



Social Movements and Strategic Litigation



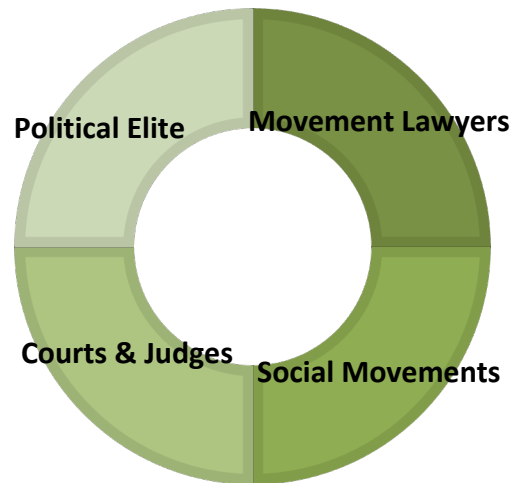
ACTORS



There are four key actors in the process of translating human rights issues into social change via strategic litigation.

- However, not all players in the game are equally positioned. Often, social movements start out with a deficit in power.
- The separation between these players are at times porous i.e. lawyers, legislators and judges may be sympathetic to the movement's cause.

KEY PLAYERS



■ Lawyers ■ Social Movements ■ Courts & Judges ■ Legislators & Policy Makers

Social Movements



A social movement is a loosely organized, sustained campaign aimed at bringing about fundamental and lasting changes in the social order.

- Social movements differ in size and levels of organization/ bureaucratization but they are all essentially collective in nature.
- However, social movements are not a unitary phenomenon - they can also be characterized as coalitions.
- Inequalities may exist within a movement, often caused by intersectional oppressions e.g. the marginalization of LBT women, trans and intersex voices within the sexual rights movement on the continent.
- The differences between actors within the movement can lead to ideological contestations about the strategies used to advance the movement's cause.
- With this context in mind, movements don't always have a unified position on whether to use litigation as a tool for social change.

Lawyers



- Lawyers are usually, though not always, necessary to access justice and realise rights in a court of law.
- There are typically two types of lawyers who deal with human rights issues:
 - Movement Lawyers:
 - Committed to a particular cause or movement.
 - Engage with the social movement and do not steer them away from their political objectives.
 - "Hired Guns":
 - Opportunistic; advocates for the interests of the highest bidder.
 - Low levels of accountability to the movement.
 - May veer the movement away from their political goals in exchange for immediate judicial gains.
- The politics of law and the practice of law are often indistinguishable. Hired guns focus solely on the practice and immediate result, whereas movement lawyers believe that how law is practiced is political.

Courts & Judges



A court: a tribunal presided over by a judge, judges, or magistrate, in civil, criminal and human rights cases.

There are two differing arguments about the role of courts in effecting social change:

1. Courts are the trailing edge of social change – they ratify, and not lead, social change; or
2. Courts have the power to cut through the democratic deficit and legitimate civil society's interests – hence they are the forerunners of social change.

Other factors that influence a court's ability to effect social change:

- The counter majoritarian dilemma
- Legal formalism vs. Judicial activism
- Judicial impartiality vs. Judges' personal ideologies and politics.



Political Elite - Legislators & Policy Makers

Ideally, judicial decisions get translated into new legislation and policy reform.

- Policy and legislative change are incremental in nature. This means that there will be periods stagnation, followed by periods of rapid change.
- In this sense one can see the process of policy and legislative reform as an attempt to change the social script i.e. attribute different meanings and understandings to previously observed social phenomena.
- Not all judicial decisions will lead directly to legislative or policy reform.
- Additionally, the political class can be lobbied by civil society to create policy change without litigation.
 - Eg Lusophone Africa such as Mozambique where the legislature decriminalized in 2014 with the new criminal code. Additionally, the social movement lobbied for anti-discrimination protections in the labour laws, which were passed in 2007 by the legislature.

Factors that influence choosing litigation



Litigation is just one of several advocacy strategies movements may choose to pursue – others include community organizing, direct action, leadership development, community education, media and communications, arts and culture, research and data, political and legislative advocacy

- The *opportunity situation* influences whether or not social movements should pursue litigation at a particular time.

The political & legal factors that influence the *opportunity situation*:

The political opportunity structure: the chances of winning through political mobilisation

- The responsiveness of the political elite
- The nature of the political regime
- The availability of other civil and political rights i.e. the right to political participation, freedom of association, right to access information and freedom of assembly
- The resources available to the social movement

Factors that influence choosing litigation



- The legal opportunity structure: the barriers faced and the potential gain from pursuing a legal strategy
 - Rights awareness within the movement
 - The nature of the laws and rights available
 - Thresholds of access to court
 - The need for legal expertise
 - Costs of litigation and time
 - Perceptions of judicial independence and effectiveness
- The degree of agency possessed by the movement: this is contingent on how marginalized the particular interest group is

Why should a SM movement litigate? African Context



- Many African governments have created an environment of fear for human rights defenders. This fear has made activists hesitant to challenge the State, especially legally. Also, some lawyers are reluctant to take on such cases.
- However, by creating a network such as this, movements can become legally empowered again and have access to a pool of lawyers ready and willing to litigate on their behalf.
- Activists are also holders of rights that cannot be violated, regardless of homophobic laws and rhetoric. Rights such as right to privacy, equality, freedom of association, etc are granted to all individuals and groups and cannot be violated due to SOGIE.

Why should a SM movement litigate? The Pros of Litigation



- Raises expectations of what is doable within the movement
- Sparks indignation and hope
- Stimulates a rights consciousness amongst movement constituents
- Legal framing legitimizes the movement's agenda by translating a movement's interests into the language of rights
- Legal institutions have the capacity to hold actors accountable and provide redress for human rights violations
- Creates issues around which to further organize a movement.
- Provides leverage in informal negotiations

Why should a SM movement litigate? The Pros of Litigation



- Attracts media attention and financial resources. This can be leveraged to attract more participants and pursue different strategies
- At times even when a case is unsuccessful, the externalities generated by pursuing a litigation strategy can bolster social movements. This is called “winning by losing”. This challenges the win/lose mentality around litigation.
- Allows grassroots movements to occupy and voice their concerns in the same space as the elites.
- Litigation is a mechanism for leveraging power from targeted groups, building organizational resources and mobilizing constituents.

The Cons of Litigation



- Voice and power dynamics affect how people access justice. Often the law benefits elites and further disempowers marginalized groups.
- Elites tend to be isolated from the broader community and will therefore have difficulty understanding the challenges faced by marginalized groups
- Litigation may divert scarce resources away from potentially more productive strategies
- Litigation discourages collective action and it may have the effect of de-radicalising the movement
- Litigation is not a substitute for actual social change. Cases may be won but how and when norms change is an important factor
- Courts are not always able to enforce their judgments
- Litigation can fracture movements – who has ownership over the case? Litigant or the movement? Need additional forms of advocacy as well.

The Cons of Litigation



- Too much of a focus on “rights” can overlook the idea that there are broader politics involved in the process of social change. Rights discourse and litigation will not always achieve the desired result, the politics always need to be considered.
- There are often intense disparate power dynamics between lawyers, judges, political actors and members of grassroots movements
- Loosing in court could damage the cause, delegitimize it, exhaust resources and set the movement back internally and politically
- Court processes can take years to finalize.

Inadvertent Consequences of Litigation



Cannot control what happens after litigation in terms of enforcement and / or legislation process.

Case example: *Canada (AG) v Bedford* 2013 SCC 72, [2013] 3 SCR 1101

- Three female sex workers, who were part of a sex-worker advocacy organization called Sex Professionals of Canada, sued the government over the criminalization of prostitution.
- The Supreme Court of Canada agreed with the women and decided that the laws banning street solicitation, brothel, and living off the proceeds from prostitution were unconstitutional since it violates the right to security of a person by putting the lives, safety and health of sex workers at risk.

Aftermath of successful litigation

- The Supreme Court said that Parliament had to change the criminalization law. In 2014, Parliament passed a law that made “pimping”, running a brothel, and purchasing sex. This is similar to the Scandinavian approach that views all sex workers as victims of exploitation and trafficking – thus decriminalizing the sex workers but criminalizing all other parties involved. Sex worker movements in Canada were outraged by the new law pass in 2014 because it does not protect them or provide them with agency and security. To the contrary, the law drives sex work further underground so that the buys and brothel owners wont get arrested and being further underground further puts the health and safety of prostitutes at risk.
- This is not the result that sex-work social movements were seeking, even though they were successful at court.



Victory

Loss

+ve

Leads to legislative, policy and social reform

“Winning by losing”: the cause is publicized leading to new constituents, increased resources, increased rights awareness, increased organisation and new strategies

-ve

The successful case sparks oppositional consciousness → leads opponents seek reform that will undermine the successful judgment for the social movement.

Ex: Canadian sex work.

Scarce resources depleted;
Court judgments may reinforce the status quo → further undermine the interests of the movement