



# Strategic Litigation Toolkit

Prepared by ALT Advisory

DFF

Digital  
Freedom Fund



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## Table of Acronyms

ACLU	American Civil Liberties Union
ACS	American Chemical Society
CSOs	Civil society organisations
CJEU	Court of Justice of the European Union
BAKE	Bloggers Association of Kenya
DPA	Data Protection Authorities
DFF	Digital Freedom Fund
ECtHR	European Court of Human Rights
EFF	Electronic Frontier Foundation
EU	European Union
FOI	Freedom of Information
FPI	Feminist Principle of the Internet
GDPR	General Data Protection Regulation
GFF	Gesellschaft für Freiheitsrechte
GIJN	Global Investigative Journalism Network
HCLU	Hungarian Civil Liberties Union
ICJ	International Committee of Jurists
LDF	Legal Defence Fund
LGBTQI+	Lesbian, gay, bisexual, transgender, queer, and intersex +
M&E	Monitoring and evaluation
MMA	Media Monitoring Africa
NHRIs	National Human Rights Institutions
PR	Public relations
SAHRC	South African Human Rights Commission
SLAPP	Strategic lawsuit against public participation
SLG	Strategic Litigation Guidelines
TAC	Treatment Action Campaign
UK	United Kingdom
US	United States
VPNs	Virtual Private Networks



## Strategic litigation guidelines (SLGs)

### Phase 1: Thinking strategically about why we litigate: the “big picture” questions

Guideline 1	<b>Listen, learn, and engage</b> with clients or potential clients to understand their realities, and work collectively to determine outcomes.
Guideline 2	The intended outcome, inclusive of your client’s or potential client’s outcomes, must always be the point of departure, and its achievement is <b>the primary goal</b> .
Guideline 3	<b>Context</b> – social, political, economic, and legal – should inform decisions on whether, when, and how to use litigation and advocacy in support of change.
Guideline 4	<b>Do not conflate success and impact.</b> The effective strategic litigator may seek to achieve both in a litigation strategy.
Guideline 5	Consider <b>how</b> you may want to use your case, <b>what</b> you are trying to achieve through your case, and <b>when</b> to use different moments within a case for maximum impact.
Guideline 6	The objective you are setting out to achieve may be direct or indirect, but it should never be purely academic in nature. It should lead to <b>positive and actual change</b> .
Guideline 7	The relief sought – and how it is crafted – can impact the order of the court. Remedies should therefore be clear, concise, and drafted in the court papers using <b>plain language</b> .
Guideline 8	Crafting <b>remedies</b> is an art. It requires precision, creativity, and a propensity to consider both short- and long-term outcomes.



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## Phase 2: Thinking strategically about how we litigate: the practical considerations

Guideline 9	<b>Funding strategic litigation</b> and assessing the cost – both in terms of capital and human resources – is a prerequisite in the determination of any litigation strategy.
Guideline 10	<b>Structuring a legal team</b> , which allows for the delegation of work, may enable strategic litigators to work on a case pro-bono or at a reduced fee.
Guideline 11	<b>Multidisciplinary teams</b> can be force multipliers. Consider including technical experts, researchers, economists, and activists in your team.
Guideline 12	<b>Understanding risk</b> – whether it is physical, mental, reputational, financial, or legal – is important in ensuring the success and longevity of strategic litigation, as well as the health and wellbeing of the legal team and your client.

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## Phase 3: Navigating the various types of litigants

Guideline 13	Decisions around litigants often turn on what may work best in a <b>particular context</b> , and the <b>procedural prescripts</b> of a given jurisdiction.
Guideline 14	Communicate effectively with your client, be reasonable with <b>expectations</b> , and prioritise clients' <b>best interests, always</b> .
Guideline 15	<b>Empowered</b> individuals with <b>agency</b> can play a critical role in making digital rights tangible. Find meaningful ways to support individuals in sharing their stories with the world.
Guideline 16	Be <b>approachable, accessible, and available</b> to communities. Make the effort to establish meaningful relationships.



<b>Guideline 17</b>	Working in silos is unhelpful in the fight for positive change. Work with others, share information and resources, <b>collaborate</b> , and support those who are in the fight with you.
<b>Guideline 18</b>	<b>Hybrid participation</b> – having different types of litigants litigating together – can be a useful way of ensuring inclusion and empowerment, whilst ensuring protection, providing institutional expertise and support, and highlighting both individualised and systemic rights violations.

## Phase 4: Ecosystems of support, advocacy, and storytelling

<b>Guideline 19</b>	Consulting with colleagues and <b>engaging with networks</b> is useful in developing a litigation strategy. Often, other strategic litigators have faced apposite legal questions and have engaged with similar questions of procedure which may assist in your case.
<b>Guideline 20</b>	<b>Allies in the public and private sectors</b> can significantly contribute to advocacy around a particular cause. Their assistance should be encouraged and facilitated.
<b>Guideline 21</b>	<b>Digital literacy campaigns</b> and programmes are likely to support your strategic objectives in a variety of ways.
<b>Guideline 22</b>	Positive change and impact are best affected through a variety of <b>parallel processes</b> that incorporate different forms of <b>advocacy and activism</b> that work together within an ecosystem, and that have a uniform goal.
<b>Guideline 23</b>	<b>The story matters.</b> Consider how best to frame the story in court papers as well as in public discourse. Your clients' stories are theirs – make sure they want to tell the story.





## Phase 5: Legal and procedural considerations

<b>Guideline 24</b>	Ideally, you should assess timing on the availability of the <b>right factual matrix</b> and within a <b>key social or political moment</b> . In some instances, you may have to proceed without a “perfect alignment”. While this is not advisable, it may be necessary.
<b>Guideline 25</b>	<b>Evidence</b> of a rights infringement is a vital element in strengthening your litigation and proving your claim. Factor in time to get the evidence you need, and seek support to collect, collate, and present the evidence.
<b>Guideline 26</b>	<b>How</b> you <b>collect evidence</b> can, in and of itself, be a strategic decision. For example, asking your opponents for access to certain information or having your opponent answer your claims “on the record” can be a hugely beneficial step in achieving the bigger picture objectives.
<b>Guideline 27</b>	<b>Key moments</b> should be identified within the litigation process, including filing deadlines and further potential social and political moments. These deadlines and moments should be used to complement the litigation strategy and <b>bolster existing or new advocacy campaigns</b> .
<b>Guideline 28</b>	Digital rights issues can arise in a range of different contexts and may warrant exploring <b>less conventional routes</b> . Be open to <b>alternative areas of the law</b> that may prove to be more effective in addressing issues, particularly against private actors.
<b>Guideline 29</b>	Reflect on why you are approaching a <b>particular forum</b> . Assess the strengths, weaknesses, and strategic opportunities various alternative fora may provide.
<b>Guideline 30</b>	<b>Different actors</b> may cause rights violations. It is important to be alive to that fact when deciding on your litigation strategy.
<b>Guideline 31</b>	Your litigation strategy should be responsive to the <b>transnational</b> and extraterritorial dimensions of private actors.



## Phase 6: Post-judgment considerations

<b>Guideline 32</b>	Strategic litigation does not always end with a judgment. The <b>struggle may continue</b> in the form of monitoring, implementation, appeals, reviews, and public education. It may also involve further litigation to enforce the judgment.
<b>Guideline 33</b>	Judgments are not always easy to understand and might be lengthy and filled with legalese and technical findings. It is therefore important that the judgment be <b>accessible and understandable</b> .
<b>Guideline 34</b>	The outcome of a judgment is often not a simple binary of winning or losing. It is important to reflect on the <b>direct and indirect</b> impacts that are both <b>material and symbolic</b> .
<b>Guideline 35</b>	One of the critical factors in ensuring that strategic litigation achieves maximum positive change is efficient and <b>effective enforcement and implementation</b> . This is often a challenge within itself. Know the process, recognise the political climate, and use compliance and non-compliance alike as key moments for advocacy.
<b>Guideline 36</b>	<b>Monitoring and evaluation</b> are important not just for assessing impact, but equally for reflecting on strategies, unpacking successes and failures, and planning for future approaches.



## Introduction

The advancement of technology and the rapid development of the online world in many ways enables transformative, safe, and empowering spaces. But it also facilitates the entrenchment of oppression, corporate exploitation, and disproportionate government responses that erode the realisation of human rights. The exponential processing of personal data, content moderation practices that encroach on free speech, states' disruption of access to the internet, and sustained concerns around privacy and surveillance are only a few of the contemporary challenges digital rights litigators and activists are facing. Developments in artificial intelligence are likely to further transform the digital rights landscape.

As contemporary challenges emerge, and digital spaces continue to evolve, it is becoming increasingly accepted that human rights must be protected both on- and off-line. However, the advancement of digital rights is in a nascent stage. It will take a variety of strategies to develop the norms, precedents, and patterns that give life to both the philosophical underpinnings and practical considerations that inform critical thinking around the strategic litigation of digital rights. That being said, it is important to guard against the popular narrative that technology develops rapidly, and the law, which develops more steadily, has not kept up with technological developments. At the outset, this toolkit seeks to redirect this narrative. The law undoubtedly has malleable characteristics and will fulfil different roles as it operates with or against evolving norms or contemporary challenges. But it is not the job of the law to keep pace with technology; it is the responsibility of technology to be developed in conformance with principles and values of international, regional, and domestic human rights laws.

It is, therefore, important to think through how existing legal principles apply in the context of developing technologies and the ways in which they can be deployed. Continuous assessment on how to apply general principles of strategic litigation to the specific context of litigating digital rights – and litigating them strategically – is ever-present. While applying these legal principles and general principles of strategic litigation, litigators should be mindful of the nuances and unique challenges and opportunities in this field. This is especially the case given the burgeoning nature of digital rights, which are often technical, novel, and unfamiliar to judges, and are developing in a rapidly evolving regulatory framework, with substantial involvement of private sector actors.

Recognising this, the Digital Freedom Fund (DFF) has developed this strategic litigation toolkit which contains tools, resources, and systems to assist and guide digital rights litigators in managing their cases from conception to finalisation. This toolkit seeks to achieve three core objectives:

1. First, it encourages litigators to think critically about when and how litigation can be an impactful and meaningful response to a rights violation. It is important to ask what you are trying to achieve through any given case, for whose benefit, and to what end. These “big picture” questions are key to understanding strategic litigation’s role in achieving positive change, as well as understanding a litigator’s function in the wider ecosystem.



## Strategic Litigation Toolkit

2. The second objective is to emphasise that litigation is one of many tools which can be used. But it is likely to be more impactful and effective if used in tandem with advocacy strategies, robust investigation, communications, and other interventions. This toolkit suggests that strategic litigation, when embedded in a wider strategy or movement, is an important means through which positive change can be achieved. This, in turn, better protects and promotes human rights in the digital age.
3. Finally, through a more practical lens, this toolkit includes guidance, tips, tools, and additional resources to assist litigators as they embark upon strategic litigation. It provides a list of strategic litigation guidelines, expert tips, examples, case studies, and references to useful resources.

The toolkit is structured in six phases:

1. **Phase 1** highlights the importance of thinking strategically and reflects on the key 'big picture' questions that need to be asked early on.
2. **Phase 2** reflects on practical considerations that need to be taken into account from the outset.
3. **Phase 3** identifies various types of litigants and encourages litigators to think about various strategies around inclusion and empowerment.
4. **Phase 4** addresses the importance of ecosystems of support, advocacy, and storytelling.
5. **Phase 5** provides an overview of some of the legal and procedural considerations that may inform a litigation strategy.
6. **Phase 6** discusses post-judgment considerations such as navigating the outcome of the case, its impact, and the need to set aside time for effective monitoring and evaluation.

We trust that it will be useful to you and wish you well in developing your litigation strategies.



## Phase 1: Thinking strategically about why we litigate: the “big picture” questions

### Determining outcomes

At the outset of your considerations listening, learning, and engaging with clients or potential clients should be a priority. Whether your clients are individuals, communities, or organisations, it is important to locate them at the centre of your considerations as you determine outcomes. The strategic and real-life priorities of your clients and the wider community that they represent as well as the impact that a case can have on them are foundational considerations. The American Civil Liberties Union (ACLU) conducts “[Listening Tours](#)” and “[People Power Tours](#)” in which they meet with individuals and communities across the United States (US) and listen and learn from their realities. These community-centred tours allow members of the ACLU to listen to how communities identify problems and creates a space for collaborative problem-solving. These tours, which span across weeks, months or even years, create a unique opportunity for interested and affected persons to lead the strategic conversations and participate in determining the outcomes.

**Guideline 1:** Listen, learn, and engage with clients or potential clients to understand their realities, and work collectively to determine outcomes.

Before developing a litigation strategy, it is important to locate the role of litigation within its social and political context. Alongside education, advocacy, protest, law reform, research, and policy development, litigation is one of a plethora of strategies to drive positive change. It is often best achieved in combination with other strategies, or as a complement to other strategies – whether they are executed by your own organisation or by partners. It can be both reactive and proactive. Effective strategic litigators are acutely aware of the social, political, and legal contexts within which they operate. This allows them to develop and propose effective remedies.<sup>1</sup> These remedies, when appropriately crafted and reasoned, can enable positive change. Effective strategic litigators are also aware of the bounds of positive change that one case or a series of cases can achieve in the absence of other strategies.

<sup>1</sup> See Dailey, ‘Strategic Litigation Impacts: Insights from Global Experience’ (2018) Open Society Foundation at 17 and 11 (accessible at <https://www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf>); and Budlender, Marcus and Ferreira ‘Public Interest Litigation and Social Change in South Africa’ (2014) Atlantic Philanthropies at 119 (accessible at <http://www.atlanticphilanthropies.org/app/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf>).



**Guideline 2:** The intended outcome, inclusive of your client's or potential client's outcomes, must always be the point of departure, and its achievement is the primary goal.

Activism – whether through strategic litigation or otherwise – does not occur in a vacuum and should always be assessed in light of its intended outcomes and potential unintended consequences. Effective strategic litigation has positive social, political, and legal benefits both in the short- and long-term. It avoids negative or regressive jurisprudence and should not be initiated for any reason other than the promotion of positive change. In other words, it should only be initiated when ripe.<sup>2</sup> In some instances, organisations are funded to engage in strategic litigation, and funding obligations can compel litigators to act more quickly than a case warrants. This can lead to mistakes and should be avoided.

**Guideline 3:** Context – social, political, economic, and legal—should inform decisions on whether, when, and how to use litigation and advocacy in support of change.

In determining the potential outcomes of a case, it is useful to ask:

1. What are we trying to achieve and why?
2. What tools and strategies do we have at our disposal?
3. What could litigation achieve that might be useful in supporting or contributing to the positive change we seek?
4. How can litigation complement other strategies?
5. Is it the right moment to pursue litigation?
6. Is there a time that a case is most likely to succeed, or have the most impact?
7. Will the litigation assist or impede other ongoing or potential strategies?
8. What are the potential unintended consequences of litigation?
9. What will the actual outcome be if we are successful?
10. If we are unsuccessful, does this case have the potential to set regressive or bad jurisprudence?

<sup>2</sup>The term “ripe” or “ripeness” is colloquially used to refer to a case that is ready to proceed.



## Expert tips: Articulate what you are setting out to achieve and identify how litigation will support it

Ben Batros and Tessa Khan, in the context of climate litigation, explain that it is important to identify the role your case will play in the larger process. This, they state, requires that—

“litigators articulate what they seek to achieve and how litigating this case will contribute to the ultimate goal. Assessing the role that each case will play requires work, but it can open up creative possibilities. It frees advocates to use a case to achieve a variety of impacts that support a strategy for change, rather than making every case a ‘solution’ to the problem. The most important contribution might not be a win in the courtroom — it might be obtaining information through discovery; forcing defendants to take a public position on the record; or getting specific factual or legal findings from the court.”<sup>3</sup>

## Success v impact: the nature of strategic litigation

The determination of outcomes is intrinsically linked to your understanding of your clients’ needs and expectations as well as the categorisation of success and impact. You cannot assess the impact of your case — whether it was effective in strategic terms — unless you know and set out in advance what your client wants, what you are collectively trying to achieve through your case and how that can be used to advance the wider strategic objectives. This is what some refer to as a “theory-of-change” framework. A theory-of-change framework of measurable outcomes can be used to reflect on the questions above. It causes you to question which of the diverse factors that influence change are being addressed and whether your values and objectives are being retained in the process. It equally encourages you to reflect on whether the realisation of human rights remains at the forefront of your strategies. Without a theory of change — without clarity about what the litigation and advocacy hope to achieve and what strategies you will pursue to get there — it is difficult to assess success and impact.<sup>4</sup>

Importantly, success and impact in litigation should not be conflated. Success can be understood in terms of whether the case is won. The impact can be understood as the extent to which a case helps achieve the ultimate strategic goals set out by you and your clients at the start. Understanding these differences requires a brief discussion on the distinction between litigation and strategic litigation, both of which may have strategic outcomes:

<sup>3</sup> Batros and Khan, ‘Thinking strategically about climate litigation’ (2020) Open Global Rights (accessible at <https://www.openglobalrights.org/thinking-strategically-about-climate-litigation/>).

<sup>4</sup> Klugman, ‘Effective social justice advocacy: a theory-of-change framework for assessing progress’ (2011) 19 *Reproductive Health Matters* at 148 (accessible at <https://www.tandfonline.com/doi/pdf/10.1016/S0968-8080%2811%2938582-5?needAccess=true>).



1. **Litigation** generally proceeds to remedy a wrong or to settle a dispute. At its core are the interests of the parties and the settlement of the dispute. It may be that during the litigation process, strategic considerations are introduced, and a broader public interest outcome is achieved. But this is ancillary to the primary aim.
2. **Strategic litigation** generally proceeds to remedy a wrong or settle a dispute and seeks to achieve a broader strategic aim, such as setting precedent, aiding a law reform process, bringing a rights issue to the fore, or transforming the opinion of authorities, the media, and the public. Therefore, settlement of the dispute and a strategic or public interest outcome are both primary aims of the litigation.

### Guideline 4: Do not conflate success and impact. The effective strategic litigator may seek to achieve both in a litigation strategy.

While being successful and impactful is often the ideal to strive for, it is important to recognise that it is not always possible. Sometimes you may succeed and get a judgment in your favour, but this may have limited impact: the remedy may fall short of achieving positive change or implementation may be untenable. By the same token, you can lose a case (not getting the judgment you want) but still have a substantial impact: it may result in the reframing of narratives, gaining access to new information, highlighting an injustice, or promoting public pressure on authorities.<sup>5</sup> It may also be the case that a “lost” judgment lays the foundation for subsequent litigation or advocacy. Therefore, when considering the success and impact you are striving for, think about the outcomes holistically, and in the longer term. Moreover, and of critical import, your client’s instructions and expectations must inform your conceptualisation of success and impact.

<sup>5</sup> Batros and Khan, above n 3.





## Case study: Creating a space for those directly affected

The Electronic Freedom Foundation (EFF) is involved in a lawsuit challenging the US Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) on grounds that it silences online speech by muzzling internet users and forcing online platforms to censor their users. It punishes certain types of speech, including expressing certain viewpoints that advocate for the decriminalisation of sex work.

The practical consequences of FOSTA are that sex workers are removed from online spaces. As the Act prevents online communication between sex workers and their clients, it drives a lot of sex workers back onto the streets. They lose the ability to screen clients beforehand and to maintain their anonymity. The Act also impacts their ability to make sure they get paid. Consequently, the small safety benefit of FOSTA ultimately creates a huge safety deficit.

While the legal arguments are seeking to achieve a particular outcome in challenging FOSTA, this case has already led to other important outcomes. It has created a space for those directly affected by the law. It provides sex workers with a forum that would not have otherwise been accessible to them and where they can talk about how the law has affected them. The lawsuit has also become an opportunity for those who have been harmed by the law to talk about these harms, share their stories under oath, submit evidence, and reach an audience that would not have otherwise been reached.

## Setting out what you are trying to achieve

In consultation with your clients, develop your understandings early on about what you are trying to achieve, how litigation may contribute to that, and how you will use different elements of a case to advance your goals.

**Guideline 5:** Consider how you may want to use your case, what you are trying to achieve through your case, and when to use different moments within a case for maximum impact.

There are many different ways to do this. Drawing on César Rodríguez-Garavito's typology on the effects of judicial decisions can be a useful way to map out your outcomes in terms of success and impact.<sup>6</sup> Below are some examples:

<sup>6</sup>Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 Texas Law Review (accessible at <https://www.corteidh.or.cr/tablas/r27171.pdf>).



	DIRECT	INDIRECT
MATERIAL	Setting a precedent that has a positive impact or facilitating a law reform process.	Forming coalitions of activists to influence the issue under consideration.
SYMBOLIC	Defining and perceiving the problem as a rights violation.	Transforming public opinion about the problem's urgency and gravity.

Mapping your outcome in terms of direct and indirect and material and symbolic goals can help delineate between success and impact and can help frame the various outcomes you hope to achieve.

In addition, you may want to consider some of the following broad outcomes in defining your strategic objectives, how to achieve these objectives, and knowing when to use key moments within a case for maximum impact:

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**Accessing information:** Choosing to litigate may allow you to gain access to pertinent information. Discovery processes or forcing defendants to take a public position under oath are examples of this.

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**Collecting facts and evidence:** Litigation equally requires the gathering and collection of facts and evidence. Unearthing evidence, documenting violations, and engaging with affected individuals or communities is another way in which a case can be used to support wider objectives. For example, in the context of strategic litigation for indigenous peoples' land rights, mapping, documenting, and recalling historical evidence was found to be important to the communities involved and was seen as an empowering element of the litigation. In some instances, this led to the strengthening of the cultural pride of the communities.<sup>7</sup>

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**Building movements:** In addition, litigation can play an important role in bringing people together around a common goal or objective. Litigation can also be a vehicle for movement building or form part of the various cycles of movement building.

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<sup>7</sup> Dailey, 'Strategic Litigation Impacts: Indigenous Peoples' Land Rights' (2017) Open Society Justice Foundation at 60 (accessible at [https://www.escr-net.org/sites/default/files/osji-strategic\\_litigation\\_impacts-lands\\_rights-04-10-20172.pdf](https://www.escr-net.org/sites/default/files/osji-strategic_litigation_impacts-lands_rights-04-10-20172.pdf)).



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**Distilling issues:**

Litigation requires issues to be distilled and often turns a dispute into a public contest that forces all sides to sharpen their arguments.

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**Setting precedent:**

Strategic litigation may assist with establishing jurisprudence that has a positive impact in both the short- and long-term. This can ensure that your client and a broader community are the beneficiaries of the case.

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**Multiple cases:**

Strategic litigation is seldom a once-off case. Sometimes it is worthwhile trying more than once, particularly when living instrument litigation, which is further detailed below, is an option. Sometimes litigation will only be effective if litigated on multiple occasions based on different factual matrices but the same legal question. Litigation may also be sequential or incremental.<sup>8</sup> There can be strategic value in litigating in multiple courts or through parallel proceedings on the same factual matrix, for example pursuing both civil and criminal claims. Multiple case litigation could also be achieved through multi-jurisdictional or trans-national litigation, where the same issue is raised in multiple countries. In this instance, you may identify which country is most likely to give a favourable judgment and litigate in that country first, then use that judgment to support your litigation in the next country. Alternatively, you pursue the litigation simultaneously on multiple fronts and raise widespread awareness about the issues.

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<sup>8</sup>The advancement of LGBTQI+ rights in many jurisdictions relied on incremental litigation alongside other advocacy and policy strategies. See America Civil Liberties Union, 'Stonewall at 50. ACLU at 100. A legacy of Fighting for Justice and Equality' (accessible at: <https://www.aclu.org/issues/lgbtq-rights/stonewall-50-aclu-100-legacy-fighting-justice-and-equality?redirect=issues/lgbt-rights/stonewall-50-aclu-100-legacy-fighting-justice-and-equality>); ILGA Europe 'Cases before the European Court of Human Rights (accessible at <https://www.ilga-europe.org/what-we-do/our-strategic-litigation-work/cases>); and Jjuuko, 'Strategic Litigation and the struggle for lesbian, gay and bisexual equality in Africa' (2020) at 186 - 189 (accessible at [https://www.lawtransform.no/wp-content/uploads/2020/10/Strategic\\_litigation\\_wCover-j6uuzr-1.pdf](https://www.lawtransform.no/wp-content/uploads/2020/10/Strategic_litigation_wCover-j6uuzr-1.pdf)).



## Case study: Creating a fertile environment for sequential litigation

In 2019, the Botswana High Court became the second court in Africa to decriminalise same-sex sexual conduct among consenting adults. This notable victory was not as a result of one impactful case, but rather a series of incremental cases that created a “fertile judicial environment” where the decriminalisation of same-sex sexual conduct could take place. Members of the LGBTQI+ community and their lawyers elected to slowly chip away, starting with less controversial cases — for example litigating for the registration of a non-profit organisation focusing on advocacy and law reform around sexual orientation and gender identity issues. Their broader strategy involved creating a body of jurisprudence in which the rights of the LGBTQI+ community were recognised and protected to varying degrees, building up to jurisprudence that acknowledges the freedoms and inherent dignity of LGBTQI+ persons.<sup>9</sup>

## Case study: Living instrument litigation

Owing to the rapidly evolving nature of digital rights, it may be strategic to rely on repeat litigation or living instrument litigation.<sup>10</sup> This form of multiple case litigation creates scope for issues to be raised in light of present-day conditions and may lead to a change in judicial reasoning that is favourable to the advancement of digital rights and freedoms.

Recent reflections on the European Convention on Human Rights (European Convention) as a living document highlighted cases relating to gender equality, domestic violence, gender identity, as well as cases relating to environmental rights, pollution, and participation to illustrate the living nature of the Convention.<sup>11</sup>

<sup>9</sup> Esterhuizen, ‘Incremental gains and public activism pave way the way for decriminalisation of same-sex sexual conduct in Botswana’ (2019) (accessible at <https://www.southernafricalitigationcentre.org/2019/06/13/salc-in-the-news-incremental-gains-and-public-activism-pave-the-way-for-decriminalisation-of-same-sex-sexual-conduct-in-botswana/>). A similar incremental approach, albeit through activism and law reform, was observed in Angola where same-sex relationships were recently decriminalised, see ALT Advisory, ‘Angola’ Penal Code decriminalising same-sex relationships comes into force’ (2021) (accessible at <https://altadvisory.africa/2021/02/19/angola-penal-code-decriminalising-same-sex-relationships-comes-into-force/>).

<sup>10</sup> The European Court of Human Rights has, on several occasions, confirmed that the European Convention on Human Rights is a “living instrument”, which must be interpreted in light of present-day conditions, changes in traditional understandings and social attitudes. See European Court of Human Rights ‘Judicial Seminar: The Convention as a Living Instrument at 70’ (2020) European Court of Human Rights (accessible at [https://echr.coe.int/Documents/Seminar\\_background\\_paper\\_2020\\_ENG.pdf](https://echr.coe.int/Documents/Seminar_background_paper_2020_ENG.pdf)).

<sup>11</sup> Id.



These reflections, found in a background paper for the 2020 Judicial Seminar on the Convention as a Living Instrument, notably, made substantial reference to internet rights and freedoms, the protection of personal information, and surveillance, noting that “[t]he progresses made in technology and science has been unprecedented over the life of the Convention. Significant advances continue to occur and with increasing frequency. In this area, the Court is often asked to take into consideration technically complex developments, such as in cases relating to bulk interception of data”. Below is a brief breakdown of some of the cases referenced in the background paper that demonstrates the living nature of the Convention:<sup>12</sup>

Freedom of expression and access to information on the internet	Retention of Personal Data and the Right to Privacy
<p>– <b>Ahmet Yildirim v Turkey:</b> The Court overturned a Turkish court’s interim judgment ordering the wholesale blocking of online content, noting that the internet has now become one of the major tools for exercising the right to freedom of expression and information.</p> <p>– <b>Cengiz and Others v Turkey:</b> The Court found that the wholesale blocking of access to YouTube was a violation of Article 10 of the European Convention, and found that there is no legal basis for domestic courts to impose a blanket blocking order on access to the internet</p> <p>– <b>Kalda v Estonia:</b> In a matter concerning internet access for prisoners, the Court found that limiting an incarcerated person’s access to legal information had breached their right to receive information.</p> <p>– <b>Mehmet Resit Arslan and Orhan Bingöl v Turkey:</b> Here the Court considered access to the internet and the right to education for persons within the criminal justice system. The Court found the domestic courts had failed to strike a fair balance between the right to education and the imperatives of public order.</p>	<p>– <b>Rotaru v Romania:</b> In a matter relating to information collected and held by a state intelligence agency, the Court found that holding and using private information about the applicant was not in accordance with the law. Further, there was no provision of domestic law defining the procedure to be followed for collecting and storing data making it impossible for the applicant to challenge the data storage or to refute the truth of the information.</p> <p>– <b>PG and JH v the United Kingdom:</b> The Court found that the use of a covert listening device in the absence of a legal framework regulating the use of such devices violated the right to privacy.</p> <p>– <b>S. and Marper v the United Kingdom:</b> This case involved the indefinite retention of the applicants’ fingerprints, cell samples, and DNA profiles after criminal proceedings against them had been terminated. The Court found this to be a disproportionate interference with the applicants’ right to privacy, noting further the need to strike an appropriate balance between potential benefits of new technologies against the right to privacy.</p>

<sup>12</sup> Id at 20-26.



Monitoring and interception of communication	Mass surveillance
<p>– <b>Roman Zakharov v Russia:</b> This case centred on a system of secret interception of mobile telephone communications in Russia. The Court held that there had been a violation of the right to privacy finding that the Russian legal provisions governing interception of communications did not provide for adequate and effective guarantees against arbitrariness and the risk of abuse.</p>	<p>– <b>Szabó and Vissy v Hungary:</b> Concerns were raised that the Hungarian legal framework on secret surveillance for national security purposes was prone to abuse. While the Court accepted that present-day threats to national safety may lead the government to resort to cutting-edge technologies, including massive monitoring of communications, in pre-empting impending incidents, there need to be appropriate safeguards.</p>

**Law reform:**

Often strategic litigation aims to develop a particular area of law. For example, it may assist in identifying a legal lacuna, which then requires the development of legislation. It is important to note that law reform operates across a spectrum, and may be dependent on the legal system, the level of activism from the courts, the willingness of courts or lawmakers to create or recognise new rights, and the social and political context of the jurisdiction.

**Public education and awareness:**

You may want to use your case as a means to advance public education and awareness on a particular issue. It may be that, in some circumstances, the fact that litigation is proceeding against an identified target based on a particular question is more powerful than the eventual outcome or finding. For example, [recent litigation in South Africa](#) exposed the over-reach and surveillance capabilities of South Africa’s state security agency. In Uganda, the litigation around the imposition of social media taxes led to an increased public awareness around the use of Virtual Private Networks (VPNs). The [Joint Council for the Welfare of Immigrants v UK Secretary of State for the Home Department](#) case about algorithms and visa applications highlighted the potential harm and discriminatory impacts of algorithms used to influence decisions about immigration status – highlighting how certain digital rights infringements disproportionately affect certain communities.



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**Test case litigation, class actions, and other forms of collective redress:**

Increasingly, strategic litigators are using “test” cases to determine broader prospects of success in strategic litigation or class action. In these cases, a sample population of clients litigates on a particular legal question and uses the case to test jurisdiction, legal arguments, remedies, and, most importantly, the position that will be adopted by the opposition. Test cases are generally easier to manage than class action litigation due to their smaller size and, if effective, they pave the way for broader and often more impactful class action litigation.

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**Guideline 6:** The objective you are setting out to achieve may be direct or indirect, but it should never be purely academic in nature. It should lead to positive and actual change.

### **Expert tips: Tools and targets**

It is important to distinguish between law as a tool for change and law as a target for change. Public awareness, information gathering, and test case litigation fall within the former. Setting precedent and law reform fall within the latter.



## Remedies: choosing the most effective path

Identifying an effective remedy is key to strategic litigation. Any effective litigator should consider the remedies that they are seeking in the early stages of strategic litigation, which can involve asking:

1. What is the relief you seek, and for whom?
2. What fora can grant relief in this case?
  - Which fora have jurisdiction over the case?
  - What are their formal powers?
  - What is the culture or practice of each forum with regard to remedies?
3. How will you craft the remedy to maximise your chances of having your matter heard and achieving the strategic goals?
4. How likely are you to be granted the particular remedies you seek?
5. How comprehensive or impactful will it be?
6. Are there any concerns with the remedy you are proposing?
  - Are their considerations around retrospectivity?
  - Does the remedy encroach on separation of powers?
  - Does the remedy impact third parties, if so, how?
7. How easy will it be to implement the remedy?
  - Is there anything you can do in defining the remedy to assist in implementation such as clearly defining benchmarks, deadlines, and responsibility?

For example, do we want an order that (i) expressly prohibits internet shutdowns in general; or (ii) prohibits a telecommunications company in a particular jurisdiction from disconnecting telecommunications services to its clients based on an unlawful disconnection instruction from the state?

Assuming that your intended outcome is to prevent an internet shutdown within a particular jurisdiction in which the telecommunications company operates, both orders would have the intended effect. However, it may be that the second order is easier to prove, and a court may be more willing to grant it. While both orders ensure the intended outcome, the second may be more gently crafted and more palatable to a judge. Additionally, by narrowing the scope of the relief that you seek, you are equally narrowing the factual matrix that needs to be presented and the defence that a respondent may raise. The second order may allow an “out” that the government or telecommunications company could exploit. For example, the government may come back in the future and argue that a current disconnection instruction is not unlawful.

To guard against ambiguities or gaps that your opponent may take advantage of in the future, you may want to persuade a judge that the judgment expressly defines the





conditions that must be met for disconnection instructions to be lawful. Accordingly, remedies should be succinctly drafted in simple plain language and should appear in the court papers. Where expert or technical evidence is introduced, it should, if possible, be drafted with the layperson in mind and it should be clearly explained.

Remedies can be compensatory, preventive, or restitutionary. Common remedies include a declaration of rights relating to the violating conduct, compensation, structural interdicts or supervisory orders, or interdictory relief. The types of remedies that you can request will vary with the nature of the claim and the attitude of the court – they may resolve a dispute or be prescriptive or deferential. In either case, you need a plan well before judgment on what you will do on the day of hand-down and going forward. For example, if you are likely to get a finding of a violation, it may be useful to have a detailed plan, before the judgment is delivered, on what is required to fix the violation.

Law reform is another common remedy. As noted above, developing the law operates across a spectrum. You may want the court to identify a lacuna in the law for the legislature to remedy or fill, or you may seek judicial interpretation to expand or narrow the scope of existing legislative provisions. If law reform is the relief you seek, there are a few considerations to bear in mind:

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### **Exposing fundamental deficiencies:**

Your remedy being to highlight how the failures of a particular provision of law are causing rights violations. In [Szabó and Vissy v Hungary](#) the European Court of Human Rights found Hungary's anti-terrorism legislation had insufficient safeguards which resulted in a violation of the right to privacy. In [Bridges v South Wales Police](#) the UK Court of Appeal found the South Wales Police's use of facial recognition technology breached privacy rights, data protection laws, and equality laws. The Court found that there were "fundamental deficiencies" in the legal framework that led to the rights violations. In this matter, [Liberty](#) sought to highlight the legal failures that allow technology to breach privacy and data protection rights and discriminate against people of colour. This case – the world's first legal challenge to the police's use of facial recognition technology – is an example of litigation being used to expose a legislative defect, which prompted the need for law reform.

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### **It's not all semantics:**

You can ask the court to declare conduct or a law inconsistent with the constitution or an international instrument and thereafter provide the legislature with sufficient time to remedy the defect. Sometimes the simple redrafting or tweaking of a legal provision can lead to material outcomes. You may want to provide some guidance on the wording of a provision in an act. For example, you could argue for words or entire sections to be removed, or you may want certain words or phrases to be read into a provision. While it will ultimately rest on the Court to decide on whether to rely on the proposed phrasing, giving clear guidance can assist in getting the order you want.

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### **Opening the door for participation:**

A court order is often a vehicle for further engagement. Seeking an order that requires a law reform process can be a strategic way of encouraging public participation, opening the door for a variety of interested and affected persons to contribute to the development of the law.

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### **Recognising new rights:**

Depending on the judicial context you are operating in, you may want to encourage or enable judicial activism. Here you may consider asking a court to recognise a new right or protection that had not been explicitly identified before but is necessary to enjoy the benefit of, or to realise, existing rights and protections in light of changed circumstances, such as technological advancements. The German Constitutional Court has a long history of constructing nuances of the right to privacy and identifying individual privacy rights.<sup>13</sup> Schwartz explains that these are “the right to a private sphere in which one is to be free to shape one’s life, a right to one’s spoken word, a right of informational self-determination, and, more recently, a right of confidentiality and integrity in information systems”.<sup>14</sup> As technology continues to intersect with the enjoyment of various rights, there is likely to be scope to develop rights or create new rights. When crafting a remedy, it may be worth asking the court to recognise a right that was not recognised before but that could be derived from other rights.

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<sup>13</sup> Schwartz, ‘Systematic government access to private-sector data in Germany’ (2012) *International Data Privacy Law* at 4 (accessible at <https://academic.oup.com/idpl/article/2/4/289/676955>).

<sup>14</sup> *Id.*



**Recognising existing rights in new contexts:**

The digital environment and the increased reliance on digital technologies has led to traditional ideas being applied in contemporary settings. The same can be true for apply existing rights to digital contexts. The recent judgment of the UK Supreme Court on Uber drivers' labour rights is a good example of this. In [Uber BS v Aslam](#) the Supreme Court remarked that the "[n]ew ways of working organised through digital platforms pose pressing questions about the employment status of the people who do the work involved". Through this case, labour rights were applied to a digital context.

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**Creating new remedies:**

In addition to recognising the nuances of a right and recognising new rights, protecting and promoting digital rights may also require developing new remedies which are directly applicable to the online world. This may require litigators to persuade courts, particularly appellate courts, to fashion contemporary remedies which enable digital rights litigation. Examples may include an order authorising the service of legal processes through a social media platform, where an anonymous user is an implicated party and their service details are unknown, or an order attaching assets to found jurisdiction against an international company who may have a physical presence in a jurisdiction.

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## Case study: Digital remedies

It is not unsurprising that digital wrongs may lead to digital remedies. This burgeoning area of remedial options is both exciting and daunting. Maayan Perel unpacked the complexities of compelling a specified digital outcome through her reflections of recent examples of digital remedies:<sup>15</sup>

1. **TickBox**, a distributor of a small device that allows users to perform computer functions such as browsing and streaming on televisions sets or other monitors, was embroiled in a legal battle for providing access to unauthorised streaming versions of copyrighted works. In this case, the California Central District Court opted for a digital remedy and ordered TickBox to “perform a software update that removes all preloaded applications from its users’ devices.” Perel explained this as “an open-ended injunction which sets a specific, prospective outcome to be achieved — that TickBox’s launcher software will not include or provide applications that link to copyright-infringing websites — but without imposing limitations on the digital means for achieving this outcome.”<sup>16</sup>
1. The American Chemical Society (ACS) sued **Sci-Hub**, a prominent website that makes research papers that are normally behind paywalls freely accessible, for copyright and trademark infringements. ACS alleged that Sci-Hub created ‘spoofed’ websites that resembled the ACS website. The court ordered Sci-Hub to stop distributing ACS content and imitating its trademark. Furthermore, the court ruled that “any person or entity in privity with Sci-Hub and with notice of the injunction, including any Internet search engines, web hosting and Internet service providers, domain name registrars, and domain name registries, cease facilitating access to any or all domain names and websites through which Sci-Hub engages in unlawful access to, use, reproduction, and distribution of the ACS’s trademarks or copyrighted works”. Perel noted that the “broad, open-ended injunction is most exceptional in the landscape of remedies law”.<sup>17</sup> She explained further that “opponents of this injunction argued that requiring third parties to censor a pirate website may over-burden innocent actors, who merely provide basic services without encouraging illegal activity”.

Perel concludes with three notable observations of digital remedies: First, digital remedies have a robust impact on the rights and interests of numerous stakeholders. Second, the implementation details of digital remedies are dynamic in their implications, costs, and capabilities of adjusting to the changing digital landscape. And third, the implementation details are embedded in privately developed, non-transparent codes.

Accordingly, and in line with the questions and guidelines above, the relief sought — and how it is crafted — is of paramount importance in the strategic litigation of digital rights.

<sup>15</sup> Perel ‘Digital Remedies’ Berkely Technology Law Journal (2020) 35 (accessible at: [https://btlj.org/data/articles2020/35\\_1/01\\_Perel\\_WEB.pdf](https://btlj.org/data/articles2020/35_1/01_Perel_WEB.pdf)).

<sup>16</sup> Id at 14.

<sup>17</sup> Id 21-22.



You may also need to reflect on **who** the relief is for and what this may mean. Is your relief tied to the individual, group, community, or organisation you represent? Or do you want your relief to extend to similarly affected persons or groups who may not have participated in the litigation? These questions must be asked at the outset and are intrinsically linked to what we are trying to achieve and why.

### Case study: collective redress

When considering who the relief is for it is also important to reflect on developing processes or options for redress, who can ask for redress, what relief may be obtained, and who the relief will impact. For example, the European Union (EU) and some EU jurisdictions have recently introduced means of collective redress. In Germany, recognised consumer associations can file so-called “[Model Declaratory Actions](#)” on behalf of consumers while the General Data Protection Regulation (GDPR) provides for [representative action](#) by non-profit bodies in cases of data protection breaches. Going forward, these new types of collective redress may open up new forms of collaboration between digital rights organisations and individuals, and may allow you to craft your remedy to envisage broader redress.

**Guideline 7:** The relief sought – and how it is crafted – can impact the order of the court. Remedies should therefore be clear, concise, and drafted in the court papers using plain language.

While there are common forms of relief, often crafted in particular ways, the need for specificity in crafting remedies should not limit creativity. Strategic litigators – particularly in the digital rights space – are often path-beaters engaging in novel legal disputes. As a result, they often need to be creative in their approaches and in the crafting of their remedies. Equally, strategic litigators should be cognisant that judges and opposing parties may not have dealt with similar matters in the past.

**Guideline 8:** Crafting remedies is an art. It requires precision, creativity, and a propensity to consider both short- and long-term outcomes.



## Case study: Public acknowledgement

In January 2021, an Italian court found popular food delivery platform Deliveroo's rider-ranking algorithm was discriminatory. The ruling found that the algorithm, used to assess delivery rider's reliability and participation, was in violation of labour laws for failing to recognise the various reasons a rider may not be working — for example, if the rider was ill, chose not to work, or was exercising lawful and legitimate abstention from work. This was a notable victory for labour rights in the delivery and e-commerce industry. However, the inclusion of an additional remedy is of interest. The court ordered Deliveroo to publish an extract of the judgment on their website under "frequently asked questions", and to pay for the publication of an extract of the decision in a national newspaper. While this may not appear to be a groundbreaking remedy, it is an important remedy that advances access to information and ensures accountability.

## Case study: Damages for good

A Twitter account with nearly 50 000 followers trended in South Africa for several months in 2020 for its race-baiting, inflammatory, and offensive tweets. Following a complaint by a member of the public, the South African Human Rights Commission (SAHRC) investigated the Twitter account, which at first glance appeared to be a white woman who was making disparaging, racist, and harassing comments towards black women in particular. It was later revealed that the account was run by a man generating an income from making these disparaging and inflammatory comments online through companies he owned and to which social media users were directed. The SAHRC has since taken the matter to the Equality Court, arguing that the tweets include "serious, demeaning and humiliating comments against women and black women in particular". Notably, in terms of remedy, the SAHRC is seeking an apology and the payment of €1100 to a non-profit organisation working with victims of gender-based violence. The matter is ongoing with hearings expected to continue in August 2021.

This is a useful illustration that compensation for wrongdoing does not always have to be linear — for example between the litigating parties — it can sometimes take a different direction. Crafting remedies like this should tie back to your "big picture" questions of what you are trying to achieve.



## Phase 2: Thinking strategically about how we litigate: the practical considerations

### Funding: how to stay the course

Litigation can be expensive, and the timeframes are often uncertain. Funding strategic litigation and assessing the cost – both in terms of capital and human resources – is, therefore, a prerequisite in the determination of any litigation strategy. As a point of departure, the nature of the case may assist with assessing costs: does it require a large legal team and is it expected to take time and go on appeal? Thereafter, what fee do the lawyers charge, are they prepared to work at a reduced rate, or *pro-bono*? Finally, what are the anticipated disbursements such as printing court documents, experts' fees, and travel?

**Guideline 9:** Funding strategic litigation and assessing the cost – both in terms of capital and human resources – is a prerequisite in the determination of any litigation strategy.

Funding strategic litigation is often not as difficult as it is made out to be. Outside of traditional funding routes such as [applying to foundations](#) or charitable organisations, contemporary models such as [crowdfunding](#) are becoming increasingly popular.

### Capacity: structuring a “dream team”

Litigation takes time and resources but, often, strategic litigators are not hard to find. Strategic litigation has two benefits for strategic litigators: (1) it allows litigators to use the law as an instrument for justice and positive change; and (2) it assists litigators to establish themselves as experts within a field. Often, strategic litigators may be willing to work on a case *pro-bono* or at a reduced rate, alongside paying work, if the case has merit and there is a possibility of strategic impact. It may also help if they form part of a broader team, where they can delegate some of the work. In structuring a “dream team”, seek out lawyers who are already working in the areas relevant to your case and ask for their assistance, or a referral. Importantly, structure and consult with your legal team as soon as possible, they may have experience not only in strategic litigation but broader advocacy efforts as well.



**Guideline 10:** Structuring a legal team, which allows for the delegation of work, may enable strategic litigators to work on a case pro-bono or at a reduced fee.

### Experts tip: Working with pro-bono lawyers

Many law firms provide free (*pro-bono*) assistance to public interest organisations. This can be a useful way to mobilise additional legal resources and expertise to support your case. However, while it may not cost money, it does require planning and investment of time – to define the tasks and timelines, provide the necessary background information, respond to requests for clarification, provide feedback on drafts, meet with the lawyers, and keep to schedule.

*Pro-bono* lawyers can assist in a range of ways, from early legal research when scoping potential cases, to targeted support for a case you are developing, to litigating a case on your behalf. It is crucial that you are clear at the outset – with yourself, and with the *pro-bono* lawyers – what assistance you are seeking and what role you see the *pro-bono* lawyers playing in your case. Support options can include:

1. obtaining and analysing evidence, whether access to information requests, searches of government records, obtaining corporate records, or interviewing witnesses;
2. conducting legal research on comparative law, on the interpretation of current or proposed legislation or regulations;
3. identifying potential legal claims, or advising on the strengths and weaknesses of legal claims that you have identified; or
4. assisting in the litigation itself by preparing court documents, advising on litigation strategy, or even acting as counsel.

Once you know what types of support you need, there are various ways to seek out *pro-bono* assistance. Many large firms have a *pro-bono* coordinator, who you can contact directly. Sometimes it can be easier to seek the assistance of an organisation that coordinates *pro-bono* assistance from multiple firms, especially for early-stage research. The [International Lawyers Project \(ILP\)](#), [International Senior Lawyers Project \(ISLP\)](#), and [PILNet](#) are examples with international reach. Specific countries, states, cities, and even bar associations may have their own *pro-bono* or public interest committees and organisations.

Regardless of whether you are contacting directly or through a coordinator, any firm will typically want to know about your organisation, its mission, what sort of assistance you are seeking, how it will be used, and the other parties that are involved in potential litigation. All firms and lawyers will need to run a check for conflicts of interest, and this can be a major challenge in getting large firms to assist in cases against major corporations who may be a client of the firms in other matters.





If you plan on engaging pro-bono more closely in a specific case, it is worth investing time in developing a close relationship with the lawyers and ensuring that your visions of how to use the law are aligned. It is beneficial to find lawyers that match your approach to legal rigour and creativity. It is also important to discuss up-front how decisions about legal strategy, timing, and resources are made.

For digital rights litigation, your “dream team” is likely to consist of more than just lawyers. Embedding technologists and community scientists into your team is often essential. There is a significant asymmetry of expertise on the technical side between the entities that are building and developing technical systems and those who are trying to rein them in. While this asymmetry may never be fully bridged, including even one or two technical experts into your team can be a force multiplier, both in terms of shaping more sophisticated responses to issues you are already working on, and of identifying issues that you may not even view as a human rights issue without having technologists on your team. For example, [Privacy International](#) has technologists as part of its team and EFF has technology fellows. Funders have also recognised this and are investing in public interest technology, working to shift narratives in computer science courses, and are encouraging organisations to create internships and opportunities for members of the technical community.<sup>18</sup>

**Guideline 11:** Multidisciplinary teams can be force multipliers. Consider including technical experts, researchers, economists, and activists in your team.

<sup>18</sup> See for example, the [Media Democracy Fund](#) which manages two different programs that match technologists with social justice organisations: the Technology Exchange Matching Fund and the PhDX Fellowship Program. The [Ford Foundation](#) is working with a community of partners to develop a path for people to use their technology skills to change the world for the better: the professional field of public interest technology. The [MacArthur Foundation](#) provides grants for developing the capacity of civil society to ensure that the social implications of artificial intelligence are addressed by advancing efforts that connect research, policy, and practice. The [Public Interest Technology University Network](#) is a partnership that fosters collaboration between universities and colleges committed to building the nascent field of public interest technology and growing a new generation of civic-minded technologists.



## Managing the risks associated with litigation

Strategic litigation may have associated risks. In some jurisdictions, these risks may be severe. Understanding risk – whether it is physical, mental, reputational, financial, or legal – is important in ensuring the success and longevity of strategic litigation, and the health and wellbeing of the team and your clients.

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### Physical risks:

Strategic litigation can lead to real-world physical harm. Malicious actors, who may align with the opposition or may disagree with your cause, may seek to harm, or intimidate members of the team. In some instances, as has [recently occurred in Egypt](#), states may detain strategic litigators, outside of a particular case, to send a message and create a “chilling effect”. In the Egyptian example, the civil society response was swift and overwhelming which caused the release of the detained lawyers. Your clients may also become targets as a result of the litigation. Threats of physical harm can lead to a client withdrawing instructions and abandoning the case. As a result, pre-emptive measures should be taken, including interim orders to protect client safety. This should be discussed and debated at the onset of potential litigation. Resultantly, safety and wellbeing should be a priority.

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### Mental risks:

Strategic litigation can become emotionally charged and often requires long hours and late nights. If this is not effectively managed, it can lead to fatigue and stress. In the extreme, it can adversely affect mental health. Teams should ensure that they regularly check in with one another and with their clients, and where necessary, ensure that psychosocial support mechanisms are in place. These risks may also extend beyond the direct team and client to partners and family members. It is important to be mindful of the ripple effect of strategic litigation. There may also be times when litigators become too close or too invested in a case. This can take a toll on their mental health and may impact their decision making. It can be helpful to have team members provide support if this happens, to act as a sounding board and provide different perspectives.

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### Reputational risks:

In polarised political landscapes, strategic litigation may have reputational risks. An example of this in the digital rights space is strategic litigation to promote the right to privacy, which may be seen by some as an affront to national security and the enablement of terrorism. The remedy here is to ensure effective public education and awareness campaigns and appropriate messaging about the case. It may also be important to acknowledge that change is always contested and the criticism that you may receive in the short term, may not last into the medium- and longer-terms.

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### Financial risks:

Strategic litigation may also carry with it financial burdens. In the ordinary course, litigation is costly. Apart from assessing the general cost of litigation, two additional risks should be considered in your early planning:

- 1. Adverse costs:** The threat of an adverse costs award can indeed be unnerving and is a risk to consider at the outset. But the risks vary considerably between jurisdictions, and in many legal systems, there are options for managing the risk –such as cost capping measures from the court or relying on provisions that enable a litigant to bring a case in the public interest to enjoy protection or limits on liability for costs. This will likely differ across jurisdictions and may also differ depending on whether the case is against a public or private actor.
  - 2. SLAPP suits:** Regrettably, and increasingly, malicious actors are using strategic lawsuits against public participation (“SLAPP suits”) to silence and intimidate critics through potential damages awards. [ARTICLE 19](#) aptly explains SLAPP suits as a form of “legal harassment” that is “pursued by law firms on behalf of powerful individuals and organisations who seek to avoid public scrutiny, they aim to drain the target’s financial and psychological resources and chill critical voices to the detriment of public participation.” While this has commonly been seen in the context of environmental litigation against mining houses, it is not new to the digital arena with [cyberSLAPPS](#) being used to target internet speech. While the possibility of this financial risk should be considered in a litigation strategy, courts are increasingly recognising so-called “SLAPP defences”, which defeat these suits. However, at this stage, [no EU member state](#) has enacted targeted rules that specifically guard against SLAPP suits. It is hoped that this position will soon change – non-governmental organisations from across Europe have proposed a [model EU anti-SLAPP law](#) proposing a set of rules which, if in place, would make sure that in each EU country, SLAPP suits are dismissed at an early stage of proceedings.
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### Legal risk:

A regressive judgment or setting a bad precedent can be a major setback. It may set back other cases that are developing or law reform efforts, or it may direct such efforts in a problematic direction. A bad judgment can set a cause back by a generation – for example, the case of Bowers v Hardwick on American sodomy laws was a major setback for the gay rights movement, and was only overturned 17 years later, and still has a “ghostly afterlife”. It may also be deflating for the team, clients, and the movement, and disrupt the momentum that has been gained up to that point.

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### Cause versus client risk:

Strategic impact litigators are, by and large, well-intentioned. However, sometimes the eagerness for the collective or “greater cause” may not align with your clients wants, needs, and best interests. Derrick Bell observed this in the Southern school desegregation cases brought by the Legal Defence Fund (LDF).<sup>19</sup> The lawyers wanted to achieve broad legal impact, whereas the parents of the children affected by the system had different aspirations for substantive improvements to Black schools. This misalignment also meant that the lawyers were detached from the local political struggles of their clients resulting in a “cavalier” attitude towards extralegal risks.<sup>20</sup> This can be mitigated through effective, meaningful, and honest conversations with your client at the outset about the outcome, challenges, and limitations. You will also need to ensure that both you and your client have a clear understanding of each other’s interests and objectives and that you align on these aspects. If a misalignment occurs it may be useful to take a step back, reflect on the “big picture” questions, confirm your client’s instructions, and recalibrate if needs be. Regular communication is also key. This includes regular updates, regular check-ins, and regular conversations about your client’s realities, expectations, and understandings of the case and its implications. It is important that you appreciate the pressures and risks your client may face.

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<sup>19</sup> Bell, ‘Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation’ Yale Law Journal 85 (1976) (accessible at <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6361&context=yjlj>)

<sup>20</sup> Leachman ‘Fighting Chance: Conflicts over Risk in Social Change Litigation’ Draft presentation paper (accessible at [https://www.law.berkeley.edu/wp-content/uploads/2021/04/Leachman\\_Fighting\\_Chance\\_CSLS.pdf](https://www.law.berkeley.edu/wp-content/uploads/2021/04/Leachman_Fighting_Chance_CSLS.pdf)).



**Guideline 12:** Understanding risk – whether it is physical, mental, reputational, financial, or legal – is important in ensuring the success and longevity of strategic litigation, as well as the health and wellbeing of the legal team and your client.

### **Expert tips: The importance of temperature checks and re-calibration**

As a team, discuss the importance of checking in, assessing fatigue, reflecting on whether goals have changed, or if the needs or wants of the client have changed. Equally, consider the timing of these check-ins; should they be at the big moments (big court dates, big deliverables), or should they be in between the big moments? It is also worth assessing how frequent they should be.

## **Case management: Protecting privacy in the cloud**

Strategic litigation often takes a long time. Good case management and record-keeping systems are important for ensuring continuity in the event of teams changing, members of the team moving on, and new members joining. Beyond that, the importance of protecting the confidentiality and legal professional privilege cannot be gainsaid. File audits, and back-ups every quarter are a sensible practice. The development of systems for the retention of documents, as well as protocols for the management of sensitive information, are further useful practices that should be adopted and adhered to.

In addition to ordinary file management protocols working on a case collaboratively often requires extensive document sharing and communications. Cloud technologies can provide workable solutions to these challenges, but they are not without risk. Both state and private-sector actors increasingly use surveillance technologies as a tool, and strategic litigation teams may seek to protect their work by implementing security systems and using privacy-friendly technologies on a case-by-case basis depending on the nature of the potential threats they face. While strategic litigators should consult digital security experts before implementing a new system, the following software may be useful to consider and test:



Communications / messaging / collaboration	<a href="#">Signal</a> , <a href="#">Wire</a>
E-mail	<a href="#">Tutanota</a> , <a href="#">Proton</a>
File-sharing	<a href="#">Nextcloud</a> , <a href="#">Tresorit</a> , <a href="#">Box</a>
Videoconferencing	<a href="#">Jitsi Meet</a> , <a href="#">BigBlueButton</a>
Online anonymity and locational privacy applications	<a href="#">Guardian Project</a>
Case management	<a href="#">Uwazi</a> , <a href="#">LawFusion</a>

## Case study: The Nile Phish

The [Nile Phish](#) was a “phishing”<sup>21</sup> campaign orchestrated by malicious actors sympathetic to the Egyptian government from 2016-2017. It targeted Egyptian civil society organisations (CSOs), particularly those implicated in Case 173, a case which had been brought by the Egyptian Government against CSOs and which was referred to as an “unprecedented crackdown”. According to a report by Citizen Lab, “Nile Phish operators demonstrate[d] an intimate knowledge of Egyptian NGOs, and [were] able to roll out phishing attacks within hours of government actions, such as arrests.”

<sup>21</sup> “Phishing” occurs where a target or targets are contacted by email, telephone, or text message by someone posing as a legitimate institution to lure individuals into providing sensitive data such as personally identifiable information, banking and credit card details, and passwords.



## Phase 3: Navigating the various types of litigants

In the context of strategic litigation, the identity of litigants can take on a variety of forms.<sup>22</sup> Choosing a litigant can be a strategic decision, a practical one, or one directed by the standing requirements of a particular court. The various roles can also be distinguished between those driving the litigation – an individual litigant (“client”) or a CSO – and those supporting it, such as third-party interveners or *amicus curiae*. In digital rights litigation, the current trends appear to err on the side of organisations or networks as the litigants rather than affected individuals or communities. While this form of representative action is not inherently negative, it is worth reflecting on the development of this trend, whose interests the litigation is ultimately seeking to protect, and how organisations can ensure that they achieve the necessary client diversity. In this context, it is also important to navigate different strategies around inclusion and empowerment to enable affected persons or communities to participate in processes that impact their rights.

**Guideline 13:** Decisions around litigants often turn on what may work best in a particular context, and the procedural prescripts of a given jurisdiction.

### Reflecting on the various types of litigants

#### Individuals

An individual as the primary litigant can give a face to an issue and can embody, in concrete terms, the impact of the rights violation. In the context of digital rights, it is often important to get that message across – to highlight that the violation is not abstract but matters to human beings. The role of an individual can take many forms and support a matter in a variety of ways. One example is collecting and sharing stories about how a digital rights issue – such as an internet shutdown – directly impacted individuals. Individuals, such as [Edward Snowden](#) and [Julian Assange](#) may fulfil a different role in highlighting the severity of an issue. Or individuals, such as [Lohé Issa Konaté](#) and [Can Dündar](#) who are facing criminal charges, highlight unjust laws. There are also individuals like [Shreya Singhal](#), and [Gina Miller](#) who take it upon themselves to fight unjust policies.

<sup>22</sup> For purposes of this toolkit the term “litigant” is understood to include a claimant, applicant or plaintiff, or other terms used to describe the party bringing the matter before a court.



Bringing together individuals who are dealing with similar issues, and who may share strategic goals, may also assist in achieving positive change. This allows the strategic impact of the cases to be assessed: which issues to raise first; which elements to highlight in each issue; and whether they are more likely to be effective if pursued together to highlight the breadth of the problem, or sequentially to highlight specific aspects within each of them. Additionally, each case may be able to benefit from the information, evidence, and analysis conducted for and obtained through the others.

### Case study: Bringing individuals together

The Hungarian Civil Liberties Union (HCLU) is supporting three clients who have reason to believe they were subjected to unlawful surveillance. The three individuals – a human rights activist, an anti-government protestor, and a student activist – are pursuing separate cases.

The strategic goal of this litigation is to “get a ruling from the European Court of Human Rights leading to the government of Hungary creating a legal environment more conducive for human rights defenders and activists to challenge surveillance, strengthen freedom of expression, and bolster the right to privacy.”

Aligning the individual cases or enabling the cases to feed into each other is likely to assist in achieving the strategic goal. Accordingly, the HCLU is working on gathering further information about the various data that has been collected about the individuals to challenge the surveillance processes used by the government.

There are however some difficulties with having an individual as the main litigant. Sometimes, individuals do not readily come forward. This may be due to concerns around the cost of litigation, safety risks, or apprehensions about the perceived length of litigation. It may also be the case that individuals are not convinced that their issue warrants litigious intervention. Or perhaps the individual does not recognise that what happened to them constitutes a violation of their rights, or they are not aware of the role strategic litigation can play in addressing the violation.

“Awareness of rights-holders becomes indispensable when knowledge of rights moves out of the abstract and they become actual victims of violations.”<sup>23</sup> This is of import in the context of digital rights litigation. Highlighting that digital rights are human rights is a simple and effective way of ensuring that people can relate to a violation, understand why it is relevant, and in turn become empowered and informed to work with teams and communities to advance digital rights.

**Guideline 14:** Communicate effectively with your client, be reasonable with expectations, and prioritise clients’ best interests, always.

<sup>23</sup> International Committee of Jurists (ICJ), ‘Guide: ESCR Litigation’ (accessible at <https://www.icj.org/chapter-3-initiating-judicial-proceedings-making-the-case-2/strategic-considerations-around-litigation/>).





## Expert tips: Prioritise empowerment and agency

Individual clients must play an active and prominent role in the litigation. Often at the heart of strategic litigation is the agency and empowerment of clients. If strategic litigation is set to affect meaningful positive change, then the manner in which litigation is conducted becomes of critical importance and litigators need to “find ways of working which empower their clients”.<sup>24</sup>

Sherrilyn Ifill explains that “the idea of the client as the centre and not you as the centre is really important”. Your client is an integral part of the team.<sup>25</sup> Clients should be involved from the outset, their involvement should be sustained throughout the process, and they should be given the opportunity to help shape the outcome of the case.<sup>26</sup> Ifill notes that there are several ways in which you can put your client at the centre, hear from them what they really want, and ascertain how best you can support them. She suggests trying the following as different ways in which you can support your clients:

1. “Here are the ways in which we think the law and the formal legal system can help you...”
2. “Here are other things that can be done, and we can support in the following ways...”
3. “Here are things that you can do that we cannot really help with, but you may find these things effective...”

You should also ask your client how they would like to tell the story and establish the ways in which they want to participate. Find out what they need from you in order to achieve their goals and advance their activism. Be open about your own objective of creating lasting positive change.

Ultimately, “you’re doing the job really well if you have created the platform and the opportunity for your client to speak and to be able to tell their story.”<sup>27</sup>

In addition, there may be a risk of diverging interests, fatigue, and unmanaged expectations. When working with individuals (or communities), it is important to highlight the limitations, risks, duration, and possible outcomes of litigation. It is necessary to be clear about and establish convergence on the goals of litigation – both the immediate goals and the strategic goals. You will need to remain conscious of the ethical issues or potential conflict that may arise between a digital rights organisation and an individual litigant. For example, what if the government offers to settle the case, the individual wants the settlement and

<sup>24</sup> Budlender, ‘People’s Power and the Courts’ (2011) Bram Fischer Memorial Lecture (accessible at <https://constitutionallyspeaking.co.za/geoff-budlender-bram-fisher-memorial-lecture/>).

<sup>25</sup> Interview with Sherrilyn Ifill, ‘Strategic Litigation Impacts: Global Narratives about social change’ Open Society Foundation (2015) (accessible at [https://www.opensocietyfoundations.org/uploads/36efb5e5-e68a-4f96-945f-3aaa76d7c08c/strategic-litigation-impacts-global-narratives-about-social-change-20151026\\_1.pdf](https://www.opensocietyfoundations.org/uploads/36efb5e5-e68a-4f96-945f-3aaa76d7c08c/strategic-litigation-impacts-global-narratives-about-social-change-20151026_1.pdf)).

<sup>26</sup> Id.

<sup>27</sup> Id.



instructs you to pursue it, and that deprives you of the precedent or legal finding that you want for your strategic purposes? It is important to remember that “[d]espite the main objective of triggering structural change, [strategic litigation] is still litigation and, therefore, must place the interests of the client above all.”<sup>28</sup> Further to this, litigators should always be mindful of “searching” for the ideal litigant. If the role of the individual litigant does not manifest organically, it may be worth considering other options.

### Guideline 15: Empowered individuals with agency can play a critical role in making digital rights tangible. Find meaningful ways to support individuals in sharing their stories with the world.

## Communities

Working with communities in the context of digital rights litigation appears to be underexplored. This may be as a result of the perceived abstract nature of digital rights, or it may be that in many jurisdictions digital rights are a fairly nascent area of the law and organisations are still working towards setting up partnerships and networks with communities. In addition to the risks of working with individuals, working with communities may pose additional complications such as the need to define the community, and navigate internal politics or the power dynamics related to the community. It may require you to navigate opposing views and complications depending on who you engage with. In this context, it is particularly important to be cognisant of existing power imbalances such as gender, race, ethnicity, language, age, and socio-economic status, and of the need not to entrench those imbalances further.

Regardless of these obstacles, community involvement in strategic litigation has proved effective and necessary time and time again. Achieving positive change, empowering communities, information sharing, and evidence gathering are all enhanced when communities are active participants in strategic litigation. Leading examples of community involvement in strategic litigation span across indigenous people’s rights,<sup>29</sup> equality rights, health care rights, and education,<sup>30</sup> to name a few.

<sup>28</sup> Center for Human Rights & Humanitarian Law, ‘Impact Litigation: An Introductory Guide’ (2016) at 4 (accessible at <https://www.wcl.american.edu/impact/initiatives-programs/center/publications/documents/impact-litigation-an-introductory-guide/>).

<sup>29</sup> See Dailey above n 7.

<sup>30</sup> See Budlender et al. above n 1.



Digital rights litigators need not look far to see the import of community involvement;<sup>31</sup> many of the benefits and challenges associated with individuals are relevant to litigation with communities. In both cases, a key goal remains to work towards genuine representation, inclusivity, and diversity.

### Case study: Working with affected communities

The recent US case against Clearview AI is a useful example of how to include communities in digital rights litigation, and how to make digital rights tangible.

In 2020, the ACLU worked alongside the Chicago Alliance Against Sexual Exploitation, the Sex Workers Outreach Project, the Illinois State Public Interest Research Group, and Mujeres Latinas en Acción to bring a case against facial recognition company Clearview AI. This novel case sought to “force any face recognition surveillance company to answer directly to groups representing survivors of domestic violence and sexual assault, undocumented immigrants, and other vulnerable communities uniquely harmed by face recognition surveillance.”<sup>32</sup>

This case highlighted that while unlawful, privacy-destroying surveillance activities affect all people, the harms from this technology may not be shared equally. The communities involved explained that the technology “isn’t just unnerving, it’s dangerous, even life-threatening. It gives free rein to stalkers and abusive ex-partners, predatory companies, and Immigration and Customs Enforcement agents to track and target us”, and it puts “survivors in constant fear of being tracked by those who seek to harm them”.

### Expert tips:

Building relationships with communities is central to the meaningful inclusion of communities in strategic litigation. This requires organisations to be proactive in reaching out to communities and being available. Finding focal points, community representatives, and being accessible are simple ways in which organisations can build relationships with communities. Inviting community organisations to events, listening to their stories, and attending their events are equally simple ways of establishing relationships with communities.

**Guideline 16:** Be approachable, accessible, and available to communities. Make the effort to establish meaningful relationships.

<sup>31</sup> Heywood, ‘South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health’ (2009) 1 Journal of Human Rights Practice (accessible at <https://academic.oup.com/jhrp/article/1/1/14/2188684>).

<sup>32</sup> See ‘ACLU sues Clearview AI’ (2020) (accessible at <https://www.aclu-il.org/en/news/aclu-sues-clearview-ai>), see also ACLU v Clearview AI - Complaint (2020) (accessible at <https://www.aclu.org/legal-document/aclu-v-clearview-ai-complaint>).



## Organisations and networks

It is by now well recognised that there are several benefits for organisations to act in their own name in litigation, and it appears that this is often the preferred route for digital rights organisations. The role of organisations as primary litigants has proven successful in digital rights litigation. The impact of the cases brought by [Privacy International](#), [Media Defence](#), [Big Brother Watch](#), [Liberty](#), [Centrum för rättvisa](#), [Media Monitoring Africa](#) and the [EFF](#) to name a few, cannot be gainsaid. Convenience, particular skills, capacity, and security may inform the decision to proceed as an organisation. Civil society or digital rights organisations are likely to make strong clients. The gaming community, trade unions, opposition political parties, students' organisations, workers forums, and UN Special Procures should also be considered as potential clients who can bring unique and dynamic contributions to the table. In certain instances, organisations may be less vulnerable to risk, and more able to develop parallel messaging and advocacy strategies. Organisations may also be better suited to “stay the course”.

“[T]he proper organisation of clients, in general, the use of an institutional client, which is well organised and informed, is usually the client of choice. That kind of client brings to bear knowledge of the problems and strategies – conducive to ultimate success. It will also be able to identify the best individuals to litigate in tandem with the organisation and it will generally have the capacity to follow up any success achieved”.<sup>33</sup>

Further, the risk that the interests of an individual client diverge from the strategic interests of the litigator is less likely to play out when organisations and networks litigate in their own name. Organisations, being slightly removed from the direct impact, are more likely to align with impact and precedent agendas. Working with a collective to affect positive change can be incredibly powerful for highlighting systemic issues but may also be useful for highlighting comparative examples. The role of organisations and networks will be dealt with in more detail in Phase 4 on ecosystems of support.

<sup>33</sup> Interview with Gilbert Marcus, ‘Value and Impact of Strategic Litigation: Fool’s Paradise or Indispensable Weapon?’ Open Society Foundation (accessible at [https://www.opensocietyfoundations.org/uploads/5149ac47-e2b2-427f-8416-0fcbec597dfe/value-and-impact-strategic-litigation-fool-s-paradise-or-indispensable-weapon-20140717\\_4.pdf](https://www.opensocietyfoundations.org/uploads/5149ac47-e2b2-427f-8416-0fcbec597dfe/value-and-impact-strategic-litigation-fool-s-paradise-or-indispensable-weapon-20140717_4.pdf)).



## Case study: Litigating algorithms

DFF's "Litigating Algorithms" meetings in 2018 and 2019 created space for organisations, litigators, academics, and technologists to share the challenges involved in litigating against automated systems that are applied across a variety of different contexts. Beyond listening to other reflections, participants could "zoom in on transferable lessons learned that can help build stronger cases going forward."<sup>34</sup> Despite the jurisdictional differences, there was a shared sense that the similarities outweighed the differences. This applied to lessons learned, best practices, and considerations of obstacles in future litigation.

## Expert tips: Share your information

To the extent possible, sharing information online about the matters you are working on may assist others in determining what routes to follow. Putting your pleadings online or sharing existing time-saving templates around repetitive actions such as data protection complaints, can support the work of others who are similarly seeking to effect positive change.

**Guideline 17:** Working in silos is unhelpful in the fight for positive change. Work with others, share information and resources, collaborate, and support those who are in the fight with you.

## The value of hybrid participation

While the various types of litigants have their pros and cons, procedural factors such as locus standi (standing) may be determinative on these questions. Litigators are encouraged to recognise the need for representation, inclusivity, and diversity. It is important to embrace the central role of empowerment and agency in positive change. It is therefore important to be thinking creatively about combining the various forms of litigants. Hybrid participation – having different types of litigants litigating together – can create space for inclusion and empowerment, whilst ensuring protection, and providing institutional expertise and support while highlighting both individualised and systemic rights violations.

Depending on the rules of the relevant court, a decision to go in as several applicants – a combination of individuals or communities and organisations – may be one approach. Another is to consider the role of *amicus* interventions or third-party interventions.<sup>35</sup> These decisions will ultimately be determined on a case-by-case basis, but it is worth exploring the various options of litigants upfront and ensuring inclusion and participation from beginning to end.

<sup>34</sup> Reventlow, 'Litigating algorithms: taking the conversation from North America to Europe and beyond' (2019) Digital Freedom Fund (accessible <https://digitalfreedomfund.org/litigating-algorithms-taking-the-conversation-from-north-america-to-europe-and-beyond/>).



## Case study: Individuals and organisations in tandem achieve positive change

In the case of *Khadija Ismayilova v. Azerbaijan*, the applicant was an individual. Ms Ismayilova was an investigative journalist who was often critical of the government, covering various topics, including corruption and violations of human rights. In an attempt to silence her, she received a threatening letter enclosing six still images from a video taken in her bedroom with a hidden camera, and on another occasion, a video was posted online featuring scenes of a sexual nature depicting the applicant's intimate life. Having exhausted domestic remedies, and having criminal proceedings launched against her, the applicant approached the ECtHR alleging that her rights under the European Convention had been breached owing to the authorities' failure to protect her from unjustified intrusions into her private life linked to her work as a journalist. Several organisations, relying on the third-party intervention mechanism available before the ECtHR, intervened and provided supporting arguments, highlighting systemic issues aligned with the applicant's case, and arguing that states have a positive obligation to protect journalists by taking measures to prevent and to investigate conduct designed to restrict journalistic activity.<sup>35</sup> This is a classic example of an individual being directly affected by a rights infringement and fulfilling the role of the main applicant whilst being supported by organisations.

**Guideline 18:** Hybrid participation – having different types of litigants litigating together – can be a useful way of ensuring inclusion and empowerment, whilst ensuring protection, providing institutional expertise and support, and highlighting both individualised and systemic rights violations.

<sup>35</sup> See World Trade Organisation, 'Practitioners handbook: overview of the Council of Europe, the Court, and its Proceedings' (2006) at 67 (accessible at [http://www.omct.org/files/2006/11/3633/handbook1\\_eng\\_01\\_part1.pdf](http://www.omct.org/files/2006/11/3633/handbook1_eng_01_part1.pdf)). See also Strasbourg Observer, 'Third Party Interventions before the ECtHR: A Rough Guide' (2015) (accessible at <https://strasbourgoobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/>) and Budlender, 'Amicus Curiae' in Woolman and Bishop, *Constitutional Law of South Africa* (2018) (accessible at <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap08.pdf>)

<sup>36</sup> Leave to intervene as third parties in the written procedure was granted to PEN International, Privacy International, Article 19, Committee to Protect Journalists, Index on Censorship, International Media Support, the Institute for Reporters' Freedom and Safety, International Partnership for Human Rights, PEN American Center, Front Line Defenders, Canadian Journalists for Free Expression, International Federation for Human Rights, World Organisation Against Torture, Norwegian Helsinki Committee, and Human Rights House Foundation.



## Phase 4: Ecosystems of support, advocacy, and storytelling

### Ecosystems of support

“By definition, strategic litigation is one part of a dynamic, complex ecosystem that includes not just litigators and plaintiffs, but other social activists and even potential plaintiffs, all of whom engage in constantly evolving mutually-reinforcing relationships.” <sup>37</sup>

The right ecosystem may enable greater prospects of maximising the impact of your strategic litigation. This includes developing effective advocacy strategies, tapping into networks, curating both public and private sector allies, coordinating parallel processes, and focusing on storytelling. It is the creation of such an ecosystem that may lead to “perfect alignments”, or, at least, these ecosystems improve prospects of success in litigation; they may also lead to “success” and “impact”, even if the litigation is ultimately unsuccessful. United Nations Special Procedures, regional mechanisms, trade unions, workers’ forums, and students organisations are possible allies or partners that could form part of your ecosystem.

### Expert tips: Traditional and emerging roles within an ecosystem

Other members of the ecosystem can play important roles in connecting you with potential litigants, developing evidence, campaigning to keep up public pressure during the case, and advocating for implementation afterwards. In addition to these more traditional roles, other members of the ecosystem can be important, particularly in the digital rights space. They can assist in providing technical support, developing policy solutions, and informing judges and lawmakers about contemporary issues.

<sup>37</sup> Dailey, ‘Strategic Litigation Impacts: Equal Access to Quality Education’ Open Society Justice Initiative’ (2017) (accessible at <https://files.eric.ed.gov/fulltext/ED606082.pdf>).



## The importance of networks

Increasingly, networks of public interest litigators are being established, with some focusing on litigating digital rights. Often these networks are useful for information-sharing, both in terms of comparative foreign law and in terms of litigation strategy. Consulting with colleagues in these networks may be useful in developing a litigation strategy. Often, other strategic litigators have faced apposite legal questions and have engaged similar questions of procedure which may assist in your case. Additionally, these networks act as useful advocacy partners who, outside of the particulars of the case, may be able to promote the cause and intended outcome and seek to engage in ancillary processes such as engaging with regional and international fora, hosting side-events at key meetings, or engaging United Nations Special Procedures.

Networks of allies may also support in instances of capacity or skills constraints. It may be helpful to ask:

1. Are others working on similar issues, either in your jurisdiction or in different jurisdictions?
2. What work has already been done?
3. Can you support existing work?
4. Who are your allies in this?
5. If you cannot do it, can you find someone who can?
6. Can someone in your network help you in a specific adjudication where you may not have a presence?

When working through the legal and capacity constraints, it is important to avoid duplicating existing efforts. You do not always need to reinvent the wheel. Attending conferences such as RightsCon and MozFest can be a good way to expand networks, learn about what others are doing, and share your experiences. You may also want to consider attending conferences such as the Black Hat Briefings to get a better sense of what the technical community is grappling with.

### Case study: Networks are tackling digital rights issues

[10 Human Rights Organisations v the United Kingdom](#) is a key example of the power of networks.<sup>38</sup> This landmark case saw 10 organisations working strategically together to highlight the rights infringements caused by the United Kingdom's (UK) mass surveillance regime. [Privacy International](#) explains that “[t]his landmark case has serious implications not only for the UK’s mass surveillance regime, but also for the mass surveillance practices of the Council of Europe’s other member states, and such practices in other parts of the world.”

An array of third party interveners participated in the case of [Magyar Jeti Zrt v. Hungary](#) which dealt with liability for hyperlinked content and the right to freedom of expression. The

<sup>38</sup>The 10 organisations are American Civil Liberties Union, Amnesty International, Bytes for All, the Canadian Civil Liberties Association, the Egyptian Initiative for Personal Rights, the Hungarian Civil Liberties Union, the Irish Council for Civil Liberties, the Legal Resources Centre, Liberty and Privacy International.





European Publishers' Council, along with 8 others<sup>39</sup> jointly submitted that hyperlinking had a number of public-interest benefits, including facilitating the journalistic process, and the promotion of diversity within the media. Access Now, the Collaboration on International ICT Policy in East and Southern Africa and European Digital Rights in their joint observations submitted that the design of the Internet was premised on the idea of free linking of information, and hyperlinks were technical and automatic means for users to access information located elsewhere.

More recently, 10 organisations applied to intervene in the [Telegram Messenger LLP & Telegram Messenger Inc. v. Russia](#) case presently before the ECtHR.<sup>40</sup> The interveners are seeking to rely on their individual and collective knowledge and expertise to present reasoned written comments on relevant comparative and international law and standards relating to communications encryption and anonymity.

The intervention of networks in existing proceedings can be a strategic way to highlight rights violations, provide comparative solutions, and can lead to an outcome far broader and more impactful than the issues between the main parties.

## Case study: Cross jurisdictional collective redress

In January 2020, the Norwegian Consumer Council and the European privacy NGO noyb.eu filed [three strategic GDPR complaints](#) against location-based social networking and online dating app Grindr and several adtech companies over the illegal sharing of users' data. Grindr was, directly and indirectly, sending highly personal data to potentially hundreds of third-party advertisers. The Norwegian Data Protection Authority upheld the complaints, confirming that Grindr did not receive valid consent from users in an advance notification, and Grindr was fined €10 million.

This is a useful example of when organisations and networks from different jurisdictions use new collective redress rights to collaborate on a case in one of their jurisdictions.

**Guideline 19:** Consulting with colleagues and engaging with networks is useful in developing a litigation strategy. Often, other strategic litigators have faced apposite legal questions and have engaged with similar questions of procedure which may assist in your case.

<sup>39</sup> Media Law Resource Center Inc., the Newspaper Association of America, BuzzFeed, Electronic Frontier Foundation, Index on Censorship, Professor Lorna Woods, Dr Richard Danbury, and Dr Nicole Stremlau.

<sup>40</sup> The 10 organisations are the Irish Council for Civil Liberties, the Canadian Civil Liberties Association, the Centro de Estudios Legales y Sociales, the Centro de Estudios de Derecho, Justicia y Sociedad, the Human Rights Law Network, the Hungarian Civil Liberties Union, the Kenya Human Rights Commission, KontraS, the Legal Resources Centre and Liberty.



## Acknowledging the role of public and private sector allies

There are potential public and private sector allies who may assist networks with advocacy strategies that complement strategic litigation. These allies may include:

PUBLIC SECTOR	PRIVATE SECTOR
State law advisors	Journalists and media organisations
Ombudsman	Civil society organisations
Constitutionally or legislatively established bodies, such as National Human Rights Institutions (NHRIs) or Data Protection Authorities (DPAs)	Activists
	Student movements
Members of parliaments and senators	Activist investors
Technical experts within state departments	Trade unions and organised labour
Policymakers	Socially responsible organisations
(Opposition) politicians	Think tanks
Academics and academic institutes	Philanthropic organisations and funders

**Guideline 20:** Allies in the public and private sectors can significantly contribute to advocacy around a particular cause. Their assistance should be encouraged and facilitated.



## Effective advocacy strategies

As has been discussed elsewhere in this guide, activism – whether through strategic litigation or otherwise – does not occur in a vacuum. Positive change is best effected through a variety of parallel processes within an ecosystem. The culmination of different strategies is often ideal and given the right circumstances “rights can be used as a catalytic agent of mobilisation”. That “[m]obilisation can, in turn, be useful for articulating demands and forging those demands into viable political options.”<sup>41</sup>

Where a uniform goal is established, these parallel processes can be even more effective. For example, staging a protest on the day that a case is heard may have multiple benefits: (1) greater prominence is given to the cause; (2) public awareness is raised; and (3) additional allies may be established. Importantly, to the extent that the litigation is unsuccessful, “impact” may still be assessed through public awareness and the establishment of allies. It is important to remember that strategic litigation is a tool in the toolbox and often works best when combined with other instruments for change. Advocacy strategies are wide-ranging, and activism for positive change can take on many forms. While there is no perfect recipe or checklist for advocacy and mobilisation,<sup>42</sup> there are some established tactics that can be used, such as the ones below, but often the beauty with advocacy and activism is the limitless potential for creativity and impact.

## Education

Part of your strategic objectives may be to educate the broader public about a particular issue. Engaging with media, publishing resources, and engaging directly in the education of different audiences can be a powerful component of your advocacy strategy. You may want to highlight an issue – such as “what’s wrong with public video surveillance?”. Or you may want to assist individuals and communities in addressing issues. For example, user guides on data protection and tips on Data Subject Access Requests can be used to both inform and empower. Toolkits and field manuals on online gender-based violence and harassment can be empowering and powerful educational tools. Interactive games can also be a useful way to share knowledge and provide people with skills and resources, for example, by teaching people about fake news. You may also want to consider teaching children about their digital rights. Boris the BabyBot is a book about big data that encourages playful conversations with children about privacy, surveillance, and resistance. Tools that give users solutions to tracking and inconsistent encryption are a useful way to teach people how to guard against threats to their privacy and security.

<sup>41</sup> Scheingold ‘Rights as Resources’ and ‘The Political Relevance of Legal Rights’ in *The Politics of Rights* (2 ed 2004) at 215.

<sup>42</sup> J Dugard & M Langford ‘Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism’ (2011) 27 SAJHR 39 at 64.



## Guideline 21: Digital literacy campaigns and programmes are likely to support your strategic objectives in a variety of ways.

### Case study: Treatment literacy in the fight for access to health care

Based on treatment literacy programmes in the United States, South African HIV/AIDS activist organisation, the [Treatment Action Campaign \(TAC\)](#), began a widespread rollout of treatment literacy programmes.

Treatment literacy recognises that in order to fight for rights effectively, people are also required to understand the science of HIV, what it was doing to their body, the medicines that might work against it, and the research that was needed. TAC developed a range of simple educational materials and combined these with an extensive training programme in which community members could be trained, take exams, work in health care settings, and then work with communities to share knowledge and train up new members. Not only did this upskill, educate, and empower many people in South Africa living with HIV/AIDS, it doubled up as a means for mobilisation and local organisation.

In the context of digital rights, digital literacy remains a concern in many jurisdictions around the world. Drawing from the TAC example and thinking creatively about effective digital literacy campaigns can be beneficial – particularly if awareness and education form part of your strategic outcomes.

In addition to the educational initiatives listed above, here are some examples of existing digital literacy campaigns, initiatives, and organisations you may want to draw from:

1. [Digital SafeTea](#), a recently launched interactive game, teaches people across Africa about responding to online harms, such as sexual harassment.
2. [CryptoParties](#) are another novel example of a movement that creates a space for people to pass on knowledge about online safety.
3. [MyDigiSkills](#) is a tool to help users understand their digital competencies on issues around information and data literacy, communication and collaboration, digital content creation, safety, and problem-solving.
4. [HTML Heroes](#) teaches young people about online safety, finding reliable information, privacy, chatting, playing, and learning online.
5. [BEE Secure](#) is a Luxembourg government initiative that teaches young children about keeping their digital devices safe, their digital footprint, and online commerce.
6. [Data Detox Kit](#) is a simple, accessible toolkit that walks you through the steps you can take towards a more in-control online self.



Judicial education, particularly around digital rights, is important. It may be worth reaching out to organisations like the International Committee of Jurists (ICJ), or other organisations in the strategic litigation ecosystem that focus on enhancing judges' understandings of digital issues, to facilitate conversations around [judicial training](#), provided it is appropriate to do so. You can also use your court papers to facilitate judicial education. In [Monroe v Hopkins](#), the Court hinted at its lack of digital literacy – noting “Twitter is still a relatively new medium, and not everyone knows all the details of how it works.” Fortunately, the parties agreed on the relevant facts about Twitter and provided a “How Twitter Works” guide, which was ultimately attached to the judgment. Bringing your technical team into the courtroom – or into court papers – may also assist in advancing the courts understanding of digital rights issues.

## Setting the standards

Another option is for you to set the standards you want to see implemented. This is different from crafting a remedy or participating in a law reform process. Setting standards as an advocacy tool is a useful way of portraying how things could and should be. This is something that should ideally be done in consultation with others. There are some useful examples of this. [The Feminist Principles of the Internet \(FPI\)](#), first drafted in 2014, are a set of statements that together provide a framework for an equal and inclusive internet, offering a gender and sexual rights lens on critical internet-related rights. There are currently 17 principles across five clusters: [Access](#), [Movements](#), [Economy](#), [Expression](#), and [Embodiment](#). The [Santa Clara Principles on Transparency and Accountability in Content Moderation](#), developed in 2018 by a group of CSOs, provide a set of baseline standards or initial steps that companies engaged in content moderation should take to promote and respect users' rights. Since 2018, the group has been reaching out to groups and individuals from around the world to facilitate online consultation sessions to get specific recommendations, responses, and input on the Principles to assist with a potential revision. Media Monitoring Africa (MMA) worked with children from the [Web Rangers](#) digital literacy programme to develop a [Children's Digital Rights Charter](#), which seeks to give effect to an internet that is accessible, safe and empowering, and that advances the development of children in line with their rights and interests.

## Research

In parallel with educational initiatives, research is important. It can inform internal understandings of issues and expose issues that may not have previously been identified. It may highlight gaps in legal frameworks and develop recommendations on how those gaps should be closed that directly inform the remedy you are seeking. It is important to acknowledge that research covers a variety of spheres, some of which may overlap:

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### **Factual research:**

Gathering information about what is actually happening and monitoring systems and results. This is likely to be done in the evidence-gathering phase.

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### Legal research:

Examining the scope of existing legal provisions and assessing why a current system may violate rights. This type of research may inform the framing of your remedy. For example, you may conduct research on how the fairness principle in the GDPR should be interpreted in the absence of a definition in the GDPR, or on why the UK immigration exception violates the right to privacy. Research of this nature can be particularly useful in the context of strategic litigation as it can provide an organisation with both the suggested remedy and the evidence for their case. [Dejusticia](#) recently set out to analyse the privacy policies of 30 companies with data-driven business models that collect data in Colombia. Through this research, Dejusticia was able to identify practices that have not been sufficiently contemplated by the personal data protection regime currently applicable in Colombia.

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### Comparative research and mapping:

Research may also prompt you to assess what is happening elsewhere. Comparative research can help formulate strategies, highlight gaps, and draw on key examples to prove that what you are trying to achieve may be possible. [Internet Lab](#) conducted a comparative legal analysis of 32 countries as part of its work on fighting the Dissemination of Non-Consensual Intimate Images. Keeping up to date with jurisprudential developments is another important research component. It is useful to have systems in place or a member of your team that monitors recent decisions. It may also be useful to review summaries provided by the courts, for example the ECtHR's 2020 [Guide on Article 8 of the European Convention on Human Rights](#), which provides helpful summaries on the Courts decisions on Article 8.

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## Demonstrations and disruptions

Demonstrations and disruptions can be big or small but can be monumental in shedding light on an issue. Below are some examples of different demonstrations and disruptions that made a huge difference:

1. In September 2016, American football quarterback Colin Kaepernick [took a knee](#) during the US national anthem to protest police brutality and racism. This prompted significant social and political reactions and has since become a common sight at demonstrations in the wake of persistent police brutality and police killings in America.



2. In April 2016, during the plenary session at the 21st International AIDS Conference, sex workers quietly moved around the auditorium with their trademark umbrella and a [poster with an active stopwatch](#) which read “You’ve been talking for 00:00 without a mention of sex work”. If the speakers mentioned sex work the timer would start again. This prompted some speakers to engage the topic, and ultimately captured the audience’s attention. Issues around sex work in many ways dominated the public discourse around the AIDS Conference and beyond.
3. In January 2017, WERK for Peace, a [queer-based grassroots organisation](#), threw a party outside then-Vice President-Elect Mike Pence’s house in Maryland in protest of his previous anti-LGBTQI+ positions. The vibrant and peaceful party attracted widespread attention, highlighting the concerns around Pence’s positions on equality, but equally highlighting the resilience of a community that has long been marginalised and oppressed.

There are countless more examples of creative and impactful demonstrations and disruptions. Working with activists and communities to bring issues to the fore can lead to a significant impact. Digital disruptions are on the rise, in many ways fueled by the COVID-19 pandemic. Below are some recent examples of digital disruptions:

1. #BlackoutTuesdays: Following the death of George Floyd, and in an attempt to pause “business as usual” in response to the protests sweeping the nation, [#BlackoutTuesday](#) broadened and morphed overnight on social media “resulting in a sea of [black boxes](#) across Instagram and other platforms.”
2. “Austerity Kills”: During a virtual panel discussion on South Africa’s economic outlook, a group of activists [disrupted](#) the presentation of South Africa’s Finance Minister. A participant wrote: “#CODERED We demand an end to austerity!” in the chat function, prompting multiple guests to switch on their microphones and shout “austerity kills!”, disrupting the meeting.
3. World of Warcraft sit-in: Most recently, players of the popular game World of Warcraft staged an in-game [sit-in](#) following allegations of sexual harassment by the game developer Activision Blizzard. Players from both factions of the game [gathered](#) on the steps in the fictional city of Oribos, sitting quietly to express their anger, but also to show support to victims and survivors of Blizzard’s abuse. While sitting on the steps of hub area Oribos, [Fence Macabre](#), a guild of players in the game, began raising money for [Black Girls Code](#), an organisation that works to “empower young women of colour ages 7-17 to embrace the current tech marketplace”.



## Mobilising, campaigning, and protesting

Protests continue to shape societies, and the movements behind the protests often catalyse change. Protests, mobilising communities, and campaigning are tried and tested forms of advocacy that often work well alongside litigation, prompt litigation, or support litigation. “[T]aking collective action to fight injustice is itself transformative.”<sup>43</sup> Many lessons can be learned from the BlackLivesMatter movement around organising, framing issues, and sharing resources. In the context of the criminalisation of sexuality and reproduction, Amnesty International provides guidance on how to empower and enable rights holders through participation, explains the various forms of participation, and suggests different ways in which effective campaigns can be built. Many of these tips can be used when formulating campaigns around digital rights. Existing campaigns such as #keepitreal, which is fighting disinformation, and #keepiton, which is fighting internet shutdowns, are good examples of bringing campaigning and mobilisation into the digital space. ReclaimYourFace is a prominent European movement that is creating awareness around the use of biometric data used to monitor the population and are calling for a ban on biometric mass surveillance across Europe. If you need some more inspiration, take a look at Tactical Tech’s Data and Activism resources where you can learn about Activism on Social Media, or read through the Organiser’s Activity Book.

**Guideline 22:** Positive change and impact are best affected through a variety of parallel processes that incorporate different forms of advocacy and activism that work together within an ecosystem, and that have a uniform goal.

## Storytelling

The story matters: not only in the way in which it is told in court papers but also in how it is presented to the public. In the context of strategic litigation and broader advocacy strategies, there are many storytellers. There are the clients, the lawyers, the media, the opponents, and the judges. Different stories are likely to emerge depending on who is telling them. Storytellers are an important part of your ecosystem and play a particularly important role in the context of digital rights which are often misunderstood or viewed as abstract or unrelatable. Stories can assist in enhancing people’s understanding of digital rights by making them tangible and meaningful.

<sup>43</sup> Amnesty International ‘The criminalization of sexuality and reproduction: A campaigning toolkit’ (2018) (accessible at [https://www.nswp.org/sites/nswp.org/files/body\\_politics\\_the\\_criminalization\\_of\\_sexuality\\_and\\_reproduction\\_a\\_campaigning\\_toolkit.pdf](https://www.nswp.org/sites/nswp.org/files/body_politics_the_criminalization_of_sexuality_and_reproduction_a_campaigning_toolkit.pdf)).





**Guideline 23:** The story matters. Consider how best to frame the story in court papers as well as in public discourse. Your clients' stories are theirs – make sure they want to tell the story.

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**Individuals:**

Storytelling can be an important way in which an issue is personified and therefore more relatable. This is not to say that people's experiences should be exploited for a good story, but for those who have experiences, and want to share them, highlighting harms and infringements on a human level can help both the courts and the public better understand the issues. This is of particular importance in the context of digital rights which remains an abstract concept for many. Highlighting several stories can be useful for putting a spotlight on a systemic issue. Podcasts and interviews are a great way of sharing stories. A [podcast](#) on the recent [Post Office scandal](#) in the UK gave a wrongly convicted individual, Janet Skinner, a chance to share her story.

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**Litigators:**

For litigators, telling a story through court papers is key – again making digital rights issues tangible can help inform a court of the harm of the infringement. Linking digital rights to other rights or providing comparable examples can assist the court in better understanding the story.

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**Media:**

The media can play an important role, so it is wise for litigators to acknowledge the role of the media and work on meaningful and mutually beneficial partnerships with them. It is worth considering engaging different forms of media such as mass or mainstream media, local community media, and specialist media, such as those serving particular professional audiences for whom your case may be relevant.

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**Social Media:**

The power of social media as a tool for activism should not be gainsaid. Hashtags, posts, memes, tweets, and stories are increasingly relied on to share information and create narratives. Social media has the potential to reach a substantial audience. There are [many ways](#) to use social media for storytelling.

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**The opposition:**

The opposition, be it the state or a private actor, is also likely to use the media to tell their side of the story. They are often supported by experienced public relations (PR) firms that work to sway public opinion and dominate particular narratives.

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**Judges:**

Judgments themselves can tell stories. Provide judges with the relevant narratives they will need to do this.

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## Case study: The media as an ally and an enemy

The Sejur Zarco case highlighted the complicated role of the media. During the civil war in Guatemala that spanned across three decades, indigenous women were systematically raped and enslaved by the military in a small community near the Sepur Zarco outpost. While these resilient women fought for justice at the highest court of Guatemala, the media emerged as both an enemy and an ally. On the one hand, communication and media coverage of this trial provided an opportunity to sensitise the wider public on the reality faced by victims and survivors of sexual and gender-based violence and exposed the living standards of marginalised indigenous communities. On the other hand, media aligned to the opposition's position worked on further stigmatising victims and survivors, including disseminating sexist insults against them.

## Expert tips: Reframing binary narratives

In some cases, it is important to disrupt binary narratives that present certain debates as “zero-sum games” where one objective can only be realised at the expense of another. For example, the perceived “security v privacy” debate has proven to be a difficult narrative to overcome. The public may be inclined to support the installation of CCTV cameras or other surveillance-based technologies on the assumption that it will address security concerns. The discourse is often “I am willing to forgo my privacy in order to advance my safety.”

Experts working on privacy and surveillance issues suggest that the security v privacy binary is unhelpful. Litigators and activists are encouraged to shift away from that binary narrative and find other ways of underscoring privacy concerns. For example, you may want to capture the imagination of the public and highlight the levels of intrusiveness that are associated with various forms of surveillance. Or you may want to talk about why privacy supports security and allows you to protect yourself from unwanted intrusions.



## Expert tips: Bringing the media on board

Having an internal communications team is one way of facilitating storytelling about the work you are doing. Cultivating relationships with the media is another. The objective is not to control the media message, but rather to try to get people to understand when something important is happening.

There are different ways you can work with the media to tell stories. You can assist them in preparing blogs and press releases. You can share key resources or case materials with them. You may want to work with investigative journalists who could end up playing a pivotal role in helping expose a rights violation. It is also worth considering enticing a journalist with an exclusive – offering a journalist first sight of your court papers as they go public may well get your story on the front page. Hosting pre-hearing briefings with the media allows you to explain what is happening in court, why it is important, and what the implications will be going forward. It also allows the media to ask questions. This may mean that journalists will have a good understanding of the matter and its implications, which in turn can impact the effectiveness of their reporting on the day of the hearing and the day of judgment.

There are many ways in which stories can be told. Traditional media is one, blogs and vlogs are another. The Bertha Foundation is working on various forms of storytelling and is seeking to (i) support filmmakers and journalists, but equally (ii) support individuals and communities to tell their stories safely and effectively, and (iii) make information accessible to audiences who can take action. It may be useful to think along these lines when you are considering your approach to storytelling.

The notion of art as a means to tell stories is also relevant. Art continues to tell stories and to teach us about the world. [Unhealed Wounds](#) is a powerful multimedia project combining photography, video, and audio recordings which brings to light the faces and stories of people injured by crowdcontrol weapons during protests. In the context of digital rights, art can play a strategic role in making concepts tangible, as well as engender empathy for an issue. Another creative and noteworthy example is the [Glass Room](#), a public intervention that provides interactive, interesting, and challenging experiences, that bring digital rights issues to life. The Glass Room has pop-up exhibitions around the world that turn issues around data and privacy into sensory and tangible experiences. Joy Buolamwini's "AI, Ain't I A Women?" poem is a powerful piece that exposes the bias of artificial intelligence, illustrating how it can misinterpret the images of iconic black women:

"Face by face the answers seem uncertain  
Young and old, proud icons are dismissed  
Can machines ever see my queens as I view them?  
Can machines ever see our grandmothers as we knew them?"<sup>44</sup>

<sup>44</sup> Excerpt from Joy Buolamwini's poem 'AI, Ain't I A Women?' (2018) (accessible at <https://www.youtube.com/watch?v=QxuyfWoVV98>).



## Phase 5: Legal and procedural considerations

Knowing when to launch, what you are launching, where to launch and against whom to launch it are critical considerations, both procedurally and for the wider socio-political impact of a case. Navigating these questions and mapping out the options as early as possible is preferable. Working through these considerations can assist in developing a litigation roadmap, highlighting key dates and key moments to mobilise around. These considerations, which are inherently intertwined, are also important for managing client expectations, assessing funding and capacity, and accepting that “strategic litigation is best understood as a process, rather than as a single legal intervention.”<sup>45</sup> However, it is not always the case that these processes will perfectly align. It is therefore important to be “receptive to diverse legal opportunities in less-than-ideal conditions”.<sup>46</sup>

### When to launch: Reflecting on timing

#### Timing: when to start the litigation process

Timing can be key to success and impact, and should be a central tenet of the litigation process. In some instances, it is not within the control of strategic litigators; often, external factors play a significant role. The primary consideration should be: if we initiate litigation at this time, will we meet our objectives, or will our objectives be better met if we wait? Often, the latter is true. There is an art to waiting for facts, circumstances, and effective arguments to align. In addition, not every piece of strategic litigation will start afresh with an allegation of a rights violation. It may be that strategic litigation starts from a defensive position or you intervene in a third party’s case, rather than build your own test case from scratch. On occasion, the best strategy is simply not to litigate.

As dealt with elsewhere in this toolkit, the right factual matrix and conflation of factors — such as complimentary advocacy strategies and key social and political moments — are crucial to success and impact in strategic litigation.<sup>47</sup> Timing considerations should be informed by the following:

1. The availability of facts and evidence within the broader social and political context at a given time.
2. The impact of timing on success and impact. In other words, when will litigation result in maximum impact in your overall campaign? For example, it may be beneficial to file a case just before the Annual General Meeting of a corporation, to maximise publicity and leverage.
3. Whether the timing of litigation will impact other strategies.

<sup>45</sup> See Dailey above n 7.

<sup>46</sup> Dugard and Langford, ‘Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism’ (2011) 27 SAJHR 39 at 41.

<sup>47</sup> Budlender et al. above n 1.



In some instances, it may be necessary to proceed without a “perfect alignment”. While this is not advisable, it may be necessary.

### Case study: Acting swiftly and joining forces

In 2018, Kenyan President Uhuru Kenyatta assented to the Computer Misuse and Cyber Crimes Act, 2018. Unfortunately, the constitutionality concerns raised by various organisations had not swayed the President’s decision. The law was passed quickly, with a 14-day window to challenge it. The Bloggers Association of Kenya (BAKE) filed a petition within the time frame challenging its constitutionality. However, given the urgency, BAKE did not have time to consult widely with partners and stakeholders. After filing the petition at the High Court, BAKE consulted subject-matter experts to explore ways of strengthening the case in court, including through evidence-based legal arguments, experiences from other jurisdictions, and expert evidence.

While the case is yet to be finalised, it demonstrated the importance of acting promptly and fostering strategic partnerships to reap widespread benefits before, during, and after litigation, even in time-sensitive rapid response cases.

It is also important to know when something is urgent, when it may require further deliberation, and when urgent litigation can support a longer-term strategy – “[f]ocusing on urgency does not mean leaving the establishment of long-term goals for a later date. On the contrary, it is an opportunity to examine and advance measures towards these goals.”<sup>48</sup> Timing may also be dependent on whether you are being proactive or reactive. In terms of the latter, you may need to be responsive to an emergent challenge or opportunity. You do not always get to choose when a bad law is passed or when unlawful conduct is perpetrated.

### Expert tips: Carve our time for court preparation

Preparation for court always takes longer than expected. Administrative tasks such as printing and preparing files, checking references and resources, and preparation for oral argument all take a lot of time and are all important parts of preparing for court. It is important that you set aside enough time to prepare for the hearing. If external lawyers are arguing the case, make sure they have everything they might need well in advance for their preparations. If you or your team are presenting oral arguments before a court or a forum, it can be useful to set up a moot court or mock court in which members of the team can present the case, test arguments, and ask and answer questions.

<sup>48</sup> Carvalho and Baker, ‘Strategic litigation experiences in the Inter-American human rights system’ (2014) 20 SUR (accessible at <https://www.corteidh.or.cr/tablas/r33886-1.pdf>).



## Key moments

As with every stage or process of strategic litigation, it is necessary to reflect on what the goal is, both the overall goal and the goal of a particular moment. For example, launching litigation may be a key moment to bring the public into the equation. When litigation is conducted in the public eye it provides an opportunity for the issues to be refined and presented. There is also an interesting dialectic here: on the one hand, launching litigation can be a key catalyst for social mobilisation and can seed mobilisation and public awareness. On the other hand, social mobilisation is very often necessary to lay the groundwork for litigation.

Political, social, and economic climates can often lead to key moments for strategic litigation. Some moments may be obvious, such as the political denial of HIV/AIDS in South Africa in the late 1990s which prompted a prolific combination of litigation, lobbying, advocacy, and all forms of legitimate social mobilisation to advance equitable access to healthcare.<sup>49</sup> The moment may be linked to the act of an individual that exposes illuminating information as was the case with the Snowden leaks. The EFF recorded that the Snowden leaks were fundamental to their litigation strategy, prompting the launch of three cases directly challenging the legal and constitutional grounds of mass surveillance – First Unitarian v NSA, Jewel v NSA, and Hepting v AT&T.

## Case study: Acting on predictable events

During the strategic litigation and activism around LGBTQI+ rights in the 1980s in the US, the anticipated deadlines associated with litigation created moments for mobilisation. Court deadlines became used as “hooks for protest”, with litigation providing the opportunity for frequent activism.<sup>50</sup> Leachman explains that “the requirement for litigating groups to keep up with the predictable, pre-charged procedural deadlines that structure litigation may have augmented these groups’ incentive to survive and planning for survival, contributing to their overall longevity”. Court proceedings or government or corporate events are also strategic targets for mobilisation.

There may not always be an “Ah-Ha” moment in which litigators intrinsically know to commence strategic litigation. But when there is, it can be hugely beneficial, and litigators should capitalise on them. Regardless of whether the moment is clear or subtle, strategic litigators should be dynamic in their approach, recognising that strategic litigation often evolves with changing social, economic, and political circumstances.<sup>51</sup> However, it is equally important to remember that there can be a fine line between identifying key moments and being influenced by popular moments. When engaging with strategic litigation, it is worth being mindful that “political winds change, governments rise and fall, and popular opinion can be opaque, contradictory, and fickle”.<sup>52</sup>

<sup>49</sup> Heywood, ‘South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health’ (2009) 1 Journal of Human Rights Practice.

<sup>50</sup> Leachman, ‘From Protest to Perry: How Litigation Shaped the LGBT Movement’s Agenda’ University of California (2014) (accessible at [https://lawreview.law.ucdavis.edu/issues/47/5/Articles/47-5\\_Leachman.pdf](https://lawreview.law.ucdavis.edu/issues/47/5/Articles/47-5_Leachman.pdf)).

<sup>51</sup> Heywood, ‘Debunking ‘Conglomo-talk’: A case study of the amicus curiae as an instrument for advocacy, investigation and mobilisation’ (2001) 5 Law Democracy & Development 133 at 136.

<sup>52</sup> Dailey, above n 7 at 12.



**Guideline 24:** Ideally, you should assess timing on the availability of the right factual matrix and within a key social or political moment. In some instances, you may have to proceed without a “perfect alignment”. While this is not advisable, it may be necessary.

## Facts and evidence

Quite simply put, timing is heavily dependent on the collection of facts and evidence to support a legal claim. Litigation should not commence in the absence of sufficient evidence.

“The disclosure of evidence of human rights abuse can be among the most potent material results of strategic litigation. The information may be in the form of reports, sworn testimony, forensic evidence, statistical data, transcripts, photographs, audio recordings, maps, death certificates, or other tangible documentation.”<sup>53</sup>

Facts and evidence – what you need, when, and for what purposes – are considerations that you will need to keep in mind during the various stages of litigation. It may be useful to think about three bundles:

1. The evidence you need at the start.
2. The evidence you can aim to gather along the way.
3. The evidence you want from your opponents – putting them to the proof or having them answer on the record.

<sup>53</sup> Id at 46.



First, the evidence that you need at an earlier stage is often procured by taking statements and preparing affidavits. Collating and storing evidence can be a time-consuming process. Allowing time for the collection of facts and evidence is an important component of the time management of a case. Working through the following questions may assist in focusing your evidence collection, and alleviating unnecessary steps:

1. What do you already know?
2. What do you need to know to make your argument stronger?
3. Where are you going to get it, and how?
4. Who can support the evidence gathering process, would law clinics or pro bono partners be able to assist?
5. Can you proceed without some of the evidence at this stage?
6. With limited evidence, can you still succeed by relying on your opposition's evidence and proceed by way of a motion as opposed to a trial?

**Guideline 25:** Evidence of a rights infringement is a vital element in strengthening your litigation and proving your claim. Factor in time to get the evidence you need, and seek support to collect, collate, and present the evidence.

Second, there is often scope for further evidence to be obtained in the build-up to litigation, or during different stages of litigation. Some forms of evidence collection, and the timing of it, can be a strategic consideration in and of itself. Access to information requests is a good example of this.





## Expert tips: accessing information

Freedom of information (FOI) requests are an invaluable tool that enables litigators, activists, communities, and individuals to obtain information about the issues they are seeking to address. The information obtained through such requests can form the basis of important evidence for a case. However, as [Privacy International](#) explains:

“Filing an FOI request is not difficult, nor in and of itself particularly time-consuming, but it does take a long time before you get what you are after. Investigations based on FOI requests sometimes take years of waiting. Governments may usually extend the time they have to respond for various reasons, and they will often use that time. Sometimes you will need to start from scratch with a new FOI request. But having said all of this, take note of the exact day you filed the request and do not hesitate to complain if they do not reply in the timeframe allocated to them.”

A useful resource is the Global Investigative Journalism Network’s (GIJNs) [Guide to Freedom of Information Resources](#) and their [Global Guide to FOI and RTI](#). These resources can help when navigating various timeframes and procedures of FOI requests.

Third, requesting or causing your opponent to provide evidence is another strategic consideration. What they do or don’t come up with can be very telling and may further support your case. Access to information requests and discovery processes are common ways of seeking evidence from your opponent. Take for example data retention practices: If there is a mandatory retention period that exceeds what is necessary for law enforcement purposes, it may be worthwhile asking for a breakdown of where access to older records was instrumental for the successful conclusion of a case. If no answer is given, or even if a weak answer is given, it opens the door for you to argue why the data retention period is excessive. A similar situation played out in 2010 when the [German Constitutional Court](#) found data retention practices caused an unlawful intrusion into citizens’ privacy. In that case, the Court suspended the constitutional complaint and gave the government six months to put together a list of cases where access to older records was instrumental for a successful conclusion. The government was unable to provide a response. The lack of response was one of the main reasons why the Court moved to set the maximum retention period at six months.

**Guideline 26:** How you collect evidence can, in and of itself, be a strategic decision. For example, asking your opponents for access to certain information or having your opponent answer your claims “on the record” can be a hugely beneficial step in achieving the bigger picture objectives.



## Procedural factors

Beyond evidence gathering and the identification of key moments, there are practical considerations that may determine the timing of a particular matter. These are most often aligned to the procedural rules of the particular court or forum in which the litigation is to be launched. It is imperative to know whether there is a statute of limitations, prescriptive period, or time bar placed on the type of matter you want to bring in a particular court. These are considerations that apply to all forms of litigation. Mapping this out early on may save you in the long run – it may even impact the decision to pursue strategic litigation altogether. These considerations should be coupled with considerations around whom the matter is being brought against. For example, litigating against the state may require different processes and time frames to those of litigating against private parties.

### Expert tips: cheat sheets and roadmaps

**Cheatsheets:** Familiarising yourself with the time frames and practical considerations of the courts you are most likely to approach is crucial for all litigators. Along with having easy access to copies of the Court Rules, developing simple “cheat sheets” that reference the days you have to launch particular matters can save time and allow the team to make an informed decision fairly easily and efficiently.

**Litigation roadmaps:** Timing, dates, and rules are indispensable to litigation. Mapping out the various stages, timeframes for filing particular documents, and timeframes within which the other side has to file can be useful. This is essentially an early case assessment that assists in giving some indication of what lies ahead. While litigation seldom runs perfectly with all timeframes adhered to, being able to identify key procedural moments ensures that the team is operating efficiently and effectively. This will also inform further strategic decisions and allow you to determine when to apply pressure, when to wait, and what moments to mobilise around.

**Guideline 27:** Key moments should be identified within the litigation process, including filing deadlines and further potential social and political moments. These deadlines and moments should be used to complement the litigation strategy and bolster existing or new advocacy campaigns.



## What, where, and against whom to launch: evaluating legal routes, fora, and defendants

Evaluating the strengths and weaknesses of different litigation fora<sup>54</sup> often goes hand in hand with identifying the correct defendants,<sup>55</sup> and assessing the strengths of different types of legal action.<sup>56</sup> These factors are also intrinsically intertwined with the overall objectives, the identity of the litigants, and the timeframe you have to work within. These are all standard inquiries made by litigators, and the considerations for digital rights litigation are substantially similar and largely dependent on the facts of the matter and the overall goal. There are however some helpful considerations that you may want to reflect on as you plot your strategy.

### Assessing different legal routes

The type of legal action may be a consequence of a strategic decision, or it may be a strategic decision in and of itself. In relation to the former, the type of legal action will likely be in response to a cause of action. For example, interdicting a particular type of conduct. In terms of the latter, it may be linked to the relief sought. For example, if you want to bring an administrative case to review a decision taken by the government. [Action4Justice](#) developed a guide that reflects on different types of legal action and some of the considerations may inform which route is best to pursue.

### Expert tips: pursuing two lines of litigation

The [Gesellschaft für Freiheitsrechte](#) (GFF) is currently involved in a matter which concerns the implementation of the Passenger Name Record Directive in Germany which is said to violate privacy rights. To address the issues around privacy and the potential misuse of datasets, GFF, working with [epicenter.works](#), is pursuing two lines of litigation: one through administrative courts and the other through civil lawsuits. Sometimes, it may be worth engaging on multiple fronts.

Digital rights issues can arise in a range of different contexts and may warrant exploring less conventional routes. This may require you to think about different bodies of law such as consumer protection, contract law, intellectual property, competition law, labour law and administrative law, as well as the different contexts in which digital issues can arise, such as criminal matters, immigration issues, discrimination concerns, and children's safety.

<sup>54</sup>The term "litigation fora" is used to reflect spaces where disputes are heard and decided on by a judicial body.

<sup>55</sup>The terms "defendant" or "defendants" are used to reflect the party against whom the case has been brought.

<sup>56</sup>The term "legal action" encapsulates all forms of legal proceedings, including but not limited to civil, criminal, and administrative cases, class actions, and appeals and reviews.



## Guideline 28: Digital rights issues can arise in a range of different contexts and may warrant exploring less conventional routes. Be open to alternative areas of the law that may prove to be more effective in addressing issues, particularly against private actors.

Connected toys are an interesting example that cuts across different fields of law as well as different contexts.<sup>57</sup> Smart or connected toys, part of the broader category of the Internet of Things, are becoming increasingly popular. However, the toys portrayed as cuddly and cute are not as innocent as they look. There are growing campaigns, such as #WatchOut and #ToyFail that seek to highlight the issues of many of these toys – in particular, issues around children’s safety and privacy, invasive data collection practices, and complex and unwieldy terms and conditions that prompt concerns around consumer rights. Bringing a case around smart toys could be done through a children’s rights lense, a privacy and data protection lense, or a consumer protection lense. Accordingly, there are different fields of law that could be relied on, separately or collectively, when addressing the concerns associated with smart toys.

Competition law is another area of law that implicates digital rights. Digital rights activists have cautioned that “a small number of large online platforms not only act as economic gatekeepers but also as ‘fundamental rights’ gatekeepers.” Big tech companies, who wield significant influence, have unfettered power to set the standards of the digital world – which often comes at a price for consumers and their digital rights. Abusive terms of service and distorted power dynamics threaten freedom of expression and access information. It may be worth exploring digital rights issues through a competition law lens, which may also include consumer protection considerations. DFF is working on Taking on Big Tech in the fight for digital rights and has developed a short guide to competition law for digital rights litigators to provide individuals working on digital rights litigation with an overview of the main principles of EU competition law.

Another example would be the tensions of intellectual property and copyright laws in the context of digital rights. ARTICLE 19 explains that while copyright laws can “benefit society, promote the progress of science and the arts, facilitate growth, support creativity and spread cultural expression”, copyright law “has been increasingly used to discourage creativity and stifle free expression and the free exchange of information and ideas in order to protect

<sup>57</sup> Connected Toys are internet enabled devices that are incorporated into physical children’s toys and often include a microphone and speaker, are connected to an app. See UK Information Commissioner’s Office, ‘Connected toys and devices’ Age appropriate design: A code of practice for online services (2020) (accessible at <https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/age-appropriate-design-a-code-of-practice-for-online-services/14-connected-toys-and-devices/>).



exclusive proprietary interests, at the expense of the wider public interest". There may also be interesting [cross-border conflicts](#), or [international trade](#) considerations. Therefore, litigating copyright matters may involve intellectual property law, international trade law, and information rights.

### Case study: Recognising less conventional routes

The case of [Carpenter v United States](#) provides an interesting example of litigators pursuing a less conventional route to achieve a significant impact. The case began as a routine criminal prosecution related to a string of armed robberies. It eventually resulted in a significant finding by the US Supreme Court that the government needs a warrant to access a person's cellphone location history. Carpenter was convicted at trial, based in part on the cell phone location evidence obtained during the criminal investigation. On appeal, a host of civil society organisations<sup>58</sup> filed an amicus brief arguing that the government violated the Fourth Amendment<sup>59</sup> when it obtained the location data. The ACLU eventually became co-counsel with Carpenter's defence attorney as the matter proceeded to the Supreme Court.

What was unique about this case was the manner in which the ACLU identified how to utilise a criminal case to raise issues that they would ordinarily want to raise in a civil case. Recognising that not every piece of litigation needs to be driven or birthed by strategic litigators is an important consideration that litigators should bear in mind.

## Evaluating the strengths and weaknesses of different litigation fora

While traditional legal routes have proven to be successful, it may be worth considering less conventional routes that may lead to similarly impactful outcomes. In the context of digital rights, it may be difficult to bring cases about surveillance given that surveillance by its very nature involves a lot of secrecy. Further to this, digital rights, data-driven harms, and algorithmic decision making are likely to affect more and more spheres of public and private life. This may result in more opportunities to litigate in non-traditional fora. Depending on the jurisdiction you are operating in, launching a surveillance case may be tricky and result in lengthy procedural fights around standing, with the key issues not being addressed for years. In situations like this, explore whether there are other ways in which the same issues can be raised more efficiently, potentially by approaching DPAs or ombudsmen.

Selecting where you intend to litigate is an important consideration and is, as always, aligned to your overall objectives. At the outset, reflect on the following questions:

1. In which court/forum will the case be heard?
2. Does your claim fall within the geographical and procedural jurisdiction of this court or forum?
3. Do you need to comply with particular procedural steps or exhaust other remedies before approaching this forum?

<sup>58</sup> The ACLU, the ACLU of Michigan, Brennan Center, Center for Democracy & Technology, Electronic Frontier Foundation, and the National Association of Criminal Defense Lawyers.

<sup>59</sup> The prohibition on unreasonable searches and seizures, requiring any search warrant to be judicially sanctioned and supported by probable cause.



#### 4. What is the judicial culture of the forum?

- Have you reviewed the precedents of the court to contemplate how it may respond to a particular issue?
- Is it an activist or conservative court?
- Does it see itself as deferential to or as challenging government?
- Is it open to creative arguments, rights-based arguments, or comparative law?

#### 5. Do you have alternative options?

#### 6. Why have you decided to pursue the case before this court/forum?

[Advocates for International Development](#) suggest that, ideally, a court should be competent, independent, and impartial – any limitations of the courts and the bias that may exist within them should be considered when lawyers develop litigation strategies. The appropriate forum is not always the ideal forum, and you may want to take some time considering various options before jumping for the higher-profile fora.

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#### Alternative spaces:

You may want to start with an FOI or [lay a complaint with a relevant regulator](#). Mediation and arbitration forums, NHRIs, ombudsman, or DPAs are other alternative institutions you may want to approach. Alternative dispute resolution forums can save time and cost and still lead to positive change. Exhausting alternative remedies before approaching courts can be useful either for obtaining relief quickly, or you may elect to start here, knowing that you will be in it for the long haul, in which case you may want to highlight systemic issues within institutions.

## Case study: Intervening in investor-state arbitrations

In 2009, South African human rights organisations, the Legal Resources Centre (LRC) and the Centre for Applied Legal Studies (CALs), fashioned an amicus-style alliance with international organisations, the International Centre for the Protection of Human Rights (INTERIGHTS) and the Centre for International Environmental Law (CIEL) with the intention of participating as non-disputing parties (NDPs) in an international investor-state arbitration.<sup>60</sup> The organisations sought to make written submissions, have access to relevant arbitral documents, attend the oral hearing and present oral arguments.<sup>61</sup> Their arguments focused on international human rights law on access to information and the need for transparency to be the “starting point and default position in the conduct of any proceeding involving the state”.<sup>62</sup> The Tribunal allowed the organisations to participate – marking a significant victory for infusing public interest considerations into investor-state arbitrations. This is a creative example of exploring alternative forums or spaces and replicating traditional amicus procedures in novel ways.

<sup>60</sup> Brickhill & du Plessis, ‘Two’s company, three’s a crowd: public interest intervention in investor-state arbitration (Piero Foresti v South Africa) (2011) 27 SAJHR. The dispute centred on the impact of South Africa’s mineral and petroleum resources legislation on the expropriate of mining rights of individuals and companies based in Italy and Luxembourg.

<sup>61</sup> See Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01, ‘Available Documents’ (accessible at <https://www.italaw.com/cases/446>).

<sup>62</sup> Id at 159.



### Lower courts:

Relying on lower courts should not be overlooked and can be useful for several reasons: (i) Many lower courts provide communities and individuals with the opportunity to obtain meaningful access to justice; (ii) higher courts are often thankful for issues being ventilated in lower courts, allowing them to consider the matter more holistically; (iii) the findings of lower courts can contribute to shaping the content of higher courts' jurisprudence; and (iv) climbing the court ladder can allow you to test arguments, build momentum and, if needs be, recalibrate. Of course, this approach needs to be balanced against the additional costs it might incur.

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### Specialist courts:

Specialist courts may be worth pursuing. They might be quicker to take the lead on new issues and more comfortable dealing with technical issues and evidence – paving the way for more traditional/conservative/generalist judges in the higher courts who will have the comfort of seeing the evidence and arguments as “vetted” by their judicial colleagues. For example, the Australian Planning and Environmental Courts have played an important role in climate law by making some useful references and findings on the impact of climate change when denying permits for new coal mines.

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### Higher courts:

The esteem of higher courts coupled with their precedent-setting abilities make them an attractive option for many strategic litigators. Subject to the nature of the matter, working towards appearing in a higher court may be your goal. Alternatively, and if the rules of court allow, under certain circumstances, you may be able to seek direct access to a higher court. Direct access provisions may allow a litigant to approach a higher court directly in instances where fundamental rights have been infringed. In Europe, several countries allow for litigants to approach higher courts in instances of fundamental rights infringements.<sup>63</sup> Relying on direct access provisions can be a strategic and impactful option if available.

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<sup>63</sup> See Gentili, 'A comparison of European systems of direct access to constitutional judges: exploring advantages for the Italian Constitutional Court' *Italian Journal of Public Law* (2012) (accessible at [http://sro.sussex.ac.uk/id/eprint/57091/1/Italian\\_PublicSSRN-id2143089.pdf](http://sro.sussex.ac.uk/id/eprint/57091/1/Italian_PublicSSRN-id2143089.pdf)) and Gentili, 'A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court' *Penn State International Law Review* (2012) 29 (accessible at <https://elibrary.law.psu.edu/psilr/vol29/iss4/2/>)



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### Regional and international courts:

Regional human rights systems or United Nations bodies may be another route to consider – particularly if you are looking for treaty compliance, or if domestic remedies have failed. The [ICJ](#) recommends considering various factors such as (i) jurisprudence of the judicial or quasi-judicial body concerning the legal issues at stake in a specific case; (ii) procedural issues (admissibility, standing, timeframes); (iii) the type of remedies that can be ordered, (iv) the nature of the decisions and (v) the perspective of enforcement and implementation. You may also want to consider first challenging an issue at the national level and then, subject to the outcome, taking the issue to a regional forum. Domestic courts may also refer a matter to a regional court for consideration. When considering this route, it is important to note that there may be some tensions between the domestic and regional fora.

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## Case study: Clashes of the courts

In [LQDN, FDN and others v. France](#), the laws around data retention periods were first challenged domestically in France in the Conseil d'État (the highest administrative court in France). The Conseil d'État referred the matter to the Court of Justice of the European Union (CJEU). In October 2020, the CJEU found that EU law prohibits a state from forcing telecommunications operators to retain metadata on the entire population and sent the case back to the domestic court for implementation of the judgment. However, and disconcertingly, the Conseil d'État in April 2021, made a finding contrary to what the CJEU required, and significantly extended the notion of “national security”. [European Digital Rights \(EDRi\)](#) explains the consequences of the Conseil d'État's ruling as follows:

“This decision reflects the blank check given by the Conseil d'État to the government and intelligence services. By reducing the rights to privacy, security, or freedom of expression to a pure declaration of principle devoid of effectiveness, the Conseil d'État gives to the sacrosanct national security a definition that is so monstrous that it enables it to annihilate the rest of fundamental rights. The Conseil d'État overturned the basic principle in terms of state surveillance and permanently enshrined it in French law: everyone is a suspect, of everything, all the time.

The position of the Conseil d'État raises multiple questions:

1. What legitimacy can France have to speak on behalf of the European Union after trampling its very principles and jurisdictions?
2. What future is there for the respect of the rule of law when the French judge is so directly opposed to a legal decision?
3. France is no longer legitimate to talk about European shared values, nor should it be.
4. In a European Union threatened by authoritarian and nationalist pressures, France has just set a sinister precedent in the negation of the fundamental rights promoted in Europe since the end of the last world war.





5. From now on, each Member State — and beyond — will be able to easily follow the French example and hide behind any “national security” claim to disregard its international obligations and the rule of law.”

**Guideline 29:** Reflect on why you are approaching a particular forum. Assess the strengths, weaknesses, and strategic opportunities various alternative fora may provide.

## Public versus private actors in litigation

The role of big tech in the context of digital rights remains a key concern:

“Despite some notable progress, most of the world’s biggest internet, mobile, and telecommunications companies are still failing to predict and mitigate the human rights harms of their business decisions, design choices, and deployment of new technologies.” <sup>64</sup>

When assessing different legal routes, consideration should be given to effective ways to hold both state and non-state actors to account. Accordingly, assessing the value of various fora may come down to who the defendants are. There are likely to be different considerations for state and non-state actors. Knowing who to litigate against, and what the various obstacles and opportunities are, may be determinative in your litigation strategy. Traditionally, the primary target of strategic litigation has been governments. However, companies are increasingly entering the fray. Litigating against the private sector can be

<sup>64</sup> Business & Human Rights, ‘Ranking Digital Rights 2019 index finds tech companies ‘still failing’ to curb abuse on privacy and free expression’ (2019) (accessible at <https://www.business-humanrights.org/en/blog/ranking-digital-rights-2019-index-finds-tech-companies-still-failing-to-curb-abuse-on-privacy-and-free-expression/>).



complicated and challenging. Significant power imbalances in relation to the availability of resources can deter human rights organisations from pursuing litigation against private sector actors. The transnational and extraterritorial dimensions of multinational corporations can further complicate the process. Fortunately, digital rights litigators are not the first to experience this problem.

In the digital rights context, these considerations can be complex and layered. You may have instances where private actors are collaborating with the state. For example, private actors who assist in the development of surveillance technology, or communications companies that allow their services to be used for state surveillance. In 2019, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, in the context of surveillance and human rights, observed that “[d]igital surveillance is no longer the preserve of countries that enjoy the resources to conduct mass and targeted surveillance based on in-house tools. Private industry has stepped in, unsupervised and with something close to impunity.” In addition, there may be direct violations from private actors, such as facial recognition companies that are violating privacy rights.

This may be further complicated in the context of free speech, social media companies, and content moderation.<sup>65</sup> The surveillance and technology sector, the software sector, and the electronic sectors have been alleged to have caused or been complicit in human rights violations.<sup>66</sup> Litigation around indigenous rights, environmental rights, and access to health care often involved litigation against powerful corporate interests such as multinational mining or oil and gas companies, big pharmaceuticals or tobacco corporations, and may therefore provide useful comparative case studies for litigants seeking to go after big tech companies. However, an antagonistic relationship with private actors may not always be the case – in some instances, they could be allies in litigation against the state. In other instances, the dispute may be between a private actor and the state and may benefit from a human rights perspective. For example, and as noted above, civil society actors have sought to intervene in a dispute between Telegram and Russia, in order to advance rights-based arguments.

**Guideline 30:** Different actors may cause rights violations. It is important to be alive to that fact when deciding on your litigation strategy.

<sup>65</sup> See EDRI, ‘Digital Services Act: what we learned about tackling the power of digital platforms’ (2020) (accessible at <https://edri.org/our-work/digital-services-act-what-we-learned-about-tackling-the-power-of-digital-platforms/>).

<sup>66</sup> Policy Department for External Relations, ‘Study: Access to legal remedies for victims of corporate human rights abuses in third countries’ (2019) at 20 – 30 (accessible at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO\\_STU\(2019\)603475\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)).



## Case study: Taking on 47 large corporations

The Commission on Human Rights of the Philippines is investigating Shell, ExxonMobil, Chevron, BP, Repsol, Sasol, and Total on allegations of being legally and morally liable for human rights harms to Filipinos resulting from climate change.

Hasminah Dimaporo Paudac, Greenpeace Philippines' legal advisor, explained some of the ways their team sought to topple modern-day Goliaths in the fight against climate polluters:

1. The team relied on groundbreaking research and studies that linked pollution to corporations.
2. Climate change and human rights issues were presented as interrelated challenges.
3. Community witnesses testified to the human rights harms they suffered as a result of the fossil fuel companies' activities. National experts validated these claims, and international experts triangulated the testimonies, science, and jurisprudence.

## Guideline 31: Your litigation strategy should be responsive to the transnational and extrajurisdictional dimensions of private actors.

The above case study can be applied to digital rights litigation against private actors:

1. Get evidence and work with technologists and computer scientists to understand the implications. The private sector is likely to be well versed on a lot of the issues you may raise as they are highly skilled and capacitated. Knowing the facts and evidence is key.
2. Highlight why digital rights are human rights and how the actions of the private sector actors are violating human rights – to the extent possible highlight individual stories or make the harms tangible for a court who may not be fully in tune with the technicalities.
3. Work with communities and individuals who may want to share stories, bring in your networks, and find allies.



## Phase 6: Post-judgment considerations

Strategic litigation can be tough. It can take a toll emotionally. It can be a painfully slow process, at times alienating, unaccountable, and risky.<sup>67</sup> It can drain capacity and resources. But it can also be a powerful tool for positive change. It can be crucial in correcting major policy missteps, unblocking bureaucratic barriers, combating corruption, injecting urgency, and forcing governments and the private sector to prioritise human rights.<sup>68</sup> As we have emphasised throughout this toolkit, litigation is but one of the tools in the toolbox. As such, the judgment is seldom the end of the road – in fact, many strategic litigators refer to the judgment as “half-time”. Sustaining the drumbeat of strategic litigation means persisting with the fight after the judgment has been handed down. It means retaining the attention of clients, partners, and the media from inception to the point where outcomes become tangible and realisable. It means sustained resistance against attempts to derail or diminish the work that has been done.

You may often need a judgment to continue a struggle. That continuation may involve promoting public education or awareness or engaging in appeal and review processes. It may also involve further litigation to enforce the judgment. A judgment is not just a homogeneous piece of paper, it can be used in different ways. The order can have great value and is a key tool in pushing for implementation. But the content of a judgment can also be extremely helpful in shaping advocacy strategies and reinforcing arguments about the role of rights. Often the authority and legitimacy of a judgment can support further research, advocacy and litigation, and can be an important stepping stone to the next phase of advancing the protection of human rights. There are, however, times in which we do not get the order we want, or the judgment is not in our favour. Knowing how to respond to this is an important consideration that should be incorporated into your strategy.

**Guideline 32:** Strategic litigation does not always end with a judgment. The struggle may continue in the form of monitoring, implementation, appeals, reviews, and public education. It may also involve further litigation to enforce the judgment.

<sup>67</sup> Dailey, ‘Using the Courts to Change the World: Insights from Experience’ (2018) (accessible at <https://www.justiceinitiative.org/voices/using-courts-change-world-insights-experience>).

<sup>68</sup> Brickhill, ‘Strategic litigation in a perfect storm—South Africa’ Open Global Rights (2019) (accessible at <https://www.openglobalrights.org/strategic-litigation-in-a-perfect-storm-south-africa/>).



## Disseminating the judgment and case material

Once an order has been made and a judgment delivered it is important to share it with clients, communities, the media, and the public. This can begin with a brief social media post but should be followed by more substantive content - press releases, access to the judgment and case materials, and useful explanatory notes. This is a simple and practical step, but one that is crucial for the next phase of the strategy, be it further advocacy, implementation and enforcement, or further litigation.

Most organisations already do a great job at this and should continue to publish content and case materials. For organisations who are still working on this, here are some examples that may assist:

1. The [ACLU](#) has dedicated [case pages](#) to the matters they are working on. The case pages include a case summary; links to press releases; the date the case was filed; which court it is before; the status of the case; links to related issues about the rights violation; and all case material (pleadings, motions, opinions, briefs, interim decisions and judgments, and orders).
2. [Privacy International](#) similarly makes court filings and related materials public. Privacy International differentiates between complaints it has filed with regulators, cases it has filed before courts, and its legal submissions in cases filed by others. These resources include a summary, links to judgments or findings, related reports, and access to legal files.
3. [Dejusticia](#) similarly uploads case summaries and provides access to the documents that are filed in different matters.
4. The [Open Society Justice Initiative](#) provides updated summaries of matters it has supported, their resources include factual and legal summaries; litigators involved; which court it is before; the status of the case; timelines; and access to legal documents.
5. Columbia University's [Global Freedom of Expression](#) portal includes an interactive world map, thematic filtering options, and resources covering case analysis; decision overview; an outline of the case significance; and official case documents.
6. The [GDPR Hub](#) collects and summarises decisions from DPAs and courts across Europe.

Judgments can be long, complex, technical, and verbose. It is therefore important to share information about the judgement in a clear and accessible way. At DFF, we have prepared a series of [case studies](#) which are simple and accessible notes that provide an overview of a given case and can be used to inform the public and raise awareness about prevalent digital rights issues. Making a judgment tangible and relatable can be challenging – particularly in the context of digital rights – but it is a necessary and important part of any strategic litigation process and will likely contribute to further advocacy around the issues.



Beyond disseminating information about a judgment, engaging with various stakeholders may be an additional approach to consider. Press briefings, training with activists and communities, and workshops can be effective ways of sharing information and informing people about their rights, how the decision may affect them, and what recourse they may have. Articulating, in relatable terms, what a judgment means could include the following:

1. This is why the court case happened.
2. This is what the court said.
3. This is why it matters.
4. Going forward, this is what should or should not happen.
5. If this does happen this is what you can do or who you can contact.

**Guideline 33:** Judgments are not always easy to understand and might be lengthy and filled with legalese and technical findings. It is therefore important that the judgment be accessible and understandable.

## Navigating “wins” and “losses”

Further to our earlier discussion about success and impact, a case may be impactful even if unsuccessful. Instances of this include strategic litigation that is used as an advocacy tool alongside protest action or as a means to compel an opponent to discover documents that would otherwise not be in the public domain. Here, success in litigation is not the aim but the litigation itself becomes a tool in a broader public interest campaign. Sharing information about a case post-judgment is important whether it is a win or a loss, but the framing and strategy might differ depending on how you want to capitalise on the outcome. Sometimes a powerful precedent is set, a firm order is given and there is likely to be a tangible outcome. Sometimes litigation does not achieve substantial changes in jurisprudence, and sometimes courts will not grant the relief you seek. This does not mean that it is the end of the road. “Unfavorable litigation outcomes can be uniquely salient and powerful in highlighting the misfortunes of individuals under prevailing law while presenting a broader narrative about the current failure of the legal status quo.”<sup>69</sup> Regardless of a perceived “win” or “loss” it is necessary to think about the judgment’s immediate and direct effects, as well as the more subtle or indirect outcomes.

<sup>69</sup> Dailey, above n 7 at 90.



Helen Duffy proposes a move away from the “win-loss” narrative. She suggests that the significance of human rights litigation should be viewed through three, more modern, sophisticated lenses:<sup>70</sup>

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**High-definition lens:**

Here you look at specific details and assess the multi-dimensional impact of human rights litigation.

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**Long lens:**

This requires viewing impact over time. Here you look beyond the judgment to see how litigation may also influence change before cases are presented, throughout the process, and long after judgment has been handed down.

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**Wide-angle lens:**

This lens allows you to see litigation in context. Through this lens, you can see the synergy between litigation and other agents for change, such as civil society advocacy, education, or legislative reform.

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**Guideline 34:** The outcome of a judgment is often not a simple binary of winning or losing. It is important to reflect on the direct and indirect impacts that are both material and symbolic.

Effects of a judgment can be wide-ranging, and how we view these can determine what we do next. A judgment can be a potential political tool for individuals, communities, and organisations. It can prompt action. It can evoke positive feelings of empowerment, rights awareness, and self-advocacy. It may also inspire other communities to pursue similar strategies, generating more broad-based pressure on the courts to address systemic rights violations.<sup>71</sup> Importantly, navigating the direct and indirect outcomes of a case, which is either a win or a loss, should feed into subsequent advocacy strategies. This could include:

<sup>70</sup> Duffy, ‘Strategic Human Rights Litigation: “Bursting the Bubble on the Champagne Moment”’ Inaugural Lecture Leiden University (2017) (accessible at <https://scholarlypublications.universiteitleiden.nl/access/item%3A2940282/view>).

<sup>71</sup> Dailey above n 7.



1. Publicising the judgment and unpacking its impact as either a win or a loss.
2. Continuing with digital literacy campaigns.
3. Exploring new partnerships and networks while reinvigorating existing ones.
4. Reinforcing why digital rights matter.
5. Participating in the policy and law reform processes.
6. Hosting informative workshops.
7. Publicising if the court ordered an action or ordered a process to start or stop.
8. Actively monitoring the enforcement of the judgment.
9. Setting up a countdown to an anticipated direct outcome and build momentum around it.
10. Organise events, marches, and workshops in the build-up to an expected moment.

## Knowing how to enforce and implement a judgment

Arguably, the most critical factor in ensuring that strategic litigation achieves maximum positive change is proper follow-up. This involves ensuring that a litigation victory is put into effect by the government or private sector actor. Implementation and enforcement, or a lack thereof, is another key post-judgment consideration that should form part of your litigation strategy from early on. Batros and Khan explain that “a plan for how to implement the decision is necessary if a legal victory is not to be a hollow one.”<sup>72</sup> This is often a very contextual consideration.<sup>73</sup> It is therefore useful to understand both the relevant judicial processes as well as the current political climate within which you are operating. It is then necessary to know when to work with or against the factors. The foundations for implementation should be laid early on. You may want to prepare your advocacy strategies, engage the relative members of your ecosystem, and most importantly, define the remedies, including who will be responsible right at the start of the matter, all with a view to implementation.

<sup>72</sup> Batros and Khan above n 3.

<sup>73</sup> See Skilbeck, From Judgment to Justice Implementing International and Regional Human Rights Decisions (2020) Open Society Justice Initiative (accessible at <https://www.justiceinitiative.org/uploads/62da1d98-699f-407e-86ac-75294725a539/from-judgment-to-justice-20101122.pdf>).





Below are some tips for navigating enforcement and implementation:

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**Know the system:**

Most national and regional systems have procedures that address issues of non-compliance. Knowing when and how to use these procedures can have a significant impact on the enforcement of the case. This, again, requires reflections on timing, knowing when you can return to courts for compliance, and knowing strategically when it is best to follow this route.

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**Recognise when the system does not work:**

While it is necessary to know the rules and procedures, it is also important to recognise when this does not work. The institutional design of national and regional systems may be well-intentioned, but when it comes to enforcement, there is little bite to their bark. This may be a broader strategic consideration and may warrant engagement with partners and networks who are interested in working on bolstering institutional capacity to facilitate better compliance. It may also be the case that you or your partners are interested in using strategic litigation to address rights violations, but are seeking to improve implementation machinery within national legal frameworks as well.<sup>74</sup>

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**Grapple with political narratives:**

Non-compliance is often tied to political factors — a lack of political will, a lack of resources and funding, or a lack of respect for judicial decisions. Understanding the political climate can assist in assessing when enforcement and implementation are likely through traditional means, or when more creative means are warranted. It is also worth exploring the political tools available to various fora. For example, within the context of the ECtHR and the Committee of Ministers, it is said that their main tool is peer pressure. The Committee of Ministers can apply pressure by making public the fact that the State has not yet executed the judgment. Further, the availability of information about the execution of judgments on the website of the Committee of Ministers also adds to publicity and moral pressure.<sup>75</sup>

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<sup>74</sup> Skillbeck above n 73 notes: “Arguably the Inter American system’s most significant implementation-related development is the promulgation of legal and legislative mechanisms at the national level to facilitate the implementation of decisions by the commission and court. Peru has articulated perhaps the best example of such legislation, which establishes the specific steps that should be taken in order to give effect to the decisions of supranational courts that order pecuniary damages or declaratory relief. Similarly, in Colombia, national legislation provides a process for the payment of pecuniary damages ordered by international human rights bodies. Further processes to develop comprehensive implementation legislation are ongoing in Argentina and Brazil.”

<sup>75</sup> Venice Commission, ‘Opinion on the implementation of the judgments of the European Court of Human Rights’ (2002) (accessible at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)034-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)034-e)).



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**Introduce creative advocacy strategies:**

When traditional methods of enforcement and implementation fail, get creative. Involve the media, mobilise around the issue, and engage with politically relevant national and international actors. The media can play a key role here. They should be brought into the conversations around non-implementation issues, how it impacts lives, and how they can bring pressure for change.<sup>76</sup> You may want to highlight how easy compliance could be, or you may want to use the non-compliance as a stepping-stone to the next stage of strategic litigation, such as approaching regional or international fora.

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**Court-mandated monitoring committees:**

In addition to the above, you may also want to consider the role of court-mandated monitoring committees – how to include them in the initial relief you seek, and how to ensure they are accountable, inclusive, and representative of various stakeholders.<sup>77</sup>

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**Be prepared to “meet again”:**

Subject to the social and political context you are litigating in, and subject to who you are litigating against, there is a possibility that you will need to litigate a similar issue more than once. For example, judgments in a particular case often motivate legislators to amend the law in an attempt to get around the judgment while still achieving their original objective. This can give rise to a form of “judicial-legislative ping-pong”, where CSOs have to litigate amended rules and new defences. Alternatively, your opponents may not comply with the order or find ways to circumvent the court order. You may need to approach the court again or reformulate your argument to cater to their avoidance or evasion tactics.

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<sup>76</sup> Stanford, ‘The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part 2: The Hole in the Roof’ (2019) EJIL Talk (accessible at <https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-2-the-hole-in-the-roof/>).

<sup>77</sup> See Dailey, ‘Implementation of Judgments: Practical Insights from Civil Society’ (2020) 12 Journal of Human Rights Practice.



## Case study: The persistence of Max Schrems

In 2015, Austrian citizen Max Schrems filed a [complaint](#) against Facebook with the Irish Data Protection Authority (DPA) around the transfer of his Facebook data from Europe to the United States (US), arguing that US laws provided insufficient data protection against US government surveillance activities. The Irish DPA rejected the complaint on the basis that the European Commission had decided on the adequacy of the US data protection system - the Safe Harbor framework. This prompted Schrems to approach the High Court of Ireland. The case was referred to the CJEU. In October 2015, in the [Schrems v Data Protection Commission \(Schrems I\)](#), the CJEU declared the European Commission's decision on the adequacy of the US data protection system invalid, finding that the requirement of adequate protection under the Data Protection Directive means essentially equivalent to the protections guaranteed in the EU, in order to ensure a high level of protection that extends to personal data transferred outside the EU. The CJEU further held that stricter requirements were needed for the transfer of personal data based on standard contract clauses.

Following Schrems I, Facebook relied on standard contractual clauses (SCCs) as an alternative mechanism to legitimise EU-US data transfers, as they could no longer rely on the Safe Harbor provisions. In December 2015, Schrems [reformulated](#) his argument and [challenged](#) the transfers of personal data to the US based on the SCCs arguing that the US regime implicated his rights to privacy, data protection and effective judicial protection. In 2016, the Privacy Shield framework replaced the Safe Harbour framework to provide for the lawful transfer of personal data from the EU to the US. The Irish DPA shared Schrems concerns and took the matter to the Irish High Court who referred several questions to the CJEU. In 2020, in [Data Protection Commissioner v Facebook Ireland and Maximilian Schrems \(Schrems II\)](#), the CJEU invalidated the European Commission's Privacy Shield decision and imposed strict conditions on SCCs.

Schrems I and II are useful illustrations of persistence in the face of circumvention or non-compliance.

In addition to the above tips, some useful resources may assist in navigating the complexities of compliance and enforcement:

1. The [Notre Dame Reparations Design and Compliance Lab](#) focus on the question "Under what conditions do states comply with orders of international tribunals in cases involving human rights?" The lab provides resources, reports, and courses on compliance with human rights measures.
2. The [European Implementation Network \(EIN\)](#) seeks to assist members and partners in turning judgments from the ECtHR into real changes in their own country. The EIN maps compliance across the region, and provides useful resources, reports and case studies.



## Expert tips:

Nani Jansen Reventlow explains that:

“A win in court does not automatically mean that the policy, law or practice you sought to change will be fixed. More work will be needed to push for implementation, legislative follow-up, and sometimes also in the courtroom. To fight these battles on multiple fronts, it is important to have partners who are skilled in pursuing those objectives together. On the other end of the spectrum is the situation where a case is lost. In some circumstances, a loss in court can still be leveraged into a win on other fronts. For example, public outrage about a judicial outcome can help create a necessary push for legislative change. Here, public support, as well as strategies and partners outside the courtroom are essential.”

**Guideline 35:** One of the critical factors in ensuring that strategic litigation achieves maximum positive change is efficient and effective enforcement and implementation. This is often a challenge within itself. Know the process, recognise the political climate, and use compliance and non-compliance alike as key moments for advocacy.

## Factor in time for monitoring and evaluation

Effective strategic outcomes and genuine impact are not easy to establish and require a full assessment to avoid unintended consequences and wasted resources and opportunities. Monitoring and evaluation (M&E) during and upon completion of strategic litigation is key. It can help identify valuable and efficient uses of resources and highlight how you can allocate and reallocate resources in better ways. It allows for the collection of necessary data that can guide future strategic planning and enables team members to make informed decisions going forward. Importantly, it allows you to reflect on the impact of your case and whether the strategic objectives have been met. However, due to the nature of strategic litigation, litigators are often already onto the next matter before the last one has been completed. Litigation teams often work tirelessly to affect positive change and do not always carve out time to reflect on matters. While time and capacity constraints are very real, the import of M&E cannot be gainsaid.

<sup>78</sup> Reventlow, 'Connecting litigation with other efforts: strategic litigation as a tool in the toolbox' (2018) Digital Freedom Fund (accessible at <https://digitalfreedomfund.org/connecting-litigation-with-other-efforts-strategic-litigation-as-a-tool-in-the-toolbox/>).



## Guideline 36: Monitoring and evaluation are important not just for assessing impact, but equally for reflecting on strategies, unpacking successes and failures, and planning for future approaches.

There are several reasons why M&E processes are useful. They allow you to:

1. Understand progress.
2. Assess resource allocation.
3. Reflect on direct and indirect impact.
4. Know what can be replicated and what should be avoided or changed.
5. Consider the unintended consequences.
6. Identify multiple levels of impact.

More tangibly, an M&E process gives you time to ask whether:

1. The initial goals set have been realised.
2. The judgment set a good precedent.
3. New laws and policies are going to be created.
4. There is better public engagement on the issues.
5. People better understand their digital rights.
6. People have been empowered through this process.
7. You are working with new partners.
8. You established meaningful relationships with the media.



## Case study: The OPERA Framework

The Centre for Economic and Social Rights (CESR), recognising the need for a simple framework for monitoring the compliance of economic, social, and cultural rights, developed the OPERA framework which takes into account four levels of analysis:

- 1. Outcomes:** The first step requires clear indicators measuring outcomes – for example, literacy or employment rates. This aims to assess the realisation of human rights in practice.
- 2. Policy Efforts:** This step identifies the commitments states have made, and how these commitments have materialised into laws or policies. This reflects on the measures taken by the state, both in terms of policy or law reform, and also reflects on the processes through which policies are formulated and implemented.
- 3. Resources:** This third step is grounded in economic and expenditure considerations, assessing the maximum available resources, and whether resource allocations are equitable and effective.
- 4. Assessment:** The final step collates the findings from the previous steps to determine whether or not a state has complied with its economic, social and cultural rights obligations.

This analysis can be replicated, and slightly tweaked, to assist in monitoring the compliance of digital rights.

It also gives you time to reflect as a team, do personal temperature checks and look at:

1. The highlights and lowlights.
2. The small or unexpected victories.
3. The challenges.
4. Future goals and plans.

To assist further in M&E impact and effectiveness, DFF has developed a new framework for measuring the impact of strategic digital rights litigation. It consists of three complementary features, which work in tandem to provide a way to monitor and measure the impact of strategic litigation on digital rights methodically and rigorously. It sets out:

1. A thematic framework which details types of impact and outcomes typical of strategic litigation, with examples and likely evidence sources.
2. Methods for collecting and analysing outcome data, based on a methodology called outcomes harvesting, can be paired with the framework.
3. Evidence principles are designed to complement the framework and methodology to encourage and support the use of high-quality evidence to support evaluation and assessment.

Digital rights litigators are encouraged to make use of this framework to support their M&E process and create scope for future work to be more resourceful, empowering, and impactful.



## Concluding remarks

This toolkit, designed to support and guide you as you embark on your strategic litigation journey, will prompt you to ask the obvious questions as well as the more difficult ones. It will give you ideas which you can recreate, and concepts you can develop. This toolkit encourages you to think strategically and question the purpose of the litigation in terms of what you and your client are trying to achieve. It causes you to pause and accept that litigation may not always be the answer – and if it is, it is likely to be most effective when conducted alongside other strategies. As you reflect on the “big picture” questions, your clients’ objectives and outcomes should remain at the fore. As you move towards the routine components of your strategy, it is helpful to think pragmatically and consider the timing, risks, and cost of litigating. Aligning your strategy with your clients – whether they are individuals, communities, organisations, or collectives – is necessary to ensure that you are meaningfully using litigation to effect positive change. When your interests overshadow those of your clients, you have lost your way, and you will need to recalibrate.

While you are working with your clients it is important to consider your ecosystems of support and identify your allies. Strategic litigation can be hollow when conducted in the absence of advocacy and storytelling. Be creative, push the boundaries and capture the essence of digital rights. This equally applies to your legal drafting. Amidst the ingenuity it is necessary to remain focused on the procedure. Successful and impactful litigation can be derailed when procedural considerations are ignored. Make sure you consider when to launch, what you are launching, where to launch and against whom to launch. It is unlikely that your strategic litigation journey will be over once the court or forum has heard your matter and made a determination. You will need to give thought to your post-judgment strategy. Questions about how you will share the judgment, whether you will need to appeal, and if there are concerns about non-compliance need to be considered as part of your strategy from the outset and not as an afterthought once judgment is delivered.

That being said, strategic litigation in all its phases and with all its components is a complex vehicle for positive change. But a powerful vehicle, nonetheless. There is no set recipe or neat checklists that you can use to develop the perfect litigation strategy. But there are tools and guidelines you can turn to as you navigate your way through a case. There are also precedents, case studies, and organisations and people that you can learn from. Critical reflections are necessary throughout the strategic litigation process, during which you will need to grapple with the big picture impact, direct implications for clients, along with procedural and external factors.

As digital rights continue to play an integral role in our lives it is likely that strategic litigation will be increasingly relied on to ensure that fundamental rights are protected, respected, and promoted, that equality and inclusion are realised, and that appropriate standards are set to safeguard us as we continue to engage with evolving technologies.

We trust that this toolkit has been useful to you and wish you well in developing your litigation strategies.



## Useful resources

### Case law

- [10 Human Rights Organisations v the United Kingdom](#) [2021] ECHR 58170/13, 62322/14 and 24960/15
- [Ahmet Yildirim v Turkey](#) [2012] ECHR 3111/10
- [Bridges v South Wales Police](#) [2020] EWCA Civ 1058
- [Cengiz and Others v Turkey](#) [2015] ECHR 48226/10 and 14027/11
- [Data Protection Commissioner v Facebook Ireland and Maximillian Schrems](#) [2020] CJEU C311/18
- [Kalda v Estonia](#) [2016] ECHR 17429/10
- [Khadija Ismayilova v Azerbaijan](#) [2019] 65286/13 and 57270/14
- [LQDN, FDN and others v. France](#) [2020] CJEU C 511/18, C 512/18, and C 520/18
- [Magyar Jeti Zrt v. Hungary](#) [2018] EHCR 11257/16
- [Mehmet Reşit Arslan and Orhan Bingöl v Turkey](#) [2019] ECHR 47121/06, 13988/07 and 34750/07
- [Monroe v Hopkins](#) [2017] EWHC 433
- [PG and JH v the United Kingdom](#) [2001] ECHR 44787/98
- [Roman Zakharov v Russia](#) [2015] ECHR 47143/06
- [Rotaru v Romania](#) [2000] ECHR 28341/95
- [S and Marper v the United Kingdom](#) [2008] ECHR 30562/04 and 30566/04
- [Schrems v Data Protection Commission](#) [2015] CJEU C-362/14
- [Szabó and Vissy v Hungary](#) [2016] EHCR 37138/14
- [Uber BS v Aslam](#) [2021] UKSC 5
- [UK Secretary of State for the Home Department v R](#) [2020] EWCA Civ 542

### Strategic litigation resources

- America Civil Liberties Union, 'Stonewall at 50. ACLU at 100. A legacy of Fighting for Justice and Equality' (accessible at: <https://www.aclu.org/issues/lgbtq-rights/stonewall-50-aclu-100-legacy-fighting-justice-and-equality?redirect=issues/lgbt-rights/stonewall-50-aclu-100-legacy-fighting-justice-and-equality>)





- Bell, 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation' Yale Law Journal 85 (1976) (accessible at <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6361&context=ylij>)
- Budlender, 'People's Power and the Courts' (2011) Bram Fischer Memorial Lecture (accessible at <https://constitutionallyspeaking.co.za/geoff-budlender-bram-fischer-memorial-lecture/>).
- Budlender, Marcus and Ferreira 'Public Interest Litigation and Social Change in South Africa' (2014) Atlantic Philanthropies (accessible at <http://www.atlanticphilanthropies.org/app/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf>).
- Center for Human Rights & Humanitarian Law, 'Impact Litigation: An Introductory Guide' (2016) (accessible at <https://www.wcl.american.edu/impact/initiatives-programs/center/publications/documents/impact-litigation-an-introductory-guide/>)
- Dailey, 'Strategic Litigation Impacts: Equal Access to Quality Education' Open Society Justice Initiative' (2017) (accessible at <https://files.eric.ed.gov/fulltext/ED606082.pdf>).
- Dailey, 'Strategic Litigation Impacts: Indigenous Peoples' Land Rights' (2017) Open Society Justice Foundation (accessible at [https://www.escr-net.org/sites/default/files/osji-strategic\\_litigation\\_impacts-lands\\_rights-04-10-20172.pdf](https://www.escr-net.org/sites/default/files/osji-strategic_litigation_impacts-lands_rights-04-10-20172.pdf)).
- Dailey, 'Strategic Litigation Impacts: Insights from Global Experience' (2018) Open Society Foundation (accessible at <https://www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf>);
- EDRI, 'Digital Services Act: what we learned about tackling the power of digital platforms' (2020) (accessible at <https://edri.org/our-work/digital-services-act-what-we-learned-about-tackling-the-power-of-digital-platforms/>).
- European Court of Human Rights 'Judicial Seminar: The Convention as a Living Instrument at 70' (2020) European Court of Human Rights (accessible at [https://echr.coe.int/Documents/Seminar\\_background\\_paper\\_2020\\_ENG.pdf](https://echr.coe.int/Documents/Seminar_background_paper_2020_ENG.pdf)).
- ILGA Europe 'Cases before the European Court of Human Rights (accessible at <https://www.ilga-europe.org/what-we-do/our-strategic-litigation-work/cases>);
- International Committee of Jurists (ICJ), 'Guide: ESCR Litigation' (accessible at <https://www.icj.org/chapter-3-initiating-judicial-proceedings-making-the-case-2/strategic-considerations-around-litigation/>).
- Klugman, 'Effective social justice advocacy: a theory-of-change framework for assessing progress' (2011) 19 Reproductive Health Matters (accessible at <https://www.tandfonline.com/doi/pdf/10.1016/S0968-8080%2811%2938582-5?needAccess=true>).
- Leachman 'Fighting Chance: Conflicts over Risk in Social Change Litigation' Draft presentation paper (accessible at [https://www.law.berkeley.edu/wp-content/uploads/2021/04/Leachman\\_Fighting\\_Chance\\_CSLS.pdf](https://www.law.berkeley.edu/wp-content/uploads/2021/04/Leachman_Fighting_Chance_CSLS.pdf)).
- Perel 'Digital Remedies' Berkely Technology Law Journal (2020) 35 (accessible at: [https://btlj.org/data/articles2020/35\\_1/01\\_Perel\\_WEB.pdf](https://btlj.org/data/articles2020/35_1/01_Perel_WEB.pdf))
- Ravo et al., 'Protecting public watchdogs across the EU: a proposal for an EU anti-SLAPP law' (accessible hat [https://www.article19.org/wp-content/uploads/2020/12/Anti\\_SLAPP\\_Model\\_Directive-2-1.pdf](https://www.article19.org/wp-content/uploads/2020/12/Anti_SLAPP_Model_Directive-2-1.pdf))



- Reventlow, 'Connecting litigation with other efforts: strategic litigation as a tool in the toolbox' (2018) Digital Freedom Fund (accessible at <https://digitalfreedomfund.org/connecting-litigation-with-other-efforts-strategic-litigation-as-a-tool-in-the-toolbox/>).
- Reventlow, 'Litigating algorithms: taking the conversation from North America to Europe and beyond' (2019) Digital Freedom Fund (accessible <https://digitalfreedomfund.org/litigating-algorithms-taking-the-conversation-from-north-america-to-europe-and-beyond/>)
- Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 Texas Law Review (accessible at <https://www.corteidh.or.cr/tablas/r27171.pdf>).
- Strasbourg Observer, 'Third Party Interventions before the ECtHR: A Rough Guide' (2015) (accessible at <https://strasbourgothers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/>)

## Resources for activism

- Amnesty International, '[The criminalization of sexuality and reproduction: A campaigning toolkit](#)' (2018)
- INCLO, [Unhealed Wounds](#)
- Joy Buolamwini, "[AI, Ain't I A Woman?](#)"
- Tactical Tech, [Activism on Social Media](#)
- Tactical Tech, [Data and Activism](#)
- Tactical Tech, [Organiser's Activity Book](#).
- Tactical Tech, [The Glass Room](#)

## Civil society standards

- [Children's Digital Rights Charter](#)
- [Feminist Principles of the Internet](#)
- [Santa Clara Principles on Transparency and Accountability in Content Moderation](#)



## Digital literacy tools

- Access Now, [Protecting our data](#)
- ACLU, [What's wrong with public video surveillance?](#)
- DFF, [Digital rights are human rights](#)
- [Digital SafeTea](#)
- GIJN, [Guide to Freedom of Information Resources](#)
- GJIN, [Global Guide to FOI and RTI](#)
- Hunter, [Boris the BabyBot](#)
- PEN, [Online harassment field manual](#)
- Power Singh Inc., [Deconstruct: Online gender-based violence](#)
- Privacy International, [Data Subject Access Requests](#)
- Tactical Tech, [Data Detox Kit](#)

## Resources for implementation, enforcement, and compliance

- [Centre for Economic and Social Rights, OPERA framework](#)
- [Dailey, 'Implementation of Judgments: Practical Insights from Civil Society' \(2020\) 12 Journal of Human Rights Practice'](#)
- [European Implementation Network](#)
- [Notre Dame Reparations Design and Compliance Lab](#)
- Skilbeck, From Judgment to Justice Implementing International and Regional Human Rights Decisions (2020) Open Society Justice Initiative (accessible at <https://www.justiceinitiative.org/uploads/62da1d98-699f-407e-86ac-75294725a539/from-judgment-to-justice-20101122.pdf>)
- Stanford, 'The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part 2: The Hole in the Roof' (2019) EJIL Talk (accessible at <https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-2-the-hole-in-the-roof/>)

# 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](http://www.digitalfreedomfund.org).

