

STRATEGIC HUMAN RIGHTS LITIGATION

Philip Alston and James A. Goldston

SYLLABUS, FALL 2022

In recent decades, strategic litigation designed to compel respect for international human rights legal standards has greatly proliferated. There are prominent examples in the domestic courts of many countries, as well as in international courts such as the European Court of Human Rights and the Inter-American Court of Human Rights and before quasi-judicial international bodies such as the UN Human Rights Committee and the African Commission on Human and Peoples' Rights. At its best, strategic litigation in defense of human rights both tests and advances a society's commitment to the rule of law. In recent years, it has freed political prisoners, given dissidents a voice, forced governments to take climate change seriously, compelled far-reaching changes in education policy, promoted sexual and reproductive rights, tackled the problem of statelessness, and sent war criminals to prison.

But going to court is costly, time-consuming and, at times, counter-productive. Critics have also condemned it as being a tactic by which powerful funders can distort priorities and promote their own political objectives. This seminar explores the practicalities as well as the complexities of such litigation and seeks to identify the conditions under which it might be an ideal, or at least a viable, tool for promoting human rights.

The seminar will be built around a series of case studies, often presented by the principal litigators themselves. But it will also seek to take a critical look at the field through engagement with the relevant scholarly literature. The seminar will explore the definition of strategic rights litigation, its history and its recent evolution. It will scrutinize the practice of rights litigation including: its goals, challenges and tactics; how best to select cases; what considerations to weigh in marshaling evidence of violations for courtroom proceedings; the relevance of ethical considerations in guiding or constraining rights litigators; and the types of remedies that are available and the circumstances under which they might be effective. Against that background, consideration will then be given to questions such as: is rights litigation more (or less) successful in some countries, or in addressing certain kinds of rights, rather than others; by what criteria do we assess its impact; how important are factors such as national law, legal and popular culture, the judiciary, the bar, civil society, and funders? This year, there will be a special focus on litigating climate change and challenging racism.

The seminar will be taught by Philip Alston, and James Goldston, Executive Director of the Open Society Justice Initiative, who is one of the most experienced and respected international litigators in this field.

Course materials

The principal sources are the materials set out in this syllabus. Additional updates might also be provided in advance, especially if they relate to current events.

Office hours

Prof. Alston: 3-5pm, Mondays, <brianne.cuffe@nyu.edu>

Prof. Goldston can be contacted at <james.goldston@opensocietyfoundations.org>

Class sessions

Various sessions of the seminar will involve guest presenters who have played a key role in the relevant litigation.

All regular class sessions take place Thursdays from 5.30 pm to 7:30 pm, with a ten-minute break in the middle.

Assessment

For this seminar you are required to write a paper for 2 credits (or 3 if an additional writing credit is approved). The regular two credit paper should be at least 6,500 words in length; a three credit paper must be at least 10,000 words. Both figures include footnotes. These are minimum, not maximum, word limits.

The topic must focus on an aspect of strategic human rights litigation but need not be limited to a specific issue addressed in class.

It is your responsibility to propose a topic. Once we have indicated agreement in principle, you will need to submit a one-page outline identifying a specific research question, describing the methodology, and outlining the proposed structure of the paper. Friday March 18 is the deadline for submitting this outline.

All papers must be handed in by the end of the exam period (May 12). The footnotes should follow any one of the standard style formats, but it need not be Blue Book.

The paper should be sent to both of us in Word format (not pdf.) by email. You do not need to submit a hard copy. You will receive an email acknowledgement upon receipt.

Final grades for the course will also take account of class participation.

Overview of classes

- 1. January 20:** Introduction
- 2. January 27:** Strategic Litigation: Law and Politics
- 3. February 3:** Climate change – Holding Carbon Majors Accountable: What’s the Remedy?
Guest: Dan Galpern, Climate Protection and Restoration Initiative
- 4. February 10:** Climate Change and Deforestation; Guest: Daniela Ikawa, Open Society Justice Initiative
- 5. February 17:** Race and Policing in New York City; Guest: Jenn Rolnick Borchetta, Bronx Defenders
- 6. February 24:** Holding State Actors Accountable for Murder and Sexual Violence: Guatemala;
Guest: Helen Mack
- 7. March 3:** Digital ID and Corporate Power: the case of Kenya; Guest: Waikwa Wanyoike, Open Society Justice Initiative
- 8. March 10:** Gender and Human Rights in Latin America; Guest: Viviana Krsticevic, Executive Director of the Center for Justice and International Law (CEJIL)
- 9. March 24:** Holding State Actors Accountable through Targeted Sanctions Regimes; Guest: Rupert Skilbeck, Director, Redress
- 10. March 31:** Using Universal Jurisdiction to Hold State Actors Accountable for Mass Atrocities in Syria; Guest: Steve Kostas, Open Society Justice Initiative; and Wolfgang Kaleck,
- 11. April 7:** New Potential Directions in Climate Change Litigation; Guest: Richard Rogers, Founding Partner - Global Diligence LLP
- 12. April 14:** Defending Democracy against Lawyers; Guest: Christine Chung, Attorney, Lawyers Defending American Democracy
- 13. April 21:** Ethics and the State of the Art

MATERIALS

1. Introduction

Frederic Megret, 'Human Rights Populism,' Open Global Rights (April 2021)

Jackie Dugard, 'Human Rights: Tackling Inequality by Catalyzing the Agents of Social Change,' Open Global Rights, February 12, 2019

Martin Abregu, 'Litigating Rights Carries Risks as well as Rewards,' Open Global Rights, January 27, 2019

Dimitrina Petrova, 'Strategic Litigation in Tough Times,' Open Global Rights, November 21, 2018, Open Global Rights, November 21, 2018

James A. Goldston, 'A Wake-Up Call for Human Rights,' Project Syndicate, August 15, 2019,

James A. Goldston, 'The Value of Strategic Litigation Amidst Rising Illiberal Democracies,' Open Global Rights, November 20, 2018

Jason Brickhill, 'Strategic litigation in a perfect storm: South Africa', OGR, April 2019

Kate Beioley, 'US Lawyers Set for Record Bonuses as Pandemic Fires Dealmaking', Financial Times, Dec. 6, 2021

2. Strategic Litigation: Law and Politics

Charles Epp, *The Rights Revolution* (1998), pp. 1 - 10, 197 - 205.

Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004), 211 – 223.

Andreas Fischer-Lescano, 'From Strategic Litigation to Juridical Action,' in *Transnational Legal Activism in Global Value Chains* (2021), pp. 299 - 312.

Erwin Chemerinsky, 'To Rein in the Police, Look to the States, not the Court,' *The New York Times* (opinion), December 20, 2021 - at <https://www.nytimes.com/2021/12/20/opinion/police-supreme-court-states.html?referringSource=articleShare>

Recommended:

J. Oloka-Onyango, *When Courts Do Politics: Public Interest Law and Litigation in East Africa* (2017), 1 – 12; 268-79.

Alexandra Lahav, *In Praise of Litigation* (2017), pp. 1 – 16.

3. Climate change – Holding Carbon Majors Accountable: What's the Remedy?

Guest: Dan Galpern, Climate Protection and Restoration Initiative

The Hague District Court, *Milieudefensie et al. v. Royal Dutch Shell plc*, NL:RBDHA:2021:5339 (26 May 2021), sections 4 and 5, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>

Annapolis v BP, PLC et al., Complaint (Feb . 22, 2021, Circuit Ct., Arundel Cty, Md.) TOC and pages 1 - 7, 164 (excerpts attached).

MC Wood, D Galpern, Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System, 45 Env'tl. L. 101 (2015), available at https://law.uoregon.edu/sites/law1.uoregon.edu/files/mary-wood_0/mary-wood/atmospheric-recovery-litigation--making-the-fossil.pdf (excerpts attached)

James Thornton, 'The Future of Climate Activism,' *The Economist*, Nov. 17, 2021

Tom Wilson, 'Lawyer who defeated Shell predicts 'avalanche' of climate cases,' *Financial Times*, Dec. 17, 2021

E. Donald Elliott, 'What's Biden's Next Move on Climate?' *The American Spectator*, Dec. 28, 2021

4. Climate Change and Deforestation

Guest: Daniela Ikawa, Legal Officer, Open Society Justice Initiative

Groupe Casino, Éco-Responsable de la déforestation, *Beef Report*, June 2020

Litigation against Casino - English Summary of the Summons/Statement of Claims served to Casino on 3 March 2021 and filed with the Saint-Etienne Judicial Court

'Amazon indigenous groups sue Casino chain over deforestation', France24.com, 03/03/2021

Duty of Vigilance Law, France (English translation), 2017

Stéphane Brabant and Elsa Savourey, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies', *Revue internationale de la compliance et de l'éthique des affaires*, 14 décembre 2017 (2017)

European Commission, 'Questions and Answers on new rules for deforestation-free products,' Nov. 17, 2021

5. Race and Policing: New York City

Guest: Jenn Rolnick Borchetta, Bronx Defenders

Mott Haven Collective Demand Letter to Mayor Bill de Blasio, January 26, 2021

Floyd v City of New York, 959 F.Supp.2d 540, 555 - 565 (SDNY) (2013).

Physicians for Human Rights, Expert Statement (April 2021)

Plaintiff's Comments on the Joint Remedial Process Reforms, *Floyd v. City of New York* (2018)

6. Holding state actors accountable for murder and sexual violence: Guatemala

Guest: Helen Mack, human rights defender, Guatemala, winner of the Right Livelihood Award (1992)

Jo-Marie Burt, 'Strategic Litigation in Cases of Gross Human Rights Violations in Guatemala: Impact and Lessons Learned', Impunity Watch, Policy Brief, (2021)

Alicia LeDuc, Strategic Alliances as an Impact Litigation Model: Lessons from the Sepur Zarco Human Rights Case in Guatemala, 25 *Willamette J. Int'l L. & Disp. Resol.* (2018) 150

Sandra Cuffe, 'Victory in court for indigenous women raped during Guatemala's civil war;', *The Guardian*, Mon 24 Jan 2022

7. Digital ID and Corporate Power: the case of Kenya

Guest: Waikwa Wanyoike, Litigation Director, Open Society Justice Initiative

Privacy International, 'Data Protection Impact Assessments and ID systems: the 2021 Kenyan ruling on Huduma Namba,' Jan. 27, 2022

Nubian Rights Forum et al v. Attorney-General, High Court of Kenya, Judgment of Jan. 30, 2020.

Abdi Latif Dahir, 'Kenya's New Digital IDs May Exclude Millions of Minorities', *New York Times*, Jan. 28, 2020

Catalysts for Collaboration, Case study: Kenya's Biometric ID System

Republic v Joe Mucheru, Cabinet Secretary Ministry of Information Communication and Technology, et al, High Court of Kenya, Judgment, 14 October 2021, Headnote

Affidavit of Dr. Ben Hayes in Republic v. Joe Mucheru

OSJI Internal - 2021 Memorandum - Case Study

8. Gender and human rights in Latin America

Guest: Viviana Krsticevic, Executive Director, Center for Justice and International Law (CEJIL)

Caso Bedoya Lima y Otra vs. Colombia, Inter-American Court of Human Rights, 26 August 2021 (machine translation into English also provided)

Samantha Schmidt, 'Colombia is responsible in kidnapping and rape of female journalist, rights court says', Washington Post, October 18, 2021

Viviana Krsticevic, 'Symposium on Gender Representation: Time to Double our Efforts – New Report Creates an Exceptional Opportunity to Break the Glass Ceiling for Women in International Justice', *Opinio Juris*, October 8, 2021

9. Holding state actors accountable through targeted sanctions regimes

Guest: Rupert Skilbeck, Director, Redress

U.S. Congressional Research Service 'The Global Magnitsky Human Rights Accountability Act: Scope, Implementation, and Considerations for Congress', Dec 2021;

Redress, 'Year One in Numbers: UK Global HR Sanctions,' July 20, 2021;

UK Foreign and Commonwealth Office, Press Release, 'UK sanctions 22 individuals involved in serious international corruption,' April 26, 2021;

Ingo Steinhaeuser, 'How human rights sanctions need to evolve for everyone's benefit,' Thomson Reuters, Oct. 29, 2021;

Human Rights First, 'Targeted Human Rights and Anti-Corruption Sanctions: A General Overview', Nov 2020;

Atlantic Council, Global Sanctions Dashboard (April 2021)

10. Using universal jurisdiction to hold state actors accountable for mass atrocities in Syria

Guests: Wolfgang Kaleck, Founder and General Secretary, European Center for Constitutional and Human Rights; and Steve Kostas, Division Director, Open Society Justice Initiative

Wolfgang Kaleck and Patrick Kroker, 'Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?', 16 *Journal of International Criminal Justice* (2018) 165

Mazen Darwish, 'I Helped Bring a Syrian War Criminal to Justice. But the Work Is Just Beginning', *Time Magazine*, February 17, 2022

Alexander Dünkelsbühler, Alexander Suttor, and Lea Borger, 'Universal jurisdiction without universal outreach?', 2021

Máximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction', 30 *European Journal of International Law* (2019) 779

11. New Potential Directions in Climate Change Litigation

Guest: Richard Rogers, Partner, Global Diligence

Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text* (June 2021)

Javier Solana, 'Climate litigation in financial markets: a typology', 9 *Transnational Environmental Law* (2020), 103-135

Javier Solana, 'Climate change litigation as financial risk,' 2 *Green Finance* (2020) 344-372.

12. Defending Democracy against Lawyers

Guest: Christine Chung, Lawyers Defending American Democracy

Hong, et al., 'Court Suspends Giuliani's Law License,' *New York Times*, June 24, 2021

Bruce A. Green and Rebecca Roiphe, 'As the Giuliani case goes forward, courts should think deeply about the First Amendment,' *Washington Post*, June 25, 2021

'Trump campaign officials, led by Rudy Giuliani, oversaw fake electors plot in 7 states,' CNN, Jan. 21, 2021

In the Matter of Rudolph M. Giuliani, Supreme Court of the State of New York, Motion No. 2021-00491, May 3, 2021

13. Ethics and the state of the art

Morial Shah, 'Ethical Standards for International Human Rights Lawyers', 32 *Georgetown Journal of Legal Ethics* (2019) 213