no longer applicable or enforceable.

CASE STUDY:

RESISTING ISLAMOPHOBIA: OVERTURNING AUSTRIA'S HIJAB BAN IN SCHOOLS

In 2019, the Austrian Government passed a law that banned primary school students under the age of 10 from wearing any "ideologically or religiously influenced clothing which is associated with the covering of the head". Although this language did not specifically refer to those of the Muslim faith, its intention and effect was to ban hijabs in primary schools. For example, the kippah or the patka were permitted to be worn under the law.

Two families challenged the ban before the Austrian courts with the support of the Islamic Religious Community in Austria (IGGÖ). These families were representing two girls who wanted to wear a hijab in their free time and at school as an expression of their religious freedom. The Austrian Constitutional Court overturned the ban and ordered that it no longer be applied. In its decision, the Court stated that the "selective ban [...] exclusively affects female Muslim pupils, thus differentiating them from other female and male pupils in a discriminatory manner". It also acknowledged that such a ban "involves a risk of making access to education more difficult for Muslim girls or of marginalising them in society".

Alternatively, the change can come about through the consequences of the decision. For example, the person or entity being sued might be ordered to give a timeline within which it intends to implement the decision. In this way, the court does not specify the change that has to take place for the law to be complied with. This still puts pressure on the person or entity who was sued to take action. In most cases, even though a case has been won, further work will need to be undertaken to make sure the decision is implemented in practice.

LOSING A CASE AND APPEALING

Even when the case is not won in the courtroom, the litigation might still result in a positive impact for the cause. A negative decision might further demonstrate the injustice surrounding a particular issue and provide fuel to the campaign. Litigation may even be taken with the intention of losing for this very reason.

Losing a case can be a catalyst for activating other actors and decision makers who hold the political power to bring about change.

CASE STUDY:

LOSS STILL LEADS TO LEGISLATIVE CHANGE ON PAY DISCRIMINATION

Lilly Ledbetter was an employee at Goodyear Tire and Rubber for 19 years. As she neared retirement, she found out that she was being paid significantly less than male colleagues with similar seniority and experience. She took her case to the US courts. However, she lost her case on a technical point.

Too much time had passed since the discriminatory pay decisions had been made against her, so according to the procedural rules the courts could not consider whether discrimination had occurred in her case.

In 2009, the same year that this case was lost, the US Congress introduced the Lilly Ledbetter Fair Pay Act. This law stated that the time limit within which an equal-pay lawsuit had to be taken resets with each new paycheque affected by the earlier pay discrimination. This meant that the courts could no longer rely on this procedural point to block equal pay cases.

When a case is lost, it is possible to appeal it to higher courts or even to regional or international courts. This is an opportunity to have the case reconsidered on the basis that it has been wrongly decided. These courts might reach a different conclusion to the original court and bring about a win. The topics of appealing and regional and international courts are explored in other parts of this guide.

LITIGATING AGAIN

Sometimes change can only really be brought about by repeatedly re-litigating an issue. This brings the matter back before the courts until proper steps are taken to fix the problem.

Just as laws are often ignored by those who are in power, court decisions can also be ignored if there is a lack of follow-up or sustained pressure on those who must comply.

Taking the matter back to court can provide an opportunity for further court measures to be imposed, putting additional pressure on those who need to act.

CASE STUDY:

BACK TO COURT FOR SLOVAKIA'S LANDFILL MANAGEMENT CASE

A landfill in Považský Chlmec, Žilina Region, in Slovakia was first opened in the 1950s and had come under criticism in the 2010s for not complying with EU laws on safe and controlled waste management activities. This law lays down standards to protect human health and the environment from the negative effects caused by the collection, transportation, storage, treatment, and disposal of waste. This law required all non-compliant sites to be shut down in 2009, unless they provided an appropriate "site conditioning plan" setting out how they would comply with the EU landfill law.

In 2013, the Court of Justice of the European Union found that it was unlawful for Slovakia to authorise the operation of the Považský Chlmec site without a site conditioning plan. Despite this, the landfill site continued to operate without such a plan years after the decision of the court and local activists highlighted that leaks from the site had contaminated groundwater. In 2016, the Slovak Environmental Inspectorate ordered that the landfill be closed, and the site restored. This was also ignored.

The case was then taken back to the Court of Justice of the European Union for a second time. In January 2018, the Court found that Slovakia had failed to comply with its earlier decision. It ordered Slovakia to pay a lump sum of EUR 1 million for this failure. It also ordered that it pay a penalty of EUR 5,000 per day of delay in complying with the earlier decision. In December of that year, the landfill was completely closed down.

SUMMARY OF HOW STRATEGIC LITIGATION CAN BE USED

There are various ways in which litigation can be used to bring about change and support communities and movements in their work. This can be done by engaging different types of law and legal claims in long-term legal strategies.

Changes might also come about in different or unexpected stages of the litigation process, including as a result of a negative court decision. Developing a legal strategy involves identifying these different opportunities for leveraging litigation, but it also involves identifying the best moment to engage in litigation.

This brings us to the question: when can you use strategic litigation?

CHAPTER FOUR:

WHEN CAN YOU USE STRATEGIC LITIGATION?

WHEN CAN YOU USE STRATEGIC LITIGATION?

Strategic litigation is best used when the time and context is right. It carries with it certain risks for all involved, it is not something to be undertaken lightly.

Many people see it as a tool of last resort. But strategic litigation can be a vital tool in the hands of communities pushing for racial, social, and economic justice. It is most useful when there is a need to threaten negative repercussions against someone who has the power, but not the will, to make the change that is needed.

Strategic litigation is more combative than tools that try to bring about change through persuasion or incentivisation. After all, it is an official and formal process for escalating a dispute. It is usually worth considering litigation where less combative tools have been used and so far failed against those with political power or influence. When people decide that their campaign needs a “stick”, rather than a “carrot”, in order to get things done, that’s when litigation comes in.

With this in mind, strategic litigation can be used effectively in a number of strategic settings, crossroads, or opportunities, such as:

- **when policy change is taking too long;**
- **when there is consistent lack of enforcement of existing law or policy;**
- **when there is a need to dial up the pressure and urgently raise awareness;**
- **when you realise it is not an isolated issue;**
- **when the issue has never been taken before the courts/cases that have been taken before the courts are not serving justice;**
- **when you want to build power in your community or movement in accessing justice;**
- **when you need to take control over legal issues that concern you and your community.**

When deciding whether litigation is the ”right” tool to choose, risks and obstacles also need to be considered. Litigation should be avoided where the risks and obstacles involved in taking the case outweigh the potential impact of the case. Here are some of the risks and obstacles that need to be considered when using litigation as a tool:

- **meeting the procedural requirements;**
- **taking the time to push for change before the courts;**
- **taking on the (financial and non-financial) costs of litigation.**

WHEN POLICY CHANGE IS TAKING TOO LONG

It may be that efforts to bring about changes in law or policy through advocacy, campaigning, and lobbying efforts are taking too long. Even though litigation itself can take several years, it can sometimes offer a faster route to change than other options.

For instance, changes to law or policy might be taking longer than the average time it takes for laws to be passed through legislative bodies. These law-making processes might be slowed down or stopped because of the political make-up of a legislature at a particular period in time. Waiting for another election cycle or for a reconfiguration of political interests might just take too long. It could even be that the legislature is overly influenced by the lobbying and financial incentives of those benefiting from the harm being challenged.

The courts should be independent, which means that they cannot be unduly influenced by other parts of the state, such as the government or the legislature. Nor can they be improperly influenced by private or partisan interests. Their role is to decide cases solely on the evidence before them and in accordance with the law. They also have to be impartial, they cannot base their decision on personal bias or prejudice. As they are not subjected to the same political influences as the legislature, they can sometimes push for change more quickly than the lawmakers otherwise would.

CASE STUDY:

TAKING ON BIG TOBACCO

The tobacco industry is both incredibly powerful and incredibly harmful, a lethal combination. They are notorious for developing a playbook full of tactics and scripts that they have deployed to resist regulation and safeguard their business interests over decades. For years, they emphasised the personal responsibility of consumers, while defending their business practices with reference to individual freedom of choice.

They paid scientists to produce research papers that instilled doubt around the health impacts of smoking, and they critically undermined the scientific research finding harms associated with smoking. They pledged to regulate themselves, so they would not have to be regulated by law. They also stubbornly denied the addictive nature of their products, and the harmful impact of their marketing to children.

Since the 1950s, tobacco companies funded PR and lobbying companies that preserved their relative stronghold over the US Congress, ensuring that they were favoured in policymaking circles. This was an incredibly difficult hold to break, and successes in loosening this grip started in litigation efforts. The first cases that were brought to the courts in the 1950s to 1980s mostly failed, these were brought by those suffering from lung cancer and their families claiming compensation to cover medical expenses, lost wages, and pain and suffering. The second wave of cases, between the 1980s and early 1990s, were based on a different strategy. They focussed on the tobacco companies' failure to warn about the hazards of smoking.

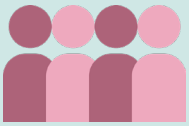
These cases were often drawn out by the tobacco lawyers, making them too expensive for many to continue pursuing. The third wave of cases, in the 1990s, was more successful. These cases were taken by individual states, arguing that the health problems caused by tobacco resulted in significant cost to the states' public health systems. These cases forced the tobacco industry to disclose 35 million pages of documents that showed how the industry used chemicals to make their products more addictive, marketed them deceptively, and concealed their impact on health. These cases were settled at USD 246 billion, in what was the biggest settlement in US legal history.

It was also a turning point for the tobacco industry. Although the industry remains powerful, lawsuits are being brought again by individuals and families seeking compensation for harm and the public perception of tobacco use has shifted. In the US, state policies toward regulating the tobacco industry have finally become more aggressive and restrictive. In 2009, the US Congress passed the Family Smoking Prevention and Tobacco Control Act which increased the regulation of the manufacture, distribution, and marketing of tobacco products.

WHEN THERE IS CONSISTENT LACK OF ENFORCEMENT OF EXISTING LAW OR POLICY

It might just be that the laws are not inadequate. They might even have been shaped and improved after years of advocacy, campaigning, and lobbying by communities. Instead, the problem could be that these laws are not being followed and those who should be held to account under them are benefitting from this non-compliance.

This situation might be one where it is necessary to go to court, particularly where all other efforts to ensure compliance with the laws have been exhausted. There might be an additional failure on the part of those responsible for overseeing enforcement in the law and these oversight bodies must also be held to account for this failure.



CASE STUDY:

TUNUVIVI COMMUNITIES HALT UNLAWFUL GAS PROJECT: PROTECTING INDIGENOUS LAND

In 2021, the major oil and gas company Santos proposed a USD 4.7 billion project to extract gas from the Timor Sea in the Indian Ocean. The project was approved by the Australian oil and gas regulator without Santos holding any consultation with the Indigenous communities whose livelihoods were at risk from the development, as was required by law.

The project was to be carried out off the coast of the Tiwi islands, a biodiversity haven that had been cared for by the Tunuvivi people for thousands of years.

The communities on these islands were concerned about the risk posed by the project to marine life, traditional fishing and hunting practices, and to species that are important for Tiwi ceremonies, songlines, and cultural practices. A senior lawman from the community, Dennis Tipakalippa, was chosen by the community to represent them in court. A case was taken asking the Federal Court to set aside the approval of the project because the community were not consulted by Santos as required under the law.

In August 2022, members of the Tunuvivi communities gave evidence in beachside court hearings held on the Tiwi islands. Later that year, the Federal Court held that the approval for the project had to be set aside. The Court also gave Santos two weeks to shut down and remove the rig from the Timor sea. It drew attention to the fact that the regulator failed to assess whether Santos had consulted with everyone affected by the proposed project, as was required by the law. Santos tried to appeal the decision, but failed.

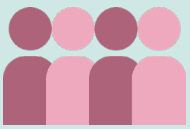
The following year, Santos began holding consultations with the communities. Later in 2023, a number of islanders filed human rights cases against banks that provided loans to Santos while the Federal Court case was ongoing.

WHEN THERE IS A NEED TO DIAL UP THE PRESSURE AND URGENTLY RAISE AWARENESS

Litigation can be a useful tool for bringing attention to an issue that is urgent and intensifying, particularly when the situation is not being treated with the urgency it deserves. Taking a case to court is a way of escalating the matter, it dials up the pressure. It highlights the fact that those affected by the issue refuse to sit back and let the situation continue unchallenged. In this situation, people are prepared to engage in a process that is both costly and risky for both those taking the case, and those against whom the case is being taken.

Campaigns and media statements can be ignored, but a court case cannot. Court systems have processes that are designed to force a party being sued to answer to the arguments being brought against them. For instance, in many countries, a failure to contest a legal claim before court will result in a "default judgment" being found in favour of the person who brought the case. In other words, they will win by default.

To add to this, failing to abide by a "court summons", an order to appear before a court, can result in significant penalties. In some cases, even serious criminal penalties. Therefore, taking litigation forces the other party to account for their role in ignoring or breaking the law.



CASE STUDY:

PUTTING NEW YORK'S RACIST STOP-AND-FRISK ON TRIAL

In 2008, four men – David Floyd, David Ourlicht, Lalit Clarkson, and Deon Dennis – took a case on behalf of thousands of primarily Black and Latino New Yorkers who had been stopped by the police without any cause. At the time, police stop-and-frisk incidents in New York City were rising exponentially, peaking in 2011 and disproportionately impacting Black and Latino New Yorkers.

The case was taken against the City of New York, the Police Commissioner, the Mayor, and named and unnamed police officers. It alleged that they had implemented and sanctioned a policy, practice, or custom of unconstitutional stops and frisks.

The act of stopping and frisking an individual without cause could be challenged simply for the fact that there is a "lack of any reasonable suspicion" to justify a stop-and-frisk, a requirement that has to be met for a search to be constitutional. However, the coalition and communities taking the case wanted to make the additional, and more difficult to make, legal argument that it also amounted to racial profiling in violation of the US Constitution.

It was crucial to them that this be part of the framing of the legal arguments in the case "so that racial disparity would be front and center". At the time of the case, approximately 85% of those who were stopped and frisked were Black and Latino, despite the fact that these groups made up 52% of the city's population.

A community organising effort was built around the case, and protests were planned. These protests escalated as the hearings in the case approached. Around the time a trial date had been set for the case, community organisers mobilised thousands of New Yorkers for a silent march down Fifth Avenue protesting the stop-and-frisk program. This was done alongside high-profile media and lobbying campaigns pushing for reform. When hearings on the case were held, supporters packed out the courtroom. On 12 August 2013, the Court found the New York Police Department had been responsible for a pattern and practice of racial profiling and unreasonable stops.

The court appointed an independent monitor to oversee a series of immediate reforms to New York Police Department practices, and the court ordered that a joint reform process be put in place. This would be a process of bringing about longer-term structural reforms to the police based on input from communities most directly affected by policing.

Since the filing of the case, reported stops have fallen significantly from a height of over 600,000 a year to under 15,000 a year. Unfortunately, racial disparities in stops persist and the court monitoring of the case and joint reform process continues at the time of writing this guide.

Litigation can be a drawn-out process (discussed throughout the following pages) but courts also have processes that allow it to consider issues urgently. They often have powers to impose "interim measures"; which are urgent orders that the court can make for certain things to be done or refrained from being done to avoid circumstances that would prevent it from delivering justice in the case. For instance, if a case is challenging a decision to deport an individual, a court might impose an urgent interim measure preventing deportation until it has considered the matter. This results in litigation being an opportunity to respond quickly to urgent matters.

CASE STUDY:

CHALLENGING IMMINENT THREAT OF UNLAWFUL EVICTION OF ROMA RESIDENTS

In 2012, French President François Hollande made the promise, in his election manifesto, that no Roma settlements would be dismantled in France without families being offered an alternative solution. Many believed the change in government in 2012 would also see a change in France's treatment of Roma people. What followed was eight years of mass evictions of Roma people in cities right across France, and serious and systemic violations of Roma rights.

In 2012, in the city of Bobigny, 200 Roma people were relocated from their settlement and provided with caravans on an alternative plot of land in the city. In 2015, the city sold this land to a municipal corporation which then took steps to evict the Roma residents. The courts blocked the corporation from doing this because the residents had settled there on the initiative of the city.

In 2017, the Mayor of the city adopted an order to evict the Roma residents from the land within a period of 48 hours. This order was quashed by the courts because no relocation measures had been adopted. The corporation then tried again to evict the residents and, in October 2018, the Mayor issued a new emergency order to evict the Roma occupants within seven days.

In light of these sustained and escalating efforts to evict them from their homes, the Roma occupants decided to take an urgent emergency case to court to challenge the Mayor's evacuation order. The case went to the highest administrative court in France, which suspended the emergency evacuation order indefinitely in February 2019.

In its decision, the Court held that the site was the Roma residents' domicile since they had lived there, at the initiative of the city, since 2012. They also reiterated that the Mayor could only adopt an order to evacuate persons from their domicile in case of "imminent danger", and there was no "imminent danger" in this case. Therefore, the order was a serious violation of the Roma occupants' rights and was illegal.

WHEN YOU REALISE IT IS NOT AN ISOLATED ISSUE

Strategic litigation concerns court cases that are brought with the intention of bringing about an impact beyond those actually taking the case. Therefore, it is inherent in all strategic cases that the issues under consideration are ones that are experienced by and affecting large numbers of individuals. Therefore, when an issue concerns more than one person, it is worth considering how a legal complaint can be taken that can also benefit those others affected.

Depending on the type of legal action being taken, litigation presents the opportunity to put evidence before the court that demonstrates the widespread pattern of harm and illegality. For instance, statistical data and analyses of patterns of discrimination can be used to support an individual claim that there has been discrimination based on personal characteristics. It can also be used to demonstrate the intersectional nature of this discrimination.

Additionally, it can also be used to make the argument that it is in fact a system, policy, or practice that is discriminatory, rather than an individual decision, and therefore it is the system, policy, or practice that needs to change.

CASE STUDY:

MOVING TOWARDS JUSTICE: CLAMPING DOWN ON DISCRIMINATORY POLICING OF ROMA COMMUNITIES

In 2012, a case was brought challenging the policing of petty offences relating to bicycles in Hungary. The law required that certain accessories be on bicycles, such as headlights and reflector prisms. A case was taken before the Equal Treatment Authority arguing that the law had been applied in a discriminatory manner against Roma. While this case was before the Authority, a Hungarian NGO (Hungarian Helsinki Committee) presented the Authority with statistical analysis demonstrating that Roma were disproportionately fined for breaking the law (97% of fines were against Roma people).

This evidence was complemented by photographic evidence taken in the area, as well as internet advertisements of second-hand bicycles in the vicinity, showing widespread non-compliance with the law. Before the Authority could reach a decision, the county police chief acknowledged that the practice may have disproportionately affected the Roma community.

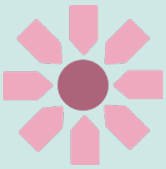
The police assigned 20 officers to a three-day anti-discrimination training. They also offered to provide the local Roma community with bicycle accessories free of charge. Finally, they promised to provide the Hungarian Helsinki Committee with data to monitor bicycle fines over the following two years.

WHEN THE ISSUE HAS NEVER BEEN TAKEN BEFORE THE COURTS OR THE CASES THAT HAVE BEEN TAKEN BEFORE THE COURTS ARE NOT SERVING JUSTICE

Litigation can hold to account individuals or entities who have never been put on the spot by the courts before. These individuals or entities might even benefit from sitting outside the reaches of the law. Maybe they have not been the focus of previous lawsuits. Litigation can force these actors to explain their role in systemic injustices and illegality.

Litigation can also help surface previously hidden or overlooked dynamics or practices that feed into broader systemic harms. Maybe the courts failed to take something into account in their previous decision-making, or they were not able to make certain findings because of the kinds of cases that had previously been brought before them.

Bringing litigation in these circumstances can play a role in unearthing and exposing such gaps and the need for holistic accountability in order to bring about change. Strategic litigation can involve finding those other legal angles that can put greater pressure on those who have the power to bring about change.



CASE STUDY:

TAKING ON THE WORLD BANK: INDIAN FISHING AND FARMING COMMUNITIES IN COURT

In April 2008, an arm of the World Bank, the International Finance Corporation (IFC), made a loan of USD 450 million for the Tata Mundra project. This project involved the building of a coal-fired power plant in Gujarat, India. The loan was approved despite it being classed as "high risk" due to its expected "significant adverse social and/or environmental impacts that are diverse, irreversible, or unprecedented".

The subsequent construction and running of the power plant destroyed land and other resources that were used by communities for fishing, farming, salt-panning, and animal rearing. In 2015, members of the fishing and farming community from the Gujarat coast, with support from EarthRights International, took a case to the courts in Washington DC, US, where the IFC is headquartered. The IFC argued that it benefitted from complete immunity under US law as an international organisation, and therefore could not be found by the courts to have broken the law.

The case went up to the Supreme Court, which reached the historic decision that international organisations, like the World Bank, could be sued in US courts provided the circumstances fall within an enumerated set of exceptions to the immunity. One of these exceptions covered legal complaints that were based upon "a commercial activity carried on in the United States". This was an important decision, as the IFC had operated for years as if it were "above the law" and was "untouchable" by providing loans to projects that ran a high risk of serious human rights abuses and harm to local communities. This decision sent a message that they could be held to account before the US courts.

Unfortunately, the US courts went on to find that, on this specific occasion, the IFC could benefit from the immunity. EarthRights International has since made submissions to the UN on the issue of development finance institutions acting as if they are above the law and the application of immunity in this case.

WHEN YOU WANT TO BUILD POWER IN YOUR COMMUNITY OR MOVEMENT IN ACCESSING JUSTICE

Strategic litigation can also involve leveraging collective power to raise issues before the courts and, in doing so, facilitate access to justice for communities. There are many barriers that exist across the world to accessing justice, and court systems themselves are rife with extractive, exclusionary, and elitist dynamics. At the same time, they can also act as levellers.

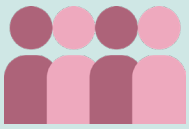
Legal systems seek to put in place checks and balances that ensure those suing and those who are being sued are on as equal a footing as possible. Some terms have been adopted to capture this principle, such as "equality before the law" or "equality of arms". Legal cases are themselves often referred to as "David vs. Goliath" moments, as they are meant to be untainted by and impartial to power or privilege.

There is still a massive gap between this theory and practice, and individuals and communities often have very different relationships to or experiences with the law. Court cases can seem like a distant or inaccessible tool. However, taking litigation can build communities' experience, knowledge, and confidence in using the courts for change.

Taking cases to court can help demystify the process of accessing justice before the courts. As taking a case requires a concerted effort, it can be an opportunity for a community or movement to collectively strategise around priorities, objectives, and action points for the change they want to achieve.

It can be a way to pull the community closer together around these objectives and garner support around the movement. There are opportunities for members of the community to assist with research and arguments around a case, build their understanding of the law and their legal rights, and learn more about court processes and procedures.

This can have broader impact beyond the specific case being pursued, as the community might be encouraged to utilise the learning and skills they have developed in taking further strategic legal action before the courts. It may also inspire other communities facing similar struggles to do the same.



CASE STUDY:

WORKERS BUILD A CASE AGAINST SYSTEMIC RACISM IN FRENCH CONSTRUCTION

In 2016, 25 undocumented Malian construction workers were hired by a company to carry out demolition and clearance of a historic building in Paris that was to become new office space. Following two serious work accidents, and with mounting concerns about their working conditions, these workers held a strike with the support of a trade union. Following this strike, the building company terminated its contract with the subcontractor that hired the workers, leaving the workers out of work.

The workers decided to take their case to the Industrial Tribunal, seeking a declaration from the Tribunal that they were not responsible for termination of the contract and that they were due compensation because of the discrimination they had experienced at their work.

Evidence was presented with the assistance of the Defender of Rights, the French equality body, which demonstrated that tasks were assigned to workers not on the basis of a worker's skills but on their nationality and perceived origins. It was evident that the Malian workers were given the most arduous and dangerous tasks. Research studies were also presented demonstrating systemic discrimination in employment and management in the French construction industry more generally.

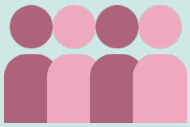
The Tribunal concluded that there was racist distribution of work and racist management in the construction sector, which amounted to an "organised system of racist domination". The Tribunal concluded that the workers' contracts were terminated due to the fault of their employer and awarded EUR 37,000 to each worker. This is one of the few occasions in Europe that a court has addressed structural racism in its decision-making. Since this decision, other construction workers have taken major construction companies to court for discrimination and exploitation.

WHEN YOU NEED TO TAKE CONTROL OVER LEGAL ISSUES THAT CONCERN YOU AND YOUR COMMUNITY

It may be that the framing around a particular issue is being dominated by one voice or group, and this framing fails to take account of the specific concerns of communities particularly impacted by such issues.

In fact, the way an issue is framed publicly can be diametrically opposed or even harmful to certain communities that have not been meaningfully consulted with when measures have been adopted.

Litigation can be an opportunity for taking control of the narrative on the issue. Courts are official platforms where communities can put forward their case, including their narrative and framing around a particular issue.



CASE STUDY:

INDIGENOUS COMMUNITIES PROTECT THEIR LAND: MOVING TOWARDS THE DISMANTLING OF WINDFARMS ON REINDEER PASTURES

In Fosen, Norway, licences had been granted for the building of 151 wind turbines in areas that were traditionally used by indigenous Sámi communities. This project was framed as an important initiative for promoting renewable energy, being one of the biggest wind power projects in Europe. In 2016, as construction began on the site, 200 people gathered and protested against it because of its disproportionate impact on indigenous Sámi communities.

In December 2018, after receiving a complaint from the community, the UN Committee on the Elimination of Racial Discrimination requested that construction on the wind farm stop as it considered the complaint. This request was ignored by the Norwegian government and, once built, the noise and shape of the wind turbines scared the herds away and deprived them of large amounts of the winter pastures.

The case was taken before the Norwegian courts and, in 2021, the highest court in Norway found that the wind farms had violated the rights of Sámi families to practise their culture of reindeer husbandry. On the 500th day anniversary of the court decision not being implemented, people gathered outside the entrance of the Ministry of Petroleum and Energy in Oslo to protest against the lack of action from the government. This was followed by a statement from the Petroleum and Energy Minister apologising for the wind farms and acknowledging that they violated the human rights of the Sámi community. However, by 2023, no action had yet been taken to properly restore Sámi pastures.

COMPLYING WITH THE RULES OF THE LEGAL PROCESS

Not every person can take a case to court on any issue they want to. In order to take a case to court, an individual must first meet certain procedural requirements. There are rules that must be followed for a court to consider the case, these are:

Taking the case on time

Usually, cases have to be taken within a "limitation period". These can differ depending on the type of harm and the law being applied. There are efforts to extend limitation periods where they represent an obstacle to justice, for example in cases concerning historical abuses.

The case must be taken by the "right" person to do so

This is known as "standing", referring to the conditions that have to be met by an individual or entity before they can take a case on the relevant matter. For instance, an individual might have to demonstrate that they have sufficient connection to the law, policy, or action being challenged.

Taking the case to the "right" court or body

Courts can only decide on cases that fall within their "jurisdiction". In other words, they must have the power to hear the particular type of claim and apply the particular set of laws being relied on in relation to the specific subject matter. For example, the European Court of Human Rights cannot hear cases concerning breaches of contract, they can only consider cases involving violations of human rights. Courts are also bound by certain geographical limits, meaning they cannot exercise their power outside of those territorial limits. They also have limits on the type of decision or order they are able to make.

The case must also comply with other procedural rules

Courts come with many rules that must be followed when filing or presenting a case to them, and these can vary depending on the court. These might come in the form of time limits on when certain submissions have to be made or when certain actions have to be taken. There can also be strict thresholds on the evidence that must be presented before courts can make certain findings.

Ultimately, those who want to take a case to court must first ask themselves whether the case is "justiciable". This involves looking at the above procedural requirements and reflecting on whether or not the case is one that the court can exercise its judicial authority over. If not, then the case will be lost or thrown out before the court can even look at its substance.

Cases could be brought to reshape these procedural aspects of the legal process. For example, litigation might push for certain matters to be justiciable and, in doing so, open up access to justice for a whole set of matters that had previously been barred from coming before the courts.

CASE STUDY:

MAKING CLIMATE CASES POSSIBLE IN CANADA

Seven young climate activists, including Indigenous activists, brought a case before the courts in Ontario, Canada, arguing that Ontario's target to reduce greenhouse gas emissions by 30% below 2005 levels by 2030 was unconstitutional. They argued that it was unconstitutional because it violated the rights to life, liberty and security, as well as the right to equality under the law, of Ontario's youth and future generations. They argued that these targets were weak and they increased the risk of death for young people. Ontario, which was being sued in the case, argued that this type of rights-based claim was not justiciable before the courts.

The decision was appealed, and in 2023, an Ontario Superior Court judge did not find violations of the rights of the young people. However, in the decision, the judge recognised that the case was justiciable. This meant that it was an appropriate legal question for the courts to weigh in on. Prior to this decision, climate cases in Canada that alleged violations of human rights had been rejected because they were not justiciable.

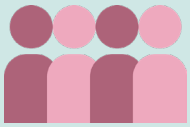
This decision clarified that it was possible for such cases to be brought before the Canadian courts, and the Canadian courts had the power to rule on them. At the time of writing, the young people involved in the case intended to appeal the case further.

TAKING THE TIME TO PUSH FOR CHANGE BEFORE THE COURTS

Challenging injustices before the courts can take time. Court processes can sometimes be slow and prolonged, particularly if courts reach incorrect decisions that are then appealed up to higher courts.

One case, before one level of court, can take anything between a few months to several years. For example, the European Court of Human Rights endeavours to decide cases within three years from when they have been filed. Many cases take much longer than this. The Court of Justice of the European Union, on average, reaches a decision over 17 months after it has been brought. Cases can take longer before the courts if they are complex, concern a high volume of claims or legal arguments, or have been taken to a court that is dealing with a considerable backlog.

Therefore, when taking on litigation, everyone involved needs to be prepared to engage in a process over the long term – it can take years or even decades before a court delivers the decision those taking the case are looking for.



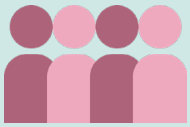
CASE STUDY:

EXPOSING HAIR DISCRIMINATION AT WORK: AIR FRANCE FACE CONSEQUENCES OF ACTION AGAINST AFRO HAIRSTYLES

Aboubakar Traoré is a Black man who worked as an air steward for the airline Air France. The airline had a uniform policy that allowed women employees, but not men, to have braided hair. Aboubakar was suspended from work after he changed his hairstyle to have short dreadlocks tied back in a chignon, and he subsequently sued Air France for his suspension.

An employment court and a lower court both ruled against him, and he then took the case to the highest appeal court in France, the Cour de Cassation. This court, ten years after Aboubakar first took the case, finally recognised that the policy amounted to gender discrimination. This case inspired the introduction of a cross-party bill to the French parliament to ban hair discrimination against natural afro hairstyles and braids.

Furthermore, change might not immediately follow a decision in the case. The day that the decision is handed down is often the start of another sustained effort, to get those bound by the decision to follow it. Just as laws can be ignored, so can court decisions. It is crucial that efforts are sustained after the decision to push for the change that is needed. But this can take time.



CASE STUDY:

THE FIGHT AGAINST ROMA SCHOOL SEGREGATION IN THE CZECH REPUBLIC

In 2000, one of the European Court of Human Rights' most well-known cases was brought by 18 Roma students in the Czech Republic. These students had been placed in "special schools", where they received a simplified curriculum. Their case was the very first European Court case to deal with racial segregation in education.

The Court initially found that the rights of the students had not been violated. However, the case was then appealed to the "higher" chamber of the European Court, the Grand Chamber. In 2007, the Grand Chamber found that the children had been discriminated against because they received an inferior education due to their "ethnic origin".

Despite this positive decision, cases continue to be brought challenging the segregation of Roma school children in the Czech Republic over fifteen years later. The body responsible for monitoring execution of European Court decisions, the Committee of Ministers, is still treating execution of the decision as "pending" as it has not been sufficiently resolved by the Czech authorities.

Even though some policy advancements have been made, as of 2022 there are still over 77 schools in the Czech Republic in which Roma children make up the majority of pupils and only a small number of these can be explained by the percentage of Roma children living in the relevant catchment area. Roma school segregation in the Czech Republic persists to this day, despite the major court victory in 2007. The fight to eradicate school segregation continues.

TAKING ON THE (FINANCIAL AND NON-FINANCIAL) COSTS OF LITIGATION

There are many costs and risks that come with taking litigation. Litigation is a combative exercise, pitting one party against the other. It can also raise the profile of those involved in the case, which can be both a positive and negative factor. It is crucial, when commencing litigation, that risks are mitigated, and costs are planned for, such as:

Financial cost

Cases cost money. A lot of work goes into building and arguing a case, from evidence gathering to strategy development and advocacy. Legal fees can also be high, although sometimes it might be possible to negotiate lawyers to take on the case pro-bono or at a reduced fee because it is an important cause. It may also be possible to obtain public funds for the case if it is covered by "legal aid".

On top of legal fees, you might have to pay for court fees and for experts, translators, investigators, and legal advisers. It is also vital that those taking the case feel supported and cared for during the process, so it may be necessary to pay for service providers that can help with this too.

The total costs of a case can vary significantly, from thousands to hundreds of thousands of Euros. The cost risk is further complicated by the fact that, in some cases, the losing party will be ordered to pay the costs of the other party's lawyers. Therefore, losing a case can come with a hefty price tag. Before taking the case, budgeting for these scenarios and fundraising are crucial.

Resourcing

Being able to pay for the legal work is one thing, but before taking a case it is crucial that those planning to litigate have the resources and capacity to do so. Before preparing and filing a case at court there are key questions to ask, including:

Are there resources available to run the necessary advocacy initiatives, campaigns, and communications alongside the litigation?

Are there established relations with lawyers, researchers, and legal advisers who can strengthen and support the case?

Is there capacity to continuously engage and make decisions during a long process such as litigation?

Setbacks

When taking a case, there is always a risk that the case will be lost and a negative decision will be made. This decision might "setback" the cause by creating judicial recognition of a position that had previously been at least up for debate before. The question is whether the cause can afford the risk of such a setback.

This is a contingency that must be planned for. A setback can be disappointing for the movement, but it can also be a galvanising moment. It can even attract more people to the cause because of the unjust outcome of the decision. It may be possible to turn a loss into a win.

Safety and security

Litigation can expose those taking the case to personal attacks on their reputation, their credibility, or even their persons. They can be targets of social media harassment campaigns from those opposed to their cause.

These dynamics are not new to many activists and campaigners, but the exposure can be greater in the context of litigation because of its adversarial nature. The party against whom the case has been taken is incentivised to push their own narrative and attack the credibility and veracity of the narrative put forward by those taking the case against them.

Measures should be taken to protect all those involved in the litigation, this might include assisting them with media training or physical and digital security training.

Re-traumatisation

Litigation involves presenting a case before a court, including factual evidence of harm and the factual stories that support the arguments being made in the case. Also, because litigation is adversarial in nature, the other party to the case is incentivised to challenge the truth and credibility of the facts being presented, and the individuals presenting those facts.

Not only can the process involve reliving traumatic experiences, it can also involve "gaslighting" dynamics around these experiences. It is vital that litigation is run in a trauma-informed way, and that the courts are pushed to minimise harm in the cases that are brought before them.

CASE STUDY:

THE OGONI NINE: SEEKING ACCOUNTABILITY FOR LIVES IMPACTED BY SHELL'S ENVIRONMENTAL DEGRADATION OF NIGER DELTA REGION

In the 1950s, Royal Dutch Shell began its operations in the Niger Delta. Parts of the Niger Delta soon became some of the most polluted places in the world. Between 1976 and 1991, Ogoniland was subjected to 2,976 separate oil spills accounting for more than two million barrels of oil. In the 1990s, the Movement for the Survival of the Ogoni People was founded and campaigned for social, economic, and environmental justice through non-violent resistance and protest. In 1995, nine environmental activists were sentenced to death and secretly executed by the Nigerian military regime.

These activists were put on trial under the pretext that the group had incited the murder of four Ogoni chiefs, a trial that has been widely criticised as fabricated and a miscarriage of justice. The widows of the Ogoni Nine have taken cases in the US and the Netherlands seeking to hold Shell accountable for their role in aiding and abetting in the arrest, unlawful detention, torture, mistrial, and killing of the Ogoni Nine. The case in the US courts lasted over six years, with the US Supreme Court finally ruling that the matter could not be ruled on by the US courts because it did not sufficiently "touch and concern" the US.

A case was subsequently brought in the Netherlands, with the Dutch courts finding there was insufficient evidence of Shell's involvement in the miscarriage of justice. The widows decided not to appeal the decision, and said through their lawyers that "[t]his has been a lengthy and demanding procedure, which makes them re-live horrible events, while the outcome is most uncertain." Shell continues to deny the allegations made against them and litigation continues to this day seeking compensation for the lives and livelihoods impacted by Shell's environmental degradation of the Niger Delta region.

SUMMARY OF WHEN YOU CAN USE STRATEGIC LITIGATION

Choosing whether to take a case to court or not is not a light-hearted decision. It can involve weighing numerous opportunities against the possible risks involved. This requires identifying the "right" moment to escalate your campaign to litigation. It also means making sure that procedural requirements are met, that efforts around the case are sustainable, and that the costs and risks involved in litigation can be mitigated. In addition, those taking the case must ask themselves: where should they be taking the litigation?

CHAPTER FIVE:

WHERE CAN YOU TAKE STRATEGIC LITIGATION?

WHERE CAN YOU TAKE STRATEGIC LITIGATION?

Depending on the type of case being taken, a legal complaint will have to be filed before a specific body or court system that has the power and authority to decide on the complaint. This authority and power is referred to as the body or court's jurisdiction to deal with the matter.

Some examples of the different bodies or courts that might deal with strategic litigation cases are:

National courts

Other national bodies

Regional courts

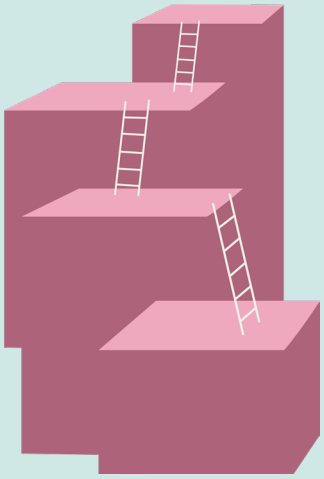
International courts or bodies

NATIONAL COURTS

Most legal systems have a hierarchy of courts, with cases being appealed up the court system from lower to higher courts. Usually, the higher the court or body, the more powers and authority they have. This means higher courts are in a better position to enact or push for broader change.

In many jurisdictions the highest court will be a Constitutional or Supreme Court, and they will usually be the highest authority when it comes to determining the legality of laws or practices according to a country's constitutional order.

HIERARCHY OF COURTS IN LEGAL SYSTEM:



The courts will also be separated into different divisions depending on the area of law or kind of disputes they handle, for example labour, commercial, criminal, administrative, and civil disputes.

Some cases might be resolved at first instance with no further action before the courts. Other cases will be fought up the court system to the higher courts. Cases are usually taken before the higher courts, a process known as "appealing", where there is disagreement or uncertainty around the legal position on a particular matter. For example, where the lower court has failed to apply the law correctly. It may be the case that victory only comes after losses in the lower courts.

CASE STUDY:

DISAGREEMENT IN FINNISH COURTS: PERSEVERING WITH CASES AGAINST RACIAL PROFILING

In 2016, two Black women, a mother and daughter, were stopped and searched by police in Helsinki. The police said that their officers were carrying out surveillance of suspected sex workers and performing immigration status checks. They denied that they had discriminated against the women but agreed that their actions were in part influenced by the colour of the women's skin.

The case was taken to the Equality and Non-Discrimination Tribunal, which found that the police had ethnically profiled the women and had discriminated against them. The Tribunal prohibited the police from repeating the practice again and imposed a conditional fine of EUR 10,000 in order to incentivise the police to follow their order. This decision was later appealed to the Administrative Court, which disagreed and overturned the earlier decision of the Tribunal.

The case was then appealed a further time, to the Supreme Administrative Court, which overturned the decision of the Administrative Court and ordered that the Tribunal decision be reinstated and followed. In other words, the police were once again prohibited from repeating racist stop and search practices under threat of a fine.

OTHER NATIONAL BODIES

Most countries have set up independent bodies that have certain powers to monitor, oversee, and make decisions on complaints on specific issues or about certain laws, even though they are not courts. These can cover issues and regulate industries across areas such as housing, education, health, environment, media, consumer protection, human rights, and equality.

These bodies are sometimes referred to as "quasi-judicial" bodies because they are court-like in nature, but may not have all the judicial powers of a court. These bodies might be able to reach decisions and impose measures that can help bring about some form of broader change. In some situations, it may even be necessary to approach such a body first before going to court.

Some bodies also have the mandate to take cases to court on behalf of others and in the public interest. This means they might take the case to court in order to support and protect those affected by a particular issue.

CASE STUDY:

ADVERTISING RACISM: BANNING A RACIST GOVERNMENT ADVERT

In the summer of 2022, the UK's Ministry of Justice used a Facebook advertisement to promote its "Prison Jobs" scheme. In this ad, a white prison officer was featured talking to a Black male prisoner. The ad also contained the text "Become A Prison Officer. One career, many roles". and a caption that read "We're key workers, problem solvers, life changers. Join us to perform a vital role at HMP Wormwood Scrubs".

The Advertising Standards Authority (ASA), which is the UK's advertising regulator, received a complaint that argued that "the ad perpetuated a negative ethnic stereotype" and was likely to cause serious offence. The ASA is responsible for overseeing compliance with the UK Code of Non-broadcast Advertising and Direct and Promotional Marketing, which contains a provision prohibiting communications that cause serious or widespread offence "on grounds of various protected characteristics, including race". The ASA ruled that this provision was breached by the advertisement.

The government tried to appeal this decision but, on appeal, the ASA reaffirmed its finding. It stated that "in the context of a prison scene, we considered the ad had the effect of perpetuating a negative ethnic stereotype about Black men as criminals. On that basis, we concluded that the ad was likely to cause serious offence". It requested that the ad not appear again, and told the Ministry of Justice to take steps to ensure similar offence was not caused again.

CASE STUDY:

CHALLENGING RACISM IN HEALTHCARE

In November 2019, the Swedish Equality Ombudsperson took a case to the Swedish courts on behalf of a man who had died following medical negligence by ambulance services. The Ombudsperson also took the case on behalf of the family members of the individual. The man, who was a Muslim man of African origin, collapsed at home as a result of a haemorrhage of the brain. An ambulance was called and the paramedics, acting against the information provided by the man's wife, refused to consider that the man was in critical need of emergency care.

According to the notes of the paramedic, the ambulance service determined that the man was awake, alert, and "faking unconsciousness". The notes also contained the question "cultural fainting?". As the man's situation was not taken seriously, he was not examined and treated urgently, and he passed away some months later.

The Swedish Equality Ombudsperson took the case to the District Court of Gothenburg which, in May 2021, ruled that the healthcare provider had discriminated against the man because of his ethnicity. They also found that the man's wife had been discriminated against by the healthcare providers because they refused to listen to the critical information she had been providing. The Court awarded compensation of around EUR 11,000. The Ombudsperson appealed against this decision, on the basis that the compensation awarded was too low.

In April 2022, the regional council agreed to settle the matter. In doing so, they agreed with the decision of the Court and offered to pay compensation of approximately EUR 25,000.

REGIONAL COURTS

Beyond national courts, some cases can also be taken to courts that sit at a regional level. These courts are responsible for adjudicating on issues that concern regional treaties or laws, including regional human rights treaties that are designed to protect and promote human rights in a particular area. In Europe, two prominent examples of such courts are the European Court of Human Rights and the Court of Justice of the European Union.

EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights is responsible for interpreting and applying the European Convention on Human Rights to individual cases.

These cases are brought against countries that have signed up to the Convention and they can only be taken once all possible national options for raising the legal complaint have been exhausted. In other words, cases are usually only considered after they have been decided upon by the highest possible national court.

The Court's decisions are binding on the country that is party to the case, which means that it is under a duty to implement the decisions against them.

The Court is not limited to simply declaring that human rights violations have occurred, it can also order that compensation be paid to the person taking the case – this is referred to as "just satisfaction".

The Court also has some powers to adopt "individual measures" to remedy or end specific human rights violations, such as requesting that an individual be released from prison. It can also in some circumstances indicate "general measures" that should be adopted to address more structural issues, such as calling for prison conditions to be improved. The Court can also impose urgent measures in certain circumstances.

CASE STUDY:

BELGIUM ORDERED TO HOUSE PEOPLE SEEKING ASYLUM

Cases have come before the European Court of Human Rights concerning the situation of people seeking asylum in Belgium. The individuals who have taken these cases have applied for international protection in Belgium but have yet to be given a place at a reception facility.

These facilities provide accommodation, meals, and clothing, as well as medical, social, and psychological assistance while their application for international protection is being processed. Due to limitations on places at reception facilities, many people seeking asylum have been living on the streets.

Cases were taken to the Belgian courts, and these courts ordered the Federal Agency for the Reception of Asylum Seekers to accommodate homeless people seeking asylum in reception facilities, hotels, or other suitable facilities. These orders were ignored, and a number of cases were then brought to the European Court of Human Rights. One of the cases concerned 148 people seeking asylum.

The Court applied additional pressure by calling on Belgium to enforce the orders of the national courts, and provide the individuals affected with accommodation and material assistance to meet their basic needs.

The decisions of the European Court of Human Rights can also be relied on in other European countries when courts are tasked with applying the European Convention on Human Rights to other similar or related cases.

CASE STUDY:

CHALLENGING THE SUPPRESSION OF LGBTQI+ COMMERCIALS IN HUNGARY

In 2022, the media regulator in Hungary found that a TV channel had violated national media law by airing a commercial about "rainbow families" during the daytime. It tried to limit airing of the commercial to between 9pm and 5am. It argued that the advert may have had a negative impact on children and therefore should be broadcast at night.

The case then went to the Hungarian courts, which disagreed with the decision of the media regulator. In doing so, the courts quoted extensively from the case law of the European Court of Human Rights. In particular, it quoted the European Court's reasoning that "there is no scientific evidence or sociological data [...] suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or 'vulnerable adults.' On the contrary, it is only through fair and public debate that society may address such complex issues". The Hungarian courts reiterated that the Hungarian laws had to be interpreted in compliance with the European Court's decisions on the topic.

COURT OF JUSTICE OF THE EUROPEAN UNION

This is the chief court of the European Union, and it oversees the application and interpretation of European Union law. These are the laws that are passed by EU institutions and that govern the member states of the EU. EU law overrules national law where there is a conflict between national law and EU law.

EU states can be brought before the Court of Justice of the European Union by the European Commission, the executive arm of the EU, where there has been a failure by the state to fulfil its obligations under EU law.

CASE STUDY:

EU LAW ON EMPLOYMENT AND DISABILITY BRINGS POSITIVE CHANGE TO ITALY

In 2000, the EU introduced laws that were aimed at combatting discrimination in the workplace. In 2011, the European Commission took Italy to the Court of Justice of the European Union for its failure to implement parts of these laws dealing with disability.

The Court agreed with the Commission, finding that Italy was not providing adjustments for disabled people in all areas of employment and all aspects of an employment relationship.

Italy was therefore found to have failed to implement the relevant EU law. Interestingly, in this decision, the Court observed that the EU law itself did not define the word "disabled". The Court said that it should be understood as consisting of "all persons affected with a disability," as it is defined by the UN Convention on the Rights of Persons with Disabilities.

Cases can also be brought to the Court by individuals or entities who claim to have been individually impacted by an unlawful act (or failure to act) by certain EU institutions or bodies.

CASE STUDY:

SEEKING JUSTICE: TAKING FRONTEX TO COURT FOR MANAGEMENT OF WORLD'S DEADLIEST BORDER

Frontex is the European Border and Coast Guard Agency of the European Union, which is responsible for promoting, coordinating, and developing European border management in line with EU law. Europe's Mediterranean border has come to be known as "the world's deadliest border". Frontex has been complicit in this by systemically pushing back refugees and people seeking asylum using illegal tactics.

In 2021, research had linked 2,000 refugee deaths to illegal EU pushbacks. In the same year, three NGOs (front-lex, Progress Lawyers Network, and Greek Helsinki Monitor) took the first ever case against Frontex to the Court of Justice of the European Union for their role in migrant rights violations.

The case was taken on behalf of two people seeking asylum, who alleged they had been violently rounded up, assaulted, robbed, abducted, detained, forcibly transferred back to sea, and ultimately abandoned on rafts off Greece's borders. This case was dismissed on technical procedural grounds concerning whether there had been a "failure to act" by Frontex. However, after being the first human rights case to be brought against the agency, it has been followed by several other cases taken by NGOs and people seeking asylum to the Court claiming Frontex's practices have violated human rights.

The most common way that a case will come before the Court of Justice is by EU states' national courts making a request to the Court of Justice to clarify a point concerning interpretation of EU law in cases before them.

Once a decision has been made by the Court, the case still returns to the national court to make a final ruling on the individual case based on the Court's decision. This also means that such decisions of the Court will have a knock-on impact across national courts within the EU when they are tasked with applying the same EU law being interpreted.

CASE STUDY:

ENSURING POLISH ANTI-DISCRIMINATION LAW APPLIES TO ALL TYPES OF WORK

In 2017, the Polish public broadcaster terminated their freelance contract with an editor, who had worked with the broadcaster on various projects before. The contract had been signed two weeks earlier and was meant to last a month. The termination came two days after the editor posted a video to YouTube promoting tolerance for same-sex couples. He tried to sue the broadcaster for discrimination on account of his sexual orientation. However, Polish anti-discrimination law only applied to those with employment contracts and did not apply to individuals with consultancy contracts.

The Polish courts posed a question to the Court of Justice of the European Union, asking whether the Polish law complied with EU equality law. The Court of Justice clarified that EU anti-discrimination law applies to all those who perform "personal work" for another party, regardless of the type of contract they have. This was a significant decision, as a few EU countries had taken a similar approach as Poland in excluding self-employed individuals from these protections. The Court clarified that this approach would not meet the obligations under EU anti-discrimination law.

These cases might also request that the Court review the legality of the underlying EU law being applied in the case. This might happen, for example, if the EU law itself violates the fundamental human rights recognised by the EU. In short, the Court can rule that certain EU laws are invalid.

CASE STUDY:

ESTABLISHING GENDER EQUALITY IN INSURANCE PREMIUMS: TACKLING SEXIST SERVICES

In 2012, EU law allowed sex-specific risk factors to be used in the calculation of insurance premiums and benefits. Insurance providers were permitted to do this under the law as long as it was based on "relevant and accurate actuarial and statistical data". This meant that women and men were paying different premiums for insurance purely on the basis of their gender. It had a similar impact on benefits. For example, women were receiving smaller annual pensions than men because women were deemed to live longer.

A Belgian consumer association, Test-Achats, took a case to the Belgian courts on this issue, and the national court asked the Court of Justice of the European Union to make a decision on the validity of this part of EU law. The Court of Justice declared the relevant part of the law void, clarifying that it amounted to unlawful discrimination. This decision effectively dismissed the part of the law permitting such discrimination, so it could no longer be relied on by insurance providers to discriminate.

INTERNATIONAL COURTS OR BODIES

Countries can be parties to international agreements, or treaties, that are the sources of international law. International courts and bodies can handle cases that concern breaches of these treaties, including human rights treaties.

For example, the International Criminal Court considers the prosecution of individuals for international crimes such as genocide, crimes against humanity, war crimes, and the crime of aggression. There are also a number of international courts and bodies that consider cases concerning international human rights law as set out in treaties such as the International Covenant on Civil and Political Rights.

The United Nations Human Rights Committee is a body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by those states that are party to the treaty. Complaints can be taken to the Committee against over 100 countries that have signed up to it. These complaints must be brought by or on behalf of an individual whose rights have been violated by the country against which the case has been taken, and they must have taken the case to national courts first.

CASE STUDY:

PUTTING AN END TO RACIST IDENTITY CHECKS: SPANISH POLICE FORCED TO APOLOGISE

In December 1992, Rosalind Williams Lecraft was stopped by a police officer in a railway station in Spain and asked to show her identity documents. She asked why she had been singled out by the police for the check, and the police officer said that he was obliged to check the identity of people that "look like her" and that they were under orders to carry out identity checks on people of colour.

The following day, Rosalind filed a complaint against the police, which kick-started years of litigation. The Spanish courts refused to find that the stop and identity check was discriminatory, so Rosalind took the case to the United Nations Human Rights Committee in 2006. In 2009, the Committee held that there had been unlawful discrimination and that Rosalind had been denied the right to a remedy. The Committee asked that Spain provide Rosalind with a remedy, including a public apology, and that it take "all necessary steps" to ensure that the police do not repeat racist stops and identity checks.

These bodies make decisions in relation to the complaints they receive, but the effectiveness of these decisions is often weaker than the decisions of national or regional courts. This means positive decisions will need to be followed by sustained campaigning, advocacy, and other efforts to secure their enforcement and implementation.

As well as the Human Rights Committee, there are other United Nations treaty bodies that can consider complaints on specific human rights topics. These bodies are:

UN Committee on Economic, Social and Cultural Rights
This body monitors implementation of the International Covenant on Economic, Social and Cultural Rights, which includes the rights to adequate housing, education, health, social security, water, sanitation, and work.

UN Committee against Torture
This body oversees implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

UN Committee on the Elimination of Racial Discrimination
This body monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination.

UN Committee on the Elimination of Discrimination against Women
This body oversees the Convention on the Elimination of All Forms of Discrimination against Women.

UN Committee on Rights of the Child
This body monitors implementation of the Convention on the Rights of the Child, as well as international treaties concerning children in armed conflict, sale of children, child prostitution, and child pornography.

UN Committee on the Rights of Persons with Disabilities
This body oversees implementation of the Convention for the Protection on the Rights of Persons with Disabilities.

UN Committee on Enforced Disappearances
This body monitors the implementation of the Convention for the Protection of all Persons against Enforced Disappearance.

CASE STUDY:

THE VAPSTEN SÁMI COMMUNITY MAKE A STAND: ADDRESSING SYSTEMATIC DISCRIMINATION IN SWEDISH MINING LAWS

In 2010, three exploitation concessions were granted by the Swedish government to a private company for open-pit mines in an area of Sweden used as traditional herding land by the Vapsten Sámi community. This was done without any consultation with the Sámi community. The mining in these pits spread dust and damaged reindeer pastures, and it cut off the migration routes between various seasonal pastures. This negatively impacted reindeer herding in the area.

These concessions were challenged before the Swedish courts, but the courts refused to overturn the concessions. Fifteen members of the Vapsten Sámi community then filed a complaint to the UN Committee on the Elimination of Racial Discrimination. In 2020, the Committee found violations of the Sámi community's property rights and reiterated that, where Indigenous peoples have been deprived of lands and territories traditionally owned by them without their free and informed consent, steps must be taken to return those lands and territories to them.

The Committee requested that Sweden revise the mining concessions after an adequate process of free, prior, and informed consent, and that Swedish concession laws be amended to reflect the status of the Sámi as an indigenous people regarding land and resource rights. In other words, it found that Swedish mining and environmental legislation systematically discriminated against Sámi reindeer herding communities and needed to change.

The Vapsten Sámi community is continuing to fight to get the Swedish government to comply with the Committee's decision.

SUMMARY OF WHERE YOU CAN TAKE STRATEGIC LITIGATION

There are a range of courts and official bodies that can consider legal complaints, and part of a litigation strategy involves identifying which of these courts and bodies is best placed to deliver a particular outcome, on a particular issue, at a particular time to best serve your cause.

Each court or body will have different powers, different thematic focus areas, different approaches to the law, and different levels of authority. It may be necessary to sustain legal complaints up the court system to higher courts, or even regional and international courts, who might be better placed to bring about the change that is needed.

The next chapter addresses the question of who can take legal complaints to the courts.

CHAPTER SIX:

WHO CAN TAKE STRATEGIC LITIGATION?

WHO CAN TAKE STRATEGIC LITIGATION?

Strategic litigation can take many forms. Similarly, those who are permitted to take cases can vary too.

The *who* depends on the legal system the case is being taken in. Most legal systems will limit those taking the case to individuals or entities who are deemed to have "standing". The term standing simply means an individual or entity has the legal right to take the case against the relevant person or entity they are taking to court.

Let's take a look at "litigants", the term used for different people or entities that can take a case.

INDIVIDUALS

Many legal systems strictly limit litigation to those individuals who have been directly harmed or impacted by the person or entity being taken to court for breaking the law.

When taking a case, these individuals will have to demonstrate to the court that they have sufficient connection to and been harmed by the action or omission of the person or entity they are suing. Cases that are taken by individuals can expose broader injustices, which means that even cases that concern individual harm can have broader impact beyond those who take the case.

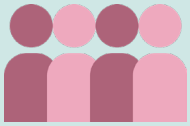
In some circumstances, the concept of individual connection and harm has been expanded to include those who are at risk of being harmed or impacted by the action or omission. Therefore, opening up the opportunity for such individuals to challenge laws or policies even when they have not been applied to their individual circumstances.

CASE STUDY:

CHALLENGING ITALY'S HUMANITARIAN ASYLUM ASSESSMENTS: TAKING ENVIRONMENTAL DEGRADATION INTO ACCOUNT

An individual from the Niger Delta region of Nigeria left his home and sought international humanitarian protection in Italy. He fled partly due to armed paramilitary conflict, but also because of environmental destruction including numerous oil spills. His application was initially rejected, and he appealed his case up to Italy's highest court.

The Italian Supreme Court of Cassation ruled that assessments carried out for the purpose of granting humanitarian protection should consider not only armed conflict scenarios but also situations of social, environmental, or climate degradation, as well as situations in which natural resources have been subjected to unsustainable exploitation in the country of origin. It stated that humanitarian protection must be granted when the situation in the country of origin does not allow for a minimum essential limit of guarantee for the right to life of the individual. In this case and future applications for humanitarian asylum, these factors had to be taken into account.



CASE STUDY:

ENFORCED OR NOT: PROVING WHY CRIMINALISATION OF SAME-SEX RELATIONSHIPS VIOLATES HUMAN RIGHTS

In 1977, a gay rights activist, David Norris, brought proceedings to the Irish courts challenging the laws that criminalised sexual acts between two men. He had never faced prosecution under the laws but he presented evidence of deep depression and loneliness on realising that he could be exposed to prosecution under the law. His doctor had advised him to leave Ireland and live in a country more accepting of gay relationships to avoid his ongoing anxiety attacks.

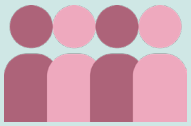
The Irish courts dismissed the case and, in doing so, reiterated that homosexuality was contrary to public order. David then took the case to the European Court of Human Rights, which could only consider cases taken by "victims" of violations of the European Convention on Human Rights. Ireland argued before the Court that David was not a "victim" because he had not been prosecuted under the laws. Nevertheless, the Court still found that the laws directly affected him because of fear of prosecution when he engaged in intimate relations with another man.

The Court highlighted that individuals were entitled to argue that a law violates their human rights by itself if they are potentially at risk. The Court concluded that the maintenance of the law directly and continuously interfered with David's private life due to threat of prosecution. The law criminalising sexual acts between two men was abolished around five years after the Court's decision.

GROUPS

Where there have been many individuals who have been impacted or affected, it may be possible for individual cases to be dealt with together, or collectively. These cases themselves can take a number of different forms.

Some might start as different individual legal claims that are later consolidated or joined together by the courts. This allows the courts (and those involved in the case) to handle the case in an efficient and cost-effective way, whilst demonstrating the widespread nature of the problem.



CASE STUDY:

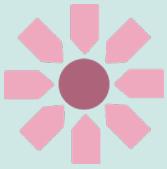
PAYING THE PRICE: REPARATIONS FOR SWEDEN'S RACIST SECRET POLICE REGISTER

In September 2013, a leading Swedish newspaper revealed that the police force in southern Sweden had put together a register of 4,700 names, most of them belonging to members of the Roma community. The title of the list was "Kringresande" or Travellers. The Swedish police tried to argue that the register was drawn up to help fight violent crime and that there had been no ethnic profiling.

Eleven individuals who had been named on the list took individual cases against the state to the Swedish courts, but they requested that their cases be treated as one single case since the context and circumstances of the cases were so similar. The Swedish courts considered their claims together, and found that the Swedish state had ethnically discriminated against the individuals on the database and ordered that the state pay SEK 30,000 (around EUR 3,000) in damages to each of the 11 individuals.

Following the case, the Chancellor of Justice announced that the state would pay damages to all those included in the police registry, since they were also entitled to compensation after the Swedish court decision. At the time, this was the largest amount ever paid by the Swedish state in compensation for an individual event.

In other circumstances, a community of individuals might decide from the outset to take a case together. This harnesses the power of the collective, while highlighting the extent of the injustice they have experienced. It is also a way of increasing the pressure on those against whom the case has been brought. The person or entity being sued is more likely to feel the "bite" of, and react to, having to compensate 500 people compared to only one person seeking compensation.



CASE STUDY:

ON TRACK TO COMPENSATE MOROCCAN RAILROAD WORKERS: FIGHTING DISCRIMINATION IN THE FRENCH RAILWAY SERVICE

In the 1970s, purportedly to make up for labour shortages, the French national railway service (SNCF) hired around 2,000 Moroccan workers. These workers were recruited as contract workers and were not given the status of official permanent SNCF workers.

Under the French law at the time, it was a requirement to be a French national to be a permanent worker at SNCF. This differentiation in status prevented the Moroccan workers from obtaining career progression, higher pay, better conditions, more favourable pensions, and other benefits.

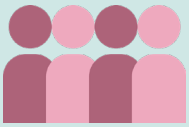
After many of them had retired, 848 of the workers took SNCF to court with the support of Sud Rail trade union. In 2018, the Paris Court of Appeal found that there had been unlawful discrimination in relation to the career and retirement rights of the Moroccan employees. It awarded each of the workers who were discriminated against EUR 173,000 for loss of career, EUR 60,555 for loss of pension benefits, EUR 3,000 for loss of training, and EUR 5,000 for the moral harm caused. It has been estimated that SNCF has to pay around EUR 180 million to the workers.

This method of taking litigation as a collective is usually limited to certain circumstances, and is often referred to as "collective", "mass", or "class" actions. The specifics of the process for taking these different types of action can vary. For example, some legal systems might require that the group of individuals taking the case be clearly defined or that individuals "opt-in" to be part of the group pursuing the litigation, while other countries might permit a more loose approach to the "group" taking the case.

Collective litigation has been used in a variety of different contexts. From Uber drivers seeking recognition that they are employees and benefit from the workers' rights that accrue from that status, to 261 sex workers challenging the criminalisation of sex work before the European Court of Human Rights, to over 13,000 Nigerian residents suing Shell in the UK High Court for the clean-up and compensation for the environmental degradation harming their communities.

ORGANISATIONS

It is possible for organisations to take cases where they are representing an individual or group of individuals. This is often referred to as a "representative action" because the organisation is taking the case on somebody else's behalf. This might provide some security to those individuals being represented, as the organisation will assume some of the risk in the litigation and will be the named party to the proceedings.



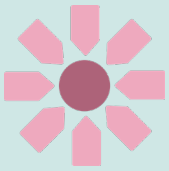
CASE STUDY:

JUSTICE FOR VIOLATION OF VALENTIN CÂMPEANU'S RIGHT TO LIFE: HOLDING THE ROMANIAN STATE ACCOUNTABLE

Valentin Câmpeanu was a young Roma man with severe disabilities who died at the age of 18 after he was seriously neglected and mistreated when he was being held in a medical and social care facility run by the Romanian state. The NGO Centre for Legal Resources took a case on his behalf, arguing that his rights had been violated by the Romanian state. The Romanian government tried to argue that, as the Centre for Legal Resources was not the victim of the rights violations being claimed, it could not take the case before the European Court of Human Rights.

The Court disagreed, and it granted the Legal Resources Centre the right to act on Valentin's behalf to avoid a denial in access to justice. The Court went on to find that Valentin's rights had been violated, including his right to life. Efforts are still being made to push for systemic changes to the failings in Romania's social and medical care provision that lay at the heart of this case, including initiatives seeking de-institutionalisation and the promotion of community-based services.

Organisations may also be able to take cases where they have an interest in the outcome of the case, for example if they can demonstrate a particular competence in and mandate to work on the issues being considered by the court. This is often used by campaigning organisations to put issues before the courts, such as challenges to law or policy.



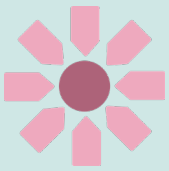
CASE STUDY:

NEW ZEALAND'S YOUNG PEOPLE DEMAND THE RIGHT TO VOTE

In 2019, the youth-led campaign group Make It 16 was formed out of the Youth Parliament of New Zealand. Its mission was to campaign for the right to vote to be extended to 16- and 17-year-olds. They took a court case challenging the law that limited the right to vote to New Zealand citizens 18 years or older.

After three years before the courts, the country's highest court declared that preventing 16 and 17-year-olds from voting amounted to prohibited age discrimination. On the day of the decision, the government announced that it would introduce a draft law to lower the voting age to 16. In 2023, the government went back on this announcement and the fight to change the voting age continues.

Organisations might also take cases to court where the organisation itself has been harmed or its rights have been violated by another. For example, if an organisation is prevented from carrying out its activism or community work due to the unlawful actions of another.



CASE STUDY:

RUSSIAN NGOS FIGHT FOREIGN AGENTS ACT

In 2012, Russia introduced the Foreign Agents Act. It was passed at a time when the largest protests against election fraud had been held in Russia since the fall of the Soviet Union. The law was targeted at foreign-funded, non-commercial organisations that the authorities deemed to be engaging in political activity. The law required that these organisations register themselves as foreign agents, meet more strenuous audit requirements, and disclose their status in all their online publications.

If they did not comply, they could receive administrative and criminal sanctions. Seventy-three organisations working on a range of issues such as human rights, environmental protection, LGBTQI+ rights, education, social protection, and migration, many of which had been forced to dissolve or wind down their activities as a result of the law, took cases to the European Court of Human Rights.

In 2022, the Court found that the Act violated the organisations' rights to freedom of assembly and association, and freedom of expression.

PUBLIC INTEREST

It is possible for cases to be taken on behalf of the public interest. This is referred to as “actio popularis”.

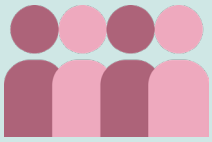
This type of litigation is often used by individuals or organisations who wish to take cases that challenge the injustices experienced by others, without those others having to be specifically identified or having to take the case themselves.

In other words, there is no need for a collective group to demonstrate a common interest in the outcome of the case. Instead, the case concerns a matter of public importance and, therefore, the public interest requires it to be resolved. It can be an effective means of challenging structural injustices, but it is not available in all legal systems.

ALTERNATIVE FORMS OF LITIGANT

Legal systems have evolved to recognise alternative forms of litigant. This has further expanded the concept of who can bring a case before the court in order to serve justice.

This has particularly been the case in relation to climate litigation, where the courts have recognised the standing of nature, Mother Earth, bodies of water, forests, and farmlands. Granting ecosystems legal rights to sue means they can fight for their own survival through the courts by cases taken by guardians who can represent them. This further opens up the opportunity for different types of cases to be taken to reach a particular strategic goal for environmental justice.



CASE STUDY:

A CASE AGAINST HATE SPEECH IN BULGARIA

In 2005, Volen Siderov was elected to the Bulgarian Parliament. He was a former journalist and founding leader of the far-right nationalist Ataka party. Through various platforms that he had access to, such as newspapers, books, TV programmes, election rallies, and speeches in Parliament, he disseminated extreme views against a number of marginalised communities, including the Roma, Jews, Armenians, and Turkish people.

An actio popularis case was built on the basis that, although individuals were not directly and personally targeted by the propaganda spread by Siderov, the communities and groups to which they belonged were negatively impacted by these hateful views and the public interest was also affected.

The Bulgarian courts separated the actio popularis into separate cases on the basis of identity. The claims brought on behalf of the Armenian and Turkish communities were upheld with a finding that the statements amounted to harassment and incitement. No such findings were made by the Bulgarian courts in relation to the anti-Roma and antisemitic speech.

The case went to the European Court of Human Rights and it, for the first time, found violations of the rights to respect for private life and non-discrimination in a case concerning general hate speech, i.e. hate speech directed at a group or community, rather than specifically targeted at an individual personally.

CASE STUDY:

CONSERVATION IN COURT: PROTECTING COLOMBIA’S ATRATO RIVER

In 2015, Indigenous and Afro-descendent communities took a case to the Colombian Constitutional Court arguing that their rights to life, health, water, food, security, a healthy environment, culture, and land had been violated by mining activities in their local area. These activities were a primary cause of pollution of the Atrato River in Chocó, Colombia.

In its decision, the Constitutional Court officially recognised that the Atrato River was subject to rights protection, conservation, maintenance, and restoration by the government. It went on to find that the Colombian government failed to prevent river pollution from mining, and therefore violated fundamental rights.

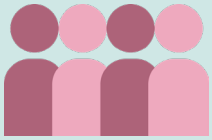
The Colombian government were told to design and implement, in collaboration with local communities, a plan to decontaminate the Atrato river basin and its tributaries, recover their ecosystems, and avoid additional damage to the environment in the region. This case provided a basis for the Supreme Court of Colombia to recognise that the Colombian Amazon was similarly subject to rights protection in 2018.

OTHER WAYS TO GET INVOLVED

There are many ways that litigation can play a role in a campaign for change, and engaging in strategic litigation can take many forms. It is not necessary for an individual or their organisation to be the ones acting as the litigant in the case. They may choose to support or leverage another litigant's case in other ways.

They might support the advocacy around another's case or help with organising or mobilising around key moments in the case. They might offer their skills to provide non-legal support to the case and those involved. This could be by facilitating trauma-informed care and support to those involved or offering campaigning or media training to those taking the case. It could be as small as offering space for case meetings to be held. Litigation is a group effort involving a community of people offering their own individual experience, skills, and resources.

The legal process itself offers different ways for individuals or organisations affected by and knowledgeable about the issue to provide input and their own perspective. They might provide expert evidence or provide a witness statement to the court in support of the arguments being made in the case.



CASE STUDY:

DRUG WRONGDOING FOUND OUT: MISCARRIAGE OF JUSTICE EVIDENCED BY DATA SCIENTIST

In 2011, a laboratory discovered that one of their chemists, Annie Dookhan, had committed misconduct while working on numerous drug prosecutions. She had taken shortcuts while testing drug samples, falsified results, and forged lab documents during her nine years at the lab. Some individuals applied to have their convictions overturned but, since so many cases had been affected, a case-by-case approach was likely to be slow and leave many without justice.

The American Civil Liberties Union took a case to court that demanded that those petitioners who challenged their convictions should be shielded against having harsher sentences imposed in their re-opened cases, and that all cases tainted by the misconduct should be dismissed where the prosecutors failed to pursue them after a set period of time. The courts permitted the shielding of petitioners, but would not allow for mass dismissal.

A data scientist produced two pieces of work that were then brought to the courts. The first stated that 62% of cases in which Dookhan had been involved were only for possession. The second set out that 91% of Dookhan's cases were prosecuted in the lower district courts, where less serious crimes are prosecuted. This evidence went against the argument put forward by the State that releasing defendants would pose a serious threat to public safety and that those concerned were "serious criminals", and that most cases concerned distribution rather than possession of drugs.

This evidence was instrumental in convincing the Supreme Judicial Court to call for district attorneys to dismiss large numbers of convictions within a set period of time. In their decision, the Supreme Judicial Court cited the statistics presented to it and gave credit to the data scientist, Paola Villareal, by name. Over 20,000 drug cases were vacated and dismissed in what is likely one of the largest single dismissals of wrongful convictions in US history.

Another way that individuals or organisations might get involved is as an intervener or "amicus curiae". This is where an individual or organisation, who is not one of the parties in a case but has a strong interest in the matter, provides input that can assist the court in reaching a just outcome in their decision.

The term "amicus curiae" translates as "friend of the court" and it underlines the fact that they are offering information, expertise, and insight so the court can reach a proper and fair decision. In some systems, they are not permitted to make arguments for or against either party and they are not permitted to comment on the specific facts of the case.

CASE STUDY:

COMING TOGETHER TO CHALLENGE TRUMP'S TRAVEL BAN

While in office, US President Donald Trump took a series of executive actions that came to be known as the "Trump travel ban". These executive orders were also referred to as the "Muslim ban" as they prohibited travel and refugee resettlement from a select number of predominantly Muslim countries.

Numerous cases were taken across many States seeking to challenge the executive orders, relying on a range of legal arguments based on immigration law and the US Constitution. A number of these cases were able to get a temporary block against deportations under the travel ban, which saw thousands released from custody and protected against deportation.

Another notable aspect of the legal efforts that were taken against the executive orders was the extent to which groups and organisations filed submissions, or amicus curiae briefs, in favour of the legal challenges. For instance, such submissions were made by over 100 museums and arts institutions, nearly 100 tech companies, over 30 universities, 10 former national security officials, over 60 national and local Asian Pacific American Bar Associations, and Muslim community organisations such as the Council on American-Islamic Relations, the Muslim Justice League, and the Muslim Public Affairs Council.

SUMMARY OF WHO CAN TAKE STRATEGIC LITIGATION

There are specific limitations on who can take cases before the courts depending on the type of court and the jurisdiction, but there are still many ways in which individuals or organisations can get involved in strategic litigation.

It might be as litigants themselves, or by being part of a collective or group that takes a case, or by forming an organisation that takes a case on behalf of the community, an individual, or the public interest.

It could also be by supporting those who are litigating a case in some other way, including by making supporting statements to the court.

In some instances, it may just be one person who has the standing to take a certain type of case. At other times, you might have to come to a decision on who is best placed to take the case forward. In the case of the latter, it's important to think strategically to maximise the potential of achieving the desired outcome, without losing sight of how the court decision can benefit a broader number of people or the community at large.

GETTING YOUR QUESTIONS ANSWERED

We hope this guide has helped answer some of your most important questions around strategic litigation, its applications, and its contribution to the fight for racial, social, and economic justice.

The guide has been designed based on the needs identified in a consultation process with organisations, communities, and movements working on racial, social, and economic justice in the Council of Europe region.

If you have any questions about strategic litigation that were not answered by this guide, let us know by emailing knowledgeandpower@systemicjustice.ngo

We will continue to develop litigation resources and tools as part of our work to build the knowledge and power of communities fighting for justice. We welcome feedback on this guide, so please do get in touch if you have ideas or suggestions for how it can be improved.

MORE ABOUT SYSTEMIC JUSTICE

Systemic Justice is “the movements’ law firm”, committed to equipping communities with the knowledge they need to use the law for systemic change.

As an NGO partnering with organisations and communities fighting to radically transform how the law works for racial, social, and economic justice, we put organisations, movements, and collectives in the lead by broadening access to judicial remedies in joint litigation. By doing so, we are dismantling the systems that sustain and fuel injustice everywhere.

Find out more about Systemic Justice:

Website: systemicjustice.ngo
Email: info@systemicjustice.ngo
Twitter/X: systemicjustic_
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