3

Thinking Strategically about Climate Litigation

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3.1 INTRODUCTION

Efforts to drive action on climate change are increasingly turning to courts. While litigation involving climate change is nothing new, an increasing number of cases are being filed and there has been a recent surge of cases that have long-term strategic ambitions. Interestingly, an increasing number of such cases use the norms and frames of human rights, as shown by César Rodríguez-Garavito in his chapter in this volume (Chapter 1). The use of litigation to advance strategic goals on climate change mirrors a long history of human rights practitioners using litigation to achieve ambitious policy change. While climate litigators recognize the relevance of substantive human rights arguments to climate change, they have paid limited attention to how the human rights community has used litigation.

This is a missed opportunity. The human rights community has spent decades debating the role of strategic litigation in effecting lasting change, reflecting on the role of strategic litigation and its relationship with other forms of advocacy and activism, and identifying how to minimize the risks of litigation and maximize its impact. Climate litigators have the opportunity to use and build upon human rights advocates' hard-won lessons on how to use litigation most effectively and strategically when facing problems with deep social, economic, and political roots.

In line with the purposes of this collective volume, this chapter outlines those links. It identifies the emergence of the next generation of climate litigation involving cases with strategic ambitions; it outlines the debates on strategic litigation within the human rights community; and it considers how the lessons from those debates apply to climate litigation. Drawing on the lessons from other fields that have significant experience in strategic litigation does not imply that there is a single correct approach or answer that all should

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follow. Nor does identifying the costs and risks of litigation mean that climate activists should stop litigating. To the contrary, there is significant potential for strategic litigation to support climate action. And a careful look shows that some climate litigators have already adopted and extended best practices in areas where many human rights litigators lag. The chapter does, however, serve as a call to ensure that each decision on whether and how to litigate considers all of the relevant factors and that climate litigators consistently maximize the impact of limited time and resources by conducting litigation as effectively, efficiently, and strategically as possible.

3.2 THE EVOLUTION OF CLIMATE LITIGATION

The scale of global climate change litigation has been well-documented,[1] including recent tallies of almost 2,000 climate change cases worldwide.[2] However, these headline numbers can obscure the diversity of legal actions that are included under the climate litigation banner.[3] These claims:

- involve a broad range of parties, with cases being brought by individuals, NGOs, governments (typically sub-national), and corporations and primarily against corporations and governments, (with a few cases against NGOs and individuals);[4]
- rely on a diverse range of legal principles, including tort, constitutional, administrative, environmental, human rights, corporations, securities, and consumer protection laws;
- challenge a wide range of acts, policies, and practices, including: perceived failures by governments and corporations to sufficiently mitigate greenhouse gas emissions; failure to adapt to climate change; failure to

[1] See, e.g., 'Global Trends in Climate Change Legislation and Litigation: 2021 Snapshot' (2021) Grantham Research Institute on Climate Change and the Environment; see also 'The Status of Climate Change Litigation: A Global Review' (2017) United Nations Environment Programme.

[2] As of 15 April 2022, the Climate Change Litigation database by the Sabin Center for Climate Change Law lists a total of 1,957 cases (1,400 US cases and 557 non-US cases. See 'About', Sabin Center Climate Change Litigation Databases, <http://climatecasechart.com/about/>). See also 'Global Trends in Climate Change Legislation and Litigation: 2021 Snapshot', above note 1, p. 5 (documenting '1,841 ongoing or concluded cases of climate change litigation from around the world, as of May 2021').

[3] For example, two leading climate litigation databases include in their collection 'cases brought before administrative, judicial and other investigatory bodies that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts'. 'Status of Climate Change Litigation', above note 1, p. 8.

[4] See, e.g., Climate Change Litigation Databases, Sabin Center for Climate Change Law, <http://climatecasechart.com/>.

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accurately manage, report, or disclose the risks associated with climate change; 'anti-regulatory' challenges against policies intended to facilitate the transition towards clean energy; and actions against those protesting climate change.

This diversity is not surprising. Climate change – its causes and effects – necessarily implicate a wide range of actors and social, political, and economic relationships. The range of climate claims also reflects the growing diversity and polycentricity of climate change governance and action.[5]

That said, certain trends in climate litigation can be identified. While many early efforts focused on challenging a particular fossil fuel–intensive project or harmful regulation, there has been a recent growth in 'strategic cases', which aim to produce ambitious and systemic outcomes. The profile of these cases has grown in the wake of the Urgenda Foundation's successful claim against the Dutch government for its failure to sufficiently reduce emissions and the endorsement of this landmark judgment by appellate courts;[6] a successful constitutional claim by Colombian youth plaintiffs for the protection of the Amazon;[7] the *Juliana* case brought on behalf of twenty-one young people in the United States;[8] Ashgar Leghari's case against the Pakistani government;[9] and, while not strictly a judicial decision, the findings of the Philippines' Human Rights Commissions following its investigation into the legal responsibility of forty-seven so-called 'carbon majors' for the human rights impacts of climate change.[10] Other potentially 'strategic' cases include those directly targeted at corporations responsible for their role in the climate crisis, like the suite of litigation against the so-called carbon major fossil fuel companies

[5] Joana Setzer and Lisa Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' 10 *WIREs Climate Change*, pp. 9–11; See also Hari M. Osofsky, 'Scales of Law: Rethinking Climate Change Governance,' PhD Dissertation, University of Oregon (2013).

[6] See Rb. Hague, 24 June 2015, HA ZA 13-1396, 2015 (Urgenda Foundation/Netherlands). An English translation of the decision of the Supreme Court delivered on 20 December 2019 is available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>.

[7] See Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil, abril 5, 2018, M.P.: L.A. Tolosa Villabona, Expediente 11001-22-03-000-2018-00319-01 (Colom.).

[8] For materials relating *Juliana* v. *United States*, including court filings, see '*Juliana* v. *United States*,' Our Children's Trust, <https://www.ourchildrenstrust.org/juliana-v-us>.

[9] See *Leghari* v. *Pakistan* (W.P. No. 25501/2015), Lahore High Court Green Bench, Order of 4 September 2015, available at: <https://affaire-climat.be/fr/the-case>.

[10] Philippines Commission on Human Rights, National Inquiry on Climate Change, Report (2022) <https://chr.gov.ph/wp-content/uploads/2022/05/CHRP-NICC-Report-2022.pdf>.

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seeking contributions for the costs imposed by climate change[11] and the litigation that led the Hague District Court to order that Shell reduce its global carbon emissions by 45% by 2030.[12]

These cases, sometimes hailed as 'new wave' or 'next generation' cases, currently comprise a small portion of climate litigation.[13] However, the momentum behind these lawsuits can be expected to grow. On one hand, our understanding of the threat, and of the urgency of action, is growing. More people are experiencing the effects of climate change in their daily lives, whether through increasingly intense and frequent wildfires, tropical storms, heatwaves, droughts, flooding, or impacts on fisheries and agriculture. There is growing awareness that we are increasingly at risk of triggering tipping points that cause abrupt and irreversible changes in the climate system and critical ecosystems, including 'runaway' climate change. Key scientific reports have become part of the mainstream understanding of the implications of further warming.[14] And research is increasingly able to quantify not only past contributions to climate change but also the contribution of climate change to specific extreme weather events and associated damage.[15]

This public awareness that climate change may cause irreversible effects in our lifetime is growing just as public faith in a political response to climate change is dwindling. Reports of the 'emissions gap' and 'production gap'

[11] For example, see lawsuits filed by US cities and counties against oil and gas companies. See Dana Drugmand, 'Climate Liability Suits by San Francisco and Oakland Receive a Flood of Support', Climate Liability News, 27 March 2019. Additionally, there is the lawsuit brought by Peruvian Farmer Saúl Luciano Lliuya against the German energy utility RWE. See 'The "Huarez" Case at a Glance', Germanwatch, <https://germanwatch.org/en/huaraz>. The inquiry currently being undertaken by the Philippines' Commission on Human Rights into the responsibility of the so-called 'carbon majors' for the human rights impacts of climate change is another example. See 'Carbon Majors', Republic of Philippines Commission on Human Rights, <http://chr.gov.ph/tag/carbon-majors/>.

[12] Milieudefensie and others v Royal Dutch Shell, The Hague District Court, HA ZA 19-379, 26 May 2021 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5337> (ECLI:NL:RBDHA:2021:5337).

[13] See, e.g., Jacqueline Peel et al., 'Shaping the "Next Generation" of Climate Change Litigation in Australia' (2018) 41 *Melbourne University Law Review* 793; see also Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 *Journal of Environmental Law* 483.

[14] See, e.g., 'Special Report on Global Warming of 1.5°C (SR15)' (2018) Intergovernmental Panel on Climate Change (IPCC).

[15] For more on the legal implications of the emerging science of extreme weather event attribution, see Sophie Marjanac and Lindene Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?' (2018) 36 *Journal of Energy & Natural Resources Law* 265; see also Geetanjali Ganguly et al., 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 *Oxford Journal of Legal Studies* 841.

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continue to grow.[16] The combination of historical inaction in the 1990s and 2000s and high-profile political setbacks in key jurisdictions in the latter part of the 2010s (such as the elections in Brazil, Australia, and the United States) has led many to question the willingness of governments to adequately address climate change in practice. The repeated failure of the UNFCCC Conference of Parties to agree on rules required to implement the Paris Agreement has also contributed to growing disillusionment with the multilateral processes that have been entrusted to address climate change.

The resulting dissonance between the urgency that people feel (and that scientists urge) for climate action and the declining confidence in political and corporate decision-making will increasingly push legal action (and other forms of popular mobilization) to the forefront of our climate response.

3.3 LINKS BETWEEN CLIMATE LITIGATION, HUMAN RIGHTS, AND STRATEGIC LITIGATION

Like other climate claims, the 'next generation' cases have been anchored in a broad range of laws and legal principles. However, there has been a recent shift to consider climate change in human rights terms. Philip Alston, the UN Special Rapporteur on extreme poverty and human rights, released a report in June 2019 arguing that 'climate change threatens the future of human rights . . . [and] represents an emergency without precedent and requires bold and creative thinking from the human rights community'.[17] Later that year, the UN High Commission for Human Rights Michelle Bachelet stated that 'the world has never seen a threat to human rights of this scope'.[18]

There have been moves by the human rights and climate communities to bridge this gap, notably with the three-year inquiry by the Philippines' Human Rights Commission into how climate change is affecting the human rights of Filipinos,[19] the appointment of the first UN Special Rapporteur on the promotion

[16] The 'emissions gap' is a term used by the UN Environment Programme to describe the difference between the greenhouse gas emission levels consistent with having a likely chance (> 66 per cent) of limiting the mean global temperature rise to below 2°C/1.5°C in 2100 above pre-industrial levels and the global effect of the current pledges made by governments to reduce greenhouse gas emissions.

[17] 'Climate Change and Poverty', Report of the Special Rapporteur on extreme poverty and human rights, UN Doc. A/HRC/41/39, 25 June 2019, ¶61.

[18] Human Rights Council, 'Opening statement by UN High Commissioner for Human Rights Michelle Bachelet', UN OHCHR, 9 September 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24956&LangID=E>.

[19] See 'About', Republic of the Philippines Commission on Human Rights, above note 10. Commissioner Robert Eugenio Cardiz announced his conclusions in December 2019; see Isabella Kaminski, 'Carbon Majors Can Be Held Liable for Human Rights Violations,

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and protection of human rights in the context of climate change, and multiple complaints filed with UN human rights treaty bodies[20] and the European Court of Human Rights asserting violations from climate change.[21] Domestic climate litigators have also begun to incorporate human rights arguments into their cases,[22] with human rights featuring in key strategic climate litigation judgments from the Dutch Supreme Court and Court of Appeal, the Berlin Administrative Court, and the Colombian Supreme Court.[23] This trend is likely to continue, as claims linking climate change and human rights become more viable as a result of the increasingly rich body of jurisprudence, commentary, and high-level recognition of these connections and the corresponding obligations of state and non-state actors.[24]

Philippines Commission Rules', Climate Liability News, 2 December 2019, <https://www.climateliabilitynews.org/2019/12/09/philippines-human-rights-climate-change-2/>.

[20] One has been brought against Australia before the Human Rights Committee (see, e.g., Client Earth, 'Climate Threatened Torres Strait Islanders Bring Human Rights Claim against Australia', Client Earth, 12 May 2019, <https://www.clientearth.org/press/climate-threatened-torres-strait-islanders-bring-human-rights-claim-against-australia/>); the other has been brought before the Committee on the Rights of the Child against Argentina, Brazil, France, Germany, and Turkey (see, e.g., '16 Young People File UN Human Rights Complaint On Climate Change', Hausfeld, 23 September 2019, <https://www.hausfeld.com/news-press/16-young-people-file-un-human-rights-complaint-on-climate-change?lang_id=1>).

[21] See e.g. the pending cases of Duarte Agostinho and others v. Portugal and others; Verein KlimaSeniorinnen Schweiz and Others v. Switzerland.

[22] See 'Global Trends in Climate Litigation: 2018 Snapshot' (2018) Grantham Research Institute on Climate Change and the Environment, pp. 1, 7–8 ('Headline issues … More climate-related human rights cases are emerging').

[23] See 'Climate Change and Future Generations Lawsuit in Colombia: Key Excerpts from Supreme Court's Decision', Dejusticia, 13 April 2018, <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/>.

[24] See, e.g., 'States' Human Rights Obligations in the Context of Climate Change' (2019) *GI-ESCR and CIEL*, <https://www.gi-escr.org/publications/states-human-rights-obligations-in-the-context-of-climate-change-2019-update>; see also *Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights)*, Advisory Opinion no OC-23/18, Inter-Am. Ct. H. R. (ser. A) No. 23 (15 November 2017); see also Human Rights Council Res. 35/20, Human Rights and Climate Change, UN Doc. A/HRC/RES/35/20, 22 June 2017; see also Human Rights Council Resolution 26/27, Human Rights and Climate Change, UN Doc. A/HRC/RES/26/27 (15 July 2014); see also Human Rights Council Res. 18/22, Human Rights and Climate Change, UN Doc. A/HRC/RES/18/22 (17 October 2011); see also 'Open Letter from Special Procedures Mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn (20–25 October 2014),' OHCHR, 17 October 2014, <https://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf>; see also 'Climate Change and Human Rights' (2015) United Nations Environment Programme, <https://www.unenvironment.org/resources/report/climate-change-and-human-rights>; see also See Hof Hague, 9 October 2018, HA ZA 13-1396, 2018 (Urgenda Foundation/Netherlands); see also *Juliana* v. *United States*, 217 F. Supp. 3d 1224 (D. Or. 2016); see also *Leghari* v. *Pakistan*, above note 9.

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In parallel, there has been a growing body of literature considering the prospects and lessons of climate litigation as a tool of governance, regulatory reform, and action.[25] However, despite the increasing attention paid to the strategic issues raised by the use of litigation in climate action and the expanding role of substantive human rights claims in climate cases,[26] drawing on the lessons of how human rights advocates have used strategic litigation is not yet mainstream practice. That is not to deny the long history of strategic litigation by the environmental movement,[27] whereby activists have turned to courts as part of multi-pronged campaigns and to democratize environmental policymaking and which has also been the subject of significant scholarly attention.[28] But the breadth of common ground shared by climate and human rights activists in challenging broad policy frameworks and corporate practices has not yet been explored.

[25] See, e.g., Setzer and Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance', above note 5; see also Jacqueline Peel and Hari Osofsky, 'Litigation as a Climate Regulatory Tool' in Christina Voigt (ed.), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge: Cambridge University Press, 2019), pp. 311–36; see also Ganguly et al., 'If at First You Don't Succeed: Suing Corporations for Climate Change,' above note 14; Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 *American Journal of International Law* 679; see also Joana Setzer and Lisa Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9 *Transnational Environmental Law* 77; see also Sabrina McCormick et al., 'Strategies in and Outcomes of Climate Change Litigation in the United States' (2018) 8 *Nature Climate Change* 829; see also Bouwer, 'The Unsexy Future of Climate Change Litigation', 483–506; see also Joana Setzer and Rebecca Byrnes, 'Global Trends in Climate Change Litigation: 2019 Snapshot' (2019) Grantham Research Institute on Climate Change; see also 'The Status of Climate Change Litigation: A Global Review' (2017) UN Environment Programme.

[26] See, e.g., John Knox, 'Bringing Human Rights to Bear on Climate Change' (2019) 9 *Climate Law* 165; see also Stephen Humphreys (ed.) *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2010); see also Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Oxfordshire: Routledge, 2016); see also 'Climate Change and Human Rights' (2015) UN Environment Programme.

[27] In 1988, the executive director of the Sierra Club Legal Defense Fund said that 'litigation is the most important thing the environmental movement has done over the past fifteen years'. On the use of litigation by the environmental movement in the United Kingdom, see, e.g., Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilisation by the Environmental Movement in the UK' (2012) 46 *Law and Society Review* 523.

[28] See, e.g., Lisa Vanhala, 'Is Legal Mobilisation for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organisations in the United Kingdom, France, Finland, and Italy' (2018) 51 *Comparative Political Studies* 380; see also William Burns and Hari Osofsky (eds.), *Adjudicating Climate Change* (Cambridge: Cambridge University Press, 2009). Note that the Aarhus Convention has played an important role in institutionalizing access to justice on environmental grounds in Europe.

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3.4 THE DEBATES OVER STRATEGIC LITIGATION OF HUMAN RIGHTS

3.4.1 *What Do We Mean by 'Strategic Litigation'?*

There is no single or broadly agreed definition of 'strategic litigation'.[29] Do we categorize a case as strategic based on its goals or the way in which it is litigated? Are the goals, motivations, or methods that matter those of the lawyer or client? Must a case be seen strategically from the outset or can strategic potential be identified and acted upon later?

This is not the place to engage, let alone resolve, all of these questions. For our purposes, a case has strategic ambition where it seeks to achieve broader change beyond the direct interests of the plaintiffs in the case or the remedies sought by them – typically changes to policy, social norms, or corporate behaviour. A case is litigated strategically when it is not seen in isolation (with the judgment as the solution or an end in itself) but rather as one step in a bigger effort to achieve the ultimate goal.[30] This contrasts with the perspective of many lawyers who see their case as the whole game. According to the latter view, a judgment in their favour is a win; game over.

There are plenty of cases that have strategic ambition but are not litigated strategically.[31] A few may even have achieved strategic change. But cases that

[29] The disagreements over how to define its parameters gives a sense of the depth of the debates in the human rights community over its role. These debates extend to the terminology: how does 'strategic litigation' relate to other concepts such as 'impact litigation' or 'public interest litigation'? Is it an alternative label for the same thing? Is one a subset of the other? Or are they distinct concepts?

[30] This perspective aligns with definitions such as 'strategic litigation is a method that can bring about significant changes in the law, practice or public awareness via taking carefully-selected cases to court. The clients involved in strategic litigation have been victims of human rights abuses that are suffered by many other people. In this way, strategic litigation focuses on an individual case in order to bring about social change'. 'Strategic Litigation', Mental Disability Access Centre, <http://mdac.org/en/what-we-do/strategic_litigation>. See also 'Guide to Strategic Litigation', Public Law Project, ¶1, <https://publiclawproject.org.uk/wp-content/uploads/data/resources/153/40108-Guide-to-Strategic-Litigation-linked-final_1_8_2016.pdf>. 'Litigation that is "strategic" is rooted in a conscious process of working through advocacy objectives and the means to accomplish them, of which litigation is often but one. Ideally, such a process involves lawyers and many other actors, considers the political and social context within which litigation takes place, takes a long view, and deploys the full range of tools available.' 'Strategic Litigation Impacts: Insights from Global Experience' (2018) Open Society Justice Initiative, 8–9.

[31] Conversely, the strategic approach to litigation can occasionally be used in cases that are tightly and deeply personal to one plaintiff in their focus. One example is Jared Genser, at Freedom Now and later Perseus Strategies, who uses a very strategic combination of political pressure,

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have strategic ambition are more likely to achieve their goals if the cases are viewed and litigated strategically, and if this approach is taken from the earliest stages of planning the case.[32]

3.4.2 *History and Debates*

Strategic litigation has a long history in the human and civil rights communities. Many date its contemporary use to the NAACP Legal Defense Fund's litigation of school segregation, including the 1954 *Brown* v. *Board of Education* ruling by the US Supreme Court.[33] But it has a longer history, arguably going back to anti-slavery litigation in the United Kingdom in the late 1700s.[34] And while it has long been prominent in the United States, recent decades have seen a much wider application. The European Court of Human Rights helped to generate a strong interest in strategic litigation in the European human rights community,[35] and the human rights courts and commissions established by the African Union and Organization of American States have spurred similar growth in those regions.[36] Strategic litigation has also become a prominent feature of human rights work in national jurisdictions with strong constitutional protections of human rights, in particular economic and social rights, in South Asia (especially India and

high-level advocacy, media, and litigation, in particular before the UN Working Group on Arbitrary Detention, to seek the release of individual detainees (often political prisoners).

[32] 'It's also very important that the litigation be tied into a wider effort to press for reforms and social change. A case in and of itself that's not connected to a broader advocacy campaign is unlikely to succeed in a significant way.' Susan Hansen, *Atlantic Insights: Strategic Litigation* (New York: Atlantic Philanthropies: 2018), p. 12.

[33] See *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954).

[34] See 'Guide to Strategic Litigation,' Public Law Project, above note 28, ¶¶ 7–8.

[35] See, e.g., Michael Goldhaber, *A People's History of the European Court of Human Rights* (New Brunswick: Rutgers University Press, 2007). The existence of the ECtHR arguably encouraged US lawyers and civil society organizations to consciously transfer lessons from civil rights litigation to European jurisdictions. The landmark ECtHR case of *DH* v. *Czech Republic*, finding that streaming Roma children into 'special' schools for the mentally handicapped, was based on the principles established fifty years earlier in *Brown*. The scope for strategic rights litigation in Europe was further expanded when the Court of Justice of the European Union was granted jurisdiction to assess compatibility of EU acts with the Charter of Fundamental Rights.

[36] In Africa, this was also the case in the sub-regional courts, especially the ECOWAS Community Court of Justice, which has seen leading anti-slavery cases of the modern era, like *Mani* v. *Niger*. See Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (New York: Bloomsbury, 2018), ch. 5.

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Pakistan), sub-Saharan Africa (e.g., South Africa and Kenya), and Latin America.[37]

That said, law is not the only means of achieving social change, and litigation is not the only way to use law.[38] The role of litigation in achieving social change has been contested for decades, with some dismissing courts as a 'hollow hope' for rights advocates as early as 1991.[39] Sometimes these critiques characterized the role of courts and litigation in realizing rights or achieving change as 'anti-democratic, wresting powers from elected representatives and their procedures', or 'elitist', as it disempowers local communities by placing control in the hands of 'the lawyers' and diverts scarce resources and attention from more authentic initiatives and solutions.[40] Others criticize litigation as ineffective, pointing to the poor record of implementation and the list of 'landmark' cases that made little change on the ground and arguing that the narrow and formalistic frame of litigation and judicial orders is inadequate to address deeply complex problems.

Fortunately, in recent decades, human rights lawyers have taken the critiques of strategic litigation as a tool for social change seriously. The resulting debates have generated a substantial and nuanced body of literature that recognizes the challenges and limitations, as well as the potential, of this tool; identifies issues that those engaged in strategic litigation should be aware of; and draws out a number of principles that are likely to enhance the effectiveness of strategic litigation (or minimize its risks).

This chapter does not pretend to distil everything the human rights community has learned about strategic litigation. Entire books[41] and multivolume report series[42] have been written on that topic, and the conclusions are still

[37] See, e.g., the discussions in Helen Duffy, above note 34.

[38] See, e.g., 'Many Roads to Justice' (2000) Ford Foundation, <https://www.fordfoundation.org/work/learning/research-reports/many-roads-to-justice/>.

[39] See Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?*, 2nd ed. (Chicago: University of Chicago Press, 2008).

[40] Duffy, *Strategic Human Rights Litigation*, above note 34, p. 4.

[41] Most recently, ibid. See also Aryeh Neier, *Only Judgment: The Limits of Strategic Litigation in Social Change* (Baltimore: International Debate Education Association, 1982); see also Charles R. Epp, *The Rights Revolution* (Chicago: University of Chicago Press, 1998); see also Charles Epp, *Making Rights Real* (Chicago: University of Chicago, 2010); see also Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, 2nd ed. (Ann Arbor: University of Michigan, 2004); see also Austin Sarat and Stuart Scheingold (eds.), *Cause Lawyers and Social Movements* (Stanford: Stanford University Press, 2006). See further resources listed in 'Strategic Litigation Impacts: Insights from Global Experience,' above note 28, Appendix C.

[42] See, e.g., the series of reports on 'Strategic Litigation Impacts' by the Open Society Justice Initiative ('Roma School Desegregation' [March 2016]; 'Equal Access to Quality Education'

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being debated. Rather, it outlines a handful of examples to illustrate the relevance of the discussion taking place in the human rights community to the next generation of climate litigation.

3.5 APPLYING LESSONS LEARNED TO CLIMATE LITIGATION

Many of the principles drawn from strategic human rights litigation can inform the way that climate litigators and other advocates approach the 'next generation' of climate cases. Both kinds of litigation tackle complex social, economic, and political problems. Both look to courts as a venue to equalize power imbalances and assert the interests of individuals, communities, or the broader public against powerful entrenched corporate and political forces. And both can seek to reframe our understanding of a problem, highlighting the costs inflicted by a status quo and the importance of building solidarity and a shared sense of responsibility for creating change.

However, these principles do not amount to a 'one size fits all' approach to using litigation to achieve social change or to maximizing its impact. Highly prescriptive approaches to litigation are of limited value: the optimal approach will vary depending on the social, political, and legal context and on the nature of the issue to be addressed; and may need to adapt as the context and the campaign evolves. But a number of key lessons or principles emerge from the debates, which may inform the use of litigation for strategic objectives.

Context Matters

One early lesson of strategic human rights litigation is that the context in which one is litigating – social, political, and legal – has an enormous impact on the role that litigation can and should play in a strategy for change, and on what type of litigation has the greatest potential.

[March 2017]; 'Indigenous Peoples' Land Rights' [April 2017]; 'Torture in Custody' [November 2017]; 'Insights from Global Experience' [October 2018]) and the multiple reflection reports from Atlantic Philanthropies (see, e.g., Brian Kearney-Grieve, 'Public Interest Litigation: Summary of a Meeting of Organisations from Northern Ireland, the Republic of Ireland, South Africa and the United States' [2011] Atlantic Philanthropies; see also Steven Budlender et al., 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' [2014] Atlantic Philanthropies; see also Ursula Kilkelly et al., 'Using the Law to Secure Social Change on the Island of Ireland' [2015] Atlantic Philanthropies; see also Susan Hansen, *Atlantic Insights: Strategic Litigation* [Atlantic Philanthropies, 2018]).

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The *social context* can include whether the litigator is addressing a problem that the public is already aware of, or whether the litigator is trying to draw public attention to a new issue. Is the society fragmented or unified? Is this an issue where the bulk of the population is suffering at the hands of an elite, or where the litigator is trying to secure the right of a minority? And what previous attempts have been made to address this issue?

The *political context* can include the nature of the government, whether there is any effective opposition (whether political or social), how important this issue is to the government. But it also includes whether the courts are independent of the government, and see themselves as a protector of the population, or whether they see themselves as protecting the government or elite interests. This may differ depending on the level of the court: in some systems, the most senior courts can be the most independent; in others, the local-level courts have the greatest independence because their decisions attract less attention.

The *legal context* includes the substantive laws that exist within the given jurisdiction and that the litigator might be able to use (including what treaties a country has ratified and what status they have domestically). But it also includes the legal culture of the system in which the litigator is operating. Are the courts typically creative and activist, or are they conservative in their decisions? Do the courts pay attention to international or comparative law sources, or are they parochial? If the issue that the litigator is litigating raises technical or scientific issues (as climate litigation often does), are the judges comfortable with such evidence? Does the litigator need to educate or socialize the judges on the issues and the types of evidence, and how open are the judges to this? How do the judges view public campaigning around a case: is it more likely to be viewed as a positive demonstration of what decision may be acceptable to the population, or a negative attempt to improperly influence the judicial process?

3.5.1 *Identifying the Role of the Case in a Bigger Plan for Change*

Many of these principles flow from the basic recognition that problems with deep structural roots – like climate change – cannot simply be litigated away.[43]

[43] Indeed, the unrealistic belief that courts will provide a neat 'solution' is the real target of some critiques of litigation – attacking not true strategic litigation but those lawyers for whom 'the courts can be regarded with almost religious reverence: solutions are sought, as if from on high, before the ultimate arbiters of truth and right, whose job it is to apply the law without fear or

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Strategic litigation is therefore about much more than obtaining a judgment in a case. Despite what lawyers often assume, a case alone is not the solution, and the judgment is not the end. Fundamentally, strategic litigation is a larger process in which any given case is one tool to be used towards the ultimate objective of securing lasting change.

This 'larger process for change' is what some organizations would call their 'theory of change'. Strategic litigation recognizes that litigation is neither a substitute for a theory of change, nor is litigation in itself a theory of change. Instead, litigation must be developed and conducted as one part of a broader plan for how advocates will achieve the desired change. That theory of change (and the role that litigation will contribute to it) requires just as much attention and rigour from strategic litigators as the strength of their legal arguments and the merits of their case.

At one level, this requires additional work by those considering bringing a strategic climate case. Recognizing that a case is one part of a broader process of change requires a rigorous assessment of each case that goes beyond the chances of winning the case on its own terms. It requires litigators to articulate what they seek to achieve by litigating this case: their ultimate goal and the contribution this case will make to that goal, particularly in the context of other efforts to create change. Clarity at the outset regarding the impacts one is aiming for, how the case will generate those, and how they will be used towards broader change is crucial for both maximizing impact and for testing assumptions about the value (and risks) of a case.[44]

Recognizing that a case is one part of a broader effort for change can also bring real benefits. Assessing the role that each case will play can open up creative possibilities; it frees advocates to use a case to achieve a wide variety of impacts in support of their strategy for change, rather than trying to make every case a 'solution' to the problem. The most important contribution of a case might not be a win in the courtroom – it might be obtaining information through the discovery process, forcing the defendants to take a formal position on public record, or getting specific factual or legal findings from the court even if the plaintiffs do not ultimately 'win' the case. Strategic litigation recognizes that different stages of litigating a case each have the potential to contribute to change – developing the case, the initial moment of filing, the

favor and to "resolve" the problem'. Duffy, *Strategic Human Rights Litigation*, above note 34, p. 4.

[44] Assessing impacts raises its own challenges. See, e.g., Setzer and Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance', above note 5, p. 12; see also Duffy, *Strategic Human Rights Litigation*, above note 34, pp. 37–48.

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conduct of the trial, the delivery of the judgment, and the implementation of any remedies ordered. But it takes planning on how to use each of these moments.

Seeing the case as part of a broader campaign is also not a one-way relationship. Yes, strategic litigation requires thinking rigorously about how any given case can advance a broader campaign for change. But it also recognizes that the broader campaign for change can benefit the case. Conducting a case alongside other advocacy and activism may mean using litigation to reinforce or empower other legal and campaign initiatives – alliances between cases with young plaintiffs and the global youth movement for climate action are an obvious example.

But just as often, the litigation may rely on other advocacy. It can create the social or political conditions for a favourable decision. For example, public debates can socialize judges on an issue, and media coverage and campaigning can provide political cover for judges to make creative or courageous decisions. And planning a campaign that extends after the judgment can maintain the pressure for implementation of a favourable decision or for reforms following a loss. The principle that litigation should not displace other efforts often works to the advantage of the litigator, as well as the broader goals.

In some respects, climate litigators are advanced in this aspect of strategic litigation. Supporters of the 'next generation' of climate cases have identified a range of benefits – aside from any legal order sought – including: public affirmation of the scientific consensus regarding various aspects of climate change, rebuttal of misinformation, effective communication of otherwise remote-seeming harms of climate change via stories of claimants, the creation of new narratives of government and corporate responsibility for climate change, and the mobilization of the broader climate movement.[45] Supporters also claim that such cases can have broader political and economic ripple effects, like encouraging actors not directly involved in the litigation to change their behaviour. For example, such cases may prompt government policymakers or negotiators to support more ambitious targets, or prompt corporations to pledge to reduce emissions or support a carbon price.

But given the broad range of public activism and political advocacy to address climate change, it remains critical to examine rigorously how a given

[45] See, e.g., Setzer and Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance', above note 5; see also Grace Nosek, 'Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories' LLM Thesis, University of British Columbia (2017).

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case will support this. Some cases appear to seek an iconic legal victory without any real plan for how such a victory is integrated into a broader theory of change. As climate litigation efforts proliferate, with more cases taken by lawyers and claimants who may not have established ties to the wider climate movement, these risks grow. And even where supporters of ambitious climate litigation do identify a range of ways that their case may contribute to the broader climate movement, there may be room in some cases for additional examination of how the case will achieve this impact and whether a case is the best way to do that. For example:

- If the goal is to publicly affirm the scientific consensus, is that scientific consensus in serious dispute in the given country?
- If the goal is the communication of otherwise remote-sounding harms, that will influence the choice of plaintiff and the framing of the claims. But have the litigators developed the communications and media strategy that will be required to accompany the case, or have formed partnerships with other groups that can do this?
- If the goal is mobilization of a new constituency to support climate action, who are the litigators aiming to mobilize? What has been tried to mobilize this constituency in the past, and why did that not work? What is their view of and relationship with this case, how will the litigators use this case to mobilize them, and why is a court case the most effective way to do so?
- If court cases are being used to push an actor to move, are the litigators (or their allies) also opening the door for them to walk through?
- Will litigation produce the results that the litigators want within the needed timeframe? Some activists turn to litigation because of the urgency of the crisis and out of frustration from delays in political action. But while litigators can control when a case is filed, if they are relying on the judgment then litigation can be a long process, especially if there are appeals.

3.5.2 *Challenges of Implementation*

To some extent, the question of implementation is just one example of how the case is intended to contribute to lasting change. Not every strategic case defines 'success' in terms of the judgment itself. But the judgment is often an important part of the impact sought from a case. If so, it is necessary to plan for *how to implement the decision* (what is required in the days, months, and years after the judgment) if a legal victory is not to be a hollow one.

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Strategic human rights litigation is full of cautionary tales of judgments that were won on paper but that failed to change the situation on the ground. *Brown* v. *Board of Education* was a huge victory, and it established a vital legal precedent. But after initially decreasing de facto segregation in schools, unequal education has increased in recent decades.[46] Landmark South African cases such as *Grootboom* and the *Mud Schools* case[47] likewise produced impressive judgments establishing important principles, but they did not solve the problems associated with housing and education in impoverished communities.

This planning starts with the remedies requested. Lawyers always have to think about what a court has the formal power to order (and what it is likely to order based on its past practice). But strategic litigators need to give additional thought to exactly what they need to get from the judgment:

- *The substance matters*: will the remedies being requested from the court actually address the underlying problem and its causes if implemented? In the human rights context, years of cases challenging ethnic profiling by police requested diversity training as a remedy. But later studies showed that isolated diversity training sessions had no impact on police behaviour.
- *The formal details matter too*: often the chances of a judgment being implemented can be improved by the way that the remedies are defined. Care must be taken to craft remedies so that responsibility for implementation is clear and the extent of implementation can be monitored. For example, if the case is against the government, which department will be responsible for implementing the judgment?

But no matter how carefully the remedies are crafted, there will frequently be resistance to implementing them. This is especially the case when those remedies require major changes in corporate or governmental policy and behaviour (as opposed to ceasing a specific action). Studies of the implementation of human rights judgments show that while defendants will usually pay compensation when ordered by a court, this does not necessarily lead to a change in policy or practice. And judgments that order significant changes in policy or practice directly, or accountability for past violations, are far more

[46] See Gary Orfield and Erica Frankenberg, 'Brown at 60: Great Progress, a Long Retreat and an Uncertain Future', UCLA Civil Rights Project, 15 May 2014; see also Alvin Chang, 'The Data Proves That School Segregation Is Getting Worse', *Vox*, 5 March 2018.

[47] See *Republic of South Africa* v. *Grootboom* 2001 (1) SA 46 (CC); see also *Centre for Child Law* v. *Eastern Cape Providence* 2010 (ECB) case no 504/10.

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challenging to implement.[48] So if litigators are asking for damages but are really aiming to change behaviour or policy moving forward, they need to closely consider and articulate how one will lead to the other.

Such challenges of implementation, political will, and resource allocation will be common in strategic climate litigation. If litigators see the judgment as the end of their case, there is a risk that they will overlook this. And though climate litigators have developed a wide portfolio of strategic cases in a short period of time, they have yet to achieve more than a limited number of favourable judgments to date. As a result, many climate litigators have not yet been confronted with the challenges of implementing strategic judgments. For example, if a case aims to increase the ambition of government mitigation policy, it is worth considering how to create a broad base of support that will give the government the additional cover or pressure it needs to undertake ambitious reform. And it is also worth considering strategies for countering the probable backlash or resistance to implementation from various interests or constituencies.[49]

While the challenges of implementation may be new to the climate litigation movement at this point, there are examples that suggest some climate litigators are already ahead of their human rights counterparts. Urgenda's strategy for implementation following its successful case against the Dutch government is one such example. Building on the broad public support that Urgenda developed for the case, it worked with 750 organizations and businesses to develop and publish fifty measures, known as the '50-point plan', that the government could feasibly implement to meet the terms of the court's emissions reduction order. The Dutch parliament subsequently adopted several motions demanding greater transparency from the government regarding its plans to meet the court's order. The case, and the court judgment, pushed the government to move, and the broader advocacy showed them a pathway forward.

3.5.3 *Evaluating Risks*

While strategic litigation can be a powerful tool, the experience of human rights advocates shows that it carries risks. There will often be risks in

[48] See, e.g., 'From Judgment to Justice: Implementing International and Regional Human Rights Decisions' (2010) Open Society Justice Initiative, 15–16, <https://www.justiceinitiative.org/publications/judgment-justice-implementing-international-and-regional-human-rights-decisions>.

[49] Consider, e.g., the political and social fallout of the Inter-American Court of Human Rights' advisory opinion on gender equality and same-sex marriage that was requested by the government of Costa Rica.

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challenging powerful state or corporate interests, and litigation is not alone in posing risks of retribution to individuals or communities. But strategic litigation carries additional risks. Some – such as the risk that litigation will backfire or entrench bad law – can be managed by carefully considering the likely response of opponents and the courts. But excessive focus on litigation also can disempower or limit other initiatives, and it can prioritize those parts of the problem that can be brought before a court over the real underlying causes.

Litigating the wrong case, at the wrong time, before the wrong forum, or making overly ambitious claims, can lead to real setbacks. Losing a case can entrench the problem that the litigation was trying to solve: it can establish bad legal precedent or legally validate the very activities being challenged; it can place other efforts to litigate in more cautious or incremental ways at risk; it can undermine the credibility of evidence or allies; and it could create a narrative that the defendants were right, even if the case was only lost on a technical or procedural point. Any of these may inhibit efforts to achieve change, whether by future litigation or by other strategies.

For example, the loss before the European Court of Human Rights in *SAS* v. *France* provided judicial endorsement of the French ban on public face veils (the niqab),[50] which undermined the impact of a challenge before the UN Human Rights Committee (a more favourable venue that ultimately gave a positive decision)[51] and imposed additional barriers to any domestic challenges to the ban. An attempt to prosecute Aung San Suu Kyi in Australia, despite her immunity as sitting Minister for Foreign Affairs, led the Australian High Court to prohibit private prosecutions for war crimes, crimes against humanity, and genocide[52] before any cases against lower-profile defendants could establish a practice of such prosecutions and show how they could work and why they were important. And while many see *Brown* v. *Board of Education* as a victory, it was the result of decades of work to undo the damage caused by an earlier failed case that enshrined 'separate but equal' into law for over fifty years.[53]

To mitigate these risks, it is always important to carefully and critically consider the likely responses of both the opponent and the courts. It is

[50] *SAS* v. *France*, ECtHR, Application no. 43835/11, Grand Chamber Judgment of 1 July 2014.

[51] The UN Human Rights Committee ultimately did rule that bans on the niqab violated the right to manifest religious belief. See *Hebbadj* v. *France*, UNHRC, Views of 17 October 2018, CCPR/C/123/D/2807/2016; see also *Yaker* v. *France*, UNHRC, Views of 7 December 2018, CCPR/C/123/D/2747/2016.

[52] See Arraf, 'High Court of Australia Closes Door on Private Prosecutions in Taylor v. Attorney-General,' Opinio Juris, 14 February 2020, <https://opiniojuris.org/2020/02/14/high-court-of-australia-closes-door-on-private-prosecutions-in-taylor-v-attorney-general/>.

[53] See *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

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important to consider how other parties will view and respond to the arguments. Are the opponents likely to fight in court, try to stop the case from reaching the courts, or try to undermine the plaintiffs' credibility in public debate? And it is important to be realistic about how judges will receive the arguments; rights-oriented lawyers may take for granted views on why international law matters that are not shared by domestic judges.

Risks are not limited to cases that lose. In recent years, human rights advocates have lost public support in some states where they have been portrayed as representing the interests only of minorities while ignoring the concerns of majority populations (for example, those posed by austerity and social and economic inequality). The reality is that climate change will affect everyone. But climate litigators might want to consider whether the ways in which they select, develop, and frame cases could leave them open to similar attacks. And the mere fact of choosing litigation has costs: litigation to set the parameters of the debate, or mobilize behind a common set of asks, can lock allies into a fixed position and may reduce room for negotiation or other action. Even cases that result in successful judgments can produce adverse consequences – a judgment that steps too far outside the political or social mainstream may undermine judicial authority. There have even been instances where this has led to a court being stripped of its jurisdiction, as happened with the Southern African Development Community Tribunal.[54]

These risks do not mean one should never litigate; but that those risks should be critically and rigorously assessed and weighed against the projected value of a case. There sometimes are good reasons for lawyers to take ambitious cases to pursue strategic change, even when the prospects of success are somewhat uncertain (the authors have well over a decade of experience in strategic human rights and climate litigation, with both wins and losses to our names). But it is important to take such cases on a systematic and considered basis, conscious of the risks, limits, and potential of litigation, and to identify, develop, and pursue cases in a way that maximizes the chances of true (rather than superficial) success.

3.6 CONCLUSION

The number and range of climate cases, in particular those with strategic ambitions, are increasing. And they are likely to continue to do so in the coming years as the effects of climate change are felt more directly by more

[54] See Laurie Nathan, 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35 *Human Rights Quarterly* 870.

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people, and as more cases gain the attention of the public, lawyers, and civil society, we can expect more cases to be brought by a growing number of litigants. This should be welcomed, and it can be constructive. But it makes the lessons from the strategic human rights litigation community particularly valuable in this moment. Some of the examples outlined above – the importance of embedding a case in a broader theory of change or the risk of a premature or flawed case undermining other cases or strategies for change – will become increasingly relevant with the likely growth, diversification, and fragmentation of the climate litigation community. And new cases will bring new challenges, some of which may be familiar to strategic human rights litigation (for example, the ethical issues that can arise when litigating for broad strategic aims but in the name of vulnerable communities or individuals whose interests may not be perfectly aligned with those of the strategic litigators).

There is an undeniable urgency to climate action. Climate litigators feel this urgency and sometimes emphasize that there is no time to waste. But this call to prompt action also means that there is no time to repeat the mistakes of the past or to miss an opportunity to maximize the impact of successes. The experience and debates of human rights activists on how and when to use litigation strategically and how to maximize the chances of leveraging a case for systemic change are a rich source for climate litigators to draw upon.

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