

A Litigation Strategy on the Digital Welfare State

Towards a digital welfare state that centres on human needs



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1. Introduction

What is the purpose of this strategy and how was it developed?

Since early 2019, the Digital Freedom Fund (DFF) has been discussing with litigators, activists and technologists how the digital welfare state impacts human rights. What is the digital welfare state?¹ What are the main challenges? How can stakeholders use strategic litigation as an instrument to help shape social welfare policies and practices to better respect and protect human rights?² In these conversations, stakeholders shared dream cases and explored desired objectives of litigation. In the first half of 2020, DFF has, in collaboration with De Argumentenfabriek (The Argumentation Factory), distilled these conversations into the foundation of a litigation strategy on the digital welfare state. The current document is the outcome of this process.

This joint litigation strategy of DFF and its stakeholders lays out a vision of strategic litigation on the digital welfare state. The vision consists of general principles that can help stakeholders build cases by identifying potential human rights violations. The principles also help them think strategically about whether cases have the potential to contribute to the desired change: advancing the equality and human dignity of those in need of social protection, while at the same time protecting the digital rights of all.

This strategy also lays out more concrete – short term – litigation objectives around five thematic focus areas: entitlement, human centred technology, equality, data and privacy protection, and redress. Like the vision, these objectives and goals are based on shared priorities of stakeholders in this context. They are therefore not exhaustive.

The purpose of this litigation strategy is to inspire deeper conversations on how strategic litigation could be used as part of a broader strategy to address the harms of the digital welfare state. The conversation on these issues is ongoing, and DFF welcomes further input and views on this litigation strategy.

¹ <https://digitalfreedomfund.org/explainer-what-is-the-digital-welfare-state/>

² <https://digitalfreedomfund.org/tackling-the-human-rights-impacts-of-the-digital-welfare-state/>

2. Terms and definitions

“Algorithm” refers to a set of instructions designed to perform a specific task.

“Automated decision making” refers to decision making solely by automated means without any human involvement, such as through the use of an algorithm.

“Digital system” refers to any data-driven, digital or automated process used in the provision and policing of social protection, varying from identity verification, needs assessments, calculation and payment of benefits, and fraud detection. For the purpose of this strategy, the term “digital systems” also extends to practices surrounding and leading up to the use of these systems.

“Digital welfare state” refers to the use of digital systems in social protection, including through the provision of benefits and other forms of assistance in various departments.

“Governments” refers to government agencies in various departments, ranging from social security, housing and education to tax and immigration.

“Social protection provision” should be read to also include the policing of social protection.

“Strategic litigation” refers to litigation that has an impact that extends beyond the parties directly involved in the case and can bring about legislative, policy or other change.

3. Background

Why do stakeholders consider the digital welfare state as a domain of particular concern and high priority?

Stakeholders observe that in many European countries decisions in the social protection context are increasingly determined by data-driven, digital and automated processes (“the digital welfare state”, see Terms and Definitions). Undeniably the availability of data and new technologies hold promise for improving government services. The digital welfare state is therefore often portrayed as a utopia for social protection policies and programmes, proclaiming that the use of technologies will empower those in need of social protection by easier and more effective access to government services, while enabling governments to be more responsive to their needs. This is also the vision that stakeholders have for the digital welfare state, as laid out in the next chapter.

However, the reality of the digital welfare state is very different from the utopia that is often portrayed, say stakeholders. Some examples. Instead of using digital systems to protect and promote individuals’ ability to exercise their right to social protection, governments’ use of digital systems may be primarily motivated by administrative convenience or budget cuts. Instead of removing obstacles between social protection and people who need it, governments may throw up barriers, such as through the use of digital systems that are difficult to access, manage, and understand. And instead of ensuring that those who are vulnerable and living in poverty get the human care and assistance they need, governments may use rigid and error-prone automated processes, such as for eligibility assessments. Stakeholders further note that these practices are often associated with a heightened level of surveillance, profiling, punishment, and containment of those requiring social protection.

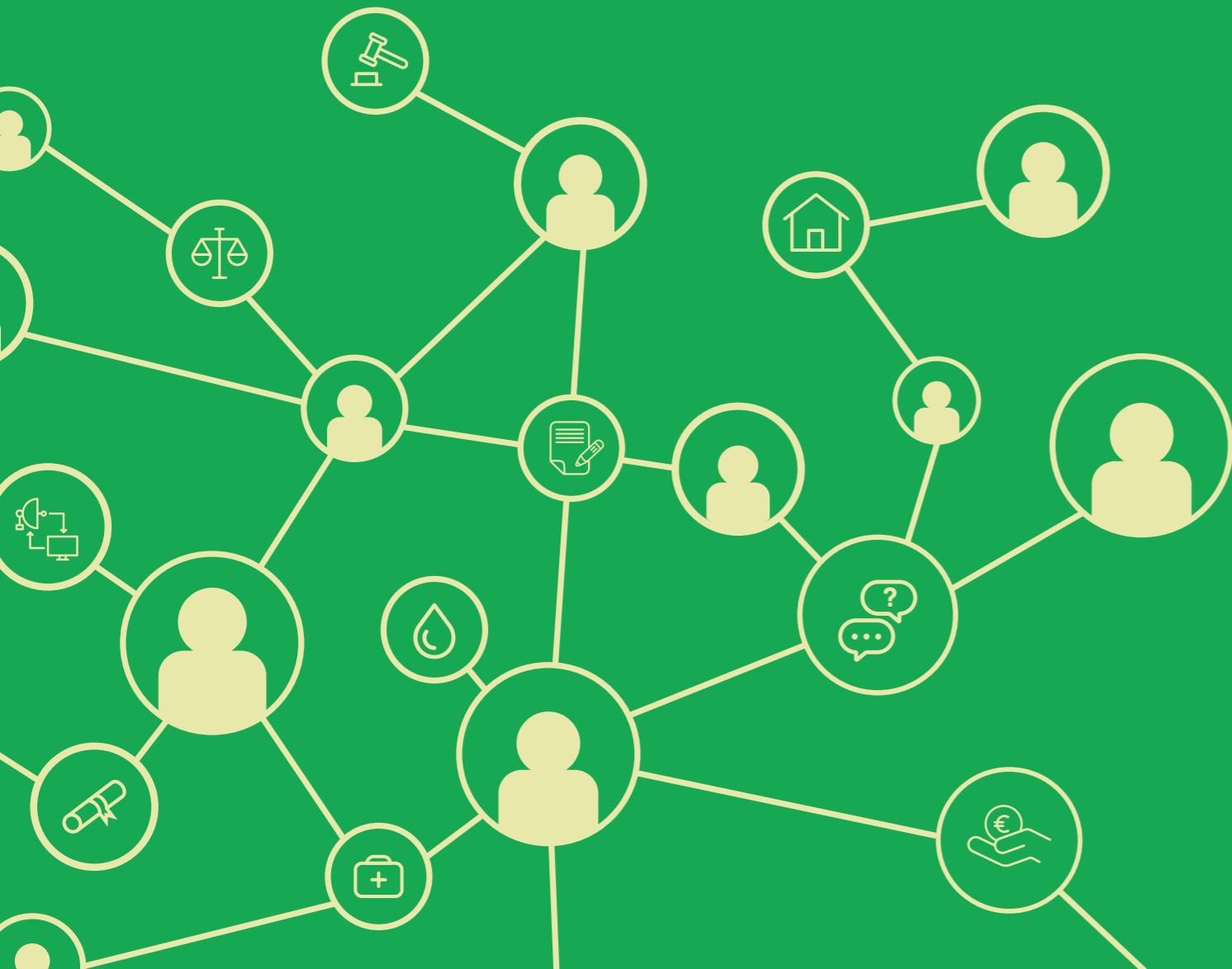
Stakeholders point out that these practices may not only culminate in lack of basic needs and other human rights violations for those in need of social protection, they also fear that these practices may undermine (access to) the social rights that form the foundation of the welfare state. They emphasise that social rights, such as the right to housing, education, healthcare and income support, are human rights. These social rights enable the majority of people to lead secure and protected lives. They are an indispensable safety net for all of society, as the economic and social consequences of the COVID-19 crisis clearly illustrate.

Despite the human rights impacts of the digital welfare state and its relevance to society, litigation in this context is still relatively rare, especially compared to the attention given to digitisation in the private sphere and mass surveillance. For this reason, DFF has been engaging with stakeholders working in the social protection context to understand what the main challenges are and better understand how these can be tackled through strategic litigation. Based on these conversations, DFF and these stakeholders have co-developed the following vision of what strategic litigation on the digital welfare state should look like, and what objectives and goals stakeholders should pursue to bring about constructive change.

4. Vision

What is the joint stakeholder vision on strategic litigation on the digital welfare state?

This vision formulates general principles that can help stakeholders build cases by identifying potential human rights violations and think strategically about whether cases have the potential to contribute to improving the digital welfare state in the optimal way.



What is the joint stakeholder vision on strategic litigation on the digital welfare state?

Litigation should be aimed at advancing equality...

... by ensuring that digital systems do not exclude people otherwise entitled to social protection.

... by ensuring digital systems are non-discriminatory by design.

... by ensuring that all individuals have access to basic rights, such as education, housing, water, food, and health care.

Litigation should be aimed at protecting human dignity...

... by ensuring that those who are vulnerable or living in poverty get the human care and assistance they need.

... by ensuring digital systems increase the self-determination and agency of those in need.

... by ensuring that individuals can meaningfully engage and express their point of view in decisions affecting their well-being.

... by ensuring that individuals do not unlawfully lose protection of their privacy and data protection rights in exchange for social protection.

Litigation must be aimed at improving the welfare system...

... by ensuring that digital systems are used to protect and promote individuals' ability to exercise their right to social protection.

... by ensuring digital systems are aimed at removing obstacles between social protection and people who need it.

... by addressing fundamental flaws in the welfare system rather than mere technical failures.

What objectives and goals for strategic litigation on the digital welfare state follow from conversations with the field?

Human centered technology

03. Ensuring that the use and design of technology in social protection centres on human needs

Examples of litigation goals that pursue this objective are:

- a. Challenge digital systems that harm the rights of those in need of social protection, such as through delays.
- b. Challenge technology design that limits the autonomy of case workers to take independent decisions, and set standards that ensure meaningful human review and control exists in relation to all decisions impacting an individual seeking or receiving social protection.
- c. Ensure that automated decision making in the social protection context takes real-life situations into account, and does not have blind spots that could violate an individual's rights.



What objectives and goals for strategic litigation on the digital welfare state follow from conversations with the field?

Equality

04. Protecting and safeguarding individuals against discrimination in social protection

Examples of litigation goals that pursue this objective are:

- a. Challenge the use of data that is subjective, irrelevant or a proxy for a protected characteristic, such as gender or ethnicity.
- b. Ensure the execution of an impact assessment of the discriminatory effects of a digital system before and while it is used in the social protection context.
- c. Set standards that advance non-discriminatory design and use of technology in the social protection context, such as standards that negate or remove biases that are fed into the system.

05. Protecting and safeguarding vulnerable groups against digital systems that (further) surveil, police, penalise and stigmatise them

Examples of litigation goals that pursue this objective are:

- a. Challenge digital systems that target individuals, whether directly or indirectly, on the basis of their affiliation with a marginalised group or because of a protected characteristic, such as on national, ethnic or gender grounds.
- b. Challenge digital systems that imply fault or blame on individuals without a reasonable and specific proof of guilt, such as in the fraud detection context.
- c. Ensure that digital systems are comprehensible and user friendly for all, such as for individuals with disabilities.

What objectives and goals for strategic litigation on the digital welfare state follow from conversations with the field?

Privacy and data protection

06. Advancing individuals' ability to exercise their rights to privacy and data protection in the social protection context

Examples of litigation goals that pursue this objective are:

- a. Protect and safeguard individuals against unjustified data sharing and repurposing of data by governments and private actors.
- b. Halt and provide safeguards against the unjustified collection and processing of biometric data, such as through facial recognition and DNA records.
- c. Halt and provide safeguards against the unwarranted surveillance of individuals by public authorities and case workers, such as on the basis of spending data.
- d. Protect and safeguard individuals against the gathering of data collected for various purposes in a centralised database, such as tax, law enforcement, and health data.



What objectives and goals for strategic litigation on the digital welfare state follow from conversations with the field?

07. Maximise transparency in automated decision making by governments and private actors

Examples of litigation goals that pursue this objective are:

- a. Challenge digital systems that obfuscate or render opaque the automated decision-making process.
- b. Set clear precedent around the definitions within the General Data Protection Regulation as they relate to 'automated decision making', with a view to demonstrating its broad application or need for reform to cover all types of automated decision making that impact individual rights.
- c. Ensure that individuals are informed of what decisions in the social protection context are automated and not, to what extent such decisions are automated, and the impact of these decisions on their rights.
- d. Ensure that public authorities meaningfully explain to the public and the individual concerned how automated decision-making functions and how they arrive at a score, category or other output.

08. Advancing public accountability of private actors engaged in the social protection context

Examples of litigation goals that pursue this objective are:

- a. Maximise transparency on the involvement of private actors in the digital welfare state, including through transparent procurement processes.
- b. Ensure that private companies respect, promote, protect and vindicate human rights in the social protection context.
- c. Set and uphold human rights standards for the acquisition, deployment and export of private algorithms by governments.

What objectives and goals for strategic litigation on the digital welfare state follow from conversations with the field?

Redress

09. Ensure redress for human rights violations caused by automated decisions in the social protection context

Examples of litigation goals that pursue this objective are:

- a. Ensure that those subjected to decisions in social protection are notified of the fact that a decision was automated, its reasons for reaching a decision, and how that decision can be challenged or subject to human review.
- b. Ensure the right to individual and collective redress in relation to human rights violations and other forms of unlawfulness caused by digital systems.
- c. Ensure that there are strong oversight mechanisms for the use of digital systems and automated decision making in the social protection context, including effective measures for the enforcement of their decisions.



About the Digital Freedom Fund

The Digital Freedom Fund supports strategic litigation to advance digital rights in Europe. With a view to enabling people to exercise their human rights in digital and networked spaces, DFF provides financial support for strategic cases, seeks to catalyse collaboration between digital rights activists, and supports capacity building of digital rights litigators. DFF also helps connect litigators with pro bono support for their litigation projects. To read more about DFF's work, visit: www.digitalfreedomfund.org.

This litigation strategy was developed by the Digital Freedom Fund in collaboration with De Argumentenfabriek (The Argumentation Factory), and in conversation with Algorithm Watch, Big Brother Watch, Data Justice Lab (Cardiff University), Center for Human Rights and Global Justice (NYU), Child Poverty Action Group, Digital Rights Ireland, epicenter.works, Foxglove, Human Rights Watch, Irish Council for Civil Liberties, Center for Digital Welfare (IT-University of Copenhagen), medConfidential, Open Society Justice Initiative, Panoptikon Foundation, Privacy International, Södertörn University, the Bureau of Investigative Journalism, and PILP-NJCM. DFF and De Argumentenfabriek would like to thank all stakeholders involved for sharing their valuable input and investing their time.

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